Solicitors Regulation Authority

Looking to the future - flexibility and public protection

All responses

June 2017

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The Law Society of Scotland

The public law project

Thomas Hulme

Thomas Wood

Tim Earl

Tunbridge Wells, Tonbridge and District Law Society

Veale Wasbrough Vizards LLP

Wainwright & Cummins LLP

Wakefield Council Legal Team

Waller and Hart Solicitors Limited

Wards Solicitors

Ware & Kay Solicitors Ltd

Warwickshire County Council

Weil, Gotshal & Manages

West London Law Society

West Sussex County Council

Wigan Law Society

Wilkin Chapman LLP

Yorkshire Law Society

Anonymous responses

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Anonymous - ID - 4

Anonymous - ID - 5

Responses not published

Brian Rogers

Drydensfairfax Solicitors

Simon Harper

Skadden, Arps, Slate, Meagher & Flom (UK) LLP

Alan McLaughlin

Dear Sirs,

I have read with interest the above consultation.

By way of background I am an in-house Solicitor in a large public sector legal department, and have a

number of points for consideration.

I support the ethos that people and small businesses need to be able to access the legal advice that

they need, at an affordable price, and that the SRA as regulator, has a duty to consider how the SRA

can help to address this.

My concern is that the proposed approach set out in the consultation may cause more confusion than

assistance to potential clients when deciding on where to obtain their legal advice, and understanding

the implications (e.g. whether they are protected by the Compensation Fund, Legal Professional

privilege and conflict of interest requirements). The SRA, therefore will need to issue greater

guidance to citizens as well as to Solicitors to avoid much of the confusion the two tier code may create

which also, in my view, creates a two tier service for the same professional which the public will be

confused by.

I am also concerned having participated in recent webinars that the approach or impression given is a

light touch approach from the SRA. This appears to be out of step with other regulators who want to

be transparent and ensure that the public have confidence that due process will be followed, in

particular in the banking, financial and medical sectors.

As an in-house public sector lawyer I am extremely interested in what changes will be made to the SRA

Practice Framework Rules, especially how they will reflect the diverse range of business models being

adopted by the public sector, and in particular the interpretation of Rule 4 and the interrelation with

the Local Authorities (Goods and Services) Act 1970 & the Legal Services Act 2007. The consultation

documents does not seem to address any of this.

If I can assist further please do not hesitate to contact me.

Regards.

Alan McLaughlin

Consultation: Looking to the future - flexibility and public protection

Response ID:516 Data

2. Your identity

Surname

Lobb

Forename(s)

Alison

We may publish a list of respondents and a report on responses. Partial attributed responses may be published. Please advise us if you do not wish us to attribute your response or for your name or the name of your firm or organisation to appear on any published list of respondents.

Attribute my/our response and publish my/our name.

Please identify the capacity in which you are submitting a response. I am submitting a response…

on my own behalf as a solicitor in private practice

3.

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

Only in respect of the time it can take, on occasion.

4.

2. Do you agree with our proposed model for a revised set of Principles?

I am concerned at the removal of the requirement to provide a proper standard of service.
I really think this is change for changes sake and there is no real reason why the current principles need to be changed. all this will do is cause uncertainty for practitioners and further time and work for compliance officers in amending procedures, training staff, etc.

5.

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

I think this require further clarification as to how it will operate in practice. otherwise it is open to abuse and misinterpretation.
I attended a "Question of Trust" roadshow, I am not aware we have had an detailed feedback from that exercise and would like to see that before commenting further.

6.

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?

See response to Q2

7.

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?

Case Studies should be provided, but these should deal with borderline issues, not the clear cut ones which would all be able to understand. They should constantly be added to an updated from the SRA's dealings with issues raised and enable practitioners, particularly COLPs. to have a level of certainty as to how particular situations may be viewed by the SRA

8.

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?

The difficulty is that the shorter the code, the more grey areas and uncertainty there might be. That is not helpful. In practice, a more detailed code an guidance is better and more transparent. The SRA repeatedly states that its aim is to encourage competition, yet by having unclear guidelines and parameters it actually stifles competition by ensuring that regulated firms have to spend more time and money dealing with and resolving compliance issues, something which our unregulated competitors do not have to be so concerned about.

9.

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

No

10.

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

See response to Q 6 & Q 2. I would rather see amore detailed code.

I would also be concerned at the removal of any specific prohibition on cold calling, which action by Claims Management companies already gives the profession a bad name. I would rather, as a PI lawyer, see more regulation in this area, than less.

11.

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

I am concerned as to whether option 1 is workable in the scenario for the future which the SRA suggest, namely with solicitors working in unregulated entities.

12.

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

see response to Q 6

13.

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

No

14.

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

see above

15.

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?

No

16.

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.

Yes, a named person/role holder is necessary to maintain compliance standards. it is important to have an maintain clear policies. it is also important that someone has the authority to report any colleagues to the SRA for regulatory breaches, whether partners or not.

17.

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

The present regime is acceptable. I would prefer calls to the helpline to be anonymous, I have not had to deal with this myself but have been told the SRA are not able to guarantee that, and say that if issues of concern are raised, they may be investigated. A system where there is no comeback on callers would I think, help COLPs to gain guidance in difficult situations and could lead to more reporting, rather than less. if a COLP has nowhere to seek such guidance the issue might be ignored.

18.

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?

Where do we start?
I would be extremely concerned about the pressure that could be put on young solicitors working in unregulated entities, for people for whom compliance is not their first concern. Those solicitors need support and guidance but are likely to receive none if their employers do not see it as being in the interests of their business.
The public are not going to buy services based on PI insurance, regulation, recourse to the Ombudsman etc. They are going to buy on price and clever marketing ploys. They will only discover their lack of protection when a problem occurs. As well as the issues they then face, the whole profession will be tainted, as we have seen with claims management companies. None of this is in the interest of the public or the profession.

19.

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

Not at all. However we might reach the stage where we are driven to by the dumbing down this will cause. I foresee a "race to the bottom".

20.

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?

Agreed

21.

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?

There needs to be a certain level of experience/knowledge that can be proven y someone to enable them to undertake supervision. learning and passing exams do not satisfy this. This is a profession where we continue to learn until the day we retire. there need to be some form of threshold , the requirement certainly should not be removed.

22.

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

No - "come to us - if it goes wrong you can sue us" is not a good marketing tool! if I was a member of the public I would be concerned at the emphasis on this and the assumption that something will go wrong. This would give a competitive advantage to unregulated bodies and thus have the adverse effect to that intended..

23.

21. Do you agree with the analysis in our initial Impact Assessment?

No.
There are other and better ways to improve access to justice than these proposals which can only undermine the profession further.

24.

22. Do you have any additional information to support our initial Impact Assessment?

No

25.

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?

Yes

26.

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?

They should only hold such money if they are subject to the accounts rules, or equivalent.

27.

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? If not, what are your reasons?

Yes

28.

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

No - again it puts the firms who "do it properly" and protect the consumer at a competitive disadvantage due to the cost of such premiums. if someone wants to practice without such protection then they should not do so under the title of Solicitor.

29.

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

see above

30.

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?

yes

31.

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

32.

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?

I believe that firms of that nature should be regulated.

33.

31. Do you have any alternative proposals to regulating entities of this type?

No

34.

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?

No

35.

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

Consultation: Looking to the future - flexibility and public protection

Response ID:728 Data

2. Your identity

Surname

LEUNG

Forename(s)

AMELIA

We may publish a list of respondents and a report on responses. Partial attributed responses may be published. Please advise us if you do not wish us to attribute your response or for your name or the name of your firm or organisation to appear on any published list of respondents.

Attribute my/our response and publish my/our name.

Please identify the capacity in which you are submitting a response. I am submitting a response…

on my own behalf as a solicitor in private practice

3.

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

NO

4.

2. Do you agree with our proposed model for a revised set of Principles?

YES

5.

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

YES

6.

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?

NO

7.

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?

ALL AREAS

8.

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?

YES

9.

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

CODE NO 5 CAN BE REWORDED, E.G. WILL NOT COMMIT ANY ACT OF DISCRIMINATION, PREJUDICE DIVERSITY OR INCLUSION IN THE SOCIETY

10.

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

NO

11.

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

OPTION 2. THE EXAMPLES ARE VERY CLEAR AND NOT DIFFICULT TO IMPLEMENT IN PRACTICE. WE WIL INCLUDE IT IN THE TERMS OF BUSINESS AND ALERT THE CLIENT OF THE POTENTIAL CONFLICT AND THE ACTION WE MAY TAKE.

12.

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

YES

13.

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

NO

14.

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

NO

15.

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?

NO

16.

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.

IN PRINCIPLE THE ROLES ASSIST THE PRACTICE BUT FOR SOLE OR SMALL PRACTICE IT DOES NOT SHOW DISTINCT EFFECTS.

17.

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

18.

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?

19.

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

IT IS LIKELY THAT SOME SOLICITORS WILL MOVE TO WORK FOR NON-REGULATED BUSINESS PROVIDING LEGAL SERVICES. THAT MAY BE A WAY TO SAVE COSTS.

20.

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?

IT SHOULD APPLY TO ALL SOLICITORS, NOT ONLY SOLE SOLICITOR.

21.

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?

THE CURRENT REQUIREMENTS ARE THE SAFEGUARD IF THE PROVISION OF LEGAL SERVICES ARE TO BE RELAXED.

22.

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

YES

23.

21. Do you agree with the analysis in our initial Impact Assessment?

24.

22. Do you have any additional information to support our initial Impact Assessment?

NIL

25.

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?

NO

26.

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?

AGREE

27.

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? If not, what are your reasons?

AGREE

28.

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

AGREE

29.

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

DIFFICULT FOR THE PUBLIC TO DISTINGUISH BETWEEN LEGAL ADVISORS REGULATED BY SRA AND THOSE WHO ARE NOT, DIFIFCULT TO ASSESS THE LEVEL OF PROTECTION AVAILABLE AND THE STANDARD OF SERVICE. THE SOLICITOR BRAND WILL SUBMERGE.

30.

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?

YES

31.

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

SAME AS THE SOLICITORS TO PROVIDE THE SAME LEVEL OF PROTECTION.

32.

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?

AGREE, BUT IT WILL CREATE THE TREND SOLICITORS WILL BE CREATE NON SRA REGULATED ARM TO AVOID COST AND COMPLIANCE.

33.

31. Do you have any alternative proposals to regulating entities of this type?

NO

34.

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?

THE SRA MAY INTERVENE THE INDIVIDUAL SOLICITOR BUT WILL HAVE NO POWER TO INTERVENE THE NON REGULATED BUSINESS

35.

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

SRA MAY CHOOSE TO REGULATE ONLY RESERVED WORK.

Andrew Boon

Consultation: Looking to the future - flexibility and public protection

Consultation questionnaire form

This form is designed to be completed electronically—in MS Word. Please save it locally before and after completing it.

Question 1

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

No

Question 2

Do you agree with our proposed model for a revised set of Principles?

The principles are expressed at a level of generality that renders their meaning speculative and makes their use as practical regulatory or educational tools problematic.

The specific concerns are that:

i) terms such as 'rule of law', 'integrity', 'independence' and 'best interests' have a range of potential meanings and implications, some of which may change over time. It is not clear from the proposed materials which of these meanings are attached to these words and phrases or what the implications are of their use.

ii) The principles allude to a range of important ethical issues. Their relationship to the code of conduct is not clear. Is it supposed to reflect the principles or are the principles free-floating regulatory materials?

iii) If, as is expressed in the document, the principles operate independently of the code (para. 45), practitioners will be justified in being nervous about how they could be interpreted. It seems problematic that those being regulated cannot assume that by following the code of conduct they are compliant.

iv) In cases before the SDT solicitors are charged with a breach of principle. There are examples of disciplinary charges laid against solicitors that stretch the likely and even the possible meaning of the principles. This is at risk of breaching the rule of law principle that defendants should be charged with specific breaches of regulation.

v) The juxtaposition of the rule of law and proper administration of justice and of honesty and integrity in single principles raise additional questions about the interpretation of these words and phrases.

vi) Making the administration of justice a governing principle is problematic. Does upholding the administration of justice go beyond the duty of an advocate or litigator to the court? If so, in what additional circumstances does it, for example, trump a duty to clients?

vii) The duty to serve a client's best interests is capable of a paternalistic interpretation and its use should be critically reviewed and/or elaborated.

I have explored these issues in more detail in a recent article, 'The Legal Professions' New Rule Books: Narratives, Standards and Values'. I can provide a link to it on request. In that article I suggest that more explanation of the principles needs to be given. Ideally, there would be an elegant commentary on the principles provided with the text. This would include references to relevant provisions in the code of conduct as examples of the manifestation of the principle. Where principles are intended to have more extended application, an indication of intended scope should be provided.

Question 3

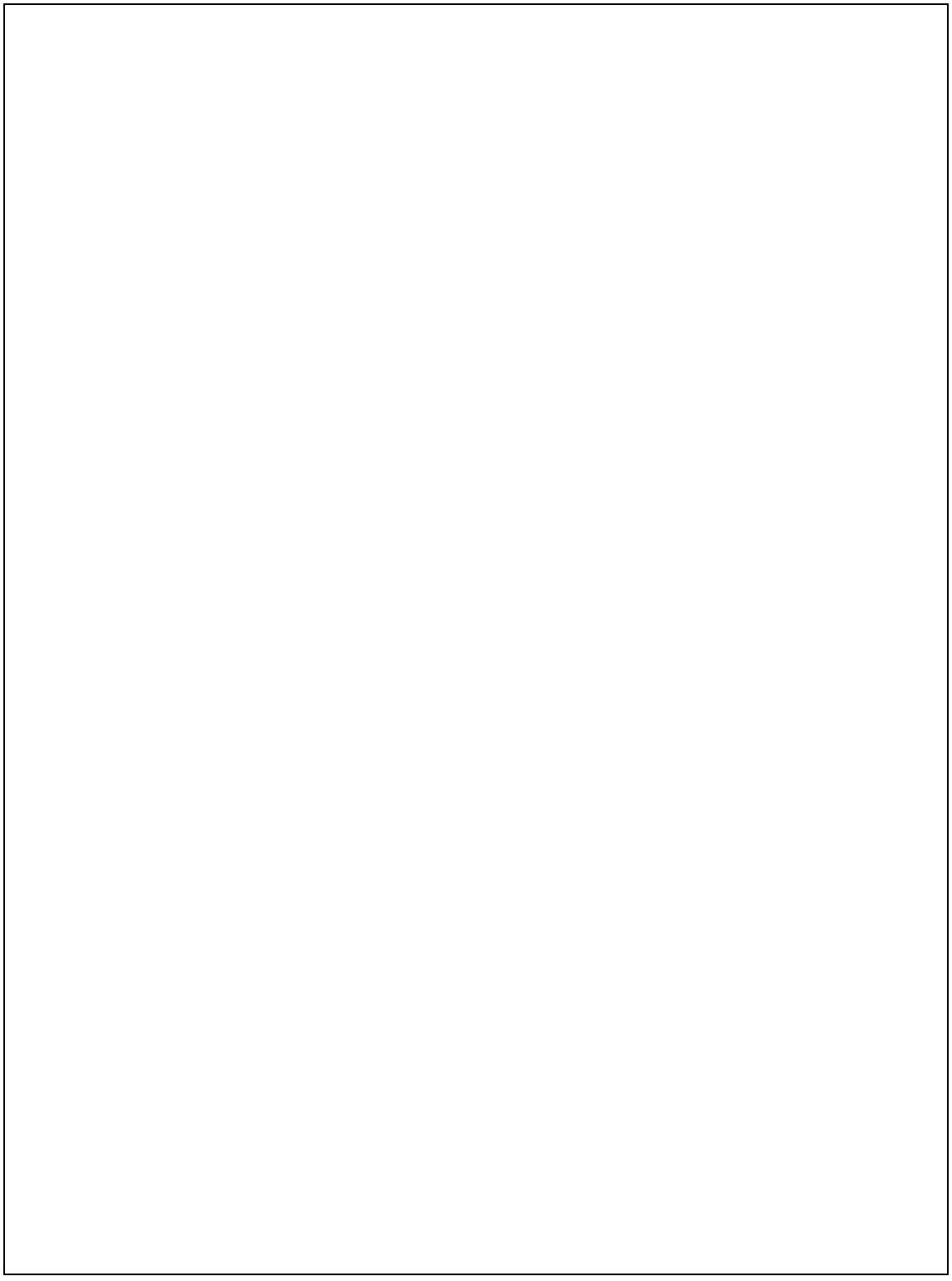
Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

I think the new principle raises some drafting issues and issues of interpretation:

i) Can conduct uphold confidence? Might it be better to say 'does not undermine confidence'?

ii) Which profession is referred to? Is it a generalised legal profession, including those regulated by other approved regulators, or just solicitors?

iii) It is not clear why other legal service providers are referred to or why solicitors should have any responsibility for the reputation of these, particularly unregulated providers.



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?

Principles are potentially multi-functional, communicating professional characteristics and aspirations as well as regulatory material. From this point of view a significant omission is any reference to observing confidentiality and client privilege. This is a defining characteristic of solicitors (and other lawyers) and clearly distinct from acting in a client's best interests.

Likewise there is no principle referring explicitly to third party interests. This creates an impression of excessive client focus and lack of commitment to the public interest.

Observing the duty to the court is probably covered by the reference to the administration of justice, but this needs to be brought out in a commentary on the Principles.

I approve of the inclusion of honesty. It was a significant omission from the old principles given its importance in practice. From that point of you it may also be important to retain a principle relating to handling client money. Solicitors are more likely to get into trouble for being slack in that regard than for any other reason. In some circumstances, misconduct in handling client money may fall short of dishonesty.

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?

Yes, please refer to my response to question 1. Both principles and code would benefit from commentary (on the principles) and guidance (on provisions in the code). If these formats were adopted, examples may be more effective than case studies. However, case studies could be used for other purposes, for example, as illustrations on an SRA conduct website.

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?

There are clearly benefits in having a succinct statement of obligations, but this must not be at the expense of completeness or clarity.

Question 7

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

Question 8

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

The code should have guidance added.

The rules have for some time focused excessively on issues of client care. There are ethical issues that it may be beneficial to clarify, such as the implications of acting in a client's best interests. 3.1 acknowledges the importance of the client's wishes, but the code then avoids the issue of whether a solicitor is obliged to carry out a client's lawful wishes.

Some of the provisions are potentially misleading. I am not sure section 2 captures the duty to the court accurately. It does not deal with knowingly allowing presentation of misleading evidence, written, such as affidavit witness testimony, or oral (2.4 does not cover this because it refers to the advocate's submissions), nor what should happen if it is found to have happened (2.7 does not cover this because the client is still entitled to confidentiality). Rather, misleading the court appears under duties to clients (1.4). This does not seem to be a very logical organisation and is potentially misleading.

Duties to third parties are basic, comprising not taking unfair advantage (1.2) or misleading others (1.4). The scope of these provisions is unclear. Do they cover sexual relationships with clients?

It should be clear whether or not solicitors should or can act so as to avert avoidable harm to third parties based on confidential client information. It should also be clear what the scope of this requirement or permission is; does it cover e.g. minor/serious harms or e.g. physical/financial or other harms?

Part 4 (client money and assets) is 'safeguarding' code for holding in a separate client account? If so, or even if that is part of it, it might be better to be explicit.

Question 9

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

If it is proposed to allow exceptions to client conflict prohibitions they must be stated. Therefore, if the consensus and common purpose exception is to be allowed, 1 is to be preferred to 2. In that case however, there needs to be a slight amendment. Clients may have a strong but ill-informed consensus; a solicitor owing a duty to both must be sure that what they want to do is in the best interests of clients who are well-informed.

Question 10

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

Separating the responsibilities of individual solicitors and firms is important in principle. I would expect this document to be much shorter than the code for solicitors but see below, response to Q13..

Question 11

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

see below, response to Q13.

Question 12

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

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?

My first query is whether it is appropriate to address a code of conduct to a firm; it might be preferable to think of another description of this document.

Most of the content is what one would expect to see in such a code but the format does raise some issues and, even if substantially retained, the content could, in my opinion, be improved. The main problem is that the document appears to cover the same ground as one addressed to individual practitioners, whereas it should be a different kind of document, aimed at ensuring that the firm supports practitioners in fulfilling their ethical responsibilities.

Much of the code for firms is addressed to a person ('you') as if it is the firm which is treating clients fairly, observing confidentiality etc., rather than the individuals in it.

Material more appropriately addressed to individuals (e.g. 1.1, 3.1, 4.1) should be removed. This should be replaced with general obligations to:

a) ensure that the firm's solicitors observe the code of conduct for solicitors

b) ensure that the firm have the infrastructure, systems and training to support them in this and monitor compliance and

c) ensure that non-solicitor employees of the firm observe their statutory and regulatory duties. Where they are not subject to specific regulatory obligations, the firm should be required to ensure that all are bound to respect those aspects of the conduct rules, e.g. confidentiality, that the entity is committed to preserve.

These can be expressed as requirements on the firm e.g. 'the firm must have procedures to ensure that the solicitors it employs observe the duties imposed by the SRA Code of Conduct for Solicitors'.

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.

It is counter-intuitive that the roles are more useful in small organisations than large, particularly when they are required for ABS. It would therefore have been interesting to see some research on this issue. The summary of issues is fair, but there is no consideration of the regulatory overhead imposed by requiring these roles. In the absence of evidence, however, the balance of the argument presented lies in retaining the roles; individuals abdicating responsibility because they have a COLP are nevertheless personally liable for breaches they commit.

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?

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?

There is substantial evidence that solicitors in situations in which they do not have adequate peer support are a higher risk in terms of misconduct. As regards this proposal there are different scenarios, some of which may create that situation. Therefore, although the limitation of this proposal to pro bono delivery may have some merit, the reference to pro bono services in the introduction is potentially misleading; the proposal goes far beyond such services. Were it limited in some way the risks would be less.

Assuming no such limitations, the absence of effective regulatory control of alternative legal services providers, the capacity to hold client money and the absence also of insurance and other compensation requirements on un-regulated solicitors, the main opportunities are to:

i) offer employment opportunities to unemployed solicitors

ii) reduce the cost of unreserved legal activity

iii) meet government agendas for de-regulation and de-professionalization by undercutting regulated professionals (by allowing alternative legal providers to avoid regulatory overheads when hiring solicitors)

iv) avoid government attempting further de-regulation and seizing regulatory initiative from the SRA.

This would be at the risk of:

i) difficulty in controlling a relatively 'unregulated' market

ii) needing to institute elaborate requirements for advertising solicitors' status

iii) considerable consumer confusion about the implications of instructing regulated and un-regulated solicitors

iv) encouraging abuse of solicitor status

v) negative consumer feedback and publicity

vi) creating a messy regulatory situation

vii) undermining the solicitor brand

viii) inviting criticism of regulatory competence

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?

Not at all!

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?

A sensible proposal.

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?

Evidence of significant historic problems suggests that there need to be effective controls of supervision. Simply removing requirements without considering how to effectively regulate does not seem to be sensible. It is not clear that the other controls mentioned will be effective to limit abuses.

Question 20

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

The evidence suggests that consumers believe that instructing solicitors gives a high degree of protection so this is at present unnecessary. If you introduce practice in unregulated organisations something along these lines would be required, but there is an argument that the onus should be on the unregulated to point out the risks of instructing them rather than on the regulated to point out the advantages of instructing them. Introducing such requirements seems inconsistent with the SRA's general approach of reducing regulation as much as possible.

Question 21

Do you agree with the analysis in our initial Impact Assessment?

It is not possible to say from this account. Why is consumer information a key component of your reform programme? – you do not explain what are you trying to achieve. To agree with the assessment one would need to know the objective and to then see what kind of information will be provided and how. Consumer information for its own sake may be no use at all.

Question 22

Do you have any additional information to support our initial Impact Assessment?

The LSB Trackers Surveys?

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?

Yes

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?

They should not.

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?

If not, what are your reasons?

It should not, because if you adopt such a measure you are potentially exposing contributors to those funds to greater risks than they themselves (collectively) pose. This seems unfair and will provoke opposition.

Question 26

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

If you do you will remove a lot of the attraction of the idea to alternative service providers. If you do not you exacerbate the risks identified in the answer to Q16.

Question 27

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

See the answer to question 16.

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?

Question 29

Do you have any views on what PII requirements should apply to Special Bodies?

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?

I think it is risky, for the profession if not for the regulator, to consider regulating circumstances in which solicitors' communications with clients are not covered by LPP. This is, in many ways, solicitors' USP.

Question 31

Do you have any alternative proposals to regulating entities of this type?

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?

Question 33

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

These potential measures seem to be inadequate to deal with the risks created. The situation created by a solicitor's misconduct may well still exist even though the solicitor is the subject of intervention; the alternative legal services provider will be able to continue business using other solicitors, or still using advertising based on the fact that they employ the solicitor the subject of intervention, despite having allowed the situation requiring intervention to arise.

Thank you for completing the **Consultation questionnaire form**.

Please save a copy of the completed form.

Please return it, along with your completed **About you form**, as an email attachment to consultation@sra.org.uk, by **21 September 2016**.

Alternatively, print the completed form and submit it by post, along with a printed copy of your **About you form**, to

Solicitors Regulation Authority
Regulation and Education - Policy - Handbook 2017
The Cube
199 Wharfside Street
Birmingham
B1 1RN

Consultation: Looking to the future - flexibility and public protection

Response ID:114 Data

2. Your identity

Surname

Duncan

Forename(s)

Andrew James

We may publish a list of respondents and a report on responses. Partial attributed responses may be published. Please advise us if you do not wish us to attribute your response or for your name or the name of your firm or organisation to appear on any published list of respondents.

Attribute my/our response and publish my/our name.

Please identify the capacity in which you are submitting a response. I am submitting a response…

on my own behalf as a solicitor in private practice

3.

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

Not yet

4.

2. Do you agree with our proposed model for a revised set of Principles?

No I believe that the SRA approach to change has resulted in a lack of certainty, both as a result of the frequency of change and by removing principles which have already been subject to sufficient interpretation to allow a meassure of certainty, with new concepts.

5.

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

The drafting of Principle 2 is far too broad and is arguably at the mercy of rapidly changing social norms and opinion. A principled stance such as a refusal to remove an object of religious observance would arguably be trapped by Principle 2. Solicitors should be able to mount a spirited defence of the rule of law without fear of subsequent regulatory action. Joseph Raz in "The Rule of Law and its Virtue" stated that law should be open, prospective and clear. Principle 2 is neither prospective nor clear. He also made the point that law should not be changed too often.

6.

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?

There have simply been too many changes in recent years. There is nothing wrong with the use of principles, but as every law student knows there is a tension between justice in indivdual cases and certainty. Where there are just principles there is too much room for interpretation and insufficient certainty. The profession's confidence in the SRA appears to have declined and in my perception there is a reluctance to gift so much room for interpretation to an organisation whose short history is littered with mistakes. A movement towards certainty, involving as it does a more thorough codification of professional practice would help in building trust in the SRA and with increased certainty the profession could spend more time and effort in serving clients and less in defensive observance of potential as yet uncrystallised compliance issues.

7.

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?

Principle 2 is so broad that there is no reasonable way in which all prospective scenarios could be explored.

8.

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?

No the exact opposite has been achieved where no-one can envisage how their actions might subsequently be interpreted against changing social norms. As a profession we should be able to understand and implement properly drafted comprehensive rules. It may suit the SRA to draw up principles which are within the drafting abilities the average secondary school student. It does nothing to encourage public confidence in the profession if their representative cannot say with certainty where the limits of acceptable behaviour start and end.

9.

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

In my view the code is misconceived.

10.

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

In my view the code is misconceived.

11.

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

In my view the 2 options for handling conflicts of interest demonstrate the inherent failings in Principle 2. On one hand there is a defensive option which restricts the ability of clients to instruct a solicitor of their choice. On the other hand there is an option exhibiting a greater appetite for risk, with dangers of a different subsequent interpretation of appropriate behaviour by the SRA.

12.

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

No, again you have increased uncertainty.

13.

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

Yet another new code.

14.

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

The entire concept is misconceived

15.

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?

The entire precept is misconceived.

16.

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.

In my understanding the 2007 Act requires a named individual to perform those roles however they are designated. If the SRA is going to utilise a process to approve the appointment of Compliance Officers they should demonstrate some confidence in their decision making. In my experience a self report to the SRA with recommendations is unlikely to lead to a positive outcome.

17.

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

As previously stated, if the SRA involves itself in the accreditation of individuals as compliance officers it should view those individuals as its agents and support their actions and recommendations. The SRA should therefore be equally responsible for any failure by compliance officers.

18.

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?

It is clear that this would create two seperate species of solicitors and thereby simultaneously reduce public confidence in all solicitors whilst potentially creating two parrallel standards.

19.

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

It difficult to understand why one would accept the greater regulatory burden and cost of being a solicitor in such circumstances as the SRA seems so determined to undermine the solicitor's brand. Our non regulated competitors already enjoy many advantages.

20.

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?

I have no particular view.

21.

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?

The qualified to supervise requirement has the useful but unintended consequence of requiring some life experience before advising clients without any direct supervision. Without the requirement an independantly wealthy individual could set up in practice before the age of 25.

22.

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

I think that the use of the word "consumer" rather than client is worrying. Client care information is usually given only after the retainer is agreed. Therefore the client is potentially at risk in the time that initial instructions are taken. However there is a risk of information overload.

23.

21. Do you agree with the analysis in our initial Impact Assessment?

No

24.

22. Do you have any additional information to support our initial Impact Assessment?

I think the whold process was misconceived

25.

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?

There is a balance to be struck in relation to client monies, the public must have absolute confidence in the integrity of their solicitors and this can be best achived by the SRA giving a cast iron indemnity against any losses. This will result in the SRA giving proper consideration to who can handle client funds and simyultaneously adding value to the solicitor's brand.

26.

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?

Again, provided the SRA authorises and indemnifies the point is moot.

27.

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? If not, what are your reasons?

If the SRA authorises, the SRA should indemnify.

28.

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

I have no particular opinion.

29.

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

There is a lack of trust in the SRA and there are legitimate concerns in relation to future interpration of imprecise rules.

30.

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?

Special Bodies require some form of indemnity cover, the SRA must accept that in creating a potential risk, the SRA should not be immune from any consequences.

31.

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

The levels of indemnity should be consistent across the profession.

32.

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?

When solicitors act in such a way as to undermine public confidence in the profession, the distinction between regulated and non regulated firms is likely to be lost upon the public generally. If the SRA wish to increase public confidence this does not seem a sensible course of action.

33.

31. Do you have any alternative proposals to regulating entities of this type?

No

34.

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?

There should only be one set of criteria with universal application.

35.

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

There should only be one set of standards

Andrius Roos

I support the Law Society's view on the consultation wholeheartedly and would urge the Authority to consider their published concerns earnestly. We as a profession cannot allow fragmentation of regulation to occur.

Regards

Andrius Roos

Senior Associate

Consultation: Looking to the future - flexibility and public protection

Response ID:733 Data

2. Your identity

Surname

page

Forename(s)

ann

We may publish a list of respondents and a report on responses. Partial attributed responses may be published. Please advise us if you do not wish us to attribute your response or for your name or the name of your firm or organisation to appear on any published list of respondents.

Attribute my/our response and publish my/our name.

Please identify the capacity in which you are submitting a response. I am submitting a response…

on my own behalf as an employed solicitor

3.

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

no

4.

2. Do you agree with our proposed model for a revised set of Principles?

No. I think that it is key to retain Principle 5 and intact the new Competency Framework is built around solicitors complying with this principle as well as continuous development of their knowledge and skills.

5.

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

6.

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?

Principle 5 as mentioned. Also confidentiality should also be included.

7.

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?

not sure

8.

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?

It is the creation of separate codes of conduct that distinguishes the responsibilities of individual solicitor wherever they are working from the organisation that they are working for. It is very confusing for consumers and is risk damaging for the law and solicitors.

9.

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

The language of the codes is imprecise and could mean that solicitors could find themselves in breach

after the proposed new code comes into force.

10.

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

There is some overlap between the two draft codes. For example in areas such as conflict complaints and client information/identification. These needs to be clearer.

11.

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

I am confused as to why unregulated entities are not subject to the same conflict rules as the regulated solicitors - what is the benefit of having giving an organisation free rein but not the employees.

12.

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

no

13.

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

The split between the responsibilities of the unregulated entity and the regulated solicitor

14.

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

not at this stage except for comments already made

15.

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?

Principle 5 has been held out as the foundation for Solicitors to adopt a competency based regime and even before this regime becomes compulsory you want to remove it. Why?

16.

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.

I am not a COLP or COFA and therefore cannot assist here

17.

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

see answer to no 14

18.

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?

There is insufficient evidence to support these proposals or in fact the estimated benefits that you think will flow from implementation.

19.

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

not

20.

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?

support

21.

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?

Agree this is necessary

22.

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

There is sufficient information currently but am not totally adverse to the requirement

23.

21. Do you agree with the analysis in our initial Impact Assessment?

no

24.

22. Do you have any additional information to support our initial Impact Assessment?

no

25.

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?

Who ever holds the client money needs to be subject to the same high standards and duties of care that are applied at the moment.

26.

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?

No they should not. They are not in business for themselves but working for an entity.

27.

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? If not, what are your reasons?

This risks eroding a key element of current client protection and therefore there would be two systems of protection. Banks have one and therefore this is easy for the consumers to understand. You would also be depending on unregulated organisations to explain why they have different protection systems.

28.

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

Again there would be confusion for consumers as to who has what.

29.

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

Confusion by consumers about all the choices you are proposing.

30.

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?

All those entities and/or individuals delivering legal services should have cover.

31.

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

It should be a level playing field for all involved in the delivery of services to consumers.

32.

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?

no

33.

31. Do you have any alternative proposals to regulating entities of this type?

A code of conduct which is followed by all involved in delivery of legal services to consumers

34.

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?

want to see more detail so not at this time

35.

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

yes

Consultation: Looking to the future - flexibility and public protection

Response ID:432 Data

2. Your identity

Surname

Martin

Forename(s)

Anthony

We may publish a list of respondents and a report on responses. Partial attributed responses may be published. Please advise us if you do not wish us to attribute your response or for your name or the name of your firm or organisation to appear on any published list of respondents.

Attribute my/our response and publish my/our name.

Please identify the capacity in which you are submitting a response. I am submitting a response…

on my own behalf as an employed solicitor

3.

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

No

4.

2. Do you agree with our proposed model for a revised set of Principles?

No.
The removal of the principles that solicitors should 'provide a proper standard of service to your clients', 'act in the best interests of each client' and 'protect client money and assets' has negative implications for consumer protection and the maintenance of professional standards.
Client confidentiality is of paramount importance. The Principles should continue to refer to the solicitor's duty to keep the affairs of the client confidential.

5.

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

I see nothing wrong with the current principles and the case for change (as opposed to change for changes sake) has not been made out.

6.

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?

I see nothing wrong with the current principles and the case for change (as opposed to change for changes sake) has not been made out.

7.

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?

No

8.

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?

I have no problem in theory with two codes. However, the approach creates two tiers of solicitors: those working in a regulated entity and those working in an unregulated entity, with consequential risks to consumer protections and professional standards which risk damaging the standing of solicitors and creating confusion for consumers;
Although both of the draft Codes focus on brevity and simplicity, they provide less certainty about what is and is not permitted. Some solicitors might prefer a more definitive approach so that compliance is clearer and there is less discretion for the SRA to determine when there is a breach, which could result in enforcement action that might have been avoidable if the Codes were clearer. It is difficult to take an informed view on how the new Codes would work in practice be without seeing the associated guidance which the SRA has not published alongside the draft Codes.
The language of the draft Codes is imprecise and could mean that members currently practising in a fully compliant way could find themselves accused of a breach after the proposed new codes come into force.
There is some overlap between the two draft Codes, most noticeably in areas such conflict, complaints and client information/identification. If this is not addressed, it is not clear which would take precedence where such inconsistencies exist.

9.

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

10.

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

11.

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

The consultation makes clear that solicitors employed by an unregulated entity would continue to be regulated as individuals and would be subject to conflict rules. However, as the conflicts rules will not apply to unregulated entities, in practice they will not have much effect if any on the unregulated entities whilst the regulated entities will be subject to the same level of restriction as they are now or, potentially, a greater level depending on which of the two options on conflicts is adopted by the SRA.
The SRA offers two options for dealing with conflicts:
- Option 1 largely replicates the 2011 Code, in prohibiting a solicitor from acting where there is a conflict or significant risk of such a conflict, unless specified circumstances are met and protections are provided.
- Option 2 would narrow the ability to act given that it provides for a complete bar on acting where there is an actual conflict, and protections to be put in place if there is a significant risk of a conflict.
Option 2 may be unworkable because it is not always possible to identify that an actual conflict exists and a solicitor may unwittingly act in a conflict situation. Because the non-regulated colleagues of regulated solicitors would not be subject to conflict rules, there is a risk of confusion to consumers, a very favourable competitive advantage to unregulated entities and lack of a fundamental consumer protection for clients of unregulated entities.

12.

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

I have no problem in theory with two codes. However, the approach creates two tiers of solicitors: those working in a regulated entity and those working in an unregulated entity, with consequential risks to consumer protections and professional standards which risk damaging the standing of solicitors and creating confusion for consumers;
Although both of the draft Codes focus on brevity and simplicity, they provide less certainty about what is and is not permitted. Some solicitors might prefer a more definitive approach so that compliance is clearer and there is less discretion for the SRA to determine when there is a breach, which could result in enforcement action that might have been avoidable if the Codes were clearer. It is difficult to take an informed view on how the new Codes would work in practice be without seeing the associated guidance

which the SRA has not published alongside the draft Codes.
The language of the draft Codes is imprecise and could mean that members currently practising in a fully compliant way could find themselves accused of a breach after the proposed new codes come into force.
There is some overlap between the two draft Codes, most noticeably in areas such conflict, complaints and client information/identification. If this is not addressed, it is not clear which would take precedence where such inconsistencies exist.

13.

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

14.

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

15.

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?

16.

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.

Consideration of these questions will benefit from the input of current COLPs and COFAs who are best placed to identify unnecessary requirements while firms and sole practitioners will also wish to consider how valuable the roles themselves are.

17.

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

18.

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?

There is insufficient evidence to support these proposals or the expected benefits from their implementation, which are stated to include improved access to quality services at affordable prices, enhanced professional standards, and increased employment opportunities.
In particular, the proposals could have undesirable and/or unintended consequences as follows:
Reputation and standing of solicitors
The proposals may result in two tiers of solicitors. Those working in unregulated businesses are unlikely to be able to give advice which is legally privileged, will not be required to have PII, clients will not have the benefit of compensation fund and the protection of the principles governing conflicts of interest. Not only is this likely to create consumer detriment and confusion but it is likely to damage the reputation of the title of solicitor.
Legal Professional Privilege (LPP)
LPP should attach to clients seeking advice from a solicitor holding a current practising certificate wherever he or she practises and any attempts to dilute or make LPP more difficult to obtain or enforce could erode the concept of LPP, which is a cornerstone of the justice system and a key right of clients. This could also undermine the standing of the solicitor profession both at home and abroad. It is not right in principle for LPP to be a distinguishing factor between regulated and unregulated service providers.
It is likely that in-house solicitors working in an unregulated entity, for example a local authority, providing advice to individuals or organisations other than the unregulated entity would not have the protection of LPP.
Conflicts and confidentiality
The proposals will result in confidentiality only applying to individual solicitors working in an unregulated entity, including in an in-house team, but not to the entity or to other employees. There is a risk that a

solicitor may unwittingly act in a conflict situation and that clients may not be aware of a potential or real conflict of interest or of the fact that the entity is not subject to the rules on conflict. It also results in making regulated entities less attractive because they will be competitively disadvantaged versus unregulated entities.

Consumer protections - Professional Indemnity Insurance (PII) and the Compensation Fund

Under the SRA's proposals, solicitors working in unregulated entities would not be required to have PII and their clients would not have access to the Compensation Fund if things go wrong. This risks eroding a key element of current client protection. The proposals risk creating two tiers of client protections - with different rules and protections applying to solicitors' clients depending on the kind of entity in which the solicitor is working.

The SRA proposes that solicitors working from unregulated entities would be required to make sure that their clients understand whether and how the services they provide are regulated and the protections available to them. Even for those working within the legal sector, insurance and client protections are complicated topics which are not easily digested and understood and clients cannot be expected to fully comprehend the implications of purchasing their legal services through an unregulated provider. The proposals also risk undermining or depleting the existing Compensation Fund as solicitors working from unregulated entities would not have to contribute to the Fund; this would seem likely to mean that solicitors working in regulated entities would have to make additional contributions to secure the Fund's viability, increasing the regulatory burden on them and exacerbating the two tier profession that could result from the proposals.

Consumer confusion about status

Under the proposals, solicitors holding a current practising certificate would be able to use their title whether providing legal services to the public through a regulated or unregulated entity. While a provider would not be able to use the term 'solicitors firm' or 'solicitors' unless the entity was regulated by the SRA,this would seem unlikely to mitigate the risk of consumer confusion especially where the unregulated entity described itself as a 'law firm' or 'legal services firm' or advertised that they employ solicitors. Consumers will lose the assurance they currently have as to quality and protections when they engage a solicitor. It is inappropriate that consumers will have to undertake fairly substantial due diligence. This will additionally undermine the standing of the profession internationally.

Annual practising certificate (PC) fees

There is no information on this point and the SRA needs to undertake and publish an analysis of the projected impact of its proposals on the PC fee, and in particular the turnover based firm fee. The SRA should not close this consultation until this information is available.

Supervision

Newly qualified solicitors without any experience would be able to set up their own unregulated firms. Newly qualified solicitors working in an unregulated entity would no longer have the requirement of support and guidance from more experienced solicitors. This will increase the risks to clients as well as putting newly qualified solicitors themselves at risk, and negatively impact on the standing of the solicitor profession Damage to standards will increase incrementally as this applies year on year and fewer solicitors in unregulated entities have ever received supervision.

19.

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

20.

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?

21.

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?

22.

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

23.

21. Do you agree with the analysis in our initial Impact Assessment?

24.

22. Do you have any additional information to support our initial Impact Assessment?

25.

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?

26.

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?

Consideration of this question will benefit from the input of current in-house teams and relevant local employers

27.

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? If not, what are your reasons?

28.

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

29.

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

30.

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?

Consideration of this question will benefit from the input of special bodies, such as law centres, which play an important role in providing access to justice for vulnerable people who may not be able to afford access to legal services.

31.

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

Consideration of this question will benefit from the input of special bodies, such as law centres, which play an important role in providing access to justice for vulnerable people who may not be able to afford access to legal services.

32.

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?

33.

31. Do you have any alternative proposals to regulating entities of this type?

34.

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?

35.

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

By email: consultation@sra.org.uk

14 September 2016

Dear Sirs

SRA consultation on reforming the handbook and guiding principles: APIL amended response

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. The association is dedicated to campaigning for improvements in the law to enable injured people to gain full access to justice, and promote their interests in all relevant political issues. Our members comprise principally of practitioners who specialise in personal injury litigation and whose interests are predominantly on behalf of injured claimants. APIL currently has around 3,400 members in the UK and abroad who represent hundreds of thousands of injured people a year.

Rationale

The rationale behind these proposals appears to be that "*many people and small businesses still cannot access the legal advice that they need, at an affordable price. As a regulator, we have a duty to consider how the way we regulate can help to address this*."[1] You also talk about "*a level of unmet need in the legal services market*."[2] It is important not to generalise. We do not believe that there is a level of unmet need in the highly competitive market for personal injury claims. Price is not a barrier for most claimants who wish to pursue a meritorious compensation claim, because they can engage their solicitor to litigate their case under a conditional fee agreement or CFA (and in a dwindling number of cases legal aid may still be available). Most personal injury claimants access the legal market free of charge at the point of need.[3]

[1] Consultation document paragraph 9
[2] Ibid, paragraph 18
[3] The cost of legal services to most claimants on a CFA is only payable if and when they are successful in their claims, when a proportion of their damages may be used to reimburse their solicitor for costs unrecovered from the losing party, together with a prescribed and limited success fee and possibly an insurance premium. For legally aided litigants the statutory charge may apply to their damages. Qualified one-way costs shifting ensures that in most unsuccessful cases personal injury claimants do not face a bill for the defendant's costs. LASPO 2013, and the advent of the claims portal for the vast majority of personal injury claims, ensures that claimant's inter partes costs are limited, addressing concerns raised by defendants pre- LASPO that the level of costs they may have had to pay if they lost made it uneconomic to defend claims.

Comments on the proposals

APIL will always welcome a simplified and clearer regulatory system for solicitors, as long as this will not compromise the highest professional standards, and consumers of legal services are fully protected. However we feel that the current proposals will serve only to confuse the public and the service they can expect from "a solicitor".

We note the SRA accepts that the term "solicitor" is a brand.[4] For a brand to work effectively, it must be consistent and that consistency rigidly applied, otherwise the brand is diluted or confused. For legal advice to be given by someone who can call themselves "a solicitor" but who operates in an unregulated entity / firm, risks them not having any professional indemnity insurance, or at least an appropriate level of insurance. In addition this solicitor's clients will not have access to the compensation fund and will not receive privileged legal advice. This dilutes and confuses the brand, when advice from solicitors in regulated entities will carry these further safeguards and advantages. This change would also seem to fly in the face of the SRA's stated aim to "*maintain the highest professional standards*"[5].

Further, whilst it may be incumbent on solicitors working in unregulated firms to explain the limitations of their advice, we are concerned that only the most sophisticated users of legal services will truly understand the differences. In our view these proposals do not adequately protect consumers of legal services offered by all solicitors.

As you may appreciate, the majority of our members are solicitors whose work encompasses reserved activities - the exercise of a right of audience and the conduct of litigation.[6] They have no choice under these proposals than to work in a regulated firm (we call these solicitors "fully regulated" for the purpose of this response). We are concerned that taking many solicitors out of full regulation will increase the cost of regulation on those that remain. For example, the cost of compensation fund contributions will fall only on those who are fully regulated. Our members face competition both inside and outside the solicitor-regulated sector (for example outside from claims management companies, and paid McKenzie friends). We are concerned that the SRA's proposals will make solicitors forced to work in the fully regulated sector less competitive in the wider legal market because the increased cost of regulation will fall on fewer members of the profession.

Amendments to the Draft Codes of Conduct

We welcome simplification of the Code of Conduct, but are extremely concerned by the omission in the draft Codes of Outcome 8.3, which prohibits cold calling by solicitors. We would also be grateful of clarification on the section covering referral fees.

Unsolicited approaches to the public

APIL is deeply concerned that the ban on cold calling by solicitors has been omitted from the new draft Codes of Conduct. The draft Codes of Conduct for Solicitors and for Firms do not contain the wording of Outcome 8.3, which states that "you do not make unsolicited approaches in person or by telephone to members of the public in order to publicise your firm."

[4] See for example ibid., paragraph 84
[5] Enid Rowlands, page 3 of your consultation document
[6] Section 12, Legal Services Act 2007

We urge the SRA to ensure that the ban on cold calling by solicitors in the personal injury sector remains in place. Removing Outcome 8.3 from the Code and therefore lifting the ban which prevents solicitors from making cold calls would be hugely irresponsible. In the case of the personal injury sector, it is necessary for the SRA Code of Conduct to go beyond the requirements of the law which surrounds the practice of cold calling in general. Cold calls are tasteless and intrusive and they exploit vulnerable people. The practice also brings personal injury practice into disrepute, generating a false perception that obtaining compensation for injuries is easy, even when there is no injury.

Referral Fees

Paragraph 5.1 of the draft Code of Conduct for Solicitors deals with referrals and introductions. This section does not, however, appear to reflect the ban at section 56(4) of LASPO 2013, on referrals where the legal services relate to a claim or potential claim for damages for personal injury or death. Paragraph 5.1(d) of the draft Code only prohibits referrals in respect of criminal proceedings.

It may be that paragraph 5.1(e) is intended to cover the ban on referrals in personal injury proceedings, but we would be grateful for clarification on this point. In fact we feel that 5 (1) (e) should be clarified and simplified in any event, as – unlike the rest of this document – we are unsure of its meaning and intent.

We hope that our comments prove useful to you.

Yours faithfully

Alice Warren

Legal Policy Officer

Association of Police Lawyers

Dear Sirs

I write on behalf of the Association of Police Lawyers as Vice Chair but also as the head of a collaborative function which provides legal services to two Chief Constables and Police and Crime Commissioners. I would wish to raise concerns regarding the impact of the new provisions in respect of the application of Legal Professional Privilege and the work of in-house police lawyers.

The Association is made up of 254 members who are police lawyers and their staff, it acts to represent and support those working in in-house legal departments and seeks to promote the effective and efficient provision of police legal services within Great Britain and Northern Ireland. The majority of police lawyers are employed by their Chief Constable although a small number are employed by the Police and Crime Commissioner and provide advice to Chief Constables.

The Association has reviewed the Consultation and had the benefit of the Law Society case studies. It is our understanding that if we provide legal advice to our employer it will attract legal privilege under the proposals but not if we act for anyone other than our employer.

The governance as to the provision of legal advice in the police services is as follows:

1. Chief Constables (unregulated corporations sole) employ in-house solicitors (around 250 across the country).

2. Those solicitors provide legal services (subject to conflict) to the Police and Crime Commissioner of the same police area.

3. Those solicitors also provide advice to other Chief Constables and Police and Crime Commissioners of other police areas subject to a formal collaboration agreement under s22A et seq. Police Act 1996 or mutual aid for emergency situations under s24 Police Act 1996 – this is subject to a General waiver from Rule 4 granted by the SRA after some considerable discussions between with the SRA and members of the Association.

The Government has announced its intention to extend the collaboration agenda for the emergency services to provide powers to mandate collaboration between the blue light services ie. police, fire & ambulance with the primary intention that collaboration starts in support services i.e. legal, finance, HR, IT etc. Those collaborations which are currently in existence are the subject of individual waivers from the SRA.

Our reading of the new proposals is that only in the circumstances described in 1. above would LPP attract. This would appear to be at odds with Government policy and would militate against collaboration (existing and future) operating to the detriment of current and future practice by in house police lawyers and risking the loss of the specialisms that currently exist. It should be noted that there is no known intention to provide services to the general public or to create any alternative business structure within our membership.

The Association would seek assurances that the provisions could be amended to avoid this eventuality or if we have misunderstood the impact of these provision confirmation from the SRA that those of us in or working towards collaborative arrangements can do so without any restriction being placed on LPP which would attach to the advice given within that arrangement.

Yours sincerely

Lisa-Marie Smith

Director

Staffordshire and West Midlands Police Joint Legal Services

Centro House

Birmingham

Barnes Masrsland Solicitors Ltd

Consultation: Looking to the future - flexibility and public protection

Consultation questionnaire form

This form is designed to be completed electronically—in MS Word. Please save it locally before and after completing it.

Question 1

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

Question 2

Do you agree with our proposed model for a revised set of Principles?

No

Question 3

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

No

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?

Yes, we believe that all rules under the Code of Conduct should apply

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?

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?

No

Question 7

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

Question 8

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

Question 9

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

Option 2 WILL be unworkable because it is not always possible to identify that an actual conflict exists and a solicitor may unwittingly act in a conflict situation. Because the non-regulated colleagues of regulated solicitors would not be subject to conflict rules, there is a risk of confusion to consumers, a very favourable competitive advantage to unregulated entities and lack of a fundamental consumer protection for clients of unregulated entities.

Question 10

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

No you have made it more confusing and difficult to operate for a small firm

Question 11

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

Question 12

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

Yes because of Outcomes Focussed Regulation we are aware that some firms manipulate the regulations so as to flout their actual intention, for e.g. routinely acting for seller and purchaser and lender

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?

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.

The roles of COLP & COFA in a small firm are onerous, time consuming and difficult to operate in a small firm

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?

Remove the roles

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?

It will result in an unfair playing field for firms such as ours; will leave to confusion for the public and cause serious risks in the erosion of legal professional privilege, the protection afforded by conflict and confidentiality rules and their protection under adequate insurance. In short it will undermine the profession and its benefit to the public.

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?

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?

We agree with this proposal but the SRA needs to act on reports made of unprofessional conduct.

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?

Question 20

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

Question 21

Do you agree with the analysis in our initial Impact Assessment?

Question 22

Do you have any additional information to support our initial Impact Assessment?

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?

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?

It should not be permitted

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?

If not, what are your reasons?

It should not be available. If clients choose to go to a non solicitor then why should solicitors fund this or more importantly suffer the reputational damage.

Question 26

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

Question 27

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

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?

Question 29

Do you have any views on what PII requirements should apply to Special Bodies?

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?

Question 31

Do you have any alternative proposals to regulating entities of this type?

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?

Question 33

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

Thank you for completing the **Consultation questionnaire form**.

Please save a copy of the completed form.

Please return it, along with your completed **About you form**, as an email attachment to consultation@sra.org.uk, by **21 September 2016**.

Alternatively, print the completed form and submit it by post, along with a printed copy of your **About you form**, to

Solicitors Regulation Authority
Regulation and Education - Policy - Handbook 2017
The Cube
199 Wharfside Street
Birmingham
B1 1RN

Consultation: Looking to the future - flexibility and public protection

Response ID:716 Data

2. Your identity

Surname

Mount

Forename(s)

Peter John

We may publish a list of respondents and a report on responses. Partial attributed responses may be published. Please advise us if you do not wish us to attribute your response or for your name or the name of your firm or organisation to appear on any published list of respondents.

Attribute my/our response and publish my/our name.

Please identify the capacity in which you are submitting a response. I am submitting a response…

on behalf of a local law society

Please enter the name of the society.: Bedfordshire Law Society

3.

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

None within my firm and our Society has not been made aware of any such issues.

4.

2. Do you agree with our proposed model for a revised set of Principles?

Yes

5.

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

Yes and (as indicated later) we are concerned that changes prosed in the Consultation will water that principle down.

6.

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?

No

7.

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?

The writer's and our Society's experience suggest that conflict of interest remains one of the most difficult areas to isolate accurately and case studies would certainly assist the process.

8.

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?

Yes, but brevity carries its own issues of interpretation. Apart from the answer to 5 above. there may well be an argument for case study examples across all the Principles where this is possible.

9.

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

No

10.

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

See reply to Question 28. This may not be appropriate as a "Principle", but the requirement for all practising solicitors to be covered by PII should be deeply entrenched.

11.

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

We think that both options are, to some extent, incomplete. We would recommend a review with a view to combing the best bits of both. Option 1 (b) is very specific and would allow the same firm, in some circumstances, to act for two clients in a contract race. That may be acceptable, but it is a view that should be fully justified.

12.

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

Yes, but we would like account to be taken of our more detailed comments.

13.

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

No

14.

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

No (but see comments on PII

15.

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?

None other than those that appear elsewhere in these replies.

16.

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.

Yes, but with some reluctance, since the roles either operate as another layer of management with a pure compliance function or, more usually, simply reflect management structure of the firm or other entity. In smaller firms, the latter position is more or less inevitable. In larger firms a single compliance officer (not necessarily a solicitor) might serve the proper interest of the SRA in enforcing compliance better.

The extent to which personal liability can be enforced against a COLP or a COFA to the exclusion of other owners or managers of the entity makes those who should be accepting appointment reluctant to do so.

17.

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

More training, recognition of the need for specialist compliance offices in larger entities and less emphasis on personal liability (as opposed to authority).

18.

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?

We think the fundamental threat which is set out below vastly outweighs any perceived opportunities. Much of this Consultation is predicated on unsubstantiated assumptions about the needs of consumers of legal services in a market which is already competitive and where there are a number of different types of lawyer already in practice. No real evidence has been adduced to show a need for anything that further complicates existing arrangements.

Even if, which is not accepted, there is such a need, the purpose of the SRA is to regulate solicitors. Such regulation should be a single standard that applies to all solicitors and is understood as such by the general public. Watering down that basic principle will only create confusion in the minds of consumers and therefore damage the brand which is represented by the word "solicitor". In particular, if consumers experience different outcomes when things go wrong, depending on the type of "solicitor" they are using, that can easily lead to irreparable damage to trust in the brand, which is currently believed to be reasonably high.

19.

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

This would not apply to a Society such as ours.

20.

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?

Agreed

21.

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?

We believe the current requirement is both necessary and fit for purpose. We would not wish to see it reduced in any way. This, again, goes to the issue of trust in the "brand".

22.

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

We are obliged to do this by letter to clients at the inception of matters. Looking at the length to which the necessary letter normally runs, we doubt if our member firms will assist matters by papering their walls with the information.

23.

21. Do you agree with the analysis in our initial Impact Assessment?

No; it appears to be limited and unsupported by meaningful evidence.

24.

22. Do you have any additional information to support our initial Impact Assessment?

It would help if it extended beyond private clients, but we believe that its validity is questionable in any event.

25.

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?

Yes

26.

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?

They should not be so permitted.

27.

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? If not, what are your reasons?

No; this goes to the principle of maintaining a single brand so that consumers, who take the trouble to consider the point, understand at all times what is implied by the word "solicitor".

28.

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

Emphatically not. It should be within the public perception that anyone holding a practising certificate and practising as a solicitor will be covered, to a level stipulated by the regulator, by PII.

29.

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

Yes. In simple terms, the approach, if implemented as suggested, will inevitably damage public trust in solicitors as a whole.

30.

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?

Yes

31.

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

PII requirements should be consistent across the whole profession.

32.

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?

No

33.

31. Do you have any alternative proposals to regulating entities of this type?

All practising solicitors should be regulated to the same standards and these should be sufficiently high to maintain trust.

34.

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?

No

35.

33. Do you agree with our proposal that all work within a recognised body or an RSP should remain

regulated by the SRA?

Yes

Ben Hoare Bell LLP

Dear Sirs

I have had the opportunity to consider the response of The Law Society to this consultation, published by them on 8 September. On behalf of Ben Hoare Bell LLP, I support and endorse the views expressed by them.

Yours faithfully

Mark Harrison

Ben Hoare Bell LLP

BENJAMIN JOHN LANSBURY

11 GALENA ROAD
LONDON W6 0LT

20 September 2016

This is my response to the SRA Consultation

Looking to the future - flexibility and public protection

I am responding to the SRA consultation

I have seen the comprehensive response submitted by The Law Society on 8 September 2016 and I adopt that response as my own. I do not agree with the proposals in their entirety, except where it is clear in this response that my views differ. The Law Society's response can be found at this link:

http://www.lawsociety.org.uk/policy-campaigns/consultation-responses/looking-to-the-future-consultations-law-society-response/

Consultation Questions
My replies to the SRA Consultation Paper have been completed below the relevant 33 questions set out in the Consultation Questionnaire form provided in electronic format by the SRA, and these are contained below on the accompanying pages.

BEN LANSBURY

Consultation questionnaire form

This form is designed to be completed electronically—in MS Word. Please save it locally before and after completing it.

Question 1

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

I have not encountered any issues in respect of the suitability test

Question 2

Do you agree with our proposed model for a revised set of Principles?

No it seems misguided. I see no reason to change the principles on which young solicitors have been trained and which embody the ethical considerations central to all practising solicitors.

Question 3

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

No, the removal of the principles that a solicitor should provide a proper standard of care to client, act in the best interest of each client and protect client money and assets seems to be a betrayal of the aims a professional should strive for.

The existing principles make clear a solicitor's professional responsibilities

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?

See comments above. I endorse the Law Society's concerns about the abolition of existing Principle 5, 8 and 10.

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?

The proposals are wrong and misconceived

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?

No you have NOT produced a rule book for professionals but an amoral charter without any guidance or indication as to where the line is drawn. Regulation should embody some degree of certainty. These proposals as written do not do that.

Question 7

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

No the existing code is fine

Question 8

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

Leave it alone. Your proposals are wrong. I endorse The Law Society's response to this question

Question 9

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

No. The options are untenable, and weaken public protection and will leave consumers confused. If it is accepted that to act for one or more clients where there is actual conflict or a significant risk of conflict is wrong then that needs to be said. I do not believe that is a proper way to train young lawyers or for the profession as a whole to behave.

Question 10

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

No you are destroying the solicitors profession without adequate protection for clients or to prevent damage to the reputation of the legal profession

Question 11

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

Do not introduce your changes. They are all unnecessary.

Question 12

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

Yes Do not make your proposed changes. This apart, there are no proper provisions covering how undertakings are to be dealt with within unregulated undertakings. This needs to be clarified

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?

Yes your code is wrong, and I endorse the comments of the Law Society. Your approach creates two tiers of solicitors, those working in a regulated entity and those working in an unregulated entity, with consequential risks to consumer protections and professional standards which will damage the standing of solicitors and create confusions for solicitors and their clients

Please stop using our profession as a catch all for all legal services. We are a particular profession with particular standards. If others want to enter the legal services market by another route they can set up their own profession with their own standards. Your time would be far more usefully spent regulating the other routers – who are not solicitors. Yes you would have to change your name but you would be doing a far more useful job as far as consumer services and public protection is concerned – and you, rather than the solicitors' profession would have to take responsibility for any disasters that occur along the way.

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.

I also endorse The Law Society's call for careful consideration of the roles of the COLP and COFA. There is a thin dividing line between over regulation and sufficient regulation to inspire public confidence. The prospect of solicitors practising in unregulated entities without any form of internal supervision causes me concern.

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?

Yes. Provide clear and detailed guidance

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?

Not a good idea. I have also seen The law Society's response and endorse those comments.

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?

I consider that this is to be avoided because of the lack of protection for the public.

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?

About your only good idea

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?

I endorse the Law Society's response

Question 20

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

The better model would be to require all unregulated entities to highlight the lack of protection to its consumers. That is where the danger lies to consumers

Question 21

Do you agree with the analysis in our initial Impact Assessment?

No. It ignores reality. The better model would be to require all unregulated entities to highlight the lack of protection to its consumers. That is where the danger lies to consumers. See the Law Society's detailed response

Question 22

Do you have any additional information to support our initial Impact Assessment?

No it is wrong. I have noted The Law Society's analysis of the Impact Statement and I commend that analysis.

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?

Yes It would clearly not be appropriate for a solicitor in an unregulated entity to hold client money in their own name; not least because the SRA is proposing the abolition of Principle 10: You must protect client money and assets.

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?

Should not be allowed. I support the Law Society's response

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?

If not, what are your reasons?

Yes but they should not be allowed to hold themselves out as solicitors. I endorse the comments of the Law Society. Two tier in this context means two tier.

Please stop using our profession as a catch all for all legal services. We are a particular profession with particular standards. If others want to enter the legal services market by another route they can set up their own profession with their own standards. Your time would be far more usefully spent regulating the other routers – who are not solicitors. Yes you would have to change your name but you would be doing a far more useful job as far as consumer services and public protection is concerned – and you, rather than the solicitors' profession would have to take responsibility for any disasters that occur along the way.

Question 26

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

No all solicitors should have PII cover or they should not be allowed to use the title solicitor.

Question 27

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

Many see comments above. I endorse the Law Society's comprehensive response on this topic.

Please stop using our profession as a catch all for all legal services. We are a particular profession with particular standards. If others want to enter the legal services market by another route they can set up their own profession with their own standards. Your time would be far more usefully spent regulating the other routers – who are not solicitors. Yes you would have to change your name but you would be doing a far more useful job as far as consumer services and public protection is concerned – and you, rather than the solicitors' profession would have to take responsibility for any disasters that occur along the way.

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?

Yes

Question 29

Do you have any views on what PII requirements should apply to Special Bodies?

The same as apply to all solicitors

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?

If you are regulating them they should be held to the same standards as solicitors. I endorse the Law Society's comprehensive response on this topic.

Please stop using our profession as a catch all for all legal services. We are a particular profession with particular standards. If others want to enter the legal services market by another route they can set up their own profession with their own standards. Your time would be far more usefully spent regulating the other routers – who are not solicitors. Yes you would have to change your name but you would be doing a far more useful job as far as consumer services and public protection is concerned – and you, rather than the solicitors' profession would have to take responsibility for any disasters that occur along the way.

Question 31

Do you have any alternative proposals to regulating entities of this type?

No. I endorse the Law Society's comprehensive response on this topic.

Please stop using our profession as a catch all for all legal services. We are a particular profession with particular standards. If others want to enter the legal services market by another route they can set up their own profession with their own standards. Your time would be far more usefully spent regulating the other routers – who are not solicitors. Yes you would have to change your name but you would be doing a far more useful job as far as consumer services and public protection is concerned – and you, rather than the solicitors' profession would have to take responsibility for any disasters that occur along the way.

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?

They seem dangerous and weaken consumer protection. I endorse the Law Society's comprehensive response on this topic.

Please stop using our profession as a catch all for all legal services. We are a particular profession with particular standards. If others want to enter the legal services market by another route they can set up their own profession with their own standards. Your time would be far more usefully spent regulating the other routers – who are not solicitors. Yes you would have to change your name but you would be doing a far more useful job as far as consumer services and public protection is concerned – and you, rather than the solicitors' profession would have to take responsibility for any disasters that occur along the way.

Question 33

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

Yes, unless regulation is returned to the Law Society.

Thank you for completing the **Consultation questionnaire form**.

Please save a copy of the completed form.

Please return it, along with your completed **About you form**, as an email attachment to consultation@sra.org.uk, by **21 September 2016**.

Alternatively, print the completed form and submit it by post, along with a printed copy of your **About you form**, to

Solicitors Regulation Authority
Regulation and Education - Policy - Handbook 2017
The Cube
199 Wharfside Street
Birmingham
B1 1RN

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?

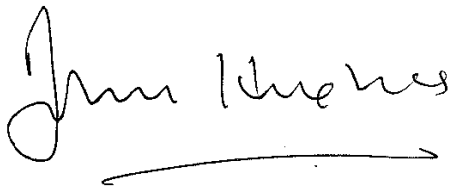
Response - Please see our response to Q30.

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

Consultation: Looking to the future - flexibility and public protection

Response ID:665 Data

2. Your identity

Surname

Smith

Forename(s)

Nigel Robert

We may publish a list of respondents and a report on responses. Partial attributed responses may be published. Please advise us if you do not wish us to attribute your response or for your name or the name of your firm or organisation to appear on any published list of respondents.

Attribute my/our response and publish my/our name.

Please identify the capacity in which you are submitting a response. I am submitting a response…

on behalf of a local law society

Please enter the name of the society.: Bournemouth and District Law Society

3.

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

I am the Senior Vice President of the Bournemouth and District Law Society (BDLS) which represents 470 members. I have been asked by the Elected Committee of BDLS to respond to this consultation. The Committee of the BDLS has met and considered the Law Society's Response to the Consultation dated September 2016. BDLS adopts and supports the Law Society's Response to all 33 questions contained in this questionnaire including this question.

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2. Do you agree with our proposed model for a revised set of Principles?

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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?

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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?

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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?

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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?

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16.

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.

I am the Senior Vice President of the Bournemouth and District Law Society (BDLS) which represents 470 members. I have been asked by the Elected Committee of BDLS to respond to this consultation. The Committee of the BDLS has met and considered the Law Society's Response to the Consultation dated September 2016. BDLS adopts and supports the Law Society's Response to all 33 questions contained in this questionnaire including this question.

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

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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?

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21. Do you agree with the analysis in our initial Impact Assessment?

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Committee of the BDLS has met and considered the Law Society's Response to the Consultation dated September 2016. BDLS adopts and supports the Law Society's Response to all 33 questions contained in this questionnaire including this question.

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Legal and Democratic Services

King's House

Grand Avenue

Hove

Date: 19th September 2016

Phone: 01273 291515

e-mail: elizabeth.culbert@brighton-hove.gov.uk

Dear Sirs

Please find enclosed our response to your consultation 'Looking to the Future'. This response is submitted on behalf of Brighton & Hove City Council.

As the SRA is aware, many local authorities are engaged in the provision of both reserved and non-reserved legal services to external bodies, pursuant to their powers under the Local Authorities Good and Services Act 1970. We consider this to be a key issue which ought to be addressed as part of this consultation. We have asked in this response for clarity from the SRA to confirm that there are no barriers to this practice and we trust that the SRA is prepared to take the necessary steps to provide such clarity.

Yours faithfully

Elizabeth Culbert

Acting Head of Legal Services

Brighton & Hove Council

elizabeth.culbert@brighton-hove.gov.uk

01272 291515

Consultation: Looking to the future - flexibility and public protection

Consultation questionnaire form

This form is designed to be completed electronically—in MS Word. Please save it locally before and after completing it.

Question 1

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

We are supportive of the need to maintain high standards in the profession and secure that all those practising as Solicitors satisfy the criteria in the Suitability Test 2011.

We have not encountered any situations where the practical application of the test has created any issues for individuals or employers.

Question 2

Do you agree with our proposed model for a revised set of Principles?

We welcome the simplification of the principles, but would not support removal of the of the principle to “protect client money and assets”. This is particularly important to Local Authorities as clients of external Solicitors. Our assets are public assets, which we have a duty to manage appropriately.

We also consider that the Principles should continue to refer to the solicitor’s duty to keep the affairs of the client confidential.

Question 3

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

The revised principles do not refer to maintaining public trust and we consider that this should be included. The concept of being able to trust your legal advisor is distinct to having confidence in them or the profession. Both the SRA's 'Question of Trust' campaign and the wording of this Question 3 suggests that the SRA believes there is a distinction between trust and confidence. Perhaps revised principle 2 could be amended to read:

"2. ensure that your conduct upholds public confidence in the profession and **trust in** those delivering legal services"

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?

No – the reduced number and simplified approach to the principles will make it easier to apply the Principles across practice areas, including Local Government and other sectors where there may be differing levels of regulation and oversight from other bodies.

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?

It will be of particular use to receive guidance from the SRA as to the application of the new Codes and Practice Framework Rules to the conduct of reserved and non-reserved activities by local authority legal teams, using existing local government powers under the Local Authorities (Goods and Services) Act 1970, the Yorkshire Purchasing Organisation Case and existing Rule 4 of the Practice Framework Rules. Please – please see further below.

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?

The simpler, more focussed code is to be welcomed. In terms of in house practice, as highlighted below in our response to Question 8, it is in the interests of both the SRA and in house Solicitors to have clarity as to what is meant by “public or a section of the public”, specifically in the context of local authority employed Solicitors who wish to provide advice to other bodies within the powers set out by the Local Authorities (Goods and Services) Act 1970. We cannot understate how important it is to clarify this in order to enable the public sector to meet the expectations of Government, its public sector partners and the public in delivering joined up public services.

Question 7

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

Section 8.4 of the Code references referrals of disputes to ADR - we are not aware that this is a current requirement. The proposals do not address circumstances in which the particular ADR scheme is not agreed between the Parties.

Please see response to question 9 in relation to conflicts of interest.

Question 8

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

It is in the interests of both the SRA and in house Solicitors to have clarity as to what is meant by “public or a section of the public”, specifically in the context of local authority employed Solicitors who wish to provide advice to other bodies within the powers set out by the Local Authorities (Goods and Services) Act 1970.

Section 8.1 would benefit from amendment to include this.

Question 9

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

Option 2 is preferable as it simplifies matters and protects both clients and Solicitors, by prohibiting acting in situations of actual conflicts of interest and allowing for exceptions where there is a significant risk of a conflict of interest arising, as is currently provided for.

Both versions appear to be somewhat confused as they rely on in the current definition of “Client Conflict” which refers to actual conflicts and significant risks of conflicts.

Question 10

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

As set out above, the Code does not address the key issues which are impacting on local government legal practice.

Question 11

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

No

Question 12

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

See response to Question 8 above.

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?

We do not have any further specific issues to highlight.

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.

We do not have any comments to make in relation to this question as it is not specifically relevant to local authority practise.

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?

We do not have any comments to make in relation to this question as it is not specifically relevant to local authority practise.

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?

Annex 5 to the Consultation at page 26 includes a scenario where the new approach to regulation would allow individual in house Solicitors the ability to provide non reserved legal advice to the public. This does not recognise the additional step required by local authorities before they can provide services to the public for profit of establishing a trading company.

Further, a large part of the work undertaken by local authority legal teams is reserved activities – including advocacy and property transactions - and so setting up an alternative legal service provider would be unlikely to be considered to provide a useful opportunity.

Therefore the opportunities presented by the proposal do not assist local authorities in providing non reserved legal activities with less regulation, as a trading company would still be required. Neither do the proposals address the key issue of ensuring that there is clarity that local authorities can provide reserved and non reserved legal advice to other public bodies pursuant to their existing powers. The threat from these proposals is that the opportunity for much needed certainty is lost.

The question raised at paragraph 89 is important in relation to whether privilege would still apply to advice provided by an alternative legal service provider, employing Solicitors in some roles and we believe this issue requires more consideration. If such advice would not be privileged we would be extremely concerned as to the implications of that for recipients of such advice. Legal professional privilege is an essential element of a functioning legal system.

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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?

Please see our response to question 16.

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)?

Local authority employed Solicitors operate to provide non-reserved and reserved activities, primarily to their employer. The local authority itself is not an entity authorised by the SRA.

As stated previously in our response, the point which is vital for us to understand is the extent to which other local authorities, the public and third sector bodies fall within the definition of the "public or section of the public". The SRA has received a copy of the opinion of James Goudie QC in response to a request for an opinion from Lawyers in Local Government and the Local Government Association, as to whether such bodies would fall within the definition of the "public or section of the public". This was unequivocal in its conclusion that the above wording did not prohibit local authority employed Solicitors from providing reserved legal activities to the types of body indicated above. In discussion, the SRA has highlighted that the Legal Services Board is able to request guidance on this wording (which originates from the Legal Services Act 2007) from the Government.

We feel that this is of such importance, that the SRA should approach the LSB to make such a request of the Government as soon as possible, so that this can be clarified and the outcome of the SRA's regulatory review can reflect this new information.

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?

While recognising that the requirement does not apply to local government legal teams, the existing requirements seem overly prescriptive and ultimately not fit for purpose. As the SRA recognises in paragraph 101, the requirement to have practised for at least 36 months within the last 10 years is no guarantee of current knowledge of the law, nor of the ability to effectively supervise another.

Question 20

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

For individuals and organisations which do not habitually instruct Solicitors it is important that they have an easy way of accessing information in relation to the protections afforded to them, particularly in the context of a fast paced and changing market.

Question 21

Do you agree with the analysis in our initial Impact Assessment?

As highlighted above, the assumptions made in relation to how local authority legal teams may react to the changes are flawed and do not recognise the specific legislative environment in which local authorities work, nor the nature of the work we undertake.

Question 22

Do you have any additional information to support our initial Impact Assessment?

Please see response to question 21.

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?

Yes

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?

In house Solicitors would not normally be responsible for holding client money, as they are an arm of the client organisation and will work closely with the finance department. Where providing services to external bodies, they should be holding money in accordance with the SAR or not at all (i.e. arranging for direct payments between the purchaser and seller on a land transaction). However, this is not what many external bodies are used to (if they have dealt with traditional firms) and in the interests of opening up the market place to alternative service delivery models, it seems sensible to provide this option.

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?

If not, what are your reasons?

We think the proposed proposals create a confusing two tier market that the public will not understand.

Question 26

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

We agree with the proposed approach, but would welcome the inclusion of an obligation that applies now under the Practice Framework Rule 4.2(b) whereby a Solicitor is required to ensure that their employer carries sufficient indemnities for the nature of the work being undertaken.

Question 27

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

This does potentially create a situation where a consumer receives negligent advice, suffers a loss and is unable to recover their losses from the alternative legal services provider. This is clearly not a desirable outcome.

Please see response to question 26.

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?

Yes, these are treated differently to non-reserved legal activities for a valid reason, that they are potentially high risk and high value. It would be counter intuitive to allow them to provide services to the public, in a similar way to other Solicitors, without some form of insurance or indemnity behind them.

Question 29

Do you have any views on what PII requirements should apply to Special Bodies?

See question 28

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?

We agree with the SRA's view that it is not desirable. It is inconsistent with the legislative requirements and would be inconsistent with the approach being adopted in terms of opening up the market.

Question 31

Do you have any alternative proposals to regulating entities of this type?

We do not have any alternative proposals.

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?

No.

Question 33

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

We agree with the SRA's proposal.

Thank you for completing the **Consultation questionnaire form**.

Please save a copy of the completed form.

Please return it, along with your completed **About you form**, as an email attachment to consultation@sra.org.uk, by **21 September 2016**.

Alternatively, print the completed form and submit it by post, along with a printed copy of your **About you form**, to

Solicitors Regulation Authority
Regulation and Education - Policy - Handbook 2017
The Cube
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B1 1RN

Bristol Law Society

Consultation: Looking to the future - flexibility and public protection

Consultation questionnaire form

This form is designed to be completed electronically—in MS Word. Please save it locally before and after completing it.

Question 1

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

We have not encountered any issues with the application of the test.

Question 2

Do you agree with our proposed model for a revised set of Principles?

We think there have already been a number of changes to the Handbook and Code of Conduct in the last few years. We don't consider that there was necessarily a mandate to change the set of Principles so soon after the last change. We think it leads to confusion, it costs money, it is not clear that the fundamental values of the profession (as opposed to the manner in which they are delivered) are changing or need to change and therefore we don't consider that changes to the Principles are necessary.

It is not clear why certain Principles have been removed when they appear to be fundamental to the values of the profession.

Question 3

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

We think "upholding public confidence in the profession" is quite a nebulous unspecific Principle. We think solicitors should be obliged to consider their professional standards personally by reference to an objective standard not by reference to what the "public" might subjectively think. It would be quite possible for the public to have a misplaced confidence in the profession. We think that public confidence in the profession is a desired outcome rather than a professional principle.

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?

We think that the Principle regarding the requirement to provide a proper standard of service was a fundamental one for the profession and it has not been explained why this has been removed. This tied into the recent changes to the Continuing Competence regime so it is not clear how those will need to be changed to accommodate the change in the Principles. We understood the requirement to provide a proper standard of service is the threshold standard of performance, effectively incorporating the negligence test into our professional Code. As such it is an effective method of ensuring that solicitors individually consider and assess their own performance as a matter of professional conduct. We think that by removing this Principle the profession could be seen to be lowering its standards of performance, which is definitely a negative.

We think client confidentiality is a fundamental principle of the legal professional so we don't understand why it is not enshrined in the core Principles. The same applies to the duty not to be conflicted.

Finally we consider that the duty to protect client money and assets is a core Principle of the profession and one which we think should remain in the fundamental Principles.

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?

We think that additional guidance on the subject of conflicts of interest is useful. In particular more detailed guidance with case studies on Chinese walls and when firms/solicitors can act for parties with potential conflicts of interest.

A compliance toolkit for in-house solicitors would be very useful.

More guidance on solicitors' obligations with regard to client assets and money would be useful.

In addition the guidance on referrals and introductions might benefit from more specific examples.

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?

We think the Code is short and focused. However short doesn't necessarily mean that the Code is easier to understand. With the benefit of guidance and case studies the Principles and Code may well be more comprehensive and comprehensible. We think the ordering of the Code is slightly strange and moves between the general and the particular (for example a wide ranging general duty of confidentiality is followed by detailed direction on how solicitors must engage with the SRA).

We did not consider that separate sections for solicitors in separate categories (such as in-house) was a hindrance to understanding and was useful structurally because in-house solicitors deal with particular issues that other solicitors don't. However we understand that if the future brings more flexible ways of practising law there will be solicitors in potentially multiple different categories and separate sections for each might be unwieldy.

Some sections (such as the referrals section) are too general so as to be unclear without more specific guidance.

Question 7

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

We consider that the cooperation and accountability section could be within the enforcement procedure for the SRA. If there was a general Code of Conduct requirement that solicitors must engage with the SRA and respond to its communications promptly, the detail of the rules of enforcement procedure could be set out elsewhere.

Question 8

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

Please see answers to Q3.

In addition we consider that the specific sections on in-house practice which exist in the current Code of Conduct were/are useful for in-house practitioners. We do not fully understand the logic of removing the specific guidance. We consider such sections should be retained in some form, whether that be in guidance or a section in the Code.

Question 9

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

We think that the “Option 2” method of describing the conflicts rules is clearer. However as stated elsewhere in this response we think that conflicts is an area where clearer guidance (especially for in-house lawyers) would be appropriate with case studies or scenarios. The rules can be stated simply with additional guidance as to the specifics of how the rules should be applied in practice.

Question 10

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

As with the Code for Solicitors (which is in substantially similar form) we consider that the Code is short and focused but a bit lacking in detail. There is a substantial overlap with the Code for Solicitors and we don't fully understand the value in repeating it verbatim. There might be a more efficient way of expressing the same obligations for both classes. Where the Code is brief it is possible that it leads to a lack of certainty on issues where detail is not included. We wonder whether this will lead to more enquiries to the SRA helpline and ultimately to a demand for more specific guidance in due course. Where Codes are specific they may be less flexible but they may be easier to comply with. Where the Code is general it may be harder for firms to comply with, with certainty.

Question 11

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

As stated in Q10 above there is a large amount of duplication with the Code for Solicitors. If the Codes were structured differently this might be expressed more efficiently than simply reiterating the points of the Code.

Question 12

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

There should be more reference to client money. It may be that an obligation to comply with the Solicitors Accounts Rules where applicable, is appropriate.

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?

The language of the draft Code items does not seem to include mandatory wording such as “you must”: rather it includes “you do not…” this does not import obligation in the quite the same way and as such seems strange. Either the obligations are mandatory or they are not. We don’t consider that they should be drafted in a “light touch” way.

The sequence of the Code provisions does not seem to be in order of importance necessarily. Whilst the Principles appear first, and trust and acting fairly appears after them, confidentiality and conflicts of interest which are fundamental values of the profession don’t appear until after dispute resolution, service and competence and referrals and introductions which are quite specific and potentially less fundamental. It might be sensible to re-order the provisions of the Code in the order of their importance.

We note that the content of the Referrals and Accountability and Publicity sections overlap in content. Perhaps they can be amalgamated or put closer together.

The glossary should be at the front of the Code.

The Client Money section should be longer or reference to Guidance should be made.

Point 1.1 of the Code provides “You do not unfairly discriminate”. For clarity shouldn’t this be “You do not unlawfully discriminate” thereby defining the fairness by reference to the law. Otherwise the provision could create confusion.

We have already made the point that the Codes for Solicitors and Firms overlap considerably in content. Wouldn’t it be better to structure the Codes differently, since SRA regulated firms are going to be filled with SRA regulated lawyers and therefore the distinction is false.

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.

Overall these roles are useful and should be retained. It is agreed that they help to give the authority needed within firms to ensure compliance by colleagues. It is also agreed that the roles have helped further the creation of a compliance officer community which facilitates the passing on of good practice and sharing knowledge although this is perhaps used less now than it was when the roles were first introduced.

The experience of a compliance officer (who is also the MP) in a medium sized firm (10 partners/150 staff) offering mainly traditional "high street" type legal services plus clinical negligence and some commercial property/litigation was of the following view:

there is not too much responsibility on the COLP/COFA but that may be because I have the support of all partners in my roles and good deputies & managers as well. I would certainly imagine that the role works best in small firms, where the COLP is also a manager or closely involved in all the firm's activities. I can well believe that in larger firms the functions are delegated out and that would make the role itself much less onerous, albeit the post holder would still carry the overall responsibility.

On balance I would say that the roles are valuable and should be retained. Whilst dealing with compliance at times may be time consuming, the fact is that we have to do it. In some ways it can be seen as a privilege and something which sets us apart from other non-professionals.

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?

A COLP in a large commercial firm commented: *It would be useful to have a regional forum (like the Bristol Risk Managers group for law firms in Bristol) where role holders can discuss issues (Chatham house rules) and informally sound out one another on grey areas. The difficulty is where an issue trips over into being reportable and to make that judgement requires experience. Having others to consult with is the key and the SRA are the wrong people, because as regulators they do not work at the coal face which is critical to understanding whether something is reportable or not.*

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?

First, this regulatory proposal seems to come at a time when there are more pressing issues to be addressed, such as the implications of Brexit and the huge unmet legal need (largely resulting from the reduction in the scope of Legal Aid). As such, it is difficult to see how the proposals are justified. It is even more difficult to see how they will deliver the supposed intended benefits.

However what is clear is that any opportunities (benefits) do not outweigh the risks and unintended consequences.

As far as we can see, the only potential opportunity is for commercial (often large) firms who may decide to create new unregulated entities to carry out their unreserved work and take advantage of the potential cost savings resulting from not having to pay the costs associated with regulation, indemnity insurance, contribution to the Solicitors Compensation Fund and employment of compliance staff. They may pass these savings onto clients but this is not guaranteed.

However, traditional (and often smaller) firms which are crucially those more likely to still be a) offering Legal Aid, b) operating in smaller and more remote towns and c) acting for individual clients in areas such as family law, immigration, housing, criminal law and some small business/sole traders are much less likely to split their businesses in this way. As such they will still have to meet the costs associated with regulation.

Why create a further divide in profitability between small, medium and large firms?

Further, the question is really whether the masses of consumers who we know are unable to access justice are actually going to benefit from the regulatory changes and potential cost saving. This seems highly unlikely. After all, most commercial firms do not offer legal aid (and have not done so for some time) and moreover,

many also no longer act for individual clients in the above areas of law (save perhaps for some exceptions, for example, large firms which continue to offer matrimonial advice for high net worth individuals where legal costs are not an issue).

The threats and risks are obvious. Clients using unregulated entities will be afforded none of the protection that clients in regulated firms have: professional indemnity insurance, access to the Compensation Fund, prevention of conflicts of interest, legal professional privilege and the standards and supervision of the profession. Moreover, they may well not know these differences until there is an issue and they need redress at which point they will be significantly disadvantaged as against clients of regulated firms.

In addition, this two tier system is likely to result in lower standards which will further undermine the confidence consumers have in the profession and leave them greater exposed to risk.

Why would we as a profession want to a) put clients at risk in this way and b) significantly limit their ability to obtain redress if something goes wrong – this stands to significantly damage the reputation of the profession which most solicitors and firms go to great lengths to uphold.

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?

It is difficult to answer this question on behalf of Bristol Law Society. We held a meeting to discuss the proposals with representatives from member firms and there were not many positive comments from those present.

Given the implications of the changes, we would suggest the SRA engage directly with firms and individuals on this question in a more meaningful way once the detail relating to the proposals is available and has been circulated.

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?

This is agreed - there are risks to clients associated with allowing sole solicitors to provided reserved legal services via non authorised organisations through lack of regulation, including on the standard of service and professional indemnity insurance.

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?

Yes – it is necessary. Allowing newly qualified solicitors to set up their own practices would be a significant risk to their clients. Those solicitors are likely to be unaware of the full extent of the risks and requirements of setting up and running a firm and further, will still be learning the fee earning job that they have chosen to practice in. Clients may well not receive the high standard of service they should be entitled to expect from the profession and in turn this would negatively impact on the reputation of the profession.

Would any consumer really want an unsupervised and inexperienced newly qualified solicitor acting for them?

The current period of 36 months is perhaps the appropriate minimum. However, it is generally accepted in practice that solicitors have really started to develop significant competence in the work they have experienced when they have 4 years PQE and even then, there is obviously still very much experience to be gained. Newly qualified solicitors need to be afforded time to do that while being supervised by someone suitably qualified, both for their own development as a lawyer and a professional but also for the benefit of their clients.

However, it is acknowledged that many individuals work for long periods as paralegals/legal assistants often carrying out the work of solicitors which develops their skills and expertise. They may well be more competent than others with fewer years' work experience but will nonetheless have from qualification, the same number of years PQE. With this in mind, assessing an individual's skills, experience and competence is more likely to achieve the desired result than setting a minimum period of post qualification experience.

Question 20

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

Yes. This benefits consumers and therefore is important. However there is nothing in the proposed new Code of Conduct requiring this. Why? Further – what 'detailed' information is being proposed?

However, clients often do not read/digest a lot of the information they are given (and which firms are quite rightly required to give) when instructions are received, often despite the best efforts of solicitors. Notwithstanding this, under the current regulation, consumers are protected even if they do not appreciate the full extent of the protection offered through being a client of a regulated firm. They have recourse if something goes wrong.

The crux of this is not whether SRA regulated firms are required to display detailed information about the protections available to consumers but that clients of unregulated firms are unlikely to fully appreciate the extent of the lack of protection afforded to them (even if it is set out in a 13 page client care letter or terms of business). Even if they do see and read the information – are they going to understand it and fully appreciate the significance and be able to weigh up the risks and benefits? Probably not. They will be focusing on any cost saving and will not think twice until something goes wrong.

At that point they will forced to deal with the matter in the same way they would if they had purchased a faulty lawnmower from a high street shop – it need not be pointed out what that will do for the image of the profession amongst members of the public – again, an image that many solicitors and firms up and down the country work so hard to uphold.

Question 21

Do you agree with the analysis in our initial Impact Assessment?

The main focus of the Assessment seems to be that the reforms will meet the current unmet legal need. It is suggested that there is a lack of flexibility and innovation within the profession which has led to unaffordable costs.

This is not agreed and the SRA ought to provide some clear and wellfounded evidence confirming this position. There clearly is an unmet legal need which needs to be addressed (other than by local solicitors offering pro bono work to those who are desperate). Although it is highly doubtful this proposal is the way forward, the government and the SRA have it within their gift to find and implement the real solutions.

In commercial services where firms are acting for businesses and high networth individuals there is plenty of flexibility and innovation when it comes to a number of aspects of the service. There are many different offerings in respect of fees including but not limited to (reasonable and competitive) fixed fees, capped fees, sending staff on sabbaticals to client organisations and offering significant value added services often for no charge. However those firms are not acting for clients who cannot afford to pay for legal services.

The unmet legal need is plainly with small businesses and individual clients. That said, many small to medium sized firms have in fact responded to cuts in legal aid in an attempt to continute to offer representation to those in need by offering fixed fees. There are also CFAs for civil work (albeit that in injury cases Claimants now have to pay some of their legal costs from the damages for their injury as success fees were deemed too high - bring back legal aid?!?)

The reality is that many small businesses and organisaitons (even when offered affordable fixed fees and CFAs) who need to resort to litigation have been denied access to justice by the highly disproportionate rise in court fees. Opponents know that starting court proceedings is no longer an option for many clients and not an avenue solicitors would recommend. They are further hit by changes in the rules relating to proportionality which mean that if their case becomes disproportionate to the level of damages sought they will not recover those costs from the paying party if they win.

The significant unmet legal need found in areas such as family law, criminal law and immigration is largely down to scaling back of Legal Aid. We have seen a huge rise in the number of unrepresentated individuals. Not only are they often getting poor outcomes but they are causing an increasing burden on the court system - at what cost? Further, some of the poorest individuals in society suffer: those on low incomes and/or benefits and those in certain parts of the country where there are legal aid deserts with no firms offering legal aid (even to those relative few who are still eligible). Even the flexibility offered by some firms through fixed fees does not fully address the problem - the reality is that any individual/family on a low income or welfare benefits is unlikely to be able to afford even a relatively modest fixed fee.

Question 22

Do you have any additional information to support our initial Impact Assessment?

No – although further evidence backing up the conclusions ought to be provided prior to further and more detailed consultation.

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?

It is plainly clear that client assets including money need to be protected at all times. Therefore, it is also plainly clear that individual solicitors working in non-regulated organisations should not be able to hold client money.

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?

We agree that financial regulation of solicitors should be proportionate and appropriate. However, we feel there should be equality of arms for solicitors and equality of protection for consumers. Therefore, solicitors acting for Special Bodies who are delivering reserved activities to the general public ought to be able to hold client monies personally, but be subject to the same or equivalent rules as solicitors in private practice so as to afford the same protections to their clients. Not to do so would be to add confusion to the marketplace and leave potentially vulnerable clients open to risk and harm.

For in house solicitors delivering only unreserved legal activities, it would seem to clarify and simplify the position if they are not permitted to hold client monies and therefore remain clear of the unnecessary burden of complying with those Accounts Rules.

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?

If not, what are your reasons?

In principle, yes. It seems right that clients of solicitors working in unregulated Alternative Legal Services Providers, if those solicitors do not have to make contributions to the fund, should not be have access to the fund. Otherwise, regulated solicitors would be contributing to the protections for unregulated solicitors and the potential for the fund to be depleted is obvious. However, there is a clear danger that the differences between the protections afforded to them will not be clear to the consumer before it is too late. If a consumer is tempted by the lower costs in choosing a solicitor working for an ALSP, should that indeed turn out to be the case, they are unlikely to look too carefully at why the costs are lower or fully appreciate the consequences and possible losses arising from the lack of protections. Given the lack of understanding by the consumer, this may also lead to significant damage to the brand of solicitor.

Question 26

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

Not at all. Like doctors, all solicitors should have insurance in place for their clients for losses arising out of the negligence of the solicitor. Everyone makes mistakes and the average consumer is likely to assume that the protection exists, whatever clauses and caveats are buried within the terms of business, which they are unlikely to read or at least fully understand. It seems unthinkable to expect clients of solicitors, in whatever capacity, to have to claim under standard consumer legislation, rather than professional indemnity insurance.

Question 27

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

Yes. The proposals are opening the door to further consumer confusion and lack of expected protections. PII for regulated firms acts as a vital check and balance to risk management and is a way of financially policing risk management such that standards need to be met and maintained. This provides a benefit to the solicitors and consumers by reducing negligence. To allow a scenario where certain solicitors may not have any insurance presents an unacceptable risk to both consumers and those solicitors personally. Similarly, to allow a situation where solicitors in unregulated entities or the unregulated entities themselves can obtain a different level of cover from regulated ones leads to further uncertainty and confusion for both parties. Insurance is pointless unless it is effective when needed and it is by no means certain that the insurance that could be obtained by unregulated entities, or the solicitors practising within them, would be.

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?

Most definitely. It is vital that the provision of identical services by Special Bodies or regulated firms comes with the same protections for the consumer. As above, it is unlikely that the full extent of any differences would be apparent to the average consumer, who may then suffer further harm at a time when they are already vulnerable. It doesn't make sense to allow an uneven playing field at the risk of harm to consumers and the brand of solicitor.

Question 29

Do you have any views on what PII requirements should apply to Special Bodies?

Yes. The same level of cover should apply as for regulated firms to ensure consistency of protection to the consumers, who may well not appreciate any subtle differences that apply and therefore be at risk.

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?

No. There should be consistency of approach to any legal services providers in order that the consumer and the brand of solicitor are properly protected. To attempt to introduce differing standards, particularly in a market where most consumers are unlikely to understand the differences, is misguided.

Question 31

Do you have any alternative proposals to regulating entities of this type?

Yes. All legal services should be sufficiently regulated so as to provide a consistent and appropriate level of protection to the consumer in whatever area they are purchasing legal services.

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?

The proposals appear almost unworkable in practice. Intervention is a powerful tool at the SRA's disposal and should, therefore, only be undertaken where there is a clear need. It is difficult to see how that clarity could be achieved where the work of a solicitor within an ALSP is inextricably tangled with the work of non solicitor colleagues within the same entity.

Question 33

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

Yes. This is absolutely vital.

Thank you for completing the **Consultation questionnaire form**.

Please save a copy of the completed form.

Please return it, along with your completed **About you form**, as an email attachment to consultation@sra.org.uk, by **21 September 2016**.

Alternatively, print the completed form and submit it by post, along with a printed copy of your **About you form**, to

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Regulation and Education - Policy - Handbook 2017
The Cube
199 Wharfside Street
Birmingham
B1 1RN

Consultation: Looking to the future - flexibility and public protection

Consultation questionnaire form

This response is submitted on behalf of the Bristol Risk Managers' Group.

We are happy for you to list our firm's names as having responded to the consultation but do not want any of the comments in this response to be attributed to our firms or to the Bristol Risk Managers' Group.

The Bristol Risk Managers' Group is an informal association of individuals with risk and compliance responsibilities in a number of national firms (all within the top 100) with offices in Bristol. The group meets bi-monthly on Chatham House terms to discuss non-competitive matters of interest and runs an annual training event. For convenience we refer to ourselves in this response as the Bristol Risk Managers' Group but the members who have participated in this response are, by alphabetical order of firm:

Bevan Brittan LLP – Peter Rogers, Director of Risk

Bond Dickinson LLP - Nicki Shepherd, Partner and Head of Risk and Best Practice

Burges Salmon LLP – Phil Steel, Head of Risk and Best Practice

Clarke Willmott LLP – Jon Green, Head of Risk and Compliance

DAC Beachcroft LLP – Tony Cherry, Partner and Chair of Business Services

Foot Anstey LLP – James Treloar, Head of Business Excellence

Thrings LLP – Anna Hudson, Director of Quality and Risk

Veale Wasbrough Vizards LLP – Claire Ainley, Partner and Head of Risk & Compliance

This response is submitted by the named individuals in their own right and it does not necessarily reflect the views of the partners or members of the firms mentioned for the simple reason that it is not feasible to canvass each one in the time available. The group feels that it is very well placed to respond to the consultation paper because of the positions that the members hold within their respective firms.

Although we have submitted a joint response we would like it to be treated as eight individual responses.

Question 1

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

We have no concerns with the content of the test. However when we recruit we assess the candidate against the suitability test requirements and there are challenges around accessing information to help in this assessment.

Most firms in the Bristol Risk Managers' Group use outside referencing agencies to carry out checks such as DBS, financial probity and validity of academic qualifications but there is a cost to this which smaller firms may find prohibitive. Additionally the results of these checks are purely objective (eg it will highlight if someone has a CCJ) and given that references from previous employers are usually bland, we have to rely on thorough interviewing to make any form of subjective assessment.

Question 2

Do you agree with our proposed model for a revised set of Principles?

The new Principles represent the fourth iteration of a set of high level principles governing the conduct of solicitors and other regulated individuals & firms in the 27 years since the Solicitors' Practice Rules 1990 ("SPR 1990") came into force, and more significantly the third in a space of the last ten years (2007-2011).

Given that solicitors' fiduciary duties have remained broadly unchanged during this period, this risks giving an impression of change for changes' sake rather than in response to a significantly different and fast evolving ethical landscape.

The 2011 Principles, whilst being the longest set of Principles to date, did resonate with our members, and the enshrining of good governance and sound financial and risk management as a new Principle in 2011 provided important leverage for COFAs and COLPs to ensure that they were given adequate resources to back up their new responsibilities. Whilst we are confident that our member firms will continue to invest in these functions notwithstanding the removal of this Principle, the same may not be true of all firms, and the risk is that these aspects will no longer be given appropriate priority when it comes to a firm's investment decisions.

The removal of the Principle around standards of work is also a concern, and although one could argue that the requirement to act in the best interest of each client can only be achieved by delivering a high standard of work, it is notable that each of the previous 3 iterations (The SPR 1990, SRA Code 2007, and the SRA Principles 2011) saw fit to include both "best interests" and "standard of work" as separate and distinct Principles.

Again, we are concerned that this may send out the wrong message to firms which might choose not to prioritise investment in training (perhaps encouraged by the other recent changes to the competence regime into thinking that their regulator no longer wishes to concern itself with this aspect of their activities). Likewise, it may also send an unfortunate message to partners and non-partners alike that shoddy work or poor standards of client service are viewed as less important than the remaining Principles which are being retained (for example equality & diversity) .

The removal of the reference in the Principles to the requirement to *"Protect client money and assets"* is also, in our view, an unfortunate downgrading of this obligation especially against the background of some high profile instances of solicitors and other legal professionals stealing client money, and is not in our view adequately compensated for by the addition of the requirement of honesty in new Principle 4, alongside new Principles 2 and 6.

Finally, in relation to the removal of the specific requirement to *"Comply with your legal and regulatory obligations and deal with your regulators and ombudsmen in an open, timely and co-operative manner"*, whilst to some extent one could read into the other Principles a requirement to the like effect (new Principles 1, 2 and 4), having this obligation spelt out in the Principles does, in our view, afford it additional weight and assist COLPs/COFAs and others tasked with engaging with the SRA etc. in gaining the cooperation of individual partners and other fee earners. This requirement could, however be addressed elsewhere in the new Code.

Question 3

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

This new Principle is "ensure that your conduct upholds public confidence in the profession and those delivering legal services".

The equivalent in the 2011 Principles was to "Behave in a way that maintains the trust the public places in you and in the provision of legal services"

Likewise in the SRA Code 2007 "You must not behave in a way that is likely to diminish the trust the public places in you or the legal profession"

Finally in the SPR 1990 one finds "A solicitor shall not do anything in the course of practising as a solicitor, or permit another person to do anything on his or her behalf, which compromises or impairs or is likely to compromise or impair…. The good repute of the solicitor or of the solicitors' profession"

All of the previous iterations of this Principle (SPR 1990, 2007 Code, & the 2011 Principles) made reference to the need to behave in a way which upholds public trust in the solicitor personally. The proposed Principle 2 doesn't do so. One could argue that it follows naturally that a client who experiences poor behaviour from their solicitor is likely to have their confidence shaken in the profession as a whole, but other than a saving of words, we cannot see the advantage of removing the reference to "you". We wonder whether it was done so as to avoid having to refer to three elements (you, the profession, and those delivering legal services).

We would also note that, having removed reference to the "profession" in the 2011 Principles, this has now been restored. In doing so this does seem to emphasise a distinction between "members of the profession" on the one hand, and "those delivering legal services" on the other, which may not have been intended.

We would endorse the Law Society's alternative wording, namely "Ensure that your conduct upholds public confidence in you and in other regulated individuals and firms" although for consistency with the existing Principle we would prefer "Behave in a way which maintains public confidence in you and in other regulated individuals and firms".

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?

As mentioned above, we consider that the revised Principles should include a Principle relating to standards of service.

If equality, diversity and inclusion are to be retained as Principles (which we fully support), then the Principle relating to governance and financial/risk management (also introduced in the 2011 Principles) should likewise be retained as a Principle for reasons mentioned in the answer to Question 2 above. Arguably the requirement for equality etc. flows from the requirement for good governance, and a firm which is poorly governed is unlikely to promote an equality and inclusiveness agenda.

The 2011 Principles regarding cooperation with the Regulator and protection of client money both served a useful purpose, and we would advocate that they be retained for the reasons mentioned in the answer to Question 2 above; that said, we would be content for the requirement for cooperation with the Regulator to be included in the Code as opposed to the Principles provided it is given adequate emphasis.

Whilst we note the Law Society's suggestion that the duty of confidentiality might be upgraded into a Principle, we feel this obligation would be adequately covered in the body of the Code (as currently in the 2011 Code) subject to the inclusion of a Principle to "Protect client money and assets" and the addition to the SRA Glossary definition of "assets" to include "proprietary and/or confidential information" (the current definition is "includes money, documents, wills, deeds, investments and other property" which place the emphasis on tangible assets whereas the "crown jewels" for many clients is in the form of electronic data).

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?

As the new Code has removed the indicative behaviours (which provided a level of guidance, albeit significantly reduced from that previously provided) and has deliberately adopted subjective (and vague) terms, comprehensive guidance and case studies will be vital. The quality of this guidance is also critical. There is little point in concentrating on simple, straightforward scenarios, as most solicitors will be able to work these out for themselves. The example scenarios provided as part of the consultation are too simplistic and could arguably best be dealt with by a FAQ section. The guidance and scenarios need to focus on the more complex /grey areas.

There is a particular need for detailed and comprehensive guidance in the area of conflicts, where it is disappointing that no examples of scenarios were supplied. So for example we need scenarios to set out when a firm can act for more than one party with particular emphasis on real estate matters. Scenarios should also cover the interaction between the conflict and confidentiality rules and the acceptable use of information barriers.

We need guidance on the use of undertakings given between solicitors working in regulated and unregulated entities.

Clear and unequivocal statements as to what information should be displayed about consumer protection and the level of detail that should be given and how it should be provided should also be provided.

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?

This question is difficult to answer without sight of the proposed guidance on the revised regulatory regime, which we understand will follow the conclusion of this consultation. Although a succinct approach to the Code is welcomed, it is essential that solicitors are guided as to what is expected from them, both in terms of compliance with the new provisions on a practical level and with regard to the SRA's proposed approach to enforcement.

Question 7

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

No, we do not consider that there are any specific provisions of the Code which ought to be removed.

Question 8

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

We refer to our response to question 4.

Amongst others, current Principle 5 (providing a proper standard of service to your client) is omitted from the new Code. Our view is that this Principle should be maintained because it is distinct from the obligation to act in the best interest of each client (new Principle 6) and emphasises the importance of solicitors providing a good and timely service to the public. We do not believe that there is a good reason for excluding this Principle from the new Code for solicitors.

Question 9

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

As this is often the most complex area to get right and goes to the heart of what it means to be a solicitor (in that it is the basis on which client trust and confidence is often built) we must ensure that there is true clarity in this area. The lack of example scenarios and guidance makes it difficult to assess how the SRA sees the two proposed options working in practice and therefore makes it difficult for us to make any substantive comments. For example, if a firm is instructed to act for a group of shareholders who will have an agreed desire to conclude the shareholders' agreement but may have slightly different interests in the detail, the lack of guidance makes it difficult to assess whether it would be permissible to act for all shareholders under Option 2. One could argue that as there are bound to be slightly different views amongst the shareholders, Option 2 would not allow you to act for all shareholders because the common interest exception is no longer available. However it could also be argued that as you will not necessarily know at the outset of a matter how different those views will be, potentially you are only recording the shareholders' requirements with just the possibility of a conflict on the horizon so you could proceed but then cease acting should things escalate to an actual conflict. Such uncertainty is not good for the profession or for clients.

Clear guidance is needed for conveyancing matters (akin to the current indicative behaviour 3.7 on acting for lender and borrower).

In the absence of any guidance, Option 1 is preferable. On the face of it, Option 2 appears to be too restrictive with the result being that solicitors will lose the ability to act in certain defined circumstances (ie common purpose/ substantial common interest) when in fact acting in such circumstances (with safeguards) may sometimes be of benefit to the client through cost and time savings because they do not have to instruct other solicitors. Such a change would be a retrograde step.

Whichever option is adopted, clarification is needed as to how the conflict rules between the two different codes will work.

Question 10

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

No – this answer is predicated by the cultural issues surrounding the Code. The Code is not an accessible document. It is not covered off in detail in training for new solicitors. There is a widespread education piece here which needs to be addressed across the profession.

In practice it tends to be referred to as a point of reference once the need to consult it has been identified. Therefore whilst the attempt to shorten the Code is laudable this does result in a general non-specific form of words being used which absent any specifics or examples by way of indicative behaviours is unlikely to provide clear guidance to those consulting it.

A good example of this is the vagueness surrounding identifying a client's identity and lack of examples demonstrating indicative behaviours around acting in the best interests of the client.

A particular concern is also the removal of references and requirements to comply with the law and specific legislation. In the absence of any provision of indicative behaviours, the identification of specific legislation as the source of the requirement elaborated in the Code would at least steer the writer to the primary legislation as a source of advice.

The SRA's attention is drawn to the example of the Financial Conduct Authority's Handbook particularly the format of the online edition where it is easy to drill down into the requirements, examples are given by way of definitions in the glossary which are cross referenced to further sources of information and significant guidance as to the interpretation of specific rules is given in the Perimeter Guidance PERG section.

Question 11

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

No

Question 12

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

As set out in Question 10 above, the lack of particularity in the wording does suggest the need for guidance in the form of specific examples or indicative behaviours to be included which are presently missing. This should be reconsidered.

Clear guidance on conflicts is needed.

This question cannot be answered properly until the proposed associated guidance has been published by the SRA. Without guidance the revised Code will create more uncertainty than exists at present. Without seeing the proposed guidance, Solicitors cannot know whether it will properly address such uncertainty.

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?

As indicated above, it requires guidance to help provide clarity. We have also indicated above where we support the Law Society's proposed alternative drafting.

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.

We are supportive of retaining both roles for recognised bodies. We consider that they represent an effective transmission mechanism for bringing regulatory compliance into the mainstream management of larger entities in a form that is consistent with the varying regulatory risks and requirements found across the different types of legal practice carried on within those entities. No members of the group making this response are involved in recognised sole practices, but as a matter of principle we have always considered the concept of a COLP or COFA in a sole practice a somewhat artificial construct and arguably it would be better if additional duties were put directly on solicitors who choose to operate as sole practitioners in their role as Principal.

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?

The COLP and COFA are exposed to considerable personal risk, through the need to make judgements in real time that may with the benefit of hindsight appear wrong. In our view the removal of Indicative Behaviours will tend to increase that risk. Originally, for larger entities, this risk was mitigated by access to a Regulatory (originally Relationship) Manager who, whilst not offering "safe harbour" was nevertheless a valuable sounding board in areas of uncertainty. The reduction in scope of Regulatory Management means that very few firms now have that option. The Ethics guidance available from the SRA is not at a sufficiently high level to meet this need and is sometimes questionable. In our view for entities paying over a threshold for annual entity based fees and Practising Certificates combined (the level to be determined) access should be available to a small group of senior regulators able to offer meaningful guidance on sensitive and/or complex issues.

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?

We regard this proposal as sound in its original conception, but flawed as to the detail. As a logical extension of the abolition of the Separate Business Rule, freeing solicitors to provide non-reserved legal services and services other than legal services through alternative structures would make a valuable contribution to competition and public choice. Unfortunately those advantages are in our view outweighed by the proposed lack of regulatory equality between solicitors in regulated and non-regulated entities. In particular, the proposals in relation to both conflicts and requirements for professional indemnity insurance appear to offer an unacceptable competitive advantage to the non-regulated body. Moreover we consider that the relaxation in each of these areas represents a significant threat to the protection enjoyed by the public. There is a substantial threat to the Solicitor brand since the public are unlikely to be able or willing to distinguish between a loss suffered, through conflict or the lack of insurance, caused by a Solicitor in an unregulated entity as opposed to one in a regulated entity.

We do not support this proposal in its current form.

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?

Whilst individuals within the firms represented in this response may wish to work outside a regulated entity, it is not possible for Bristol Risk Managers' Group to speak for the intentions of either them, or the individual firms represented. In general terms, though, we can say that since each firm carries out a mix of reserved and unreserved work, it would be necessary to set up a separate entity to take advantage of the looser regulatory environment and clearly one issue would be the difficulty of establishing governance between the parent firm and the new entity, together with the risks of brand contamination. It is beyond the scope of this response to consider how such issues and risks might be weighed against the opportunities by each firm.

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?

This seems to be a sensible approach. The risk with allowing a sole solicitor to provide reserved legal activities via a non-authorised body dilutes the profession's standards and potentially puts clients as risk (in terms of standards of service, regulation of that provider and professional indemnity insurance requirements.)

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?

Allowing newly qualified solicitors set up their own practice seems to present a significant risk to the profession. Surely this presents a risk that whilst "qualified" the individual would lack the relevant experience to enable them to consider and understand all the risks that operating your own practice presents. The requirement to be supervised for 36 months before being deemed qualified to supervise seems appropriate. Whether this is too long or not long enough is up for debate but it seems appropriate that there would be some period of time where a newly qualified person should be supervised by an experienced individual. The risk to the profession here is that a proper standard of service is not provided which impacts the reputation of the solicitor brand.

Question 20

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

Yes. We think it is important that clients know the protections that SRA regulated firms require and provide its consumers and also what protection an unregulated firm does not offer. This should allow consumers to make an informed choice in relation to protection and support when choosing a legal service provider and the risks associated with choosing a non SRA regulated provider.

Question 21

Do you agree with the analysis in our initial Impact Assessment?

We endorse the comments made in the Law Society's response to this question. We do not agree that the changes proposed will make legal services more accessible. There appears to be no evidence to support the assertion that the changes "should boost growth". Regardless of the content of the consumer support strategy, we believe that the proposed changes will confuse consumers, expose them to unnecessary risks through their lack of understanding of whether their solicitor can conduct reserved or unreserved activities for them and thereby damage trust and confidence in the profession.

Question 22

Do you have any additional information to support our initial Impact Assessment?

No

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?

While the justification put forward for this proposal in the consultation paper appears logical, it does expose the ongoing risks of allowing regulatory inequality, the creation of uneven playing field for those within the legal market and the potential for confusion amongst consumers. Surely passing the responsibility to individual solicitors to safeguard client assets within an unregulated business, within which they may have little control, confidence in or knowledge of the management systems, will make it far less attractive for solicitors to want to work for alternative legal service providers and therefore will encourage solicitors to remain working within regulated practices?

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?

The priority must be to protect client money, especially given that many Special Bodies will be working with particularly vulnerable people. On that basis we agree with the proposal for those working in Special Bodies.

We cannot comment on the application of this rule to in house solicitors.

It is well established that criminals are targeting solicitors and their clients with a view to diverting client funds into fraudulent accounts. It might help the profession to be able to access a (controlled) list of firms with client accounts to be able to verify the details against any fraudulent details which may have been provided.

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?

If not, what are your reasons?

No we do not agree that the SRA Compensation Fund should not be available to clients of solicitors working in alternative legal service providers. We are concerned that:

1) It will reduce consumer protection

Consumers who suffer loss as a result of fraud, negligence or the inadequate insurance of a solicitor in an alternative legal services provider will not have access to the SRA Compensation Fund in relation to this loss and so may well be without financial recourse. We are extremely concerned that these proposals will have a fundamental reduction in consumer protections.

2) There will be lack of clarity to the consumer

We are not confident that the consumer will fully understand the relevant distinctions of levels of protection offered and that by seeking advice from a solicitor working in an alternative legal service provider they will not be eligible to make a claim on the Compensation Fund.

We understand that under the proposed changes it will be the responsibility of the solicitor to advise clients of the regulatory protections they are entitled to and to explain to them, if necessary, that they are not eligible to make a claim on the Compensation Fund. We are concerned about how and when this information will be communicated to the consumers and the lack of clarity around this.

3) The "non savvy" consumer will be most adversely impacted by the changes

We understand that the proposed changes are driven by a perceived cost benefit to the consumer. We understand that the suggestion is that solicitors working in alternative legal service providers will be able to offer consumers a more competitive price as they do not have to make payments into the Compensation Fund. However, whilst we accept there will be some sophisticated consumers who are willing to be exposed to some risk to trade off certain protections (such as access to the Compensation Fund) in exchange for lower prices, we think those looking for cheaper alternatives are more likely to be the less commercially driven consumers who may well not even be aware they are running the risk.

4) It will damage the existing Compensation Fund

The proposals also risk undermining or depleting the existing Compensation Fund as solicitors working in unregulated entities would not have to contribute to the Fund. This would seem likely to mean that solicitors working in regulated entities would have to make additional contributions to secure the Fund’s viability, increasing the regulatory burden on them and exacerbating the two tier profession that could result

from the proposals.

Question 26

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

No we do not agree with the proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor. We think that there should be a mandatory obligation for the solicitor to have sufficient individual professional indemnity insurance in place (whether that is arranged and provided by them or their employer).

Question 27

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

Yes. The difficulties we envisage with the proposed approach are:

1) Consumer confusion

We are concerned about the risk of consumer confusion. We think the different protections attached to the services provided by solicitors dependent on whether it is through regulated providers or alternative legal providers creates scope for confusion. We think there is a potential risk that consumers will believe that in gaining advice from a solicitor through an alternative legal services provider they are still subject to the same protections as if that solicitor worked in a regulated provider (eg the SRA compensation fund protection and professional indemnity insurance cover).

2) Lack of clarity

We think that some consumers may not understand that, in seeking the services of a solicitor through an alternative legal service provider, they are potentially foregoing some of the protections that currently exist (including access to the Compensation Fund and regulated indemnity insurance requirements).

Even for those people working within the legal sector, professional indemnity insurance and client protections are complicated topics which are not easily understood and so clients cannot be expected to fully comprehend the nuances and implications of purchasing their legal services through an unregulated legal provider.

3) It will create a favourable competitive advantage to unregulated entities

We are concerned that those smaller firms which are currently struggling to get PII might see becoming an alternative service provider a more attractive option. However this decision would be driven by commercial pragmatism rather than the clients' best interests. Similarly the proposals will make regulated entities less attractive to consumers because they will be competitively disadvantaged versus unregulated entities.

4) Detriment to the profession

We are also extremely concerned that the proposed changes will tarnish the legal profession as a whole and will damage the title of solicitor.

We think there is an expectation from the consumer that the legal advice they receive is covered by some form of professional indemnity insurance. If solicitors are allowed to work without mandatory insurance cover we think it will lead to a decrease in confidence in the legal profession and a "slippery slope" towards a deregulated legal market.

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?

Yes. Professional indemnity insurance is in place to ensure that consumers can access a financial remedy so this protection should be available to all consumers regardless of how they access reserved legal activities.

Question 29

Do you have any views on what PII requirements should apply to Special Bodies?

The level of consumer protection should be consistent with that provided by regulated firms. We suggest that it replicate the current "reasonably equivalent level of cover" contained in the Practice Framework Rules for solicitors employed by Special Bodies.

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?

We agree it is not desirable to impose thresholds on non-SRA regulated firms, which are mainly or wholly owned by SRA authorised solicitors. We should state, however, that the imposition of thresholds does not get around the fundamental concerns we have about the SRA's proposal to permit solicitors to deliver non-reserved legal services to the public via unregulated firms. These concerns are primarily about the likely reduction in consumer protection and reputation of solicitors operating within such entities. If this were permitted, the imposition of a threshold is likely to cause confusion among consumers and may lead to uninformed decision-making on their part about the most appropriate firm to provide the service they are seeking.

Question 31

Do you have any alternative proposals to regulating entities of this type?

No. We believe only one system of regulation should apply equally to all providers of legal services, whether individual or entities, to ensure fair, consistent consumer protection in a framework which is clear and easily comprehensible to the consumer. To have a two-tier system will not achieve that and runs the high risk of duality of standards between regulated and unregulated firms, as well as confusion to the consumer. We are concerned that such a system may ultimately reduce public confidence in the legal profession, a principle the SRA must not allow to be compromised.

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?

The SRA's proposals do not clearly state what its position is on intervention in a solicitor's individual practice within an unregulated entity. The SRA has the power to do this. However, it is likely to prove to be a more complex and difficult process to untangle the practice of the solicitor and the unregulated entity, without the right to intervene in the unregulated practice. We are unclear how the SRA's additional powers to request information could help it in investigations where intervention was not an option, for the reasons described above. We consider that the same issues would arise as to the information owned by the unregulated entity (and as such presumably outside the jurisdiction of the SRA) and that owned by the solicitor.

We see this potential difficulty as another very important reason for retaining a regulatory framework applicable to all legal services providers. If the SRA is limited as to the action it is empowered to take against an unregulated entity, this may result in an outcome whereby standards are compromised and consumer protection is reduced, notwithstanding the regulatory obligations on the solicitor operating within that entity. The regulatory disconnect between the solicitor and the unregulated entity employer may lead to this outcome as a result of the entity's ability to shift total regulatory responsibility to the solicitor. We believe this will create a significant tension between the commercial objectives of the entity and the regulatory obligations of the solicitor. Where this exists, the solicitor's economic dependence on the employer makes this undesirable outcome more likely.

Question 33

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

Yes. We agree.

Thank you for completing the **Consultation questionnaire form**.

Please save a copy of the completed form.

Please return it, along with your completed **About you form**, as an email attachment to consultation@sra.org.uk, by **21 September 2016**.

Alternatively, print the completed form and submit it by post, along with a printed copy of your **About you form**, to

Solicitors Regulation Authority
Regulation and Education - Policy - Handbook 2017
The Cube
199 Wharfside Street
Birmingham
B1 1RN

Cambridge & District Law Society

Consultation: Looking to the future - flexibility and public protection

Consultation questionnaire form

This form is designed to be completed electronically—in MS Word. Please save it locally before and after completing it.

Question 1

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

No

Question 2

Do you agree with our proposed model for a revised set of Principles?

Yes

Question 3

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

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?

No

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?

Conflicts and conduct, both with clients and third parties. It would help to have an analysis of the queries received by the Ethics helpline.

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?

Yes, but possibly too brief which may lead to more uncertainty.

Two examples are:-

1) contract races are not explicitly covered and

2) it is not clear whether it would be acceptable to contact a represented party directly.

Question 7

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

No

Question 8

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

Yes, all solicitors should carry PII if they are practising (regulated or non-regulated activities) and whether as part of a regulated or non-regulated entity. All clients should have access to the compensation fund and the benefit of LPP

Question 9

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

We cannot understand why 6.2 (b) is proposed. We feel that it should be removed.

Question 10

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

Yes, subject to previous observations

Question 11

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

No

Question 12

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

No

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?

No, subject to previous observations.

Question 14

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

Question 14a

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

14)
Yes

14a)

We believe the roles do assist in as much as the compliance officers are seen to have authority possibly not perceived hitherto.

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?

Feedback and further/ongoing training. We have no idea of the relevance of these posts in practice, nor the benefits they bring to consumers or others. What anecdotal evidence or statistics are available?

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?

We are very concerned as to the loss of client protection:

1. Professional Indemnity Insurance cover
2. Access to the compensation fund
3. LPP

We do not accept that clients will understand the difference between the ‘two tiers’ of solicitors.

We do not believe this will make solicitors cheaper although there is a significant risk of diluting the brand.

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?

No

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?

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?

This must be maintained, especially with reference to a minimum level of experience (currently 3 years). The emerging data analysis which suggests new qualifieds 'do not present a significant risk to delivery of a proper standard' is flawed: the reason they do not present a significant risk is that they are closely supervised, this supervision is what you are now proposing to remove.

What is the problem with the current system? Again, the proposed changes appear to risk diluting the brand through negligence claims against new qualified unsupervised solicitors.

Question 20

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

It is more the solicitors not within the regulated firms that are cause for concern. The reality is that the level of information we provide at engagement is already overwhelming, further information will only be lost in this mix.

Where would this information be displayed?

Question 21

Do you agree with the analysis in our initial Impact Assessment?

No, particularly as you appear only to consider ‘consumers’ to be private clients (i.e. able to complain to the legal ombudsman etc).

Question 22

Do you have any additional information to support our initial Impact Assessment?

What about commercial and institutional clients?

Why do you believe private clients who you note ‘do not always understand the range of consumer protections that apply’ will suddenly be able to do so?

Why do you think there will be a ‘commercial incentive’ to obtain professional indemnity insurance given its cost and difficulty of obtaining?

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?

Yes

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?

We believe that such solicitors should not be permitted to hold client money personally.

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?

If not, what are your reasons?

No. If all clients have access to the SRA compensation fund then all solicitors should be required to contribute to it.

Question 26

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

No

Question 27

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

As Robert Bourns comment in the law gazette (25 July 2016) 'Engage with a solicitor's firm and you can rely on a number of certainties. The advice you are given – and the things you say – will be confidential. The person who is giving you the advice is well-trained and well-regulated. On the rare occasion the advice turns out to be wrong you have recourse – through the Legal Ombudsman (LeO) and the compensation fund solicitors pay into. You can also rely on the fact that your solicitor has insurance and, if they are junior, 'properly supervised.' However, with the current proposals none of the above will be 'certain'.

Your proposal will create a two tier system and reduce client protection, probably to the most vulnerable clients. Those most least likely to understand the distinctions of the two tier solicitors.

You risk solicitors working in 'friction' with non-regulated entities (see your annex 9, page 201, scenario 2).

Your proposals erode legal professional privilege, undermine PII and risk poor supervision.

In conclusion, the overall effect will be to dilute the brand 'solicitor' and risk lowering the public's view of the profession.

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?

Yes, all solicitors should have PII.

Question 29

Do you have any views on what PII requirements should apply to Special Bodies?

Same as for regulated firms i.e. minimum requirements etc.

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?

No

Question 31

Do you have any alternative proposals to regulating entities of this type?

We are at risk of creating gaps in client protection and diluting our brand, by having this two tier entity system.

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?

No

Question 33

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

Yes

Thank you for completing the **Consultation questionnaire form**.

Please save a copy of the completed form.

Please return it, along with your completed **About you form**, as an email attachment to consultation@sra.org.uk, by **21 September 2016**.

Alternatively, print the completed form and submit it by post, along with a printed copy of your **About you form**, to

Solicitors Regulation Authority
Regulation and Education - Policy - Handbook 2017
The Cube
199 Wharfside Street
Birmingham
B1 1RN

Consultation: Looking to the future - flexibility and public protection

Response ID:662 Data

2. Your identity

Surname

Jackson

Forename(s)

Paul

We may publish a list of respondents and a report on responses. Partial attributed responses may be published. Please advise us if you do not wish us to attribute your response or for your name or the name of your firm or organisation to appear on any published list of respondents.

Attribute my/our response and publish my/our name.

Please identify the capacity in which you are submitting a response. I am submitting a response…

on behalf of my firm.
Please enter your firm's name:: Cambridge legal Practice Ltd

3.

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

What test? The question is unclear.

4.

2. Do you agree with our proposed model for a revised set of Principles?

No. I think it is ill conceived and risks damaging the profession and the reputation of the profession.

Apart form that this looks like the SRA trying to justify its own existence. There have been far too many changes to professional conduct rules and regulatory principles so that most practitioners are sick and tired of having new rules every few years. Do you do it to sell books? Changes lead to both practitioners and the public being confused and should be avoided unless absolutely necessary.

If clear and reasonable principles already exist thanks to the SRA why are we now having the SRA propose changes? It is not that legal needs have changed requiring new rules. It's that someone is looking for an excuse to waste more time and money changing what presumably already works. If it doesn't we probably need a new body to replace the SRA who botched the work in the first place.

5.

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

No.

Change is not required and imposing it will create confusion among practitioners and the public.

Consumer protection will not be assisted by removing the principles requiring a proper standard of service, acting in the best interests of each client and protecting client money and assets. Why did the SRA approve those principles in the first place if they were't to be maintained by all solicitors?

6.

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?

Keep the current principles and require all solicitors to apply them. It's nonsense to change what are fair and broad principles that should be followed.

7.

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?

The question assumes that there will be Codes. Is this a consultation or mere window dressing. If the latter, it seems a waste of time responding to these questions.

I do not believe that there should be anything other than a unified code. We already have that. We don't need case studies. We certainly don't need more than one code.

8.

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?

Yes. That is the SRA Code of Conduct 2011. If you want to create confusion and a mickey mouse legal profession then you will persist in the brainless ideas that you are currently proposing.

Two codes will completely confuse the public. Most people have difficulty recognising the differences between solicitors and barristers for the purposes of regulation. If you then have two sets of rules for solicitors imagine the confusion.

9.

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

These questions as as clear as your proposals. They're opaque. Are you talking about the existing Code? That's fine and does not need to be changed.

10.

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

A principle of entrenchment to stop the SRA changing it every other year. The lack of a regulator's confidence in its own product is serious cause for concern.

The language of the draft codes is imprecise. Brief codes create a danger of oversimplification and uncertainty.

11.

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

Option 1 is similar to the existing rule. We don't need to change the 2011 Code.

Option 2 creates a risk to the public by further confusion over when a professional can act while leaving some entities unregulated giving a real risk to the public.

12.

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

You have failed. Leave things as they are and don't try to be clever.

One point I want to make is that I believe the proposed changes will damage the reputation and standing of solicitors. Some will be regulated while others won't. Those who are unregulated may do enormous damage to the reputation of the profession to the harm o those who have professional stands still imposed on them. The system should be unified and easily understood by all - both solicitors and the public.

Simplicity is always better.

13.

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

The SRA. Leave the Code alone and keep the SRA out of it.

14.

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

No. Retain the 2011 Code.

15.

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?

Retain the 2011 Code.

16.

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.

Yes. If it's not broken, don't fix it.

17.

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

I think you should send up to date copies of the Law Society's COLP and COFA Toolkits to every COLP and COFA with annual updates.

18.

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?

I think it is a sign of the disintegration of the legal profession and a watering down of the quality of service to the public. It's an opportunity for some to make money. The threat is to society. The existence of alternative service providers as outlets for legal services works for those who can't cut it working for a competent law firm. It based on Thatcherite principles of turning everything into a low grade shop. The equivalent is TV. We had several good TV channels that did the job. Now we have hundreds that cater for the lowest standards in society in satisfaction of consumer demand. I am confident that the SRA can do the same for legal services.

19.

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

I am not interested.

20.

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?

It doesn't sound like something that has been sufficiently investigated. Leave well alone until you have done your research.

21.

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?

There is no requirement for change.

22.

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

No. They already do have to provide a great deal of information that protects the public.

23.

21. Do you agree with the analysis in our initial Impact Assessment?

No. I think you need to do some practical research.

24.

22. Do you have any additional information to support our initial Impact Assessment?

No. I don't support your initial Impact Assessment.

25.

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?

I don't agree with your approach generally. In this instance i agree.

26.

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?

I don't think they should hold client money at all.

27.

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? If not, what are your reasons?

Yes. I don't think the proper profession which excludes alternative legal service providers should shoulder responsibility for incompetence of these newcomers.

28.

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

No.

29.

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

Your approach is self-serving (change for the sake of it) and will lead to a reduction in standards for the profession and increased risk to the public.

30.

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?

No comment.

31.

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

No comment.

32.

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?

I think you should either completely deregulate and abolish the SRA or have one regulator for all and one code of conduct for all. Stop messing around.

It seems that you want to create complexity from which no-one other the the SRA benefits. If you mess the system up enough and create complex rules you will have sufficient work to keep your clerical minds busy.

33.

31. Do you have any alternative proposals to regulating entities of this type?

Leave the system as it is.

34.

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?

No.

35.

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

We need one unified regulator. However, it is becoming doubtful that the SRA is fit for purpose.

Cardiff & District Law Society

"Looking to the future" : Response to Consultation questions

INTRODUCTION

The Incorporated Law Society for Cardiff and District trades under the name Cardiff and District Law Society (CDLS). CDLS is the largest local law society in Wales. It has a membership of over 1,000 people including solicitors, barristers, legal executives and academic lawyers.

CDLS appoints a number of specialist committees, including a Regulatory Issues Sub-committee.

Through these committees CDLS responds to a number of public consultations on matters which affect the professional lives of solicitors in the Cardiff and District area. CDLS welcomes the opportunity to respond to the SRA's ***Looking to the Future*** Consultation.

OPENING COMMENTS

We disagree with many of the proposals set out in the SRA's "***Looking to the future***" consultation.

We do not believe that the SRA has made a convincing case for change, particularly with the evidence that there is "*unmet legal need*". This is more than the response of a profession arguing for the *status quo* in that we have significant concerns that the proposals would:

1. leave clients and consumers with less protection; and

2. produce a two tier profession with more client confusion.

We are also concerned that solicitors will be subject to the new Code of Conduct and yet the organisations for whom they work may not be subject to the Code - this is likely to cause confusion for solicitors and may also lead to vulnerable solicitors, especially young solicitors, coming under intolerable pressure from their non-regulated employers.

In our view, the proposals have serious adverse implications for :

(1) client protection

(2) legal professional privilege

(3) professional supervision

(4) competition and

(5) the standing/reputation of the solicitors' profession.

There are also areas of ambiguity which will need to be clarified.

MAIN CONCERNS :

1. Two tier market : solicitors who work in a regulated entity will be subject to different rules and client protection to those working in a non-regulated entity.

2. Advice provided by a solicitor within a non-regulated entity will not be subject to legal privilege : this could undermine the standing of the profession and will create confusion.

3. Solicitors working for a non-regulated entity may not be required (or able) to obtain professional indemnity insurance and clients may not have the protection of the Compensation Fund or Legal Ombudsman if matters go wrong.

4. Newly qualified solicitors may not have access to appropriate or meaningful supervision within a non-regulated business, nor will they be able to discuss regulatory issues with a COLP/COFA. This will place newly qualified solicitors at risk as well as their clients. This could also adversely affect the reputation of the profession.

5. Unregulated entities will not be subject to SRA rules relating to conflicts and confidentiality whereas the individual solicitor will be, which will create confusion. This also leaves regulated firms at a potential disadvantage. Further it removes protection for clients in unregulated entities which are considered important for regulated firms.

6. Whereas the overall proposals will undoubtedly shorten the 'rule book', solicitors prefer clarity as to what is and what is not acceptable. There is a danger that the SRA may disagree with the solicitor's interpretation of the rule where the provision is ambiguous.

7. By simplifying the Solicitors Accounts Rules as proposed there will be a greater risk of uncertainty as to whether a firm is compliant.

SUMMARY :

Whilst the SRA's purpose is to simplify the Handbook, there are many ambiguities which will create confusion, misunderstanding and/or misinterpretation. Client protection with unregulated entities will be significantly reduced (eg PI insurance, Compensation Fund access, LeO complaint handling). Clients could have different protections for the same work depending on who they instruct and many clients are unlikely to understand this, especially if unregulated entities are under no obligation to provide this information.

We are concerned that this may not be in the interests of the clients, the public or the profession.

SRA SUITABILITY TEST

Question 1

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

Since the requirement was abolished for trainee solicitors to have enrolled as student members, the first time a trainee's suitability is tested is at their application for admission. We believe that this creates uncertainty after a firm has expended money and resources in recruiting and training a

candidate. We would prefer to have students admitted as members and satisfy the test before they commence their period of recognised training.

SRA PRINCIPLES 2017

Question 2

Do you agree with our proposed model for a revised set of Principles?

CDLS does not agree with the proposed model for the revised set of Principles in particular the decision to reduce the ten mandatory principles to 6. We note that the loss of current principle 5 (provide a proper service to your clients) and current principle 10 (protect client money and assets) may cause some concern that the levels of service to clients and the protection of clients is diminished (something which is echoed throughout the consultation).

The proposed new Codes are much shorter than the current Code and with the removal of Indicative Behaviours the importance of the Principles becomes that much greater in ensuring that all solicitors adhere to consistent standards of ethical behaviour and integrity

Question 3

Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?We share the Law Society's concern that the wording of the new Principle 2 does not refer to the importance of regulated individuals' behaviour in a way that retains public trust in them as individuals.

We agree that this should be clarified and support the Law Society's proposal that the new Principle be redrafted as follows: "**New Principle 2**: ***Ensure that your conduct upholds public confidence in you and in other regulated individuals and firms".***

We also have a general concern relating to the removal of some of the other existing Principles resulting in over-reliance on the general duty to act in each client's best interests.

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?

CDLS are concerned that the removal of the overarching principle to protect client money and assets (current principle 10), to act in the best interests of the client (current principle 4) and to provide a proper standard of service (current principle 5) are to be replaced by the suggested widely-encompassing "to act in the best interests of your client" (proposed principle 6). We are concerned that the protections for the client and levels of service may be diminished especially as there are further reductions in protections for clients throughout the consultation.

CDLS also believes that the duty to keep clients' affairs confidential is of such fundamental importance that it merits the Principle being retained rather than falling back on the more general duty to act in the best interests of each client.

SUPPORTING MATERIAL – GUIDANCE AND TOOLKITS

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?

In the corporate sector, thought should be given to the requirement to comply with anti-money laundering legislation in the light of the changes to LPP. Corporate work is in the regulated sector for the purpose of the Proceeds of Crime Act and the Money Laundering Regulations but is not reserved legal services. That means that solicitors and COLPs working for non-regulated entities (and their clients) may not have the benefit of LPP. One of CDLS' members encountered a scenario in practice where a shareholder client consulted the firm for advice regarding a fraud on the company that he had uncovered that had been committed by one of the directors. The shareholder was advised to report the matter to the police but preferred to deal with it internally to avoid negative publicity and the likely adverse impact it would have on the company. The solicitor who acted reported the matter to the COLP who was also the nominated officer who took the view that the information was privileged and therefore the nominated officer had a defence to failing to make a suspicious activity report. An entity that is not regulated by the SRA would still be operating in the regulated sector, would still be required to have a nominated officer and would still have to comply with the Proceeds of Crime Act and the Money Laundering Regulations. In the scenario described above, if that had happened in a non-regulated entity after the new Codes come into effect the nominated officer would not have the ability to rely on the information being privileged as a defence to failing to make a suspicious activity report.

CODE FOR SOLICITORS

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?

Whilst CDLS does understand the reasoning behind the proposal to create two codes, CDLS is concerned that the language of the draft Codes is imprecise and we would welcome clarity on the obligations of the firm versus the individual.

Whilst we agree that that the Code has been shortened, we are concerned that the removal of "Outcomes" and Indicative behaviours will lead to a scenario where solicitors will find themselves unsure of their regulatory responsibilities. We are concerned that whilst the approach leads to a Code which is easier to read and digest, we are aware that many solicitors would rather have a definitive approach where compliance is clearer. We are concerned that the likely "grey areas" will lead to greater disputes between solicitors and the Regulator (increasing the costs of regulation). We are also concerned that there is the possibility where solicitors who are fully compliant now, may potentially be in breach after a new code is introduced as it would give the Regulator the unpredictable power to determine whether something is a breach.

In addition, CDLS is concerned that the proposals will result in two tiers of solicitors i.e. those working in a regulated entity and those working in an unregulated entity with the consequence of risks to consumer protections and which will create confusion and consequent damage to the reputation and standing of the profession.

Question 7

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

There is some overlap between the two draft Codes and not all the provisions are consistent between the two, especially in areas such as conflict, complaints and client information/identification. There is also a lack of clarity on the application of the rules on LPP to unregulated entities. If this isn't addressed, it is not clear which would take precedence when such inconsistencies arise.

Question 8

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

CDLS note that at paragraph 8.9 of the proposed code for individual solicitors, a solicitor is required to provide details to clients about the protections available to them, we wonder whether it should be incumbent upon those providing advice outside of a recognised body to state what protections are not available to the client (in particular the lack of access to the SRA Compensation Fund and lack of requirement for PII cover).

It is difficult to address some of the questions in this consultation without seeing the associated guidance notes which the SRA has not yet provided.

Question 9

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

It is noted that unregulated organisations will not be subject to the SRA rules of conflict, although individual solicitors will. We are concerned that this would mean that unregulated entities could act in circumstances where regulated entities cannot. Whilst this obviously creates a significant disadvantage for regulated firms, we are also concerned that there is a risk of confusion to consumers and a lack of fundamental consumer protection for the clients of unregulated entities. CDLS believes that the current rules on conflict are there for a reason and the dilution of these rules would significantly reduce client protection.

We believe that clarity is essential in the handling of all conflicts, but particularly in conveyancing transactions. The consultation sets out two options – the second option (of a complete ban) is in our view unworkable, as it is overly restrictive. So we focus on option one which, in the main, largely replicates the 2011 Code, in prohibiting a solicitor from acting where there is a conflict or significant risk of conflict. However, in addition to dropping indicative behaviour, it makes a number of changes that weaken the existing rules. We feel that these safeguards should be reinstated and that more precise drafting is required.

CODE FOR FIRMS

Question 10

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

We believe that the comments in response to Question 6 above apply equally here.

Question 11

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

Please see our response to Question 7 which apply equally here.

Question 12

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

We are aware that our members are concerned with the ongoing and real problem of "touting" for clients. We are concerned that there remains nothing in the Code which makes any reference to this being prohibited (indeed the publicity section of the current Code does not appear to have been repeated). We are aware that some of our members would welcome a more robust approach being taken in respect of this ongoing problem.

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?

We are generally concerned that the language of the Codes is imprecise and the removal of Outcomes and Indicative Behaviours will lead to greater uncertainty amongst solicitors in how the Codes should be interpreted.

We have concern about some specific clauses notably, the potential for conflict between the two Codes where they overlap in areas such as conflict, complaints, client information/identification and LPP.

We also agree with the specific points raised by the Law Society with regard to the drafting of the clauses set out within their response to this question.

COLP & COFA ROLES

Question 14

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

We agree that the roles for COLP and COFA should be retained for recognised bodies although we question their value to sole practitioners. We also note that there will be no requirement for non-regulated entities to have COLPs and COFAs. We are concerned that the individual solicitor who works within a non-regulated entity will not have the advice and assistance from a COLP nor will they have the same level of responsibility for keeping records in respect of compliance with the regulatory framework. Although we accept that they would only be responsible for their own

compliance under the terms of the code for individuals, the primary burden for compliance will fall on the individual and not the firm. We believe this risks vulnerable lawyers being pressurised into putting the interests of the firm ahead of the client and other breaches of the Principles.

We agree with the Law Society's recommendation that the SRA conducts and acts on a survey of individual COLPS and COFAs.

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

The COLP in particular has a very important role in providing advice and guidance to solicitors and other individuals who are employed by recognised bodies. Much of that advice is given informally at the specific time that it is required which an SRA helpline is not always able to do. In passing, one of CDLS' members who is a COLP commented that, although the Indicative Behaviours are non-mandatory, they are very useful in giving weight to advice that the COLP gives as the COLP is able to say that it is in the Handbook. The removal of the Indicative Behaviours is likely to make the COLP's job that much harder in having to interpret the rules and anticipate how the SRA may respond to a subsequent complaint.

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?

There will be a significantly increased need for written guidance on the application of the Codes and the SRA's interpretation of the Codes given the likely "grey" areas.

The SRA's guidance at the moment is provided via a telephone helpline which can often provide quite limited advice. In cases where written advice is requested, the SRA need to respond much quicker in the future as their timelines are of little help in practice when a COLP has to provide an answer quickly. The SRA's own website states that their "desired response" to emails and letters for Professional Ethics is 95% response within 10 working days and that they are "working toward" responding within 10 working days. This far too slow and will be exacerbated if the new Codes are adopted as the logical consequence of removing so much of the detail is an increase in the number of enquiries for advice.

WHERE SOLICITORS CAN PRACTISE

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?

We are deeply concerned about the proposals to allow solicitors to deliver non-reserved work through alternative legal providers. We are particularly concerned with the following aspects:

- The creation of a two tier market where there are those solicitors who work within a regulated entity and those who do not. It is of concern that there will be different rules for these different solicitors as well as different client protections available depending where

the individual solicitor practices. We are concerned that the average consumer (e.g. clients) will not understand the differences between the different types of solicitor/legal adviser and this will lead to lesser protection for the public in general and significantly diminish the trust the public places in the profession in the longer term;

- Legal Professional Privilege – we are concerned that the advice given by solicitors in unregulated entities would not be covered by LPP. This would certainly be detrimental to the trust the public places in the profession. We are concerned that the average consumer would not understand when their instructions are privileged and where they are not;

- Professional Indemnity Insurance/Compensation Fund – we are concerned that solicitors working in unregulated entities would not be required to have professional indemnity insurance and clients would not have access to either the Compensation Fund or Legal Ombudsman in the event that things go wrong. This would obviously reduce the protections available to clients of unregulated entities and will cause a great deal of confusion amongst the general consumer who will be unaware of the level of protection that they have (or more likely do not have). The proposals also risk undermining or depleting the existing Compensation Fund as solicitors working from unregulated entities would not have to contribute to the Fund; this would seem likely to mean that solicitors working in regulated entities would have to make additional contributions to secure the Fund's viability, increasing the regulatory burden on them and exacerbating the two tier profession that could result from the proposals.;

- Supervision – the changes to the supervision requirement mean that newly qualified solicitors with no experience would be able to set up their own unregulated firms. The assistance newly qualified solicitors obtain under existing requirements is essential for both the individual solicitors as well as the future of the profession as a whole and we are concerned that young solicitors may be vulnerable to pressure from unregulated bodies where the burden of compliance and risk falls on the individual solicitor and not the firm

- Conflicts/Confidentiality – We are concerned that unregulated organisations will not be subject to SRA rules of conflict and confidentiality although solicitors who work for them will. This may lead to situations where unregulated entities can act where a regulated entity would not be able to as they would have to comply with the rules of conflict/confidentiality. We are concerned that this would leave regulated firms at a commercial disadvantage and removes significant protections for consumers/clients.

- Quality – Solicitors currently are required to meet the academic and vocational stages of training before being admitted as a solicitor. In the vast majority of cases that means a degree and the GDL if not a qualifying law degree plus the LPC followed by a two year period of recognised training. Individuals who work for unregulated organisations will not face the same requirements and may not meet the same high standards with the inevitable decline in the quality of advice given to clients. That decline in quality will lead to higher claims but with fewer protections for the clients when things do go wrong and we believe this will ultimately damage the reputation and standing of the solicitors' profession.

- Annual practising certificate (PC) fees - There is no information on this point and the SRA needs to undertake and publish an analysis of the projected impact of its proposals on the PC fee, and in particular the turnover based firm fee. The SRA should not close this consultation until this information is available.

As a general comment, we believe there is insufficient evidence to support these proposals or the expected benefits from their implementation, which are stated to include improved access to quality services at affordable prices, enhanced professional standards, and increased employment opportunities.

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?

Whilst we as a Society would not be involved in taking advantage of the greater flexibility, we are aware that our members (either in business or individually) would have to consider setting up alternative business structures to carry out non-reserved legal work in order to compete with businesses which are likely to enter the market (out of necessity to compete rather than choice). Unfortunately, the two-tier system which will be imposed would mean that a regulated entity would not be able to compete financially with a non-regulated entity. We echo our previous comments in respect of the two tier proposals and the likely detriment to consumers which will flow from the proposals.

We also believe that the two-tier system will give rise to added uncertainty and confusion for clients. Although it is likely that the large commercial and specialist firms will hive off their unreserved legal work into separate businesses, in practice it is likely to be much more complicated. Many corporate transactions include real property transfers which can only be carried out by a regulated body. Clients are likely to be very confused and unhappy at receiving two engagement letters for what seems to them to be the same transaction, with different requirements and protections for each.

SOLE SOLICITOR

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)?

We acknowledge that it is right to maintain the position reserved legal services for the public can only be conducted by an entity authorised by the SRA (or another approved regulator).

REQUIREMENT TO BE QUALIFIED TO SUPERVISE

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?

We believe that the current rule in place is necessary to address an identified risk and should remain. Whilst we agree that newly qualified solicitors do not present a significant risk to the delivery of a proper standard of service, we would suggest that this is due to the amount of supervision and training they are currently given. A removal of the "*qualified to supervise*" requirement could significantly reduce the supervision newly qualified solicitors are given and could lead to a significant risk to the delivery of a proper standard of service.

This will increase the risks to clients as well as putting vulnerable newly qualified solicitors themselves at risk of claims and under pressure to breach the Code, and negatively impact on the standing of the solicitor profession. Damage to standards will increase incrementally as this applies year on year as fewer solicitors in unregulated entities will have ever received supervision.

In any event, we do not believe that the current requirement to undertake at least 12 hours of management training provides any real qualification for running a business.

CONSUMER PROTECTION

Question 20

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

We are not sure that the requirement for SRA regulated firms to display detailed information about the protections available to consumers is necessary. Details of the protections available to consumers are contained within client retainer documents and the client is made aware on numerous occasions of the protections available to them (indeed it would be our view that most are aware of the protections they have in any event). We are more concerned that solicitors who provide services via non-regulated bodies should be required to display detailed information about the protections which are not afforded to them by virtue of the advice being given outside of a regulated firm.

IMPACT ASSESSMENT

Question 21

There is insufficient evidence in the Consultation document to make a judgement on this.

We agree that consumers need additional information but remain more concerned that solicitors who provide legal services via unregulated bodies will not be required to provide the same level of information.

Do you agree with the analysis in our initial Impact Assessment?

Question 22

Do you have any additional information to support our initial Impact Assessment?

CLIENT MONEY

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?

We are concerned that as there is no prohibition on non-regulated entities holding client money, we are concerned that this will erode a significant protection available to clients. At least where individual solicitors are holding client money, a trust exists and client money is better protected. We are concerned that clients will not understand the difference between placing money with a regulated firm and a non-regulated entity to their significant detriment. We are also concerned that the ability of a solicitor to work within a non-regulated entity and not have to comply with stringent rules regarding the holding of client monies would put regulated firms at a significant disadvantage.

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?

We are concerned as to the impact of allowing in-house solicitors to provide legal advice to those other than their employer.

We are particularly concerned (1) that there will be no legal professional privilege in these circumstances and (2) that many of the issues described in detail within this response relating to solicitors working in unregulated entities also apply to in-house solicitors and Special Bodies providing legal advice.

We would also point out that Special Bodies have an important role in providing legal services to vulnerable people. Any disparity in safeguards offered by Special Bodies will create an inconsistency in the level of consumer protection offered to vulnerable clients which should be avoided. We do not believe that solicitors working for Special Bodies should be permitted to hold client money personally.

In line with the fact that in-house solicitors and ALSPs will be permitted to only offer non reserved legal services to the public, we agree that solicitors working therein should not be permitted to hold client money in their own name.

SRA COMPENSATION FUNDS

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?

If not, what are your reasons?

Whilst we agree that the SRA Compensation Fund should not necessarily be available to clients of solicitors working in alternative legal service providers, we are concerned that clients will not be aware that the protection offered by the fund is not available until after the event (thus reducing the protections for consumers). We are also concerned with the proposals that solicitors working in alternative legal service providers may not be required to contribute to the fund. In the event (as is

likely) that significant proportions of non-reserved work is conducted by alternative legal services providers (especially where regulated firms are forced to create separate businesses to provide non-reserved work competitively), there is a real risk that the fund would either be diminished to such a level where it was not fit for purpose or where regulated firms would face an increased financial burden in contributing the fund to sustain it (thereby further reducing their ability to compete in the "new" legal marketplace).

PII COVER

Question 26

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

We are strongly opposed to this as we are concerned that this will reduce the level of protection available for clients. We are also concerned that it could lead to a situation where individual solicitors are personally exposed for claims in negligence where their non-regulated employer does not obtain appropriate indemnity insurance.

Question 27

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

Please see the reply to Question 27 above.

PII COVER – SPECIAL BODIES

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?

Yes.

Question 29

Do you have any views on what PII requirements should apply to Special Bodies?

We believe that clients of Special Bodies should be entitled to PII protection in the same way as clients of traditional law firms to ensure consistency in the consumer protection offered to clients

Under the current Rules, solicitors employed by Special Bodies must have a 'reasonably equivalent' level of cover to that required by the SRA Indemnity Insurance Rules we believe that this safeguard should remain in place.

ENTITY REGULATION

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?

We do not agree with the suggestions within the consultation document that a significant number of firms would not be looking to leave SRA regulation. We would suggest that many firms would have to consider hiving off their non-reserved work into a separate non-regulated body simply to be able to compete in a new marketplace. However, we agree that non-SRA regulated firms which are mainly or wholly owned by SRA authorised solicitors should not have thresholds imposed upon them as it would be unfair to place them at a disadvantage to their competitors.

Question 31

Do you have any alternative proposals to regulating entities of this type?

No.

INTERVENTION – UNREGULATED FIRMS

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?

We believe that the position is unsatisfactory as it is not clear from the consultation document whether the SRA will have the power to intervene if, for example, a matter is being worked on by both a regulated solicitor and an unregulated individual.**SRA REGULATED ACTIVITY WITHIN A RECOGNISED BODY OR RSP**

Question 33

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

We would ordinarily agree that all work of a recognised body or RSP should remain regulated by the SRA. However, we are concerned with the two tier system being proposed and the ability of a regulated entity to compete in such a marketplace. It would seem entirely unreasonable for non-reserved work of a recognised body or RSP to continue to be regulated by the SRA where work conducted by a practising solicitor in exactly the same manner (at almost certainly a significantly reduced cost) in an alternative legal practice is not.

Consultation: Looking to the future - flexibility and public protection

Response ID:349 Data

2. Your identity

Surname

MAUNDER

Forename(s)

CAROL

We may publish a list of respondents and a report on responses. Partial attributed responses may be published. Please advise us if you do not wish us to attribute your response or for your name or the name of your firm or organisation to appear on any published list of respondents.

Attribute my/our response and publish my/our name.

Please identify the capacity in which you are submitting a response. I am submitting a response…

on my own behalf as a solicitor in private practice

3.

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

4.

2. Do you agree with our proposed model for a revised set of Principles?

no

5.

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

no, how can it if the principles 'provide a proper standard of service to your clients', 'act in best interests' and 'protect client money and assets' are removed.

6.

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?

important to maintain client confidentiality

7.

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?

8.

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?

the approach creates 2 tiers of solicitors - regulated and unreg which is damaging to the standing of solicitors and confusing for consumers.

9.

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

10.

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

11.

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

there is a risk of confusion to consumers, a competitive advantage to unreg entities and lack of protection for clients of unreg entities.

12.

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

13.

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

14.

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

15.

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?

16.

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.

I am not the COLP or COFA, question is best answered by them.

17.

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

18.

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?

damaging to the standing of solicitors, legal professional priviledge should apply equally to all solicitors, confusion and competitive disadvantage, lack of supervision.

19.

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

20.

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?

21.

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?

22.

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

consumers would be unlikely to read it, they will assume a solicitor is regulated.

23.

21. Do you agree with the analysis in our initial Impact Assessment?

24.

22. Do you have any additional information to support our initial Impact Assessment?

25.

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?

26.

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?

I'm not in-house, question needs to be answered by in-house sols.

27.

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? If not, what are your reasons?

28.

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

29.

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

30.

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?

31.

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

32.

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?

33.

31. Do you have any alternative proposals to regulating entities of this type?

34.

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?

35.

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

Consultation: Looking to the future - flexibility and public protection

Response ID:649 Data

2. Your identity

Surname

Rodman

Forename(s)

Maria

We may publish a list of respondents and a report on responses. Partial attributed responses may be published. Please advise us if you do not wish us to attribute your response or for your name or the name of your firm or organisation to appear on any published list of respondents.

Attribute my/our response and publish my/our name.

Please identify the capacity in which you are submitting a response. I am submitting a response…

on behalf of my firm.
Please enter your firm's name:: Carpenters

3.

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

We accept that there should be a very high standard applied to those who wish to be authorised and regulated. The issue we have encountered is with the time it takes for an application to be processed.

4.

2. Do you agree with our proposed model for a revised set of Principles?

Some surprise at the removal of the principle "to provide a proper standard of service to your clients". In the current legal (and professional services generally) world where the client (or customer) is king and with all of the available choice and information at their fingertips, why this principle would be relegated to the second tier, as it were.

Despite the growth and focus on regulation and compliance over the last 10 years or so and with the introduction of new COLP/COFA regime, we can understand the removal of the second principle if the aim is to enable solicitors to undertake non-regulated work. It might have been sensible to retain the governance and risk management principle as it applies to both.

5.

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

Yes. The issue with principles is whilst everyone may understand the message, particular individuals and/or circumstances may cloud judgment.

6.

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?

"Act in the best interest and provide a proper standard of service to each of your clients regardless of any external or internal influences."

7.

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?

I believe that outcome-focused and risk-based regulation was a welcome change to the rigid rules-based regime, however, in some areas I believe that case studies would assist especially for smaller firms or those who have not invested resources into their regulatory and compliance frameworks. Allowing solicitors to set up a practice without being authorised (doing non-reserved work) but being able to call yourself a solicitor will be very confusing for consumers and this is where very clear guidance/scenarios would add value.

8.

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?

Yes. I also believe that this will put the onus on solicitors to take responsibility for their own actions and be aware of their obligations rather than leaving this to the firm (or assuming all responsibility is with the firm).

9.

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

No.

10.

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

As the Code for individual solicitors is a fundamental change this is where some specific guidance and support would be useful)

11.

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

Unsure as to why any change is being made to the status quo as the obligations are straightforward.

12.

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

Yes. The amalgamation of various sets of rules in relation to authorisation and being authorised is a welcome step.

13.

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

14.

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

Whilst there may be some protections elsewhere in codes or statutory provisions (such as communications) we would have assumed that the SRA would have retained certain behavioural obligations such as not to cold call) So much media has been focused on bad practice in such areas and impact on confidence of consumers.

15.

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?

Whilst believe that the Code as it stands is too long, believe that this could have been reduced whilst retaining many of the most important aspects for consumer protection and trust - confidentiality, understanding who is regulated and eradicating behaviour that brings profession into disrepute (and coming down very hard on those who are obviously trying to flout the regulations / law)

16.

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.

The introduction of this regime did have the impact of concentrating the mind on those firms who may not have paid sufficient attention to regulation and compliance previously. Any solicitor who is willing to accept the responsibilities that come with the role of COLP is going to be sure that they have sufficient resources and support to carry out the role. The downside may be that the COLP role may be considered too wide especially in larger firms where the seniority of the role may mean they are not sufficient involved in middle management where issues may arise and/or the risk management work required to underpin. A less senior (and/or qualified compliance) role may be a useful one to consider.
In smaller firms where senior people may be more involved in day to day as well as high level management, whilst resources may be less abundant, easier to be aware of the issues.

17.

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

There is substantial guidance and support available to those who require it. A whole industry has grown up around risk and compliance seminars, webinars and publications as well as software to assist with the administration and management. A secondary recognised post may be worth considering.

18.

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?

The legal profession may not be held in such high regard as it once was, however, generally the public does assume a certain level of knowledge, professionalism and integrity with "solicitors" or "lawyers" and those who believe this is important will try to maintain this trust. These solicitors will now be subject to the individual Code. Can already be done as non-practising. The unregulated market can be seen as more open to bad practice and even fraudulent activity therefore solicitors may be unfairly tarnished especially as in that market where need to maintain competitiveness - currently consumers know what they are getting and may pay more for the expertise / protections - but equally in the comparison age, many expect the best service for a low price

19.

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

This would be something to consider as part of our strategy.

20.

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?

Yes agree that this should be maintained especially as the Code envisaged will be split - need the protection of both. A sole solicitor requires the full scrutiny of the regulated body if required.

21.

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?

Yes it is necessary. There are substantial benefits to having robust management standards throughout the firm as they improve efficiency, quality of service and minimise risks to the business - targeted as to the level of complexity of the work. It is right that this can be a mixture as both qualified and unqualified staff who can demonstrate competence to provide effective supervision, whilst managers retain overall responsibility. The onus is on the firm to be able to demonstrate this with a range of tools such as training, monitoring, audit and performance management systems and firms who apply resources in these areas

generally have a well run firm. Regulators should scrutinise firms who obviously don't have good management practices as it is they who are most likely to affect clients and offer a poor view of the industry

22.

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

Although consumers are much more savvy in this day and age with the amount of information at their fingertips, consumer websites / comparison sites (and - not sure how - consideration being given to adding legal services to this facility?) and the Ombudsman service, there should be no reason why this should not be the case. This is a clear and transparent way to inform consumers - and in terms of enforcement, a straightforward indication of any intent to mislead on the part of unscrupulous firms.

23.

21. Do you agree with the analysis in our initial Impact Assessment?

24.

22. Do you have any additional information to support our initial Impact Assessment?

25.

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?

Yes.

26.

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?

No.

27.

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? If not, what are your reasons?

Yes, if they don't hold client monies should not need to pay into this - claims normally come from identifying breaches/misuse of client monies but unlikely as sars don't apply.

28.

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

Yes, they need to be clear as to the protections available to clients and ensure they have sufficient cover (as they would in other areas), firms would take responsibility for their employees to be covered to minimise any liabilities. This will provide clarity.

29.

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

30.

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?

31.

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

32.

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?

33.

31. Do you have any alternative proposals to regulating entities of this type?

34.

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?

35.

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

CHILD POVERTY ACTION GROUP

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Solicitors Regulation Authority
Regulation and Education - Policy - Handbook 2017
The Cube
199 Wharfside Street
Birmingham
B1 1RN

By email - consultation@sra.org.uk

21/09/16

Dear Sir/Madam

SRA – Looking to the Future

I am writing in response to the consultation 'Looking to the Future' and in particular issues regarding Special Bodies given that I am the solicitor for the Child Poverty Action Group.

Background

Child Poverty Action Group is a registered charity with offices both in London and in Glasgow. CPAG is a recognised expert in the field of welfare benefits law and child poverty. Its work includes research and policy, campaigning, benefits advice, training and publications, as well as legal work on high profile test cases. It has a staff of almost fifty, including one solicitor and one trainee solicitor.

Response to consultation

Special Bodies paragraphs 94-98 of the consultation document

While there is no specific question in relation to this section of the consultation document, I wish to reiterate the views that I expressed at a meeting with Chris Handford on 14 September 2016, namely that the current regime works for CPAG whereby individual solicitors working in Special Bodies are regulated by the SRA but the organisation as a whole is not. Given that CPAG only has one solicitor providing reserved legal services in an organisation that also carries out extensive policy and research, campaigning, media, training and publication work, it would appear disproportionate for the organisation as a whole to be subject to SRA regulation. As a charity we are already subject to the requirements of the Charity Commission; individually I am regulated by the SRA; and much of our legal work is legally aided requiring compliance with regulations of the Legal Aid Agency. In these circumstances it is difficult to see what additional benefit organisation wide regulation by the SRA would bring either to CPAG or to individual clients.

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CPAG would therefore either wish for the current position of no regulation to be maintained or, if changes are to be made, that regulation by the SRA of Special Bodies is on an entirely voluntary, opt-in basis. CPAG would have considerable concerns regarding any form of mandatory regulation by the SRA of Special Bodies.

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?

CPAG has no particular views on this but would welcome a flexible approach whereby solicitors in Special Bodies are permitted to hold client money personally where this works best for the organisation.

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?

CPAG considers that this requirement should be maintained and has not experienced any particular difficulties in obtaining PII for these purposes.

Yours faithfully

Carla Clarke
Solicitor

Chris Southey

Dear Sir,

I have read with interest the above consultation document. As I understand it, the proposals upon which the Solicitors Regulation Authority is seeking views would have the effect, amongst other consequences, of limiting legal professional privilege for employed solicitors to communications between their employers and themselves.

I think you will know that there is an increasing trend for a variety of services to be provided from a single source to more than one public body, this move towards collaboration being openly supported and encouraged-to the extent of enabling legislation- by the government.

In this particular locality, the constabularies of Durham, Cleveland and North Yorkshire are adopting the collaborative provision of legal services, with the appointment of a director to oversee this process to be made next week; similar structures are already well-established in other areas of the country.

This being so, the restriction of LPP to the extent envisaged by the consultation document would seem at best to amount to an unnecessary restriction upon the candid provision of legal advice, and at worst to constitute an absolute barrier upon the ability of diverse public services to seek such advice from the same group of in-house practitioners.

I hope that these comments prove of assistance to you, and that on reflection the SRA will prove inclined to maintain the benefit of its Rule 4 waiver for police solicitors.

Chris Southey

Solicitor

Durham Constabulary

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UNIVERSITY OF OXFORD

Solicitors Regulatory Authority

16 September 2016

Response to Consultation
"Looking to the future: Flexibility and public protection"

I have been undertaking an extensive review of approaches to regulation, compliance and enforcement by different regulators across the UK, and of the various theories and practices that are in general use. This research clearly shows that there is a general direction of travel amongst regulators in diverse sectors in the UK towards more principles-based regulation, involving fewer rules, and encouraging greater reliance on self-regulating behaviour.

I see the broad thrust of the SRA's proposals on reform of the codes as being very strongly in accordance with this general approach, and as conforming to both government policy and best practice in regulation. Accordingly, I strongly approve of the SRA's proposals in terms of both general policy and almost all of the detail.

The broad policy can be seen from the general development of the Better Regulation movement over a decade or more, in the Regulators' Code, and in the recent statement by the Committee on Standards in Public Life's Report *Striking the Balance* (where there is an explicit reference to Regulators actively engaging with those they regulate and taking a leadership role by encouraging positive attitudes towards compliance.[1] Recent examples of the similar approach can be seen in Ofwat's whole approach to behaviour over the past 3 years,[2] Ofgem's recent consultation on adoption of slimmed-down principles-based Standards of Conduct,[3] and the Food Standards Agency's 'Food We Can Trust' initiative involving just five general principles.[4]

The substantiation for the general change is recorded at length in my book CJS Hodges, *Law and Corporate Behaviour: Combining Theories of Regulation, Enforcement, Compliance, Culture and Ethics* (Hart Publishing, 2015).

That work, and discussions with the Department for Business and others, led me to propose a general approach based on traders generating a body of evidence that they can be trusted, in response to which regulators (and also staff, customers, suppliers and investors) would respond with a more cooperative and supportive relationship (not only in responding to problems, through 'enforcement', or rather, in most cases, support for future compliance and improvement, but also on an ongoing relationship,

[1] *Striking the Balance. Upholding the Seven Principles of Public Life in Regulation* (Committee on Standards in Public Life, 2016), https://www.gov.uk/government/publications/striking-the-balance-upholding-the-7-principles-in-regulation, see especially pages 62, 69-70.
[2] recently *Consultation on Ofwat's approach to enforcement* (OFWAT, March 2016).
[3] *Standards of Conduct. Treating Customers Fairly. Findings from the 2014 Challenge Panel* (Ofgem, March 2015)
[4] *Food We Can Trust: Regulating the Future* (FSA, 2016).

such as under the Primary Authority scheme). The approach has been called 'Ethical Business Regulation'. Short summaries of the ideas and evidence were subsequently commissioned by the Department for Business[5] and the Committee on Standards in Public Life.[6] A further general summary of the approach has just been published, that includes some examples of where it has been taken forward in various different sectoral regulatory regimes.[7]

I anticipate that UK Government will issue a major policy paper on Future Regulation towards the end of this year that will adopt this general direction of travel. The approach is also supported in UNCTAD's recent draft *Manual on Consumer Protection* (chapter 6).[8]

In summary, therefore, it is apparent that the approach to codes that the SRA is proposing is consistent with what I understand to be UK Government policy, best practice amongst diverse regulatory UK regimes generally, and consistent with leading academic thinking on regulation and maximising ensuring compliance whist reducing regulatory burden on both regulatees and regulators. I support the proposals to increase flexibility and reduce rules, such as allowing solicitors who are bound by an ethical code to be enabled to practice more widely and flexibly in future evolving markets.

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[5] C Hodges, *Ethical Business Regulation: Understanding the Evidence* ( ), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/497539/16-113-ethical-business-regulation.pdf
[6] At https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/550542/Prof_Christopher_Hodges_-_Ethics_for_regulators.pdf
[7] C Hodges, *Policy Brief: Ethical Business Regulation: Growing Empirical Evidence* (Foundation for Law Society and Justice, 2016), http://www.fljs.org/content/ethical-business-regulation.
[8] http://unctad.org/en/PublicationsLibrary/webditcclp2016d1.pdf

Response to the SRA Consultation: LOOKING TO THE FUTURE: FLEXIBILITY & PUBLIC PROTECTION

A response by
The Chartered Institute of Legal Executives

September 2016

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Introduction

1. The Chartered Institute of Legal Executives (CILEx) is the professional association and governing body for Chartered Legal Executive lawyers, other legal practitioners and paralegals. CILEx represents around 20,000 members, which includes approximately 7,500 fully qualified Chartered Legal Executive lawyers.

2. CILEx continually engages in the process of policy and law reform. At the heart of its engagement is the public interest, as well as that of the profession. Given the unique role played by Chartered Legal Executives, CILEx considers itself uniquely placed to inform policy and law reform relating to justice issues.

3. As it contributes to policy and law reform, CILEx endeavours to ensure relevant regard is given to equality, social mobility and human rights, and the need to ensure justice is accessible to those who seek it.

Overall Response

4. This latest SRA consultation is part of an ongoing historical and planned review and amendment of its regulatory arrangements, based on its new model of regulation as set out in its November 2015 Policy Statement[1]. It seeks to provide focus through the replacement of the single code of conduct by 2 separate simplified codes (one for individuals and one for firms) and it also explicitly references other contextual developments in the sector including the Competition & Markets Authority (CMA) Legal Services Market Study and the existing and future reforms of the regulatory framework and legal services market. The other major element of the proposals consulted on is therefore that which seeks to permit solicitors to compete with 'providers in the alternative legal services market' by allowing solicitors to deliver non-reserved legal services to the public from entities not regulated by the SRA for the first time.

5. The SRA consultation refers to the issue of unmet legal need from the outset, both in the consultation paper and in its Initial Regulatory Impact Assessment. Regulation clearly has a part to play in relation to the health and effectiveness of the market but it is not a panacea. Interestingly, it should be borne in mind that the CMA legal services market study looked at the effectiveness of the market in relation to these elements too and significantly its interim report has concluded that the state of the market and its functioning does not justify a full-scale market investigation. In the context of that study, others have commented on the difficulty of defining what is meant by unmet legal need and of drawing conclusions from the behaviours of those seeking to resolve particular issues, ie seeking legal advice is a choice that may or may not be appropriate to an issue and the choice can therefore be to resolve it by other means. Whilst costs and availability are major factors, there are also many other sometimes complex factors at play.

6. There are no doubt access to justice issues that need to be addressed but regulation can only make a contribution to such complex problems rather than fix them completely. Reduced legal aid, increased court fees are examples of such issues that cannot be cured by regulatory change alone, for example. Therefore,

[1] 26 November 2015 - http://www.sra.org.uk/sra/policy/regulation-reform.page

the SRA should be realistic about the contribution that unregulated providers can make to solving access to justice problems and therefore the effect of permitting solicitors to practise from the unregulated sector. The CMA report rightly speaks of information provision to consumers as a key factor in them accessing the right services and arguably the need to enable them to make the right decisions about the optimum manner to resolve their issues. This includes understanding the differences between levels and types of that provision; this is critical and care will have to be taken not to simply blur the lines between services and providers that makes this harder. If anything, greater definition and clarity around specialism and specific services is required.

7. CILEx supports proportionate, right touch regulation that makes compliance easier, is outcomes focused, costs less and does not stifle innovation. However, those changes should not threaten or undermine consumer protection and they should be clearly understandable to consumers. Therefore, whilst there is some logic in the SRA assertion that the fact that unregulated providers could employ solicitors to deliver unreserved legal services, it may not be immediately apparent to consumers what the tangible value and benefits of that arrangement is (should a firm in that scenario choose to tell consumers). 'Drawing confidence from their professional status' may be one thing, but consumer confidence in using such a firm in such a way does not necessarily deliver real or demonstrable value to the consumer.

8. Similarly, there are real benefits to be derived from simpler, clearer regulation. CILEx supports the concept of targeted regulation based on the specialism of the lawyer and the nature of the services being delivered. Such changes, though, have to demonstrate that they are genuinely better than the previous regime. Not only that, but the changes should not threaten current rights and protections either.

9. Arguably, the SRA's proposals unfortunately do just that in relation to Legal Professional Privilege (LPP)[2]. The proposals suggest that clients will not have the

[2] Paras 149 - 154

benefit of LPP in relation to advice received from a solicitor working from an unregulated entity as that advice, though from a solicitor, would be deemed to come from his or her unregulated employer. Such an arrangement, whilst apparently having some benefit for consumers in terms of access and cost, does however have the potential to cause confusion and risk. Consumers can have confidence that LPP attaches to advice given to them by lawyers[3] but the SRA reforms risk erosion of this assurance by creating a tier of solicitor lawyers to whom it does not apply.

10. And this is just one aspect of where, potentially, the proposals risk creating parallel systems and roles for solicitors: consumers attracted to seeking services from solicitors in the unregulated sector not only may not have the benefit of LPP but also may find that the solicitor does not carry the usual level of professional indemnity insurance (PII) cover[4] (though they will be expected to make this clear to clients[5]) nor will it be as straight forward for the SRA to intervene if things go wrong[6], notwithstanding intervention is still possible in relation to a solicitor's individual practice.

11. This therefore represents a material difference in the professional status of some, but not all, solicitors. Unlike other lawyers, such as Chartered Legal Executives, who have operated under more targeted or outcomes-focused regulatory models, consumers may be confused by the imposition of new and variable standards for an already established brand such as solicitors. For consumers of services provided by Chartered Legal Executives, the public can be assured that they are trained in a particular specialism and are limited to practise in those areas; an important aspect of consumer protection. Whereas solicitors are trained and able to practise as generalists, and so changes to their regulatory standards that in effect remove certain consumer protections could pose increased risks. The confidence a consumer can have in a solicitor's professional status in an

[3] To be clear the Supreme Court case *R (on the application of Prudential plc) v Special Commissioner of Income Tax* [2013] UKSC 1; [2013] 2 AC 185 (23 January 2013) cited at para 149 of the SRA consultation paper clarified that a qualified lawyer to whom LPP applied meant a solicitor or barrister or chartered legal executive

[4] Paras 138 – 141; this includes access to the Compensation Fund

[5] Para 115

[6] Para 161

unregulated entity is not therefore going to be the same as one in a regulated structure. This will extend to other professional obligations too; the solicitor as an individual will remain bound by them but the unregulated entity will not and will therefore be able to circumvent them. As well as creating confusion for consumers, this may give unregulated firms employing a solicitor a competitive advantage at the expense of consumer protections. And yet, the best interests of the consumer would be served by ensuring consumers ‘get what they pay for’ ie clarity and certainty around the different roles and obligations of the various providers in the market.

12. Finally, there may be a risk that even greater deregulation occurs through these proposed changes: if enough of an incentive is truly created for unregulated providers, it is conceivable that regulated firms will seek to offload all their unreserved legal activities to unregulated vehicles. It is not clear what the impact of any such rush would be either on firms themselves or on the consumers but it is possible that some of the confusion and risk transfer cited above would be exacerbated.

Specific questions/answers

13. Building on the Overall Response to the issues and themes raised by the SRA's consultation above, CILEx addresses a number of the specific questions contained within it, below.

Question 1: Have you encountered any particular issues in respect of the practical application of the Suitability Test?

14. There are a number of dual qualified solicitors and Chartered Legal Executives who we would recommend should be directly consulted on any changes proposed following this review.

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

15. As stated above, CILEx believes that there are real benefits to be derived from simpler, clearer regulation. However, if it is to truly mean better regulation, simpler rules need to be properly understood in order to be complied with. For example to 'uphold the rule of law and the proper administration of justice' goes to the heart of what it means to be a lawyer and explanation of what compliance with that principle really looks like may be needed. CILEx's Code of Conduct, for example, provides definitions and explanations of what is expected of members. The content of 'support package'[7] of guidance and toolkits will therefore be crucial.

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

16. CILEx agrees that the drafting of this principle looks sound but, again, 'the devil will be in the detail'. Understanding how to comply with the Principles will be key and to that extent, it will be easier to judge that once the SRA's proposed revised Enforcement Strategy is seen.

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?

[7] Para 52

17. The need for appropriate detail to aid compliance is critical. Therefore, a set of expectations or case study scenarios in relation to each of the revised principles is likely to be required. When the SRA previously changed its 'separate business rule'[8], much clarity was needed for practitioners to understand what was actually possible for them to do in practice; the same will be true here in relation to permitting solicitors to practise from unregulated entities. There have also been many calls for greater clarity on what compliance looks like in relation to acting with 'independence'[9] and case studies around that will be essential following the introduction of a shorter Code.

Question 6/10: Have we achieved our aim of developing a short, focused Code for all solicitors, wherever they work which is clear and easy to understand?
Question 7/11: In your view is there anything specific in the Code for all solicitors that does not need to be there?
Question 8/12: Do you think that there anything specific missing from the Code for all solicitors that we should consider adding?
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?

18. As stated above, the revised Codes for individual solicitors and firms are certainly shorter and more focused but it remains to be seen if they, and the accompanying 'support package' of guidance and toolkits are sufficient to make compliance clear to understand. For some more risk-averse firms who are not used to operating under a regulatory regime with fewer prescriptive rules, there is a risk that they will fall back on the certainties of operating under the 'old regime' rather than risk censure in the future from the SRA for an incorrect interpretation. It is possible therefore, subject to seeing the other related amended materials, that more should be added to the Codes.

[8] November 2015
[9] For example following publication of the SRA's report 'Independence, Representation and Risk' [Dr Stephen Vaughan and Claire Coe, 2015

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?

19. As stated in our overall response above, that whilst it is possible that this new permitted arrangement enables another avenue to access the services of solicitors there are risks associated with it. Unlike other lawyers, such as Chartered Legal Executives, who have operated under more targeted or outcomes-focused regulatory models, consumers may be confused by the imposition of new and variable standards for an already established brand such as solicitors. For consumers of services provided by Chartered Legal Executives, the public can be assured that they are trained in a particular specialism and are limited to practise in those areas; an important aspect of consumer protection. Whereas solicitors are trained and able to practise as generalists, and so changes to their regulatory standards that in effect remove certain consumer protections could pose increased risks. The confidence that consumers draw from their 'professional status' could be illusory if it is not clear that the solicitor in the unregulated entity does not have the same level of PII cover, does not have LPP attached to the advice he or she gives and is not as capable of being intervened against in the event of problems as a solicitor in a regulated firm. Any potential 'quality control and brand enhancement'[10] would not be real. In addition, it is possible that firms will embark on greater deregulation by hiving off their unreserved legal services to an unregulated body if they feel unregulated providers have a commercial competitive advantage over them, which could be at the expense of consumer protections. The confidence in solicitors' professional status in those circumstances could be dissipated yet further. There is also the risk that the solicitor's role will actually be that of Practice Manager who will then delegate the work to unqualified staff. This will lead to increased personal risk to the solicitor with little protection in the event of fraud or negligence by third parties.

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?

[10] Para 85

20. CILEx Believes that the SRA's current 'qualified to supervise' requirement is fit for the purpose of addressing an identified risk.

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

21. CILEx believes that it is important for there to be as much transparency and clarity as possible around the client protections available to consumers. This is arguably even more the case here in the context of the other suggested reforms where there is the capacity for a lack of clarity of the status of the solicitor and associated protections he or she carries to be exacerbated. However, as the SRA rightly acknowledges, it has no power over unregulated entities so there is an immediate challenge to requiring the provision of details information about client protections on a solicitor operating from an unregulated firm.

Question 21: Do you agree with the analysis in our initial Impact Assessment?
Question 22: Do you have any additional information to support our initial Impact Assessment?

22. As stated above, the Initial Regulatory Impact Assessment references the issue of unmet legal need, and whilst regulation clearly has a part to play in relation to the health and effectiveness of the market, it is not a panacea. Also, there is little in the assessment that seeks to gauge the effect, particularly on smaller firms, of stripping out of most prescription within the Code. The potential risk to consumers around the acknowledged reduction of consumer protections is similarly not tackled in detail.

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?

23. CILEx agrees that client protection is best served by not permitting solicitors working in alternative legal services providers to hold client money. This would be an example where the proposed Third Party Managed Account (TPMA) could be a successful alternative, as proposed in the SRA's Accounts Rules Review.

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?

24. CILEx believes that in-house solicitors or those working in Special Bodies should not be permitted to hold client money personally. The level of risk for a solicitor in that position would be high, perhaps especially in relation to fraud or negligence perpetrated by others within the organisation. This in turn risks greater exposure for clients and the clients of such bodies tend to be disproportionately poorer and more vulnerable.

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? If not, what are your reasons?

25. CILEx agrees that clients of solicitors outside of authorised firms will not be able to make a claim on the Compensation Fund in any circumstances. This ensures the integrity of the client protections that are part of the framework for regulated entities as distinct from unregulated over which the SRA have no control. That said, this is another aspect to what we refer to above[11], namely there is the potential for confusion amongst consumers as to the level of protection they receive from a solicitor as a regulated individual; they would certainly be exposed to more potential risk. The level of the potential detriment is not covered in the Initial Regulatory Impact Assessment..

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

26. CILEx sees real risk in removing the regulatory requirements on individual solicitors to hold PII cover. Whilst the need/extent to ensure employees are adequately indemnified is a firm's decision in the scenario in which a solicitor is practising from an Alternative Legal Services Provider, consumers will still assume that the solicitor will hold the usual level of cover. The proposal has the potential to create consumer confusion, reduce levels of protection and heighten risk.

[11] Para 10

Looking to the Future - flexibility and public protection

Response by Citizens Advice to SRA consultation

September 2016

citizens advice

About the CAB service

The Citizens Advice service provides free, independent, confidential and impartial advice to everyone about their rights and responsibilities. It values diversity, promotes equality and challenges discrimination.

The service aims:

- to provide the advice people need for the problems they face
- to improve the policies and practices that affect people's lives

There are over 300 member local Citizens Advice services in England and Wales giving advice from about 2,500 locations including high street offices, libraries, courts, prisons, GP's surgeries and hospitals. All local Citizens Advice and Citizens Advice are registered charities. Of the 28,500 people who work for the service, over 22,000 of them are volunteers and nearly 6,500 are paid staff.

Citizens Advice is the membership body for local Citizens Advice services in England and Wales. We provide vital support and training for the local Citizens Advice network, including regular audits to ensure that they provide a high quality advice service to the public.

In 2014/5 the Citizens Advice service helped 2.5 million people with 6.2 million issues:

- 1.9 million people were helped with 5.6 million issues by our local Citizens Advice network
- 0.6 million people received advice via our consumer service

The top five issues were:

- Benefits and tax credits 1.8 million issues
- Debt 1.6 million issues
- Consumer 0.9 million issues
- Housing 0.45 million issues
- Employment 0.38 million issues.

A further 20.7 million people were assisted via our website. 47 million pages were viewed including:

- Consumer 12.6 million page visits
- Benefits and tax credits 8.5 million page visits
- Employment 7.2 million page visits
- Debt 4.7 million page visits
- Relationships and family 4.6 million page visits.

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

We have not experienced specific problems with the application of the test to date, however considering the possibility of bringing Special Bodies into the scope of regulation we would like to have further discussions with SRA about how the test would operate in practice.

We have specific concerns about how 'manager' would be defined in reference to trustee boards and the impact this could have on the costs of regulation. There is a risk that a disproportionate approach could damage Special Bodies' ability to recruit and retain a diverse Trustee Board.

Trustee Boards are already subject to Charity Commission oversight. The SRA should consider the extent to which regulation should be extended based on rigorous risk analysis. Further regulation should only be required where there is a demonstrable risk which needs to be addressed.

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

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

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?

We think that the SRA should consider re-instating current Principle 5 'provide a proper standard of service to your clients' to the new Principles.

Being offered good quality, effective advice is central to the expectations of clients and we think that it should remain a key focus of regulation.

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?

Case Studies covering the following areas would be helpful:

- How boundaries of regulation are applied in Special Bodies. Special Bodies will often provide a variety of services to their clients and it will be important to distinguish which properly fall within regulation and which areas should not.

- How jurisdictions for multiple regulators can be managed to avoid multiple, potentially conflicting regulatory regimes applying simultaneously and how regulation can be maintained at an appropriate level based on clear assessment of risk.

- How compliance with robust membership schemes and quality marks can be used to demonstrate compliance with the Code.

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?

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

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

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

A short focused code could be an important step in ensuring that regulation is clearly understood by those who are regulated and also for their clients, however it is important that brevity isn't at the expense of clarity.

Further effective guidance will be essential to ensure that solicitors and organisations employing solicitors can take a consistent approach to the application of the code and that they can clearly understand what is expected of them.

Balancing this, the SRA will need to be mindful of the potential for creeping complexity as more guidance is published. Maintaining a coherent body of easily accessible and searchable documentation which solicitors can rely on will be important, particularly in the early days as the code beds in. Without this there is both a risk of over and under compliance.

We can see potential for differences of opinion regarding interpretation of the code, for example where the code requires regulated people to act 'reasonably'. Focus needs to remain on client interests and protection rather than technical issues which drive up the cost of compliance without improving services to consumers.

We think that the exclusion of an explicit requirement on unsolicited approaches to clients is a real concern. Our experience of problems in the claims management industry suggests that there is potential for considerable client detriment to develop where cold calling is allowed. It is possible that the abuse of this marketing route could be dealt with under alternative sections of the code, however clarity on this would be welcome.

Our views on the issue of cold calling in claims management can be read here. Beyond the potential damage to client interests, a proliferation in cold calling could have a detrimental impact on the reputation of solicitors and the legal sector as a whole.

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

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

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

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?

Any extension of regulation for Special Bodies needs to based on a clear evidence base of the risks posed to clients. It should also take into consideration the very real risk of inadvertently reducing the provision of free legal advice, including provision of legal aid services.

If Special Bodies do become subject to firm based regulation, further guidance will become important.

We would like specific focus on how Special Bodies can most appropriately comply with the code and we request that the SRA works closely with representative bodies as guidance is developed. Special Bodies are subject to existing regulation,

membership schemes and quality marks so special care needs to be taken to ensure that any firm based regulation is proportionate and works effectively and efficiently with what currently exists.

To minimise confusion between existing membership schemes and quality marks the SRA could also work with representative bodies to ensure that where existing policies and procedures are sufficient to protect clients and they are achieving the same ends as of the code, they are formally accepted by SRA as compliant.

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.

The thinking on this needs to take into consideration the wide variety of recognised bodies.

Where there is a small legal practice, for example a small legal unit within a charity or in the case of a sole practitioner, formal roles of this type may appear disproportionate.

We would suggest that the SRA considers adopting a flexible approach which reflects risk levels and any existing regulatory protections which may already exist.

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?

The SRA should provide specific guidance for people undertaking the roles of COLP / COFA in Special Bodies if these roles are required. The guidance should take into consideration charity law and any other overlapping regulatory schemes which are currently in place.

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

We are concerned about the proposal to allow unregulated legal service providers to employ solicitors who are not covered by indemnity insurance. We feel that clients have a general expectation that where they instruct a solicitor, they will have protection if things go wrong.

The routes to redress can already be complicated for a client to navigate, adding a new form of solicitor service with reduced protection could leave clients disadvantaged and could ultimately reduce confidence in the legal services sector.

Citizens Advice is a major referral organisation into the legal services sector. Having clarity as to the protections our clients can expect from organisations we refer to is important us.

We think that the SRA has an opportunity to drive consumer protection for clients of alternative legal service providers by requiring appropriate risk based levels of indemnity insurance cover for the work undertaken by the solicitor.

The SRA could also encourage the adoption of quality marks to drive the development of effective policies and procedures within the alternative legal service sector.

The consultation refers to the availability of Alternative Dispute Resolution (ADR). As a relatively new provision we think it may be too early to draw conclusions about the increase in consumer protection this is driving. As far as we are aware there has been no detailed research into the actual provision of ADR in the legal services market. As participation from businesses is not mandatory, caution needs to be exercised when assessing its impact. Further research is needed to establish the extent of ADR provision, client awareness, client engagement and the overall effectiveness of ADR that is being provided.

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?

Not applicable.

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?

We believe that this would help to create consistency.

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?

We are concerned about the risks of removing the ‘qualified to supervise’ requirement. The consultation argues that newly qualified solicitors are no more

likely to be the subject of a complaint than others. We suggest that this may not be the most reliable way to measure the potential risk of removing the requirement. Newly qualified solicitors are currently required to work under the supervision of more experienced solicitors and will have the protection of the firm's existing regulatory compliance procedures.

Without this early grounding, there is a risk that new firms will be set up without the necessary understanding of regulatory requirements.

We agree that the 12 hour management course requirement may not be effective but would ask the SRA to consider amending rather than removing the requirement. For example, some means to demonstrate sufficient regulatory knowledge could be established.

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

Thought would need to be given to the way information should be provided for clients of multi-disciplinary practices and Special Bodies. Where work could fall under several regulators any mandatory display requirements could cause considerable confusion for clients.

In these circumstance it may be better to require that clients need to be individually informed about the protection that covers them for the particular service they are accessing.

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

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

A further analysis into the impact on supply of legal services in the free-to-client market will be necessary once the proposals for Special Bodies have been clarified.

The Legal Services Consumer Panel tracker survey 2016 suggests that the number of people who are able to access free legal services has fallen and the Law Society has recently highlighted advice deserts where the provision of legal aid has reduced substantially in some geographical areas.

There is a risk of pushing Special Bodies who currently provide relatively small but locally important volumes of reserved legal activities out of the market. Under the current proposals, the delivery of any amount of reserved legal activity becomes a cliff edge for regulatory purposes.

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?

Where client money is being held by an alternative legal service provider in connection with a service which is being provided by a solicitor, there may be merit in the money being held in the solicitor's name. The protections afforded by the Accounts Rules would then be available.

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?

We think that there are circumstances when it would be appropriate for solicitors in Special Bodies to hold client money and therefore think that there shouldn't be any bar on this.

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?
If not, what are your reasons?

We are concerned that this proposal would leave clients without recourse to compensation in the event of fraud unrelated to holding of client money. Without further information on the breakdown of claims against the fund we are unable to ascertain whether this proposal would prove to be significantly detrimental to clients.

We are also concerned that the operation of the compensation fund will not be easily understood by clients in advance of them making a decision about the most appropriate provider of legal services. They may only find out about the importance of the compensation fund when the need to make a claim but find they can't.

This is another area where damage could be done to the reputation of the solicitors profession and the SRA as the regulator.

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

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

As detailed above in the answer to question 16, we have significant concerns about removing the requirement to have indemnity insurance.

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?

Yes, we think this provides valuable protection for clients.

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

We believe that it is appropriate for Special Bodies to hold appropriate levels of indemnity insurance, reflecting the risk levels that arise from the work they undertake.

Indemnity insurance requirements should allow for a block insurance approach which will enable Special Bodies to maintain effective client protection at an affordable rate.

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

If Special Bodies are brought under entity regulation, further discussions about the extent of appropriate regulatory boundaries would be needed and we welcome the commitment shown in the consultation document to continue positive dialogue with representative bodies.

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14th September 2016

Dear Sirs

Response of the CLLS Professional Rules and Regulation Committee to the SRA Consultation on the SRA Handbook Review: Looking to the future – flexibility and public protection (June 2016)

Structure of this Response

This response is presented in two parts, Part A (General Comments and responses to the consultation questions) and Part B (Mark-up of Suggested Changes to draft new Codes of Conduct, and Explanatory Notes).

Part A records, under the heading "General Comments", the views strongly held by CLLS member firms that the proposals to allow solicitors to be employed and practise within the alternative sector raise a number of serious risks and concerns. This part of our response should therefore be viewed by the SRA as the response of the CLLS member firms more generally. It draws upon and reflects the data collected from CLLS member firms by means of the questionnaire exercise referred to in paragraph A.2 below. The CLLS represents 58 member firms, whose 15,000 solicitors make the largest contribution internationally to the financial success of English law. For more information about the CLLS, the CLLS's Professional Rules and Regulation Committee ("PRRC") and other specialist CLLS Committees, see the CLLS website.

Part B addresses the day-to-day practicalities of living with new Codes of Conduct, should the SRA decide to take its split Code idea forward (despite the reservations expressed in Part A). The mark-up of suggested changes has been put together by PRRC Committee members, each of whom are regulatory compliance experts and Heads of Compliance/Risk, GC or similar at

leading City law firms. Should the SRA proceed with its proposals, the PRRC hopes to have the opportunity to engage with the SRA constructively about the final form of the new Codes, in order that the end product works as well as possible not just for City law firms but the profession as a whole.

Part A – General Comments:

1. **Length/style of Consultation**

CLLS member firms have found it hard to decipher, from this long consultation paper, what all the relevant issues are. It is not until question 16 (of 33) that the consultation questions begin to address the substance of the SRA's proposals whilst some key facts (e.g. that an unregulated provider could act, through solicitors, for both a buyer and a seller of a business) do not get drawn out. We would have expected each key change to be accompanied by a specific question and, as a consequence, we are unclear whether some changes (e.g. the apparent obligation to now tell former clients, as opposed to simply current clients, that they may have a claim against a firm) are intentional or are drafting errors.

The net effect is that we think it could be a challenge for "ordinary" solicitors, as opposed to compliance professionals, and other stakeholders (such as insurers) to penetrate this consultation and respond to it thoughtfully. We therefore recommend that future consultations reflect this feedback and also reflect Gunning principles.

2. **Our Questionnaire**

CLLS member firms were asked to consider a shorter and more focussed questionnaire to generate the data needed to draft this response. A copy of the CLLS questionnaire is annexed. The response rate was excellent, with a number of firms sending the CLLS very considered submissions.

3. **Wider Context**

We wanted to flag that the CLLS also found it hard to comment on the SRA's proposals in the absence of the wider context of those other regulatory reforms/initiatives which have yet to be completed.

For example, when responding to the SRA's "Training for Tomorrow" consultation ("TFT"), the CLLS expressed concerns that the SRA's proposals might damage the reputation of the solicitors profession– we would like to understand, therefore, where the SRA's TFT proposals now stand in order that we can consider whether taken together with these proposals they might, cumulatively, risk greater reputational damage to the profession.

Similarly, it occurs to us that the SRA's proposals may be out of step with work being done by others. For example, the Competition & Markets Authority ("CMA") published its Legal Services Market Study interim report on 8 July, during the SRA's consultation period. The CMA's interim report suggests that, in the consumer/SME market, it is greater transparency about pricing and quality (in the form of consumer feedback) which

would drive competition – not liberalisation of use of the solicitor title. Will the SRA take this into account when considering what to do next?

In addition, the outcome of the independence debate is not yet known – an important part of that debate is whether the regulatory model should change so that the SRA regulates individuals to a base level whilst the Law Society regulates the entry standards, competency and ethics of the profession of solicitors.

Further, just as we were finalising this response, the LSB published its "vision for legislative reform of the regulatory framework for legal services in England and Wales" which, among other things, calls for a new legislative framework for regulating legal services, a fully independent regulator and activity (not title) based regulation.

How will the SRA take these issues into account when considering what to do next?

4. Unmet Legal Need

We feel unqualified to comment on statements included in the consultation regarding unmet legal need. Whilst we favour access to justice, we wonder whether much of the perceived unmet legal need can be attributed to the withdrawal of Legal Aid, in which case greater competition/more choice will probably do little to solve the problem. We think the consultation should be clearer on evidencing the unmet legal need and how the SRA's proposals will address it.

If the hurdle for putative consumers of legal services is price, which the CMA's interim report suggests, deregulation is unlikely to solve that, given we already have an unregulated legal services market which evidently is not (if there is unmet legal need) providing services at the right costs level.

In addition, we think that greater thought needs to be given to whether removing a requirement for entity regulation around solicitors will (i) reduce costs and (ii) as a direct consequence reduce legal fees to the consumer.

5. Damage to the Solicitors Profession and English Law Globally

The CLLS member firms who responded to our questionnaire unanimously agreed that there are significant issues involved with solicitors being permitted to practice using their solicitor title in unregulated entities, including around risks to client confidentiality.

In summary, CLLS member firms consider it is inevitable that removing one layer of regulation in its entirety (i.e. entity-based regulation) from those operating as solicitors will result in increased risks to consumers using those services directly; and if the deregulation for some solicitors forces solicitors in regulated entities to review their approach to regulation to seek to regain a level playing field, potentially all consumers. This could result in damage to the reputation of the solicitors profession.

The question to our mind is not whether there is risk of reputational damage – there is clearly risk of that; instead the question is whether that risk is worth taking in order to satisfy the unmet legal need identified. We see insufficient evidence that these

proposals will solve that (see above) and so do not think at this stage the risk is worth it. Other solutions should be investigated.

The cumulative effect of these proposals and of TFT could well be that consumers/competitors will form/exploit the impression that there is nothing special about being a solicitor – that solicitors are just another service provider. This impression, even if mistaken or more prevalent in only some areas of the market, could be damaging to the perception of the profession as a whole, including City/commercial solicitors internationally, and therefore the strength/reputation of English law globally.

6. Privilege

The SRA paper asserts (on the basis of undisclosed advice to the SRA from Counsel) that legal advice given by solicitors, to members of the public, working in unregulated businesses will not attract privilege. We worry about the impact this may have on the perception of privilege more generally. Changing the regulatory regime so that the advice of only certain solicitors attracts privilege, depending on where they work, could be viewed by some as eroding privilege.

The SRA has suggested that the availability of privilege might be addressed by individual solicitors contracting with clients direct but this may not be an attractive or realistic proposition for City firms (should they choose to hive their unreserved work across to an unregulated entity) or their unregulated competitors. Sophisticated clients will, we think, want to contract with the entity, not an individual they do not know, and the individual solicitor's personal assets would still be at risk, notwithstanding any indemnities from his/her employer. The CLLS has not sought advice from Counsel on the privilege aspects of the SRA's proposals, and may wish to do so should the SRA decide to move ahead as articulated in this consultation. At this point, we are, therefore, commenting principally on the practicalities only of the work-around proposed by the SRA – whilst we see contracting with individual solicitors (rather than unregulated providers) as a messy solution (and one which a number of sophisticated clients may not be attracted to), it may transpire to be feasible for some businesses. It may be complicated and reliant on carefully crafted engagement letters but this is not necessarily a concern for our part of the legal services market, or our competitors. We do, however, wonder whether the SRA's suggested workaround might mean that the individual contracting solicitor has to become a "recognised sole practitioner" - effectively making him/her an entity for the purposes of SRA rules, and thereby introducing the full weight of entity-based regulation. Is this something which the SRA has considered?

Clients have not had to think about privilege when instructing solicitors to date, as any legal advice from them would attract privilege. Clearly privilege is important to clients but how important it is to them and when is currently difficult to quantify. In some circumstances, privilege may not be important to clients – for example, accountants give tax advice and this does not attract privilege. A requirement to give clear and transparent information on whether advice given by a solicitor, working in an unregulated business, attracts privilege will be key – however, we have reservations as to whether:

(A) such information will always be read/understood/capable of evaluation at the right time by consumers (even if sophisticated), see further below; and

(B) whether, for example, a junior solicitor will have the clout to compel his/her unregulated employer to provide it properly.

7. Limits of Transparency Information

We doubt that all clients will read/understand transparency information given to them by unregulated providers, even if sophisticated. Even if transparency information is read, it may be too difficult in some cases to evaluate it at the time it is given. In addition, we think that the SRA's emphasis and reliance on the giving of transparency information increases the risk of "mis-selling" by some unregulated providers, who simply won't get the detail right or will fail to draw a client's attention to the most pertinent information in any particular case. If this were to result in a significant number of claims, some unregulated providers will go bust – which has the obvious potential to damage the solicitors profession.

The consultation implies that it will be for solicitors in regulated entities to use their consumer protection strengths as an "advertisement tool". Given that "solicitor" already has a meaning in the English culture, we think the burden should instead be on unregulated entity solicitors to explain that, in their case, solicitor does not mean what the consumer might assume. This would not, however, be a welcoming message at the start of a trusted adviser relationship and goes to the unworkability of these proposals in relation to producing a level playing field.

8. Shift of Burden and Risk to the Consumer

These proposals appear to shift to the consumer the burden of choosing the right service, against the backdrop that those most in need of protection will be unable to do so. (Indeed even the most sophisticated clients could struggle to understand the difference between PII on Minimum Terms and Conditions and PII on market norm terms). Because the term "solicitor" has such resonance already, that burden of deconstructing what it means in different circumstances is a heavy one, and we suggest an impossible one for most clients.

9. Unlevel Playing Field

Creating a two tier regulation system would potentially mean that accountancy firms, consulting firms and foreign law firms employing solicitors would compete with traditional law firms for unreserved work whilst having the benefit of more liberal regulation. They will escape entity-based regulation on conflicts (possibly), information security, PII and risk management not only to the detriment of consumers but to the City law firms competing with them. This highlights the need for the SRA to press Government to revisit the list of reserved activities in the Legal Services Act 2007, and to consider whether it forms the right basis for a risk-based approach to regulation.

Answers to Specific Consultation Questions:

1. **Have you encountered any particular issues in respect of the practical application of the Suitability Test (either on an individual basis, or in terms of business procedures or decisions)?**

We think that the reporting thresholds in the Suitability Test are set too low. For example, we wonder why the SRA would wish to know whether a solicitor has been given a PND for littering. The reporting of trivial matters such as these wastes SRA resources, takes up COLP time and causes anxiety for the individual concerned unnecessarily. It is not possible for firms/solicitors to take a pragmatic or proportionate view on trivial reporting matters, given that failure to report is treated by the SRA as prima facie evidence of dishonesty. This underlines the need for the SRA to draw the line at an appropriate level.

We favour a comprehensive review and consolidation of all SRA reporting obligations, with an appropriately high and consistent materiality threshold being introduced across the board.

Further, the Suitability Test does not describe the standards expected of solicitors, instead simply listing certain things which need to be reported. It does not therefore "speak" to individuals, does not articulate what "suitability" is and cannot therefore be used by firms as an effective training tool.

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

If the Principles are to apply to business services staff (as well as to regulated firms and solicitors), they should include a reference to confidentiality. Everyone who works in a law firm has an important role to play in protecting clients' information and this should be clear in the Principles (not relegated to the Codes, which may not apply to all staff).

This could be done by introducing a new Principle 7 or adding to Principle 6 stating that you must protect your client's confidential information.

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

We do not understand why the SRA is proposing to re-word what is currently Principle 6 – what might be wrong with the existing formulation is not explained in the consultation paper. The existing formulation is well understood and we favour its retention, in the absence of a good reason to change it.

We have two specific comments on the revised formulation. First, we think that use of the word "ensure" could set a higher standard than the existing obligation to "maintain" and is unrealistic. Secondly, we think that the reference to "those delivering legal services" is too wide, given that this would catch the unregulated sector. The Principle should instead refer to upholding public confidence in "you and your profession".

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

See our answer to question 2 above.

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

On balance, we are not in favour of the SRA developing guidance or case studies, which could become additional regulation "by the back door". You have said that feedback from stakeholders suggests that individuals and firms find the status of the existing Indicative Behaviours confusing, which is why you are not replicating them in your new Codes. If you develop guidance and case studies, you risk replicating this problem. There is also a danger that issuing such guidance and/or case studies would have the practical effect of making the Handbook "long, confusing and complicated" which would defeat the SRA's aim of attempting to simplify it in the first place. The Codes need to be clear – and that may mean that they have to be longer – to remove the need for additional guidance.

Further, we think it is for our representative bodies, not our regulators, to issue any guidance or case studies the profession may find helpful, in a manner which supports solicitors and does not goldplate regulation.

If the SRA does produce guidance or case studies, we think it should consult on these, whether formally or informally with stakeholder groups, before they are issued. In this eventuality, we would like to explore with you further what role the CLLS could play in preparing/reviewing City-based case studies and guidance.

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

Our members do not agree that the existing combined Code is "long, confusing and complicated". Further, simplification for its own sake can be dangerous – whilst superficially attractive, reducing the amount of text to read and recall, the introduction of new terminology just to reduce the number of words can easily create ambiguities. A split Code is, however, logical if the SRA is to permit solicitors to use their solicitor title in unregulated firms (as to the undesirability of which, see our General Comments above.)

That issue aside, we asked our member firms whether they were in favour of two Codes, or one. The majority of firms who responded favoured the retention of a combined Code of Conduct, stating that, in their experience, when individual solicitors think of their professional obligations, they think of ethics in a broader sense. They know what the parameters are, and consult with dedicated compliance professionals in the firm's central team when they need help – including in relation to conflicts analysis. These firms did not see how a split Code would, therefore, help to "reconnect" their lawyers as they do not consider that they are ethically disconnected. Their lawyers receive regular ethics training and know how to issue-spot, and seek further guidance when they need it. The fact that they do seek that guidance does not mean that they are abrogating their professional responsibilities to either the firm or its central Compliance/Risk team. In fact, the opposite is true – it demonstrates that they are in

touch with their personal regulatory responsibilities. In addition, the introduction of two Codes might necessitate a substantial re-education and training programme, in firms, for no obvious benefit and at considerable cost.

A minority of firms who responded thought a split Code was a good idea which, if linked to good internal training, could help to refocus individuals' attention on their personal ethical and regulatory responsibilities. In addition, our in-house lawyer client contacts may find a split Code easier to navigate and therefore to understand what the SRA expects of them as solicitors.

We are concerned that the Code for Solicitors will not contain enough detail to support individual solicitors in unregulated entities who are the ones most at risk of challenges to their professional requirements.

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

See our further comments and mark-up of the Codes in Part B of this response.

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

See our further comments and mark-up of the Codes in Part B of this response.

9. **What are your views on the two options set out for handling actual conflict or significant risk of a conflict between two or more clients and how do you think they will work in practice?**

We are very strongly in favour of Option 1, with the amendments set out in the attached mark-up.

The two existing exceptions (auction and substantially common interest) are very important to and frequently used by many of us/our clients and we would like to see these explicitly replicated in the new rule – we would not wish instead to rely on SRA assurances that there is no conflict/significant risk of one in the circumstances covered by those exceptions.

We asked our members whether they thought the SRA should consider the introduction of a new informed consent exception.

The majority of those responding thought that a sophisticated client exception, requiring informed consent, would (although some anticipated using it in limited circumstances only) be a useful extension to the conflict rule, offering greater flexibility to clients and helping to alleviate some of the level playing field concerns referred to in our answer to question 16 below. Some thought that, if a sophisticated client exception were to be introduced, it should not be available in a litigious/similar context but only where there is "indirect adversity".

In contrast, some of those responding thought that the existing exceptions are sufficiently broad. If an informed consent exception were to be introduced, they thought it would need to be made clear that it is for sophisticated clients and should be only

used sparingly – this, they thought, could be difficult to define, lend itself to abuse and therefore risk damaging the solicitors profession.

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

See our answer to question 6 above. Also see our further comments and mark-up of the Codes in Part B of this response.

11. **In your view is there anything specific in the Code [for SRA regulated firms] that does not need to be there?**

See our further comments and mark-up of the Codes in Part B of this response.

12. **Do you think that there is anything specific missing from the Code [for SRA regulated firms] that we should consider adding?**

See our further comments and mark-up of the Codes in Part B of this response.

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?**

See our further comments and mark-up of the Codes in Part B of this response.

14. **Do you agree with our intention to retain the COLP and COFA roles for recognised bodies and recognised sole practices? [14a. In responding to this question, please set out the ways in which the roles either assist or do not assist with compliance.]**

In summary, the majority of our members are in favour of retaining the roles, although some do not feel strongly either way (principally because they are of the view that their firms have personnel in quasi - COLP/COFA roles in any event).

Our members have a range of views as to whether the roles have given them any additional benefits, over and above having a Head of Compliance/Risk, General Counsel or similar, with the majority considering that there is a benefit, albeit not necessarily substantial for City firms. A clear majority see the roles as having assisted in re-enforcing the role of Head of Compliance/Risk, General Counsel or similar, though in general such roles pre-dated the COLP/COFA regime.

Whilst, in principle, reminding partners and employees of the firm's obligation to report breaches (through the COLP and COFA) strengthens the compliance function, it has possibly been handicapped by the SRA Handbook omitting a requirement on partners and employees to report to the COLP and COFA, leaving that to the firm's own policies.

The COLP role has become well known in firms, but the COFA role less so, in part owing to the confusing title: the COFA is not (as COFA) responsible for finance, and certainly not responsible for administration. This is a drawback if the role is to be taken seriously day-to-day by the rest of the firm for whom simplicity of roles and titles is important.

So long as the SRA Accounts Rules required an external audit, the COFA role was largely otiose especially as most firms of any size have a well-defined finance director role. Now that the requirement for an external audit is being abolished this, is not, we suggest, the right time to abolish the COFA role, as the COFA may have a more useful function in the future than the past.

Whatever the correct interpretation of the remit of the COFA (see below), the bulk, if not all, of a firm's compliance with the Companies Act (as modified for LLPs) on accounting matters confusingly remains with the COLP; the COLP has to be a solicitor, as much of compliance concerns technical legal matters, but he/she has responsibility to the SRA for the bulk of accounting compliance, even though the firm, if of any size, will have a professionally qualified accountant as finance director.

Given that firms have had to establish structures to support the COLP/COFA roles, they see no benefit in abolishing them.

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

Taking up the point in our answer to question 14 above, we suggest the addition of an obligation in the SRA Handbook on partners and employees to notify possible breaches to the COLP/COFA. We also suggest consideration of whether, if an individual partner or employee does so, he/she is deemed to discharge his/her responsibility under the Handbook to the SRA (paralleling how reporting obligations work under the Proceeds of Crime Act 2002).

We suggest clarifying confusion over the COFA role (and consequently COLP role also as, on the drafting of Authorisation Rule 8.5, they are mutually exclusive), in particular:

(A) Responsibility for compliance with the SRA Accounts Rues is clear, but confusingly the COFA is not responsible for the Accounts provisions of the SRA Overseas Rules, so the COLP is – that defies logic.

(B) It is sometimes asserted that as financial instability might imperil the safety of client money, so the COFA's role extends to financial stability. Maybe it should be; our members are divided on the point with, on balance, a majority in favour as the COFA is usually the finance director (or, at least, UK finance director) but, if that is the correct current interpretation, it is also unclear where the dividing line lies between COLP and COFA.

(C) A majority of our members consider that responsibility for all aspects of the keeping of financial records, production of annual accounts, financial compliance, including compliance with the Companies Act (as modified for LLPs) on accounting matters, financial stability and payment of taxes by the firm should rest with the COFA, not the COLP. Finance directors often do not understand why such responsibility rests with the COLP, who is a solicitor.

(D) The title, COFA, is confusing – for what part of "administration" is he/she responsible?

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

Our views are as follows:

(A) **Damage to solicitors profession** – Our members think that the SRA's proposals pose a threat to the profession. See further paragraph 5 of our General Comments above. The proposed changes will establish a two tier system and the existence of unregulated firms, with no requirements as to client confidentiality or conflicts at a structural level, could undermine the profession.

(B) **Unfair conflicts regime** – The SRA's proposed changes could mean that (for example) accountancy firms will be able to employ solicitors to do unreserved work but that the SRA's conflict rules will only apply at an individual level – so a non-SRA regulated firm might act for, say, both a buyer and a seller of a business (provided the same solicitor does not act for both clients and, possibly, client waivers were in place). We think it is unfair that non-SRA regulated firms will benefit from a more liberal conflicts regime. Although we cannot currently measure/quantify the impact of this, it is potentially detrimental to all City/commercial law firms. We would reiterate here the point made at paragraph 6 of our general comments, namely that we think the SRA should clarify its thinking on the conflicts position – do you consider that an unregulated provider could act for (example) buyer and seller of a business provided the same solicitor was not on both teams? This seems possible at first blush, as the SRA conflict rules would only bite at the individual level – but might those individuals risk breaching SRA Principles (e.g. obligation to act in client's best interests) by agreeing to represent a client in circumstances where he/she could be negotiating terms with/against a colleague?

(C) **Privilege** – Clients have not had to think about privilege when instructing solicitors to date, as any legal advice from them would attract privilege. See further paragraph 6 of our General Comments above.

(D) **Transparency information solution flawed** – We doubt that many clients will read/understand transparency information given to them, even if sophisticated and transparency information provided by the unregulated sector is up to the mark. See further paragraph 7 of our General Comments above.

(E) **Entity-based regulation as a kite mark** – Clients simply have not had to think about how much they value entity-based regulation to date. It automatically comes as part of any law firm offering. That said, we think that sophisticated clients will expect it to continue to be part of the offering – they expect to contract with properly run businesses with sound risk management systems/controls and stringent confidentiality obligations. This is why we do not think they would want to contract with an individual solicitor working for an unregulated provider (e.g. as a mechanism to ensure privilege).

(F) **Unrealistic burden on individual solicitors** – We are concerned about the number of very specific obligations placed on individual solicitors, in the new

Code for solicitors, with which they cannot properly comply in isolation from the organisation in which they work. Rules 8.6 to 8.9, for example, give individuals obligations in respect of client information and publicity. In both cases, the Code for Firms does not contain equivalent obligations. Further, if a solicitor is working for an unregulated entity, how can solicitors realistically comply with obligations such as these – particularly if they are in a minority, and relatively junior?

17. How likely are you to take advantage in the greater flexibility around where solicitors can practice as an individual or as a business?

It would be possible, under the SRA's proposed new approach, for City law firms to split off the unreserved part of their business into a separate business (to avoid SRA regulation at an entity level), provided they gave their clients the right information about the protections available to them. We asked our members whether they saw this as an opportunity to "hive across" their unreserved work (e.g. corporate, M&A, commercial, financing) to a new business which those firms would effectively "self-regulate", free from the constraints and cost of SRA regulation and with the availability of US-style conflict waivers (should they want to offer them to two or more clients who may seek to instruct the firm on the same/a related matter).

The majority of firms responding thought this was a highly unattractive idea – it would be too messy for any law firm which did not genuinely intend to run two separate businesses (with separate buildings, employees, technology systems etc). In addition, for general risk management purposes, most firms would want to replicate many of the systems/controls they currently have in place which also ensure compliance with SRA rules. Additionally, if there were to be such a separation, the firm would lose the benefit of the "designated professional body" regime under the Financial Services and Markets Act 2000 and might well conclude it needed to be authorised by the FCA. There would therefore, be no savings to them in "hiving across" their unreserved business. Clients expect us to have those systems/controls and so they are part of our offering. Privilege could also be a stumbling block, as could the views of local law societies/bars/regulators in other jurisdictions.

If the SRA's proposals go ahead, it is something which City law firms, would, however, need to keep under review and to monitor developments, especially if our fears of being put at a competitive disadvantage prove correct.

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

Our members are not in favour of solicitors being permitted to practice, using their solicitor title, for entities which are not regulated by the SRA. It therefore follows that they favour maintaining the position whereby sole practitioners must be SRA authorised, as entities, to provide reserved activities to the public.

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?

There is a requirement for a rule which ensures that every firm is supervised by someone with a minimum level of practice experience, otherwise there is a risk to the profession and consumers. Rule 12 of the existing SRA Practice Framework Rules was drafted for a time when the vast majority of firms were single site and relatively small and so having a single such person in each authorised firm made some sense. The rule does not, however, reflect the modern day reality of the proliferation of multi-office and multi-national firms. In this context, it would make sense to require that each office of an authorised firm be supervised by a suitably qualified and experienced practitioner. Some overseas Codes, in Hong Kong for example, go further and are more specific about what supervision means in practice which might also be a sensible extension of the current SRA rule.

The question about unregulated providers recruiting junior solicitors and then not being able to support them is a separate, but related issue (see further 16(F) above). In relation to your reference to emerging data suggesting that newly qualified solicitors "do not present a significant risk to the delivery of a proper standard of service", we think this is may be due to the internal management structures of SRA regulated firms, including the appropriate allocation of (less complex, less risk-inherent) work to NQs and clear guidance, briefing, monitoring and ongoing supervision by more experienced solicitors, and not because NQs are of their nature less risky practitioners.

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

Given what we say in this response about the assumptions consumers make when they instruct a solicitor, we think the regulatory emphasis should be on ensuring that solicitors who work in unregulated entities give consumers detailed information about the protections which are not available to them (but would be if they used a regulated provider) – for example, we think that consumers (including sophisticated consumers) will assume that when they are being advised by a solicitor (regardless of whether the solicitor works for a regulated/unregulated entity), the advice they receive will be privileged and insured. If this is not the case, because the consumer is contracting with an unregulated entity, the solicitor providing the services should be obliged to make this clear. However, we acknowledge that this would place significant compliance burdens on individual solicitors employed by unregulated services providers, particularly if they are junior and the employer is a large enterprise.

21. Do you agree with the analysis in our initial Impact Assessment?

We think you have given insufficient weight to the risks summarised in paragraph (viii) on page 45 of your Impact Assessment, namely (a) consumer confusion around different protections and (b) the erosion of the solicitors profession. In addition, we query whether risks to client confidentiality have been given due regard.

Further, we do not think that consumers would necessarily benefit from your proposed changes in the ways summarised in paragraph (vii) of your Impact Assessment. In particular, we do not think that consumers will have a better understanding of the legal

services market as a consequence – in fact, the opposite is likely to be true. Consumers (even sophisticated consumers) will make assumptions about the benefits/protections available to them when advised by a solicitor, and these will not be countered by detailed transparency information – which could be too difficult to absorb, impossible to evaluate at the time of instruction and places the onus on the consumer to do due diligence on the unregulated provider which they are unlikely to be equipped and/or have the time to do.

22. Do you have any additional information to support our initial Impact Assessment?

We feel unable to answer this question, given that we have no dedicated resources to investigate the issues.

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?

We agree with your specific proposal that solicitors who work outside of an "authorised body" should not personally hold client money.

As we understand it, this approach does not prevent the organisation in which the solicitor is employed holding client money, and that an unauthorised vehicle to which an SRA authorised law firm chooses to hive-off its unreserved work could hold client money notwithstanding the fact that the individual solicitor/principals and employees of that entity could not hold client money in their own names. Such an unregulated law firm would not appear to have any obligation to comply with the SRA Accounts Rules when holding client money, even if it was an all solicitor owned business. If our analysis is correct, this lacuna in the draft rules could present a considerable risk to the clients of such an unregulated solicitors firm, and to therefore to reputation of the profession.

Although not of direct interest to CLLS members firms, we are also concerned about how your approach would play out for an unincorporated solicitor sole practitioner or general partnership which only engages in unreserved activities, and chooses to do so without being authorised as a "recognised sole practitioner" or "recognised body" respectively. We believe that the effect of draft rule 4.2 would be to prohibit the holding of client money by these service providers, irrespective of whether doing so was essential to the viability of their practices. If our interpretation is correct, this would deny these providers the opportunity to exploit the rule change, and put them at a commercial disadvantage as against their incorporated competitors.

In justification for your approach to the holding of client money, we note paragraph 124 of the consultation which says that the SRA considers "that it would be artificial and confusing to have different obligations on an individual solicitor compared to the business in which they are working. The compliance responsibility would place an unrealistic, disproportionate, and impractical burden on the individual solicitor." We believe this same statement is equally pertinent to a number of other obligations contained in the draft SRA Code of Conduct for Solicitors, RELs and RFLs which the SRA is seeking to impose on solicitors working in unregulated businesses, and highlights significant flaws in the regulatory approach being proposed.

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?

Given that this response is being made on behalf of City law firms, which are CLLS members, we do not feel qualified to comment on this question, and therefore defer to the in-house community.

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? [Question 25a. If not, what are your reasons?]

We neither agree nor disagree. However, we do think that consumers will assume that they have access to the fund, so transparency information given by solicitors working for alternative providers would need to make it clear that this protection is not available. As stated above, we think that consumers (even sophisticated consumers) will find the transparency information which unregulated providers will need to give them too difficult to absorb and impossible to evaluate at the time of instruction. We also think that it will place the onus on the consumer to do due diligence on the unregulated provider which they are unlikely to be both equipped and/or have the time to do. Consumers should be able to assume that, when they are advised by a solicitor, this automatically brings them certain protections.

In addition, we would be concerned if the Compensation Fund were to be available to firms which did not have PII obligations. This could increase the chances of inappropriate claims being made on the fund.

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

No. Our members very strongly feel that PII cover should be compulsory, even for the unregulated sector, if a solicitor is advising. We think it is important that any user of a solicitor's services (whether through a regulated firm or an unregulated entity) should have complete confidence that there is PII available (on the minimum terms and conditions) in the event of an error by the solicitor. For example, we would be concerned if an unregulated entity providing tax or employment services could offer the services of a solicitor in circumstances where the client would have no insurance protection in the event that the solicitor was negligent.

However, an associated PII requirement may make solicitors less attractive hires for alternative providers.

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

Whilst, in theory at least, consumers can ask providers what their commercial insurance levels are and choose to proceed with a properly insured provider only, this (unfairly) place the onus on the consumer to do due diligence on the unregulated provider. As stated above, we think they are unlikely to be equipped and/or have the time to do this. Any consumer (regardless of how sophisticated) would be stretched to evaluate the comparative benefits of commercial insurance cover with the same amount of PII cover

on the minimum terms and conditions, for example. Consumers should be able to assume that, when they are advised by a solicitor, this automatically brings them certain protections – including minimum PII on industry-wide standard terms.

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

Yes.

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

No. See our answer to question 24 above.

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?**

Not imposing threshold standards would simply be, we think, an inevitable consequence of your proposals to allow solicitors to practice as solicitors for unregulated entities. We are not in favour of this.

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

We think that solicitors should only be able to provide services to the public, as solicitors, through SRA regulated entities. We believe the SRA should focus on revisiting the definition on reserved legal services and working with all relevant parties to achieve a re-draft of these.

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

We are not clear what your proposed position is. However, we would expect you to act in the best interests of consumers, including by use of your intervention powers, if necessary.

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

Yes. We think the alternative would be too messy and very confusing for clients. Realistically, City law firms would not, for example, wish to operate a different approach to conflicts depending on whether work was reserved/unreserved and any law firm wishing to do this is bound to run into difficulties – as work on a matter can involve a blend of the two and/or flip from one to the other.

Annexure to Part A

SRA Handbook Review – Questions for CLLS Member Firms

Background:

1. On 1 June 2016, the SRA published a consultation called "Looking to the future – flexibility and public protection" – marking the first phase of the SRA's review not only of its Handbook but also its regulatory approach. The purposes of this note is to alert and seek the reaction of CLLS member firms to the principal issues this consultation poses for City law firms. For the reasons summarised below, the impact of the changes being proposed could be quite radical and has the potential to affect the entire sector (not just high street firms).

2. Whilst the SRA emphasises, in its consultation paper, the need to simplify its rules and reconnect individuals with their personal regulatory obligations, the real driving force for change is the perceived "unmet need" of individual consumers and small businesses for legal advice – which the SRA plans to address by enabling solicitors to practice in unregulated entities, delivering non-reserved* legal services.

3. This explains why the SRA needs to tackle its Code of Conduct first (notwithstanding that it is arguably the simplest part of the current Handbook), splitting it into two versions – one Code which apply to SRA regulated firms/entities and another Code which will apply to individual solicitors alone.

4. If it goes through unchanged, the SRA's review package will mean, for example, that:

   (A) firms which are currently SRA regulated will be able to "hive across" their unreserved work to entities they set up in the unregulated sector and employ solicitors in such entities (whose turnover will not be subject to the annual charge on renewal of recognised body status) to undertake that work;

   (B) existing businesses (e.g. other professional services firms) will be able to diversify into legal services, employing solicitors to deliver non-reserved legal services to clients using their "solicitor" title;

   (C) existing businesses which employ in-house solicitors will be able to use their in-house departments to provide non-reserved legal services to the public;

   (D) existing alternative legal service providers (which currently deliver non-reserved legal services to the public through unqualified staff) will be able to employ solicitors to undertake/supervise this work, so seeking what the SRA calls "brand enhancement"; and

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* Reserved legal activities are, in summary: rights of audience; the conduct of litigation; reserved instrument activities (including the preparation of transfers of and charges over real property in E&W); probate activities; notarial activities and the administration of oaths.

(E) new firms may be established to deliver non-reserved legal services, also using solicitors to undertake/supervise this work and taking the opportunity to achieve "brand enhancement".

5. In summary, solicitors who work for non-SRA regulated firms will only be subject to individual-based regulation, which does not mandate risk management, such conflicts avoidance and the purchase of PII cover, at an entity level. In addition, it may be that privilege will not attach to the advice which clients of unregulated entities receive.

6. To help to set the tone for the CLLS's response to this consultation, and subsequent consultations on the Handbook review, please answer the questions which follow – sending your response to kevin.hart@citysolicitors.org.uk by Friday, 29 July 2016.

Questions:

1. Do you think that splitting the SRA Code of Conduct will help to reconnect individual solicitors with their personal regulatory responsibilities, or do you favour the retention of a combined Code where individuals and the firm are "in it together"? In your experience, do practitioners find the existing Code of Conduct "long, confusing and complicated"?

2. Even if you do not think the SRA's proposals will affect your market, do you think the changes could pose a threat to the strength/value of the solicitor brand in general (e.g. because the consumer protections available to clients instructing unregulated firms may be significantly reduced, and some unregulated firms may lack the appropriate systems, controls and infrastructure to support the solicitors they employ in meeting their individual regulatory responsibilities)?

3. The SRA's proposed changes would mean that (for example) accountancy firms will be able to employ solicitors to do unreserved work but that the SRA's conflict rules will only apply at an individual level – so a non-SRA regulated firm could act for, say, both a buyer and a seller of a business (provided the same solicitor does not act for both clients). Do you think it is unfair that non-SRA regulated firms will therefore benefit from a more liberal conflicts regime, and how might this affect your business?

4. The SRA has put forward two alternative formulations for its reworded conflict rule. One is similar to the current rule, whilst the other does not replicate the "auction" and substantially common interest exceptions (although it is not clear whether this is just a drafting issue or whether the SRA really intends to dispense with the availability of these two exceptions). How important are those exceptions to you in practice? Further, given that the SRA is apparently consulting on substantive changes to the conflicts rules, would you like to see other changes introduced? For example, do you think that the SRA should also consider an informed consent exception, perhaps only when dealing with sophisticated clients?

5. The SRA has sought advice from Counsel on privilege and has been advised that legal advice given by unregulated firms may not attract legal professional privilege, even if that advice is given by a solicitor (although this could be subject to work arounds – e.g. if the client contracts with the solicitor rather than the firm). If this advice is right, how

important do you think this would be to your clients when deciding whether to instruct a regulated or unregulated provider?

6. If given transparency information by an unregulated firm about the protections available to them when using such a firm, do you think this will help clients (even if sophisticated) make the right choices about what they need? Do you think that solicitors working for unregulated firms should be required, as a regulatory matter, to offer minimum levels of PII to their clients?

7. It would be possible for you to split off the unreserved part of your business into a separate business (to avoid SRA regulation at an entity level), provided you give your clients the right information about the protections available to them. Do you see this as an opportunity to "hive across" your unreserved work (e.g. corporate, M&A, commercial, financing) to a new business which you would effectively "self-regulate", free from the constraints and cost of SRA regulation and with the availability of US-style conflict waivers (should you want to offer them to two or more clients who may seek to instruct you on the same/a related matter)? Why might his be attractive/unattractive to you?

8. Do you think that your clients value entity-based regulation and see it as a "kite mark"? Alternatively, do you think your clients would be happy to continue to instruct you if you became a "self-regulated" entity – bearing in mind that you could choose to maintain the same levels of PII and adopt certain risk management systems across the board?

9. The SRA is currently of the view that all work, whether reserved or unreserved, must be regulated if done by an SRA regulated firm. Do you think it should reconsider this? Are you attracted to the idea that the SRA should only regulated reserved work?

10. Whilst the SRA is minded to retain the COLP/COFA roles for all SRA regulated firms, they would like views on how these roles are working in practice, their value and how effective they are. Do you agree that the roles should be retained in broadly the current form? In your opinion, how do the roles assist with/hinder compliance? The COFA's role is currently limited to compliance with the SRA Accounts Rules, leaving all other aspects of finance and financial stability to the COLP. Given that the COFA is typically an accountant, do you agree that the role of the COFA should be extended to both the Overseas Accounts Rules and all other aspects of finance and financial stability?

Part B of CLLS Consultation Response

CLLS PRRC Comments on Draft SRA Code of Conduct for Solicitors, RELs and RFLs [2017]

The SRA Principles comprise the fundamental tenets of ethical behaviour that we expect all those that we regulate to uphold. This includes you, as well as authorised firms and their managers and employees in so far as is relevant to their roles[1]. The principles are as follows:

You:

1. uphold the rule of law and the proper administration of justice
2. ensure that your conduct ~~upholds~~ maintains public confidence in ~~the~~ you and your profession[2] ~~and those delivering legal services~~
3. ~~act with~~do not allow your independence to be compromised[3]
4. act with honesty and with integrity[4]
5. ~~act~~ perform your role in a way that encourages equality, diversity and inclusion[5]
6. act in the best interests of each ***client*** and protect their confidential information[6]

The Code of Conduct describes the standards of professionalism that we, the SRA, and the public expect of individuals (solicitors, registered European lawyers and registered foreign lawyers) authorised by us to provide legal services. They apply to conduct and behaviour relating to your practice, and comprise a framework for ethical and competent practice which applies irrespective of your role or practice setting but subject to the Overseas Rules relating to your practice outside England & Wales[7]; ~~although s~~Section 8 applies only when you are providing legal services to the public or a section of the public.

You must exercise your judgement in applying these standards to the situations you are in and deciding on a course of action, bearing in mind your role, responsibilities and the nature of your clients and areas of practice. You are personally accountable for compliance with the Code - and our other regulatory requirements that apply to you - and must always be prepared to justify your decisions and actions. Serious misconduct or a material ~~breach~~[17] may result in our taking regulatory action against you. A breach may be ~~serious~~ material[17] either in isolation or because it comprises a persistent failure to comply or pattern of behaviour.

The Principles and Codes are underpinned by our Enforcement Strategy, which explains in more detail our approach to taking regulatory action in the public interest.

Maintaining trust and acting fairly

1.1 You do not unfairly discriminate by allowing your personal views to affect your professional relationships and the way in which you provide your services.

1.2 You do not abuse your position by taking unfair advantage of ***clients*** or others relying on your advice[8].

1.3 You perform all ***undertakings*** given by you, and do so within an agreed timescale or if no timescale has been agreed then within a reasonable amount of time.

1.4 You do not mislead or attempt to mislead your ***clients***, the ***court*** or others relying on your advice[8], either by your own acts or omissions or allowing or being complicit in the acts or omissions of others (including your ***client***).

Dispute resolution and proceedings before courts, tribunals and inquiries

[NB Our litigation experts, through the CLLS Litigation Committee, note that it is proposed to delete current Outcome 5.5 and IBs 5.4, 5.5, 5.7 (b) and 5.9 and that the proposal is that this may possibly be replaced by SRA guidance. They consider that it would be useful to continue to have a specific rule equivalent to Outcome 5.5 noting that when professional obligations require solicitors to do things that are likely to be contrary to their clients' interests or wishes it is extremely valuable to have a specific rule to point to.]

2.1 You do not misuse or tamper with evidence, or attempt to do so.

2.2 You do not seek to influence the substance of evidence, including generating false evidence or persuading witnesses to change their evidence.

2.3 You do not provide or offer to provide any benefit to witnesses dependent upon the nature of their evidence or the outcome of the case.

2.4 You only make assertions or put forward statements, representations or submissions to the ***court*** or others tribunals or inquiries[8] which are properly arguable.

2.5 You do not place yourself in contempt of ***court***, and you comply with ***court*** orders which place obligations on you.

2.6 You do not waste the ***court's*** time.

2.7 You draw the ***court's*** attention to relevant cases and statutory provisions, or procedural irregularities of which you are aware and which are likely to have a material effect on the outcome of the proceedings.

[NB Generally, concerning rules relating to advocacy, it is important for these to be consistent with those applicable to barristers and, if not, can the SRA explain why

they should be different?]

Service and competence

3.1 You only act for ***clients*** on instructions from the ***client***, or from someone ~~authorised to~~who can properly[9] provide instructions on their behalf. If you have reason to suspect that the instructions do not represent your ***client's*** wishes, you do not act unless you have satisfied yourself that they do.

3.2 You ensure that the service you provide to ***clients*** is competent and delivered in a timely manner.

3.3 You maintain your competence to carry out your role and keep your professional knowledge and skills up to date.

3.4 You consider and take account of your ***client's*** attributes, needs and circumstances.

3.5 Where you supervise or manage others providing legal services:

(a) you remain accountable for the work carried out through them; and

(b) you effectively supervise work being done for ***clients***.

3.6 You ensure that the individuals you manage are competent to carry out their role, and keep their professional knowledge and skills up to date.

Client money and assets

4.1 You properly account to ***clients*** for any ***financial benefit*** you receive as a result of their instructions except where they have agreed otherwise[10].

4.2 You safeguard money and ***assets*** entrusted to you by ***clients*** and others.

4.3 Unless you work in an ***authorised body***, you do not personally hold ***client money***.

Referrals, introductions and separate businesses

Referrals and introductions

5.1 In respect of any referral of a ***client*** by you to another ***person,*** or of any third party who introduces business to you or with whom you share your fees, you ensure that:

(a) ***clients*** are informed of any financial or other interest which you or your business or employer has in referring the ***client*** to another ***person*** or which an ***introducer*** has in referring the ***client*** to you;

(b) ***clients*** are informed of any fee sharing ***arrangement*** that is relevant to their matter;

(c) the agreement is in writing;

(d) you do not receive payments relating to a referral or make payments to an ***introducer*** in respect of ***clients*** who are the subject of criminal proceedings; and

(e) any ***client*** referred by an ***introducer*** has not been acquired in a way which would breach the ***SRA's regulatory arrangements*** if the ***person*** acquiring the ***client*** were regulated by the ***SRA***.

Separate businesses

5.2 You ensure that ***clients*** are clear about the extent to which the services that you and any ***separate business*** offer are regulated.

5.3 You do not represent a ***separate business*** or any of its services as being regulated by the ***SRA***.

5.4 You only:

(a) refer, recommend or introduce a ***client*** to a ***separate business***; or

~~(b) put your ***client*** and a ***separate business*** in touch with each other; or~~[11]

(~~c~~b) divide, or allow to be divided, a ***client's*** matter between you and a ***separate business***,

where the ***client*** has given informed consent to your doing so.

5.5 Where you and a ***separate business*** jointly publicise services, you ensure that the nature of the services provided by each business is clear.

Conflict, confidentiality and disclosure

Conflict of interests

6.1 You do not act if there is an ***own interest conflict***[12] ~~a conflict of interest between you and your ***client*** or a significant risk of such a ***an own interest conflict***[12]~~.

6.2 You take reasonable steps to satisfy yourself that your business or employer has effective systems and controls to identify and monitor conflicts of interest as appropriate[13]

6.3 You do not act in relation to a matter or particular aspect of it if there is a ***client conflict*** or a significant risk of such a conflict in relation to that matter or aspect of it, unless:

(a) the ***clients*** have an agreed common purpose in relation to the matter or the aspect of it, as appropriate, and a strong consensus on how that purpose is to be achieved; or

(b) the ***clients*** are ***competing for the same objective*** which, if attained, by one ***client*** will make that objective unattainable ~~to~~by the other ***client***:

and the conditions below are met, namely that:

(i) all the ***clients*** have given informed consent, given or evidenced in writing, to you acting; and

(ii) where appropriate, you put in place effective safeguards to protect your ***clients'*** confidential information; and

(iii) the benefits to the ***clients*** of doing so outweigh the risks to the ***clients*** of you acting.

Confidentiality and disclosure

6.43 You keep the affairs of current and former ***clients*** confidential unless disclosure is required or permitted by law or the ***client*** consents and you take reasonable steps to satisfy yourself that where your business or employer holds information confidential to your clients or former clients your business or employer has effective systems and procedures to protect that confidential information[14].

6.54 Where you are acting for a ***client,*** you make that ***client*** aware of all information material to the matter of which you have knowledge, except when:

(a) the disclosure of that information is prohibited by law;

(b) your ***client*** gives informed consent, given or evidenced in writing, to the information not being disclosed to them;

(c) you have reason to believe that serious physical or mental injury will be caused to your ***client*** or another if the information is disclosed; or

(d) the information is contained in a privileged [or confidential][15] document that you have knowledge of only because it has been mistakenly disclosed.

6.65 You do not act for a ***client*** in a matter where that ***client*** has an interest adverse to the interest of another current or former ***client*** ~~or a former ***client***~~ for whom your business or employer holds confidential information which is material to that matter, unless:

(a) ~~all~~ effective measures have been taken which result in there being no real risk of disclosure of the confidential information; or

(b) the ***client*** or former ***client*** has given informed consent, given or evidenced in writing, to you acting, including to any measures taken to protect their information.

Cooperation and accountability

7.1 You keep up to date with and follow the law and regulation governing the way you work.

7.2 You are able to justify your decisions and actions in order to demonstrate compliance with your obligations under the ***SRA regulatory***

arrangements.

7.3 You cooperate with the ***SRA***, other regulators, ombudsmen and those bodies with a role overseeing and supervising the delivery of, or investigating concerns in relation to, legal services.

7.4 You respond promptly to the ***SRA*** and:

(a) provide full and accurate explanations, information and documents in response to any proper request or lawful requirement[16];

(b) ensure that relevant information which is held by you, or by third parties carrying out functions on your behalf which are critical to the delivery of your legal services, is available for inspection by the ***SRA***.

7.5 You do not attempt to prevent anyone from providing information to the ***SRA***.

7.6 You notify the ***SRA*** promptly if you become aware:

(a) of any material changes to information previously provided to the ***SRA***, by you or on your behalf, about you or your practice; and

(b) that information provided to the ***SRA***, by you or on your behalf, about you or your practice is or may be false, misleading, incomplete or inaccurate.

7.7 You ensure that a prompt report is made to the ***SRA*** or another ***approved regulator***, as appropriate, of any serious misconduct[17] in breach of their ***regulatory arrangements*** by any ***person*** regulated by them (including you) of which you are aware. If requested to do so by the ***SRA*** you investigate whether there ~~have~~ has been any serious ~~breaches~~ misconduct that should be reported to the ***SRA***.

7.8 You act promptly to take ~~any~~ appropriate remedial action requested by the ***SRA***.

7.9 You promptly inform ***clients*** ~~promptly~~ for whom you are acting[18] of any act or omission which could give rise to a claim by them against you. If requested to do so by the ***SRA*** you investigate whether anyone may have a claim against you.

7.10 Any obligation under this section or otherwise[19] to notify, or provide information to, the ***SRA*** will be satisfied if you provide information to your firm's ***COLP*** or ***COFA***, as and where appropriate, on the understanding that they will do so if necessary.

When you are providing services to the public or a section of the public:

Client identification

8.1 You take appropriate steps to ~~identify~~ establish[20] for whom you are acting

~~for~~ in relation to any matter.

Complaints handling

8.2 You ensure that, as appropriate in the circumstances, you either establish and maintain, or participate in, a procedure for handling ***complaints*** in relation to the legal services you provide.

8.3 You ensure that ***clients*** are informed in writing at the time of engagement about their right to complain about your services and your charges, and how ***complaints*** can be made.

8.4 You ensure that ***clients*** are informed, in writing:

(a) both at the time of engagement and, if a ***complaint*** has been brought at the conclusion of your ***complaints*** procedure, of any right they have to complain to the ***Legal Ombudsman***, the time frame for doing so and full details of how to contact the ***Legal Ombudsman***; and

(b) if a ***complaint*** has been brought and your ***complaints*** procedure has been exhausted:

(i) that you cannot settle the ***complaint***;

(ii) of the name and website address of an alternative dispute resolution (ADR) approved body which would be competent to deal with the ***complaint***; and

(iii) whether you agree to use the scheme operated by that body.

8.5 You ensure that ***clients' complaints*** are dealt with promptly, fairly and free of charge.

Client information and publicity

8.6 You give ***clients*** information in a way they can understand. You ensure they are in a position to make informed decisions about the services they need, how their matter will be handled and the options available to them.

8.7 You ensure that ***clients*** receive the best possible information about how their matter will be priced and, both at the time of engagement and when appropriate as their matter progresses, about the likely overall cost of the matter and any costs incurred.

8.8 You ensure that any ***publicity*** you are responsible for in relation to your practice is accurate and not misleading, including that relating to your charges and the circumstances in which ***interest*** is payable by or to ***clients***.

8.9 You ensure that ***clients*** ~~understand~~ are given clear and accessible information about[21] whether and how the services you provide are regulated and about the protections available to them.

When acting as part of a team[22]

8.10 When you are providing services to the public or a section of the public together with other individuals regulated by the SRA, any obligation under this section to take steps, establish or maintain or participate in procedures or to provide information to clients or others will be satisfied if other individuals regulated by the SRA with whom you are acting on any matter, do so on your behalf or in a manner which encompasses satisfaction of your own obligation.

Supplemental notes

Powers, commencement/transitional provisions

Explanatory Notes for the SRA on Solicitors' Code mark-up

1. It would be helpful to clarify that the Principles only apply to employees who are not solicitors insofar as they are relevant to their roles, not more generally for matters arising outside their work context, notwithstanding and subject to the impact of the "public confidence" Principle 2.

2. "Maintaining" public confidence is more appropriate than "upholding" it, the latter suggesting a more onerous positive obligation. That would be consistent with current Principle 6. The reference to "those delivering legal services" also seems far too broad when applied to the alternative unregulated sector – it is maintaining confidence in the solicitors' profession which needs to be protected, not the reputation of other multi-disciplinary/corporate service providers whose services may happen to include legal advice. Consistency with text with which the profession has become familiar would also be highly desirable here.

3. This formulation, with which the profession has become familiar, better reflects expected behaviours. A positive obligation to "act with independence" is easily capable of being misconstrued, especially by non-professional employees to whom the Principles will apply.

4. Small change but designed to ensure the obligation is a double one – i.e. to act with honesty and to act with integrity – and this is not an attempt to redefine what it means to act with integrity to require not acting dishonestly.

5. This is important to clarify that behaviour outside of a work context, especially by non-solicitor employees, is not caught by this Principle requiring encouragement to diversity and inclusion etc. (although it might separately of course impact Principle 2 if behaviour fails to maintain confidence etc.). If the SRA is trying to promote a change in this respect, it should be expressly consulting on this aspect.

6. Adding express reference to protecting confidentiality is extremely important to those non-solicitor employees bound by the Principles but not by the Code. It is also a sufficiently fundamental obligation, including for solicitors practising in unregulated entities, as to mandate its inclusion at Principles level. We have no strong views whether this is just added at the end of Principle 6 or highlighted by adding a new Principle 7.

7. Important to qualify by reference to the Overseas Rules otherwise this drafting would seem to override them.

8. Need to clarify this so it does not apply (when referring to "others" for example) to those with whom you are negotiating in the best interests of your client.

9. The word "authorised" is likely to cause confusion. Would it cover ostensible authority in a corporate context for example? This alternative provides more

clarity.

10. Client consent is needed as an exception to allow certain benefits to be retained as at present is permitted with consent. If this is not stated some would have concerns about whether consents contained in their terms of business, for example, would mean it was "proper" not to account the client for benefits received from third parties in connection with a retainer.

11. This can be deleted as it is covered by "introduce" in 5.4 (a) and therefore the text simplified.

12. Better to use the definition of own interest conflict in the Glossary. As drafted, this looks like it catches client conflicts too which is not intended.

13. This is important to ensure that within unregulated businesses a solicitor takes reasonable steps to satisfy him/herself that his/her business or employer has satisfactory conflicts management systems and controls in place in order to protect the solicitor's clients.

14. Extremely important confidentiality protection for information held within the unregulated sector – not just about a duty of confidentiality but about how the business protects information from attack, leakage and loss. Not just a key consumer protection, but also needed to support junior solicitors working, in the minority, in unregulated businesses.

15. The SRA should consider whether it is appropriate to extend this to cover confidential information which may not be privileged if, for example, it has emanated from the unregulated sector.

16. Important changes to highlight that the SRA has to make a proper and lawful request for information etc. before a solicitor is obliged to respond.

17. It is very important to retain a different level of breach, currently described in the Code as "serious misconduct" which goes way beyond material breach of the Principles or Code, as the basis for reporting breaches by other solicitors or regulated firms outside your own firm. Consider clarifying in the Glossary a definition of "serious misconduct". At present it is settled that this involves breaches involving dishonesty or which involve a serious arrestable offence as previous SRA guidance has made clear. To highlight the distinction also consider changing the terminology to "material" breaches instead of referring to "serious" breaches throughout. Many will assume that the change in terminology is intended to imply a change in substance to something more serious than material breaches.

18. It is very important that this is changed to clarify that as at present only current clients need to be notified of possible claims against you. As at present this would be done "promptly" so this has been added. If the SRA wants to change this important requirement to extend (significantly beyond what is currently expected of fiduciaries) it to cover clients for whom you have acted in the past

but are not currently advising, this should be subject to a separate consultation to which we expect PI insurers would wish to respond. Gunning principles could be relevant here, as the change is not highlighted in this consultation, nor explained.

19. It would be helpful for this to apply more generally, not just for section 7.

20. Use of the term "identify" is likely to cause confusion with anti-money laundering requirements. "Establish" would be better.

21. Solicitors cannot really ensure their clients actually "understand" what they tell them so they can only sensibly be required to provide clear and accessible information.

22. This new provision would be very helpful, especially for those operating within the unregulated sector without a COLP or risk and compliance support and also for those who operate providing services in teams alongside other solicitors to relieve individuals of having to take steps etc. themselves when someone else working with them will have done so, in effect, on their behalf.

CLLS PRRC comments on Draft SRA Code of Conduct for Firms [2017]

The SRA Principles comprise the fundamental tenets of ethical behaviour that we expect all those that we regulate to uphold. This includes all individuals and firms that we regulate, including authorised firms and their managers and employees in so far as is relevant to their roles[1]. The principles are as follows:

You:

1. uphold the rule of law and the proper administration of justice
2. ensure that your conduct ~~upholds~~ maintains public confidence in ~~the~~ you and your profession[2] ~~and those delivering legal services~~
3. ~~act with~~ do not allow your independence to be compromised[3]
4. act with honesty and with integrity[4]
5. perform your role ~~act~~ in a way that encourages equality, diversity and inclusion[5]
6. act in the best interests of each ***client*** and protect their confidential information[6]

This Code of Conduct describes the standards and business controls that we, the SRA, and the public expect of firms authorised by us to provide legal services. These aim to create and maintain the right culture and environment for the delivery of competent and ethical legal services to ***clients***~~consumers~~. If you are a MDP, the SRA Principles and these standards apply in relation to your regulated activities.

Sections 8 and 9 set out the requirements of managers and compliance officers in those firms, respectively.

Serious misconduct or material[16] breach may lead to our taking regulatory action against the firm itself as an entity, or its managers or compliance officers, who ~~all share~~ each have ~~responsibility~~ responsibilities for ensuring or taking reasonable steps to ensure that the standards and requirements are met[7]. We may also take action against employees working within the firm for ~~any~~ material breaches[16] of the principles ~~for which they are responsible~~by them. A breach may be ~~serious~~material[16] either in isolation or because it comprises a persistent failure to comply or pattern of behaviour.

Maintaining trust and equality and diversity

1.1 You do not abuse your position by taking unfair advantage of ***clients*** or others relying on your advice[8].

1.2 You monitor, report and publish workforce diversity data, as ***prescribed*** by the ***SRA***.

[Why are there no equivalent provisions to 1.3, 1.4 and 2.1-2.7 in the Solicitors' Code? These provisions seem just as applicable to authorised firms as they are to individual solicitors. These provisions could be incorporated under Paragraph 3.1 (Applicable Outcomes in the SRA Code of Conduct for Solicitors and RELs 2017).]

Compliance and business systems

2 .1 You have effective governance structures, arrangements, systems and controls in place ~~that~~ designed to ensure[11]:

(a) you comply with all the ***SRA's regulatory arrangements***, as well as with other regulatory and legislative requirements, which apply to you;

(b) your ***managers*** and ***employees*** comply with the ***SRA's regulatory arrangements*** which apply to them;

(c) your ***managers***, ***employees*** and ***interest holders*** and those you employ or contract with do not cause or substantially contribute to a breach of the ***SRA's regulatory arrangements*** by you or your ***managers*** or ***employees***;

(d) your ***compliance officers*** are able to discharge their duties under rules 9.1 and 9.2 below.

2.2 You keep and maintain records to demonstrate compliance with your obligations under the ***SRA's regulatory arrangements***.

2.3 You remain accountable for compliance with the ***SRA's regulatory arrangements*** where your work is carried out through others, including your ***managers*** and those you employ or contract with.

2.4 You actively monitor your financial stability and business viability of your regulated activities. Once you are aware that you will cease to operate, you effect the orderly wind- down of your activities.

2.5 You identify, monitor and manage all material risks to your business, including those which may arise from your ***connected practices.***

Cooperation and information requirements

3.1 You keep up to date with and follow the law and regulation governing the way you work.

3.2 You cooperate with the ***SRA***, other regulators, ombudsmen and those bodies with a role overseeing and supervising the delivery of, or investigating concerns in relation to, your legal services.

3.3 You respond promptly to the ***SRA*** and:

(a) provide full and accurate explanations, information and documentation in response to any proper requests or lawful requirements[15];

(b) ensure that relevant information which is held by you, or by third parties carrying out functions on your behalf which are critical to the delivery of your legal services, is available for inspection by the ***SRA***.

3.4 You act promptly to take ~~any~~ appropriate remedial action properly requested[15] by the ***SRA***.

3.5 You promptly inform ***clients*** ~~promptly~~ for whom you are acting[17] of any act or omission which could give rise to a claim by them against you. If requested to do so by the ***SRA*** you investigate whether anyone may have a claim against you.

3.6 You notify the ***SRA*** promptly:

(a) of any indicators of serious financial difficulty relating to you or your regulated activities;

(b) if a ***relevant insolvency event*** occurs in relation to you;

(c) of any change to information recorded in the ***register***.

3.7 You provide to the ***SRA*** an information report on an annual basis or such other period as specified by the ***SRA*** in the ***prescribed*** form and by the ***prescribed*** date. [NB SRA to provide further details of what is to be required here.]

3.8 You notify the ***SRA*** promptly if you become aware:

(a) of any material changes to information previously provided to the ***SRA***, by you or on your behalf, about you or your ***managers***, ***owners*** or ***compliance officers***; and

(b) that information provided to the ***SRA***, by you or on your behalf, about you or your ***managers***, ***owners*** or ***compliance officers*** is or may be false, misleading, incomplete or inaccurate.

3.9 You promptly report to the ***SRA*** or another ***approved regulator***, as appropriate, any serious misconduct[16] or material breach of their ***regulatory arrangements*** by any ***person*** regulated by them (including you) of which you are aware. If requested to do so by the ***SRA*** you investigate whether there have been any ~~serious~~ material breaches that should be reported to the ***SRA***.

Service and competence

4.1 You only act for ***clients*** on instructions from the ***client***, or someone

~~authorised~~ who can properly[9] to provide instructions on their behalf. If you have reason to suspect that the instructions do not represent your ***client's*** wishes, you do not act unless you have satisfied yourself that they do.

4.2 You ensure that the service you provide to ***clients*** is competent and delivered in a timely manner, and takes account of your ***client's*** attributes, needs and circumstances.

4.3 You ensure that your ***managers*** and ***employees*** are competent to carry out their role, and keep their professional knowledge and skills up to date.

4.4 You have an effective system for supervising ***clients'*** matters.

Client money and assets

5.1 You properly account to ***clients*** for any ***financial benefit*** you receive as a result of their instructions except where they have agreed otherwise[10].

5.2 You safeguard money and ***assets*** entrusted to you by ***clients*** and others.

Conflict and confidentiality

Conflict of interests

6.1 You do not act if there is an ***own interest conflict***[12] ~~conflict of interest between you and your **client**~~ or a significant risk of an ***own interest conflict***[12] ~~such a conflict~~.

6.2 You do not act in relation to a matter or a particular aspect of it if there is a ***client conflict*** or a significant risk of such a conflict in relation to that matter or aspect of it, unless:

(a) the ***clients*** have an agreed common purpose in relation to the matter or the aspect of it, as appropriate, and a strong consensus on how that purpose is to be achieved; or

(b) the ***clients*** are ***competing for the same objective*** which, if attained, by one ***client*** will make that objective unattainable ~~to~~ by the other ***client***:

and the conditions below are met, namely that:

(i) all the ***clients*** have given informed consent, given or evidenced in writing, to you acting;

(ii) where appropriate, you put in place effective safeguards to protect your ***clients'*** confidential information; and

(iii) the benefits to the ***clients*** of doing so outweigh the risks to the ***clients*** of you acting.

Confidentiality and disclosure

6.3 You keep the affairs of current and former ***clients*** confidential unless disclosure is required or permitted by law or the ***client*** consents.

6.4 Any of your individual employees who is acting for a ***client*** makes that ***client*** aware of all information material to the matter of which ~~the~~ that individual has knowledge except when:

(a) ~~legal restrictions prohibit them from passing the information to the ***client;*~~** disclosure of that information is prohibited by law

(b) the ***client*** gives informed consent, given or evidenced in writing, to the information not being disclosed to them;

(c) ~~there is evidence~~ the individual has reason to believe that serious physical or mental injury will be caused to the ***client*** or another if the information is disclosed; or

(d) the information is contained in a privileged [or confidential] [13] document~~s~~ that the individual has knowledge of only because ~~they have~~ it has been mistakenly disclosed.

6.5 You do not act for a ***client*** in a matter where that ***client*** has an interest adverse to the interest of another current or former ***client*** ~~or a former ***client***~~ for whom you hold confidential information which is material to that matter, unless:

(a) ~~all~~ effective measures have been taken which result in there being no real risk of disclosure of the confidential information; or

(b) the ***client*** or former ***client*** has given informed consent, given or evidenced in writing, to you acting, including to any measures taken to protect their information.

Applicable Outcomes in the SRA Code of Conduct for Solicitors and RELs 2017

7.1 The following sections of the SRA Code of Conduct for Solicitors, RELs and RFLs 2017 apply to you in their entirety as though references to "you" were references to you as a ***firm***:

(a) Referrals, introductions and separate businesses (5.1 to 5.5);

(b) [Include 1.3, 1.4, 2.1-2.7 as referred to above?]

(c~~b~~) Standards which apply when providing services to the public or a section of the public, namely Client identification (8.1), Complaints handling (8.2 to 8.5), and Client information and publicity (8.6 to 8.9).

Managers in SRA authorised firms

8.1 If you are a ***manager***, other than a manager based outside England & Wales with no management responsibility for your *firm's* business in England & Wales, you are responsible for compliance by your ***firm*** with this Code. This responsibility is joint and several if you share ~~management~~ responsibility with other ***managers*** of the ***firm***[14].

Compliance officers

9.1 If you are a ***COLP*** you take all reasonable steps to:

(a) ensure compliance with the terms and conditions of your ***firm's authorisation***;

(b) ensure compliance by your ***firm*** and its ***managers***, ***employees*** or ***interest holders*** with the ***SRA's regulatory arrangements*** which apply to them;

(c) ensure that your ***firm's managers***, ***employees*** and ***interest holders*** do not cause or substantially contribute to a breach of the ***SRA's regulatory arrangements***; and

(d) as soon as reasonably practicable, report to the ***SRA*** any serious misconduct or material[16] breach of the terms and conditions of your ***firm's authorisation***, or the ***SRA's regulatory arrangements*** which apply to your ***firm***, ***managers*** or ***employees***;

save in relation to the matters which are the responsibility of the ***COFA*** as set out in rule 9.2 below.

9.2 If you are a ***COFA*** you take all reasonable steps to:

(a) ensure that your ***firm*** and its ***managers*** and ***employees*** or the ***sole practitioner*** comply with any obligations imposed upon them under the ***SRA Accounts Rules***, rule [ ] of the Overseas Rules and in relation to financial controls, financial compliance, financial stability or financial viability;

(b) as soon as reasonably practicable, report to the ***SRA*** any serious misconduct or material[16] breach of the ***SRA Accounts Rules*** which apply to ~~them~~your firm and its managers and employees or the sole practitioner.

Supplemental notes

Powers, commencement/transitional provisions.

Explanatory Notes for the SRA on Firm Code mark-up

1. It would be helpful to clarify that the Principles only apply to employees who are not solicitors insofar as they are relevant to their roles, not more generally for matters arising outside their work context, notwithstanding and subject to the impact of the "public confidence" Principle 2.

2. "Maintaining" public confidence is more appropriate than "upholding" it, the latter suggesting a more onerous positive obligation. That would be consistent with current Principle 6. The reference to "those delivering legal services" also seems far too broad when applied to the alternative unregulated sector – it is maintaining confidence in the solicitors' profession which needs to be protected, not the reputation of other multi-disciplinary/corporate service providers whose services may happen to include legal advice. Consistency with text with which the profession has become familiar would also be highly desirable here.

3. This formulation, with which the profession has become familiar, better reflects expected behaviours. A positive obligation to "act with independence" is easily capable of being misconstrued, especially by non-professional employees to whom the Principles will apply.

4. Small change but designed to ensure the obligation is a double one – i.e. to act with honesty and to act with integrity – and this is not an attempt to redefine what it means to act with integrity to require not acting dishonestly.

5. This is important to clarify that behaviour outside of a work context, especially by non-solicitor employees, is not caught by this Principle requiring encouragement to diversity and inclusion etc. (although it might separately of course impact Principle 2 if behaviour fails to maintain confidence etc.). If the SRA is trying to promote a change in this respect, it should be expressly consulting on this aspect.

6. Adding express reference to protecting confidentiality is extremely important to those non-solicitor employees bound by the Principles but not by the Code. It is also a sufficiently fundamental obligation, including for solicitors practising in unregulated entities, as to mandate its inclusion at Principles level. We have no strong views whether this is just added at the end of Principle 6 or highlighted by adding a new Principle 7.

7. This more accurately reflects relevant responsibilities. It is misleading to suggest that compliance officers share the same responsibilities as managers.

8. Need to clarify this so it does not apply (when referring to "others" for example) to those with whom you are negotiating in the best interests of your client.

9. The word "authorised" is likely to cause confusion. Would it cover ostensible authority in a corporate context for example? This alternative provides more clarity.

10. Client consent is needed as an exception to allow certain benefits to be retained as at present is permitted with consent. If this is not stated some would have concerns

about whether consents contained in their terms of business, for example, would mean it was "proper" not to account the client for benefits received from third parties in connection with a retainer.

11. This change is necessary to avoid the impact that there is in effect an absolute guarantee of compliance ("effective to ensure"). Having systems and controls etc. in place which are "designed to ensure" compliance would better reflect what is intended by 2.1. Not every breach of the Code of course should also mean that there has been a breach of 2.1 just because, by definition, systems and controls have not been effective to prevent that breach.

12. Better to use the definition of own interest conflict in the Glossary. As drafted, this looks like it catches client conflicts too which is not intended.

13. The SRA should consider whether it is appropriate to extend this to cover confidential information which may not be privileged if, for example, it has emanated from the unregulated sector.

14. It is important to clarify the responsibilities of managers based outside England and Wales in international firms and who the SRA intends should be treated as having management responsibility for these purposes. Our mark up reflects what in practice we understand to be the current status quo at least so far as enforcement is concerned.

15. Important changes to highlight that the SRA has to make a proper and lawful request for information etc. before a solicitor is obliged to respond.

16. It is very important to retain a different level of breach, currently described in the Code as "serious misconduct" which goes way beyond material breach of the Principles or Code, as the basis for reporting breaches by other solicitors or regulated firms outside your own firm. Consider clarifying in the Glossary a definition of "serious misconduct". At present it is settled that this involves breaches involving dishonesty or which involve a serious arrestable offence as previous guidance has made clear. To highlight the distinction also consider changing the terminology to "material" breaches instead of referring to "serious" breaches throughout. Many will assume that the change in terminology is intended to imply a change in substance to something more serious than material breaches.

17. It is very important that this is changed to clarify that as at present only current clients need to be notified of possible claims against you. As at present this would be done "promptly" so this has been added. If the SRA wants to change this important requirement to extend (significantly beyond what is currently expected of fiduciaries) it to cover clients for whom you have acted in the past but are not currently advising, this should be subject to a separate consultation to which we expect PI insurers would wish to respond. Gunning principles could be relevant here, as the change is not highlighted in this consultation, nor explained.

Yours faithfully

THE CITY OF LONDON LAW SOCIETY

Professional Rules and Regulation Committee

Individuals and firms represented on this Committee are as follows:

Sarah de Gay (Slaughter and May, Chair)

Tracey Butcher (Mayer Brown International LLP)

Roger Butterworth (Bird & Bird LLP)

Raymond Cohen (Linklaters LLP)

Sonya Foulds (Freshfields Bruckhaus Deringer LLP)

Annette Fritze-Shanks (Allen & Overy LLP)

Antoinette Jucker (Pinsent Masons LLP)

Mike Pretty (DLA Piper UK LLP)

Jo Riddick (Macfarlanes LLP)

Chris Vigrass (Ashurst LLP)

Clare Wilson (Herbert Smith Freehills LLP)

Subject:	Looking to the Future – flexibility and public protection
Issued by:	Solicitors Regulation Authority
Consultation Date:	June 2016
Closing Date:	21 September 2016
Response Date:	18 September 2016
Respond to:	Name: Solicitors Regulation Authority Address: Regulation and Education – Policy – Handbook 2017 The Cube 199 Wharfdale Street Birmingham B1 1RN Email: consultation@sra.org.uk
CCUA Contacts:	Robert Marr, Chairman of the Legal & Technical Committee Email:1robertmarr@gmail.com Claire Stokes, Association Administrator Email: claires@ccua.org.uk
Representation:	The CCUA Legal & Technical Committee has drawn upon the views of its members. Our members currently represent 85% of all claims in the County Courts in England and Wales and regularly deal with consumer credit related matters, either as creditor representatives or as the creditor.

1. Introduction

The Civil Court Users Association ("CCUA") welcomes the opportunity to contribute to the SRA's consultation paper entitled "Looking to the future – flexibility and public protection".

The CCUA is a campaigning organisation that primarily campaigns for an efficient cost effective court service for its members. It does not have a regulatory function.

The comments that follow are therefore submitted by the CCUA's Legal & Technical Committee based upon observations and comments of members. Our interest in this area is because many of the Association's members are inter alia in house solicitors and solicitors within private practice representing primarily creditors or other professionals. The members generally engage in court proceedings to recover debts that are due and owing.

2. Replies to the Consultation's Questions

1. No.
   However, the time taken for an application to be processed should be drastically shortened;

2. Yes.

3. Yes.

4. No.

5. No, none are required. We support a move away from prescription.

6. Yes.

7. No.

8. No.

9. We prefer option 2. We take the view that it will work well in practice and practise.

10. Yes.

11. No.

12. No.

13. No.

14. Yes.

15. We take the view that “material breach” requires redefinition. In addition case studies need to be regularly updated to be relevant and of assistance to all. Further, a channel or channels of confidential communication (“hotline”) should be established to enable confidential discussions to occur. Finally, there should be whistle blowing protection written into the Codes of Conduct.

16. The paper summarises the position well. It is worth conducting regular reviews to ensure that the public and solicitors, including the solicitor brand prosper and are protected.

17. Unlikely.

18. We agree that the current position is continued.

19. We were evenly split in our views with part expressing the view that the rule is outdated and part expressing the view that it be retained. Regardless, it is important that the public and the solicitor brand is/are protected.

20. It is an acceptable requirement, promoting transparency and good practice. It promotes protections that are available for clients.

21. Yes.

22. No.

23. We do agree.

24. We do not think they should hold client money personally.

25. No. We take the view that all clients should receive the benefits of the Compensation Fund regardless of wherever they go to, to obtain advice.

26. We agree. However, we suggest that solicitors have a regulatory requirement to ensure that their firm or employer has professional indemnity insurance or equivalent insurance.

27. Any difficulties arising with our suggestion could be if a firm or an employer is uncooperative or is not transparent. The position could resemble the situation where junior solicitors were threatened with court action resulting from their errors.

28. Yes.

29. The requirements should be the same as for SRA regulated firms.

30. Thresholds could be arbitrary.

31. No.

32. Mixed regulators and regulation cause issues and problems. It sends a mixed message to consumers.

33. Yes.

3. Observation

We refer to one matter which was touched upon in the consultation but did not have a question dedicated to it - legal professional privilege. There appears to be a dichotomy between LPP within SRA regulated and non regulated bodies – whilst this may be from statute it poses questions and uncertainty for all, this cannot be correct given the attempts at clarity in the consultations other suggestions.

We therefore take the view that all bodies and organisations should consult and collaborate to resolve this issue so that there is certainty and therefore a lack of opportunity for mischief to arise.

4. Conclusion

The CCUA welcomes the opportunity to respond to this important consultation and looks forward to the response in due course

18 September 2016

Clapham & Collinge LLP

This response is made on behalf of the 4 equity partners of Clapham & Collinge LLP.

1. We have considered the response to the Consultation made by the Law Society and we support that response which raises in great detail some extremely important concerns. We are particularly concerned about the points they raise concerning undertakings which are so vital to the carrying out of so much of our day to day work, particularly when the issue of fraud is so prevalent. The lack of clarity with regard to conflicts of interest, already made less certain following the previous revision to our Code, is of particular concern.

2. Section 3 of the Consultation, in particular paragraphs 77 to 88, gives rise to concerns as to how it will operate in practice if implemented. In our view it will weaken the protection of the public and consumer. It is the SRA's job to regulate the profession and these proposals seem to us to be an attempt by the SRA to abrogate its responsibility in this regard under the guise of purporting to appease public consumer demand. However we query what evidence exists of such demand. In our view, if implemented, these changes will make the task of enforcement more difficult.

3. We have concerns regarding the proposed adoption of two codes; one for individuals and one for firms. The risk is that it will be difficult in some situations to establish clearly which applies and which prevails. This will be difficult enough for the profession itself, let alone for the public and consumer who are the persons aimed at being protected. It is a recipe for confusion all round.

4. Paragraph 8 of Annex 1 relating to Complaints is a worry. We are particularly concerned by 8.4 (ii) and 8.5. First we think that it may be difficult to find an ADR body which will be prepared to take on this type of work – trying to resolve complaints to firms or individual solicitors when the respondent has already tried and failed to resolve the complaint. The LeO is set up to deal with complaints at that stage. Secondly, dealing with the initial complaint can be extremely time consuming as can dealing with the LeO. Having to deal with a whole new layer between the two will greatly add to the burden. This is against a background, certainly in our case, of the majority of complaints either being resolved by us or being found to be unjustified by the LeO.

Thirdly, 8.5 states that a client's complaint shall be dealt with 'free of charge' – does that mean that the solicitor or firm must pay for the whole of the proposed ADR process whatever the outcome? If so this could be most unfair in many cases. In our experience, often it is the most unsustainable and unreasonable complaints that are taken the furthest. If it is the intention that the cost of any ADR effort to resolve a dispute be shared between the firm/solicitor on the one hand and the complainant on the other, then this should be clearly set out in the Codes. The proposal to add the ADR requirement, though perhaps considered an ideal standard and a way of relieving the LeO of part of its workload, is in our opinion going to be difficult to arrange in practice and prove time consuming and potentially costly; maybe very for the solicitor/firm if they have to bear all of the costs to comply with 8.5.

Yours faithfully

Clapham & Collinge LLP

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Partner

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Solicitors Regulation Authority
Regulation and Education - Policy - Handbook 2017
The Cube
199 Wharfside Street
Birmingham
B1 1RN

By email: consultation@sra.org.uk

21 September 2016

Dear Sir/Madam,

Subject: ClientEarth's Response to SRA Consultation: Looking to the future - flexibility and public protection

Overview

1. The SRA's aim, as explained in its consultation on a revised regulatory approach for solicitors and the organisations they practice in, is to consult on changes to the Practice Framework Rules (**PFR**) that will introduce greater flexibility for the profession and also allow it "*to innovate, compete and grow.*"

2. Established in 2007, ClientEarth is a leading not-for-profit, public interest environmental law organisation. Since its inception, ClientEarth has expanded to a team of 90 working in offices in London, Brussels and Warsaw in our programmes covering climate change, forests, biodiversity, toxics, and energy. We support and promote the development, implementation and enforcement of effective environmental law and policy in the EU and beyond. We translate our policy solutions into arguments for new or revised laws, and keep pressure on institutions and authorities to make sure the laws achieve their environmental aims and where necessary we bring cases to court to make sure laws are respected and upheld. Our work is is funded by grants from foundations and institutional donors, by donations and by limited consultancy income.

3. ClientEarth welcomes the SRA's consultation proposal to remove the restriction on solicitors being required to practice through a firm authorised by one of the legal regulators whenever providing services to the public. This restriction is an anomaly that places solicitors who do not work in a solicitor's firm at an unfair disadvantage when compared with non-solicitors.

4. ClientEarth is not regulated by the SRA. ClientEarth is a registered charity in the UK. ClientEarth employs solicitors among its programme staff as well as other experts with a range of backgrounds and qualifications in our three offices. Our employees who are solicitors hold practising certificates, and it is understood that for the purposes of the SRA they operate as in-house solicitors. ClientEarth also holds Public Indemnity Insurance (**PII**).

ClientEarth, as a not-for-profit body and charity, meets the criteria for carrying out reserved legal services under the transitional provisions in section 23 of the Legal Services Act 2007 (LSA). The SRA refers to such bodies as 'Special Bodies' and we note that in relation to them the SRA proposes:

"... to develop a framework that is flexible enough to allow the LSB to consider ending those transitional arrangements, and to bring special bodies within SRA entity regulation... we propose to develop a framework that is broadly similar to the approach we have previously taken to the regulation of multidisciplinary practices (MDPs) with entity regulation applying only where appropriate and proportionate." (para. 95 of the Consultation Paper)

5. We therefore intend to accept the SRA's offer, at para 96 of the Consultation Paper, to engage with the SRA Innovate programme to help devise a regulatory framework that will allow ClientEarth to provide reserved activities without the burden of unnecessary regulation. The SRA in the Consultation paper seeks views on a wide number of issues arising from it consultation proposals that are relevant to individual solicitors, solicitor's firms and a variety of other individuals and organisations that provide and use legal services. ClientEarth, in this response, will therefore focus on the questions that are the most pertinent to its work, namely questions 16, 24, 28 and 29 in Section 3 of the Consultation Paper only.

ClientEarth's response

"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?"

6. We consider the implementation of this proposal to be essential to remove the current anomaly with respect to solicitors. The current rules create an unnecessary restriction on the activities of in-house solicitors and alternative legal service providers, which places them at an unfair disadvantage when it comes to delivering non-reserved legal services to members of the public.

7. We therefore support the proposal.

8. Consequential changes should be made to the PFR, in particular to delete or amend Rule 4, In-House Solicitors when the SRA reviews these. At present Rule 4 is unnecessarily complicated as well as unduly restrictive. We understand that a further consultation will be held on such changes.

"*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?*"

9. We have no view on this matter. In practice, as a responsible employer, and given the nature of ClientEarth's funding, we would be unlikely to have client monies held by an individual staff solicitor.

"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?

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

10. ClientEarth does not object to the requirement for Special Bodies to have PII when providing reserved legal activities to the public or a section of the public. However, such PII must be proportionate to the level of activity undertaken and likely risk, when reserved activities only form a small part of a Special Bodies work and the risk of a claim is low.

11. In summary, we support a minimalist regulatory approach for charities and not-for-profit organisations (and solicitors employed by them) that is proportionate to their risk profile and recognises the valuable legal services they provide to members of the public under the terms of their constitution and charitable registration.

12. A copy of this response will be sent to the Innovate team.

Yours faithfully,

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20 September 2016

Solicitors Regulation Authority
Regulation and Education – Policy –
Handbook 2017
The Cube
199 Wharfside Street
Birmingham
B1 1RN

Dear Sirs

Looking to the Future

This letter responds to your Consultation - Looking to the Future. In response to your specific questions:

1. No, we have not.

2. Not entirely. In paragraph 43, you say that the Principles are intended to "convey a clear message" about your Regulatory Purpose. We do not endorse your view of your Regulatory Purpose. In our view, the SRA has a duty also to members of the profession to ensure that it is held in high regard both in this country and internationally. This therefore is to underpin, for instance, London as a centre for legal and financial services. Members of the profession should expect to look to the regulator to protect and enhance the profession's reputation. Against that background, we would suggest Principle 2 should be amended to read:

   "ensure your conduct does not damage the reputation of the profession"

   In relation to Principle 3, the SRA needs to explain what it means by this. As the 2015 Report "Independence, Representation and Risk" (Chapter 4) makes clear, it is not understood: "the current definition of independence in the SRA handbook does

not necessarily account for many of the complexities and nuances of independence in today's large legal practices".

It may become apparent in trying to explain this term that it alone is insufficient and more than the single word may be needed in the Principle.

3. No; see above.

4. Subject to the points made in 2 above, no.

5. In our view, there is significant risk in moving away from a "detailed" Code. It permits solicitors / firms to take the view that something is not clearly prohibited and therefore to push boundaries and/or take a risk on the basis that they can always argue the point if challenged. There are endless areas where this arises. Just some examples are as follows:

   (a) in complying with the duty of confidentiality, is it acceptable to take "inward secondees" – i.e. in-house lawyers from clients in circumstances where your firm holds confidential information from competing organisations? If so, what protections need to be put in place?

   (b) if you are appointed by X to act for Y (X choosing you because it is paying Y's fees) and X makes it clear you must not advise Y on anything other than certain points, should you decline to act on the basis that you are in breach of (new) Principle 2 and/or 3 and/or 6? (See Independence Report mentioned in 2 above; "Shadow Clients" at Chapter 4, page 59 ff).

   (c) At what points does the success fee on any work amount to an "own interest" conflict? Is it controlled by what is permitted at law under CFA's? If so, how do the higher sums now permitted under DBA's affect the position? Given that these apply only to contentious work, what is the position in transactional work?

   These are all issues which have been put to the SRA and on which there has been no answer. In our view, if a regulator does not make the effect of its rules clear, its ability to enforce is undermined. The less the practical guidance in the Code, the less clear the effect of the provisions.

6. No; we do not believe it will make it easy for solicitors to know how to act in detailed practical situations.

7. No.

8. Yes; a proper explanation of what is meant by "independence"; guidance on issues such as those mentioned in 5 above; greater attention to the conduct of in-house solicitors in demands they make of solicitors instructed on behalf of their employers.

9. It is vital that Option 1 is retained. The current "exception" which permits a firm to act for competing clients is very important for City firms. It reflects practice not just here but in all countries other than some in Scandinavia. In the context of this, the first sentence of your paragraph 63 is wrong. The only circumstance in which option 2 would work is if (sophisticated) clients are able to waive a conflict. Again, England & Wales is unusual in not permitting this.

   The writer of this letter chaired the Committee which led to the adopted of the current rules in 2006. He is happy to explain further the background to the current "exceptions" and why, illogically, the rules do not permit conflict waiver if that would be helpful.

10. Yes, but the practical assistance it provides for firms is limited.

11. No.

12. There is a lot which could usefully be added – please see 5 above.

13. Yes. It needs to be clear that "clients" in clause 3.5 applies only to current clients: the duty to inform is part of a solicitors fiduciary duty which ends on completion of the retainer. In addition, it is unclear in clause 2.3 whether "those you... contract with" is limited to others providing legal services or extends to all suppliers. The degree of record keeping under clause 2.2 needs to be made clear.

14. Yes.

14(a) The position helps to establish the authority within a firm of the individual with risk and compliance responsibilities. On the other hand, as the Code increasingly ceases to have practical guidance for solicitors, they increasingly do not refer to it and the existence of a COLP encourages this distancing from the regulatory rules – they assume that the COLP will have put in place internal procedures to cover anything required by the SRA. Increasingly, lawyers simply refer to those internal rules and guidance and tend to ignore the Code.

15. The SRA needs to be able to provide swift and practical answers to questions put to it, and to publicise its position for the benefit of other COLPs / firms. The issues in 5 above are just three examples.

16. We believe there are serious defects in the proposal. It cannot be right that solicitors in "alternative legal services providers" can provide non-reserved legal services without being bound by the same conflict rules and the same insurance requirements. Not only is that uncompetitive, but it also threatens to bring the "solicitor" brand into disrepute. Solicitors in the unregulated sector would also be without the risk management requirements of the SRA at entity level. We do not see why the SRA would not consider any solicitor acting without meeting these standards to be in breach of proposed Principle 2.

    The proposal will likely drive law firms to hive off non-reserved legal activities into entities not regulated by the SRA.

    It is also crucial to establish whether privilege will attach to work done by solicitors in the unregulated sector and to unqualified staff supervised by them. If it does not, this will likely bring the solicitor brand into disrepute when clients are prejudiced as a result.

17. We would be unlikely to want to hive out solicitors into an unregulated entity but if – as would seem likely – this would result in a material saving in the cost of regulation and other firms did it, we would likely have to follow. The issue of privilege would probably be the main impediment.

18. We agree with this proposal.

19. We do not have a view on this issue.

20. The clients of this firm – sophisticated buyers of legal services – do not require this information. For unsophisticated clients, we think this information should be provided.

21. We do not have a view on this.

22. No.

23. Yes.

24. We do not think they should do so.

25. Yes.

25(a) n/a

26. No.

27. Yes. All solicitors should be subject to the same insurance requirement. Anything else risks bringing the "solicitor" brand into disrepute. It also fails to ensure a level playing field and is therefore uncompetitive.

28. Yes, and that it should apply also to solicitors in Special Bodies who carry out non-reserved legal services.

29. We see no reason why it should not be the same as for other regulated entities.

30. Given that we are not in favour of solicitors working in an unregulated environment, no.

31. No.

32. Our only observation is that this shows how impractical the proposals are. It will be virtually impossible to separate / distinguish the solicitor from the unregulated entity and it will in practice be very hard indeed for the SRA to intervene at all.

33. Yes; it should be a defining feature of the entity being regulated by the SRA (the position with ABS's being an anomaly). However, if the SRA proposals are put into effect, we suspect that over time the solicitor brand will become fractured and continuing regulation of non-reserved activities will become untenable.

We trust you will find these comments helpful.

Yours faithfully

Clifford Chance

Clifford Chance LLP

Consultation: Looking to the future - flexibility and public protection

Response ID:575 Data

2. Your identity

Surname

READ

Forename(s)

TIM

We may publish a list of respondents and a report on responses. Partial attributed responses may be published. Please advise us if you do not wish us to attribute your response or for your name or the name of your firm or organisation to appear on any published list of respondents.

Attribute my/our response and publish my/our name.

Please identify the capacity in which you are submitting a response. I am submitting a response…

on behalf of my firm.

Please enter your firm's name:: Clifton Ingram LLP

3.

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

I do not understand the context in which this question is asked.

4.

2. Do you agree with our proposed model for a revised set of Principles?

No.

The removal of the principles that solicitors should 'provide a proper standard of service to your clients', 'act in the best interests of each client' and 'protect client money and assets' has negative implications for consumer protection and the maintenance of professional standards.

The Principles should continue to refer to the solicitor's duty to keep the affairs of the client confidential.

5.

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

The creation of separate codes of conduct distinguishes the responsibilities of an individual solicitor, wherever he or she is working, and those of a regulated entity. The creation of two codes is not an issue. However, the approach creates two tiers of solicitors: those working in a regulated entity and those working in an unregulated entity, with consequential risks to consumer protections and professional standards which risk damaging the standing of solicitors and creating confusion for consumers;

Although both of the draft Codes focus on brevity and simplicity, they provide less certainty about what is and is not permitted. Some solicitors might prefer a more definitive approach so that compliance is clearer and there is less discretion for the SRA to determine when there is a breach, which could result in enforcement action that might have been avoidable if the Codes were clearer. It is difficult to take an informed view on how the new Codes would work in practice be without seeing the associated guidance which the SRA has not published alongside the draft Codes.

The language of the draft Codes is imprecise and could mean that members currently practising in a fully compliant way could find themselves accused of a breach after the proposed new codes come into force.

There is some overlap between the two draft Codes, most noticeably in areas such conflict, complaints and client information/identification. If this is not addressed, it is not clear which would take precedence where such inconsistencies exist.

6.

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?

7.

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?

8.

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?

9.

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

10.

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

11.

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

The consultation makes clear that solicitors employed by an unregulated entity would continue to be regulated as individuals and would be subject to conflict rules. However, as the conflicts rules will not apply to unregulated entities, in practice they will not have much effect if any on the unregulated entities whilst the regulated entities will be subject to the same level of restriction as they are now or, potentially, a greater level depending on which of the two options on conflicts is adopted by the SRA.
The SRA offers two options for dealing with conflicts:
- Option 1 largely replicates the 2011 Code, in prohibiting a solicitor from acting where there is a conflict or significant risk of such a conflict, unless specified circumstances are met and protections are provided.
- Option 2 would narrow the ability to act given that it provides for a complete bar on acting where there is an actual conflict, and protections to be put in place if there is a significant risk of a conflict.
Option 2 may be unworkable because it is not always possible to identify that an actual conflict exists and a solicitor may unwittingly act in a conflict situation. Because the non-regulated colleagues of regulated solicitors would not be subject to conflict rules, there is a risk of confusion to consumers, a very favourable competitive advantage to unregulated entities and lack of a fundamental consumer protection for clients of unregulated entities.

12.

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

13.

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

14.

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

15.

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?

16.

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.

Consideration of these questions will benefit from the input of current COLPs and COFAs who are best placed to identify unnecessary requirements while firms and sole practitioners will also wish to consider how valuable the roles themselves are.

17.

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

See above

18.

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?

There is insufficient evidence to support these proposals or the expected benefits from their implementation, which are stated to include improved access to quality services at affordable prices, enhanced professional standards, and increased employment opportunities.
In particular, the proposals could have undesirable and/or unintended consequences as follows:
Reputation and standing of solicitors
The proposals may result in two tiers of solicitors. Those working in unregulated businesses are unlikely to be able to give advice which is legally privileged, will not be required to have PII, clients will not have the benefit of compensation fund and the protection of the principles governing conflicts of interest. Not only is this likely to create consumer detriment and confusion but it is likely to damage the reputation of the title of solicitor.
Legal Professional Privilege (LPP)
LPP should attach to clients seeking advice from a solicitor holding a current practising certificate wherever he or she practises and any attempts to dilute or make LPP more difficult to obtain or enforce could erode the concept of LPP, which is a cornerstone of the justice system and a key right of clients. This could also undermine the standing of the solicitor profession both at home and abroad. It is not right in principle for LPP to be a distinguishing factor between regulated and unregulated service providers.
It is likely that in-house solicitors working in an unregulated entity, for example a local authority, providing advice to individuals or organisations other than the unregulated entity would not have the protection of LPP.
Conflicts and confidentiality
The proposals will result in confidentiality only applying to individual solicitors working in an unregulated entity, including in an in-house team, but not to the entity or to other employees. There is a risk that a solicitor may unwittingly act in a conflict situation and that clients may not be aware of a potential or real conflict of interest or of the fact that the entity is not subject to the rules on conflict. It also results in making regulated entities less attractive because they will be competitively disadvantaged versus unregulated entities.
Consumer protections - Professional Indemnity Insurance (PII) and the Compensation Fund
Under the SRA's proposals, solicitors working in unregulated entities would not be required to have PII and their clients would not have access to the Compensation Fund if things go wrong. This risks eroding a key element of current client protection. The proposals risk creating two tiers of client protections - with different rules and protections applying to solicitors' clients depending on the kind of entity in which the solicitor is working.
The SRA proposes that solicitors working from unregulated entities would be required to make sure that their clients understand whether and how the services they provide are regulated and the protections available to them. Even for those working within the legal sector, insurance and client protections are complicated topics which are not easily digested and understood and clients cannot be expected to fully comprehend the implications of purchasing their legal services through an unregulated provider. The proposals also risk undermining or depleting the existing Compensation Fund as solicitors working from unregulated entities would not have to contribute to the Fund; this would seem likely to mean that solicitors

working in regulated entities would have to make additional contributions to secure the Fund's viability, increasing the regulatory burden on them and exacerbating the two tier profession that could result from the proposals.

Consumer confusion about status

Under the proposals, solicitors holding a current practising certificate would be able to use their title whether providing legal services to the public through a regulated or unregulated entity. While a provider would not be able to use the term 'solicitors firm' or 'solicitors' unless the entity was regulated by the SRA,this would seem unlikely to mitigate the risk of consumer confusion especially where the unregulated entity described itself as a 'law firm' or 'legal services firm' or advertised that they employ solicitors. Consumers will lose the assurance they currently have as to quality and protections when they engage a solicitor. It is inappropriate that consumers will have to undertake fairly substantial due diligence. This will additionally undermine the standing of the profession internationally.

Annual practising certificate (PC) fees

There is no information on this point and the SRA needs to undertake and publish an analysis of the projected impact of its proposals on the PC fee, and in particular the turnover based firm fee. The SRA should not close this consultation until this information is available.

Supervision

Newly qualified solicitors without any experience would be able to set up their own unregulated firms. Newly qualified solicitors working in an unregulated entity would no longer have the requirement of support and guidance from more experienced solicitors. This will increase the risks to clients as well as putting newly qualified solicitors themselves at risk, and negatively impact on the standing of the solicitor profession Damage to standards will increase incrementally as this applies year on year and fewer solicitors in unregulated entities have ever received supervision.

19.

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

See answer to Q 16 above

20.

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?

21.

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?

22.

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

23.

21. Do you agree with the analysis in our initial Impact Assessment?

24.

22. Do you have any additional information to support our initial Impact Assessment?

25.

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?

See reply to Q 16 above

26.

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?

27.

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? If not, what are your reasons?

See reply to Q 16 above

28.

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

29.

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

30.

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?

31.

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

32.

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?

See reply to Q 16 above

33.

31. Do you have any alternative proposals to regulating entities of this type?

See reply to Q 16 above

34.

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?

See reply to Q 16 above

35.

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

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By email: consultation@sra.org.uk

Our Ref	Your Ref	Date
1218411		21 September 2016

Dear Sirs

Response to consultation document "looking to the future – flexibility and public protection

We are writing in response to the SRA's consultation document, "looking to the future – flexibility and public protection".

Clyde & Co is an international law firm with 45 offices and associated offices and 2000 lawyers globally, with approximately 900 in the UK. We are a leading provider of legal services to the insurance market and the premier ranked firm for professional indemnity work. We also advise professional clients, including lawyers and law firms, on matters of professional regulation.

We are concerned by the SRA's proposals, which we consider to be radical, unwarranted and likely to cause irreparable harm to the profession. We fully endorse the Law Society's response to the consultation and that of the City of London Law Society (whose questionnaire we answered). Accordingly, this response will be brief.

Before we respond to some of the specific consultation questions, we would make a number of general remarks on the two main proposals, which are: (i) to allow solicitors to practise in unregulated firms providing unreserved services; and (ii) a revised set of Principles and Code of Conduct, with a separate code for firms and individuals.

Solicitors practising in unregulated firms

The SRA's proposal that solicitors will be able to provide unreserved services in unregulated firms will in our view result in a deterioration of professional standards and materially reduce the protections available to the consumer of legal services.

While solicitors practising in unregulated firms would be subject to a personal code of conduct under the SRA's proposals, their employers would not. Unregulated entities will have no systems in place to ensure their solicitors receive appropriate training and comply with their professional obligations. On the contrary, unregulated entities are likely to place their solicitors under pressure to relax their ethical standards, if these conflict with its commercial objectives.

It is particularly important, in our view, that junior solicitors in the formative stage of their careers gain experience in a traditional law firm environment so that they develop good ethical practices. However, we note that there are no requirements under the SRA's proposals for a minimum level of experience before a solicitor may work in an unregulated firm or provisions for supervision of the solicitor thereafter.

Any deterioration in ethical standards will also impact on consumer protection. For example, an unregulated firm would not be under the same requirements regarding the management of conflicts of interest or client confidentiality as a regulated firm. An unregulated firm would also have much greater flexibility (than a regulated firm) regarding the terms of its retainer, including greater scope to limit its duties and its liability to the client.

Moreover, solicitors employed in unregulated firms will not be required to hold PII cover under the SRA's proposals, so consumers may be left without redress if something goes wrong and individual solicitors may be faced with substantial personal liability. We also consider it optimistic to assume that unregulated firms would choose to obtain PII cover if their firm does not already have it in place. It may also be that premiums, which are based in part on perceived risk, would be materially higher for an unregulated firm as insurers would not have the same confidence (as they would with a regulated firm) that systems were in place to ensure good behaviours and practices.

Nor would the client be entitled to compensation under the Solicitors' Compensation Fund, in circumstances in which the client would face a much higher risk (from an unregulated firm) of the misappropriation of client funds.

A further important client protection, which the client of an unregulated firm might not benefit from, is legal professional privilege. Legal privilege is a fundamental human right of the client and a cornerstone of our legal justice system. We consider that it would be undesirable for solicitors to be giving legal advice which is not protected by legal professional privilege. If this were to be permitted, the principle of legal professional privilege would be likely to be undermined.

The SRA has suggested that there should be no objection in principle to these reduced protections, provided the consumer is informed of the difference in protections available between an unregulated and a regulated firm. We strongly disagree. Many consumers are unlikely to understand the distinction between the regulated and the unregulated firm, even if it is explained to them diligently by the solicitor in an unregulated firm. The recent Competition & Markets Authority interim study found that the majority of consumers are not aware of the regulatory status of their provider or what this implies for consumer protection. The majority of consumers assume that all legal service providers are regulated.

Unregulated firms will have a commercial interest in downplaying the significance of the differences and there would be no regulatory recourse against them if they did so. Even if the client is informed of the limited protections available from an unregulated firm, the importance of those protections may only be fully appreciated by the client when something goes wrong and they are not available.

The erosion in professional standards and the loss of important consumer protections, which are inevitable consequences of the SRA's proposals, will significantly and irreparably damage the public's trust and faith in the profession. What is more, the SRA has not presented any reliable evidence that its proposals would lead to further competition in the legal market, or increased affordability for consumers. On the contrary, the Competition & Markets Authority has not found any evidence that regulatory costs are a barrier to entry for any new solicitors' firm.

The proposed changes to the Principles and the Code of Conduct

We are of the view that the current Code of Conduct, which is only 5 years old, is sufficiently clear and does not require change. We also believe that having separate codes for solicitors and firms is unhelpful and will give rise to confusion, particularly for solicitors practising in regulated firms, who will have to have regard to both codes. Moreover, solicitors' firms would need to devote substantial resources to putting systems in place to ensure compliance with the new Principles and Code. Such an administrative burden should only be imposed on firms where this is warranted by a clear deficiency in the current Code, which we do not believe is the case here. Neither do we consider that the purported benefits of the proposed changes, either for consumers or the profession, justify or are proportionate to the substantial burden of implementing them.

We note that the SRA's proposed new framework, involving a code for individual solicitors and a separate code for firms, is driven by the proposal that solicitors be able to practise in unregulated firms, while still being subject to professional standards. Should the SRA reconsider that proposal, then the proposed new framework would not be necessary and solicitors' firms might be saved the considerable administrative burden of having to adapt to a new Code of Conduct. However, if the proposals for a new set of Principles and Code of Conduct were to be proceeded with, we would need to see further details of the guidance which the SRA would publish to supplement the current proposals, before we could form a view as to their adequacy.

We now turn to the specific consultation questions. We do not propose to comment on every question set out in the consultation document.

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

We do not see any reason to shorten or revise the current Principles.

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

Principle 2 is a rewording of current Principal 6, without reference to the individual ensuring that his/her conduct upholds confidence in them personally. We prefer the original wording of Principle 6.

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?***

We would favour the retention of the current Principles. However, failing this, we consider the retention of Principle 5, which requires a solicitor to provide a proper standard of service to his client, to be a fundamental professional standard which should be retained as a core Principle.

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

We would favour the retention of Indicative Behaviours, which we consider helpful in the interpretation of the objectives. We are concerned that, by removing the Indicative Behaviours, there will be greater scope for interpretation of the objectives, which would lead to greater uncertainty, and inconsistency in their application.

If the Indicative Behaviours are not retained, substantial guidance and/or case studies would be needed to replace them (which would lengthen the Codes considerably). As a minimum, guidance and/or case studies should be provided to address conflicts management. Solicitors practising in unregulated firms would also need guidance as to what constitute reserved services and what information they should provide their clients as to the distinctions between an unregulated and a regulated firm.

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?***

As noted above, we do not consider that wholesale change to the Code is necessary or desirable.

Our primary concern is that shortening the Code will increase the scope for its interpretation and lead to inconsistency in the application of the Code by firms and solicitors, and possibly even within the SRA.

If the SRA's proposals were to be implemented, then we would need much more information about the guidance and case studies that would accompany the Codes before we could a form a view as to their adequacy.

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

We are in favour of Option 1. The substantially common interest "exception" (although perhaps not really an exception at all but a scenario where there is no actual conflict) is particularly important to our insurance defence practice where, subject to any actual conflicts, we routinely act for insurer and insured. We think it would be much preferable to keep something close to the current conflict rule wording.

We consider that any new rule should continue to prohibit firms acting for both sides in litigation or on transactional matters where directly adverse, even with consent, but that informed consent can make sense where there is only indirect adversity.

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

We refer to our response to Question 6 above.

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

Yes.

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

It would be helpful if further guidance was provided as to what would constitute a "serious breach" for the purposes of rule 9.1 of the proposed new Code, pursuant to which the COLP/COFA is required to report such a breach to the SRA.

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

We refer to our comments above. In short, we consider that the opportunities are likely to be limited and the threats to the standing of the profession and consumer protection to be serious.

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?***

As a significant proportion of our work involves the provision of reserved services, and there is often overlap between reserved and unreserved work, it is not immediately obvious that there would be any material benefit to the firm of setting up a separate business for unreserved work.

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?***

All practising solicitors, whether providing reserved or unreserved services, should be subject to regulation to ensure that professional standards are adhered to across the profession.

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?***

Yes, it is necessary to set out the requirements necessary for a solicitor to be "qualified to supervise". However, we are concerned about the removal of current Outcome 7.8, which provides that firms must have systems in place for supervising client matters, including regular checking of the quality of work by suitably competent and experienced people. This is an essential requirement to ensure the sustained quality of legal services. Of course, even were the SRA to retain Outcome 7.8, in some form, on the basis of the current proposals unregulated firms would not be required to provide appropriate supervision. This would inevitably lead to a deterioration of the standard of legal services, and considerable detriment to consumers and the profession.

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

We would need more information about what this would involve before we could form a view, although we have no objection in principle to a requirement that such information should be displayed. However, a much more important issue, in our view, is that consumers understand what protections are *not* available to them when instructing a solicitor in an unregulated firm.

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

We disagree. We do not believe that the Consultation paper has demonstrated that the proposed changes will prompt any meaningful improvement in competition or in access to legal services and may well have an adverse effect on competition.

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?***

We agree that individual solicitors in unregulated firms should not be allowed to hold client money in their own names.

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?**

We agree that it would not be appropriate to allow clients of solicitors working in unregulated firms, who would not contribute to the Fund, to claim from the Fund.

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

We disagree. PII cover should be a mandatory requirement for all solicitors to protect consumers and themselves. Solicitors frequently advise their clients on matters which are of considerable importance to their clients and redress should be available to clients if something goes wrong.

It is not sufficient protection for consumers to require that the solicitors inform them that they do not have PII available. Unregulated firms will have no such obligation, and will have an interest in deterring their solicitors from emphasising the lack of PII cover. Even where consumers are advised that their solicitor does not have PII, they may not appreciate the significance of this until a problem arises.

Individual solicitors working in unregulated firms who choose not to take out PII will be exposed to personal liability. In practice, it may be difficult for individual solicitors to insist that their employer obtain PII, whether at an equivalent level to that available while working for a regulated firm, or at all.

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

Please see our response to Question 26.

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?***

For the reasons we have given in response to Question 26, we also consider that PII cover should be mandatory for Special Bodies to ensure consumer protection and the protection of individual solicitors.

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

Special Bodies should be required to maintain an equivalent level of PII to regulated firms, to ensure that both consumers and individual solicitors are adequately protected.

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?***

It is difficult to envisage how the SRA can effectively regulate solicitors practising in unregulated firms without the firm's cooperation. For example, how would the SRA go about obtaining documents, held by the firm rather than the individual solicitors, when they will have no jurisdiction over the firm?

We hope that the above is of assistance.

Yours faithfully

Clyde & Co LLP

Clyde & Co LLP

STRICTLY PRIVATE & CONFIDENTIAL

Solicitors Regulation Authority
Regulation and Education – Policy – Handbook 2017
The Cube
199 Wharfside Street
Birmingham
B1 1RN

By post and by email: consultation@sra.org.uk

Our ref CES/DBW/10288/107/2584068/V02

21 September 2016

Dear Sirs,

SRA consultation: Looking to the Future - flexibility and public protection

We write in response to the consultation launched by the Solicitors Regulation Authority (**SRA**) in June 2016, Looking to the Future - flexibility and public protection (the **Consultation**).

1. ABOUT US

1.1 Maurice Turnor Gardner LLP

Maurice Turnor Gardner LLP (**MTG**) is a law firm which specialises in advising professional practices, with a particular focus on law firms. MTG advises partnerships, LLPs and other forms of professional practice on a range of issues, including constitutional documents, governance issues, international structure, LLP conversions, team moves, mergers/demergers and disputes (both internal and external). MTG has a particular specialism advising on regulation and compliance, including advising on compliance with the SRA Handbook and the authorisation of recognised bodies and ABSs.

1.2 The COLP Forum

Prior to the introduction of the SRA Handbook in 2011, MTG launched the COLP Forum, a forum for COLPs and senior law firm representatives to discuss challenges presented by the (then new) regulatory regime.

The COLP Forum still meets regularly to discuss hot topics in law firm regulation and share best practice in law firm risk management. The COLP Forum thrives on interactive discussion between COLPs, and has also attracted contributions from high calibre external commentators such as representatives from the SRA and the Information Commissioner's Office.

The COLP Forum has around 100 members, ranging from magic circle firms with global turnover in excess of £1bn to two partner boutique firms. Between 20 and 45 law firms are represented at each meeting of the COLP Forum.

1.3 Contributors to this response

MTG has prepared this response to the Consultation with contributions from COLPs and representatives of firms which participate in the COLP Forum. All COLP Forum members had the opportunity to contribute to and review this response before it was submitted, although not all of the COLP Forum's members have done so.

The following firms or individuals participate in the COLP Forum and expressly wish to indicate that they share the views set out in this response.

- Forsters LLP
- Maurice Turnor Gardner LLP
- Penningtons Manches LLP
- Withers LLP

- Nick Giles, Managing Partner, Edwin Coe LLP
- Eddie Breen, General Counsel and COLP, Gowling WLG (UK) LLP

1.4 Confidentiality

We do not require this response to the Consultation, or any part of it, to be kept confidential.

1.5 Further information

We would welcome the opportunity to discuss the issues highlighted by the Consultation with the SRA. Please feel free to contact Corinne Staves, Partner, Maurice Turnor Gardner (corinne.staves@MTGLLP.com, 020 7786 8724).

2. LAW SOCIETY RESPONSE

2.1 We have had the chance to review the submission of the Law Society dated September 2016 and we share the concerns expressed by the Law Society in its submission.

2.2 We have the following additional comments.

3. GENERAL COMMENTS

We set out below detailed comments relating to the questions posed in the Consultation. We also have some general comments arising from the proposals set out in the Consultation.

3.1 Risk of damage to the profession

We are concerned about the proposal to allow individuals to practise as solicitors outside SRA regulated entities. Of particular concern is the real risk of damage to the legal profession and the public perception of the solicitors' profession if such individuals are not required to adhere to fundamental protections for clients, including PI insurance, client money rules and a minimum amount of practical experience before practising outside supervision. This is our overwhelming objection to the proposals.

We do not feel that advising clients of the differences between a solicitor practising from a regulated entity and an unregulated entity will be fully appreciated by clients when they select an adviser. The differences involve a level of nuance that in today's online age (and the corresponding immediacy that goes with it) is likely to go unnoticed until an issue arises and the client realises that they are not protected in the same way as they would have been if they had appointed a solicitor practising from a regulated firm.

The last ten years has seen examples of law firm failures and poor behaviour from rogue individuals, and we have seen the damage that this can cause the staff, clients, suppliers and others involved with those practices and individuals. Those circumstances and their consequences arose in an era of full regulation. One cannot imagine how much more damage might have been done if regulatory obligations and scrutiny had been less rigorous.

The legal profession and solicitors are held in high esteem, and rightly so. Once this has been eroded and the perception of solicitors tarnished (perhaps reducing the profession to little more than a 'brand'), it will be impossible to regain that position.

3.2 **Administrative burden**

COLPs and law firm managers have devoted significant resource, time and effort to understanding the requirements of the SRA Handbook for their firms and to designing, implementing and maintaining effective systems and controls to ensure compliance.

The new rules are very different and will require a detailed and time consuming assessment of the extent to which firms' existing systems achieve the required outcomes. It seems inevitable that following the review, firms will need to implement changes to reflect the SRA's new requirements, including training for all staff.

The rationale for the new regime, seemingly driven by a strong desire to shorten the Code, does not seem to justify the imposition of such a significant additional burden on COLPs, managers and firms. Further, the benefits do not seem to be proportionate to the anticipated burden. This is unwelcome only five years after the significant efforts that were needed to understand and ensure compliance with the 2011 Handbook.

4. DETAILED COMMENTS

We do not have comments on every question posed in the Consultation. We refer below to the numbering adopted in the Consultation itself.

4.1 Question 3

This standard could be interpreted as a moving target. If public confidence in the profession or those providing legal services is lost, does the standard required of us diminish?

4.2 Question 4

It seems odd that we are no longer explicitly required to provide a proper standard of care to our clients. This is at the heart of the provision of legal services, so merits its current status as a Principle.

4.3 Question 5

The indicative behaviours in the current Code are a useful guide in practice. Although not binding, it can be helpful to have a clear example of how a provision might operate in practice, both in terms of aiding the understanding of a practising solicitor and of reinforcing the judgment of a COLP.

We are concerned that the deletion of indicative behaviours will give firms and solicitors too wide a scope within which to interpret the relevant Code of Conduct. This will not only remove a layer of certainty, but will potentially open COLPs to additional pressure from within their firms (or for solicitors within unregulated firms, to pressure from their non-solicitor managers) to take a robust view where the indicative behaviours might have offered support for a more prudent interpretation.

The importance of certainty and guidance is very keenly felt where the SRA does not deliver the collaborative support and two-way interaction that policy makers have previously promised. COLP Forum firms have commented that although the SRA has spoken of an open dialogue with firms and support in achieving the outcomes, in practice there is very limited support. For example, many firms would welcome the opportunity to discuss queries or judgement issues with a relationship manager (or similar). In practice, firms have also commented that the SRA has been quick to issue formal notices, rather than taking a proactive and collaborative approach to contact the firm and understand the issues and relevant factors before determining the action needed (if any).

As a minimum, guidance and/or case studies will be needed to address the following issues:

- Which activities fall within the reserved legal activities (or not).
- How/when to operate information barriers (or not).
- The separate business provisions (particularly where a business that is currently regulated decides to split into a regulated business and an unregulated business).
- Practical examples of how to manage conflicts, including in conveyancing transactions.
- What is meant by "serious" under 9.1(d) of the Code for Firms? How is this different from the "material" standard to which we have become accustomed under Authorisation Rule 8.5?

4.4 Questions 6 & 10

We welcome the initiative to address the difficulty in the current Handbook regarding exactly what is meant by 'you'.

At this stage, it is impossible to comment on whether the Codes will work in practice. A greater understanding of the final detail, including the accompanying guidance, will be needed. Even then, it is rarely until the Codes are applied in practice that the issues emerge. We refer to our earlier points regarding the strength of the rationale for doing so and the administrative burden of getting to grips with a new set of rules.

We are concerned that the obligation to investigate under O7.7 and O7.9 of the Code for individuals places an open ended burden on individual solicitors. This exceeds the statutory powers of investigation conferred on to the SRA. Further, with limited options to intervene in unregulated firms, this power may be a vital part of the SRA's investigatory and enforcement function and effectively place the burden of investigation and enforcement onto individuals.

4.5 Question 11 & 12

O2.1 - The requirement in O2.1 that a firm has systems to ensure that its interest holders and those with which the firm contracts do not breach the SRA rules places a heavy burden on the regulated firm.

Where firms split and have both regulated and unregulated businesses, it is odd that solicitors can contract with whomever they choose if operating through an unregulated firm (no matter how obvious their inconsistency with the SRA Code).

There is a burden on regulated firms to ensure that non-managers (e.g. employees) are compliant. Surely it is prudent that there is an equivalent obligation on individual solicitors for staff/employees (where for example they oversee a team).

O8 – There is "Joint and several" responsibility for managers of firms. Presumably this is intended to mean that all managers are responsible, and one manager's failure increases the obligation on the others to ensure firm compliance. This principle is sound. However the wording has two issues:

1. Several responsibility - one manager could be required to discharge the entire regulatory burden, even if other managers are part of the business. This cannot be right.

2. Joint and several liability is most commonly encountered when determining how liabilities or costs are shared, with financial consequences. For example, in a general partnership the general partners are jointly and severally liable for the firm's debts. The UK Government introduced the LLP vehicle to enable members to be protected against such liability and this wording undermines that limited liability protection. For example, this wording means that managers must comply and the costs of compliance are shared on a joint and several basis by the managers, not by the firm. This is a new and unacceptable risk.

O9.1(d) is this intended to replace the current provisions relating to the reporting of patterns of non-material breaches or has the SRA concluded that it is no longer necessary to report such patterns (unless of course they are 'serious' under O9.1(d))? Guidance on when to report patterns of non-serious breaches would be welcome.

4.6 Question 14 & 15

There are different views on the role of the COLP but on balance, it is thought a useful role to create a focal point for risk management and compliance within a firm. This entails a risk that other managers feel that the risk management function has been delegated to the COLP (or COFA) and they have no role to play.

In practice, there is sometimes friction between the COLP and other managers (the risk management team becoming known as the 'Business Prevention Unit'). For this reason, absolute clarity is needed so that COLPs do not have to 'defend' their interpretation of the SRA Code against other managers who are often eager to act on a client's instructions and may take a more robust, commercial view of the Code's provisions.

We assume the reference to 'recognised bodies' in Question 14 is a typographical error and the reference should be to 'authorised bodies' (on the grounds that the actual intention is that the COLP and COFA roles will apply equally to both recognised bodies and licensed bodies).

4.7 Question 16

To allow solicitors to undertake non-reserved legal services in alternative legal service providers will open up to them a great proportion of the work available to solicitors in regulated firms while retaining the title "solicitor" and the prestige attached to it.

It is anticipated that the new rules would incentivise regulated firms to split-off their non-reserved legal services while themselves retaining only the small amount of reserved work. We disagree with the SRA's assertion that these arrangements are unlikely to "emerge in any numbers". There appears to be a clear regulatory benefit to firms undertaking work through a new alternative legal service provider structure, and simply transferring work back to the main body of the firm for reserved services such as the execution of deeds.

We consider that most clients are unlikely to fully understand the meaning or significance of, for example, the lesser PII protection or legal privilege involved with engaging an unregulated provider. Allowing solicitors to practise within these structures where these protections are unavailable or restricted, while retaining the title "solicitor", is likely to increase consumer confusion significantly.

It is important to make sure that consumers are appropriately protected, not only for the sake of doing so but also to protect the title of solicitor from becoming tarnished.

4.8 Question 19

We agree that the current requirements that a solicitor undertake 12 hours of management training and be entitled to practise for 36 months before being "qualified to supervise" may be overly prescriptive without providing any real assurance of competence. However, removing it seems to present far greater risks than retaining an imperfect system.

If these requirements are removed, effective rules would need to be implemented in their stead. For example, if a junior solicitor wishes to set up a firm practising in a certain area, it would be sensible for him/her to have relevant experience in that practice area. There is a concern that consumers will believe that having completed their training and earned the title 'solicitor' that person will be a fully trained, rounded lawyer, whereas the reality is that their breadth of experience may still be very limited.

Has any research been undertaken into the expected long term effect of these proposals on the training of solicitors for the future? If a number of firms decide to become unregulated, or split their regulated and unregulated operations, the opportunities for thorough and continuing supervision and training of trainee and junior solicitors would significantly reduce. This is likely to have a detrimental impact on the availability and quality of training available to the next generation of solicitors and thus the quality and pipeline of future solicitors. Finally, if a reduced number of trainees are recruited each year into regulated firms, are the SRA confident that this will not have a detrimental impact on diversity in the profession?

4.9 Question 20

SRA regulated firms are required to have protections in place to protect consumers. It would seem to be a matter of choice for the firm whether it chooses to advertise this or not. However, it is vital that clients understand what protections are **not** available to them when engaging a solicitor operating from an unregulated business.

The proposals place an onus on clients themselves, many of whom are unsophisticated laypersons, to research their legal providers. It is imagined that more often than not, price is the key/only factor which has a bearing on selection decisions. This may reduce the choice of legal services advice down to a costs/benefit analysis, whereas the current system ensures that by choosing a solicitor, the client does not have to make compromises.

4.10 Questions 21 & 22

While the intention to raise awareness is admirable, we fear it will have little or no meaningful impact on consumers of legal services.

4.11 Question 23

Yes, we agree that individuals should not be allowed to hold client monies.

However, due to the likelihood of confusion between unregulated entities with practising solicitors and regulated entities with practising solicitors, we feel that unregulated entities holding client

monies should be subject to controls over client monies. While we appreciate this is challenging for the reasons set out in the Consultation, this is a vital protection. If this protection proves logistically impossible, the proposed changes should not be introduced.

Finally, to exempt non-regulated providers from these rules would contribute further to the "uneven playing field" regulated firms face as a result of the additional regulation and the costs of compliance.

4.12 Question 25

Yes, we agree that the SRA Compensation Fund should not be available to clients of solicitors working in unregulated firms.

4.13 Question 26 & 27

No, we do not agree that unregulated firms should not be required to have PII cover.

There is a real danger of harm to clients and consumers if insurance cover is not compulsory. We recognise the challenges if the proposed model is adopted, but (as for client monies) there must be a way for the unregulated entity (which is likely to be the party with which the client has contracted) to guarantee protection for services provided by a solicitor.

It also creates an uneven playing field in terms of costs for those practising as solicitors.

One area where this is particularly acute is run off insurance. The burden on managers when winding up a firm is significant, and rightly so, to ensure that clients are protected. Run off insurance can be a significant cost, running to several hundred thousand pounds even for two or three partner firms. In addition, there is the additional cost and burden of ensuring that clients and files are re-homed prior to cessation.

Unregulated firms would not face the same obligations.

This highlights another issue: How can firms switch from regulated to unregulated status? It is possible that the system might be abused to escape the onerous obligations on cessation. For example, a firm wishes to cease practising, so it stops undertaking reserved legal activities for a certain period, steps back from SRA regulation and then ceases to operate. Will it escape the run off obligation? If not, is the run off obligation triggered when the change of status occurs (and if so, how will this work in practice as we imagine that a number of firms may wish to continue in business but cease to be SRA regulated).

4.14 Paras 149 – 154 - Legal professional privilege

We recognise that availability of legal professional privilege is outside the SRA's powers. However, we have concerns that clients will not appreciate its value and the implications of using an unregulated firm unless the SRA imposes requirements on firms to explain this complex issue to ensure client/consumers make an informed decision when deciding to forgo privilege.

A possible side effect of the legal position on privilege is that solicitors working in unregulated firms might enter into direct engagements with clients to secure privilege. In the event of negligent advice, this exposes the individual to personal liability and the client to only one (probably uninsured) individual to seek redress for the losses suffered.

4.15 Question 30 & 31

We agree with the SRA that the threshold approach to entity regulation is not desirable, due to the arbitrary nature of such a scheme and the "moving target" element where individuals join or leave the entity in question.

We recognise the difficulty in deciding an appropriate approach, but a firm staffed with a substantial number of solicitors may 'look and feel' to a consumer like a regulated firm. It is argued that this risk needs further consideration.

4.16 Question 32

We agree that an inability to intervene is the logical conclusion from the proposals in the Consultation.

However, this is unsatisfactory for clients and consumers, and solicitors given the risk to the public perception of the solicitors' profession. If a satisfactory solution cannot be reached to enabling the SRA to intervene where solicitors are acting or there is a risk of confusion, then again this would tend to suggest that the new proposals are flawed as a matter of principle.

One area of particular concern is how the reserved legal activities will be policed. At the heart of this new regime is the principle that the SRA must be able to ensure that solicitors are not undertaking reserved legal activities as part of an unregulated business.

Please let us know if you wish to discuss this.

Yours faithfully,

Maurice Turnor Gardner LLP.

Maurice Turnor Gardner LLP

Consultation: Looking to the future - flexibility and public protection

Response ID:609 Data

2. Your identity

Surname

Earl

Forename(s)

Anthony Howard

We may publish a list of respondents and a report on responses. Partial attributed responses may be published. Please advise us if you do not wish us to attribute your response or for your name or the name of your firm or organisation to appear on any published list of respondents.

Attribute my/our response and publish my/our name.

Please identify the capacity in which you are submitting a response. I am submitting a response…

on behalf of a local law society

Please enter the name of the society.: Cornwall Law Society

3.

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

No

4.

2. Do you agree with our proposed model for a revised set of Principles?

No

5.

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

The removal of the principles that solicitors should 'provide a proper standard of service to your clients', 'act in the best interests of each client' and 'protect client money and assets' has negative implications for consumer protection and the maintenance of professional standards.

.

6.

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?

The Principles should continue to refer to the solicitor's duty to keep the affairs of the client confidential

7.

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?

No

8.

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?

The creation of separate codes of conduct distinguishes the responsibilities of an individual solicitor, wherever he or she is working, and those of a regulated entity. The creation of two codes is not an issue. However, the approach creates two tiers of solicitors: those working in a regulated entity and those working

in an unregulated entity, with consequential risks to consumer protections and professional standards which risk damaging the standing of solicitors and creating confusion for consumers;

9.

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

10.

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

11.

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

The consultation makes clear that solicitors employed by an unregulated entity would continue to be regulated as individuals and would be subject to conflict rules. However, as the conflicts rules will not apply to unregulated entities, in practice they will not have much effect if any on the unregulated entities whilst the regulated entities will be subject to the same level of restriction as they are now or, potentially, a greater level depending on which of the two options on conflicts is adopted by the SRA.
The SRA offers two options for dealing with conflicts:
- Option 1 largely replicates the 2011 Code, in prohibiting a solicitor from acting where there is a conflict or significant risk of such a conflict, unless specified circumstances are met and protections are provided.
- Option 2 would narrow the ability to act given that it provides for a complete bar on acting where there is an actual conflict, and protections to be put in place if there is a significant risk of a conflict.
Option 2 may be unworkable because it is not always possible to identify that an actual conflict exists and a solicitor may unwittingly act in a conflict situation. Because the non-regulated colleagues of regulated solicitors would not be subject to conflict rules, there is a risk of confusion to consumers, a very favourable competitive advantage to unregulated entities and lack of a fundamental consumer protection for clients of unregulated entities.

12.

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

Although both of the draft Codes focus on brevity and simplicity, they provide less certainty about what is and is not permitted. Some solicitors might prefer a more definitive approach so that compliance is clearer and there is less discretion for the SRA to determine when there is a breach, which could result in enforcement action that might have been avoidable if the Codes were clearer. It is difficult to take an informed view on how the new Codes would work in practice be without seeing the associated guidance which the SRA has not published alongside the draft Codes.
The language of the draft Codes is imprecise and could mean that members currently practising in a fully compliant way could find themselves accused of a breach after the proposed new codes come into force.
There is some overlap between the two draft Codes, most noticeably in areas such conflict, complaints and client information/identification. If this is not addressed, it is not clear which would take precedence where such inconsistencies exist.

13.

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

Please see answer to 10

14.

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

Please see answer to 10

15.

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?

Please see 10

16.

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.

Yes

17.

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

Clearer definition of their duties with case studies and consideration of different duties in some respect depending on the size of the firm

18.

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?

There is insufficient evidence to support these proposals or the expected benefits from their implementation, which are stated to include improved access to quality services at affordable prices, enhanced professional standards, and increased employment opportunities.
In particular, the proposals could have undesirable and/or unintended consequences as follows:
Reputation and standing of solicitors
The proposals may result in two tiers of solicitors. Those working in unregulated businesses are unlikely to be able to give advice which is legally privileged, will not be required to have PII, clients will not have the benefit of compensation fund and the protection of the principles governing conflicts of interest. Not only is this likely to create consumer detriment and confusion but it is likely to damage the reputation of the title of solicitor.
Legal Professional Privilege (LPP)
LPP should attach to clients seeking advice from a solicitor holding a current practising certificate wherever he or she practises and any attempts to dilute or make LPP more difficult to obtain or enforce could erode the concept of LPP, which is a cornerstone of the justice system and a key right of clients. This could also undermine the standing of the solicitor profession both at home and abroad. It is not right in principle for LPP to be a distinguishing factor between regulated and unregulated service providers.
It is likely that in-house solicitors working in an unregulated entity, for example a local authority, providing advice to individuals or organisations other than the unregulated entity would not have the protection of LPP.
Conflicts and confidentiality
The proposals will result in confidentiality only applying to individual solicitors working in an unregulated entity, including in an in-house team, but not to the entity or to other employees. There is a risk that a solicitor may unwittingly act in a conflict situation and that clients may not be aware of a potential or real conflict of interest or of the fact that the entity is not subject to the rules on conflict. It also results in making regulated entities less attractive because they will be competitively disadvantaged versus unregulated entities.
Consumer protections - Professional Indemnity Insurance (PII) and the Compensation Fund
Under the SRA's proposals, solicitors working in unregulated entities would not be required to have PII and their clients would not have access to the Compensation Fund if things go wrong. This risks eroding a key element of current client protection. The proposals risk creating two tiers of client protections - with different rules and protections applying to solicitors' clients depending on the kind of entity in which the solicitor is working.
The SRA proposes that solicitors working from unregulated entities would be required to make sure that their clients understand whether and how the services they provide are regulated and the protections

available to them. Even for those working within the legal sector, insurance and client protections are complicated topics which are not easily digested and understood and clients cannot be expected to fully comprehend the implications of purchasing their legal services through an unregulated provider. The proposals also risk undermining or depleting the existing Compensation Fund as solicitors working from unregulated entities would not have to contribute to the Fund; this would seem likely to mean that solicitors working in regulated entities would have to make additional contributions to secure the Fund's viability, increasing the regulatory burden on them and exacerbating the two tier profession that could result from the proposals.

Consumer confusion about status

Under the proposals, solicitors holding a current practising certificate would be able to use their title whether providing legal services to the public through a regulated or unregulated entity. While a provider would not be able to use the term 'solicitors firm' or 'solicitors' unless the entity was regulated by the SRA,this would seem unlikely to mitigate the risk of consumer confusion especially where the unregulated entity described itself as a 'law firm' or 'legal services firm' or advertised that they employ solicitors. Consumers will lose the assurance they currently have as to quality and protections when they engage a solicitor. It is inappropriate that consumers will have to undertake fairly substantial due diligence. This will additionally undermine the standing of the profession internationally.

Annual practising certificate (PC) fees

There is no information on this point and the SRA needs to undertake and publish an analysis of the projected impact of its proposals on the PC fee, and in particular the turnover based firm fee. The SRA should not close this consultation until this information is available.

Supervision

Newly qualified solicitors without any experience would be able to set up their own unregulated firms. Newly qualified solicitors working in an unregulated entity would no longer have the requirement of support and guidance from more experienced solicitors. This will increase the risks to clients as well as putting newly qualified solicitors themselves at risk, and negatively impact on the standing of the solicitor profession Damage to standards will increase incrementally as this applies year on year and fewer solicitors in unregulated entities have ever received supervision.

19.

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

Please see response to 17

20.

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?

Please see reply to question 17 as to general concerns

21.

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?

Please see reply to question 17

22.

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

Yes this should be a requirement of all firms carrying out legal services

23.

21. Do you agree with the analysis in our initial Impact Assessment?

24.

22. Do you have any additional information to support our initial Impact Assessment?

25.

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?

Yes

26.

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?

Consideration of this question will benefit from the input of current in-house teams and relevant local employers.

27.

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? If not, what are your reasons?

yes but careful consideration has to be given so as to avoid confusion with consumers as to whether they have the protection or not of the compensation fund

28.

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

careful consideration has to be given so as to avoid confusion with consumers as to whether they have the protection or not of their solicitor having PII cover

29.

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

The potential problems set out in previous replies and the concern that the consumer is not going to be protected from knowing that they may obtain legal advise from an in house solicitor or unregulated solicitor who will be carrying out regulated legal work without the protection of that solicitor having PII cover or having access to the compensation fund. The differences in the consumers protection must be clear to the public

30.

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?

Consideration of this question will benefit from the input of special bodies, such as law centres, which play an important role in providing access to justice for vulnerable people who may not be able to afford access to legal services.

31.

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

Consideration of this question will benefit from the input of special bodies, such as law centres, which play an important role in providing access to justice for vulnerable people who may not be able to afford access to legal services.

32.

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?

33.

31. Do you have any alternative proposals to regulating entities of this type?

34.

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?

All solicitors or alternative legal providers should be subject to the same rules and provide the same protection to the consumers so that we are all working on a level playing field

35.

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

yes

Looking to the future - flexibility and public protection

Response by the Council of Mortgage Lenders
to the Solicitors Regulation Authority consultation paper

Introduction

1. The CML is the representative body for the residential mortgage lending industry that includes banks, building societies and specialist lenders. Our 139 members currently hold around 97% of the assets of the UK mortgage market. In addition to home ownership, CML members also lend to support the social housing and private rental markets.

2. We welcome the opportunity to respond to this consultation. We have responded only with regard to the aspects of the consultation of most interest to our members. Enquiries on the content of this consultation should be sent to jennifer.bourne@cml.org.uk

Enforcement policy

3. We note that the SRA is planning to consult on their enforcement strategy later this year. Streamlining existing regulation by moving from relatively prescriptive rules to principles-based regulation, with increased flexibility in how to apply the rules, means there is a greater reliance on regulated firms and individuals to exercise good judgement as to whether they are compliant.

4. Good guidance and support from the regulator will therefore be essential to ensure that firms and individuals do not, deliberately or innocently, relax the standards expected of them, which can then be detrimental for their clients. We welcome the intention to provide guidance in the form of toolkits and case studies. This will need to be supported by strong supervision and enforcement. Post credit-crunch, lenders uncovered significant solicitor fraud and we have previously expressed concern about the SRA's enforcement of its regulated firms. We therefore welcome the forthcoming review of enforcement.

Simplified code of conduct for solicitors

5. With regard to the conflict of interests section of the code, and Q9 in particular, it is important that any changes made to the current code should not impact on what is currently acceptable practice in the conveyancing profession around joint representation of lenders and borrowers. The proposed drafting will lose some of the detail that exists in relation to lender and borrower representation in conveyancing transactions and it would be helpful to understand whether this will be retained in guidance or case studies. (refer to Q5 of CP)

Where solicitors can practise

6. We only have a general comment that, as clients, our members will want to be reassured that wherever a solicitor is practising, they are subject to the same standards; and that the client protections remain the same regardless of where the solicitor is practicing. We agree that sole practitioners should only provide reserved legal services as an entity regulated by the SRA, or another approved regulator.

Handbook reform: what it means for consumer protection

7. We note that a solicitor working in an alternative legal provider does not have the same protections that would apply if they were working in an SRA authorised firm. We agree it will need to be made clear to clients what protections will apply, and that SRA should require their firms to display such information to consumers (Q20). Lender clients will consider the level of protection afforded them in deciding whether they wish to use the services of a solicitor in an alternative legal provider.

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telephone 0845 373 6771 fax 0845 373 6778 website www.cml.org.uk

8. In relation to client money, we agree that solicitors working in an alternative legal services provider should not hold client money in their own name. This could open up additional risks around the sole control of client monies, as well as the other matters highlighted in the consultation paper. (Q23)

9. In relation to the Compensation fund, we note that access to the Compensation Fund is already restricted for lender clients, but we make the general observation that it must be made clear to clients of solicitors working in alternative legal providers that they will not be able to access the fund. (Q25)

10. In relation to the proposal not to make individual professional indemnity insurance cover a requirement for individual solicitors, we would expect that lenders will need to take into account the client protections afforded by the alternative legal provider and may choose not to use a solicitor if they feel that the protections available to them as a client are not robust enough.

Intervention

11. We note and agree with the proposed position around interventions for individual solicitors and regulated firms versus unregulated firms.

Tracking documents and case studies

12. We have reviewed the tracking documents for the proposed codes for firms and individuals, and the case studies provided on the SRA website.

13. As we highlighted earlier, we note that the draft code and tracking documents will remove most of the indicative behaviours. I.B 3.7 currently sets out when it is appropriate to act for both buyer and mortgage lender in a conveyancing transaction, in the wider context of conflicts of interest. We anticipate that without some form of additional guidance, and or case studies in this area, the well-accepted custom of joint representation of buyer and mortgage lender in a conveyancing transaction may unnecessarily be questioned by those new or inexperienced in conveyancing, which could cause unnecessary delays or concerns. It also removes the reference to the agreed certificate of title between the CML and Law Society, which again may give rise to queries about that document's status which is well-accepted. We would therefore urge that IB 3.7 is retained in some way, either by direct reference in the Code or in guidance.

14. We welcome the inclusion of a requirement for client identification, however we feel that guidance and/ or case studies will be of benefit as to what is 'appropriate'. Currently there are a range of ways to check a client's identification, some more robust than others. The existing anti-money laundering legislation and guidance as well as the wider issue of fraud should be considered when considering guidance as to what is appropriate.

CML

September 2016

Consultation: Looking to the future - flexibility and public protection

Consultation questionnaire form

This form is designed to be completed electronically—in MS Word. Please save it locally before and after completing it.

Question 1

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

We are supportive of the need to maintain high standards in the profession and secure that all those practising as Solicitors satisfy the criteria in the Suitability Test 2011.

We know of no situations where the practical application of the test has created any issues for individuals or employers.

Question 2

Do you agree with our proposed model for a revised set of Principles?

We welcome the simplification of the principles, but note particularly the removal of the principle to "protect client money and assets". While this could be considered to be a behaviour consistent with acting in the best interests of each client, the presence of specific accounts rules and the apparently high incidence of Solicitors who are brought before the SDT for failing to handle client assets correctly, leads us to conclude that this is valuable to retain as a separate principle. This is particularly important to Local Authorities as clients of external Solicitors, as our assets are in fact public assets and tax payers' money, which we have a duty to manage appropriately.

We note that while local authorities are subject to the Public Sector Equality Duty under the Equality Act 2010 in a way that many regulated entities are not, the presence of a principle around equality, diversity and inclusion seems incongruous when read alongside the other principles, which focus on specific professional conduct. As we must act in a way consistent with the principle by virtue of the Equality Act 2010, we do not object to the inclusion of this principle, but felt this a relevant observation to make. We note that this is broadly consistent with the existing principles and is something that the SRA considers important in terms of maintaining confidence in the profession.

Question 3

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

While we welcome the simplified approach and don't feel that the deletion of existing principle 5 (provide a proper standard of service to your clients) has much impact, the absence of the word "trust" from the revised principles is surprising. In the context of the SRA's recent "Question of Trust" campaign, the concept of being able to trust your legal advisor, seems distinct to having confidence in them or the profession. The wording of this Question 3 suggests too that the SRA believes there is a distinction between trust and confidence. Perhaps revised principle 2 could be amended to read (or similar):

"2. ensure that your conduct upholds public confidence in the profession and ***trust in*** *those delivering legal services"*

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?

No – the reduced number and simplified approach to the principles will make it easier to apply the Principles across practice areas, including Local Government and other sectors where there may be differing levels of regulation and oversight from other bodies.

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?

It will be of particular use to receive guidance from the SRA as to the application of the new Codes and Practice Framework Rules (in due course) to the conduct of reserved and non-reserved activities by local authority legal teams, using existing local government powers under the Local Authorities (Goods and Services) Act 1970, the Yorkshire Purchasing Organisation Case and existing Rule 4 of the Practice Framework Rules. Please see further below.

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?

The simpler, more focussed code is to be welcomed. In terms of in house practice, as highlighted below in our response to Question 8, it is in the interests of both the SRA and in house Solicitors to have clarity as to what is meant by "public or a section of the public", specifically in the context of local authority employed Solicitors who wish to provide advice to other bodies within the powers set out by the Local Authorities (Goods and Services) Act 1970. We cannot understate how important this is to understand.

We feel the drafting of 6.4 could be clarified in terms of the phrase "information material to the matter".

Question 7

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

Section 8.4 references referrals of disputes to ADR - we are not aware that this is a current requirement. What happens if we do not agree to use the scheme operated by that body? It would be useful to receive some further clarity around this.

Please see response to question 9 in relation to conflicts of interest.

Question 8

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

While it is perhaps not a matter to be immediately included in the code, it is in the interests of both the SRA and in house Solicitors to have clarity as to what is meant by "public or a section of the public", specifically in the context of local authority employed Solicitors who wish to provide advice to other bodies within the powers set out by the Local Authorities (Goods and Services) Act 1970. Section 8.1 may need to be amended accordingly.

Question 9

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

Option 2 is preferable as it simplifies matters and not only protects clients, but Solicitors, by prohibiting acting in situations of actual conflicts of interest and allowing for similar exceptions where there is a significant risk of a conflict of interest arising, as is currently provided for. Option 1 suggests that you can act in the presence of a conflict of interest, with safeguards, but we would question whether that should actually the case.

The shorter drafting in Option 2 is sufficiently wide to allow for consideration of matters that are in Option 1, specifically that at (b).

Both versions appear to be somewhat circular in the context of the current definition of "Client Conflict" which refers to actual conflicts and significant risks of conflicts.

Question 10

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

We do not have any comments to make in relation to this question as it is not specifically relevant to local authority practise.

Question 11

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

We do not have any comments to make in relation to this question as it is not specifically relevant to local authority practise.

Question 12

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

We do not have any comments to make in relation to this question as it is not specifically relevant to local authority practise.

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?

We do not have any further specific issues to highlight.

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.

We do not have any comments to make in relation to this question as it is not specifically relevant to local authority practise.

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?

We do not have any comments to make in relation to this question as it is not specifically relevant to local authority practise.

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?

In terms of local government lawyers, this proposal would enable us to deliver non-reserved legal services to other public sector bodies, the third sector and the public through the medium of a trading company (in line with the applicable local government legislation around charging and trading). In reality, the larger proportion of the work undertaken by local authority legal teams is in fact reserved activities and so we would question whether this would be a particularly appealing avenue, as it may be more profitable in the medium to long term to create an ABS instead.

While alternative legal service providers may *choose to employ Solicitors to supervise the non-reserved work, it seems unlikely that this will be an immediate reaction to the changes, as the costs for the businesses will increase, including in relation to the costs of compliance. We feel these changes are unlikely to have a large impact on provision through alternative legal service providers.*

However, if it could be evidenced that this would lead to increased supervision by regulated individuals of currently unregulated legal work to consumers, we feel that this could only have a positive effect on the protection of consumers and confidence in the profession.

The question raised at paragraph 89 is important in relation to whether privilege would still apply to advice provided by an alternative legal service provider, employing Solicitors in some roles.

We note that Annex 5 to the Consultation at page 26 includes a scenario where the new approach to regulation would allow individual in house Solicitors the ability to provide non reserved legal advice to the public. This of course does not recognise the additional step required by local authorities in providing services to the public of establishing a trading company. We do not agree that this is a likely scenario, despite the interest shown by a number of local authorities around becoming an ABS. A large part of local authority's work is advocacy and property transactions, which as highlighted above are reserved legal activities.

Furthermore, if such advice would not be privileged we would be extremely concerned as to the implications of that for recipients of such advice. Legal professional privilege is an essential element of a functioning legal system. Privilege should attach to clients seeking advice from anyone holding a current practising certificate, no matter the entity they are employed within.

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?

Please see our response to question 16.

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?

Local authority employed Solicitors operate to provide non-reserved and reserved activities, primarily to their employer. The local authority itself is not an entity authorised by the SRA. Where the core work of a local authority employed Solicitor is reserved activities, they do so on the basis set out at paragraph 8 of the consultation document.

As stated previously in our response, the point which is vital for us to understand is the extent to which other local authorities, public and third sector bodies fall within "public or section of the public". The SRA has received a copy of the opinion of James Goudie QC in response to a request for an opinion from Lawyers in Local Government and the Local Government Association, as to whether such bodies would fall within "public or section of the public". This was unequivocal in its conclusion that the above wording did not prohibit local authority employed Solicitors from providing reserved legal activities to the types of body indicated above. In discussion, the SRA has highlighted that the Legal Services Board is able to request guidance on this wording (which originates from the Legal Services Act 2007) from the government.

We feel that this is of such importance, that the SRA and LLG should jointly approach the LSB to make such a request of the government as soon as possible, so that this can be clarified and the outcome of the SRA's regulatory review can reflect this new information.

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?

While recognising that the requirement does not apply to local government legal teams, the existing requirements seem overly prescriptive and ultimately not fit for purpose. As the SRA recognises in paragraph 101, the requirement to have practised for at least 36 months within the last 10 years is no guarantee of their current knowledge of the law, nor their ability to effectively supervise another.

Question 20

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

For individuals and organisations which do not habitually instruct Solicitors, the legal advice itself can be sufficiently daunting for them, let alone the consumer rights they enjoy as users of such services. We feel it is therefore very important that consumers have an easy way of accessing information in relation to the protections afforded to them, particularly in the context of a fast paced and changing market.

Question 21

Do you agree with the analysis in our initial Impact Assessment?

While it is difficult to predict with 100% certainty how the market will respond to the proposed changes, the conclusions drawn seem logical. However, as highlighted above, the assumptions made in relation to how local authority legal teams may react to the changes are flawed and do not recognise the specific legislative environment in which local authorities work, nor the nature of the work we undertake.

Question 22

Do you have any additional information to support our initial Impact Assessment?

Please see response to question 21.

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?

We agree with the proposed approach.

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?

In house Solicitors would not normally be responsible for holding client money, as they are an arm of the client organisation and will work closely with the finance department. Where providing services to external bodies, they should be holding money in accordance with the SAR or not at all (i.e. arranging for direct payments between the purchaser and seller on a land transaction). However, this is not what many external bodies are used to (if they have dealt with traditional firms) and in the interests of opening up the market place to alternative service delivery models, it seems sensible to provide this option.

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?

If not, what are your reasons?

We agree with the proposed approach, but also see there are risks in not providing this or similar recourse for clients of solicitors working in alternative legal services providers.

Question 26

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

We agree with the proposed approach, but would welcome the inclusion of an obligation that applies now under the Practice Framework Rule 4.2(b) whereby a Solicitor should ensure that their employer carries sufficient indemnities for the nature of the work being undertaken.

Question 27

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

This does potentially create a situation where a consumer receives negligent advice, suffers a loss and is unable to recover their losses from the alternative legal services provider. This is clearly not a desirable outcome.

Please see response to question 26.

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?

Yes, these are treated differently to non-reserved legal activities for a valid reason, that they are potentially high risk and high value. It would be counter intuitive to allow them to continue to provide services to the public, in a similar way to other Solicitors, without some form of insurance or indemnity behind them.

Question 29

Do you have any views on what PII requirements should apply to Special Bodies?

We do not have any specific views on this point.

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?

We agree with the SRA's view that it is not desirable. It is inconsistent with the legislative requirements and would be inconsistent with the approach otherwise being adopted in terms of opening up the market.

Question 31

Do you have any alternative proposals to regulating entities of this type?

We do not have any alternative proposals.

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?

We do not have any views on this subject.

Question 33

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

We agree with the SRA's proposal.

Thank you for completing the **Consultation questionnaire form**.

Please save a copy of the completed form.

Please return it, along with your completed **About you form**, as an email attachment to consultation@sra.org.uk, by **21 September 2016**.

Alternatively, print the completed form and submit it by post, along with a printed copy of your **About you form**, to

Solicitors Regulation Authority
Regulation and Education - Policy - Handbook 2017
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199 Wharfside Street
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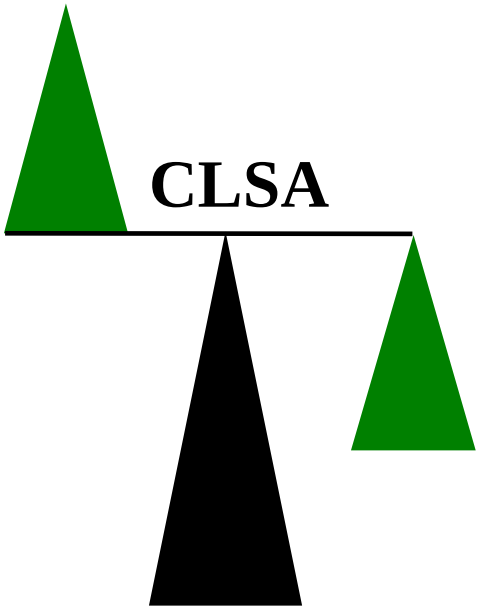

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The Criminal Law Solicitors' Association
Response to the SRA consultation
"Looking To The Future: Flexibility And Public Protection".

The Criminal Law Solicitors' Association is the only national association entirely committed to professionals working in the field of criminal law. The CLSA represents criminal practitioners throughout England and Wales and membership of the Association is open to any solicitor - prosecution or defence - and to legal advisers, qualified or trainee - involved with, or interested in, the practice of criminal law. The CLSA is responding to the consultation on behalf of its members.

In short, we understand it is proposed that there should be:

- two codes of conduct;
- no indicative behaviours;
- fewer topline principles and the wording of those remaining should be varied;
- an ability for solicitors to provide unreserved legal services through unregulated entities;
- a revision of accounts rules including a new definition of client money.

By way of preamble, we are concerned as to the motives for the proposed reforms to regulation.

Furthermore, it is unclear why these proposals are being brought forward so soon after the root and branch revision of the regulation of solicitors necessitated by the Clementi reforms.

We understand that the apparent justification for such a fundamental revision of the regulatory framework is said to be "unmet need".

We are wholly unclear as to any evidence for this "unmet need" and further how the proposals would, if it in fact exists, meet such a need.

It is clear to us that the "unmet need" envisaged by our regulators is not concerned with advice deserts created by the reduction, sometimes wholesale, in availability of legal laid for the most needy but, instead, the SRA appear to have identified a section of the population requiring legal services provided by a solicitor which comprises of individuals and small businesses who have to pay for legal services but who are not able or willing to afford the legal services provided through regulated firms.

We have not seen any empirical evidence for the existence of this marketplace or the need to create a new type of legal services provision by solicitors to provide it.

It is, in our view, wholly unsatisfactory to fundamentally alter the regulatory regime to provide for need which has not been empirically quantified or allocated a monetary value. It is almost as if someone has said it must exist so we will say that it does. We

are also concerned that our regulators see fit to attempt to manipulate or create a market when in fact their role is to make sure that individuals and firms that we regulate operate independently and with integrity in the interests of their clients and in the wider public interest.

Not only are these proposals creating an unregulated market but one that seriously weakens protection for clients. That development cannot be in the public interest unless the 'public interest' is solely defined by cost cutting. A short term saving in professional fees permitted by failure to properly regulate may cause serious problems far outweighing any cost benefit savings including the diminution of the reputation of the profession.

We have very real concerns about the proposals in the following areas especially in so far as they impact on the stated aim of regulation:

A. Protection for the consumer
B. The creation of an uneven playing field and the creation of a two tier system
C. The cost of regulation, the allocation of that cost under the new regime and the lack of provision for resource to enforce breaches of the code
D. The diminution of the solicitor brand
E. The methodology of the consultation and the process of change

In short we do not consider that there is a problem which needs fixing here.

If, however, we are wrong about that (and we do not believe that we are) now is not the time to be engaging in wholesale regulatory reform when the existing regime is only five years old.

Time has not yet been allowed for the new framework to "bed down". Furthermore, firms have invested hugely in time and cost to deal with the current regulatory regime.

We find ourselves in a position of pleading with the SRA not to experiment with regulation at what is already a great time of change within the profession and wider afield.

Although it is not the Association's primary concern, the economy as a whole is potentially at risk from a perceived lack of confidence in the proper regulation of solicitors. The concern is that this will force lawyers in other jurisdictions to evolve links with legal services in other European countries. This would damage the wider UK economy, the interests of our members and the interests of the public at large.

A. Protection for the consumer

Under the new proposals, solicitors will be entitled to work as employees of unregulated businesses.

Those clients will not have the protections available to clients of regulated firms.

It is no answer, in our view, to say that a solicitor employed in an unregulated entity will be required to make the position clear in an engagement letter, for instance (even if, of course, that solicitor will produce an engagement letter as we now know it, or at all).

The solicitor "brand" resonates with the public's expectation that advice given by a solicitor is correct, is free from conflict and other outside interests and is not only backed up by the organisation in which they work but, if things go wrong, gives access to compensation. This of course is backed up and reinforced by the SRA regulations.

Whilst the consumer may not initially see it, the deregulation of the profession (for that is what it will be) will offer none of the safeguards demonstrated within the traditional professional retainer, an unregulated company has no need to be sure of the consumer safeguard "independently and with integrity in the interests of their clients".

That of course may fall upon the individual solicitor as the only compensation route available to a customer/client who seeks advice from a solicitor in an unregulated entity will be against the solicitor him or herself. That cannot be in the interests of the public at large or the individual consumer when the solicitor does not have the ultimate fall back of a business to protect him or her.

Moreover, the public will not understand that the solicitor in an unregulated entity will be giving advice which is unlikely to be subject to legal professional privilege.

Nor will the public understand that the same rules as to conflicts of interest which exist in regulated firms will not exist in regulated entities between individual solicitors.

Perhaps most importantly, a solicitor advising within an unregulated entity will not have the regulatory and compliance support that is available in a regulated firm. How can the public be sure, for instance, that such a solicitor has kept himself up to date through continuing professional development?

We are concerned that any measures, whether inspired by regulatory reform or not, which weaken the concept of legal professional privilege will diminish the standing of the solicitor and the advice they give.

The concept of legal professional privilege is already under challenge and if it can be shown that in unregulated entities solicitors practise without the protection of legal professional privilege that would be one more nail in the coffin of what is currently a major outstanding difference between qualified, regulated lawyers and other professionals.

We are also surprised that the issue of conflict of interest appears not to have been thought through.

Where solicitors practice in a regulated firm then the conflict is regulated within the firm.

Solicitors practising in a non-regulated entity under the proposals will not be subject to the same rules concerning conflict. The public will find that, at the very least, confusing.

The protection of confidential information is fundamental to the relationship between a solicitor and his client. It is a given. Equally fundamental is that a solicitor should not act whether is a conflict of interest.

B. The creation of an uneven playing field and a two tier system

The proposals risk the creation of two classes of solicitors.

One class of solicitors will be able to deliver unreserved work through unregulated entities and without traditional consumer protection. The other will be regulated very much as before.

From the public's point of view it does not matter, we believe, whether an unregulated entity is called "lawyers" and employs solicitors or is called a solicitors' firm. The former would be allowed and the latter would not. How is the prospective client to understand the difference? Perhaps the unregulated companies offering legal services could be called Unregulated Legal Service Companies, or ULSC for short, so as not to mislead the public? What is certain in our view is that unregulated firms must be clear and transparent in their communications with the public that the client will not have the safeguards normally applicable were they to instruct a regulated firm.

If it is true that the employment of solicitors within an unregulated entity will drive down cost (and we do not necessarily share the SRA's view that any cost saving will be significant), solicitors practising in an unregulated entity will enjoy that undoubted advantage over the solicitors practising in a regulated firm whilst offering none of the protections available to the client within a regulated firm.

The potential price reductions for consumers must be accompanied by full disclosure as to the risks. Otherwise, why have regulation in place at all for any entity if there is no clear distinction between them which is openly accessible to the public? Competition should be based upon more than price. Reliability and safeguards in place are as important as the price for legal work.

We are also concerned that the lack of supervision and support available to solicitors working within an unregulated entity will contribute to a lowering of professional standards and, potentially, greater risk to the consumer in instructing such an individual solicitor.

If the SRA reduction in costs argument is followed through, it seems likely to us that unregulated entities will tend to employ newly qualified solicitors keen to find employment which might not otherwise be available to them in the regulated sector.

The fact that the regulated sector of the profession has the ability to absorb a finite number of newly qualified solicitors must not dictate or indeed contribute toward the

relaxing of , driving down or otherwise diminishing standards by the availability of employment as a solicitor in an unregulated entity.

We are also concerned that, if as we suspect, unregulated entities would employ a disproportionate number of newly qualified and young solicitors, the opportunities for the top line principles to be compromised will be many.

This is not because young solicitors are less ethical or more likely to act in an unprofessional way per se.

It is simply because they will be acting without direct regulatory supervision from their employer and this in itself will contribute to all sorts of temptations and compromises which will not otherwise be available within the regulated firms.

We do not wish to paint a picture of regulated firms as being beyond approach. Clearly that is not the case. However, if you take away the culture of compliance and the supervision of the COLP and COFA and replace it with an overriding expectation that the interests of the unregulated entity should be paramount, there lies huge problems both for the consumer and for the individual solicitor.

Advocacy is a reserved activity.

How is a court to determine whether a solicitor appearing before it is employed by a regulated firm or an unregulated entity? It will certainly not enquire. The SRA is very unlikely to enforce because it will not have the resources to do so.

It should not be underestimated how many international companies choose to invest in the UK due to the high reputation and integrity of our judicial system and those who work within it. Any erosion of respect for advocates by de-skilling or blurring of the distinction will have an eventual impact upon our international competitiveness. Criminal and commercial lawyers do understand that symbiotic relationship in reputational terms.

By the back door, we will see the increasing appearance of advocates from unregulated firms until the distinction becomes blurred and, then, ceases to have any meaning in the eyes of the consumer and no doubt the court

C. The cost of regulation, the allocation of that cost under the new regime and the lack of provision for resource to enforce breaches of the code

There is a risk that if an economic and competitive advantage is identified by larger firms to transfer the employment of many of their solicitors to an unregulated entity this will create a huge shortfall in funding for the SRA.

This in turn will impact on the availability of resources to ensure compliance with not only the code of conduct for firms but also, and crucially, the code of conduct governing individuals' professional standards.

It follows that where a practise in reserved activities dictates that a firm must be regulated (as would be the case, for instance, of niche criminal law firms and other smaller firms offering a criminal law service) it seems likely that the cost of regulation to that firm will increase.

It is at least possible that the increase will be significant to make up for the loss of practising fees paid by solicitor firms. Only a proportion of SRA funding is received from individual practice certificate fees.

This possibility is of considerable concern to practitioners in criminal law who, it must be accepted, are amongst the poorest remunerated in the solicitors' profession, despite the fact that they deal with peoples' liberty and reputation which are obviously issues of extreme importance.

The current existence of a network of criminal law firms across the country would be challenged by this alone. Suddenly, criminal law firms could become at the same time the most regulated, the poorest paid and the biggest contributors to the funding of the SRA. That cannot be right.

D. The diminution of the solicitor brand

Those who practice in the public eye, such as advocates in the criminal courts, will be constantly aware of the reduction in reputation and standing of solicitors despite their very best endeavours.

If one accepts, as we do, that there is value in the principled ethical method of acting for a client as embodied in the current top line principles, we cannot support any regulatory reform which would further diminish the reputation and standing of solicitors.

At present, as a profession solicitors are well respected and trusted by their own clients. We see the creation of the two tier system as being contrary to the promotion of the trusted adviser which is so central to the solicitor brand.

To weaken the solicitor brand is in no one's interests, least of all the consumer.

E. The methodology of the proposed change

We are concerned that the way in which this consultation process is being conducted is not conducive to the provision of informed responses. It feels very much like the recently criticised "Brexit" debate.

We understand that the current consultation paper is intended to be one of a number of steps or stages towards full regulatory reform. How is it possible that we can be invited to comment on the proposals without knowing the full picture?

For instance, we know that there are no longer going to be indicative behaviours and that the intention is to replace them with guidance, but we do not know what the guidance is likely to contain.

Firms have been engaged in interpreting the indicative behaviours to identify ways of practising which comply. Taking away the indicative behaviours and not supplying with detailed guidance will be a recipe for considerable uncertainty, at the very least.

We view this as yet another example of this consultation on regulatory reform being no more than unnecessary "kite flying" which distracts from the essential elements of regulation, - consumer protection and certainty for the profession.

The Abolition of Outcome 8.3

We have one more important matter to rise by way of preamble.

The intention to do away with Outcome 8.3 will have a consequence which, we accept, may not have been envisaged. Whatever the outcome of the consultation, we urge the SRA to seriously consider the effect of the abolition of Outcome 8.3 in the following circumstances.

In case it has been forgotten, Outcome 8.3 prohibits the making of unsolicited approaches in person or by telephone to members of the public in order to publicise a firm or in-house practice or another business.

Our members are concerned that, as criminal law firms become increasingly financially pressured, there is a tendency amongst a few unprincipled firms and individuals to tout for business.

This takes many forms but one of the most invidious is the "cold call" approaching of vulnerable defendants remanded in prison, where efforts are made to undermine the trust between the existing solicitor representative and his client. Of course, this sort of behaviour should be covered by the current top line principle 2 and 6, as well as 1 and 4.

However, we have no confidence that the issue is one which the SRA is currently motivated to address.

We are sure that if this regulatory reform goes through then the abolition of outcome 8.3 will lead to chaos in the prisons and for the representation of some of the most vulnerable customers in society.

Furthermore, we are advised by our colleagues dealing with other areas of the law that touting currently exists in civil litigation as well as in family law.

In our view, nothing should be done which has the effect of encouraging such unethical behaviour. In fact, there is a very good case, and we urge it on the SRA, to include a specific additional rule dealing with this pernicious activity.

The rule might read for instance: "any unsolicited approach either in person or by telephone or by written correspondence designed to encourage or persuade a person remanded in custody to instruct the solicitor or firm making the approach is prohibited as being a direct breach of whatever principles by that time pertain to this type of unethical behaviour."

We make it clear that we seek this amendment in addition to the safeguards already contained within 8.3

It may be that the rule is capable of expansion to other types of similar behaviour both within the criminal justice system and outside it, such as unsolicited approaches to clients at courts and at police stations.

It is our understanding that the Law Society and the SRA are in discussion on this topic and we urge a speedy resolution of the issue raised here which is both injurious to the individual client and damages the public perception of the way in which solicitors conduct themselves.

Finally, we comment that we have seen the comprehensive response submitted by The Law Society on 8 September and we adopt that response as our own except where it is clear that the views of the Association differ. We have tried here to engage with those aspects of the proposed reform which impinge directly on our members and the practise of criminal law.

http://www.lawsociety.org.uk/policy-campaigns/consultation-responses/looking-to-the-future-consultations-law-society-response/

Consultation Questions

The SRA Consultation Paper containing the text of the questions is at this link:

http://www.sra.org.uk/sra/consultations/code-conduct-consultation.page]

Question 1.

We have not encountered any issues in respect of the suitability test.

Question 2.

For the reasons stated above, we see no reason to change the ten top line principles on which young solicitors have been trained and which embody the ethical considerations central to all practising solicitors.

Question 3.

The existing principles make clear a solicitor's professional responsibilities.

Question 4.

We endorse the law society's concerns about the abolition of existing Principle 5, 8 and 10.

Question 5

The removal of the Indicative Behaviours makes the need for detailed Guidance essential. This consultation does not include that Guidance and we are told that it will follow later. It is impossible to comment in a truly meaningful way about these proposals without knowing how the Codes are to be interpreted. A straightforward example is the dilemma of whether and, if so, when a solicitor can act for both buyer and seller. Guidance will be required. We are also very interested to know how it is intended that the issue of conflict between clients of an unregulated entity will be resolved.

Question 6

Too much is being left to interpretation without guidance or indication as to where the line is drawn. How will we know whether following former indicative behaviours will place a solicitor on the right side of the line. Without Indicative Behaviours it is like trying to navigate a reef at night without a compass. Regulation should embody some degree of certainty. These proposals as written do not do that.

Question 7

It is not so much a question of what is there that should not be there as what is not there which should be. To embark on such a fundamental regulatory reform without guidance is far from helpful. It strikes us that those who formulated the code do not yet know what will be the right side of the line and what will not. The profession and the public should not be subjected to experimentation in this way.

Question 8

We have a real concern about the abolition of Outcome 8.3 ad this has already been referred to above. We endorse The Law Society's response to this question but go further. We consider that the SRA should prohibit unsolicited contact to represented prisoners.

Question 9

We are concerned about the lack of guidance on the fundamental issue of conflict. We are not sure what the SRA is seeking to achieve. If it is accepted that to act for one or more clients where there is actual conflict or a significant risk of conflict is wrong then that needs to be said. To do otherwise is to create the risk of a bear garden where

anything goes. We do not believe that is a proper way to train young lawyers or for the profession as a whole to behave.

Question 10.

Brevity is not necessarily a good thing if it does not provide adequate protection for clients or preventing damage to the reputation of the legal profession. We have already commented on the lack of clarity and guidance.

Questions 11

The Code for firms requires more detail and guidance if it is to provide firm's with a clear impression of the SRA's expectations. Compliance should not be left to chance.

Question 12

We need to see the Guidance which we are told will follow in subsequent consultations before we can comment on this further.

We do not understand how undertakings are to be dealt with within unregulated undertakings. This needs to be clarified.

Question 13

We endorse the multiple comments and queries raised by The Law Society about the drafting of the two Codes.

Question 14

We also endorse The Law Society's call for careful consideration of the roles of the COLP and COFA. There is thin dividing line between over regulation and sufficient regulation to inspire public confidence. The prospect of solicitors practising in unregulated entities without any form of internal supervision causes us concern.

Question 15

We are interested in the Law Society's 2015 Regulation Survey. The prospect of weakened regulation adversely affecting consumers is a concern – as is the possibility that less clear and effective regulation may harm the reputation of solicitors generally.

Question 16

We refer to the concerns raised in our opening comments. We have also seen The law Society's response and endorse those comments.

Question 17

Solicitors practising in criminal law are engaged in a reserved activity. They will not be able to take advantage – if it be such – of the relaxed regulatory regime. Moreover, they may unfairly bear the burden of the cost of regulation as we have previously indicated.

Question 18

This is an appropriate safeguard.

Question 19

We endorse the Law Society's response.

Question 20

The better model would be to require all unregulated entities to highlight the lack of protection to its consumers. That is where the danger lies to consumers.

Question 21

It is not for the SRA to fill in the gaps regarding the provision of legal services. It is a regulatory authority, not a marketer of legal firms and options. It is not the role of a regulator to provide information about a market which it does not regulate.

Question 22

We have noted The Law Society's analysis of the Impact Statement and we commend that analysis.

Question 23

The holding of client money has always been carefully regulated, and for good reason. We are a little surprised that this question is even being asked. It would clearly not be appropriate for a solicitor in an unregulated entity to hold client money in their own name; not least because the SRA is proposing the abolition of Principle 10: *You must protect client money and assets.*

Question 24

For the reasons set out in its response we agree with The Law Society.

Question 25

It is relatively simple. If the solicitor is not required to hold PII then his clients should not have access to the SRA Compensation Fund. It must be right that if this regulatory reform is taken forward clients of solicitors in unregulated entities who practise uninsured do not have the benefits available to clients of regulated firms. Two tier in this context means two tier.

Question 26

The answer is to make all individual solicitors practising in unregulated entities subject to the mandatory requirement for PII.

Question 27

We endorse the Law Society's comprehensive response on this topic.

Question 28

Yes, of course.

Question 29

It should be the same as for all regulated firms.

Question 30

We believe we have made it clear that we are opposed in principle to the establishment of a two tier profession with some solicitors practising in unregulated entities and with the regulated firms engaged in reserved activities carrying the burden of regulation.

Question 31

See above

Question 32

We are concerned that the enforcement of the top line principles where breaches are reported against individual solicitors in unregulated entities will be too difficult and too costly. We are concerned that the regulation of solicitors in unregulated entities simply will not happen. There will be neither the will nor the resource to do so.

Question 33

Yes

Cripps LLP

Consultation: Looking to the future - flexibility and public protection

Consultation questionnaire form

This form is designed to be completed electronically—in MS Word. Please save it locally before and after completing it.

Question 1

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

None

Question 2

Do you agree with our proposed model for a revised set of Principles?

We do not agree that the Code of Conduct needs revision. However, as the amendments proposed are minor, they are acceptable save for the following:

New Principle 2: Ensure that your conduct upholds public confidence in the profession and those delivering legal services

It is inappropriate for regulated individuals or firms to be placed under any regulatory obligations with regard to non-regulated providers. Our regulated status is a key differentiator with the unregulated sector and it is important for the solicitors' profession that, if appropriate, we are able to reference these differences.

Question 3

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

See above

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?

We have concerns about the removal of the following:

Current principle 5 ("provide a proper standard of service to your clients")

We do not understand why it is suggested that this principle be removed. It is a central tenant for the profession and provides consumer confidence around quality of service they can expect from regulated individuals and firms. What would its removal say to consumers as to the value the profession places on service delivery standards and consumer protections?

Current principle 10 (“protect client money and assets")

Again, the removal of this principle raises concerns from the perspective of professional standards and consumer protection. It is vital for consumer confidence and to protect the brand of solicitor, that we retain a duty to protect client money and assets.

There should also be specific reference to the importance of confidentiality.

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?

We believe this would be helpful for each significant sector within the legal profession.

The removal of indicative behaviours from the handbook leaves a significant guidance gap.

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?

It is difficult to answer this question without sight of the proposed guidance/ scenarios.

On its own, although helpfully brief, the code lacks sufficient clarity. We are concerned that the right balance has not been struck between clarity, certainty and brevity.

Question 7

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

On the contrary, we are concerned about the removal of certain principles and the lack of guidance (see above)

Question 8

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

We have particular concerns about undertaking the position where a solicitor in an unregulated provider gives an undertaking to a solicitor in a regulated firm or to others who would need to place reliance on it. Undertakings have become a crucial element of the practice of law in the UK and are used to expedite matters that, in the absence of an undertaking, would cause considerable delay and inconvenience to the practitioner and the client.

Even though an undertaking relates to an individual solicitor, we have significant concerns regarding an undertaking provided by a solicitor employed by an unregulated provider. We believe that solicitors in a regulated firm would be highly unlikely to accept an undertaking from an unregulated provider due to a lack of protections if things go wrong.

We take the view that undertakings are sufficiently important to warrant protection in both the codes, making clear that they are not just an enforceable agreement, but that breach can give rise to disciplinary proceedings.

Question 9

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

Our preference is for option 1 but we have some significant concerns as to removal of a number of consumer protections which has weakened the proposal and may impact negatively on the public's perception. This is particularly pertinent in the conveyancing sector with its large number of diverse providers.

Question 10

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

No- see above.

Question 11

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

No- see above.

Question 12

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

Yes- see above.

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?

Yes- see above

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.

Yes, on balance.

In a firm of our size, we have professional teams in place to ensure regulatory compliance. The roles do not materially impact on our approach to the relevant issues. However, we appreciate in smaller practices the regime might give an important focus to regulatory compliance, professional standards and ethics.

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?

See previous answers- regulatory clarity and guidance including appropriate scenarios, outcomes and indicative behaviours.

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?

We are opposed to this proposal.

While it is asserted that the proposals would be likely to deliver improved access to quality services at affordable prices, enhanced standards, increased employment opportunities and a strengthened solicitor brand, we believe the opposite is more likely.

The proposals create a risk of significant damage to the standing of the solicitor profession at home and internationally.

The proposals would enable solicitors to work for unregulated entities providing unreserved legal services to the public. Such solicitors would be subject to the proposed new Code of Conduct for Solicitors but the entities they work for would not be regulated.

Despite receiving advice from a solicitor, clients of a solicitor working in an unregulated firm would have none of the protections that clients in regulated firms have and will continue to have.

This has potentially serious implications with respect to the following:

Legal Professional Privilege

Legal professional privilege (LPP) is one of the most important rights recognised by English law and plays a crucial role in ensuring the proper administration of our justice system.

Clients of unregulated firms, despite receiving their advice from a solicitor with a practising certificate, will not have the benefit of LPP as in order for the advice from a solicitor in an unregulated entity to attract privilege, the contract / retainer would have to be between the individual solicitor and the client, not the firm.

These proposals therefore present a substantial risk that by using an unregulated provider, consumers would find that they do not benefit from protections which they had assumed they would, or only become aware of the lack of protection when they have a significant legal issue for which they want to be able to claim LPP but find they cannot. In such situations, it will be too late for the consumer to do anything about it.

This is a slippery slope that could erode the concept of LPP; a cornerstone of the justice system, a key right of clients and a major factor in the high standing of the solicitor profession at home and abroad.

Professional Indemnity Insurance (PII) and the Compensation Fund

The proposals allow solicitors to operate from unregulated entities without mandatory

PII in place. This risks eroding a key element of current client protection, and would also leave the individual solicitors concerned exposed to significant personal liability if they chose to operate without PII.

Additionally, clients of unregulated entities will not have access to the Solicitor's Compensation Fund.

Prevention of conflicts of interest

Under the proposals, solicitors providing services through an unregulated provider would be regulated as individuals and would be subject to the requirements set out in the Code of Conduct for Solicitors around conflict and confidentiality. However, this would not be true for the unregulated entities themselves or for non-regulated individuals employed by them.

Unregulated entities would therefore be able to act in situations where regulated firms would not, creating an uneven playing field, and creating a risk of conflicts in the unregulated entities that would not be present had the client engaged a solicitor in a regulated firm. In such situations, the client might not be aware of a potential or real conflict of interest.

There is also a real risk to the perception of justice if a solicitor is seen to act whilst having a conflict of interest.

There is clearly a danger of downgrading professional standards with this proposal and consequentially a seriously negative impact on the standing of the profession internationally where conflict of interest is taken very seriously by Bar Associations.

Creation of a two tier profession and greater client confusion

The SRA's proposal would effectively divide the profession in two by creating a second class of solicitors, delivering unreserved work through unregulated entities and without protections that have been traditionally available to those who consult solicitors.

Clearly this scenario will create confusion to consumers. Apart from confusion regarding the client protections available, we believe it will be difficult for consumers to differentiate the type of firm they are instructing. While an unregulated entity will not be able to use the term ‘solicitor's firm’ or ‘solicitors’, it would be able to use titles that included the words "law", "legal services" or "lawyers".

Supervision

The proposal that newly qualified solicitors with no experience would be able to set up their own unregulated firms creates additional risk.

If no support and supervision were available, this could place clients at risk, as well as risking the standing of the solicitor profession itself, at home and internationally.

In addition to the above, the prospect of intervention is a powerful incentive for compliance. The SRA would not be able to intervene in an unregulated entity. The effect of this lack of enforcement power could have serious implications on the behaviours of the entity and, by extension, the solicitors within it.

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?

Not likely.

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?

We agree with this proposal.

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?

We firmly believe this is necessary- see above.

Question 20

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

Regulated firms will continue to make it clear to consumers the protections available as is the requirement under the current Code.

We do not consider any further requirements to be necessary especially as the SRA will have no authority to require anything of this nature from unregulated entities.

Question 21

Do you agree with the analysis in our initial Impact Assessment?

No- as it has failed to analyse and address the issues we have identified in our response.

Question 22

Do you have any additional information to support our initial Impact Assessment?

See above

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?

Yes (although we are opposed to the proposal).

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?

We agree they should not- see above

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?

If not, what are your reasons?

We agree as such solicitors would not be required to hold PII and thus their clients should not be able to access the Compensation Fund.

We envisage this would cause significant issues in relation to the good administration of the Fund.

Question 26

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

We strongly disagree with the proposal in principle and believe solicitors must have individual PII cover. Again, this will cause consumer confusion, damage to public protection and to the brand of solicitor.

Question 27

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

Many- see above.

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?

Yes. Protections should be consistently applied across all regulated legal providers.

Question 29

Do you have any views on what PII requirements should apply to Special Bodies?

See above- the same as other regulated entities.

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?

We have the same concerns here as with previous questions. Regulation should apply consistently and fairly to all legal services in order to protect consumers and reduce confusion.

Question 31

Do you have any alternative proposals to regulating entities of this type?

See above.

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?

No.

Question 33

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

Yes.

Thank you for completing the **Consultation questionnaire form**.

Please save a copy of the completed form.

Please return it, along with your completed **About you form**, as an email attachment to consultation@sra.org.uk, by **21 September 2016**.

Alternatively, print the completed form and submit it by post, along with a printed copy of your **About you form**, to

Solicitors Regulation Authority
Regulation and Education - Policy - Handbook 2017
The Cube
199 Wharfside Street
Birmingham
B1 1RN

Consultation: Looking to the future - flexibility and public protection

Response ID:587 Data

2. Your identity

Surname

Neville

Forename(s)

Tiffany

We may publish a list of respondents and a report on responses. Partial attributed responses may be published. Please advise us if you do not wish us to attribute your response or for your name or the name of your firm or organisation to appear on any published list of respondents.

Attribute my/our response and publish my/our name.

Please identify the capacity in which you are submitting a response. I am submitting a response…

on behalf of my firm.
Please enter your firm's name:: DAS Law

3.

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

We have not encountered any particular issues.

4.

2. Do you agree with our proposed model for a revised set of Principles?

We do agree with the proposed model.

5.

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

Yes

6.

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?

We consider protecting client money and assets (Principle 10) should be included. Assets is a wide ranging term and includes a lot more than just the client's money. Solicitors deal with client money and assets on a regular basis. We consider this Principle is very important and should feature in the new Principle given we are of the opinion the proposed new Principles do not go as far to cover this.

7.

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?

- Conflict scenarios; and
- Separate business rules.

Additionally, we consider MI/data published on the type of enquires receive to the ethics line or examples of practical suggestions to common and difficult ethical situations would be useful.

8.

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?

Yes.

9.

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

No.

10.

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

No.

11.

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

We consider there is some ambiguity around option 1 (b) and therefore guidance maybe useful. We appreciate that there may not be conflict if clients are competing for the same objective but we are slightly perplexed why a conflict would not arise in such situation where one clients objective will be unattainable if another was to achieve.

12.

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

Yes, although further guidance around some areas (conflict and separate business rules) would be beneficial.

13.

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

No.

14.

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

No.

15.

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?

No.

16.

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.

We consider the roles should be retained. We consider the roles assist to:
- Embed a compliance culture within all staff;
- Ensures/assists with proactive risk management which is driven from the personal obligation of the COLP;
- A dedicated contact ensures timely responses to the SRA;
- Provides a specialist in risk and compliance to ensure there is someone which can identify and report compliance related issues, including material breaches if necessary; and
- Ensures continual review and improvement of systems and controls.

17.

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

- Provide more realistic examples of common ethical scenarios;
- Anonymised MI around material breaches;
- Increased commitment to responses from the ethics line; and
- Drive for networking between COLP/COFAs.

18.

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?

The proposal is a proactive step to recognise the change in consumers attitude to legal service from the way in which they purchase and the increased use and reliance on technology. The proposed changes go some way to ensure that solicitors are able to respond to the changing future market and structure their business to meet client demand.

Notwithstanding the above, we have concern the proposals could result in undesirable and/or unintended consequences to the profession specifically to client protection. At present, client protection is taken for granted by clients when instructing solicitors. The proposals could result in clients who engage a solicitor in an unregulated entity to carry out non-reserved activities may not have access to Professional Indemnity Insurance (PII) and the compensation fund. Furthermore, seemingly clients would not be able to complain to the Legal Ombudsman if they are unhappy with the service they have received. We have concern that solicitors reputation could deteriorate as a result as clients may mistakenly believe that they have access to the aforementioned protections, only to discover they do not once it is too late. Initially, this is likely to be an issue for the profession, and there does seem to be shortcomings with the protections to clients considered.

The biggest threat to our mind is diluting the strength of the profession as a result of uncertainties, and lack of protections for clients.

19.

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

As a firm, we probably will not take advantage of the greater flexibility at present.

20.

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?

If other firms must be authorised by SRA to provide regulated services, it makes sense to continue this approach for sole practitioners. This would allow the SRA to target regulation more effectively and ensure all practices which provide reserved legal services to the public have the correct safe-guards in place. It would also provide uniformity across the board of regulated legal service providers. To not do so is likely to cause confusion to clients.

We agree with the proposal to maintain the position whereby a sole solicitor (or REL) can only provide reserved legal services for the public as an entity which is authorised by the SRA or another approved regulator. Not to do so could increase risk to clients understanding regulation and the protections they have and undermine the profession.

21.

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?

For ABS's the requirements of someone being qualified to supervise it is not entirely practicable, owners or

management may have people in positions which do not meet the prescriptive requirements but are just as qualified to supervise. Therefore, we do not currently consider the requirement is fit for purpose for all types of firms.

22.

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

We consider consumers should be informed about the protections but have concern this could get lost in the client care letter and retainer which contain many other required information. We have concern clients will not understand the different protections and regulation they may get from those they instruct. We consider a consumer friendly publicised document such as 'key facts about solicitors- what can you expect' would be beneficial. Solicitors could also send this to clients upon receiving an enquiry or with their retainer letter for consideration. This document could include an over-view of regulatory benefits, protections they would or would not have, thus giving consumers a document to compare the types of people/practices they are considering instructing rather than just considering marketing material or price.

23.

21. Do you agree with the analysis in our initial Impact Assessment?

24.

22. Do you have any additional information to support our initial Impact Assessment?

25.

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?

Yes

26.

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?

We do not consider solicitors should be permitted to hold client money personally. It opens up risk and could prevent businesses employing solicitors.

27.

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? If not, what are your reasons?

If there is no holding of client money then yes we agree as the risk to the consumer would be low. The consumer should be clear about this though when instructing.

28.

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

As long as the client has access to some form of insurance, for example if the business a solicitor is working for has another form of insurance which covers, then we can see no issue. However, we appreciate the regulatory difficulty with ensuring this. Alternatively, clients should be made very clear about the level of protection they are receiving, if any.

29.

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

There is a risk that an individual solicitor will not have the requisite skills to assess the risk to the client. For example, solicitors who have never had any dealings with PII or the insurance market could have difficulties in assessing the this risk with rigor.

30.

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?

Yes. To do so could cause confusion to clients to understand what protection they will receive from Special Bodies if it is dependent on the type of work the Special Body does. We can see the benefit of having a reasonable equivalent but to alter this for only certain work provided by Special Bodies is considered to cause confusion.

31.

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

We consider the insurance should meet the requirements of PII and clients should be given clear advice on the type of insurance, if not PII, which they are protected by.

32.

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?

Threshold could lead to increased complexity and clients lack of understanding.

33.

31. Do you have any alternative proposals to regulating entities of this type?

Regulate all in the same way.

34.

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?

We consider it is positive for both individuals and firms to be investigates. It ensures compliance and good practice.

35.

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

Yes. It is additionally a selling point for those regulated.

David Foster

Dear Sir,

I have been a partner in private practice since 1993 and I am submitting this response on my own behalf.

I attach the completed "About You" form.

I am also Chairman of the Commercial Litigation Association and make these comments in the light of having been in practice since 1985.

1. Dealing with legal issues and the client's money calls for considerable regulation. Full protection should apply to all clients.
2. I do not view recent changes as having all been either helpful or sensible. There is one example, Cooperative Legal Services, who have not shone in the legal market and would probably have gone out of business if they had been a smaller entity: instead, they are being buttressed simply because they are part of a much larger organisation. Potential changes to indemnity insurance allowing unregulated entities not to require to have professional indemnity insurance would be a retrograde step.
3. One of the areas that concerns me most is the possibility of new qualified solicitors being able to set up their own unregulated firms. Current supervision requirements are loose enough and it would be potentially catastrophic if they were loosened further. Handling the law well takes experience.
4. One of the reasons for the many rules over issues like conflicts and confidentiality and professional privilege are the ethical standards and responses which those handling the law, currently primarily solicitors, have to attain. Unregulated organisations should have to comply fully with solicitors' existing practice rules if they are allowed to enter the market in areas in which they currently are not allowed to delve. Generally, I would argue that there is a need for more careful training and compliance rather than the opposite.
5. Certainly in terms of the commercial litigation sector clients are well served and there is no need for the sort of changes currently being advocated.

Thank you for your attention,

Yours sincerely

David Foster

Consultation: Looking to the future - flexibility and public protection

Consultation questionnaire form

This form is designed to be completed electronically—in MS Word. Please save it locally before and after completing it.

Please Note:-

It will become clear that the following responses proffered are based very heavily on the Law Society's published material on the subject.

It should in no way be taken that because of this the answers are not considered to be correct and pertinent by the sender. On the contrary; the Law Society is our representative body and as such have deployed a team of personnel to scrutinise and respond to the present consultation.

We have taken the view, therefore, that having studied the SRA consultation documents and the responses published by the Law Society it would be wasteful and indeed less effective to draft individual replies. Why have a dog and bark one's self?

It seems clear from the following responses that the creation of a two tier system of legal service delivery is fraught with problems that will not have good outcomes for the profession. For instance, to have regulated and unregulated entities subject to differing levels of safeguard, yet still be able to employ 'solicitors' is troublesome for all solicitors. The majority of consumers will not be aware of the differences in levels of professional legal privilege, professional insurance indemnity cover and the like; to most consumers a solicitor is a solicitor, is a solicitor ……. It will only be when something goes wrong that that a consumer will learn the difference but by then the reputational damage will have been done.

Question 2

Do you agree with our proposed model for a revised set of Principles?

No, please see later responses.

Question 3

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

The removal of the principles that solicitors should;

- 'provide a proper standard of service to your clients',
- 'act in the best interests of each client' and
- 'protect client money and assets'

has negative implications for consumer protection and the maintenance of professional standards. These are the building blocks that give clients confidence and safeguards and they should be retained.

The Principles should continue to refer to the solicitor’s duty to keep the affairs of the client confidential.

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?

No answer.

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?

No answer.

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?

The creation of separate codes of conduct distinguishes the responsibilities of an individual solicitor, wherever he or she is working, and those of a regulated entity. The creation of two codes is not an issue.

However, the approach creates two tiers of solicitors: those working in a regulated entity and those working in an unregulated entity, with **consequential risks to consumer protections and professional standards which risk damaging the standing of solicitors and creating confusion for consumers**;

Although both of the draft Codes focus on brevity and simplicity, they provide less certainty about what is and is not permitted. Some solicitors might prefer a more definitive approach so that compliance is clearer and there is less discretion for the SRA to determine when there is a breach, which could result in enforcement action that might have been avoidable if the Codes were clearer. It is difficult to take an informed view on how the new Codes would work in practice be without seeing the associated guidance which the SRA has not published alongside the draft Codes.

The language of the draft Codes is imprecise and could mean that members currently practising in a fully compliant way could find themselves accused of a breach after the proposed new codes come into force.

There is some overlap between the two draft Codes, most noticeably in areas such conflict, complaints and client information/identification. If this is not addressed, it is not clear which would take precedence where such inconsistencies exist.

Question 7

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

No answer.

Question 8

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

No answer.

Question 9

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

The consultation makes clear that solicitors employed by an unregulated entity would continue to be regulated as individuals and would be subject to conflict rules. However, as the conflicts rules will not apply to unregulated entities, in practice they will not have much effect if any on the unregulated entities whilst the regulated entities will be subject to the same level of restriction as they are now or, potentially, a greater level depending on which of the two options on conflicts is adopted by the SRA.

The SRA offers two options for dealing with conflicts:

- Option 1 largely replicates the 2011 Code, in prohibiting a solicitor from acting where there is a conflict or significant risk of such a conflict, unless specified circumstances are met and protections are provided.

- Option 2 would narrow the ability to act given that it provides for a complete bar on acting where there is an actual conflict, and protections to be put in place if there is a significant risk of a conflict.

Option 2 may be unworkable because it is not always possible to identify that an actual conflict exists and a solicitor may unwittingly act in a conflict situation. Because the non-regulated colleagues of regulated solicitors would not be subject to conflict rules, there is a risk of confusion to consumers, a very favourable competitive advantage to unregulated entities and lack of a fundamental consumer protection for clients of unregulated entities.

Question 10

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

No answer.

Question 11

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

No answer.

Question 12

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

No answer.

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?

No answer.

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.

Consideration of these questions will benefit from the input of current COLPs and COFAs who are best placed to identify unnecessary requirements while firms and sole practitioners will also wish to consider how valuable the roles themselves are.

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?

No answer.

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?

There is insufficient evidence to support these proposals or the expected benefits from their implementation, which are stated to include improved access to quality services at affordable prices, enhanced professional standards, and increased employment opportunities.

In particular, the proposals could have undesirable and/or unintended consequences as follows:

Reputation and standing of solicitors

The proposals may result in two tiers of solicitors. Those working in unregulated businesses are unlikely to be able to give advice which is legally privileged, will not be required to have PII, clients will not have the benefit of compensation fund and the protection of the principles governing conflicts of interest. Not only is this likely to create consumer detriment and confusion but it is likely to damage the reputation of the title of solicitor.

Legal Professional Privilege (LPP)

LPP should attach to clients seeking advice from a solicitor holding a current practising certificate wherever he or she practises and any attempts to dilute or make LPP more difficult to obtain or enforce could erode the concept of LPP, which is a cornerstone of the justice system and a key right of clients. This could also undermine the standing of the solicitor profession both at home and abroad. It is not right in principle for LPP to be a distinguishing factor between regulated and unregulated service providers.

It is likely that in-house solicitors working in an unregulated entity, for example a local authority, providing advice to individuals or organisations other than the unregulated entity would not have the protection of LPP.

Conflicts and confidentiality

The proposals will result in confidentiality only applying to individual solicitors working in an unregulated entity, including in an in-house team, but not to the entity or to other employees. There is a risk that a solicitor may unwittingly act in a conflict situation and that clients may not be aware of a potential or real conflict of interest or of the fact that the entity is not subject to the rules on conflict. It also results in making regulated entities less attractive because they will be competitively disadvantaged versus unregulated entities.

Consumer protections - Professional Indemnity Insurance (PII) and the Compensation Fund

Under the SRA's proposals, solicitors working in unregulated entities would not be required to have PII and their clients would not have access to the Compensation Fund if things go wrong. This risks eroding a key element of current client protection. The proposals risk creating two tiers of client protections - with different rules and protections applying to solicitors' clients depending on the kind of entity in which the solicitor is working.

The SRA proposes that solicitors working from unregulated entities would be required to make sure that their clients understand whether and how the services they provide are regulated and the protections available to them. Even for those working within the legal sector, insurance and client protections are complicated topics which are not easily digested and understood and clients cannot be expected to fully comprehend the implications of purchasing their legal services through an unregulated provider. The proposals also risk undermining or depleting the existing Compensation Fund as solicitors working from unregulated entities would not have to contribute to the Fund; this would seem likely to mean that solicitors working in regulated entities would have to make additional contributions to secure the Fund's viability, increasing the regulatory burden on them and exacerbating the two tier profession that could result from the proposals.

Consumer confusion about status

Under the proposals, solicitors holding a current practising certificate would be able to use their title whether providing legal

services to the public through a regulated or unregulated entity. While a provider would not be able to use the term ‘solicitors firm’ or ‘solicitors’ unless the entity was regulated by the SRA,this would seem unlikely to mitigate the risk of consumer confusion especially where the unregulated entity described itself as a ‘law firm’ or 'legal services firm' or advertised that they employ solicitors. Consumers will lose the assurance they currently have as to quality and protections when they engage a solicitor. It is inappropriate that consumers will have to undertake fairly substantial due diligence. This will additionally undermine the standing of the profession internationally.

Annual practising certificate (PC) fees

There is no information on this point and the SRA needs to undertake and publish an analysis of the projected impact of its proposals on the PC fee, and in particular the turnover based firm fee. The SRA should not close this consultation until this information is available.

Supervision

Newly qualified solicitors without any experience would be able to set up their own unregulated firms. Newly qualified solicitors working in an unregulated entity would no longer have the requirement of support and guidance from more experienced solicitors. This will increase the risks to clients as well as putting newly qualified solicitors themselves at risk, and negatively impact on the standing of the solicitor profession Damage to standards will increase incrementally as this applies year on year and fewer solicitors in unregulated entities have ever received supervision.

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?

No answer.

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?

No answer.

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?

No answer.

Question 20

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

No answer.

Question 21

Do you agree with the analysis in our initial Impact Assessment?

No answer.

Question 22

Do you have any additional information to support our initial Impact Assessment?

No answer.

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?

No answer.

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?

Consideration of this question will benefit from the input of current in-house teams and relevant local employers.

Consideration of this question will benefit from the input of special bodies, such as law centres, which play an important role in providing access to justice for vulnerable people who may not be able to afford access to legal services.

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?

If not, what are your reasons?

No answer.

Question 26

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

No answer.

Question 27

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

No answer.

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?

No answer.

Question 29

Do you have any views on what PII requirements should apply to Special Bodies?

No answer.

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?

No answer.

Question 31

Do you have any alternative proposals to regulating entities of this type?

No answer.

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?

No answer.

Question 33

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

No answer.

Thank you for completing the **Consultation questionnaire form**.

Please save a copy of the completed form.

Please return it, along with your completed **About you form**, as an email attachment to consultation@sra.org.uk, by **21 September 2016**.

Alternatively, print the completed form and submit it by post, along with a printed copy of your **About you form**, to

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By email only to: consultation@sra.org.uk

26 July 2016

Dear Regulation and Education team

Thank you for the opportunity of responding to your consultation "Looking to the future - flexibility and public protection". Please find below the response of decoded:Legal.

About decoded:Legal

decoded:Legal is a small (two person) specialist SRA-regulated law firm advising Internet, telecoms, technology and healthcare start-ups and businesses. We went through the SRA authorisation process in late 2015, and received authorisation in January 2016. We do not currently provide any reserved activities.

Summary

We support the approach of splitting obligations of a solicitor from obligations of a firm. This increases the accessibility and usability of the framework.

We understand the intention behind the removal from the Codes of requirements already imposed by legislation. We found the inclusion of these requirements useful as we went through the process of authorisation, and as a reference point after authorisation, and so we welcome the proposal to include relevant content in guidance and case studies.

We have significant concerns in respect of the SRA's proposal around indemnity insurance. At a high level, it would appear that a solicitor would be able to hold herself out as a solicitor, and provide (non-reserved) legal advice to a member of the public, without holding PII cover if she was part of an alternative legal services provider. Conversely, a solicitor providing exactly the same (non-reserved) services, to exactly the same client base, would be required to maintain expensive PII cover, if they chose to do so through an SRA-regulated vehicle. This represents a significant change from the current position, and it is hard to see how this unequal treatment of similar services can be merited.

Please find specific answers to certain questions set out below.

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

Yes.

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?

Yes.

As we went through the process of authorisation, we found the the requirements within the regulatory framework towards other obligations contained in broader legislation — such as those relating to money laundering and client verification — were very helpful in ensuring that we developed robust policies and procedures.

We agree with the approach of not duplicating legal requirements in the SRA's framework, but we do see a value in increasing the visibility of these requirements. This may be a role for SRA-issued guidance, or it might be a role which could be played by the Law Society, as part of a practice note on starting and running a law firm.

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?

Partly.

We welcome a simplified approach, and we support the delineation of obligations attracting to solicitors as individuals and obligations pertaining to a law firm.

We recognise the SRA's desire to move away from a prescriptive framework to one in which solicitors are able to implement policies and procedures which are appropriate to the context in which they are operating, and we support this.

We would welcome reassurance in respect of the way the SRA would enforce compliance which such non-prescriptive requirements. Our concern is that the SRA's view as to what might, for example, constitute a "reasonable" or "appropriate" action may be different to that held by the solicitor or law firm and that, despite discretion being afforded to the firm by the framework, an individual or firm may still be found to be non-compliant because the SRA takes a different view as to what is reasonable or appropriate in the event of a complaint.

Will the SRA adopt the position that, as long as the law firm reaches its position in a procedurally sound manner, and that the position is neither irrational nor *Wednesbury* unreasonable, the SRA will consider the firm compliant with the requirement in question?

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

We consider that Option 1 is the more appropriate language.

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

See answer to question 6.

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

No.

It would seem that, if no PII requirement is to be placed on solicitors individually, and if there is no basis on which firm-based rules would apply to the provider of alternative legal services, such solicitors / firms are not required to have PII cover.

The disparity between law firms and alternative providers in terms of the requirement (or lack of requirement) to have PII cover has been just about sustainable to date, on the basis that solicitors have not been able to practise as a solicitor, including using the professional title "solicitor", without having PII cover.

However, the SRA's proposals here would mean that a solicitor could practise as a solicitor, providing non-reserved legal services to the public, without needing to maintain PII cover if they were to do so through an alternative legal services provider, while an equivalent solicitor working through a law firm, providing equivalent non-reserved services, to the same clients, would be required to maintain regulated indemnity insurance.

As the same clients would be receiving the same services from people both holding themselves out as solicitors, there is no clear reason why PII should be required in one situation but not the other. To impose this would appear to be a clear case of regulating similar services in very different manners.

To the extent that there is a concern around consumer protection, a more proportionate approach would be to remove the requirement for PII cover for non-reserved activities, but require solicitors to be clear and transparent to clients as to whether they hold PII and the policy's scope / limits. Those who perceive an advantage in having PII can choose to do so, and promote this to their clients. Those who, for whatever reason, wish not to do so, can take that path, and be clear to their clients that this is the case.

It is hard to reconcile the change being proposed here with the SRA's comment, at paragraph 155 of the consultation document, that "we do not consider it likely that a significant number of firms would look to take advantage of the proposed reforms by leaving SRA regulation."

As a small firm, PII is our biggest non-personnel cost of operating by a substantial margin, and the many thousands of pounds which PII cover costs (increased significantly once run-off cover is factored into a budget) could be readily spent on other areas of the business. If the SRA were to implement a framework which distorted the playing field in favour of non-regulated firms, allowing them to practise as solicitors without such a substantial regulatory burden, it would be difficult to see why a regulated law firm would remain an attractive vehicle.

If it is not the SRA's intention to encourage law firms practising non-reserved activities to move away from the regulated law firm model, we would suggest strongly that this aspect of the reform is reconsidered.

Conclusion

We welcome the opportunity to engage with the SRA on the matters under consultation, and we would be happy to discuss these points further should this be of use.

Yours sincerely

Neil Brown

Director, decoded:Legal

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14th September 2016

Dear Sirs

Response of the CLLS Professional Rules and Regulation Committee to the SRA Consultation on the SRA Handbook Review: Looking to the future – flexibility and public protection (June 2016)

Structure of this Response

This response is presented in two parts, Part A (General Comments and responses to the consultation questions) and Part B (Mark-up of Suggested Changes to draft new Codes of Conduct, and Explanatory Notes).

Part A records, under the heading "General Comments", the views strongly held by CLLS member firms that the proposals to allow solicitors to be employed and practise within the alternative sector raise a number of serious risks and concerns. This part of our response should therefore be viewed by the SRA as the response of the CLLS member firms more generally. It draws upon and reflects the data collected from CLLS member firms by means of the questionnaire exercise referred to in paragraph A.2 below. The CLLS represents 58 member firms, whose 15,000 solicitors make the largest contribution internationally to the financial success of English law. For more information about the CLLS, the CLLS's Professional Rules and Regulation Committee ("PRRC") and other specialist CLLS Committees, see the CLLS website.

Part B addresses the day-to-day practicalities of living with new Codes of Conduct, should the SRA decide to take its split Code idea forward (despite the reservations expressed in Part A). The mark-up of suggested changes has been put together by PRRC Committee members, each of whom are regulatory compliance experts and Heads of Compliance/Risk, GC or similar at

leading City law firms. Should the SRA proceed with its proposals, the PRRC hopes to have the opportunity to engage with the SRA constructively about the final form of the new Codes, in order that the end product works as well as possible not just for City law firms but the profession as a whole.

Part A – General Comments:

1. **Length/style of Consultation**

CLLS member firms have found it hard to decipher, from this long consultation paper, what all the relevant issues are. It is not until question 16 (of 33) that the consultation questions begin to address the substance of the SRA's proposals whilst some key facts (e.g. that an unregulated provider could act, through solicitors, for both a buyer and a seller of a business) do not get drawn out. We would have expected each key change to be accompanied by a specific question and, as a consequence, we are unclear whether some changes (e.g. the apparent obligation to now tell former clients, as opposed to simply current clients, that they may have a claim against a firm) are intentional or are drafting errors.

The net effect is that we think it could be a challenge for "ordinary" solicitors, as opposed to compliance professionals, and other stakeholders (such as insurers) to penetrate this consultation and respond to it thoughtfully. We therefore recommend that future consultations reflect this feedback and also reflect Gunning principles.

2. **Our Questionnaire**

CLLS member firms were asked to consider a shorter and more focussed questionnaire to generate the data needed to draft this response. A copy of the CLLS questionnaire is annexed. The response rate was excellent, with a number of firms sending the CLLS very considered submissions.

3. **Wider Context**

We wanted to flag that the CLLS also found it hard to comment on the SRA's proposals in the absence of the wider context of those other regulatory reforms/initiatives which have yet to be completed.

For example, when responding to the SRA's "Training for Tomorrow" consultation ("TFT"), the CLLS expressed concerns that the SRA's proposals might damage the reputation of the solicitors profession– we would like to understand, therefore, where the SRA's TFT proposals now stand in order that we can consider whether taken together with these proposals they might, cumulatively, risk greater reputational damage to the profession.

Similarly, it occurs to us that the SRA's proposals may be out of step with work being done by others. For example, the Competition & Markets Authority ("CMA") published its Legal Services Market Study interim report on 8 July, during the SRA's consultation period. The CMA's interim report suggests that, in the consumer/SME market, it is greater transparency about pricing and quality (in the form of consumer feedback) which

would drive competition – not liberalisation of use of the solicitor title. Will the SRA take this into account when considering what to do next?

In addition, the outcome of the independence debate is not yet known – an important part of that debate is whether the regulatory model should change so that the SRA regulates individuals to a base level whilst the Law Society regulates the entry standards, competency and ethics of the profession of solicitors.

Further, just as we were finalising this response, the LSB published its "vision for legislative reform of the regulatory framework for legal services in England and Wales" which, among other things, calls for a new legislative framework for regulating legal services, a fully independent regulator and activity (not title) based regulation.

How will the SRA take these issues into account when considering what to do next?

4. Unmet Legal Need

We feel unqualified to comment on statements included in the consultation regarding unmet legal need. Whilst we favour access to justice, we wonder whether much of the perceived unmet legal need can be attributed to the withdrawal of Legal Aid, in which case greater competition/more choice will probably do little to solve the problem. We think the consultation should be clearer on evidencing the unmet legal need and how the SRA's proposals will address it.

If the hurdle for putative consumers of legal services is price, which the CMA's interim report suggests, deregulation is unlikely to solve that, given we already have an unregulated legal services market which evidently is not (if there is unmet legal need) providing services at the right costs level.

In addition, we think that greater thought needs to be given to whether removing a requirement for entity regulation around solicitors will (i) reduce costs and (ii) as a direct consequence reduce legal fees to the consumer.

5. Damage to the Solicitors Profession and English Law Globally

The CLLS member firms who responded to our questionnaire unanimously agreed that there are significant issues involved with solicitors being permitted to practice using their solicitor title in unregulated entities, including around risks to client confidentiality.

In summary, CLLS member firms consider it is inevitable that removing one layer of regulation in its entirety (i.e. entity-based regulation) from those operating as solicitors will result in increased risks to consumers using those services directly; and if the deregulation for some solicitors forces solicitors in regulated entities to review their approach to regulation to seek to regain a level playing field, potentially all consumers. This could result in damage to the reputation of the solicitors profession.

The question to our mind is not whether there is risk of reputational damage – there is clearly risk of that; instead the question is whether that risk is worth taking in order to satisfy the unmet legal need identified. We see insufficient evidence that these

proposals will solve that (see above) and so do not think at this stage the risk is worth it. Other solutions should be investigated.

The cumulative effect of these proposals and of TFT could well be that consumers/competitors will form/exploit the impression that there is nothing special about being a solicitor – that solicitors are just another service provider. This impression, even if mistaken or more prevalent in only some areas of the market, could be damaging to the perception of the profession as a whole, including City/commercial solicitors internationally, and therefore the strength/reputation of English law globally.

6. Privilege

The SRA paper asserts (on the basis of undisclosed advice to the SRA from Counsel) that legal advice given by solicitors, to members of the public, working in unregulated businesses will not attract privilege. We worry about the impact this may have on the perception of privilege more generally. Changing the regulatory regime so that the advice of only certain solicitors attracts privilege, depending on where they work, could be viewed by some as eroding privilege.

The SRA has suggested that the availability of privilege might be addressed by individual solicitors contracting with clients direct but this may not be an attractive or realistic proposition for City firms (should they choose to hive their unreserved work across to an unregulated entity) or their unregulated competitors. Sophisticated clients will, we think, want to contract with the entity, not an individual they do not know, and the individual solicitor's personal assets would still be at risk, notwithstanding any indemnities from his/her employer. The CLLS has not sought advice from Counsel on the privilege aspects of the SRA's proposals, and may wish to do so should the SRA decide to move ahead as articulated in this consultation. At this point, we are, therefore, commenting principally on the practicalities only of the work-around proposed by the SRA – whilst we see contracting with individual solicitors (rather than unregulated providers) as a messy solution (and one which a number of sophisticated clients may not be attracted to), it may transpire to be feasible for some businesses. It may be complicated and reliant on carefully crafted engagement letters but this is not necessarily a concern for our part of the legal services market, or our competitors. We do, however, wonder whether the SRA's suggested workaround might mean that the individual contracting solicitor has to become a "recognised sole practitioner" - effectively making him/her an entity for the purposes of SRA rules, and thereby introducing the full weight of entity-based regulation. Is this something which the SRA has considered?

Clients have not had to think about privilege when instructing solicitors to date, as any legal advice from them would attract privilege. Clearly privilege is important to clients but how important it is to them and when is currently difficult to quantify. In some circumstances, privilege may not be important to clients – for example, accountants give tax advice and this does not attract privilege. A requirement to give clear and transparent information on whether advice given by a solicitor, working in an unregulated business, attracts privilege will be key – however, we have reservations as to whether:

(A) such information will always be read/understood/capable of evaluation at the right time by consumers (even if sophisticated), see further below; and

(B) whether, for example, a junior solicitor will have the clout to compel his/her unregulated employer to provide it properly.

7. Limits of Transparency Information

We doubt that all clients will read/understand transparency information given to them by unregulated providers, even if sophisticated. Even if transparency information is read, it may be too difficult in some cases to evaluate it at the time it is given. In addition, we think that the SRA's emphasis and reliance on the giving of transparency information increases the risk of "mis-selling" by some unregulated providers, who simply won't get the detail right or will fail to draw a client's attention to the most pertinent information in any particular case. If this were to result in a significant number of claims, some unregulated providers will go bust – which has the obvious potential to damage the solicitors profession.

The consultation implies that it will be for solicitors in regulated entities to use their consumer protection strengths as an "advertisement tool". Given that "solicitor" already has a meaning in the English culture, we think the burden should instead be on unregulated entity solicitors to explain that, in their case, solicitor does not mean what the consumer might assume. This would not, however, be a welcoming message at the start of a trusted adviser relationship and goes to the unworkability of these proposals in relation to producing a level playing field.

8. Shift of Burden and Risk to the Consumer

These proposals appear to shift to the consumer the burden of choosing the right service, against the backdrop that those most in need of protection will be unable to do so. (Indeed even the most sophisticated clients could struggle to understand the difference between PII on Minimum Terms and Conditions and PII on market norm terms). Because the term "solicitor" has such resonance already, that burden of deconstructing what it means in different circumstances is a heavy one, and we suggest an impossible one for most clients.

9. Unlevel Playing Field

Creating a two tier regulation system would potentially mean that accountancy firms, consulting firms and foreign law firms employing solicitors would compete with traditional law firms for unreserved work whilst having the benefit of more liberal regulation. They will escape entity-based regulation on conflicts (possibly), information security, PII and risk management not only to the detriment of consumers but to the City law firms competing with them. This highlights the need for the SRA to press Government to revisit the list of reserved activities in the Legal Services Act 2007, and to consider whether it forms the right basis for a risk-based approach to regulation.

Answers to Specific Consultation Questions:

1. **Have you encountered any particular issues in respect of the practical application of the Suitability Test (either on an individual basis, or in terms of business procedures or decisions)?**

We think that the reporting thresholds in the Suitability Test are set too low. For example, we wonder why the SRA would wish to know whether a solicitor has been given a PND for littering. The reporting of trivial matters such as these wastes SRA resources, takes up COLP time and causes anxiety for the individual concerned unnecessarily. It is not possible for firms/solicitors to take a pragmatic or proportionate view on trivial reporting matters, given that failure to report is treated by the SRA as prima facie evidence of dishonesty. This underlines the need for the SRA to draw the line at an appropriate level.

We favour a comprehensive review and consolidation of all SRA reporting obligations, with an appropriately high and consistent materiality threshold being introduced across the board.

Further, the Suitability Test does not describe the standards expected of solicitors, instead simply listing certain things which need to be reported. It does not therefore "speak" to individuals, does not articulate what "suitability" is and cannot therefore be used by firms as an effective training tool.

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

If the Principles are to apply to business services staff (as well as to regulated firms and solicitors), they should include a reference to confidentiality. Everyone who works in a law firm has an important role to play in protecting clients' information and this should be clear in the Principles (not relegated to the Codes, which may not apply to all staff).

This could be done by introducing a new Principle 7 or adding to Principle 6 stating that you must protect your client's confidential information.

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

We do not understand why the SRA is proposing to re-word what is currently Principle 6 – what might be wrong with the existing formulation is not explained in the consultation paper. The existing formulation is well understood and we favour its retention, in the absence of a good reason to change it.

We have two specific comments on the revised formulation. First, we think that use of the word "ensure" could set a higher standard than the existing obligation to "maintain" and is unrealistic. Secondly, we think that the reference to "those delivering legal services" is too wide, given that this would catch the unregulated sector. The Principle should instead refer to upholding public confidence in "you and your profession".

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

See our answer to question 2 above.

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

On balance, we are not in favour of the SRA developing guidance or case studies, which could become additional regulation "by the back door". You have said that feedback from stakeholders suggests that individuals and firms find the status of the existing Indicative Behaviours confusing, which is why you are not replicating them in your new Codes. If you develop guidance and case studies, you risk replicating this problem. There is also a danger that issuing such guidance and/or case studies would have the practical effect of making the Handbook "long, confusing and complicated" which would defeat the SRA's aim of attempting to simplify it in the first place. The Codes need to be clear – and that may mean that they have to be longer – to remove the need for additional guidance.

Further, we think it is for our representative bodies, not our regulators, to issue any guidance or case studies the profession may find helpful, in a manner which supports solicitors and does not goldplate regulation.

If the SRA does produce guidance or case studies, we think it should consult on these, whether formally or informally with stakeholder groups, before they are issued. In this eventuality, we would like to explore with you further what role the CLLS could play in preparing/reviewing City-based case studies and guidance.

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

Our members do not agree that the existing combined Code is "long, confusing and complicated". Further, simplification for its own sake can be dangerous – whilst superficially attractive, reducing the amount of text to read and recall, the introduction of new terminology just to reduce the number of words can easily create ambiguities. A split Code is, however, logical if the SRA is to permit solicitors to use their solicitor title in unregulated firms (as to the undesirability of which, see our General Comments above.)

That issue aside, we asked our member firms whether they were in favour of two Codes, or one. The majority of firms who responded favoured the retention of a combined Code of Conduct, stating that, in their experience, when individual solicitors think of their professional obligations, they think of ethics in a broader sense. They know what the parameters are, and consult with dedicated compliance professionals in the firm's central team when they need help – including in relation to conflicts analysis. These firms did not see how a split Code would, therefore, help to "reconnect" their lawyers as they do not consider that they are ethically disconnected. Their lawyers receive regular ethics training and know how to issue-spot, and seek further guidance when they need it. The fact that they do seek that guidance does not mean that they are abrogating their professional responsibilities to either the firm or its central Compliance/Risk team. In fact, the opposite is true – it demonstrates that they are in

touch with their personal regulatory responsibilities. In addition, the introduction of two Codes might necessitate a substantial re-education and training programme, in firms, for no obvious benefit and at considerable cost.

A minority of firms who responded thought a split Code was a good idea which, if linked to good internal training, could help to refocus individuals' attention on their personal ethical and regulatory responsibilities. In addition, our in-house lawyer client contacts may find a split Code easier to navigate and therefore to understand what the SRA expects of them as solicitors.

We are concerned that the Code for Solicitors will not contain enough detail to support individual solicitors in unregulated entities who are the ones most at risk of challenges to their professional requirements.

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

See our further comments and mark-up of the Codes in Part B of this response.

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

See our further comments and mark-up of the Codes in Part B of this response.

9. **What are your views on the two options set out for handling actual conflict or significant risk of a conflict between two or more clients and how do you think they will work in practice?**

We are very strongly in favour of Option 1, with the amendments set out in the attached mark-up.

The two existing exceptions (auction and substantially common interest) are very important to and frequently used by many of us/our clients and we would like to see these explicitly replicated in the new rule – we would not wish instead to rely on SRA assurances that there is no conflict/significant risk of one in the circumstances covered by those exceptions.

We asked our members whether they thought the SRA should consider the introduction of a new informed consent exception.

The majority of those responding thought that a sophisticated client exception, requiring informed consent, would (although some anticipated using it in limited circumstances only) be a useful extension to the conflict rule, offering greater flexibility to clients and helping to alleviate some of the level playing field concerns referred to in our answer to question 16 below. Some thought that, if a sophisticated client exception were to be introduced, it should not be available in a litigious/similar context but only where there is "indirect adversity".

In contrast, some of those responding thought that the existing exceptions are sufficiently broad. If an informed consent exception were to be introduced, they thought it would need to be made clear that it is for sophisticated clients and should be only

used sparingly – this, they thought, could be difficult to define, lend itself to abuse and therefore risk damaging the solicitors profession.

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

See our answer to question 6 above. Also see our further comments and mark-up of the Codes in Part B of this response.

11. **In your view is there anything specific in the Code [for SRA regulated firms] that does not need to be there?**

See our further comments and mark-up of the Codes in Part B of this response.

12. **Do you think that there is anything specific missing from the Code [for SRA regulated firms] that we should consider adding?**

See our further comments and mark-up of the Codes in Part B of this response.

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?**

See our further comments and mark-up of the Codes in Part B of this response.

14. **Do you agree with our intention to retain the COLP and COFA roles for recognised bodies and recognised sole practices? [14a. In responding to this question, please set out the ways in which the roles either assist or do not assist with compliance.]**

In summary, the majority of our members are in favour of retaining the roles, although some do not feel strongly either way (principally because they are of the view that their firms have personnel in quasi - COLP/COFA roles in any event).

Our members have a range of views as to whether the roles have given them any additional benefits, over and above having a Head of Compliance/Risk, General Counsel or similar, with the majority considering that there is a benefit, albeit not necessarily substantial for City firms. A clear majority see the roles as having assisted in re-enforcing the role of Head of Compliance/Risk, General Counsel or similar, though in general such roles pre-dated the COLP/COFA regime.

Whilst, in principle, reminding partners and employees of the firm's obligation to report breaches (through the COLP and COFA) strengthens the compliance function, it has possibly been handicapped by the SRA Handbook omitting a requirement on partners and employees to report to the COLP and COFA, leaving that to the firm's own policies.

The COLP role has become well known in firms, but the COFA role less so, in part owing to the confusing title: the COFA is not (as COFA) responsible for finance, and certainly not responsible for administration. This is a drawback if the role is to be taken seriously day-to-day by the rest of the firm for whom simplicity of roles and titles is important.

So long as the SRA Accounts Rules required an external audit, the COFA role was largely otiose especially as most firms of any size have a well-defined finance director role. Now that the requirement for an external audit is being abolished this, is not, we suggest, the right time to abolish the COFA role, as the COFA may have a more useful function in the future than the past.

Whatever the correct interpretation of the remit of the COFA (see below), the bulk, if not all, of a firm's compliance with the Companies Act (as modified for LLPs) on accounting matters confusingly remains with the COLP; the COLP has to be a solicitor, as much of compliance concerns technical legal matters, but he/she has responsibility to the SRA for the bulk of accounting compliance, even though the firm, if of any size, will have a professionally qualified accountant as finance director.

Given that firms have had to establish structures to support the COLP/COFA roles, they see no benefit in abolishing them.

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

Taking up the point in our answer to question 14 above, we suggest the addition of an obligation in the SRA Handbook on partners and employees to notify possible breaches to the COLP/COFA. We also suggest consideration of whether, if an individual partner or employee does so, he/she is deemed to discharge his/her responsibility under the Handbook to the SRA (paralleling how reporting obligations work under the Proceeds of Crime Act 2002).

We suggest clarifying confusion over the COFA role (and consequently COLP role also as, on the drafting of Authorisation Rule 8.5, they are mutually exclusive), in particular:

(A) Responsibility for compliance with the SRA Accounts Rues is clear, but confusingly the COFA is not responsible for the Accounts provisions of the SRA Overseas Rules, so the COLP is – that defies logic.

(B) It is sometimes asserted that as financial instability might imperil the safety of client money, so the COFA's role extends to financial stability. Maybe it should be; our members are divided on the point with, on balance, a majority in favour as the COFA is usually the finance director (or, at least, UK finance director) but, if that is the correct current interpretation, it is also unclear where the dividing line lies between COLP and COFA.

(C) A majority of our members consider that responsibility for all aspects of the keeping of financial records, production of annual accounts, financial compliance, including compliance with the Companies Act (as modified for LLPs) on accounting matters, financial stability and payment of taxes by the firm should rest with the COFA, not the COLP. Finance directors often do not understand why such responsibility rests with the COLP, who is a solicitor.

(D) The title, COFA, is confusing – for what part of "administration" is he/she responsible?

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

Our views are as follows:

(A) **Damage to solicitors profession** – Our members think that the SRA's proposals pose a threat to the profession. See further paragraph 5 of our General Comments above. The proposed changes will establish a two tier system and the existence of unregulated firms, with no requirements as to client confidentiality or conflicts at a structural level, could undermine the profession.

(B) **Unfair conflicts regime** – The SRA's proposed changes could mean that (for example) accountancy firms will be able to employ solicitors to do unreserved work but that the SRA's conflict rules will only apply at an individual level – so a non-SRA regulated firm might act for, say, both a buyer and a seller of a business (provided the same solicitor does not act for both clients and, possibly, client waivers were in place). We think it is unfair that non-SRA regulated firms will benefit from a more liberal conflicts regime. Although we cannot currently measure/quantify the impact of this, it is potentially detrimental to all City/commercial law firms. We would reiterate here the point made at paragraph 6 of our general comments, namely that we think the SRA should clarify its thinking on the conflicts position – do you consider that an unregulated provider could act for (example) buyer and seller of a business provided the same solicitor was not on both teams? This seems possible at first blush, as the SRA conflict rules would only bite at the individual level – but might those individuals risk breaching SRA Principles (e.g. obligation to act in client's best interests) by agreeing to represent a client in circumstances where he/she could be negotiating terms with/against a colleague?

(C) **Privilege** – Clients have not had to think about privilege when instructing solicitors to date, as any legal advice from them would attract privilege. See further paragraph 6 of our General Comments above.

(D) **Transparency information solution flawed** – We doubt that many clients will read/understand transparency information given to them, even if sophisticated and transparency information provided by the unregulated sector is up to the mark. See further paragraph 7 of our General Comments above.

(E) **Entity-based regulation as a kite mark** – Clients simply have not had to think about how much they value entity-based regulation to date. It automatically comes as part of any law firm offering. That said, we think that sophisticated clients will expect it to continue to be part of the offering – they expect to contract with properly run businesses with sound risk management systems/controls and stringent confidentiality obligations. This is why we do not think they would want to contract with an individual solicitor working for an unregulated provider (e.g. as a mechanism to ensure privilege).

(F) **Unrealistic burden on individual solicitors** – We are concerned about the number of very specific obligations placed on individual solicitors, in the new

Code for solicitors, with which they cannot properly comply in isolation from the organisation in which they work. Rules 8.6 to 8.9, for example, give individuals obligations in respect of client information and publicity. In both cases, the Code for Firms does not contain equivalent obligations. Further, if a solicitor is working for an unregulated entity, how can solicitors realistically comply with obligations such as these – particularly if they are in a minority, and relatively junior?

17. How likely are you to take advantage in the greater flexibility around where solicitors can practice as an individual or as a business?

It would be possible, under the SRA's proposed new approach, for City law firms to split off the unreserved part of their business into a separate business (to avoid SRA regulation at an entity level), provided they gave their clients the right information about the protections available to them. We asked our members whether they saw this as an opportunity to "hive across" their unreserved work (e.g. corporate, M&A, commercial, financing) to a new business which those firms would effectively "self-regulate", free from the constraints and cost of SRA regulation and with the availability of US-style conflict waivers (should they want to offer them to two or more clients who may seek to instruct the firm on the same/a related matter).

The majority of firms responding thought this was a highly unattractive idea – it would be too messy for any law firm which did not genuinely intend to run two separate businesses (with separate buildings, employees, technology systems etc). In addition, for general risk management purposes, most firms would want to replicate many of the systems/controls they currently have in place which also ensure compliance with SRA rules. Additionally, if there were to be such a separation, the firm would lose the benefit of the "designated professional body" regime under the Financial Services and Markets Act 2000 and might well conclude it needed to be authorised by the FCA. There would therefore, be no savings to them in "hiving across" their unreserved business. Clients expect us to have those systems/controls and so they are part of our offering. Privilege could also be a stumbling block, as could the views of local law societies/bars/regulators in other jurisdictions.

If the SRA's proposals go ahead, it is something which City law firms, would, however, need to keep under review and to monitor developments, especially if our fears of being put at a competitive disadvantage prove correct.

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

Our members are not in favour of solicitors being permitted to practice, using their solicitor title, for entities which are not regulated by the SRA. It therefore follows that they favour maintaining the position whereby sole practitioners must be SRA authorised, as entities, to provide reserved activities to the public.

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?

There is a requirement for a rule which ensures that every firm is supervised by someone with a minimum level of practice experience, otherwise there is a risk to the profession and consumers. Rule 12 of the existing SRA Practice Framework Rules was drafted for a time when the vast majority of firms were single site and relatively small and so having a single such person in each authorised firm made some sense. The rule does not, however, reflect the modern day reality of the proliferation of multi-office and multi-national firms. In this context, it would make sense to require that each office of an authorised firm be supervised by a suitably qualified and experienced practitioner. Some overseas Codes, in Hong Kong for example, go further and are more specific about what supervision means in practice which might also be a sensible extension of the current SRA rule.

The question about unregulated providers recruiting junior solicitors and then not being able to support them is a separate, but related issue (see further 16(F) above). In relation to your reference to emerging data suggesting that newly qualified solicitors "do not present a significant risk to the delivery of a proper standard of service", we think this is may be due to the internal management structures of SRA regulated firms, including the appropriate allocation of (less complex, less risk-inherent) work to NQs and clear guidance, briefing, monitoring and ongoing supervision by more experienced solicitors, and not because NQs are of their nature less risky practitioners.

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

Given what we say in this response about the assumptions consumers make when they instruct a solicitor, we think the regulatory emphasis should be on ensuring that solicitors who work in unregulated entities give consumers detailed information about the protections which are not available to them (but would be if they used a regulated provider) – for example, we think that consumers (including sophisticated consumers) will assume that when they are being advised by a solicitor (regardless of whether the solicitor works for a regulated/unregulated entity), the advice they receive will be privileged and insured. If this is not the case, because the consumer is contracting with an unregulated entity, the solicitor providing the services should be obliged to make this clear. However, we acknowledge that this would place significant compliance burdens on individual solicitors employed by unregulated services providers, particularly if they are junior and the employer is a large enterprise.

21. Do you agree with the analysis in our initial Impact Assessment?

We think you have given insufficient weight to the risks summarised in paragraph (viii) on page 45 of your Impact Assessment, namely (a) consumer confusion around different protections and (b) the erosion of the solicitors profession. In addition, we query whether risks to client confidentiality have been given due regard.

Further, we do not think that consumers would necessarily benefit from your proposed changes in the ways summarised in paragraph (vii) of your Impact Assessment. In particular, we do not think that consumers will have a better understanding of the legal

services market as a consequence – in fact, the opposite is likely to be true. Consumers (even sophisticated consumers) will make assumptions about the benefits/protections available to them when advised by a solicitor, and these will not be countered by detailed transparency information – which could be too difficult to absorb, impossible to evaluate at the time of instruction and places the onus on the consumer to do due diligence on the unregulated provider which they are unlikely to be equipped and/or have the time to do.

22. Do you have any additional information to support our initial Impact Assessment?

We feel unable to answer this question, given that we have no dedicated resources to investigate the issues.

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?

We agree with your specific proposal that solicitors who work outside of an "authorised body" should not personally hold client money.

As we understand it, this approach does not prevent the organisation in which the solicitor is employed holding client money, and that an unauthorised vehicle to which an SRA authorised law firm chooses to hive-off its unreserved work could hold client money notwithstanding the fact that the individual solicitor/principals and employees of that entity could not hold client money in their own names. Such an unregulated law firm would not appear to have any obligation to comply with the SRA Accounts Rules when holding client money, even if it was an all solicitor owned business. If our analysis is correct, this lacuna in the draft rules could present a considerable risk to the clients of such an unregulated solicitors firm, and to therefore to reputation of the profession.

Although not of direct interest to CLLS members firms, we are also concerned about how your approach would play out for an unincorporated solicitor sole practitioner or general partnership which only engages in unreserved activities, and chooses to do so without being authorised as a "recognised sole practitioner" or "recognised body" respectively. We believe that the effect of draft rule 4.2 would be to prohibit the holding of client money by these service providers, irrespective of whether doing so was essential to the viability of their practices. If our interpretation is correct, this would deny these providers the opportunity to exploit the rule change, and put them at a commercial disadvantage as against their incorporated competitors.

In justification for your approach to the holding of client money, we note paragraph 124 of the consultation which says that the SRA considers "that it would be artificial and confusing to have different obligations on an individual solicitor compared to the business in which they are working. The compliance responsibility would place an unrealistic, disproportionate, and impractical burden on the individual solicitor." We believe this same statement is equally pertinent to a number of other obligations contained in the draft SRA Code of Conduct for Solicitors, RELs and RFLs which the SRA is seeking to impose on solicitors working in unregulated businesses, and highlights significant flaws in the regulatory approach being proposed.

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?

Given that this response is being made on behalf of City law firms, which are CLLS members, we do not feel qualified to comment on this question, and therefore defer to the in-house community.

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? [Question 25a. If not, what are your reasons?]

We neither agree nor disagree. However, we do think that consumers will assume that they have access to the fund, so transparency information given by solicitors working for alternative providers would need to make it clear that this protection is not available. As stated above, we think that consumers (even sophisticated consumers) will find the transparency information which unregulated providers will need to give them too difficult to absorb and impossible to evaluate at the time of instruction. We also think that it will place the onus on the consumer to do due diligence on the unregulated provider which they are unlikely to be both equipped and/or have the time to do. Consumers should be able to assume that, when they are advised by a solicitor, this automatically brings them certain protections.

In addition, we would be concerned if the Compensation Fund were to be available to firms which did not have PII obligations. This could increase the chances of inappropriate claims being made on the fund.

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

No. Our members very strongly feel that PII cover should be compulsory, even for the unregulated sector, if a solicitor is advising. We think it is important that any user of a solicitor's services (whether through a regulated firm or an unregulated entity) should have complete confidence that there is PII available (on the minimum terms and conditions) in the event of an error by the solicitor. For example, we would be concerned if an unregulated entity providing tax or employment services could offer the services of a solicitor in circumstances where the client would have no insurance protection in the event that the solicitor was negligent.

However, an associated PII requirement may make solicitors less attractive hires for alternative providers.

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

Whilst, in theory at least, consumers can ask providers what their commercial insurance levels are and choose to proceed with a properly insured provider only, this (unfairly) place the onus on the consumer to do due diligence on the unregulated provider. As stated above, we think they are unlikely to be equipped and/or have the time to do this. Any consumer (regardless of how sophisticated) would be stretched to evaluate the comparative benefits of commercial insurance cover with the same amount of PII cover

on the minimum terms and conditions, for example. Consumers should be able to assume that, when they are advised by a solicitor, this automatically brings them certain protections – including minimum PII on industry-wide standard terms.

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

Yes.

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

No. See our answer to question 24 above.

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?**

Not imposing threshold standards would simply be, we think, an inevitable consequence of your proposals to allow solicitors to practice as solicitors for unregulated entities. We are not in favour of this.

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

We think that solicitors should only be able to provide services to the public, as solicitors, through SRA regulated entities. We believe the SRA should focus on revisiting the definition on reserved legal services and working with all relevant parties to achieve a re-draft of these.

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

We are not clear what your proposed position is. However, we would expect you to act in the best interests of consumers, including by use of your intervention powers, if necessary.

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

Yes. We think the alternative would be too messy and very confusing for clients. Realistically, City law firms would not, for example, wish to operate a different approach to conflicts depending on whether work was reserved/unreserved and any law firm wishing to do this is bound to run into difficulties – as work on a matter can involve a blend of the two and/or flip from one to the other.

Annexure to Part A

SRA Handbook Review – Questions for CLLS Member Firms

Background:

1. On 1 June 2016, the SRA published a consultation called "Looking to the future – flexibility and public protection" – marking the first phase of the SRA's review not only of its Handbook but also its regulatory approach. The purposes of this note is to alert and seek the reaction of CLLS member firms to the principal issues this consultation poses for City law firms. For the reasons summarised below, the impact of the changes being proposed could be quite radical and has the potential to affect the entire sector (not just high street firms).

2. Whilst the SRA emphasises, in its consultation paper, the need to simplify its rules and reconnect individuals with their personal regulatory obligations, the real driving force for change is the perceived "unmet need" of individual consumers and small businesses for legal advice – which the SRA plans to address by enabling solicitors to practice in unregulated entities, delivering non-reserved* legal services.

3. This explains why the SRA needs to tackle its Code of Conduct first (notwithstanding that it is arguably the simplest part of the current Handbook), splitting it into two versions – one Code which apply to SRA regulated firms/entities and another Code which will apply to individual solicitors alone.

4. If it goes through unchanged, the SRA's review package will mean, for example, that:

   (A) firms which are currently SRA regulated will be able to "hive across" their unreserved work to entities they set up in the unregulated sector and employ solicitors in such entities (whose turnover will not be subject to the annual charge on renewal of recognised body status) to undertake that work;

   (B) existing businesses (e.g. other professional services firms) will be able to diversify into legal services, employing solicitors to deliver non-reserved legal services to clients using their "solicitor" title;

   (C) existing businesses which employ in-house solicitors will be able to use their in-house departments to provide non-reserved legal services to the public;

   (D) existing alternative legal service providers (which currently deliver non-reserved legal services to the public through unqualified staff) will be able to employ solicitors to undertake/supervise this work, so seeking what the SRA calls "brand enhancement"; and

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* Reserved legal activities are, in summary: rights of audience; the conduct of litigation; reserved instrument activities (including the preparation of transfers of and charges over real property in E&W); probate activities; notarial activities and the administration of oaths.

(E) new firms may be established to deliver non-reserved legal services, also using solicitors to undertake/supervise this work and taking the opportunity to achieve "brand enhancement".

5. In summary, solicitors who work for non-SRA regulated firms will only be subject to individual-based regulation, which does not mandate risk management, such conflicts avoidance and the purchase of PII cover, at an entity level. In addition, it may be that privilege will not attach to the advice which clients of unregulated entities receive.

6. To help to set the tone for the CLLS's response to this consultation, and subsequent consultations on the Handbook review, please answer the questions which follow – sending your response to kevin.hart@citysolicitors.org.uk by Friday, 29 July 2016.

Questions:

1. Do you think that splitting the SRA Code of Conduct will help to reconnect individual solicitors with their personal regulatory responsibilities, or do you favour the retention of a combined Code where individuals and the firm are "in it together"? In your experience, do practitioners find the existing Code of Conduct "long, confusing and complicated"?

2. Even if you do not think the SRA's proposals will affect your market, do you think the changes could pose a threat to the strength/value of the solicitor brand in general (e.g. because the consumer protections available to clients instructing unregulated firms may be significantly reduced, and some unregulated firms may lack the appropriate systems, controls and infrastructure to support the solicitors they employ in meeting their individual regulatory responsibilities)?

3. The SRA's proposed changes would mean that (for example) accountancy firms will be able to employ solicitors to do unreserved work but that the SRA's conflict rules will only apply at an individual level – so a non-SRA regulated firm could act for, say, both a buyer and a seller of a business (provided the same solicitor does not act for both clients). Do you think it is unfair that non-SRA regulated firms will therefore benefit from a more liberal conflicts regime, and how might this affect your business?

4. The SRA has put forward two alternative formulations for its reworded conflict rule. One is similar to the current rule, whilst the other does not replicate the "auction" and substantially common interest exceptions (although it is not clear whether this is just a drafting issue or whether the SRA really intends to dispense with the availability of these two exceptions). How important are those exceptions to you in practice? Further, given that the SRA is apparently consulting on substantive changes to the conflicts rules, would you like to see other changes introduced? For example, do you think that the SRA should also consider an informed consent exception, perhaps only when dealing with sophisticated clients?

5. The SRA has sought advice from Counsel on privilege and has been advised that legal advice given by unregulated firms may not attract legal professional privilege, even if that advice is given by a solicitor (although this could be subject to work arounds – e.g. if the client contracts with the solicitor rather than the firm). If this advice is right, how

important do you think this would be to your clients when deciding whether to instruct a regulated or unregulated provider?

6. If given transparency information by an unregulated firm about the protections available to them when using such a firm, do you think this will help clients (even if sophisticated) make the right choices about what they need? Do you think that solicitors working for unregulated firms should be required, as a regulatory matter, to offer minimum levels of PII to their clients?

7. It would be possible for you to split off the unreserved part of your business into a separate business (to avoid SRA regulation at an entity level), provided you give your clients the right information about the protections available to them. Do you see this as an opportunity to "hive across" your unreserved work (e.g. corporate, M&A, commercial, financing) to a new business which you would effectively "self-regulate", free from the constraints and cost of SRA regulation and with the availability of US-style conflict waivers (should you want to offer them to two or more clients who may seek to instruct you on the same/a related matter)? Why might his be attractive/unattractive to you?

8. Do you think that your clients value entity-based regulation and see it as a "kite mark"? Alternatively, do you think your clients would be happy to continue to instruct you if you became a "self-regulated" entity – bearing in mind that you could choose to maintain the same levels of PII and adopt certain risk management systems across the board?

9. The SRA is currently of the view that all work, whether reserved or unreserved, must be regulated if done by an SRA regulated firm. Do you think it should reconsider this? Are you attracted to the idea that the SRA should only regulated reserved work?

10. Whilst the SRA is minded to retain the COLP/COFA roles for all SRA regulated firms, they would like views on how these roles are working in practice, their value and how effective they are. Do you agree that the roles should be retained in broadly the current form? In your opinion, how do the roles assist with/hinder compliance? The COFA's role is currently limited to compliance with the SRA Accounts Rules, leaving all other aspects of finance and financial stability to the COLP. Given that the COFA is typically an accountant, do you agree that the role of the COFA should be extended to both the Overseas Accounts Rules and all other aspects of finance and financial stability?

Part B of CLLS Consultation Response

CLLS PRRC Comments on Draft SRA Code of Conduct for Solicitors, RELs and RFLs [2017]

The SRA Principles comprise the fundamental tenets of ethical behaviour that we expect all those that we regulate to uphold. This includes you, as well as authorised firms and their managers and employees in so far as is relevant to their roles[1]. The principles are as follows:

You:

1. uphold the rule of law and the proper administration of justice
2. ensure that your conduct ~~upholds~~ maintains public confidence in ~~the~~ you and your profession[2] ~~and those delivering legal services~~
3. ~~act with~~do not allow your independence to be compromised[3]
4. act with honesty and with integrity[4]
5. ~~act~~ perform your role in a way that encourages equality, diversity and inclusion[5]
6. act in the best interests of each ***client*** and protect their confidential information[6]

The Code of Conduct describes the standards of professionalism that we, the SRA, and the public expect of individuals (solicitors, registered European lawyers and registered foreign lawyers) authorised by us to provide legal services. They apply to conduct and behaviour relating to your practice, and comprise a framework for ethical and competent practice which applies irrespective of your role or practice setting but subject to the Overseas Rules relating to your practice outside England & Wales[7]; ~~although s~~Section 8 applies only when you are providing legal services to the public or a section of the public.

You must exercise your judgement in applying these standards to the situations you are in and deciding on a course of action, bearing in mind your role, responsibilities and the nature of your clients and areas of practice. You are personally accountable for compliance with the Code - and our other regulatory requirements that apply to you - and must always be prepared to justify your decisions and actions. Serious misconduct or a material ~~breach~~[17] may result in our taking regulatory action against you. A breach may be ~~serious~~ material[17] either in isolation or because it comprises a persistent failure to comply or pattern of behaviour.

The Principles and Codes are underpinned by our Enforcement Strategy, which explains in more detail our approach to taking regulatory action in the public interest.

Maintaining trust and acting fairly

1.1 You do not unfairly discriminate by allowing your personal views to affect your professional relationships and the way in which you provide your services.

1.2 You do not abuse your position by taking unfair advantage of ***clients*** or others relying on your advice[8].

1.3 You perform all ***undertakings*** given by you, and do so within an agreed timescale or if no timescale has been agreed then within a reasonable amount of time.

1.4 You do not mislead or attempt to mislead your ***clients***, the ***court*** or others relying on your advice[8], either by your own acts or omissions or allowing or being complicit in the acts or omissions of others (including your ***client***).

Dispute resolution and proceedings before courts, tribunals and inquiries

[NB Our litigation experts, through the CLLS Litigation Committee, note that it is proposed to delete current Outcome 5.5 and IBs 5.4, 5.5, 5.7 (b) and 5.9 and that the proposal is that this may possibly be replaced by SRA guidance. They consider that it would be useful to continue to have a specific rule equivalent to Outcome 5.5 noting that when professional obligations require solicitors to do things that are likely to be contrary to their clients' interests or wishes it is extremely valuable to have a specific rule to point to.]

2.1 You do not misuse or tamper with evidence, or attempt to do so.

2.2 You do not seek to influence the substance of evidence, including generating false evidence or persuading witnesses to change their evidence.

2.3 You do not provide or offer to provide any benefit to witnesses dependent upon the nature of their evidence or the outcome of the case.

2.4 You only make assertions or put forward statements, representations or submissions to the ***court*** or others tribunals or inquiries[8] which are properly arguable.

2.5 You do not place yourself in contempt of ***court***, and you comply with ***court*** orders which place obligations on you.

2.6 You do not waste the ***court's*** time.

2.7 You draw the ***court's*** attention to relevant cases and statutory provisions, or procedural irregularities of which you are aware and which are likely to have a material effect on the outcome of the proceedings.

[NB Generally, concerning rules relating to advocacy, it is important for these to be consistent with those applicable to barristers and, if not, can the SRA explain why

they should be different?]

Service and competence

3.1 You only act for ***clients*** on instructions from the ***client***, or from someone ~~authorised to~~who can properly[9] provide instructions on their behalf. If you have reason to suspect that the instructions do not represent your ***client's*** wishes, you do not act unless you have satisfied yourself that they do.

3.2 You ensure that the service you provide to ***clients*** is competent and delivered in a timely manner.

3.3 You maintain your competence to carry out your role and keep your professional knowledge and skills up to date.

3.4 You consider and take account of your ***client's*** attributes, needs and circumstances.

3.5 Where you supervise or manage others providing legal services:

(a) you remain accountable for the work carried out through them; and

(b) you effectively supervise work being done for ***clients***.

3.6 You ensure that the individuals you manage are competent to carry out their role, and keep their professional knowledge and skills up to date.

Client money and assets

4.1 You properly account to ***clients*** for any ***financial benefit*** you receive as a result of their instructions except where they have agreed otherwise[10].

4.2 You safeguard money and ***assets*** entrusted to you by ***clients*** and others.

4.3 Unless you work in an ***authorised body***, you do not personally hold ***client money***.

Referrals, introductions and separate businesses

Referrals and introductions

5.1 In respect of any referral of a ***client*** by you to another ***person,*** or of any third party who introduces business to you or with whom you share your fees, you ensure that:

(a) ***clients*** are informed of any financial or other interest which you or your business or employer has in referring the ***client*** to another ***person*** or which an ***introducer*** has in referring the ***client*** to you;

(b) ***clients*** are informed of any fee sharing ***arrangement*** that is relevant to their matter;

(c) the agreement is in writing;

(d) you do not receive payments relating to a referral or make payments to an ***introducer*** in respect of ***clients*** who are the subject of criminal proceedings; and

(e) any ***client*** referred by an ***introducer*** has not been acquired in a way which would breach the ***SRA's regulatory arrangements*** if the ***person*** acquiring the ***client*** were regulated by the ***SRA***.

Separate businesses

5.2 You ensure that ***clients*** are clear about the extent to which the services that you and any ***separate business*** offer are regulated.

5.3 You do not represent a ***separate business*** or any of its services as being regulated by the ***SRA***.

5.4 You only:

(a) refer, recommend or introduce a ***client*** to a ***separate business***; or

~~(b) put your ***client*** and a ***separate business*** in touch with each other; or~~[11]

(~~c~~b) divide, or allow to be divided, a ***client's*** matter between you and a ***separate business***,

where the ***client*** has given informed consent to your doing so.

5.5 Where you and a ***separate business*** jointly publicise services, you ensure that the nature of the services provided by each business is clear.

Conflict, confidentiality and disclosure

Conflict of interests

6.1 You do not act if there is an ***own interest conflict***[12] ~~a conflict of interest between you and your ***client*** or a significant risk of such a ***an own interest conflict***[12]~~.

6.2 You take reasonable steps to satisfy yourself that your business or employer has effective systems and controls to identify and monitor conflicts of interest as appropriate[13]

6.3 You do not act in relation to a matter or particular aspect of it if there is a ***client conflict*** or a significant risk of such a conflict in relation to that matter or aspect of it, unless:

(a) the ***clients*** have an agreed common purpose in relation to the matter or the aspect of it, as appropriate, and a strong consensus on how that purpose is to be achieved; or

(b) the ***clients*** are ***competing for the same objective*** which, if attained, by one ***client*** will make that objective unattainable ~~to~~by the other ***client***:

and the conditions below are met, namely that:

(i) all the ***clients*** have given informed consent, given or evidenced in writing, to you acting; and

(ii) where appropriate, you put in place effective safeguards to protect your ***clients'*** confidential information; and

(iii) the benefits to the ***clients*** of doing so outweigh the risks to the ***clients*** of you acting.

Confidentiality and disclosure

6.43 You keep the affairs of current and former ***clients*** confidential unless disclosure is required or permitted by law or the ***client*** consents and you take reasonable steps to satisfy yourself that where your business or employer holds information confidential to your clients or former clients your business or employer has effective systems and procedures to protect that confidential information[14].

6.54 Where you are acting for a ***client,*** you make that ***client*** aware of all information material to the matter of which you have knowledge, except when:

(a) the disclosure of that information is prohibited by law;

(b) your ***client*** gives informed consent, given or evidenced in writing, to the information not being disclosed to them;

(c) you have reason to believe that serious physical or mental injury will be caused to your ***client*** or another if the information is disclosed; or

(d) the information is contained in a privileged [or confidential][15] document that you have knowledge of only because it has been mistakenly disclosed.

6.65 You do not act for a ***client*** in a matter where that ***client*** has an interest adverse to the interest of another current or former ***client*** ~~or a former ***client***~~ for whom your business or employer holds confidential information which is material to that matter, unless:

(a) ~~all~~ effective measures have been taken which result in there being no real risk of disclosure of the confidential information; or

(b) the ***client*** or former ***client*** has given informed consent, given or evidenced in writing, to you acting, including to any measures taken to protect their information.

Cooperation and accountability

7.1 You keep up to date with and follow the law and regulation governing the way you work.

7.2 You are able to justify your decisions and actions in order to demonstrate compliance with your obligations under the ***SRA regulatory***

arrangements.

7.3 You cooperate with the ***SRA***, other regulators, ombudsmen and those bodies with a role overseeing and supervising the delivery of, or investigating concerns in relation to, legal services.

7.4 You respond promptly to the ***SRA*** and:

(a) provide full and accurate explanations, information and documents in response to any proper request or lawful requirement[16];

(b) ensure that relevant information which is held by you, or by third parties carrying out functions on your behalf which are critical to the delivery of your legal services, is available for inspection by the ***SRA***.

7.5 You do not attempt to prevent anyone from providing information to the ***SRA***.

7.6 You notify the ***SRA*** promptly if you become aware:

(a) of any material changes to information previously provided to the ***SRA***, by you or on your behalf, about you or your practice; and

(b) that information provided to the ***SRA***, by you or on your behalf, about you or your practice is or may be false, misleading, incomplete or inaccurate.

7.7 You ensure that a prompt report is made to the ***SRA*** or another ***approved regulator***, as appropriate, of any serious misconduct[17] in breach of their ***regulatory arrangements*** by any ***person*** regulated by them (including you) of which you are aware. If requested to do so by the ***SRA*** you investigate whether there ~~have~~ has been any serious ~~breaches~~ misconduct that should be reported to the ***SRA***.

7.8 You act promptly to take ~~any~~ appropriate remedial action requested by the ***SRA***.

7.9 You promptly inform ***clients*** ~~promptly~~ for whom you are acting[18] of any act or omission which could give rise to a claim by them against you. If requested to do so by the ***SRA*** you investigate whether anyone may have a claim against you.

7.10 Any obligation under this section or otherwise[19] to notify, or provide information to, the ***SRA*** will be satisfied if you provide information to your firm's ***COLP*** or ***COFA***, as and where appropriate, on the understanding that they will do so if necessary.

When you are providing services to the public or a section of the public:

Client identification

8.1 You take appropriate steps to ~~identify~~ establish[20] for whom you are acting

~~for~~ in relation to any matter.

Complaints handling

8.2 You ensure that, as appropriate in the circumstances, you either establish and maintain, or participate in, a procedure for handling ***complaints*** in relation to the legal services you provide.

8.3 You ensure that ***clients*** are informed in writing at the time of engagement about their right to complain about your services and your charges, and how ***complaints*** can be made.

8.4 You ensure that ***clients*** are informed, in writing:

(a) both at the time of engagement and, if a ***complaint*** has been brought at the conclusion of your ***complaints*** procedure, of any right they have to complain to the ***Legal Ombudsman***, the time frame for doing so and full details of how to contact the ***Legal Ombudsman***; and

(b) if a ***complaint*** has been brought and your ***complaints*** procedure has been exhausted:

(i) that you cannot settle the ***complaint***;

(ii) of the name and website address of an alternative dispute resolution (ADR) approved body which would be competent to deal with the ***complaint***; and

(iii) whether you agree to use the scheme operated by that body.

8.5 You ensure that ***clients' complaints*** are dealt with promptly, fairly and free of charge.

Client information and publicity

8.6 You give ***clients*** information in a way they can understand. You ensure they are in a position to make informed decisions about the services they need, how their matter will be handled and the options available to them.

8.7 You ensure that ***clients*** receive the best possible information about how their matter will be priced and, both at the time of engagement and when appropriate as their matter progresses, about the likely overall cost of the matter and any costs incurred.

8.8 You ensure that any ***publicity*** you are responsible for in relation to your practice is accurate and not misleading, including that relating to your charges and the circumstances in which ***interest*** is payable by or to ***clients***.

8.9 You ensure that ***clients*** ~~understand~~ are given clear and accessible information about[21] whether and how the services you provide are regulated and about the protections available to them.

When acting as part of a team[22]

8.10 When you are providing services to the public or a section of the public together with other individuals regulated by the SRA, any obligation under this section to take steps, establish or maintain or participate in procedures or to provide information to clients or others will be satisfied if other individuals regulated by the SRA with whom you are acting on any matter, do so on your behalf or in a manner which encompasses satisfaction of your own obligation.

Supplemental notes

Powers, commencement/transitional provisions

Explanatory Notes for the SRA on Solicitors' Code mark-up

1. It would be helpful to clarify that the Principles only apply to employees who are not solicitors insofar as they are relevant to their roles, not more generally for matters arising outside their work context, notwithstanding and subject to the impact of the "public confidence" Principle 2.

2. "Maintaining" public confidence is more appropriate than "upholding" it, the latter suggesting a more onerous positive obligation. That would be consistent with current Principle 6. The reference to "those delivering legal services" also seems far too broad when applied to the alternative unregulated sector – it is maintaining confidence in the solicitors' profession which needs to be protected, not the reputation of other multi-disciplinary/corporate service providers whose services may happen to include legal advice. Consistency with text with which the profession has become familiar would also be highly desirable here.

3. This formulation, with which the profession has become familiar, better reflects expected behaviours. A positive obligation to "act with independence" is easily capable of being misconstrued, especially by non-professional employees to whom the Principles will apply.

4. Small change but designed to ensure the obligation is a double one – i.e. to act with honesty and to act with integrity – and this is not an attempt to redefine what it means to act with integrity to require not acting dishonestly.

5. This is important to clarify that behaviour outside of a work context, especially by non-solicitor employees, is not caught by this Principle requiring encouragement to diversity and inclusion etc. (although it might separately of course impact Principle 2 if behaviour fails to maintain confidence etc.). If the SRA is trying to promote a change in this respect, it should be expressly consulting on this aspect.

6. Adding express reference to protecting confidentiality is extremely important to those non-solicitor employees bound by the Principles but not by the Code. It is also a sufficiently fundamental obligation, including for solicitors practising in unregulated entities, as to mandate its inclusion at Principles level. We have no strong views whether this is just added at the end of Principle 6 or highlighted by adding a new Principle 7.

7. Important to qualify by reference to the Overseas Rules otherwise this drafting would seem to override them.

8. Need to clarify this so it does not apply (when referring to "others" for example) to those with whom you are negotiating in the best interests of your client.

9. The word "authorised" is likely to cause confusion. Would it cover ostensible authority in a corporate context for example? This alternative provides more

clarity.

10. Client consent is needed as an exception to allow certain benefits to be retained as at present is permitted with consent. If this is not stated some would have concerns about whether consents contained in their terms of business, for example, would mean it was "proper" not to account the client for benefits received from third parties in connection with a retainer.

11. This can be deleted as it is covered by "introduce" in 5.4 (a) and therefore the text simplified.

12. Better to use the definition of own interest conflict in the Glossary. As drafted, this looks like it catches client conflicts too which is not intended.

13. This is important to ensure that within unregulated businesses a solicitor takes reasonable steps to satisfy him/herself that his/her business or employer has satisfactory conflicts management systems and controls in place in order to protect the solicitor's clients.

14. Extremely important confidentiality protection for information held within the unregulated sector – not just about a duty of confidentiality but about how the business protects information from attack, leakage and loss. Not just a key consumer protection, but also needed to support junior solicitors working, in the minority, in unregulated businesses.

15. The SRA should consider whether it is appropriate to extend this to cover confidential information which may not be privileged if, for example, it has emanated from the unregulated sector.

16. Important changes to highlight that the SRA has to make a proper and lawful request for information etc. before a solicitor is obliged to respond.

17. It is very important to retain a different level of breach, currently described in the Code as "serious misconduct" which goes way beyond material breach of the Principles or Code, as the basis for reporting breaches by other solicitors or regulated firms outside your own firm. Consider clarifying in the Glossary a definition of "serious misconduct". At present it is settled that this involves breaches involving dishonesty or which involve a serious arrestable offence as previous SRA guidance has made clear. To highlight the distinction also consider changing the terminology to "material" breaches instead of referring to "serious" breaches throughout. Many will assume that the change in terminology is intended to imply a change in substance to something more serious than material breaches.

18. It is very important that this is changed to clarify that as at present only current clients need to be notified of possible claims against you. As at present this would be done "promptly" so this has been added. If the SRA wants to change this important requirement to extend (significantly beyond what is currently expected of fiduciaries) it to cover clients for whom you have acted in the past

but are not currently advising, this should be subject to a separate consultation to which we expect PI insurers would wish to respond. Gunning principles could be relevant here, as the change is not highlighted in this consultation, nor explained.

19. It would be helpful for this to apply more generally, not just for section 7.

20. Use of the term "identify" is likely to cause confusion with anti-money laundering requirements. "Establish" would be better.

21. Solicitors cannot really ensure their clients actually "understand" what they tell them so they can only sensibly be required to provide clear and accessible information.

22. This new provision would be very helpful, especially for those operating within the unregulated sector without a COLP or risk and compliance support and also for those who operate providing services in teams alongside other solicitors to relieve individuals of having to take steps etc. themselves when someone else working with them will have done so, in effect, on their behalf.

CLLS PRRC comments on Draft SRA Code of Conduct for Firms [2017]

The SRA Principles comprise the fundamental tenets of ethical behaviour that we expect all those that we regulate to uphold. This includes all individuals and firms that we regulate, including authorised firms and their managers and employees in so far as is relevant to their roles[1]. The principles are as follows:

You:

1. uphold the rule of law and the proper administration of justice
2. ensure that your conduct ~~upholds~~ maintains public confidence in ~~the~~ you and your profession[2] ~~and those delivering legal services~~
3. ~~act with~~ do not allow your independence to be compromised[3]
4. act with honesty and with integrity[4]
5. perform your role ~~act~~ in a way that encourages equality, diversity and inclusion[5]
6. act in the best interests of each ***client*** and protect their confidential information[6]

This Code of Conduct describes the standards and business controls that we, the SRA, and the public expect of firms authorised by us to provide legal services. These aim to create and maintain the right culture and environment for the delivery of competent and ethical legal services to ***clients***~~consumers~~. If you are a MDP, the SRA Principles and these standards apply in relation to your regulated activities.

Sections 8 and 9 set out the requirements of managers and compliance officers in those firms, respectively.

Serious misconduct or material[16] breach may lead to our taking regulatory action against the firm itself as an entity, or its managers or compliance officers, who ~~all share~~ each have ~~responsibility~~ responsibilities for ensuring or taking reasonable steps to ensure that the standards and requirements are met[7]. We may also take action against employees working within the firm for ~~any~~ material breaches[16] of the principles ~~for which they are responsible~~by them. A breach may be ~~serious~~material[16] either in isolation or because it comprises a persistent failure to comply or pattern of behaviour.

Maintaining trust and equality and diversity

1.1 You do not abuse your position by taking unfair advantage of ***clients*** or others relying on your advice[8].

1.2 You monitor, report and publish workforce diversity data, as ***prescribed*** by the ***SRA***.

[Why are there no equivalent provisions to 1.3, 1.4 and 2.1-2.7 in the Solicitors' Code? These provisions seem just as applicable to authorised firms as they are to individual solicitors. These provisions could be incorporated under Paragraph 3.1 (Applicable Outcomes in the SRA Code of Conduct for Solicitors and RELs 2017).]

Compliance and business systems

2 .1 You have effective governance structures, arrangements, systems and controls in place ~~that~~ designed to ensure[11]:

(a) you comply with all the ***SRA's regulatory arrangements***, as well as with other regulatory and legislative requirements, which apply to you;

(b) your ***managers*** and ***employees*** comply with the ***SRA's regulatory arrangements*** which apply to them;

(c) your ***managers***, ***employees*** and ***interest holders*** and those you employ or contract with do not cause or substantially contribute to a breach of the ***SRA's regulatory arrangements*** by you or your ***managers*** or ***employees***;

(d) your ***compliance officers*** are able to discharge their duties under rules 9.1 and 9.2 below.

2.2 You keep and maintain records to demonstrate compliance with your obligations under the ***SRA's regulatory arrangements***.

2.3 You remain accountable for compliance with the ***SRA's regulatory arrangements*** where your work is carried out through others, including your ***managers*** and those you employ or contract with.

2.4 You actively monitor your financial stability and business viability of your regulated activities. Once you are aware that you will cease to operate, you effect the orderly wind- down of your activities.

2.5 You identify, monitor and manage all material risks to your business, including those which may arise from your ***connected practices.***

Cooperation and information requirements

3.1 You keep up to date with and follow the law and regulation governing the way you work.

3.2 You cooperate with the ***SRA***, other regulators, ombudsmen and those bodies with a role overseeing and supervising the delivery of, or investigating concerns in relation to, your legal services.

3.3 You respond promptly to the ***SRA*** and:

(a) provide full and accurate explanations, information and documentation in response to any proper requests or lawful requirements[15];

(b) ensure that relevant information which is held by you, or by third parties carrying out functions on your behalf which are critical to the delivery of your legal services, is available for inspection by the ***SRA***.

3.4 You act promptly to take ~~any~~ appropriate remedial action properly requested[15] by the ***SRA***.

3.5 You promptly inform ***clients*** ~~promptly~~ for whom you are acting[17] of any act or omission which could give rise to a claim by them against you. If requested to do so by the ***SRA*** you investigate whether anyone may have a claim against you.

3.6 You notify the ***SRA*** promptly:

(a) of any indicators of serious financial difficulty relating to you or your regulated activities;

(b) if a ***relevant insolvency event*** occurs in relation to you;

(c) of any change to information recorded in the ***register***.

3.7 You provide to the ***SRA*** an information report on an annual basis or such other period as specified by the ***SRA*** in the ***prescribed*** form and by the ***prescribed*** date. [NB SRA to provide further details of what is to be required here.]

3.8 You notify the ***SRA*** promptly if you become aware:

(a) of any material changes to information previously provided to the ***SRA***, by you or on your behalf, about you or your ***managers***, ***owners*** or ***compliance officers***; and

(b) that information provided to the ***SRA***, by you or on your behalf, about you or your ***managers***, ***owners*** or ***compliance officers*** is or may be false, misleading, incomplete or inaccurate.

3.9 You promptly report to the ***SRA*** or another ***approved regulator***, as appropriate, any serious misconduct[16] or material breach of their ***regulatory arrangements*** by any ***person*** regulated by them (including you) of which you are aware. If requested to do so by the ***SRA*** you investigate whether there have been any ~~serious~~ material breaches that should be reported to the ***SRA***.

Service and competence

4.1 You only act for ***clients*** on instructions from the ***client***, or someone

~~authorised~~ who can properly[9] to provide instructions on their behalf. If you have reason to suspect that the instructions do not represent your ***client's*** wishes, you do not act unless you have satisfied yourself that they do.

4.2 You ensure that the service you provide to ***clients*** is competent and delivered in a timely manner, and takes account of your ***client's*** attributes, needs and circumstances.

4.3 You ensure that your ***managers*** and ***employees*** are competent to carry out their role, and keep their professional knowledge and skills up to date.

4.4 You have an effective system for supervising ***clients'*** matters.

Client money and assets

5.1 You properly account to ***clients*** for any ***financial benefit*** you receive as a result of their instructions except where they have agreed otherwise[10].

5.2 You safeguard money and ***assets*** entrusted to you by ***clients*** and others.

Conflict and confidentiality

Conflict of interests

6.1 You do not act if there is an ***own interest conflict***[12] ~~conflict of interest between you and your **client**~~ or a significant risk of an ***own interest conflict***[12] ~~such a conflict~~.

6.2 You do not act in relation to a matter or a particular aspect of it if there is a ***client conflict*** or a significant risk of such a conflict in relation to that matter or aspect of it, unless:

(a) the ***clients*** have an agreed common purpose in relation to the matter or the aspect of it, as appropriate, and a strong consensus on how that purpose is to be achieved; or

(b) the ***clients*** are ***competing for the same objective*** which, if attained, by one ***client*** will make that objective unattainable ~~to~~ by the other ***client***:

and the conditions below are met, namely that:

(i) all the ***clients*** have given informed consent, given or evidenced in writing, to you acting;

(ii) where appropriate, you put in place effective safeguards to protect your ***clients'*** confidential information; and

(iii) the benefits to the ***clients*** of doing so outweigh the risks to the ***clients*** of you acting.

Confidentiality and disclosure

6.3 You keep the affairs of current and former ***clients*** confidential unless disclosure is required or permitted by law or the ***client*** consents.

6.4 Any of your individual employees who is acting for a ***client*** makes that ***client*** aware of all information material to the matter of which ~~the~~ that individual has knowledge except when:

(a) ~~legal restrictions prohibit them from passing the information to the ***client;*~~** disclosure of that information is prohibited by law

(b) the ***client*** gives informed consent, given or evidenced in writing, to the information not being disclosed to them;

(c) ~~there is evidence~~ the individual has reason to believe that serious physical or mental injury will be caused to the ***client*** or another if the information is disclosed; or

(d) the information is contained in a privileged [or confidential] [13] document~~s~~ that the individual has knowledge of only because ~~they have~~ it has been mistakenly disclosed.

6.5 You do not act for a ***client*** in a matter where that ***client*** has an interest adverse to the interest of another current or former ***client*** ~~or a former ***client***~~ for whom you hold confidential information which is material to that matter, unless:

(a) ~~all~~ effective measures have been taken which result in there being no real risk of disclosure of the confidential information; or

(b) the ***client*** or former ***client*** has given informed consent, given or evidenced in writing, to you acting, including to any measures taken to protect their information.

Applicable Outcomes in the SRA Code of Conduct for Solicitors and RELs 2017

7.1 The following sections of the SRA Code of Conduct for Solicitors, RELs and RFLs 2017 apply to you in their entirety as though references to "you" were references to you as a ***firm***:

(a) Referrals, introductions and separate businesses (5.1 to 5.5);

(b) [Include 1.3, 1.4, 2.1-2.7 as referred to above?]

(c~~b~~) Standards which apply when providing services to the public or a section of the public, namely Client identification (8.1), Complaints handling (8.2 to 8.5), and Client information and publicity (8.6 to 8.9).

Managers in SRA authorised firms

8.1 If you are a ***manager***, other than a manager based outside England & Wales with no management responsibility for your *firm's* business in England & Wales, you are responsible for compliance by your ***firm*** with this Code. This responsibility is joint and several if you share ~~management~~ responsibility with other ***managers*** of the ***firm***[14].

Compliance officers

9.1 If you are a ***COLP*** you take all reasonable steps to:

(a) ensure compliance with the terms and conditions of your ***firm's authorisation***;

(b) ensure compliance by your ***firm*** and its ***managers***, ***employees*** or ***interest holders*** with the ***SRA's regulatory arrangements*** which apply to them;

(c) ensure that your ***firm's managers***, ***employees*** and ***interest holders*** do not cause or substantially contribute to a breach of the ***SRA's regulatory arrangements***; and

(d) as soon as reasonably practicable, report to the ***SRA*** any serious misconduct or material[16] breach of the terms and conditions of your ***firm's authorisation***, or the ***SRA's regulatory arrangements*** which apply to your ***firm***, ***managers*** or ***employees***;

save in relation to the matters which are the responsibility of the ***COFA*** as set out in rule 9.2 below.

9.2 If you are a ***COFA*** you take all reasonable steps to:

(a) ensure that your ***firm*** and its ***managers*** and ***employees*** or the ***sole practitioner*** comply with any obligations imposed upon them under the ***SRA Accounts Rules***, rule [ ] of the Overseas Rules and in relation to financial controls, financial compliance, financial stability or financial viability;

(b) as soon as reasonably practicable, report to the ***SRA*** any serious misconduct or material[16] breach of the ***SRA Accounts Rules*** which apply to ~~them~~your firm and its managers and employees or the sole practitioner.

Supplemental notes

Powers, commencement/transitional provisions.

Explanatory Notes for the SRA on Firm Code mark-up

1. It would be helpful to clarify that the Principles only apply to employees who are not solicitors insofar as they are relevant to their roles, not more generally for matters arising outside their work context, notwithstanding and subject to the impact of the "public confidence" Principle 2.

2. "Maintaining" public confidence is more appropriate than "upholding" it, the latter suggesting a more onerous positive obligation. That would be consistent with current Principle 6. The reference to "those delivering legal services" also seems far too broad when applied to the alternative unregulated sector – it is maintaining confidence in the solicitors' profession which needs to be protected, not the reputation of other multi-disciplinary/corporate service providers whose services may happen to include legal advice. Consistency with text with which the profession has become familiar would also be highly desirable here.

3. This formulation, with which the profession has become familiar, better reflects expected behaviours. A positive obligation to "act with independence" is easily capable of being misconstrued, especially by non-professional employees to whom the Principles will apply.

4. Small change but designed to ensure the obligation is a double one – i.e. to act with honesty and to act with integrity – and this is not an attempt to redefine what it means to act with integrity to require not acting dishonestly.

5. This is important to clarify that behaviour outside of a work context, especially by non-solicitor employees, is not caught by this Principle requiring encouragement to diversity and inclusion etc. (although it might separately of course impact Principle 2 if behaviour fails to maintain confidence etc.). If the SRA is trying to promote a change in this respect, it should be expressly consulting on this aspect.

6. Adding express reference to protecting confidentiality is extremely important to those non-solicitor employees bound by the Principles but not by the Code. It is also a sufficiently fundamental obligation, including for solicitors practising in unregulated entities, as to mandate its inclusion at Principles level. We have no strong views whether this is just added at the end of Principle 6 or highlighted by adding a new Principle 7.

7. This more accurately reflects relevant responsibilities. It is misleading to suggest that compliance officers share the same responsibilities as managers.

8. Need to clarify this so it does not apply (when referring to "others" for example) to those with whom you are negotiating in the best interests of your client.

9. The word "authorised" is likely to cause confusion. Would it cover ostensible authority in a corporate context for example? This alternative provides more clarity.

10. Client consent is needed as an exception to allow certain benefits to be retained as at present is permitted with consent. If this is not stated some would have concerns

about whether consents contained in their terms of business, for example, would mean it was "proper" not to account the client for benefits received from third parties in connection with a retainer.

11. This change is necessary to avoid the impact that there is in effect an absolute guarantee of compliance ("effective to ensure"). Having systems and controls etc. in place which are "designed to ensure" compliance would better reflect what is intended by 2.1. Not every breach of the Code of course should also mean that there has been a breach of 2.1 just because, by definition, systems and controls have not been effective to prevent that breach.

12. Better to use the definition of own interest conflict in the Glossary. As drafted, this looks like it catches client conflicts too which is not intended.

13. The SRA should consider whether it is appropriate to extend this to cover confidential information which may not be privileged if, for example, it has emanated from the unregulated sector.

14. It is important to clarify the responsibilities of managers based outside England and Wales in international firms and who the SRA intends should be treated as having management responsibility for these purposes. Our mark up reflects what in practice we understand to be the current status quo at least so far as enforcement is concerned.

15. Important changes to highlight that the SRA has to make a proper and lawful request for information etc. before a solicitor is obliged to respond.

16. It is very important to retain a different level of breach, currently described in the Code as "serious misconduct" which goes way beyond material breach of the Principles or Code, as the basis for reporting breaches by other solicitors or regulated firms outside your own firm. Consider clarifying in the Glossary a definition of "serious misconduct". At present it is settled that this involves breaches involving dishonesty or which involve a serious arrestable offence as previous guidance has made clear. To highlight the distinction also consider changing the terminology to "material" breaches instead of referring to "serious" breaches throughout. Many will assume that the change in terminology is intended to imply a change in substance to something more serious than material breaches.

17. It is very important that this is changed to clarify that as at present only current clients need to be notified of possible claims against you. As at present this would be done "promptly" so this has been added. If the SRA wants to change this important requirement to extend (significantly beyond what is currently expected of fiduciaries) it to cover clients for whom you have acted in the past but are not currently advising, this should be subject to a separate consultation to which we expect PI insurers would wish to respond. Gunning principles could be relevant here, as the change is not highlighted in this consultation, nor explained.

Yours faithfully

THE CITY OF LONDON LAW SOCIETY

Professional Rules and Regulation Committee

Individuals and firms represented on this Committee are as follows:

Sarah de Gay (Slaughter and May, Chair)

Tracey Butcher (Mayer Brown International LLP)

Roger Butterworth (Bird & Bird LLP)

Raymond Cohen (Linklaters LLP)

Sonya Foulds (Freshfields Bruckhaus Deringer LLP)

Annette Fritze-Shanks (Allen & Overy LLP)

Antoinette Jucker (Pinsent Masons LLP)

Mike Pretty (DLA Piper UK LLP)

Jo Riddick (Macfarlanes LLP)

Chris Vigrass (Ashurst LLP)

Clare Wilson (Herbert Smith Freehills LLP)

Consultation: Looking to the future - flexibility and public protection

Response ID:187 Data

2. Your identity

Surname

Bannon

Forename(s)

Donal

We may publish a list of respondents and a report on responses. Partial attributed responses may be published. Please advise us if you do not wish us to attribute your response or for your name or the name of your firm or organisation to appear on any published list of respondents.

Attribute my/our response and publish my/our name.

Please identify the capacity in which you are submitting a response. I am submitting a response…

on my own behalf as a solicitor in private practice

3.

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

4.

2. Do you agree with our proposed model for a revised set of Principles?

5.

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

No; on the contrary the removal of the principles that solicitors should 'provide a proper standard of service to your clients', 'act in the best interests of each client' and 'protect client money and assets' will adversely impact on consumer protection and the maintenance of professional standards.
The Principles should continue to refer to the solicitor's duty to keep the affairs of the client confidential.

6.

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?

7.

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?

8.

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?

The creation of two codes of conduct which distinguishes the responsibilities of an individual solicitor, wherever he or she is working, and those of a regulated entity creates two tiers of solicitors: those working in a regulated entity and those working in an unregulated entity, with consequential risks to consumer protections and professional standards which risk damaging the standing of solicitors and creating confusion for consumers.
Although both of the draft Codes focus on brevity and simplicity, they provide less certainty about what is and is not permitted. I would prefer a more definitive approach so that compliance is clearer and there is less discretion for the SRA to determine when there is a breach, which could result in enforcement action that might have been avoidable if the Codes were clearer. It is difficult to take an informed view on how the

new Codes would work in practice be without seeing the associated guidance which the SRA has not published alongside the draft Codes.
The language of the draft Codes is imprecise and could mean that members currently practising in a fully compliant way could find themselves accused of a breach after the proposed new codes come into force.
There is some overlap between the two draft Codes, most noticeably in areas such conflict, complaints and client information/identification. If this is not addressed, it is not clear which would take precedence where such inconsistencies exist.

9.

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

10.

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

11.

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

The consultation makes clear that solicitors employed by an unregulated entity would continue to be regulated as individuals and would be subject to conflict rules. However, as the conflicts rules will not apply to unregulated entities, in practice they will not have much effect, if any, on the unregulated entities whilst the regulated entities will be subject to the same level of restriction as they are now or, potentially, a greater level depending on which of the two options on conflicts is adopted by the SRA.

Option 2 may be unworkable because it is not always possible to identify that an actual conflict exists and a solicitor may unwittingly act in a conflict situation. Because the non-regulated colleagues of regulated solicitors would not be subject to conflict rules, there is a risk of confusion to consumers, a very favourable and unfair competitive advantage to unregulated entities and lack of a fundamental consumer protection for clients of unregulated entities.

12.

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

No

13.

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

14.

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

15.

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?

16.

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.

17.

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

18.

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?

There is no evidence to support these proposals or the expected benefits from their implementation, which are stated to include improved access to quality services at affordable prices, enhanced professional standards, and increased employment opportunities. A mere assertion that such evidence exists is not acceptable.

In particular, the proposals could have undesirable and/or unintended consequences as follows:
1.Reputation and standing of solicitors
The proposals may result in two tiers of solicitors. Those working in unregulated businesses are unlikely to be able to give advice which is legally privileged, will not be required to have PII, clients will not have the benefit of the compensation fund and the protection of the principles governing conflicts of interest. Not only is this likely to create consumer detriment and confusion but it is likely to damage the reputation of the title of solicitor.
2. Legal Professional Privilege (LPP)
LPP should attach to clients seeking advice from a solicitor holding a current practising certificate wherever he or she practises and any attempts to dilute or make LPP more difficult to obtain or enforce could erode the concept of LPP, which is a cornerstone of the justice system and a key right of clients. This could also undermine the standing of the solicitor profession both at home and abroad. It is not right in principle for LPP to be a distinguishing factor between regulated and unregulated service providers.
It is likely that in-house solicitors working in an unregulated entity, for example a local authority, providing advice to individuals or organisations other than the unregulated entity would not have the protection of LPP.
3.Conflicts and confidentiality
The proposals will result in confidentiality only applying to individual solicitors working in an unregulated entity, including in an in-house team, but not to the entity or to other employees. There is a risk that a solicitor may unwittingly act in a conflict situation and that clients may not be aware of a potential or real conflict of interest or of the fact that the entity is not subject to the rules on conflict. It also results in making regulated entities less attractive because they will be competitively disadvantaged versus unregulated entities.
4.Consumer protections - Professional Indemnity Insurance (PII) and the Compensation Fund
Under the SRA's proposals, solicitors working in unregulated entities would not be required to have PII and their clients would not have access to the Compensation Fund if things go wrong. This risks eroding a key element of current client protection. The proposals risk creating two tiers of client protections - with different rules and protections applying to solicitors' clients depending on the kind of entity in which the solicitor is working.
The SRA proposes that solicitors working from unregulated entities would be required to make sure that their clients understand whether and how the services they provide are regulated and the protections available to them. Even for those working within the legal sector, insurance and client protections are complicated topics which are not easily digested and understood and clients cannot be expected to fully comprehend the implications of purchasing their legal services through an unregulated provider. The proposals also risk undermining or depleting the existing Compensation Fund as solicitors working from unregulated entities would not have to contribute to the Fund; this would seem likely to mean that solicitors working in regulated entities would have to make additional contributions to secure the Fund's viability, increasing the regulatory burden on them and exacerbating the two tier profession that could result from the proposals.
5.Consumer confusion about status
Under the proposals, solicitors holding a current practising certificate would be able to use their title whether providing legal services to the public through a regulated or unregulated entity. While a provider would not be able to use the term 'solicitors firm' or 'solicitors' unless the entity was regulated by the SRA,this would seem unlikely to mitigate the risk of consumer confusion especially where the unregulated entity described itself as a 'law firm' or 'legal services firm' or advertised that they employ solicitors.

Consumers will lose the assurance they currently have as to quality and protections when they engage a solicitor. It is inappropriate that consumers will have to undertake fairly substantial due diligence. This will additionally undermine the standing of the profession internationally.

6.Annual practising certificate (PC) fees

There is no information on this point and the SRA needs to undertake and publish an analysis of the projected impact of its proposals on the PC fee, and in particular the turnover based firm fee. The SRA should not close this consultation until this information is available.

7.Supervision

Newly qualified solicitors without any experience would be able to set up their own unregulated firms. Newly qualified solicitors working in an unregulated entity would no longer have the requirement of support and guidance from more experienced solicitors. This will increase the risks to clients as well as putting newly qualified solicitors themselves at risk, and negatively impact on the standing of the solicitor profession. Damage to standards will increase incrementally as this applies year on year and fewer solicitors in unregulated entities have ever received supervision.

19.

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

None. It is very damaging proposal to both the public and the profession.

20.

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?

21.

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?

22.

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

No this is unnecessary and would be a further regulatory burden.

23.

21. Do you agree with the analysis in our initial Impact Assessment?

No; there is no evidence to support the premise that any change is necessary.

24.

22. Do you have any additional information to support our initial Impact Assessment?

Obtain independent evidence of the need for any change before proceeding with these changes.

25.

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?

26.

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?

27.

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? If not, what are your reasons?

28.

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

29.

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

30.

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?

31.

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

32.

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?

33.

31. Do you have any alternative proposals to regulating entities of this type?

34.

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?

35.

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

DUCHENNES

Solicitors · Commissioners for Oaths

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SRA number 223899

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19th September 2016

Solicitors Regulation Authority
Regulation and Education policy – Handbook 2017
The Cube
199 Wharfside Street
Birmingham B1 1RN

Dear Sirs

SRA Consultation – Looking to the Future - closing date 21st September 2016

I would like to respond to the above consultation. I am in agreement with the thorough response of The Law Society to this consultation and associate myself with it.

I also enclose your 'About you' form duly completed.

Yours faithfully

Josephine Duchenne

Josephine Duchenne

Josephine Duchenne LLB (Hons), BA (Hons)
Consultant: Charles Duchenne LLB (Hons)

Consultation: Looking to the future - flexibility and public protection

Consultation questionnaire form

This form is designed to be completed electronically—in MS Word. Please save it locally before and after completing it.

Question 1

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

We are supportive of the need to maintain high standards in the profession and secure that all those practising as Solicitors satisfy the criteria in the Suitability Test 2011.

We have not encountered any situations where the practical application of the test has created any issues for individuals or employers.

Question 2

Do you agree with our proposed model for a revised set of Principles?

We welcome the simplification of the principles, but would not support removal of the of the principle to "protect client money and assets". This is particularly important to Local Authorities as clients of external Solicitors. Our assets are public assets, which we have a duty to manage appropriately.

We also consider that the Principles should continue to refer to the solicitor's duty to keep the affairs of the client confidential.

Question 3

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

The revised principles do not refer to maintaining public trust and we consider that this should be included. The concept of being able to trust your legal advisor is distinct to having confidence in them or the profession. Both the SRA's 'Question of Trust' campaign and the wording of this Question 3 suggests that the SRA believes there is a distinction between trust and confidence. Perhaps revised principle 2 could be amended to read:

"2. ensure that your conduct upholds public confidence in the profession and **trust in** those delivering legal services"

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?

No – the reduced number and simplified approach to the principles will make it easier to apply the Principles across practice areas, including Local Government and other sectors where there may be differing levels of regulation and oversight from other bodies.

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?

It will be of particular use to receive guidance from the SRA as to the application of the new Codes and Practice Framework Rules to the conduct of reserved and non-reserved activities by local authority legal teams, using existing local government powers under the Local Authorities (Goods and Services) Act 1970, the Yorkshire Purchasing Organisation Case and existing Rule 4 of the Practice Framework Rules. Please – please see further below.

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?

The simpler, more focussed code is to be welcomed. In terms of in house practice, as highlighted below in our response to Question 8, it is in the interests of both the SRA and in house Solicitors to have clarity as to what is meant by "public or a section of the public", specifically in the context of local authority employed Solicitors who wish to provide advice to other bodies within the powers set out by the Local Authorities (Goods and Services) Act 1970. We cannot understate how important it is to clarify this in order to enable the public sector to meet the expectations of Government, its public sector partners and the public in delivering joined up public services.

Question 7

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

Section 8.4 of the Code references referrals of disputes to ADR - we are not aware that this is a current requirement. The proposals do not address circumstances in which the particular ADR scheme is not agreed between the Parties.

Please see response to question 9 in relation to conflicts of interest.

Question 8

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

It is in the interests of both the SRA and in house Solicitors to have clarity as to what is meant by "public or a section of the public", specifically in the context of local authority employed Solicitors who wish to provide advice to other bodies within the powers set out by the Local Authorities (Goods and Services) Act 1970.

Section 8.1 would benefit from amendment to include this.

Question 9

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

Option 2 is preferable as it simplifies matters and protects both clients and Solicitors, by prohibiting acting in situations of actual conflicts of interest and allowing for exceptions where there is a significant risk of a conflict of interest arising, as is currently provided for.

Both versions appear to be somewhat confused as they rely on in the current definition of "Client Conflict" which refers to actual conflicts and significant risks of conflicts.

Question 10

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

As set out above, the Code does not address the key issues which are impacting on local government legal practice.

Question 11

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

No

Question 12

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

See response to Question 8 above.

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?

We do not have any further specific issues to highlight.

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.

We do not have any comments to make in relation to this question as it is not specifically relevant to local authority practice.

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?

We do not have any comments to make in relation to this question as it is not specifically relevant to local authority practice.

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?

Annex 5 to the Consultation at page 26 includes a scenario where the new approach to regulation would allow individual in house Solicitors the ability to provide non reserved legal advice to the public. This does not recognise the additional step required by local authorities before they can provide services to the public for profit of establishing a trading company.

Further, a large part of the work undertaken by local authority legal teams is reserved activities – including advocacy and property transactions - and so setting up an alternative legal service provider would be unlikely to be considered to provide a useful opportunity.

Therefore the opportunities presented by the proposal do not assist local authorities in providing non reserved legal activities with less regulation, as a trading company would still be required. Neither do the proposals address the key issue of ensuring that there is clarity that local authorities can provide reserved and non reserved legal advice to other public bodies pursuant to their existing powers. The threat from these proposals is that the opportunity for much needed certainty is lost.

The question raised at paragraph 89 is important in relation to whether privilege would still apply to advice provided by an alternative legal service provider, employing Solicitors in some roles and we believe this issue requires more consideration. If such advice would not be privileged we would be extremely concerned as to the implications of that for recipients of such advice. Legal professional privilege is an essential element of a functioning legal system.

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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?

Please see our response to question 16.

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)?

Local authority employed Solicitors operate to provide non-reserved and reserved activities, primarily to their employer. The local authority itself is not an entity authorised by the SRA.

As stated previously in our response, the point which is vital for us to understand is the extent to which other local authorities, the public and third sector bodies fall within the definition of the "public or section of the public". The SRA has received a copy of the opinion of James Goudie QC in response to a request for an opinion from Lawyers in Local Government and the Local Government Association, as to whether such bodies would fall within the definition of the "public or section of the public". This was unequivocal in its conclusion that the above wording did not prohibit local authority employed Solicitors from providing reserved legal activities to the types of body indicated above. In discussion, the SRA has highlighted that the Legal Services Board is able to request guidance on this wording (which originates from the Legal Services Act 2007) from the Government.

We feel that this is of such importance, that the SRA should approach the LSB to make such a request of the Government as soon as possible, so that this can be clarified and the outcome of the SRA's regulatory review can reflect this new information.

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?

While recognising that the requirement does not apply to local government legal teams, the existing requirements seem overly prescriptive and ultimately not fit for purpose. As the SRA recognises in paragraph 101, the requirement to have practiced for at least 36 months within the last 10 years is no guarantee of current knowledge of the law, nor of the ability to effectively supervise another.

Question 20

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

For individuals and organisations which do not habitually instruct Solicitors it is important that they have an easy way of accessing information in relation to the protections afforded to them, particularly in the context of a fast paced and changing market.

Question 21

Do you agree with the analysis in our initial Impact Assessment?

As highlighted above, the assumptions made in relation to how local authority legal teams may react to the changes are flawed and do not recognise the specific legislative environment in which local authorities work, nor the nature of the work we undertake.

Question 22

Do you have any additional information to support our initial Impact Assessment?

Please see response to question 21.

Question 23

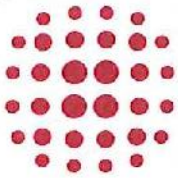
Do you agree with our approach that solicitors working in an alternative legal services provider should not be allowed to hold client money in their own name?

Yes

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?

In house Solicitors would not normally be responsible for holding client money, as they are an arm of the client organisation and will work closely with the finance department. Where providing services to external bodies, they should be holding money in accordance with the SAR or not at all (i.e. arranging for direct payments between the purchaser and seller on a land transaction). However, this is not what many external bodies are used to (if they have dealt with traditional firms) and in the interests of opening up the market place to alternative service delivery models, it seems sensible to provide this option.


Solicitors
Regulation
Authority

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?

If not, what are your reasons?

We think the proposed proposals create a confusing two tier market that the public will not understand.

Question 26

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

We agree with the proposed approach, but would welcome the inclusion of an obligation that applies now under the Practice Framework Rule 4.2(b) whereby a Solicitor is required to ensure that their employer carries sufficient indemnities for the nature of the work being undertaken.

Question 27

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

This does potentially create a situation where a consumer receives negligent advice, suffers a loss and is unable to recover their losses from the alternative legal services provider. This is clearly not a desirable outcome.

Please see response to question 26.

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?

Yes, these are treated differently to non-reserved legal activities for a valid reason, that they are potentially high risk and high value. It would be counter intuitive to allow them to provide services to the public, in a similar way to other Solicitors, without some form of insurance or indemnity behind them.

Question 29

Do you have any views on what PII requirements should apply to Special Bodies?

See question 28

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?

We agree with the SRA's view that it is not desirable. It is inconsistent with the legislative requirements and would be inconsistent with the approach being adopted in terms of opening up the market.

Question 31

Do you have any alternative proposals to regulating entities of this type?

We do not have any alternative proposals.

Solicitors Regulation Authority

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?

No.

Question 33

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

We agree with the SRA's proposal.

Thank you for completing the **Consultation questionnaire form**.

Please save a copy of the completed form.

Please return it, along with your completed **About you form**, as an email attachment to consultation@sra.org.uk, by **21 September 2016**.

Alternatively, print the completed form and submit it by post, along with a printed copy of your **About you form**, to

Solicitors Regulation Authority
Regulation and Education - Policy - Handbook 2017
The Cube
199 Wharfside Street
Birmingham
B1 1RN

Consultation: Looking to the future - flexibility and public protection

About you form

This form is designed to be completed electronically—in MS Word. You must save it locally before and after completing it.

Please identify yourself

Surname

Grout

Forename(s)

Richard John

Your SRA ID number (if applicable)

136439

Name of the firm or organisation where you work

East Sussex County Council

Your email address

richard.grout@eastsussex.gov.uk

We will use your email address if we need to contact you about your response.

Email updates

Would you like to receive email alerts about Solicitors Regulation Authority consultations?

Yes ☒

No ☐

Confidentiality

A list of respondents and their responses may be published by the SRA after the closing date. Please express clearly if you do not wish your name and/or response to be published. Though we may not publish all individual responses, it is SRA policy to comply with all Freedom of Information requests.

I am submitting a response...

Please identify the capacity in which you are submitting a response by selecting **one option only** from the lis0t below. To select an option, click on the check box next to it.

☐ **on behalf of my firm**
Please enter your firm's name.

☐ **on behalf of a Law Society board or committee**
Please enter the name of the board or committee.

☐ **on behalf of a representative group**
Please enter the name of the group.

☐ **on behalf of a local law society**
Please enter the name of the society.

☐ **as an academic**
Please enter the name of your institution.

☐ **on my own behalf as a solicitor in private practice**

☐ **on my own behalf as an employed solicitor**

☐ **as another legal professional**
Please specify

☐ **as a trainee solicitor**

☐ **as a student studying for a qualifying law degree or legal practice course**

☐ **as a member of the public**

☒ **in another capacity**
Please specify On behalf of East Sussex County Council Legal Services

Please answer the next two questions if you are responding on behalf of an SRA-authorised firm.

Has your firm been granted interim permission by the Financial Conduct Authority?

Yes ☐

No ☐

What consumer credit activities does your firm undertake? (Please confirm all.)

More about you

We want to ensure that responses capture the opinions of a wide cross-section of the profession and stakeholders. Please help us by answering several more questions.

Your sex

Male ☒

Female ☐

Your age

16–24 ☐

25–34 ☐

35–44 ☐

45–54 ☐

55–64 ☒

65 plus ☐

Disability

The Disability Discrimination Act 1995 defines a disability as "a physical or mental impairment which has a substantial and long-term adverse effect on the ability to carry out normal day-to-day activities".

Do you consider yourself to be disabled as set out under the Disability Discrimination Act 1995?

Yes ☐

No ☒

Please indicate your type(s) of impairment. You may select more than one option below.

Physical impairment ☐

Hearing impairment ☐

Visual impairment ☐

Learning disability/difficulty or cognitive impairment ☐

Mental health condition ☐

Long-standing illness or health condition ☐

Other ☐

Please specify

Your ethnicity

White

British ☒
Irish ☐
Any other white background ☐
Details

Black or Black British

Caribbean ☐
African ☐
Any other black background ☐
Details

Asian or Asian British

Indian ☐
Pakistani ☐
Bangladeshi ☐
Other Asian or Asian British background ☐
Details

Mixed

White and Black Caribbean ☐
White and Black African ☐
White and Asian ☐
Any other mixed background ☐
Details

Chinese or other ethnic background

Chinese ☐
Any other ☐
Details

Where did you hear about this consultation?

Thank you for completing the **About you form**.

Please save a copy of the completed form.

Please return it as an email attachment to consultation@sra.org.uk, by **21 September 2016**. Alternatively, print the completed form and submit it by post, along with a printed copy of your **Consultation questionnaire form**, to

Solicitors Regulation Authority, Regulation and Education - Policy - Handbook 2017, The Cube, 199 Wharfside Street, Birmingham, B1 1RN.

Ed Boyce

Dear Sirs

I have read the response from the Criminal Law Solicitors Association and wish to adopt it on behalf of this firm.

Regards

Ed Boyce - Solicitor Advocate

Consultation: Looking to the future - flexibility and public protection

Response ID:347 Data

2. Your identity

Surname

Wegorzewski

Forename(s)

Edward

We may publish a list of respondents and a report on responses. Partial attributed responses may be published. Please advise us if you do not wish us to attribute your response or for your name or the name of your firm or organisation to appear on any published list of respondents.

Attribute my/our response and publish my/our name.

Please identify the capacity in which you are submitting a response. I am submitting a response…

on my own behalf as a solicitor in private practice

3.

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

No

4.

2. Do you agree with our proposed model for a revised set of Principles?

No. I agree with 5 "act in a way that encourages equality, diversity and inclusion" as a separate principle, but it should not be in this list. It is not solicitor specific, and there are no circumstances (for example) where that principle should even in theory be able to take precedence over upholding the rule of law, or acting with honesty and integrity.

5.

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

Yes

6.

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?

The removal of the principles that solicitors should 'provide a proper standard of service to your clients', 'act in the best interests of each client' and 'protect client money and assets' has negative implications for consumer protection and the maintenance of professional standards.

The Principles should continue to refer to the solicitor's duty to keep the affairs of the client confidential.

7.

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?

Yes. Given that "In the event of any conflict between the Principles, then the Principle that best serves the public interest in the proper administration of justice will take precedence" please provide at least one example for each principle of an instance where the public interest might conflict with and override that Principle. For example, when might one of the other Principles take precedence over upholding the rule of law; or acting with honesty and integrity? (My view is that the caveat should not apply to the key Principles,

which should remain undiluted by any possibility of being overridden, but perhaps I am missing some point).

8.

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?

The creation of separate codes of conduct distinguishes the responsibilities of an individual solicitor, wherever he or she is working, and those of a regulated entity. The creation of two codes is not an issue. However, the approach creates two tiers of solicitors: those working in a regulated entity and those working in an unregulated entity, with consequential risks to consumer protections and professional standards which risk damaging the standing of solicitors and creating confusion for consumers;
Although both of the draft Codes focus on brevity and simplicity, they provide less certainty about what is and is not permitted. Some solicitors might prefer a more definitive approach so that compliance is clearer and there is less discretion for the SRA to determine when there is a breach, which could result in enforcement action that might have been avoidable if the Codes were clearer. It is difficult to take an informed view on how the new Codes would work in practice be without seeing the associated guidance which the SRA has not published alongside the draft Codes.
The language of the draft Codes is imprecise and could mean that members currently practising in a fully compliant way could find themselves accused of a breach after the proposed new codes come into force.
There is some overlap between the two draft Codes, most noticeably in areas such conflict, complaints and client information/identification. If this is not addressed, it is not clear which would take precedence where such inconsistencies exist.

9.

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

The creation of separate codes of conduct distinguishes the responsibilities of an individual solicitor, wherever he or she is working, and those of a regulated entity. The creation of two codes is not an issue. However, the approach creates two tiers of solicitors: those working in a regulated entity and those working in an unregulated entity, with consequential risks to consumer protections and professional standards which risk damaging the standing of solicitors and creating confusion for consumers;
Although both of the draft Codes focus on brevity and simplicity, they provide less certainty about what is and is not permitted. Some solicitors might prefer a more definitive approach so that compliance is clearer and there is less discretion for the SRA to determine when there is a breach, which could result in enforcement action that might have been avoidable if the Codes were clearer. It is difficult to take an informed view on how the new Codes would work in practice be without seeing the associated guidance which the SRA has not published alongside the draft Codes.
The language of the draft Codes is imprecise and could mean that members currently practising in a fully compliant way could find themselves accused of a breach after the proposed new codes come into force.
There is some overlap between the two draft Codes, most noticeably in areas such conflict, complaints and client information/identification. If this is not addressed, it is not clear which would take precedence where such inconsistencies exist.

10.

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

The creation of separate codes of conduct distinguishes the responsibilities of an individual solicitor, wherever he or she is working, and those of a regulated entity. The creation of two codes is not an issue. However, the approach creates two tiers of solicitors: those working in a regulated entity and those working in an unregulated entity, with consequential risks to consumer protections and professional standards which risk damaging the standing of solicitors and creating confusion for consumers;
Although both of the draft Codes focus on brevity and simplicity, they provide less certainty about what is and is not permitted. Some solicitors might prefer a more definitive approach so that compliance is clearer and there is less discretion for the SRA to determine when there is a breach, which could result in enforcement action that might have been avoidable if the Codes were clearer. It is difficult to take an

informed view on how the new Codes would work in practice be without seeing the associated guidance which the SRA has not published alongside the draft Codes.
The language of the draft Codes is imprecise and could mean that members currently practising in a fully compliant way could find themselves accused of a breach after the proposed new codes come into force.
There is some overlap between the two draft Codes, most noticeably in areas such conflict, complaints and client information/identification. If this is not addressed, it is not clear which would take precedence where such inconsistencies exist.

11.

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

The consultation makes clear that solicitors employed by an unregulated entity would continue to be regulated as individuals and would be subject to conflict rules. However, as the conflicts rules will not apply to unregulated entities, in practice they will not have much effect if any on the unregulated entities whilst the regulated entities will be subject to the same level of restriction as they are now or, potentially, a greater level depending on which of the two options on conflicts is adopted by the SRA.
The SRA offers two options for dealing with conflicts:
- Option 1 largely replicates the 2011 Code, in prohibiting a solicitor from acting where there is a conflict or significant risk of such a conflict, unless specified circumstances are met and protections are provided.
- Option 2 would narrow the ability to act given that it provides for a complete bar on acting where there is an actual conflict, and protections to be put in place if there is a significant risk of a conflict.
Option 2 may be unworkable because it is not always possible to identify that an actual conflict exists and a solicitor may unwittingly act in a conflict situation. Because the non-regulated colleagues of regulated solicitors would not be subject to conflict rules, there is a risk of confusion to consumers, a very favourable competitive advantage to unregulated entities and lack of a fundamental consumer protection for clients of unregulated entities.

12.

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

No

13.

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

see earlier answers

14.

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

see earlier answers

15.

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?

No

16.

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.

Consideration of these questions will benefit from the input of current COLPs and COFAs who are best placed to identify unnecessary requirements while firms and sole practitioners will also wish to consider how valuable the roles themselves are.

17.

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

18.

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?

There is insufficient evidence to support these proposals or the expected benefits from their implementation, which are stated to include improved access to quality services at affordable prices, enhanced professional standards, and increased employment opportunities.
In particular, the proposals could have undesirable and/or unintended consequences as follows:
Reputation and standing of solicitors
The proposals may result in two tiers of solicitors. Those working in unregulated businesses are unlikely to be able to give advice which is legally privileged, will not be required to have PII, clients will not have the benefit of compensation fund and the protection of the principles governing conflicts of interest. Not only is this likely to create consumer detriment and confusion but it is likely to damage the reputation of the title of solicitor.
Legal Professional Privilege (LPP)
LPP should attach to clients seeking advice from a solicitor holding a current practising certificate wherever he or she practises and any attempts to dilute or make LPP more difficult to obtain or enforce could erode the concept of LPP, which is a cornerstone of the justice system and a key right of clients. This could also undermine the standing of the solicitor profession both at home and abroad. It is not right in principle for LPP to be a distinguishing factor between regulated and unregulated service providers.
It is likely that in-house solicitors working in an unregulated entity, for example a local authority, providing advice to individuals or organisations other than the unregulated entity would not have the protection of LPP.
Conflicts and confidentiality
The proposals will result in confidentiality only applying to individual solicitors working in an unregulated entity, including in an in-house team, but not to the entity or to other employees. There is a risk that a solicitor may unwittingly act in a conflict situation and that clients may not be aware of a potential or real conflict of interest or of the fact that the entity is not subject to the rules on conflict. It also results in making regulated entities less attractive because they will be competitively disadvantaged versus unregulated entities.
Consumer protections - Professional Indemnity Insurance (PII) and the Compensation Fund
Under the SRA's proposals, solicitors working in unregulated entities would not be required to have PII and their clients would not have access to the Compensation Fund if things go wrong. This risks eroding a key element of current client protection. The proposals risk creating two tiers of client protections - with different rules and protections applying to solicitors' clients depending on the kind of entity in which the solicitor is working.
The SRA proposes that solicitors working from unregulated entities would be required to make sure that their clients understand whether and how the services they provide are regulated and the protections available to them. Even for those working within the legal sector, insurance and client protections are complicated topics which are not easily digested and understood and clients cannot be expected to fully comprehend the implications of purchasing their legal services through an unregulated provider. The proposals also risk undermining or depleting the existing Compensation Fund as solicitors working from unregulated entities would not have to contribute to the Fund; this would seem likely to mean that solicitors working in regulated entities would have to make additional contributions to secure the Fund's viability, increasing the regulatory burden on them and exacerbating the two tier profession that could result from the proposals.
Consumer confusion about status
Under the proposals, solicitors holding a current practising certificate would be able to use their title whether providing legal services to the public through a regulated or unregulated entity. While a provider

would not be able to use the term 'solicitors firm' or 'solicitors' unless the entity was regulated by the SRA,this would seem unlikely to mitigate the risk of consumer confusion especially where the unregulated entity described itself as a 'law firm' or 'legal services firm' or advertised that they employ solicitors. Consumers will lose the assurance they currently have as to quality and protections when they engage a solicitor. It is inappropriate that consumers will have to undertake fairly substantial due diligence. This will additionally undermine the standing of the profession internationally.
Annual practising certificate (PC) fees
There is no information on this point and the SRA needs to undertake and publish an analysis of the projected impact of its proposals on the PC fee, and in particular the turnover based firm fee. The SRA should not close this consultation until this information is available.
Supervision
Newly qualified solicitors without any experience would be able to set up their own unregulated firms. Newly qualified solicitors working in an unregulated entity would no longer have the requirement of support and guidance from more experienced solicitors. This will increase the risks to clients as well as putting newly qualified solicitors themselves at risk, and negatively impact on the standing of the solicitor profession Damage to standards will increase incrementally as this applies year on year and fewer solicitors in unregulated entities have ever received supervision.

19.

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

I disagree with the proposals for greater "flexibility" for the reasons stated. i will consider my position if despite the objections from the profession the proposed changes are made.

20.

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?

Agreed and the same level of client protection must be provided by any provider

21.

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?

Yes. See (16)

22.

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

No

23.

21. Do you agree with the analysis in our initial Impact Assessment?

24.

22. Do you have any additional information to support our initial Impact Assessment?

25.

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?

Under the SRA's proposals, solicitors working in unregulated entities would not be required to have PII and their clients would not have access to the Compensation Fund if things go wrong. This risks eroding a key element of current client protection. The proposals risk creating two tiers of client protections - with different rules and protections applying to solicitors' clients depending on the kind of entity in which the solicitor is

working.
The SRA proposes that solicitors working from unregulated entities would be required to make sure that their clients understand whether and how the services they provide are regulated and the protections available to them. Even for those working within the legal sector, insurance and client protections are complicated topics which are not easily digested and understood and clients cannot be expected to fully comprehend the implications of purchasing their legal services through an unregulated provider. The proposals also risk undermining or depleting the existing Compensation Fund as solicitors working from unregulated entities would not have to contribute to the Fund; this would seem likely to mean that solicitors working in regulated entities would have to make additional contributions to secure the Fund's viability, increasing the regulatory burden on them and exacerbating the two tier profession that could result from the proposals.

26.

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?

Consideration of this question will benefit from the input of current in-house teams and relevant local employers.

Consideration of this question will benefit from the input of special bodies, such as law centres, which play an important role in providing access to justice for vulnerable people who may not be able to afford access to legal services.

27.

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? If not, what are your reasons?

Under the SRA's proposals, solicitors working in unregulated entities would not be required to have PII and their clients would not have access to the Compensation Fund if things go wrong. This risks eroding a key element of current client protection. The proposals risk creating two tiers of client protections - with different rules and protections applying to solicitors' clients depending on the kind of entity in which the solicitor is working.
The SRA proposes that solicitors working from unregulated entities would be required to make sure that their clients understand whether and how the services they provide are regulated and the protections available to them. Even for those working within the legal sector, insurance and client protections are complicated topics which are not easily digested and understood and clients cannot be expected to fully comprehend the implications of purchasing their legal services through an unregulated provider. The proposals also risk undermining or depleting the existing Compensation Fund as solicitors working from unregulated entities would not have to contribute to the Fund; this would seem likely to mean that solicitors working in regulated entities would have to make additional contributions to secure the Fund's viability, increasing the regulatory burden on them and exacerbating the two tier profession that could result from the proposals.

28.

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

No

29.

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

Yes, see above

30.

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?

Yes, see above

31.

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

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31. Do you have any alternative proposals to regulating entities of this type?

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35.

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

Yes

Consultation: Looking to the future - flexibility and public protection

Response ID:672 Data

2. Your identity

Your SRA ID number (if applicable)

140535

Name of the firm or organisation where you work

Ellis Jones Solicitors LLP

Please identify the capacity in which you are submitting a response. I am submitting a response...

on behalf of my firm.

Please enter your firm's name:: Ellis Jones Solicitors LLP

3.

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

I am the Managing Partner of Ellis Jones Solicitors LLP. As an organisation, we have considered the Law Society's Response dated September 2016. We adopt and support the Law Society's responses to each of the questions in this questionnaire including this one.

4.

2. Do you agree with our proposed model for a revised set of Principles?

I am the Managing Partner of Ellis Jones Solicitors LLP. As an organisation, we have considered the Law Society's Response dated September 2016. We adopt and support the Law Society's responses to each of the questions in this questionnaire including this one.

5.

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

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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?

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8.

6. Have we achieved our aim of developing a short, focused Code for all solicitors, wherever they

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I am the Managing Partner of Ellis Jones Solicitors LLP. As an organisation, we have considered the Law Society's Response dated September 2016. We adopt and support the Law Society's responses to each of the questions in this questionnaire including this one.

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

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I am the Managing Partner of Ellis Jones Solicitors LLP. As an organisation, we have considered the Law Society's Response dated September 2016. We adopt and support the Law Society's responses to each of the questions in this questionnaire including this one.

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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?

I am the Managing Partner of Ellis Jones Solicitors LLP. As an organisation, we have considered the Law Society's Response dated September 2016. We adopt and support the Law Society's responses to each of the questions in this questionnaire including this one.

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

I am the Managing Partner of Ellis Jones Solicitors LLP. As an organisation, we have considered the Law Society's Response dated September 2016. We adopt and support the Law Society's responses to each of the questions in this questionnaire including this one.

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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?

I am the Managing Partner of Ellis Jones Solicitors LLP. As an organisation, we have considered the Law Society's Response dated September 2016. We adopt and support the Law Society's responses to each of the questions in this questionnaire including this one.

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I am the Managing Partner of Ellis Jones Solicitors LLP. As an organisation, we have considered the Law Society's Response dated September 2016. We adopt and support the Law Society's responses to each of

the questions in this questionnaire including this one.

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

I am the Managing Partner of Ellis Jones Solicitors LLP. As an organisation, we have considered the Law Society's Response dated September 2016. We adopt and support the Law Society's responses to each of the questions in this questionnaire including this one.

23.

21. Do you agree with the analysis in our initial Impact Assessment?

I am the Managing Partner of Ellis Jones Solicitors LLP. As an organisation, we have considered the Law Society's Response dated September 2016. We adopt and support the Law Society's responses to each of the questions in this questionnaire including this one.

24.

22. Do you have any additional information to support our initial Impact Assessment?

I am the Managing Partner of Ellis Jones Solicitors LLP. As an organisation, we have considered the Law Society's Response dated September 2016. We adopt and support the Law Society's responses to each of the questions in this questionnaire including this one.

25.

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?

I am the Managing Partner of Ellis Jones Solicitors LLP. As an organisation, we have considered the Law Society's Response dated September 2016. We adopt and support the Law Society's responses to each of the questions in this questionnaire including this one.

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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?

I am the Managing Partner of Ellis Jones Solicitors LLP. As an organisation, we have considered the Law Society's Response dated September 2016. We adopt and support the Law Society's responses to each of the questions in this questionnaire including this one.

27.

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? If not, what are your reasons?

I am the Managing Partner of Ellis Jones Solicitors LLP. As an organisation, we have considered the Law Society's Response dated September 2016. We adopt and support the Law Society's responses to each of the questions in this questionnaire including this one.

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

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31. Do you have any alternative proposals to regulating entities of this type?

I am the Managing Partner of Ellis Jones Solicitors LLP. As an organisation, we have considered the Law Society's Response dated September 2016. We adopt and support the Law Society's responses to each of the questions in this questionnaire including this one.

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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?

I am the Managing Partner of Ellis Jones Solicitors LLP. As an organisation, we have considered the Law Society's Response dated September 2016. We adopt and support the Law Society's responses to each of the questions in this questionnaire including this one.

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

I am the Managing Partner of Ellis Jones Solicitors LLP. As an organisation, we have considered the Law Society's Response dated September 2016. We adopt and support the Law Society's responses to each of the questions in this questionnaire including this one.

Emerson Development

Consultation: Looking to the future - flexibility and public protection

Consultation questionnaire form

This form is designed to be completed electronically—in MS Word. Please save it locally before and after completing it.

Question 1

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

No

Question 2

Do you agree with our proposed model for a revised set of Principles?

Yes

Question 3

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

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?

No

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?

Dealing with third parties in situations of potential conflict eg contract races/second contracts

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?

Question 7

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

Question 8

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

Question 9

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

Question 10

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

Question 11

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

Question 12

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

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?

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.

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?

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?

Relaxing restrictions on pro-bono work is a helpful step

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?

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?

Good safeguard

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?

Question 20

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

This should only be where the services are provided to the public

Question 21

Do you agree with the analysis in our initial Impact Assessment?

Question 22

Do you have any additional information to support our initial Impact Assessment?

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?

Generally yes

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?

In house solicitors should not be able to hold client money except, perhaps for fees/disbursments. We occasionally have an issue where monies are paid to our client employer by cheque in favour of a named solicitor. The cheque has to be returned and redrawn which can cause difficulties.

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?

If not, what are your reasons?

Yes, providing they are not expected to pay into the Fund!

Question 26

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

Yes. Currently Insurers will not provide cover where the work is for an employer client as it makes it more likely the Employer will seek recovery from the Insurer as a “first port of call”

Question 27

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

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?

Question 29

Do you have any views on what PII requirements should apply to Special Bodies?

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?

Question 31

Do you have any alternative proposals to regulating entities of this type?

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?

Question 33

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

Thank you for completing the **Consultation questionnaire form**.

Please save a copy of the completed form.

Please return it, along with your completed **About you form**, as an email attachment to consultation@sra.org.uk, by **21 September 2016**.

Alternatively, print the completed form and submit it by post, along with a printed copy of your **About you form**, to

Solicitors Regulation Authority
Regulation and Education - Policy - Handbook 2017
The Cube
199 Wharfside Street
Birmingham
B1 1RN

Farleys

Dear Sirs,

Please see our response to the consultation document below.

Regulatory Impact Assessment

We tend to agree with the Law Society that the SRA has not produced any real evidence of significant clear and present “harm” generated by the current system which would require systemic and radical reform such as is proposed. The Society believes that the proposals are poorly evidenced and misconceived in that they will demonstrably beyond reasonable doubt create consumer confusion and harm, will not address any actual unmet legal needs, nor assist with access to justice. We are not aware of any in-depth analysis, study or investigation of the impact of the proposals or likely achievement of the articulated objectives.

The substance and content of the proposals

The substance and content of the proposals smell of the ‘heavy lobbying of big business seeking to commodities all aspects of legal services’, for why else would an organisation like the SRA that exists to regulate the sector, now want to have solicitors working for unregulated entities?

How will traditional solicitor firms regulated by the SRA be able to compete on ‘a level playing field’ with those outside of the regulated sector based on these proposals?

Organisations who are not subject to any SRA code or regulation will result in serious implications in relation to client protection.

In our view the ‘dumping down of regulatory control’ over legal services would undermine the positive reputation held in relation to solicitors in England/Wales and would undermine the global competitiveness of UK law in the eyes of foreign companies. Many international companies already base their organisations in this country so they can avail themselves of our excellent legal service providers and judicial system so at the very time, post Brexit, when we should be encouraging such behaviour we should not be seen to be ‘dumping down’ our industry in the relentless surge to commoditise every legal service to the point where it can be picked up off a shelf with the weeks shopping.

The Consultation

We agree with the Law Society that we are being asked to respond to a consultation paper with inadequate detail of what is actually being proposed. It would assist if we knew:

* What is the SRA’s thinking behind the proposals?;
* Who has so far influenced their thinking, as it is not the profession or the Law Society? and
* What are the consequences of the proposed changes likely to be?

As such we and no doubt the rest of the profession are not in a position to put forward 'fully informed comments' on the proposals and reach a judgment on the impact of the new practice framework and how effective the new Codes of Conduct would be without being provided with the intended additional guidance, which will replace the provisions in the code that have been removed, and with all necessary information as to how the new form of regulation will be supervised and enforced.

We agree with the Law Society that under the 'Gunning Principles':

1. Consultation must take place when the proposal is still at a formative stage;
2. Sufficient reasons must be put forward for the proposal to allow for intelligent consideration and response;
3. Adequate time must be given for consideration and response; and
4. The product of consultation must be conscientiously taken into account.

The consultation does not provide information or modelling on the affect on firms who remain fully regulated by the SRA and what the consequent impact on the cost of practising certificates and the compensation fund would be. We fear the changes would be 'anti competitive' by leaving the traditional profession 'hamstrung by regulation' and the new unregulated entities free to 'ply their trade without hindrance'. Actually just the sort of approach 'big business' would lobby for!

Indeed we are sure that 'big business' would also lobby for shorter and more simple overarching principles and would definitely advocate losing the principle "provide a proper standard of service" amongst others. Clearly in their mind providing protection for the consumer will damage their profit margins!

We agree with the Law Society that the consultation paper is noticeably lacking in detail on how the SRA would deal with issues of enforcement, particularly with respect to ensuring that solicitors employed by an unregulated entity do not undertake reserved work, not least because (i) issues commonly cross between areas of legal activity and (ii) the boundary between reserved and unreserved services is sometime less clear cut than the terms would suggest.

We agree with the Law Society that the 'piecemeal' approach to the regulatory review as a whole and the fact that this current consultation is just one of a number of linked consultations, means that it is particularly problematic to have any real understanding of how the new regime will work. There is a well known saying; 'the devil is in the detail' but with these proposals the 'devil' is in a complete lack of detail to the extent that consultees have little chance of making an informed decision and meaningful response.

The SRA should provide to the profession what it expects the profession to provide to its clients; namely 'clarity' so an informed decision can be made on these proposals. Clarity by confirmation of who has tabled each and every proposal so we can understand where they have come from and how the SRA have been influenced accordingly.

While the SRA assert that the proposals would be likely to deliver improved access to quality services at affordable prices, enhanced standards, increased employment opportunities and a strengthened solicitor brand, we do not understand how those conclusions have been reached and agree with the Law Society that the exact opposite is more likely by providing:

- weaker consumer protection because of the implications for:
- legal professional privilege
- confusion by clients over a two tier market place;
- professional indemnity insurance and the Compensation Fund;
- prevention of conflicts of interest;
- creation of a two tier profession and greater client confusion;
- lower professional standards;
- the restraint of traditional firms trade;
- other significant issues including:
- contract protection;
- disproportionate impact of regulation on smaller firms and sole practitioners;
- impact on in-house practitioners;
- impact on special bodies;
- overlap between the two Codes of Conduct.

Given the above we feel that the proposals will significantly damage the standing of the solicitor profession in England/Wales and more importantly internationally.

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

No.

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

No. See our comments below:

New Principle 1 - We would extend as follows “Uphold the rule of law and the proper administration of justice within the jurisdiction of England and Wales”. New Principle 2 – We agree with the Law Society alternative wording “Ensure that your conduct upholds public confidence in you and in other regulated individuals and firms”.

New Principle 3 – We believe this to be too simplistic and can see no published reason for why the SRA would wish to alter the current wording. Nevertheless we would propose "Do not allow your independence to be compromised"

New Principle 4 – Agreed.

New Principle 5 – There is no need for this principle at all as protection of issues of equality, diversity and inclusion are already enshrined within existing legislation and why should the traditional profession have additional onus placed on us beyond current legislation when the unregulated sector will not? So in the spirit of simplification – get rid of it!

New Principle 6 – Agreed.

Question 3: Do you consider that the new Principle 2 sets the right

expectations around maintaining public trust and confidence?

No. See our response in Q2 above.

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?

The SRA proposes the removal of four principles:

* Current principle 5 "provide a proper standard of service to your clients"

We like the Law Society believe that this principle should be retained as this is central to the profession and reflects the high level of quality that consumers can expect from a regulated individual. Its removal gives rise to concerns from the perspective of professional standards and consumer protection. It is to a great degree what we are measured against by the SDT and Legal Ombudsman.

We can understand why big business would not want this whilst they are busy commoditising as much of legal services as they can, but with client protection uppermost we can see no other justification for its removal.

* Current principle 7 "comply with your legal and regulatory obligations and deal with your regulators and ombudsmen in an open, timely and co-operative manner"

Agreed.

* Current principle 8 "run your business or carry out your role in the business effectively and in accordance with proper governance and sound financial and risk management principles"

This principle can go providing the following principle is retained.

* Current principle 10 “protect client money and assets"

One could argue that this principle is so important that it should be ‘new principle 2’.

We believe that the new set of principles should retain an explicit reference to the protection of client money and assets. Indeed we have not seen one justifiable reason for excluding this most important principle and foundation of many SDT disciplinary matters!

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?

We support the suggestion of the Law Society of a suite of scenarios which will provide guidance to both practitioners, professional ethics and the SRA’s own investigators.

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?

Since the current codes were brought into being we have been concerned that the language used is often vague or loosely constructed. As we are required to ‘risk manage’ our business and the individual cases we conduct the proposed code would in itself create a risk that requirements will be misunderstood due to their brevity / simplistic and generalised nature. As a consequence there is a real risk the new codes would give the SRA too much discretion in what is in their view compliant. There is a need for the SRA to provide more information and ensure that it acts in a consistent way and to make an explicit commitment to those subject to regulation that it will be consistent, fair, open, transparent and predictable about the circumstances in which it will decide to take or not to take action.

Whilst guidance has been promised we note that this is not yet forthcoming and with respect this does not assist the profession in responding herein accordingly.

Question 7: In your view is there anything specific in the Code for all solicitors that does not need to be there?

See our response to previous questions.

Question 8: Do you think that there anything specific missing from the Code for all solicitors that we should consider adding?

* We agree with the Law Society that unsolicited approaches to clients should remain banned. Whilst 'big business' trying to commoditise the industry will undoubtedly want to use such tactics there is clear consumer evidence to suggest that such tactics are not in the interests of consumers and are frowned upon by the public.

* Reference to firms acting reasonably should remain. Whatever reason could justify its exclusion?

* All legal service providers must have systems in place to identify a conflict of interest and without such provisions how can an entity comply with new principle 2 and 3?

* The provision and receipt of undertakings is necessary for the day to day business of a legal service provider and are of such importance that they must be included within both codes.

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

The need for clarity around handling of conflicts of interest is paramount as we have already stated at Q 8 above. We agree entirely with the Law Society over their concerns and would require additional explanation of the SRA's thinking and an understanding as to where this proposal has come from before commenting further.

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

See our response (prior to responding to your individual questions) under the headings:

* The substance and content of the proposals; and
* The Consultation

Question 11: In your view is there anything specific in the Code for SRA regulated firms that does not need to be there?

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The Consultation

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.

The creation of the COLP and COFA roles to some extent ignored the various business models with some firms being:

* Sole practitioners;
* Managed at partnership level;
* Managed by a senior partner;
* Managed by partnership sub committees; and
* Others via a management committee.

All of the above have their strengths and weaknesses, but what is consistent with them all is that they are currently a regulated entity and as such responsibility should start and end there for all aspects of compliance.

As each regulated entity now has to effectively seek authorisation from the SRA each year to exist via your licence process we believe that responsibility should return to the entity to manage itself and its employees in a proper manner and above all comply with both codes.

We therefore agree with the Law Society that COLP's and COFA's should be consulted over their potential continued existence.

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?

As this question seems to ignore Q 14 on whether the COLP/COFA roles should continue we would refer to our response to Q 14.

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?

We agree with the views of the Law Society and are surprised that there does not appear to have been any analysis of the risks resulting from the suggested approach of allowing solicitors to deliver non-regulated services to the public through unregulated providers. In our view all entities involved in the provision of legal services should be regulated by the SRA or some other authority to protect the consumer.

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?

We cannot answer this at this stage given the limitations we have already expressed over the lack of information provided by the SRA over the 'driving forces' behind these proposals.

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?

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?

We believe that a form of 'qualified to supervise' rule should remain but within the authorisation rules.

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

This could be achieved simply by the SRA and the Law Society controlling the publication of the benefits of SRA regulation and perhaps by adding an SRA logo to letterheads in much the same way as Lexcel.

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

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

Answering Q 21 & 22 together we agree with the remarks of the Law Society.

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?

Yes as client money needs to protected at all times and in all circumstances.

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?

Solicitors working 'in house' or in a 'special body' should not hold client money.

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? If not, what are your reasons?

Yes. Without mandatory PII cover for the protection of the consumer alternative legal services should not be indemnified via the SRA Compensation Fund.

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

No. There should be mandatory PII cover for the protection of the consumer.

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

We entirely agree with the remarks of the Law Society in this respect.

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?

Absolutely.

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

For the protection of the consumer a consistent level of PII protection must apply otherwise a consumer could opt for a 'cheaper service supplier' only to find that their PII cover was inadequate, which was why they were cheaper in the first place.

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

Answering Q 30 & 32 together we consider regulation/control should apply consistently and fairly to all legal service providers, otherwise 'a level playing field' is not provided and the traditional body of the profession could find itself discriminated against and its abilities to trade effectively restricted in favour of an unregulated area of the market.

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?

For the protection of the public someone needs to regulate/control them!

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

We agree that all work in a recognised body/RSP should be regulated by the SRA.

Finally we hope that our response will assist in moving these important areas forward.

Yours sincerely,

David Ruscoe
Business Manager
For and on behalf of Farleys
Solicitors LLP
22-27 Richmond Terrace
Blackburn
BB1 7AF

Consultation: Looking to the future - flexibility and public protection

Response ID:727 Data

2. Your identity

Surname

Rider

Forename(s)

Antony Thomas Basil

We may publish a list of respondents and a report on responses. Partial attributed responses may be published. Please advise us if you do not wish us to attribute your response or for your name or the name of your firm or organisation to appear on any published list of respondents.

Attribute my/our response and publish my/our name.

Please identify the capacity in which you are submitting a response. I am submitting a response…

on behalf of my firm.
Please enter your firm's name:: Fieldfisher LLP

3.

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

No, we have not encountered any particular issues.

4.

2. Do you agree with our proposed model for a revised set of Principles?

Yes.

5.

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

'Public confidence' goes wider than 'the trust the public places in you' and we can see why you have included it. It also arguably encompasses it. But 'trust' is a stronger word and is at the very heart of a solicitor's relationship with their client and the wider world. We think 'trust' should be included in Principle 2 as in: "ensure that your conduct upholds public trust and confidence in the profession and those delivering legal services".

6.

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?

We think you should retain the Principle that a solicitor "must provide a proper standard of service to your client". While it is covered by new section 3.2, we believe the public would expect to see this fundamental requirement explicitly highlighted in the Principles.

7.

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?

Yes. In relation to the Code of Conduct for Solicitors:

• 1.2 - around the balance between acting in a client's best interests versus not taking unfair advantage of others (for example, when acting against unrepresented litigant).
• The interplay between 6.2 and 6.4 – how to handle the situation where you/ the firm are acting for client A

and you/ a colleague in the firm is approached by prospective client B, who in asking you to act (which you decline) imparts information confidential to them that would be material to client A's matter.
• 7.9 – how to notify a client of an act or omission without breaching the terms of your PI insurance policy
• 8.9 – around what information should be given to clients "about the protections available to them" that are in addition to informing them that you are regulated by the SRA.

In relation to the Code of Conduct for Firms:

• 2.2 - around what records you expect firms to maintain to demonstrate compliance.
• 3.6 – what you mean by "indicators of serious financial difficulty".
• 9.1 and 9.2 – guidance on what would, or would not, be considered "serious" breaches in terms of the reporting responsibilities of COLPs and COFAs would be helpful.

8.

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?

Yes.

9.

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

No, but on the understanding that when it comes to sections 8 and 9 of the Code for Firms, the broadly corresponding provisions in rule 8 of the SRA Authorisation Rule will be removed.

10.

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

We suggest the inclusion (retention) of:

• current Outcome (8.3) (prohibition on unsolicited approaches to members of the public to publicise the firm, the in-house practice or another business) in section 8 of both new Codes;
• current Outcome (11.3) (when acting for seller, informing all buyers immediately of seller's intention to deal with more than one buyer).

It may be that a solicitor/ firm acting contrary to either of these current Outcomes would be viewed in future as breaching new Principle 2 or some other provision in the Codes but we think it should be spelt out in the Codes for the sake of clarity and in order to promote public confidence.

11.

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

In our view Option 1 has worked well in practice and so we see no reason to tinker with it.

12.

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

Yes, but subject to the same point in response to Question 7 above.

13.

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

No, but same comment in response to Question 7 above applies.

14.

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

See response to Question 8 above.

15.

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?

We prefer the wording of current Principle 3. "Act with independence" has a brevity that is presentationally attractive. However, "not allow your independence to be compromised" gives a clearer steer as to what is meant by "act with independence" and is the test that we think should be applied in deciding whether there has been a breach.

16.

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.

We feel having and appointed COLP and COFA is generally a good thing as the roles provide a focal point for the Partners/Managers to assist them with their compliance responsibilities.

17.

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

By providing regular feedback for COLPs and COFAs in respect of their role and provide more case studies and practical guidance which can be used as materials to influence members of the firm.

18.

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?

The concern is that how are members of the public going to know who or what is regulated by the SRA. It could be a large burden on an individual lawyer working in a 'non-law firm' environment. Will there be enough support?

19.

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

Very unlikely.

20.

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?

We support the SRA's wish to retain this requirement.

21.

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?

We feel in the case of larger firms this role is redundant because all individual members fit this requirement.

22.

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

No - details are contained in the client engagement letter and on the website.

23.

21. Do you agree with the analysis in our initial Impact Assessment?

Yes.

24.

22. Do you have any additional information to support our initial Impact Assessment?

No.

25.

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?

Yes.

26.

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?

We think this would again put too great an onus on an individual. Depends whether any loss would be covered by the Company/Special Body.

27.

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? If not, what are your reasons?

Yes.

28.

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

We understand the SRA's wish to provide wider opportunities for solicitors in the wider market. However, not to make PII cover a requirement does seem counter-intuitive from the point of view of consumer protection.

29.

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

Our concern is that unsophisticated legal user clients may not appreciate until 'something goes wrong' that the unregulated organisation and the solicitor working within it does not have PII cover. While recognising that the revised Code will impose an obligation on all solicitors to ensure their clients understand about the protections available to them, it seems probable the relevant information given to clients of unregulated entities will focus on what protections are available (for example, consumer protection legislation) rather than what is not (PII cover). If this results in a client being unable to obtain financial recompense for a solicitor's negligence (for example, because the unregulated entity lacks the financial resources or has ceased trading by the time the error is discovered), this would have a very negative impact in terms of public confidence on the whole 'solicitor' brand.

30.

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?

Yes.

31.

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

No.

32.

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?

Yes but the SRA will need to be very clear about what it expects.

33.

31. Do you have any alternative proposals to regulating entities of this type?

No.

34.

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?

No.

35.

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

Yes.

Consultation: Looking to the future - flexibility and public protection

Response ID:10 Data

2. Your identity

Surname

Gillam

Forename(s)

Fiona

We may publish a list of respondents and a report on responses. Partial attributed responses may be published. Please advise us if you do not wish us to attribute your response or for your name or the name of your firm or organisation to appear on any published list of respondents.

Attribute my/our response and publish my/our name.

Please identify the capacity in which you are submitting a response. I am submitting a response…

in another capacity

Please specify: on my own behalf as a non-practising solicitor

3.

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

no

4.

2. Do you agree with our proposed model for a revised set of Principles?

yes

5.

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

yes

6.

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?

no

7.

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?

Conflicts of interest esp in conveyancing. At present some firms feel able to justify acting on both sides of a conveyancing transaction as a matter of course, effectively ignoring the current negative Indicative Behaviour 3.14

8.

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?

Yes, but the down side of a short Code with no Indicative Behaviours is that there will be greater uncertainty about interpretation of that Code among solicitors, who typically consult the Code infrequently at best. This will be addressed I expect by the support you will provide via the enforcement strategy/case studies/toolkits you will be developing, but isn't this just moving the detail from the Code to supporting

documents, so where is the overall benefit? That said, I like the idea of a skeletal Code of Conduct because it means there will be more demand for the services of compliance experts.

9.

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

no

10.

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

no

11.

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

prefer Option 2 as it presents a clearer two-step process
Please also consider reviewing the definition of conflict: the American Bar Association and the Code of Conduct for European Lawyers both have much more practical and useful definitions

12.

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

yes

13.

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

no

14.

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

no

15.

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?

no

16.

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.

yes. Increases the profile of risk and compliance in the firm and makes the firm "own" these areas, albeit to varying degrees. Most of the COLP's I talk to are proud of the input they have into making their firm successful and aware of the key function they have in terms of ensuring that, through their diligent risk management, the firm survives into the future

17.

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

Keep up the annual COLP Conference: this is extremely valuable. Support/initiate COLP networks in regions and urban hubs so that good practice is promulgated

COLP/COFA of the Year?Excellence award?

18.

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?

fine, but be prepared for a lot of enquiries, so you may need additional support resources for those trialling this new avenue eg FAQ's

19.

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

very likely

20.

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?

agree

21.

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?

I always found this hard to understand/quantify so agree it is adequately covered by other requirements. Phase out.

22.

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

The firm is already required to do this. The weakness is that unregulated firm s do not have to and therefore clients of unregulated firms are completely unaware that their work is unprotected/unregulated and are unable therefore to make an informed choice. You cannot regulate these firms so why should the regulated sector have to jump through more hoops when the issues does not lie with them?

23.

21. Do you agree with the analysis in our initial Impact Assessment?

24.

22. Do you have any additional information to support our initial Impact Assessment?

no

25.

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?

agree

26.

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?

27.

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? If not, what are your reasons?

yes

28.

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

yes but again this should be covered by the FAQ's so that solicitors taking this route are aware of the implications for them

29.

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

30.

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?

31.

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

no

32.

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?

yes

33.

31. Do you have any alternative proposals to regulating entities of this type?

no

34.

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?

agree

35.

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

yes

Consultation: Looking to the future - flexibility and public protection

Response ID:485 Data

2. Your identity

Surname

Threlfall

Forename(s)

Stephen David

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Attribute my/our response and publish my/our name.

Please identify the capacity in which you are submitting a response. I am submitting a response…

on behalf of my firm.
Please enter your firm's name:: Fletchers Solicitors Ltd

3.

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

No

4.

2. Do you agree with our proposed model for a revised set of Principles?

We believe that removal of the principles that solicitors should provide a proper standard of service to clients, act in the best interests of each client and protect client money and assets has negative implications for consumer protection and the maintenance of professional standards.

In our view, the Principles should still refer to the solicitor's duty to keep the affairs of the client confidential.

5.

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

Please see answer to 1

6.

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?

In our view, the Principles should continue to refer to the solicitor's duty to keep the affairs of the client confidential.

7.

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?

Generally, the indicative behaviours were previously helpful in determining courses of action which demonstrated compliance with the Principles.

Having said this, there are no specific areas where guidance would be particularly helpful.

8.

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?

The creation of separate codes of conduct distinguishes the responsibilities of the individual and those of the firm. The creation of two codes is not an issue.

However, we agree with the view that the approach creates two tiers of solicitors, those working in a regulated firm and those in an unregulated entity.

There is substantial risk to consumer protection and professional standards. These risk damaging the standing of solicitors in the community and, in our opinion, could create significant confusion for customers.

9.

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

No

10.

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

There is less certainty about what is and is not permitted.

It is sometimes helpful for the codes to be more definitive so that compliance is clearer and there is less discretion to determine whether there is a breach.

Language within the codes is imprecise. It is possible that solicitors practicing compliantly could find themselves in breach after the new codes come into force.

There is some overlap, particularly on the issues of conflict, complaints and ID.

11.

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

Whilst solicitors working for unregulated entities would be subject to conflict rules, these will not apply to the entities themselves, which seems wrong.

We agree with the view that Option 2 may be unworkable because it is not always possible to identify that an actual conflict exists and a solicitor may unwittingly act.

Because the non-regulated colleagues of regulated solicitors would not be subject to conflict rules, there is risk of confusion to customers.

It provides a competitive advantage to unregulated entities with risk of adverse effect on consumer protection.

12.

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

As mentioned earlier, there is less certainty about what is and is not permitted.

There is also overlap.

13.

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

No

14.

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

Solicitors duty to keep affairs of the client confidential.

15.

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?

No

16.

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.

Yes. They provide a focal point for compliance and practice issues generally within the regulated firm.

17.

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

Designated point of contact within the SRA to discuss any points of consideration.

18.

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?

The proposals may result in two tiers of solicitors. Solicitors in unregulated businesses will not be required to have PII. Clients will not have the benefit of the fund and the protection of principles governing conflict.

This is likely to create consumer confusion and damage the reputation of the solicitor profession.

19.

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

Unsure at present

20.

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?

No issue

21.

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?

Necessary

22.

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

Yes

23.

21. Do you agree with the analysis in our initial Impact Assessment?

No specific comment

24.

22. Do you have any additional information to support our initial Impact Assessment?

No

25.

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?

Yes

26.

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?

They should not

27.

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? If not, what are your reasons?

Risks eroding a key element of client protection. the proposal risk creating two tiers of client protections, with different rules and protections depending upon which entity the solicitor is working within.

It will be difficult for clients to fully comprehend the implications of purchasing legal services through an unregulated entity. The proposals risk undermining or depleting the existing fund as solicitors for unregulated entities would not have to contribute. It follows that solicitors in regulated firms would have to make additional contributions, increasing the regulatory burden on them.

28.

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

No

29.

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

The creation of a two tier profession which causes confusion for the customer.

30.

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?

No comment

31.

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

No comment

32.

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?

No

33.

31. Do you have any alternative proposals to regulating entities of this type?

No

34.

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?

No

35.

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

Yes

Informing Progress – Shaping the Future

A Response by the Forum of Insurance Lawyers to the consultation by the SRA: Looking to the Future – flexibility and public protection.

September 2016

Informing Progress – Shaping the Future

FOIL (The Forum of Insurance Lawyers) exists to provide a forum for communication and the exchange of information between lawyers acting predominantly or exclusively for insurance clients (except legal expenses insurers) within firms of solicitors, as barristers, or as in-house lawyers for insurers or self-insurers. FOIL is an active lobbying organisation on matters concerning insurance litigation.

FOIL represents over 8000 members. It is the only organisation which represents solicitors who act for defendants in civil proceedings.

The consultation was drafted following consultation with the membership.

Any enquiries in respect of this response should be addressed initially to:
Shirley Denyer
Shirley Denyer LLP
Technical Director for FOIL

info@foil.org.uk

FOIL
c/o Stratos Gatzouris
Hill Dickinson LLP
50 Fountain Street
Manchester
M2 2AS

A Response by the Forum of Insurance Lawyers to the consultation by the SRA: Looking to the Future – flexibility and public protection.

FOIL member firms are modern, innovative businesses, working in an area of fast-paced change with commercially-aware clients expecting a pro-active, business-oriented attitude from their lawyers. Against that background FOIL supports the SRA's view that regulation must be up to date and fit for purpose. It supports the SRA's aim of developing a competitive and effective legal sector, whilst providing public protection.

FOIL has very serious concerns at the proposals put forward in the consultation to introduce two separate Codes of Conduct, allowing solicitors to deliver non-regulated legal services outside regulated firms. It believes that this change will have a seriously detrimental effect upon the standards and reputation of the profession and that it does not achieve the right balance between the need for a competitive legal sector and public protection.

Under regulatory and legal principles developed over a very long period of time the solicitor 'brand' brings with it expectations of standards of integrity, confidentiality and protection which the public can rely upon. Whilst the detail of the provisions may not be well-known, instructing a solicitor brings with it a degree of confidence that the individual and the firm will work to a high standard and that, if anything goes wrong, there will be appropriate sanction and redress. The proposals now put forward will remove that reassurance, and will inevitably lead to circumstances where clients instructing a solicitor find that their interests have been inadequately protected.

FOIL has concerns in a number of areas:

<u>The lack of Legal Professional Privilege</u>

The right to be open with one's lawyer without fear of disclosure is a fundamental right, providing an essential safeguard in the administration of justice. Clients have a right to expect that their communications with a solicitor will not only be confidential but also privileged.

It is a serious concern that under the proposals clients instructing a solicitor in an unregulated firm will not have the benefit of LPP. FOIL does not believe that the theoretical possibility that solicitors will be able to personally contract with their client to offer LLP is either workable or desirable.

The consultation paper says that it will be "*down to the individual solicitor to make clear to their clients what sort of protections that client has.*" Given the importance of LLP, and the fact that only clients of solicitors and barristers enjoy its benefits, FOIL considers this position to be complacent. Whatever the information provided, clients are unlikely to appreciate the full significance of the

loss of LPP until circumstances arise where they wish to rely upon it. A regulatory environment in which a solicitor is expected to explain to a client that "*I am a solicitor, just not that kind of solicitor*" is inevitably damaging to the profession as a whole.

A two-tier profession, within which some clients have inherent rights that are denied to others would represent a serious diminution of professional standards, particularly where the implications of those rights and the lack of them are not easy for clients to understand.

Professional Indemnity Insurance and the Compensation Fund

Under the proposals solicitors will be able to practice without the need for PII. Clients instructing a solicitor in an unregulated entity will also be denied access to the Compensation Fund. These represents very significant changes to the consumer protections currently in place. FOIL does not believe that the requirement to provide information on insurance and redress to clients will be sufficient to overcome the disadvantage to clients of instructing a solicitor in circumstances where financial compensation may not be available in the event they suffer a loss.

Implications of working within an unregulated business

Solicitors providing services to the public currently work in an environment where the entity in which they work is also regulated. Under the proposals solicitors will be working in situations where they may be the only individuals who are governed by regulation and where the entity itself will be unregulated. An unregulated entity will be entitled to adopt business practices which will not accord with solicitors' regulation and the ethos may be very different from that of a regulated business. There is the potential for professional standards to come under strain leading to higher risks for consumers.

The potential for unregulated entities to act in a way prohibited within regulated firms is a particularly concern in the area of conflicts of interest. Whilst an individual solicitor will be bound by the obligations in the Code of Conduct, the entity in which they work will not, putting at risk an important safeguard integral to the solicitor 'brand'.

Consumer risk

The adoption of the proposals in Section 3 of the paper will, for the first time, create a professional environment where solicitors providing services to the public will be governed by different rules, delivering very different degrees of protection to the public. The plans are likely to increase the risk to the public, whilst at the same time reducing the requirements to have in place the means to provide redress.

One of the stated aims of the proposals is to address unmet legal need. Whilst not accepting that the SRA has sufficiently demonstrated that unmet legal need exists, FOIL does not believe that it is appropriate to address the issue by

weakening the profession by a loosening of standards. The SRA indicates that unregulated entities employing solicitors are likely to be able to offer services to the public more cheaply. As it appears that the only advantage such organisations will have over regulated firms is a saving on the costs of regulation, it seems inevitable that current standards will have to be down-graded to achieve such costs savings. It is difficult to see how the SRA can justify the need for a tight regulatory regime for regulated firms, whilst at the same time accepting much lower consumer protection standards from solicitors working elsewhere.

Looking at other parts of the consultation paper, in particular:

- **Question 1** – FOIL sees no justification for a new set of Principles, removing the current express Principles to protect client money and assets, provide a proper standard of service, and run your business effectively and co-operate with the regulators. If the aim is as stated, to make the Principles easily understood, and owned, by the profession and the public, there appears no reason why the current Principles do not meet that criterion.

- **Question 19** – FOIL does not believe that the requirements, to practice for 36 months and undertake management skills training before being 'qualified to supervise' and therefor become a sole practitioner, should be removed. Whilst the detail of the current requirements may need to be further considered, in principle FOIL would not support proposals which would allow solicitors with less than three years' entitlement to practice to set up regulated and unregulated firms.

  Given that newly qualified solicitors are currently working in a supervised environment, it is complacent to suggest that data indicating that newly qualified lawyers do not represent a significant risk to the delivery of a proper standard of service, can be stretched to conclude that it is therefore acceptable for them to work alone or solely with other recently qualified solicitors.

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Regulation and Education - Policy - Handbook 2017
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Dear Sir/Madam

21 September 2016

GC100 Response to the SRA Consultation "Looking to the future – flexibility and public protection"

1. Introduction

1.1 This response to the SRA Consultation paper "Looking to the future – flexibility and public protection" is provided on behalf of the Association of General Counsel and Company Secretaries of the FTSE 100, generally known as GC100. GC100 was officially launched on 9 March 2005 and brings together the senior legal officers of more than 85 FTSE 100 companies. The main objectives of GC100 are to:

a) Provide a collective voice and, as appropriate, make representations on areas of policy, regulatory and legislative reform that impact on large companies listed in the United Kingdom;
b) Enable members to share knowledge and information on the law, company secretarial practice, risk management, compliance, governance, pro bono work and other areas of common interest;
c) Develop, publish and encourage best practice; and
d) Assist members and potential future members in their professional development

1.2 Please note that the views expressed in this response do not necessarily reflect those of each and every individual member of GC100 or the companies they work for.

2. GC100 response

Our response is divided into two parts: General comments on the consultation itself and the SRA vision for future regulation are set out under the "General comments" heading below. More specific comments on the proposed Principles and Code for Solicitors are set out in our answers to some of your specific consultation questions.

3. General comments

3.1 **The consultation is not directed at in-house lawyers** – We are disappointed that, despite its length and ambition to set out the SRA's vision for the future regulation of the provision of legal services as a whole, the consultation paper does not specifically address in-house lawyers either as providers or consumers of legal services. Although paragraph 48 identifies a need to provide greater clarity for in-house lawyers on what their responsibilities are and what standards they must uphold, the consultation does not explore this any further. In addition, whilst paragraph 55 refers to a "toolkit" which the SRA would like to produce to help employers understand the obligations and responsibilities required of the in-house solicitors they employ, it is not clear what this might cover. In view of this, it is difficult for the in-house community to comment with any confidence on the proposed changes because their (different) needs do not seem to have been taken into account at the formation stage.

This point made, we do favour a split Code – which works well for the in-house community – as explained further below.

3.2 The consultation does not provide a complete picture of what is proposed – The consultation runs to around 320 pages in total. It sets out a vision that affects all areas of the SRA Handbook 2011 and yet provides detailed drafting only in respect of proposed changes to the SRA Principles and SRA Code of Conduct 2011. These proposed changes hint at a liberalisation of the other aspects of the SRA Handbook which are of great relevance to in-house lawyers (in particular Rule of 4 of the SRA Practice Framework Rules 2011) but provide no detail. This makes commenting on the specifics of the proposed Code for Solicitors difficult as it is not clear what else might change and how. Any comments made in this response are therefore subject to what the SRA might propose in the future as part of its Handbook review exercise.

3.3 The consultation places too much weight on resolving the issue of a perceived unmet legal need at the cost of potentially undermining the concept of privilege – We have set out some specific comments below in respect of the proposals to allow unregulated providers to employ solicitors to provide legal services. However, as a general point, GC100 is concerned that the benefit of providing solicitors with greater flexibility and freedom to work in

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unregulated businesses (in order to address a perceived "unmet legal need") does not sufficiently take into account that unsophisticated purchasers of unregulated services provided by solicitors will not fully understand (even if given "good" transparency information) how these services differ from those provided by regulated firms. For example, will such purchasers of legal services understand the consequences of their communications with their solicitor not attracting privilege (where that is the case)?

3.4 This, more generally, could have the consequence of undermining the concept of privilege more widely (to the detriment of all consumers of England and Wales legal services) if it transpires that only advice given by some solicitors (and not all, as now) will attract privilege.

3.5 GC100 is not in a position to comment on the SRA's view that there is an unmet legal need, but is the solution that is being proposed one that could have wider reaching consequences than intended? In addition, is the SRA confident that its proposals will address the problem? Here, we note that the Competition and Markets Authority's interim report on the legal services market suggests that it is a lack of transparency about price and quality which impacts the individual/SME sector, not unavailability of the "solicitor" title. How does the SRA plan to address the CMA's findings?

3.6 **Timing** – Finally we question why an overhaul of the regulatory regime is now necessary (less than ten years after the SRA was formed). We note that the CMA has not yet completed its study on the legal market. More recently, the LSB has published its "vision for legislative reform of the regulatory framework for legal services in England and Wales" which among other things calls for a new legislative framework for regulating services, a fully independent regulator and activity based regulation. It therefore seems premature for the SRA to suggest changes to the regulatory framework. More generally, this a very busy period for UK companies and their lawyers as they try to assess the impact of leaving the EU and therefore, in the absence of a pressing need, is the requirement to spend time and resources on a lengthy consultation really necessary?

4. Answers to specific questions

(a) Question 2: Do you agree with our proposed model for a revised set of Principles?

GC100 is in favour of the proposal for a shorter set of Principles which focus on individual responsibilities which in-house solicitors are easily able to understand and adhere to. The removal of "entity-specific" type obligations (as set out in the current SRA Principles 8 and 9) that require individual solicitors to "carry out their role in the

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business" in a particular way is helpful and in keeping with the SRA's stated aim to clearly define the boundary between individual and entity based regulation.

We would, however, have expected the revised Principles to address confidentiality and suggest that a new Principle is added to the list to cover this. The protection of our employer's confidential information is key to us whenever we engage external providers and we expect everyone working in law firms (whether solicitors or not) to have regulatory obligations in this regard.

We also query why new Principle 2 refers to "those delivering legal services" as this could catch unqualified lawyers/others working for unregulated entities. We think this reference should instead be to "your profession", which is a narrower and more relevant concept.

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

GC100 is cautiously supportive of the idea proposed at paragraph 55 of an employer's toolkit which would help employers understand the obligations and responsibilities of the solicitors who work for them. However, any form of SRA guidance carries the risk of undermining its outcomes-focused approach and it should therefore be clear that any toolkit would not create mandatory rules/guidance for in-house lawyers who should be free to interpret how the SRA rules apply to their working practices. Should the SRA decide to issue any such guidance, GC100 would expect it to consult on its content prior to publication.

(c) Question 6: Have we achieved our aim of developing a short, focused Code for all solicitors, wherever they work that is clear and easy to understand?

Subject to the general points made above, GC100 is in favour of the proposal to split the SRA Code of Conduct. It agrees that the proposed Code for Solicitors is simpler to understand and it welcomes the removal of the Indicative Behaviours and the specific obligations on those within in-house teams that have management responsibilities (which effectively amounts to a form of entity-based regulation via the back door). The proposals to impose specific responsibility on those who supervise others for the quality of their work and their professional competence (as envisaged by rules 3.5

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and 3.6) seem a reasonable approach in line with how in-house teams operate in practice.

Also helpful is the clarification that client care/transparency information need only be given where providing services to the public or a section of the public. This removes many of the burdensome (and largely irrelevant) requirements to provide information to in-house clients about the services provided by a dedicated in-house legal team.

(d) Question 9: What are your views on the two options set out for handling actual conflict or significant risk of conflict between two or more clients and how do you think they will work in practice?

We are strongly in favour of Option 1, for the reasons set out below. The current conflict rules work very well for the in-house community, which use the substantially common interest exception to allow in-house lawyers to act for employer affiliates, and are well understood by in-house lawyers both as providers and purchasers of legal services.

Option 1 also includes a helpful addition in respect of the requirement to obtain informed consent from each client where relying on the exceptions set out in parts (a) and (b). Allowing informed consent to be "evidenced" in writing (e.g. by making a written file note of what the in-house clients have agreed to) reflects the way conflicts are managed in-house.

Option 2 raises concerns as it seems to remove the "auction" and "substantially common interest" exceptions. Although the auction rule exception is rarely relied on by in-house lawyers, the scope for peripheral conflicts existing/arising when advising different parts of a group mean that the "substantially common interest" exception is of great importance. As drafted, Option 2 suggests that in-house lawyers cannot act on a matter where a conflict exists. This drafting does not take into account that in-house lawyers frequently are asked to advise different entities within their organisations which may have differing interests. Often these differing interests may amount to a technical conflict but the general consensus of each client is that any conflicts are peripheral to the larger objective. In these circumstances, the common interest exception is helpful as it recognises the existence of peripheral conflicts but allows in-house lawyers to act where there is a clear common purpose and a strong consensus on how the agreed objective is to be achieved.

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The introduction of a "new" exception allowing solicitors to act where there is a significant risk of a conflict in circumstances where they have client consent (but requires lawyers to cease acting if a conflict subsequently arises) is, as currently drafted, unworkable. In practical terms clients considering a significant risk of a conflict would, when giving their consent, anticipate at least some level of conflict arising. Whether or not a solicitor should continue to act in those circumstances would depend how central the conflict is, and whether it is reasonable in the circumstances to act. For these reasons, GC100 is of the view that if a new exception is to be added it should apply to circumstances where there is a conflict (and not just a significant risk of one) but that other protections (e.g. whether it is still reasonable to act) should be added. Such an exception might also properly be limited to sophisticated clients only, to protect against abuse. However, we would reiterate that we favour the status quo, as reflected in Option 1. When purchasing legal services, we would not wish to be put under any "relationship" or other pressure to consent to our chosen law firm acting for another party – in the absence of the two existing exceptions applying. We consider that they provide sufficient flexibility for both law firms and their clients.

(e) Question 10: What is your view of the opportunities and threats presented by the proposal to allow solicitors to deliver non-reserved legal services to the public through alternative services providers

Although it is too early to say, the general view is that it is unlikely that many GC100 organisations would seek to provide legal services to the public either through their existing legal teams or by recruiting dedicated teams of solicitors.

The proposals to allow solicitors to deliver non-reserved legal services through alternative service providers are therefore of most interest to GC100 members in their capacity as purchasers (rather than providers) of legal services. Our concerns relating to privilege are set out in our "General comments" above. We should stress here that we have not seen the Counsel's opinion to which the SRA consultation refers, and would like to have the opportunity to do so. As a result of taking this advice, the SRA suggests that consumers using unregulated providers might enjoy privilege if they contract with the individual solicitor advising them (rather than his/her employer) direct. Our initial view of this suggested work around is that it is messy and unattractive. It would be very dependent upon getting the right paperwork in place – which, aside from other factors, would generate more work for

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in-house lawyers (who would need to review it) whilst not necessarily guaranteeing the desired outcome.

As a general rule, the use of unregulated legal service providers by members of the GC100 is fairly low. Whilst the presence of solicitors in these organisations would provide some reassurance as to quality, there are concerns that the fact that services provided by solicitors would not benefit from entity-based regulation might not be immediately understood.

For example, an in-house lawyer instructing an unregulated firm on behalf of its employer in relation to the purchase of a company might be surprised to find out subsequently that the firm it had instructed was also acting for the seller of that company (should that in fact be permissible without their consent as a matter of law and/or without breaching SRA Principles). However, this is something that the new rules appear to permit provided the same solicitor does not act for both purchaser and seller. If such an arrangement could only proceed with client consent, we would not wish to feel pressured, in any particular circumstance, to give that consent. See further our answer to question 9 above.

Further, there are concerns that solicitors working in organisations which are not themselves regulated might find it difficult to uphold some of their individual obligations because they would not be supported by proper systems and controls. For example, how can a client of an unregulated service provider be certain that its information is being kept confidential when the organisation itself is not bound by such duties and the solicitor has no operational responsibility for (or visibility of) what IT systems and controls are put in place by the solicitor's employer?

As sophisticated purchasers of legal services the members of GC100 would be able to address some of these concerns surrounding conflicts and confidentiality through negotiation with unregulated providers and would be well aware of the loss of privilege type consequences when buying such services. Furthermore they may be in a position to take a view on whether or not to buy uninsured services. However, this is not likely to be the case for less sophisticated purchasers of legal services who may mistakenly believe that the presence of a solicitor means they are obtaining equivalent services to those provided by regulated firms. In these cases, even if adequate information is provided to consumers there is still a risk that they will not understand the consequences of purchasing services from entities that do not provide the same regulatory protections until it is too late. This ultimately may have

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the effect of making solicitors operating in these organisations seem "less regulated", something which could have negative implications for the profession as a whole.

(f) 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)?

Under the current rules, in-house lawyers are permitted to provide reserved legal services to their employer, related bodies and work colleagues and GC100 assumes that this will continue to be the case even after the SRA has consulted on the SRA Practice Framework Rules 2011.

Although GC100 remains neutral as to whether solicitors operating in-house or in other unregulated entities should be entitled to provide reserved legal activities to the public generally, it is firmly of the view that the current rules on pro bono set out in rule 4.10 of the Practice Framework Rules and guidance note x to Rule 4 are too restrictive.

Given the SRA's concerns about unmet legal need, it would seem an appropriate time to review the restrictions set out in s15 Legal Services Act and allow in-house lawyers very clearly to provide reserved legal services on a pro bono basis.

5. Conclusions

Although GC100 welcomes the splitting of the Code of Conduct and the simplification of rules applying to in-house lawyers, it is concerned that the regulatory changes proposed by the SRA could create confusion for consumers of legal services. Greater choice for consumers should not come at the cost of lesser regulatory protection, particularly for unsophisticated consumers.

Yours faithfully,

Mary Mullally
Secretary, GC100

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GELDARDS LLP'S RESPONSE TO SRA'S LOOKING TO THE FUTURE CONSULTATION

Note. We have not responded to questions on which we could provide little meaningful comment, and we have responded to certain questions by providing a collective answer to groups of them.

REVISION OF THE PRINCIPLES

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

We have not experienced any issues.

Q.2 Do you agree with our proposed model for a revised set of Principles?

Q.3 Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

Q.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?

The removal of the Principles that solicitors should 'provide a proper standard of service to your clients' and 'protect client money and assets' has negative implications for consumer protection and the maintenance of professional standards.

These principles are the benchmarks of our professional standards and are the values on which consumers base their confidence in us and our profession. There are potential risks to the reputation of solicitors in the lessening of these core principles.

Any revised Principles should contain an explicit reference to the protection of client money and assets. Consumers are highly unlikely to be informed of this watering down of protections and should thus be explicitly protected within these principles from any such risks to their assets.

Any revised Principles should also refer to the solicitor's duty to keep the affairs of the client confidential instead of that merely being implicit within another principle. This is part of the core framework of a solicitor/client relationship.

SEPARATE CODES OF CONDUCT

Q.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?

Q.7 In your view is there anything specific in the Code that does not need to be there?

Q.8 Do you think that there anything specific missing from the Code that we should consider adding?

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

Whilst the new Code is shorter and more focussed, we remain concerned that the creation of separate codes of conduct distinguishes between the responsibilities of an individual solicitor, wherever he or she is working, and those of a regulated entity.

That approach risks the creation of two tiers of solicitors; those working in a regulated entity, and those working in an unregulated entity, with consequential risks to consumer protections and professional standards which risk damaging the standing of solicitors and creating confusion for consumers.

Although both of the draft Codes focus on brevity and simplicity, they provide less certainty about what is and is not permitted. Some solicitors might prefer a more definitive approach so that compliance is clearer and there is less discretion for the SRA to determine when there is a breach, which could result in enforcement action that might have been avoidable if the Codes were clearer. It is difficult to take an informed view on how the new Codes would work in practice without seeing the associated guidance which the SRA has not published alongside the draft Codes.

The language of the draft Codes is imprecise and could mean that members currently practising in a fully compliant way could find themselves accused of a breach after the proposed new codes come into force.

There is some overlap between the draft Codes, most noticeably in areas such as conflict, complaints and client information/identification. If this is not addressed, it is not clear which would take precedence where such inconsistencies exist.

The creation of two separate codes of conduct will only add complexity and create duplication. It will result in two tiers of solicitors with those employed within regulated entities having to comply with a greater regulatory burdens irrespective of the risk to clients, which will arguably be greater with unregulated entities.

Furthermore, the apparent simplicity of the draft Codes has the potential for confusion as there is no clear approach and therefore the potential for more disputes between firms and the SRA. The brevity of the draft Codes actually results in less predictability and runs the risk of more unintended breaches and increased enforcement action.

Without seeing the intended guidance and case studies that are to replace the Outcomes and Indicative Behaviours sections from the Handbook, it is difficult to add further

comment, although the removal of the prohibition on unsolicited approaches does pose significant risks to consumer protection and should be addressed; the new proposed wording is too vague and weak.

The SRA clearly needs to provide more information.

HANDLING CONFLICTS OF INTEREST

Q.9 What are your views in the two options for handling conflicts of interests and how they will work in practice?

The consultation makes it clear that solicitors employed by an unregulated entity would continue to be regulated as individuals and would be subject to conflict rules. However, as the conflicts rules will not apply to unregulated entities, in practice they will not have much effect if any on the unregulated entities. Regulated entities, in contrast, will be subject to the same level of restriction as they are now or, potentially, a greater level, depending on which of the two options on conflicts is adopted by the SRA.

We are unclear why in the Individual Code does not include references to "your business or employer" in paragraph 6.1. The risk of conflict between unregulated services providers and their "clients" must be substantial, considering the variety of drivers that bring such providers to the legal services market. We see no reason why consumers should not enjoy the same protections here.

The SRA offers two options for dealing with conflicts:

- Option 1 largely replicates the 2011 Code, in prohibiting a solicitor from acting where there is a conflict or significant risk of such a conflict, unless specified circumstances are met and protections are provided.

- Option 2 would narrow the ability to act given that it provides for a complete bar on acting where there is an actual conflict, and protections to be put in place if there is a significant risk of a conflict.

Option 2 may be unworkable because it is not always possible to identify that an actual conflict exists and a solicitor may unwittingly act in a conflict situation. Because the non-regulated colleagues of regulated solicitors would not be subject to conflict rules, there is a risk of confusion to consumers, a very favourable competitive advantage to unregulated entities and lack of a fundamental consumer protection for clients of unregulated entities.

COMPLIANCE OFFICERS FOR LEGAL PRACTICE (COLPS) AND FOR FINANCE AND ADMINISTRATION (COFAS)

Q.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.

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

The COLP/COFA do provide a focus for the compliance function, but we continue to believe that with true firm-based regulation the need for the individuals to have direct duties to the SRA is of questionable value. We think the same culture could be created by having a firm-based obligation to appoint a competent COLP/COFA and to ensure that the appointee complies with the requirements of the role.

PROPOSALS TO ALLOW SOLICITORS TO UNDERTAKE UNRESERVED LEGAL SERVICES IN AN UNREGULATED ENTITY

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

We consider that there are significant dangers to the value of the "Solicitor Brand". We agree with the Law Society that the inherent risks of differing consumer protections (e.g. LPP, Conflict, PII & powers of intervention) are significant and we are not convinced of the benefits to consumers.

We believe that the name "solicitor" should be reserved only for solicitors who are able to provide equivalent consumer protections to those required to be provided by regulated providers.

We are also concerned that the effective increase in regulatory burden for the SRA of regulating large numbers of individual solicitors employed by unregulated legal service providers will inevitably result in reactive regulation and enforcement rather than engagement in prevention and risk management.

We can easily foresee negative publicity (damaging to the standing of solicitors generally) arising as and when the impact of the lack of these protections becomes apparent and the real risk that the consumer who thought they were dealing with a solicitor did not get the protections that they might have expected. To expect consumers who have gone to a solicitor for advice to understand the difference between a "solicitor" and a firm of "solicitors" is optimistic.

We also observe that the proposal is directly contradictory to the assurance that we, and many other firms, were given when the concept of ABSs was introduced, that it was fundamental that there be no lesser regulatory requirements of ABSs than of solicitors' firms, which would otherwise hand ABSs a massive competitive advantage. We do not see why that viewpoint has changed.

There is insufficient evidence to support these proposals or the expected benefits from their implementation, which are stated to include improved access to quality services at affordable prices, enhanced professional standards, and increased employment opportunities.

In particular, the proposals could have undesirable and/or unintended consequences as follows:

16.1 Reputation and standing of solicitors

The proposals may result in two tiers of solicitors. Those working in unregulated businesses are unlikely to be able to give advice which is legally privileged, will not be required to have PII, clients will not have the benefit of the compensation fund or the protection of the principles governing conflicts of interest. Not only is this likely to create consumer detriment and confusion but it is likely to damage the reputation of the title of solicitor.

16.2 Legal Professional Privilege (LPP)

LPP should attach to clients seeking advice from a solicitor holding a current practising certificate wherever he or she practises, and any attempts to dilute or make LPP more difficult to obtain or enforce could erode the concept of LPP, which is a cornerstone of the justice system and a key right of clients. This could also undermine the standing of the solicitor profession both at home and abroad. It is not right in principle for LPP to be a distinguishing feature between regulated and unregulated service providers.

16.3 Conflicts and confidentiality

The proposals will result in confidentiality obligations only applying to individual solicitors working in an unregulated entity, but not to the entity or to other employees. There is a risk that a solicitor may unwittingly act in a conflict situation and that clients may not be aware of a potential or real conflict of interest or of the fact that the entity is not subject to the rules on conflict. It also results in making regulated entities less attractive because they will be competitively disadvantaged versus unregulated entities.

16.4 Consumer protections - Professional Indemnity Insurance (PII) and the Compensation Fund

Under the SRA's proposals, solicitors working in unregulated entities would not be required to have PII and their clients would not have access to the Compensation Fund if things go wrong.

This risks eroding a key element of current client protection. The proposals risk creating two tiers of client protections - with different rules and protections applying to solicitors' clients depending on the kind of entity in which the solicitor is working.

The SRA proposes that solicitors working from unregulated entities would be required to make sure that their clients understand whether and how the services they provide are regulated and the protections available to them. Even for those working within the legal sector, insurance and client protections are complicated

topics which are not easily digested and understood and clients cannot be expected to fully comprehend the implications of purchasing their legal services through an unregulated provider. The proposals also risk undermining or depleting the existing Compensation Fund as solicitors working from unregulated entities would not have to contribute to the Fund; this would seem likely to mean that solicitors working in regulated entities would have to make additional contributions to secure the Fund's viability, increasing the regulatory burden on them and exacerbating the two tier profession that could result from the proposals.

The trade-off suggested by the SRA for other benefits such as low prices seems misconceived as consumers may not be aware of the differing standards of protections being offered between different providers.

Also, tracking solicitors who move between regulated and unregulated activities would be costly and administratively difficult to calculate. The burden would ultimately have to be passed on to consumers for the increased regulatory burden.

16.5 Consumer confusion about status

Under the proposals, solicitors holding a current practising certificate would be able to use their title whether providing legal services to the public through a regulated or unregulated entity. While a provider would not be able to use the term 'solicitors firm' or 'solicitors' unless the entity was regulated by the SRA, this would seem unlikely to mitigate the risk of consumer confusion especially where the unregulated entity described itself as a 'law firm' or 'legal services firm' or advertised that they employ solicitors. Consumers will lose the assurance they currently have as to quality and protections when they engage a solicitor. It is inappropriate that consumers will have to undertake fairly substantial due diligence. This will additionally undermine the standing of the profession internationally.

16.6 Annual practising certificate (PC) fees

There is no information on this point and the SRA needs to undertake and publish an analysis of the projected impact of its proposals on the PC fee, and in particular the turnover based firm fee. The SRA should not close this consultation until this information is available.

16.7 Supervision

Newly qualified solicitors without any experience would be able to set up their own unregulated firms. Newly qualified solicitors working in an unregulated entity would no longer have the requirement of support and guidance from more experienced solicitors. This will increase the risks to clients as well as putting newly qualified solicitors themselves at risk, and negatively impact on the standing of the solicitor profession Damage to standards will increase incrementally as this applies year on year and fewer solicitors in unregulated entities will have ever received supervision.

These proposals threaten the viability of, particularly, small and medium sized solicitors' firms. The proposed changes could result in many firms splitting into two entities: a traditional solicitors' firm which would carry out the reserved work; and a newly-created unregulated entity due to the significant cost savings that being an unregulated entity could potentially offer. That may be the only way that an established traditional solicitors' firm

could hope to compete in this new two-tier legal profession that this consultation is proposing, where competitors would be able to provide legal services without being subject to the costs of regulation and consumer protection. Smaller firms and sole practitioners, who are unlikely to be able to divide their businesses, will be placed at a further competitive disadvantage.

The proposals may in fact ultimately substantially lessen consumer protection as many consumers will be unaware of the risks associated with unregulated entities, and may, without being fully informed, choose the ostensibly "cheaper" provider at an ultimately significantly higher "price".

It is not in the public interest that there should be regulated and unregulated providers

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

Unlikely.

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?

This seems necessary in the context of the proposed reforms.

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?

We would have concerns if the notion of "qualified to supervise" was removed. The statement that "*Our emerging data analysis suggests that newly qualified solicitors do not present a significant risk to the delivery of a proper standard of service*" is perhaps an indication that the current firm-based requirements for supervision are in fact ensuring that inexperienced lawyers do not pose a regulatory risk.

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

We would be opposed to any burdensome requirement to notify clients of protections which was not matched by unregulated providers of legal services having the same or similar requirements. As indicated above, the consumer confusion will not be assisted by one body of providers having strictly prescribed notifications.

As highlighted by the Law Society, the reasons for the consumer protections are complex and therefore the more important issue is for the unregulated providers to explain the protections they do not provide – but this is beyond the powers of the SRA and requires the LSB and Government to take responsibility.

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

There is insufficient detail for us to form a view, but for the reason stated above consumer education is crucial. We share the Law Society's scepticism that such complex areas can ever really be fully understood by those who are most vulnerable.

Q.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?

Yes.

Q.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? If not, what are your reasons?

Yes.

Q.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?

Yes. There needs to be a level playing field between all providers.

Q.31 Do you have any alternative proposals to regulating entities of this type?

No.

Q.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?

The proposal is yet another example of the ways in which clients will be prejudiced by this approach. It seems to us to be essential that where an employed solicitor uses that "brand" or "title" the SRA needs to ensure that the legal services provider is contractually obliged to allow an intervention.

Gepp and Sons

Consultation: Looking to the future - flexibility and public protection

Consultation questionnaire form

This form is designed to be completed electronically—in MS Word. Please save it locally before and after completing it.

Question 1

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

No

Question 2

Do you agree with our proposed model for a revised set of Principles?

Yes

Question 3

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

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?

No

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?

Conflicts and conduct, both with clients and third parties. It would help to have an analysis of the queries received by the Ethics helpline.

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?

Yes, but possibly too brief which may lead to more uncertainty.

Two examples are:-

1) contract races are not explicitly covered and

2) it is not clear whether it would be acceptable to contact a represented party directly.

Question 7

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

No

Question 8

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

Yes, all solicitors should carry PII if they are practising (regulated or non-regulated activities) and whether as part of a regulated or non-regulated entity. All clients should have access to the compensation fund and the benefit of LPP.

Question 9

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

We cannot understand why 6.2 (b) is proposed. We feel that it should be removed.

Question 10

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

Yes, subject to previous observations

Question 11

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

No

Question 12

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

No

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?

No, subject to previous observations.

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.

Yes, we believe the roles do assist in as much as the compliance officers are seen to have authority possibly not perceived hitherto.

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?

Feedback and further/ongoing training. We have no idea of the relevance of these posts in practice, nor the benefits they bring to consumers or others. What anecdotal evidence or statistics are available?

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?

We are very concerned as to the loss of client protection:

1. Professional Indemnity Insurance cover

2. Access to the compensation fund

3. LPP

We do not accept that clients will understand the difference between the 'two tiers' of solicitors.

We do not believe this will make solicitors cheaper although there is a significant risk of diluting the brand.

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?

No

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?

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?

This must be maintained, especially with reference to a minimum level of experience (currently 3 years). The emerging data analysis which suggests new qualifieds 'do not present a significant risk to delivery of a proper standard' is flawed: the reason they do not present a significant risk is that they are closely supervised, this supervision is what you are now proposing to remove.

What is the problem with the current system? Again, the proposed changes appear to risk diluting the brand through negligence claims against new qualified unsupervised solicitors.

Question 20

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

It is more the solicitors not within the regulated firms that are cause for concern. The reality is that the level of information we provide at engagement is already overwhelming, further information will only be lost in this mix.

Where would this information be displayed?

Question 21

Do you agree with the analysis in our initial Impact Assessment?

No, particularly as you appear only to consider 'consumers' to be private clients (i.e. able to complain to the legal ombudsman etc).

Question 22

Do you have any additional information to support our initial Impact Assessment?

What about commercial and institutional clients?

Why do you believe private clients who you note 'do not always understand the range of consumer protections that apply' will suddenly be able to do so?

Why do you think there will be a 'commercial incentive' to obtain professional indemnity insurance given its cost and difficulty of obtaining?

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?

Yes

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?

We believe that such solicitors should not be permitted to hold client money personally.

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?

If not, what are your reasons?

No. If all clients have access to the SRA compensation fund then all solicitors should be required to contribute to it.

Question 26

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

No

Question 27

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

As Robert Bourns commented in the Law Society Gazette (25 July 2016) 'Engage with a solicitor's firm and you can rely on a number of certainties. The advice you are given - and the things you say - will be confidential. The person who is giving you the advice is well-trained and well-regulated. On the rare occasion the advice turns out to be wrong you have recourse - through the Legal Ombudsman (LeO) and the compensation fund solicitors pay into. You can also rely on the fact that your solicitor has insurance and, if they are junior, 'properly supervised.' However, with the current proposals none of the above will be 'certain'.

Your proposal will create a two tier system and reduce client protection, probably to the most vulnerable clients i.e. those who are least likely to understand the distinctions of the two tier solicitors.

You risk solicitors working in 'friction' with non-regulated entities (see your annex 9, page 201, scenario 2).

Your proposals erode legal professional privilege, undermine PII and risk poor supervision.

In conclusion, the overall effect will be to dilute the brand 'solicitor' and risk lowering the public's view of the profession.

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?

Yes, all solicitors should have PII.

Question 29

Do you have any views on what PII requirements should apply to Special Bodies?

Same as for regulated firms i.e. minimum requirements etc.

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?

No

Question 31

Do you have any alternative proposals to regulating entities of this type?

We are at risk of creating gaps in client protection and diluting our brand, by having this two tier entity system.

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?

No

Question 33

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

Yes

Thank you for completing the **Consultation questionnaire form**.

Please save a copy of the completed form.

Please return it, along with your completed **About you form**, as an email attachment to consultation@sra.org.uk, by **21 September 2016**.

Alternatively, print the completed form and submit it by post, along with a printed copy of your **About you form**, to

Solicitors Regulation Authority
Regulation and Education - Policy - Handbook 2017
The Cube
199 Wharfside Street
Birmingham
B1 1RN

The Solicitors' Regulation Authority Consultation
Looking to the Future

The Response of Gotelee Solicitors, 31 – 41 Elm Street, Ipswich

It is unclear why these proposals are being brought forward so soon after the root and branch revision of the regulation of solicitors necessitated by the Clementi reforms.

We understand that the apparent justification for such a fundamental revision of the regulatory framework is said to be "unmet need". We are wholly unclear as to any evidence for this "unmet need" and further how the proposals would, if it in fact exists, meet such a need. It is clear to us that the "unmet need" envisaged by our regulators is not concerned with advice deserts created by the reduction, sometimes wholesale, in availability of legal laid for the most needy but, instead, the SRA appear to have identified a section of the population requiring legal services provided by a solicitor which comprises of individuals and small businesses who have to pay for legal services but who are not able or willing to afford the legal services provided through regulated firms. We have not seen any empirical evidence for the existence of this marketplace or the need to create a new type of legal services provision by solicitors to provide it.

It is, in our view, wholly unsatisfactory to fundamentally alter the regulatory regime to provide for need which has not been empirically quantified or allocated a monetary value. We are concerned that our regulators see fit to attempt to manipulate or create a market when in fact their role is

… to make sure that individuals and firms that we regulate operate independently and with integrity in the interests of their clients and in the wider public interest.

Not only are these proposals creating an unregulated market but one that seriously weakens protection for clients. That development cannot be in the public interest unless the 'public interest' is solely defined by cost cutting. A short term saving in professional fees permitted by failure to properly regulate may cause serious problems far outweighing any cost benefit savings including the diminution of the reputation of the profession.

In short we do not consider that there is a problem which needs fixing here. Now is not the time to be engaging in wholesale regulatory reform when the existing regime is only five years old.

Time has not yet been allowed for the new framework to "bed down". Furthermore, firms have invested hugely in time and cost to deal with the current regulatory regime.

We are concerned that the economy as a whole is potentially at risk from a perceived lack of confidence in the proper regulation of solicitors . The concern is that this will force lawyers in other jurisdictions to evolve links with legal services in other European countries. This would damage the wider UK economy, the interests of our members and the interests of the public at large.

We are concerned specifically in the following areas:

Protection for the consumer

Under the new proposals, solicitors will be entitled to work as employees of unregulated businesses. Those clients will not have the protections available to clients of regulated firms. It is no answer, in our view, to say that a solicitor employed in an unregulated entity will be required to make the position clear in an engagement letter, for instance (even if, of course, that solicitor will produce an engagement letter as we now know it, or at all).

The solicitor "brand" resonates with the public's expectation that advice given by a solicitor is correct, is free from conflict and other outside interests and is not only backed up by the organisation in which they work but, if things go wrong, gives access to compensation. This of course is backed up and reinforced by the SRA regulations.

Whilst the consumer may not initially see it, the deregulation of the profession (for that is what it will be) will offer none of the safeguards demonstrated within the traditional professional retainer, an unregulated company has no need to be sure of the consumer safeguard "*independently and with integrity in the interests of their clients".*

That of course may fall upon the individual solicitor as the only compensation route available to a customer/client who seeks advice from a solicitor in an unregulated entity will be against the solicitor him or herself. That cannot be in the interests of the public at large or the individual consumer when the solicitor does not have the ultimate fall back of a business to protect him or her.

Moreover, the public will not understand that the solicitor in an unregulated entity will be giving advice which is unlikely to be subject to legal professional privilege.

Nor will the public understand that the same rules as to conflicts of interest which exist in regulated firms will not exist in regulated entities between individual solicitors.

Perhaps most importantly, a solicitor advising within an unregulated entity will not have the regulatory and compliance support that is available in a regulated firm. How can the public be sure, for instance, that such a solicitor has kept himself up to date through continuing professional development?

We are concerned that any measures, whether inspired by regulatory reform or not, which weaken the concept of legal professional privilege will diminish the standing of the solicitor and the advice they give. The concept of legal professional privilege is already under challenge and if it can be shown that in unregulated entities solicitors practise without the protection of legal professional privilege that would be one more nail in the coffin of what is currently a major outstanding difference between qualified, regulated lawyers and other professionals.

We are also surprised that the issue of conflict of interest appears not to have been thought through. Where solicitors practice in a regulated firm then the conflict is regulated within the firm. Solicitors practising in a non-regulated entity under the proposals will not be subject to the same rules concerning conflict. The public will find that, at the very least, confusing. The protection of confidential information is fundamental to the relationship between a solicitor and his client. It is a given. Equally fundamental is that a solicitor should not act whether is a conflict of interest.

The creation of an uneven playing field

The proposals risk the creation of two classes of solicitors. One class of solicitors will be able to deliver unreserved work through unregulated entities and without traditional consumer protection. The other will be regulated very much as before.

From the public's point of view it does not matter, we believe, whether an unregulated entity is called "lawyers" and employs solicitors or is called a solicitors' firm. The former would be allowed and the latter would not. How is the prospective client to understand the difference? Perhaps the unregulated companies offering legal services could be called Unregulated Legal Service Companies, or ULSC for short, so as not to mislead the public? What is certain in our view is that unregulated firms must be clear and transparent in their communications with the public that the client will not have the safeguards normally applicable were they to instruct a regulated firm.

If it is true that the employment of solicitors within an unregulated entity will drive down cost (and we do not necessarily share the SRA's view that any cost saving will be significant),solicitors practising in an unregulated entity will enjoy that undoubted advantage over the solicitors practising in a regulated firm whilst offering none of the protections available to the client within a regulated firm. The potential price reductions for consumers must be accompanied by full disclosure as to the risks. Otherwise, why have regulation in place at all for any entity if there is no clear distinction between them which is openly accessible to the public? Competition should be based upon more than price. Reliability and safeguards in place are as important as the price for legal work.

We are also concerned that the lack of supervision and support available to solicitors working within an unregulated entity will contribute to a lowering of professional standards and, potentially, greater risk to the consumer in instructing such an individual solicitor.

If the SRA reduction in costs argument is followed through, it seems likely to us that unregulated entities will tend to employ newly qualified solicitors keen to find employment which might not otherwise be available to them in the regulated sector. The fact that the regulated sector of the profession has the ability to absorb a finite number of newly qualified solicitors must not dictate or indeed contribute toward the relaxing of , driving down or otherwise diminishing standards by the availability of employment as a solicitor in an unregulated entity. We are also concerned that, if as we suspect, unregulated entities would employ a disproportionate number of newly qualified and young solicitors, the opportunities for the top line principles to be compromised will be many. This is not

because young solicitors are less ethical or more likely to act in an unprofessional way per se. It is simply because they will be acting without direct regulatory supervision from their employer and this in itself will contribute to all sorts of temptations and compromises which will not otherwise be available within the regulated firms.

We do not wish to paint a picture of regulated firms as being beyond approach. Clearly that is not the case. However, if you take away the culture of compliance and the supervision of the COLP and COFA and replace it with an overriding expectation that the interests of the unregulated entity should be paramount, there lies huge problems both for the consumer and for the individual solicitor.

Advocacy is a reserved activity. How is a court to determine whether a solicitor appearing before it is employed by a regulated firm or an unregulated entity. It will certainly not enquire. The SRA is very unlikely to enforce because it will not have the resources to do so. It should not be underestimated how many international companies choose to invest in the UK due to the high reputation and integrity of our Judicial system and those who work within it. Any erosion of respect for advocates by de-skilling or blurring of the distinction will have an eventual impact upon our international competitiveness. Criminal and commercial lawyers do understand that symbiotic relationship in reputational terms. By the back door, we will see the increasing appearance of advocates from unregulated firms until the distinction becomes blurred and, then, ceases to have any meaning in the eyes of the consumer and no doubt the court

The cost of regulation

There is a risk that if an economic and competitive advantage is identified by larger firms to transfer the employment of many of their solicitors to an unregulated entity this will create a huge shortfall in funding for the SRA. This in turn will impact on the availability of resources to ensure compliance with not only the code of conduct for firms but also, and crucially, the code of conduct governing individuals' professional standards.

It follows that where a practise in reserved activities dictates that a firm must be regulated (as would be the case, for instance, of niche criminal law firms and other smaller firms offering a criminal law service) it seems likely that the cost of regulation to that firm will increase.

It is at least possible that the increase will be significant to make up for the loss of practising fees paid by solicitor firms. Only a proportion of SRA funding is received from individual practice certificate fees.

The diminution of the solicitor brand

Those who practice in the public eye, such as advocates in the criminal courts, will be constantly aware of the reduction in reputation and standing of solicitors despite their very best endeavours. If one accepts, as we do, that there is value in the principled ethical

method of acting for a client as embodied in the current topline principles, we cannot support any regulatory reform which would further diminish the reputation and standing of solicitors.

At present, as a profession solicitors are well respected and trusted by their own clients. We see the creation of the two tier system as being contrary to the promotion of the trusted adviser which is so central to the solicitor brand. To weaken the solicitor brand is in no one's interests, least of all the consumer.

The methodology of the proposed change

We are concerned that the way in which this consultation process is being conducted is not conducive to the provision of informed responses. It feels very much like the recently criticised “Brexit” debate. We understand that the current consultation paper is intended to be one of a number of steps or stages towards full regulatory reform. How is it possible that we can be invited to comment on the proposals without knowing the full picture?

For instance, we know that there are no longer going to be indicative behaviours and that the intention is to replace them with guidance, but we do not know what the guidance is likely to contain. Firms have been engaged in interpreting the indicative behaviours to identify ways of practising which comply. Taking away the indicative behaviours and not supplying with detailed guidance will be a recipe for considerable uncertainty, at the very least.

We view this as yet another example of this consultation on regulatory reform being no more than unnecessary "kite flying" which distracts from the essential elements of regulation, - consumer protection and certainty for the profession.

The Law Society Response

We have seen the comprehensive response submitted by The Law Society on 8 September and we adopt that response as our own except where it is clear that the views of this firm differ. http://www.lawsociety.org.uk/policy-campaigns/consultation-responses/looking-to-the-future-consultations-law-society-response/

Consultation Questions

[The SRA Consultation Paper containing the text of the questions is at this link: http://www.sra.org.uk/sra/consultations/code-conduct-consultation.page]

Question 1.

We have not encountered any issues in respect of the suitability test.

Question 2.

For the reasons stated above, we see no reason to change the ten topline principles on which young solicitors have been trained and which embody the ethical considerations central to all practising solicitors.

Question 3.

The existing principles make clear a solicitor's professional responsibilities.

Question 4.

We endorse the law society's concerns about the abolition of existing Principle 5, 8 and 10.

Question 5

The removal of the Indicative Behaviours makes the need for detailed Guidance essential. This consultation does not include that Guidance and we are told that it will follow later. It is impossible to comment in a truly meaningful way about these proposals without knowing how the Codes are to be interpreted. A straightforward example is the dilemma of whether and, if so, when a solicitor can act for both buyer and seller. Guidance will be required. We are also very interested to know how it is intended that the issue of conflict between clients of an unregulated entity will be resolved.

Question 6

Too much is being left to interpretation without guidance or indication as to where the line is drawn. How will we know whether following former indicative behaviours will place a solicitor on the right side of the line. Without Indicative Behaviours it is like trying to navigate a reef at night without a compass. Regulation should embody some degree of certainty. These proposals as written do not do that.

Question 7

It is not so much a question of what is there that should not be there as what is not there which should be. To embark on such a fundamental regulatory reform without guidance is far from helpful. It strikes us that those who formulated the code do not yet know what will be the right side of the line and what will not. The profession and the public should not be subjected to experimentation in this way.

Question 8

We endorse The Law Society's response to this question.

Question 9

We are concerned about the lack of guidance on the fundamental issue of conflict. We are not sure what the SRA is seeking to achieve. If it is accepted that to act for one or more clients where there is actual conflict or a significant risk of conflict is wrong then that needs to be said. To do otherwise is to create the risk of a bear garden where anything goes. We do not believe that is a proper way to train young lawyers or for the profession as a whole to behave.

Question 10.

Brevity is not necessarily a good thing if it does not provide adequate protection for clients or preventing damage to the reputation of the legal profession. We have already commented on the lack of clarity and guidance.

Questions 11

The Code for firms requires more detail and guidance if it is to provide firm's with a clear impression of the SRA's expectations. Compliance should not be left to chance.

Question 12

We need to see the Guidance which we are told will follow in subsequent consultations before we can comment on this further.

We do not understand how undertakings are to be dealt with within unregulated undertakings. This needs to be clarified.

Question 13

We endorse the multiple comments and queries raised by The Law Society about the drafting of the two Codes.

Question 14

We also endorse The Law Society's call for careful consideration of the roles of the COLP and COFA. There is thin dividing line between over regulation and sufficient regulation to inspire public confidence. The prospect of solicitors practising in unregulated entities without any form of internal supervision causes us concern.

Question 15

We are interested in the Law Society's 2015 Regulation Survey. The prospect of weakened regulation adversely affecting consumers is a concern – as is the possibility that less clear and effective regulation may harm the reputation of solicitors generally.

Question 16

We refer to the concerns raised in our opening comments. We have also seen The Law Society's response and endorse those comments.

Question 17

Solicitors practising in a reserved activity will not be able to take advantage – if it be such – of the relaxed regulatory regime. Moreover, they may unfairly bear the burden of the cost of regulation as we have previously indicated.

Question 18

This is an appropriate safeguard.

Question 19

We endorse the Law Society's response.

Question 20

The better model would be to require all unregulated entities to highlight the lack of protection to its consumers. That is where the danger lies to consumers.

Question 21

It is not for the SRA to fill in the gaps regarding the provision of legal services. It is a regulatory authority, not a marketer of legal firms and options. It is not the role of a regulator to provide information about a market which it does not regulate.

Question 22

We have noted The Law Society's analysis of the Impact Statement and we commend that analysis.

Question 23

The holding of client money has always been carefully regulated, and for good reason. We are a little surprised that this question is even being asked. It would clearly not be appropriate for a solicitor in an unregulated entity to hold client money in their own name; not least because the SRA is proposing the abolition of Principle 10: *You must protect client money and assets.*

Question 24

For the reasons set out in its response we agree with The Law Society.

Question 25

It is relatively simple. If the solicitor is not required to hold PII then his clients should not have access to the SRA Compensation Fund. It must be right that if this regulatory reform is taken forward clients of solicitors in unregulated entities who practise uninsured do not have the benefits available to clients of regulated firms. Two tier in this context means two tier.

Question 26

The answer is to make all individual solicitors practising in unregulated entities subject to the mandatory requirement for PII.

Question 27

We endorse the Law Society's comprehensive response on this topic.

Question 28

Yes, of course.

Question 29

It should be the same as for all regulated firms.

Question 30

We believe we have made it clear that we are opposed in principle to the establishment of a two tier profession with some solicitors practising in unregulated entities and with the regulated firms engaged in reserved activities carrying the burden of regulation.

Question 31

See above

Question 32

We are concerned that the enforcement of the topline principles where breaches are reported against individual solicitors in unregulated entities will be too difficult and too costly. We are concerned that the regulation of solicitors in unregulated entities simply will not happen. There will be neither the will nor the resource to do so.

Question 33

Yes

Government law Society Liaison Committee
Proposed Response to SRA HANDBOOK CONSULTATION

4.5 Proposals to allow solicitors to undertake unreserved legal services in an unregulated entity

The SRA have opened a consultation with the aim of reviewing their regulatory approach. One of the SRA proposals is to enable solicitors who work for unregulated entities to provide unreserved legal activities to the public.

The Government Legal Service is not commenting generally on the Handbook Consultation but so far as this proposal is concerned would like confirmation that it is not proposed to cut across the current position regarding solicitors in Government Service as set out in Rule 4.18 of the present Code of Practice.

> ***Version 4.1 of the Handbook (1.4.2016) – In-house Practice states***
>
> *The Crown, non-departmental public bodies and the Legal Aid Agency*
>
> *4.18*
> *If you are employed by the Crown, a non-departmental public body or the Legal Aid Agency (or any body established or maintained by the Legal Aid Agency), you may give legal advice to, and act for, persons other than your employer if in doing so you are carrying out the lawful functions of your employer.*

A solicitor employed by the Crown can therefore provide reserved or unreserved legal activities to the public if in so doing he or she is carrying out the functions of their employer. We have in the past represented the Archbishop of Canterbury and other public bodies and we continue to act for individuals (usually public servants) in courts, tribunals and inquiries. We think that it would be helpful if the substance of Rule 4.18 was carried forward into any new regime in order to acknowledge that fact. However we regard this provision as a statement that simply reflects the current legal position and removing it would not in fact prevent a solicitor employed by the Crown, a non-departmental public body or the Legal Aid Agency (or any body established or maintained by the Legal Aid Agency), from giving legal advice to, and acting for, persons other than his or her employer if in so doing he or she were carrying out the lawful functions of that employer. Again we would be grateful for confirmation that the SRA shares that view.

We are aware that it has been suggested by some commentators that advice given by solicitors working in unregulated entities may not benefit from legal professional privilege. Our comment is that a Government Department is neither regulated nor unregulated. It is sui generis. Government solicitors do and will rely on legal professional privilege when acting for third parties in reserved and unreserved legal activities.

Gowling WLG LLP

Dear Liz

I think the City of London Law Society submission to the SRA's Handbook Review Consultation is

excellent and I endorse it as COLP for Gowling WLG LLP.

Kind regards,

Eddie Breen

General Counsel

Gowling WLG LLP

4 More Riverside

London SE1 2AU

Consultation: Looking to the future - flexibility and public protection

Response ID:734 Data

2. Your identity

Surname

Taghi

Forename(s)

Louise

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Attribute my/our response and publish my/our name.

Please identify the capacity in which you are submitting a response. I am submitting a response…

on behalf of my firm.

Please enter your firm's name:: Gross & Co

3.

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

No

4.

2. Do you agree with our proposed model for a revised set of Principles?

Yes, subject to the addition of the principles to 'provide a proper standard of service to your clients','act in the best interests of each client' and 'protect client money and assets' and 'to keep the affairs of the client confidential'.

5.

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

Yes

6.

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?

See answer to question 2

7.

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?

No

8.

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?

Yes

9.

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

No

10.

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

Difficult to say without seeing the associated guidance which the SRA say they will provide.

11.

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

We have concerns that there will not be a similar code for unregulated firms.

12.

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

Yes but we have concerns that there will not be a similar code for unregulated firms.

13.

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

No.

14.

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

Difficult to say without seeing the associated guidance which the SRA say they will provide.

15.

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?

No

16.

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.

Yes but it would be helpful to offer modified, simpler requirements for SME's and sole practitioners in the same way that a more flexible approach is currently offered to small firms.

17.

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

It would be helpful to offer modified, simpler requirements for SME's and sole practitioners in the same way that a more flexible approach is currently offered to small firms.

18.

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?

Helpful that individual solicitors have their own code of conduct but concerns over possible lack of PI insurance protection. However LPP should apply to all solicitors. Further restrictions required to protect client conflict/confidentiality and also on NQ solicitors to prevent them from setting up in business immediately post qualification.

19.

17. How likely are you to take advantage in the greater flexibility about where solicitors can practice as an

individual or as a business?

Unlikely

20.

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?

Agree

21.

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?

Qualified to supervise is necessary.

22.

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

Yes

23.

21. Do you agree with the analysis in our initial Impact Assessment?

Yes

24.

22. Do you have any additional information to support our initial Impact Assessment?

No

25.

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?

Yes

26.

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?

This question would benefit from the input of current in-house teams.

27.

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? If not, what are your reasons?

Yes, provided they are afforded similar protections from another Fund.

28.

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

Agreed.

29.

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

No

30.

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?

Yes

31.

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

We have no views as they do not relate directly to our activities but we feel strongly that input should be sought from the Special Bodies to which the requirements would apply.

32.

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?

Yes

33.

31. Do you have any alternative proposals to regulating entities of this type?

No

34.

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?

No.

35.

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

Yes

Hamish Ferguson

Dear Sirs

I have read the SRA's proposals and the Law Society's commentary upon them. My thoughts are as follows.

If I were looking to regulate the legal profession, I would consider it from three perspectives. The client's perspective, the employed solicitor's perspective and the legal business owner's perspective.

The client's perspective

In reality, most clients are not sophisticated. The Regulator's role should be to protect them from themselves by ensuring that anyone who holds their money is regulated and insured.

The employed solicitor's perspective

In private practice the way to the top is through your time sheets and billing. There is pressure on fee earners to get in work and bill it. The Regulator's role should be to ensure that fee earners are fee to act with integrity in their dealings with clients. To achieve this, the Firm (and those in charge of it) must be responsible for regulatory observation. If the burden of, say, assessing conflict of interest is with the individual rather than with the firm I could see internal conflicts arising. The boss saying get on with it, get the job, get the fee etc and the individual being obliged to shortcut the regulation to progress the career. If the buck does not stop at the top and with those who control the firm, the pressure on the fee earner will be immense.

The legal business owner's perspective

As with any business money comes in and money goes out. There is competition – no bad thing of course. The Regulator's role should be to ensure that there is an even playing field between competing businesses. Otherwise corners will be cut and the consumer will suffer.

My comments are brief but, I hope, of some assistance from the coalface.

Best wishes

Hamish Ferguson

Managing Partner

Edgeborough House,

Upper Edgeborough Road,

Guildford, Surrey, GU1 2BJ.

Consultation: Looking to the future - flexibility and public protection

Response ID:110 Data

2. Your identity

Surname

Edgerley Harris

Forename(s)

Adrienne

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Attribute my/our response and publish my/our name.

Please identify the capacity in which you are submitting a response. I am submitting a response…

on behalf of a local law society
Please enter the name of the society.: Hampshire

3.

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

We anticipate that you mean the Suitability Test which is applied across all applicants to the profession. We have responded in earlier consultation relating to Trust and the public's perception of solicitors and consider that responses to that consultation should feed in to any amendment of the Test.

The Society is not aware of any particular issues in connection with the practical application of the test.

4.

2. Do you agree with our proposed model for a revised set of Principles?

The Society agrees in principle to simplification of the Code including streamlining the many outcomes & Principles & removal of indicative behaviours (their status is confusing & too prescriptive).

we have not seen what additional rules are to take the place of those Principles being removed. However, the Society considers that the protection of client money and assets is a key Principle and should be retained.

5.

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

The Society agrees that a solicitor's conduct is key to the trust and confidence that the public places in the profession.

6.

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?

See previous response re client money and assets.

7.

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?

The Society is not in favour of extended separate guidance or case studies. Their status is never clear and

even "guidance" could be interpreted adversely if not observed.

8.

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?

The Society agrees that individual and firm responsibilities are indistinct
It also agrees that solicitors should be able to practice in alternative legal service providers
However, the Society opposes the suggestions of two separate Codes as this will complicate obligations of solicitors in alternative service providers; dilute the solicitor brand; and lead to a risk of inconsistent enforcement.

9.

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

The Society considers that the bulk of indicative behaviours in unnecessary for an outcome focussed regime of regulation.

10.

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

Conflict: the different drafting approaches should aim for clarity and Option 2 is preferred as the parameters for when you can act are made clear. The Society notes that the substance of the rule is not changed & would apply to both Codes.

COLP/ COFA roles: we agree they should both be kept. However, the COLP role is particularly onerous as it appears to incorporate teh COFA obligations too. Consideration should be given as to how it could be made less burdensome.

11.

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

Please see the last response

12.

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

We consider the bulk of indicative behaviours could be removed, as mentioned previously.

13.

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

Indicative behaviours

14.

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

See our response re the Principles and COLP/ COFA roles

15.

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?

The Society agrees that solicitors should be able to provide non-reserved services without SRA approval but not that they should be subject to the proposed separate Code (as there should only be one Code). We agree that this may encourage solicitor employment but consider instead that the extent of non-reserved services should be reviewed & certainly exclude will writing.

16.

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.

The Society considers that they should be kept for both. However, the COLP role is particularly onerous as mentioned previously.

17.

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

The Society suggests that a less onerous set of requirements would assist practices and those undertaking the roles. Whilst everyone in a firm has a part to play in compliance, the ultimate burden is shared by the COLP and COFA.

18.

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?

The Society agrees that solicitors should be able to provide non-reserved services without SRA approval but not that they should be subject to the separate Code (as there should only be one Code). We agree that this may encourage solicitor employment but consider the extent of non-reserved services should be reviewed & certainly exclude will writing.

19.

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

The various types of practice and work is considered to be confusing to the public e.g. ABS's, MDP's, reserved and unreserved work.Any increase in flexibility should reduce the terminology and possible confusion.
Individual and firm responsibilities are indistinct and we agree with the principle that solicitors should be able to practice in alternative legal service providers.

20.

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?

The Society considers that sole solicitors still to be authorised as an entity: there must be more scope to allow chamber style practice & consultancy to unregulated firms. The idea of rules re being qualified to supervise should be maintained. The Society does not agree that a newly qualified solicitor should be able to set up in business immediately as a sole practitioner.

21.

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?

The idea of supervision is sound, although we have no specific suggestions to make as to risk or fitness for purpose. The Society considers that a broad approach to supervision and how it can operate will allow flexibility and innovation.

22.

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

The current protections appear sufficient.

23.

21. Do you agree with the analysis in our initial Impact Assessment?

We have no particular comments on this.

24.

22. Do you have any additional information to support our initial Impact Assessment?

No

25.

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?

We have no comments

26.

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?

No particular comments although protection of client assets and money must be the overriding Principle.

The proposal that client money cannot be held by solicitors in their own name in alternative legal services provider must be looked at in more detail.

27.

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? If not, what are your reasons?

The Society considers that claims from clients of solicitors working in alternative service providers should not be allowed: to do so will increase the cost to solicitors generally & encourage claims.

28.

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

PII minimum terms for solicitor in alternative service provider: to have different terms is confusing to clients & puts further obligation on the solicitor to explain what is or is not within scope. We have not considered whether the level of cover should be retained for special bodies.

29.

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

PII minimum terms for solicitor in alternative service provider: to have different terms is confusing to clients & puts further obligation on the solicitor to explain what is or is not within scope. The Society has not considered whether the level of cover should be retained for special bodies.

30.

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?

see earlier reply

31.

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

no

32.

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?

No comments as we are not clear to what this question is directed.

33.

31. Do you have any alternative proposals to regulating entities of this type?

Legal professional privilege (LPP) only applies to qualified lawyers: whether it should be extended to those in alternative providers with the obligation on the solicitor to make "the level of protection" clear seems to make the position more unclear & is not something that this Society would support.

34.

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?

No particular comments to make at this stage. Consistency in intervention outcomes is important however.

35.

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

The Society considers that activities of solicitors should only be regulated by the one regulator.

HERBERT
SMITH
FREEHILLS

Strictly private and confidential

Solicitors Regulation Authority
Regulation and Education
The Cube
199 Wharfside Street
BIRMINGHAM
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Our ref
17230
Your ref

Date
20 September 2016

By email: consultation@sra.org.uk

Dear Sirs

Response of Herbert Smith Freehills LLP ("HSF") to the SRA Consultation on the SRA Handbook Review: Looking to the future – flexibility and public protection (June 2016) ("Consultation Paper")

We wish to endorse the response of the CLLS Professional Rules and Regulation Committee, of which we are a member, to the SRA's Consultation Paper dated 14 September 2016 (the "**CLLS Response**"). We also wish to make the following comments to highlight what we regard as some of the most significant issues.

We understand and support the need for better access to high-quality legal advice to the public, but we are concerned as to whether the proposals to allow solicitors to work using that title in an unregulated entity will achieve that end. To liberalise the use of the "Solicitor" title does we believe by definition increase the risk of damage to that brand – and we are not sure that the case has been made that the increased risk is worth taking to achieve the end of better access to justice. It seems to us likely that the proposed changes would cause confusion by requiring consumers to understand some highly technical issues: a complexity which could be avoided by extending the access to legal advice in other ways. The risk of misunderstanding such issues would be borne by the consumer as they would be likely to go to the risk taken by the consumer in deciding from which kind of solicitor-backed offering advice would be purchased.

Largely for that reason, we would have preferred to see these proposals put into the wider context of other possible changes to the regulation of the legal profession which are being mooted to achieve the aims of better representation and better supporting the evolving models for the delivery of low cost legal advice.

The benefits accruing to the profession and the economy as a whole by virtue of the international recognition of standards, reputation and the concept of privilege are very significant. The result of the Brexit referendum serves to place more importance on preserving such benefits. In light of Brexit, we encourage the SRA to focus on seeking to protect the continued full recognition of the solicitor brand and the reputation of the English legal profession in the European Union, and to consider any proposals, such as this and the revised Training for Tomorrow: Assessing Competence proposal in the light of that, with an eye to what the EU equivalent professions might consider suitable for a new form of mutual recognition. We assume that there has been no time for

any such dialogue or at least not in any significant depth.

It is our view that the attempt to broaden the ambit of the professional title whilst seeking to include within that title significant distinction in regulatory protection and in privilege make the preservation of the professional benefits more difficult to achieve. Furthermore, it is our view that such broadening is not necessary in order to achieve the overriding objective of improving the access to justice, with which we agree.

We have been involved in detail on the comments on the changes to the Code itself so we will not repeat those points here save that we endorse the CLLS Response on these points. We do think that with continued dialogue the drafting of the Code can be settled in a way which would be an improvement.

Yours faithfully

P.P.

Clare Wilson for
Herbert Smith Freehills LLP

Hugo Hunt

I am responding to the consultation paper 'Looking to the Future – flexibility and public protection' in my personal capacity as a solicitor. I was formerly senior partner of the firm for which I now work as a part time consultant following my retirement from partnership. I am not responding on this Firm's behalf. I have been unable to download the 'About You' form from the page on your website dated 1 June 2016, as the link no longer works.

Although I am on the General Committee of the Sussex Law Society, I did not take part in the discussions or response that it made to the consultation dated 5 September 2016. However, I agree with that response, and wish to endorse it as my own response, so as to avoid repetition.

Hugo Hunt

Consultant Solicitor

Notary Public

Commercial Property

Consultation: Looking to the future - flexibility and public protection

Response ID:616 Data

2. Your identity

Surname

Stewart

Forename(s)

Nathalie

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Attribute my/our response and publish my/our name.

Please identify the capacity in which you are submitting a response. I am submitting a response…

on behalf of a local law society

Please enter the name of the society.: Hull Incorporated Law Society

3.

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

In respect of the Suitability Test i.e. the new competence statements, it is too soon to report on particular issues in relation to the practical application of the test as it is only about to come mandatory and the firms therefore will be in a better position to answer this in the future.

4.

2. Do you agree with our proposed model for a revised set of Principles?

No, we do not agree with the Principles that essentially has separate codes for Solicitors and for Firms. It is unnecessary and in our view creates a two tiered profession. A single code is sufficient

5.

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

No, it does not need to be reduced to 6 and brevity is not the most important factor. The principles regarding 'protect client money and assets' certainly should not be removed nor should provide a proper standard of service to your clients. The reduction in basic principles seems completely unecessary.

6.

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?

Please see response to question 3. There is no need to depart from the current Principles.

7.

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?

Case Studies and guidance are very useful and should be used to assist with the current Codes. However, we do not agree with the changes to the Code.

8.

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?

No. In this case brevity increases vagueness. Whilst the Code may be easier to read it does not provide enough guidance and creates a lot of scope for uncertainty or regulator discretion. A better balance can and should be struck between brevity and detailed rules.

9.

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

The view is that the detail is missing. The two Codes are overlapping and is unnecessary duplication in our opinion

10.

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

Our view is that the previous handbook strikes a better balance between brevity and prescriptive rules

11.

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

In our view the stricter rule is better and accords with the fact that the conflict of interest must be actual but also seen to be done. It is not believed that there is a problem with the current rules regarding conflicts to warrant any change.

12.

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

No, as above, unfortunately with brevity, there is now vagueness. The duplication of both Codes is unnecessary.

13.

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

As above, see response in respect of question 7

14.

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

As above, see our response in question 8

15.

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?

As above, our issues are with the vagueness in order to achieve brevity.

16.

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.

COLPs and COFAs do need to be retained and they provide an added layer of protection and supervision for compliance. In our view these are required for all solicitors

17.

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

Please ensure that the supervision and client protection elements of their role and not compromised

18.

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?

The threats are a) diminishing client protection b) loss of legal professional privilege c) loss of supervision d) conflicting interest between the alternative legal service provider and the regulator/profession e) loss of trust and confidence in the brand of solicitor f) a two tiered profession.

There is already consumer confusion about who is qualified and regulated and who is not. These confusions only lessen the brand and means the consumer has widely differing experiences which they attribute to the entire legal profession with no understanding of the distinctions. This results in loss of confidence and inadequate protection. In a competitive market there is no real incentive for the distinctions to be promoted. In our view to allow solicitors to work in an unregulated firm is a distinction not likely to be promoted or understand by consumers and is likely to result in a loss of confidence in the profession

19.

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

In our area, our preference is for our solicitors to be regulated and the firms or businesses they operate in to be regulated.

20.

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?

This is essential. Carrying out a reserved legal service must be done by a regulated person in a regulated firm

21.

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?

The changes proposed by you essentially mean a newly qualified is qualified to supervise provided they pass a mandatory test. In our view experience is key and therefore needs to be part of the addition to any test. Experience working within a firm is key before supervision qualifications can be granted.

22.

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

Yes. A clear distinction would need to be made with unregulated firms to allow consumer choice if unregulated firms are permitted.

23.

21. Do you agree with the analysis in our initial Impact Assessment?

No comment

24.

22. Do you have any additional information to support our initial Impact Assessment?

No comment

25.

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?

Yes

26.

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?

We do not agree

27.

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? If not, what are your reasons?

We do not agree that solicitors should be able to work for alternative legal services providers. Having said that the clients should not benefit from the SRA Compensation Fund where the legal service provider does not contribute to it.

28.

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

We consider this removes significant client protection for clients.

29.

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

The loss of client protection and redress. We do not consider that clients will necessarily understand the difference in the providers (the unregulated providers having little incentive to advise of the difference). We consider this will negatively affect clients and thus the profession

30.

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?

Anybody providing reserved legal activities should have PII. However this should be limited to regulated firms.

31.

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

We do not agree with the creation of special bodies with the existence of regulated firms.

32.

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?

No comment

33.

31. Do you have any alternative proposals to regulating entities of this type?

No comment - as above, we do not agree with the proposals

34.

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?

We have great difficulty in seeing obligations on alternative legal services providers to cooperate when they are not regulated by the SRA

35.

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

All regulated firms should continue to be regulated by the SRA

Ian Savill

Dear Sirs

I write to you in connection with the consultation. I am currently a Consultant Solicitor for a firm of Solicitors in Private Practice, having before now been a Sole Practitioner for a number of years. I write on my own behalf.

I have perused the proposals and the Law Society's response.

I am extremely concerned about the proposals which would weaken Solicitor's Professional Standards and provide a worse and confusing service to the public both from Solicitors and from the various other unregulated organisations. Without wishing to be repetitive I can only endorse entirely what the Law Society say.

Having been a qualified Solicitor for almost 40 years I am most alarmed to see these proposals to lower standards, and I hope that the SRA will reconsider the matter.

Thank you for your consideration.

Yours sincerely

Ian Savill

Our ref HM/JDB/11722847
Your ref
Date 21 September 2016

IBB solicitors

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Regulation and Education - Policy - Handbook 2017
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Dear Sirs

SRA Looking to the Future

I enclose with this letter IBB's response to the Looking to the Future consultation.

As you will see from our response, we have significant concerns regarding the proposals.

Primarily, we do not believe that the proposed changes will satisfy the unmet legal need identified. We are also concerned that the changes envisaged will lead to further dilution in the protection afforded to consumers of legal services, confusion amongst those consumers as to what protections are available to them and ultimately harm to the solicitor brand.

Yours faithfully

J. DeBiase

Joanna DeBiase
Managing Partner

IBB

IBB is West London's leading law firm. We are a dynamic and forward-thinking legal practice which handles complex legal work for individuals and businesses nationally and internationally, and can trace our history back to 1774. We have 29 partners, 85 qualified lawyers and fee earners, and 198 employees in total, (including consultants) working across four main practice areas – Real Estate, Commercial, Private Client and Community Legal Services.

A. General Comments

We have read the response from the Law Society and agree with the principal points made in that response. We also agree with many of the points made by the City of London Law Society in their response.

We believe that the SRA's proposals to regulate solicitors and authorised firms separately and to allow solicitors (including newly qualified solicitors) to provide legal services to the public from within non-SRA regulated entities have the potential to increase complexity and uncertainty and reduce consumer protections. It is also unclear to us how the reforms would help consumers, support the profession, or assist vulnerable people accessing legal services.

Our response is structured under a number of general headings and we have then answered some (but not all) of the individual questions raised in the consultation.

We wish to comment as follows:

1. Timing, context and length of the consultation

We wondered why the SRA felt the need for the consultation to take place now? The country and the legal markets are going through a period of great uncertainty following the Brexit vote and it seems to us that any regulatory changes should be limited at this point in time to those required to address any immediate harm rather than implementing wide-ranging regulatory changes.

We also found the consultation to be very long and we were not clear whether we had correctly identified all the relevant issues. The new draft codes of conduct were provided without any of the guidance which we understand will replace some of the provisions (in particular the indicative behaviours) in the Code that have been removed and as a result in some places we found it hard to make fully informed comments on the proposals and their impact.

In addition, because of the SRA's series of consultations, it is hard to understand what the overall regulatory framework will actually look like. This is effectively only a partial consultation with the majority of proposals still to follow - including the outcome of the training for tomorrow consultation, the independence debate (what should the SRA regulate and what should the Law Society regulate), detailed practice framework rules, professional indemnity and compensation fund arrangements, and the SRA enforcement rules and strategy.

Further, the Competition and Markets Authority (**CMA**) is already considering the Legal Services Market and indeed its interim report was published during the SRA consultation period. Will the SRA take the findings (interim and/or final) of the CMA study into account when considering what changes (if any) to make?

In this regard it is worth noting that the CMA interim report states that it is greater transparency of pricing and information on the quality of service provided that would increase competition with the legal sector, not further regulatory change.

Finally, the Legal Services Board has recently published its "vision for legislative reform of the regulatory framework for legal services in England and Wales" which suggests that the move should be to have a wholly independent regulator and to regulate by type of service being provided rather than by title. How does the SRA intend to address these views?

2. Unmet Legal Need

As a provider of legal services to individuals as well as SME's and larger businesses we have witnessed first-hand the issues that the withdrawal of legal aid has had on the ability of firms to provide legal services to vulnerable members of society.

The principal reason for the proposals appears to be that the reforms would address 'unmet legal need'. The SRA suggests that such unmet legal need has arisen primarily because of a lack of flexibility and innovation in the legal services sector leading ultimately to unaffordable costs. However, we do not feel that the SRA has articulated clearly enough what the unmet legal need is that it thinks greater competition will solve, nor how the proposals for change will address such unmet need.

If the hurdle is price, a view supported by the CMA's interim findings, then given an unregulated legal services markets already exists and there is still unmet legal need, it is not clear how further de-regulation will solve the problem.

We agree that everyone, regardless of social background or wealth, should have access to justice and that there are clearly unmet legal needs in certain sections of the population but the most significant unmet legal need relates to the removal of legal aid provision. It is not clear to us that greater competition and/or more choice will have any impact on this unmet legal need.

Many consumers, in particular among the most vulnerable communities, are not able to pay for legal services at any price point and for them there is no realistic prospect of addressing their legal need without some restoration of publicly funded legal services.

Consumers in the most vulnerable communities, in particular those on low incomes/benefits or those with low incomes and mental and physical disabilities, will never be able to afford legal services unless these are provided free of charge. There is no realistic prospect of addressing their legal need without some restoration of publicly funded legal services or reliance on charitable services. Consumers in middle income groups already have access to legal services at different price points provided by different types of legal businesses including traditional law firms. These consumer legal services are provided in the market at different service levels and at different prices. These consumers make a choice about price,

service and provider. It is unclear to us how these consumers have an unmet legal need that will be addressed by more regulatory change.

3. Risk

The SRA's proposals seem to result in the consumer bearing the burden of determining which is the right service for them. Unregulated providers will be required to give the clients information about the type of firm/service being provided but we doubt whether clients will read and/or understand such information.

The profession would be divided into two types:

- solicitors delivering legal services through regulated law firms with all the protections currently available and
- a second class of solicitors, delivering unreserved work through unregulated entities without protections that have been traditionally available to those who consult solicitors.

Solicitors working in unregulated entities may not be required to have professional indemnity insurance. Their clients may also not have access to the compensation fund or access to the Legal Ombudsman if things go wrong. This risks eroding a key element of current client protection.

This is bound to create confusion for consumers. Apart from confusion regarding the client protections available, we believe it will also be difficult for consumers to differentiate the type of firm they are instructing and the most vulnerable consumers are likely to be those for whom such decisions are hardest. It will also be hard for a junior lawyer working in an unregulated business to insist on their employer providing the information to clients thus placing that solicitor in a difficult position.

4. Damage to the Solicitors Profession / Unlevel playing field

We consider that there are significant issues involved in allowing solicitors to practise using the solicitor title within unregulated entities. One of the most significant issues is in relation to client confidentiality and conflict.

The current proposals would enable an unregulated provider to act, through solicitors, for both the seller and the buyer of a business, something solicitors working in regulated firms cannot do. This does not seem to us to be fair.

We also have concerns regarding the proposed changes to the supervision requirements. This would mean that newly qualified solicitors with no experience would be able to set up their own unregulated firms. Newly qualified solicitors generally welcome the support and guidance from more experienced solicitors and this is also a key driver of quality of service. If that's not available it could place clients as well as newly qualified solicitors at risk, and negatively impact on the standing of the solicitor profession.

Creating a two-tier system of regulation would potentially mean that non-traditional law firms (eg accountancy firms, consulting firms and foreign law firms) would compete for unreserved

legal work with the benefit of more liberal regulation. They would not have to comply with the entity-based rules on professional indemnity insurance, information security and risk management. This would be to the detriment of both consumers and the traditional law firms competing with them.

This is an issue resulting from the list of reserved activities in the Legal Services Act 2007 and we would suggest that the SRA should be revisiting with Government the list of reserved legal activities rather than de-regulating in the manner proposed by this consultation.

5. Privilege

The consultation paper states that the SRA has received counsel's opinion that legal advice given by solicitors working within unregulated entities will not attract privilege. We have not sought our own advice on this point but understand that the Law Society agrees with that analysis.

We have significant concerns about making changes to the regulatory regime so that the advice of only certain solicitors attracts privilege. This could be viewed as eroding the concept of privilege, something we would not generally be in favour of.

The SRA suggests that the solution to retain privilege would be for clients to contract with the individual solicitors where privilege is important. For a number of reasons, particularly on matters involving a number of different solicitors, we do not think this is a workable solution and we are not sure how an individual solicitor could contract directly with a client without the need to be a recognised sole practitioner (with the burden of entity-based regulation).

B. Responses to the consultation questions (where relevant to us)

Suitability test (Question1)

The test is not really a 'suitability test' since it does not describe standards of behaviour but simply lists certain things which have to be reported. We also consider that the reporting thresholds are too low and require solicitors and firms to report trivial matters to the SRA; failure to do so being treated as potential evidence of dishonesty.

Revision of the Principles (Questions 2, 3 & 4)

We think the current principles 3 and 6 should remain as drafted. We do not understand the rationale for the proposed changes to the wording.

We think that the principles (presumably new principle 6) should incorporate a reference to the duty of confidentiality owed to clients.

Guidance (or not) (Question 5)

The consultation states that the status of indicative behaviours is unclear which is why there are none in the new codes. If this is the case then there is clearly a risk that any additional guidance is likely to suffer from the same issue. That said, as a firm we do not find the indicative behaviours confusing and as examples of what constitutes compliance with the outcomes we have found them to be helpful.

If the SRA considers that guidance is necessary to 'clarify' the new codes then we would have concerns that the codes are not drafted in clear enough terms.

If there is to be guidance issued then it seems to us that separate consultation on that guidance would probably also be appropriate.

Separate Codes (Questions 6, 7, 8, & 10)

We are happy with the current code of conduct and do not find it 'long, confusing and complicated'. We therefore do not really see a need for change at this time and have concerns that brevity may simply lead to ambiguity. In particular we have concerns that a shorter, less clear code may result in enforcement action 'with the benefit of hindsight' by the SRA and solicitors will no longer have the ability to point to indicative behaviours as evidence of compliance.

We can see the benefit of two codes if solicitors are to be able to practise in unregulated businesses but, as we have said above, that is not something we favour and for solicitors practising in regulated firms we think a single, combined code makes more sense.

Conflicts of interest (Question 9)

We would strongly prefer Option 1 in relation to conflicts. The two existing exceptions are important and should be retained.

Codes of Conduct (Questions 10, 11, 12, & 13)

There is overlap between the two Codes and it is not clear which would take precedence in the event of there being a conflict between the two Codes. This will need to be clarified.

If the proposals are accepted, the SRA handbook will be shorter. Although this could be superficially attractive, we consider that the current code is ok as it stands and having a set of "do's" and "don'ts" makes compliance more certain. It is not clear from the consultation how the system of enforcement will work under the new codes - we are concerned that this lack of clarity creates ambiguity.

Code for Individuals

As stated above in response to question 9, we would strongly prefer Option 1 in relation to conflicts.

In relation to new 4.1, we think there should be an exception if the client has given consent.

We consider that existing Outcome 5.5 in the existing code of conduct should be retained.

In the new 7.7, we do not like the reference to *serious breach*. We think the SRA should retain the concept within the existing code of conduct of *serious misconduct* which we understand as being conduct involving dishonesty or a serious criminal offence.

In the new 7.9, we do not think the obligation should be extended to include former clients. The provision should be re-drafted to make it clear that this only applies to current clients.

This is a material change and one which also impacts on firms' insurers and we are surprised it was not specifically addressed in the consultation.

Code for Firms

No additional comments but the comments on the code for individuals apply equally here.

COLPS and COFAs (Questions 14 & 15)

On balance we think having the COLP and COFA roles is helpful and having set up the structure see no need to dismantle it. However, we think there could be much greater clarity (and potential extension of) the scope of the COFA's role. Essentially at present it is limited to compliance with the SRA accounts rules (which with the historic need for external audits was a largely irrelevant role) and it is the COLP who is responsible for compliance with many aspects of accounting compliance. This does not seem to us to be sensible given that the COLP will be a solicitor and not an accountant.

An additional obligation in the code on managers and employees to report breaches to the COLP/COFA would be helpful.

Unreserved legal services in unregulated entities (Questions 16, 17, 23, 25, 30, 31 & 32)

We have a number of concerns; most of which we have already raised in our general comments:

- We think the proposals pose a threat to the brand of solicitor for the reasons given in our general comments above.
- Non-regulated firms will benefit from a more liberal conflicts regime. We do not think this is fair to traditional law firms.
- We have concerns about the possible erosion of privilege.
- We have concerns that many clients simply will not understand the difference between regulated and unregulated firms and the protections (or not) from which they (the client) will benefit.
- We are concerned about the burden being placed on individual (potentially very junior) solicitors working in unregulated entities.

Whilst it would be possible for IBB to split off its unreserved activities into a separate business; at present we think it is unlikely that we would do so. The main reason would be the duplication required in terms of systems and controls and the need to ensure true separation, the costs of which would we think outweigh the benefits.

Sole Practitioners (Question 18)

We favour retention of the current position whereby sole practitioners are required to be authorised.

Qualified to supervise requirements (Question 19)

We believe that it is sensible to retain a rule that every firm/office is supervised by someone with a minimum level of experience in practice.

We are also concerned about unregulated providers recruiting junior solicitors and not being able to supervise/support them.

Information to be supplied by regulated firms (Question 20)

This seems to us to be the wrong way round. Surely the burden should be placed on solicitors working in unregulated firms to highlight what protections are not available rather than placing the burden on regulated firms to show what protections they do have. This is especially true since clients will most likely assume (based on their historical dealings with solicitors and the position that has applied to date) that the protections are in place.

Impact Assessment (Question 21)

As previously mentioned, we are not convinced that consumers will benefit from the proposed changes in the way summarised in the impact assessment or that unmet legal need will be addressed by the proposed changes.

We also think you have underestimated the scope for confusion on the part of consumers about what protections they are being offered and the risk of damage to the solicitor brand.

PII (Questions 26 & 27)

No. We consider that every solicitor whether working in a regulated or an unregulated entity should have to have professional indemnity insurance on the minimum terms. We do not think that it should be for the consumer to find out what insurance their advisor holds. The consumer should be entitled to assume that as they are being advised by a solicitor, that solicitor will have appropriate professional indemnity insurance

Scope of regulation (Question 33)

Yes. Anything else would seem to us to be too complicated.

IBB

21 September 2016

Looking to the Future - flexibility and public protection

ICAEW welcomes the opportunity to comment on the *Looking to the Future - flexibility and public protection* published by Solicitors Regulation Authority (SRA) on 1 June 2016, a copy of which is available from this link.

This ICAEW response of 21 September 2016 reflects consultation with the Business Law Committee which includes representatives from public practice and the business community. The Committee is responsible for ICAEW policy on business law issues and related submissions to legislators, regulators and other external bodies.

It also reflects consultation with the ICAEW Solicitors Group. The Solicitors Group Committee is made up of experts in providing professional accountancy services to firms of solicitors.

ICAEW was granted status as an accrediting body for the reserved legal service of probate in August 2014 and since that time has both authorised accountancy firms and licensed them as Alternative Business Structures (ABSs) for probate services. We have currently accredited over 200 firms for probate services, most of which are small or medium sized practicing firms.

The majority of our member firms are still prohibited from providing any reserved legal services, but they invariably provide advisory services which come within the definition of other legal services. This includes giving front line advisory services to many SME clients (who frequently have a close working relationship with their accountant) as well as individuals seeking advice on their tax and other financial affairs.

Many of our members and members firms will on occasion need to obtain legal advice. They also, on occasion, refer clients to lawyers or other appropriate legal service providers and on occasion have clients referred to them by legal service providers. This response takes account of the needs of our members in those capacities as well as their capacity as legal service providers or advisers to law firms.

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ICAEW is a world-leading professional accountancy body. We operate under a Royal Charter, working in the public interest. ICAEW's regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the UK Financial Reporting Council. We provide leadership and practical support to over 145,000 member chartered accountants in more than 160 countries, working with governments, regulators and industry in order to ensure that the highest standards are maintained.

ICAEW members operate across a wide range of areas in business, practice and the public sector. They provide financial expertise and guidance based on the highest professional, technical and ethical standards. They are trained to provide clarity and apply rigour, and so help create long-term sustainable economic value.

For more information, please contact: representations@icaew.com

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MAJOR POINTS

1. We welcome the opportunity to comment on the SRA's Consultation *Looking to the Future-flexibility and future protection.*

2. We agree that the SRA's proposals contained in this consultation are a positive move towards establishing a code of practice fit for the 21st Century and the changing legal services market.

3. We are pleased that the SRA has taken note of our recommendation in our response (ICAEW REP 36/15) to an earlier consultation, *Separate Business Rule,* (SBR) that the SRA Principles should apply to all solicitors, including those who classify themselves as 'non-practising'. We repeat our concern, however, that there is still the potential for considerable harm to consumers over the possible confusion as to when a solicitor is regulated or not and the consequent expectation of a means of redress that may not exist.

4. We agree that solicitors are currently unnecessarily heavily regulated in supplying unreserved legal services. They also, however, have a number of advantages in competing with unregulated suppliers, including a long history of professional standards of client care and consequent brand recognition. It is clearly a key element of the proposed structure for all solicitors to be bound by the proposed Code of Conduct for individuals. But we suggest that consumers obtaining their legal services from a solicitor (working under that designation) in an unregulated firm should also be entitled to at least minimal regulatory protections imposed on their employing organisation, including compensation, PII, and requirements for integrity on the provider as an entity. Such entity level regulation could be provided by any suitable regulatory authority, for example by the FSA or a suitable Chartered professional body.

5. We note that the analysis of Legal Professional Privilege (see paragraphs 159-162) does not mention statutory privilege, as generated by legal practitioners authorised by non-traditional legal regulators. This will be an increasingly important factor in the legal services market, which should not be overlooked, but rather explicitly recognised in SRA publications, including in the Codes. It would be unfortunate if solicitors were not to recognise or respect the Privilege generated by other legal services providers under Section 190 of the Legal Services Act.

6. Currently ABSs have proved to be the most agile in responding to market conditions (and therefore a key driver in opening up the market) provided under comprehensive regulatory oversight by the SRA or an alternative approved regulator. It would be anti-competitive if ABSs were to be put at a disadvantage by any regulatory changes made by the SRA. For example, we think that it would be unfortunate if the number of applicants for ABS status were to dry up, in favour of unregulated entities employing solicitors to provide unreserved services to the general public under reduced regulatory protection.

7. We would be happy to discuss our approach with the SRA. While we do not hold out that ICAEW's system of regulation for members and member firms as the best or only way to regulate a professional body the challenge faced by ICAEW in maintaining public confidence in the accountancy profession is similar to that faced by the SRA in maintaining public confidence in the legal profession and therefore our approach and experience may provide a useful point of comparison.

RESPONSES TO SPECIFIC QUESTIONS

Q1: Have you encountered any particular issues in respect of the practical application of the Suitability Test (either on an individual basis, or in terms of business procedures or decisions)?

8. We have no particular issues with the operation of the Suitability Test at this time. However, we note that the current Test is long, detailed and the principles underlying its provisions are not set out clearly or simply. We would prefer a more principles-based test.

Q2: Do you agree with our proposed model for a revised set of Principles?

9. We strongly agree that the SRA's Codes of Conduct should be based on a limited number of Principles, on which the appropriate ethics for the legal profession should be based. However, it could be problematic if those principles do not clearly and explicitly cover all of the Professional Principles set out in the Legal Services Act 2007 (the Act) Section 1(3). If they are not, it could be argued that the SRA is in breach of its duty, under the Regulatory Objectives set out in Section 1(1) of the Act of 'promoting and maintaining adherence to the professional principles'.

10. The Professional Principles set out in the Act are:

    (a) that authorised persons should act with independence and integrity,
    (b) that authorised persons should maintain proper standards of work,
    (c) that authorised persons should act in the best interests of their clients,
    (d) that persons who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, by virtue of being authorised persons should comply with their duty to the court to act with independence in the interests of justice, and
    (e) that the affairs of clients should be kept confidential.

    While the Proposed SRA Principles are to :

    1. uphold the rule of law and the proper administration of justice
    2. ensure that your conduct upholds public confidence in the profession and those delivering legal services
    3. act with independence
    4. act with honesty and integrity
    5. act in a way that encourages equality, diversity and inclusion
    6. act in the best interest of each client.

    In the event of any conflict between the Principles, then the Principle that best serves the public interest in the proper administration of justice will take precedence.

    We accept that compliance with Professional Principle (d) is accommodated by compliance with Proposed SRA principles 1 and 3, but it is less clear that this is equally true of Professional Principles (b) and (e).

11. We broadly agree that in the event of a conflict, the Principle that best serves the public interest in the proper administration of justice will take precedence, but it will be important to ensure that the interpretation of this arbitrating factor does not vary with current social or political circumstances, but is interpreted consistently over time. It is also likely to be difficult for individual solicitors or firms to make judgements on this prioritisation, so if it is required of them clear Guidance will be needed.

Q3: Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

12. We are content with the revision of this existing principle, which we believe will support the reputation and professional standards maintained by solicitors.

Q4: Are there any other Principles that you think we should include, either from the Current Principles or which arise from the newly revised ones?

13. We think that the SRA's Principles should include the requirement that authorised persons should maintain proper standards of work (competence).

Q5: 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?

14. We are concerned that the status of Case Studies issued by regulatory bodies can be unclear, for example as to the extent that they apply to different but similar circumstances. This lack of clarity can lead to just that complexity and 'Regulatory Creep' that the SRA will be anxious to avoid. Rather, if additional guidance is needed on the provisions of any particular Principle or Rule, then this should be supplied in the form of explicit Guidance. Case Studies will, of course, be useful in training exercises (including CPD) but we think that they should be issued and updated by training organisations, and not by regulators.

Q6: Have we achieved our aim of developing a short, focussed Code for all solicitors, wherever they work which is clear and easy to understand?

15. We have not identified any areas where the focus of the Code could be improved, or where it could be made clearer or easier to understand, except as expressed elsewhere in this response.

Q7: In your view is there anything specific in the Code that does not need to be there?

16. No, except as expressed elsewhere in this response.

Q8: Do you think there is anything specific missing from the Code that we should consider adding?

17. The Code refers to the SRA Principles but does not explain what an individual solicitor or firm should do if there is any conflict between the Principles. A 'public interest' judgement is likely to be more difficult in such circumstances than it is for the SRA itself,

Q9: What are your views on the two options for handling conflicts of interest and how will they work in practice?

18. No comment.

Q10: Have we achieved our aim of developing a short focussed Code for SRA regulated firms which is clear and easy to understand?

19. We think that this draft Code is a considerable improvement on its predecessors. Areas where more guidance is required will emerge over time, but where possible the current concise format should be retained.

Q11: In your view is there anything specific in the Code that does not need to be there?

Q12: Do you think there is anything missing from the Code that we should consider adding?

20. Our suggestions on these are contained in our 'Major Points' (above) or in response to other specific questions.

Q13: Do you have any specific issues on the drafting of the Code for Solicitors or Code for Firms or any particular clauses within them?

21. The fact that both sets of regulations are called 'Codes of Conduct' could be confusing to consumers who may not be aware that there are two codes.

22. The ICAEW avoids this difficulty by the imposition of a 'Code of Ethics' applicable to all members including students, affiliates and member firms and additional 'Practice Assurance Standards' which apply to member firms, but not individual members.

Q14: Do you agree with our intention to retain the COLP and the COFA roles for recognised bodies and recognised sole practices?

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

23. Yes we do agree. The role of the COLP and COFA are fundamental to ensuring compliance but it is easy for the necessity for this to be downgraded to allow commercial concerns to take priority. In larger practices the role can ensure that the necessity for compliance is endorsed by senior management - the so called 'tone from the top.'

Q15: How could we improve the way in which the COLP/COFA roles work or to provide further support for compliance officers, in practice?

24. The vigour with which COLPs and COFAs are able to fulfil their roles would be strengthened were they to be aware that their functions will be examined critically, within any firm in which significant compliance failures have occurred, with a view to disciplinary action where necessary. Encouraging the development of suitable training offerings could also assist them.

25. Managing bodies of firms (whether the partners in general meeting, or members of a managing committee) should also be held to account, if they do not support and assist COLPs and COFAs in the performance of their responsibilities.

26. In larger practices a 'Compliance Committee' which directly reports to senior management may be more appropriate than placing responsibility on one person. We have in mind the role of 'Audit Committees' in PLCs.

Q16: What is your view of the opportunities and threats presented by the proposal to allow solicitors to deliver non-reserved legal services to the public through alternative legal services providers?

27. We agree that it would improve access to justice, and the market in legal services, for solicitors to be able to practice from unregulated entities, but we are seriously concerned that insufficient protections are being proposed to ensure that consumers are appropriately protected, and that conditions are in place to ensure that public confidence in the legal profession and suppliers of legal services is maintained. (Proposed SRA Objective 2).

28. In-House solicitors have practised without serious concerns for many years, but in that case they have only one client – their employer. So if the employer over-rules their solicitor's professional scruples, the situation is clear in that it is the employer who has ignored the advice which it has been given, and therefore bears culpability for its own behaviour.

29. This is not the case for legal services provided to the general public. An employer can exert a lot of pressure on an individual employee, no matter how impressive is his or her qualification and professional allegiance. Unless basic standards can be imposed on the employing organisation, the solicitor providing legal services should not be allowed to trade on his or her title as a solicitor – not even as a 'non-practising solicitor'.

Q17: How likely are you to take advantage in the greater flexibility about where solicitors can practice as an individual or as a business?

30. Our member firms will be enabled to employ practising solicitors in client facing roles, with more ease and fewer restrictions than was previously the case.

Q18: What are you 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)?

31. Yes, we agree. Entity regulation for sole practitioners provides a necessary protection for consumers.

Q19: What is your view on whether the current 'qualified to supervise' requirement is necessary to address an identified risk and /or is fit for that purpose?

32. We suggest that supervision of others working on the provision of legal services is a challenging activity which should not be available automatically to any newly qualified solicitor, though we are not opposed to a weakening of the current requirements, replaced by an additional general requirement for the supervisor to be competent to carry out this function.

33. We do think that additional requirements should be added, covering the actual performance of supervision – for example, no supervisor should have more supervisees than he or she can adequately and personally supervise.

Q20: Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

34. Yes. SRA regulated firms should be required to ensure that detailed information about the protections available to consumers are easy to obtain and in a form easily understood.

Q21: Do you agree with the analysis in our Initial Impact Assessment?

Q22: Do you have any additional information to support our Initial Impact Assessment?

35. We have no comments to make on the Impact Assessment at this time.

Q23: 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?

36. Yes. Further, their employing organisation should not be allowed to hold client money, unless separately regulated for that activity (for example, as a bank).

Q24: What are your views on whether or when in house solicitors or those working in Special Bodies should be permitted to hold client money personally?

37. We would prefer these to be forbidden from holding client money as well. We question whether holding client money is appropriate to a non–commercial relationship.

Q25: 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? If not, what are your reasons?

Q26: Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

Q27: Do you think there are any difficulties with the approach we propose and if so, what are these difficulties?

38. We are not convinced that these conclusions are appropriate. We suggest that all solicitors designated as such and providing legal services to the general public on a commercial basis should be held to broadly the same standards and requirements, including access to an appropriate compensation scheme (whether that of the SRA or another regulatory body) and

PII. Without this equivalence, the same confusion and lack of clarity is likely to apply as is currently the case between 'practising' and 'non-practising' solicitors, with consequent risk of damage to the reputation of the profession.

Q28: Do you think we should retain a requirement for Special Bodes to have PII when providing reserved legal activities to the public or a section of the public?

Q29: Do you have any views on what PII requirements should apply to Special Bodies?

39. Different considerations apply to Special Bodies, depending on whether they are Trade Unions or Charities, but in neither case do we think that they should be required to maintain PII cover. Neither type of organisation acts on a commercial basis, but they contribute very significantly to the achievement of the Act's *Regulatory Objective* of improving access to justice, particularly in the case of persons who may not be able to access it by any other means. Because the principles of contract do not apply in these circumstances, we do not think that the clients of such bodies should be automatically entitled to compensation, and so the need for insurance does not apply as it does to commercial entities. And as PII cover is one of the most onerous of regulatory costs, it follows that its imposition on Special Bodies damages their ability to extend access to justice as far as they would otherwise be able to do.

40. Further, the clients of Special Bodies have additional protections not available in commercial situations – in Trade Unions by their membership of what is effectively a co-operative organisation, and in the case of Charities by the regulatory functions of the Charities Commission.

Q30: 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?

Q31 Do you have any alternative proposals for regulating entities of this type?

Q32: Do you have any views on our proposed position for intervention in relation to alternative legal service providers and the individual solicitors working with them?

41. As for employees in 'alternative providers', we think that the SRA should retain broadly equivalent standards for all such entities where solicitors are involved in providing legal services to the general public, to avoid damage to the tile of 'solicitor' and the reputation of the profession.

Q33: Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

42. Yes. Though in implementing this proposal, the SRA should ensure that this does not unnecessarily impact adversely on entities which have opted for formal regulation by adopting a structure as an ABS, as opposed to unregulated firms opting to employ one or more solicitor to provide legal services to the general public.

Infolegal Limited

Consultation: Looking to the future - flexibility and public protection

Consultation questionnaire form

This form is designed to be completed electronically—in MS Word. Please save it locally before and after completing it.

Question 1

Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)

No

Question 2

Do you agree with our proposed model for a revised set of Principles?

Our comments are these:

- *Broadly agree with the removal of the Principles dealing with proper standard of service (covered in new Codes), complying with legal and regulatory obligations/cooperation (covered in new Codes), running your business effectively etc (covered in new firms' Code), client money and assets (covered Accounts Rules). These were added as Principles in 2011 to give increased visibility to these issues and, in particular, for the SRA to get across a message about the importance of effective management and cooperation with regulators. They are not really "ethical" principles and could now be removed. This should also aid SDT proceedings by reducing the duplication of allegations involving a combination of Principle and Code offences in respect of e.g. management and standard of service issues. This can add gravity to what can be relatively minor breaches of the Code.*

- *We do not agree with Principle 4 – that you act with honesty and integrity. All previous Codes of Conduct have included an obligation to act with integrity but not an obligation to act honestly. It was not considered necessary to include such an obligation in the Code as all solicitors were aware of the duty to act honestly. There is a judicial test for honesty laid down in Twinsectra v Yardley [2002] UKHL 12 which is relied upon by the SDT when considering any allegation of dishonesty. There is no such test or definition for what constitutes integrity. Honesty and integrity do not constitute the same standards of behaviour and should not therefore be joined together in the same Principle. A person can act without integrity but not act dishonestly. The tests are different. Principle 4 would need to be divided into two parts in order to advance an allegation of lack of integrity. It would be confusing to the profession and to the public and make enforcement of this Principle a logistical nightmare for the SRA.*

  Also under the present arrangements if an allegation of dishonesty is proved at the SDT, the sanction is an automatic strike off unless there are exceptional circumstances as per Solicitors Regulation Authority v Sharma [2010] EWHC 2022 (Admin). If a breach of the present Principle 2 i.e. lack of integrity is proved, the sanction can vary from a fine to a suspension to a strike off. If Principle 4 were adopted there is a risk of a person being struck off for lack of integrity on an almost automatic basis because lack of integrity is coupled to dishonesty. This cannot be the intention. The two standards of behaviour are very different. Principle 4 should not therefore be adopted in this form.

Question 3

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

We don't have an issue with this – it is just another way of expressing what is currently Principle 6.

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?

No

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?

Generally, 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. The new standard on costs is so brief it gives no help on the many aspects of the information different clients will need. Detailed guidance on this with links to guidance issued by LeO and the Law Society would help. It would help to have a reminder that the Solicitors Act still governs billing and recovery of costs. Many firms are unaware of this.*

- ***Conflicts of interest**. It is essential that there is guidance on this subject. This will always be a difficult issue for firms and this is underlined by our experience as compliance consultants. 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 in our experience 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 hammering home. There have been some public relations disasters for the legal profession involving referral arrangements and the lessons must not be lost. We are beginning to see 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?

It is written in plain English and, on the face of it, easy to understand. However, the complexities that lie behind some of the minimalist standards must be explained in guidance with case studies and examples. Without seeing that, it is difficult to form an opinion on how the "look, no hands" standards will be applied by firms. Even when firms are trying to behave ethically – and most do try – it is going to be difficult for them to meet some of the standards without clear pointers. This will be especially true of new firms who will no longer be prompted to think, for example, that acting for seller and buyer is high risk in terms of conflicts.

Question 7

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

Nothing obvious.

Question 8

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

Two things:

Conflicts/confidentiality

In relation to proposed standard 6.2 dealing with the exceptions where it is permitted to act despite a conflict or significant risk of a conflict, the current overriding test of reasonableness has been removed. In relation to standard 6.5 dealing with the circumstances where information barriers can be used, again the reasonable test has been omitted. It is our view that despite client consent, effective safeguards to protect confidential information and, in relation to conflicts, the benefits outweighing the risks, it is important that the solicitor be asked to take a view as to whether overall it is reasonable to act for both/all parties. Although the benefits may appear to outweigh the risks, there may be other factors which might suggest it is not a good idea to proceed using the exception such as the unequal bargaining position of the clients, one client's vulnerability etc. The bottom line has to be – can the solicitor deal even-handedly with both/all parties?

Publicity

It appears that the restriction on cold calling has been removed. As this was recently flagged up as being a risk in the warning notice on PI claims work, what is the reason now to remove it? Do we want to be different from claims management companies that are banned from cold calling and invite more ambulance chasing stories so beloved of the Daily Mail etc.?

Question 9

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

Option 2 is likely to 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 current exceptions were designed to allow firms the flexibility of advising clients within the same firm who disagree on a minor issue over, for example, setting up a business. Looked at objectively, it would be hard to say that there was not a conflict on a particular aspect of the clients' matter but it would be disproportionate to make them seek independent advice where they did not wish to do so. The current drafting has not obviously created problems – and it has now been in place for 10 years – so it seems sensible to leave well alone.

One further point is that it is impossible to say that there is not an actual conflict when acting for clients who are "competing for the same objective". Option 2 is, therefore, likely to create difficulties for the City firms that use this exception.

The SRA is also proposing a new shortened definition of "client conflict". 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 meant that the firm were 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 have been intended?

See also the answer to question 8 above on the reasonable test relating to the conflict/confidentiality exceptions.

Question 10

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

We have concerns about the introduction of two Codes where much of the material is repeated in both. Rather than simplify, this is likely to make things more complicated and does not seem to enhance "entities regulation" which does not need a separate Code to be effective.

In particular, it is odd to have non-lawyer employees and managers being regulated by what is called the "Code for firms" with regulated individuals being subject to the "solicitors/RELs/RFLs" Code. This means that fee earners, if solicitors/RELs/RFLs, will be subject to different standards from other fee earners who are not. It doesn't make sense.

Why not simply have a section of a single Code setting out the management/notification/reporting requirements and COLP/COFA obligations?

It does seem a good idea to incorporate all the reporting/notification requirements from other sections of the Handbook so that they are all in place.

The heading in both Codes "When providing services to the public or a section of the public" is presumably there to deal with solicitors employed by non-solicitor bodies providing services to the public, if and when permitted. The purpose of all firms is, of course, to provide services to the public so why not simply call it "Client Care"?

It leads on to another issue which is this. The reference to "the public" and "a section of the public" is likely to cause uncertainty in the same way as the same wording has created issues by its use in section 15 of the Legal Services Act. Is it intended to apply, for example, to those working for associations formed for the benefit of their members? Are large corporations "the public"? Guidance may be needed if this wording is to be used.

Question 11

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

See comments above about the need for 2 Codes.

Question 12

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

See answer to question 8.

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?

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.

The roles have now become embedded and, on the whole, seem beneficial. They do give a focus within a firm for regulatory compliance and risk management and generally seem to have had an effect in driving up standards. They also mean that compliance for firms has become more than just drafting a compliance manual and leaving it to fester on a shelf. A lot of the initial concerns about the roles have not materialised – e.g. that the compliance officers would become scape goats – and firms seem more relaxed now about the integration of the roles into their structures. However, it would seem fair to remove the culpability of the COLP and COFA for the acts or omissions of their firm – these are people sometimes who are not managers or owners of the business.

As to the downside of the roles in all firms, there is evidence of other partners then neglecting this aspect of their responsibilities and "insourcing" responsibility for compliance and knowledge of the Code/Accounts Rules to the nominees.

For smaller firms, COLPs and COFAs meeting the criteria set out in rule 13.3 of the Authorisation Rules are deemed approved. For sole practitioners and/or small firms a sensible next step might be to remove the requirement for a COLP/COFA entirely. For sole practitioners this means that they are almost inevitably both and when becoming authorised the SRA has the opportunity to look at whether they are suitable to be authorised.

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?

If the new Codes are implemented, they will need guidance to help them explain the new standards. This would undoubtedly help them with internal training within their firms.

Guidance is long overdue on what constitutes a material breach. This is something which as regulatory consultants we often get asked questions about. The SRA must have lots of examples available now and it would be very helpful if these could be included in guidance.

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?

There are many threats. Whilst there would be benefits in that well managed, ethical and membership type organisations would be able to improve their legal services by employing solicitors, there would undoubtedly be the unethical organisations that would employ solicitors to front their services. It is not hard to imagine that solicitors who could not get employment elsewhere would be exploited and used to give credibility to these organisations. Those employed are more likely to be solicitors who are newly qualified or with a poor disciplinary record or from certain ethnic backgrounds who would be prepared to accept a low salary rather than be unemployed. Because they may fear being sacked for refusing to "toe the line", they could be vulnerable to being pushed into unethical behaviour. The commercial pressures on them "to perform" could be enormous.

Other problems we see arising are over identifying exactly what work these solicitors were responsible for. For example, where legal work was being done by non-lawyers in the same organisation, to what extent would the solicitor be held responsible for the non-lawyers errors or unethical behaviour? Would there tend to be an assumption that the solicitor was responsible because he or she should have been supervising the non-lawyers? Without clear guidelines on this issue solicitors employed by non-lawyers would be at enormous risk of carrying the can for others.

In the not for profit sector, solicitors have for many decades been employed by unregulated organisations such as law centres or advice centres. These have not been problem free but various factors allowed them to provide largely ethical and competent services. Notably they:

- *did not have the commercial drivers that are present in private enterprise to produce profits;*
- *held very limited amounts of client money and often, none at all;*
- *operated in limited areas of law;*
- *were operating under the aegis of the Law Centres Federation, FIAC or the NACAB which were organisations that had a vested interest in ensuring that they were well run.*

We believe that the risks of allowing solicitors to provide services to the public through all and any type of organisation far outweigh the benefits. To go down this path without restriction on the type of organisations that can use solicitors to provide legal services could present very real risks to the public and also to

the solicitors themselves and the reputation of the profession as a whole.

Access to justice cannot come at any price and this is a step too far which will create huge risks to the regulatory objective of "protecting and promoting the interests of consumers".

Having said that, the restrictions in rule 4 of the Practice Framework Rules should be relaxed to allow pro bono work to be delivered more effectively but more thought needs to be given to the other type of organisations that should be allowed to employ solicitors to provide legal services. One possibility would be to allow authorised entities to provide non-reserved legal services through wholly/majority owned non-authorised entities. In that situation, the SRA would have a measure of control if it was found that referrals were being made to them where service and ethical standards were putting the public at risk.

One final point. The SRA is proposing that where solicitors are employed by non-lawyer organisations, they should not be allowed to hold client money in their own name. This is entirely contrary to the position at present with not for profit organisations where, if client money is held for legal work, it must be held by the solicitor and in their name.

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?

As regulatory consultants, we do not provide services to the public so this would be irrelevant to us.

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?

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?

Because of the authorisation and COLP and COFA regime, this is probably now a bit of an irrelevance.

Question 20

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

If solicitors are going to provide services in the unregulated sector they must be required to make quite clear to clients the protections they have and those they don't.

Question 21

Do you agree with the analysis in our initial Impact Assessment?

Consumer education is obviously key. However, providing information on the SRA's website and other initiatives are only likely to penetrate the better educated. The most vulnerable members of society such as the elderly who are not computer literate will remain unaware of the risks and be the ones likely to suffer when things go wrong.

Question 22

Do you have any additional information to support our initial Impact Assessment?

No.

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?

This runs counter to the position governing solicitors employed in the not for profit sector where, if client money is held for legal services, it must be held in a client account in the name of the solicitor. This gives clients additional protection.

If solicitors are not going to hold client money in the alternative legal services market, clients should be told and the risks explained.

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?

Those working in special bodies do hold client money in their own names and have done so for decades. Similarly, those working in-house have been allowed to hold client money e.g. where they do debt collection work for their employers. There is no evidence that this has caused real problems.

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?

If not, what are your reasons?

If solicitors hold client money in their own name then clients should be able to have recourse to the compensation fund. Otherwise, no.

Question 26

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

They should be required to have adequate PII cover – whether taken out individually or by their employer. If there was a large claim and they were not covered this could have huge repercussions for the client, the solicitor and the reputation of the profession. Those in the nfp sector have always had to have cover reasonably similar to that required for private practice and this should be extended into the private sector.

Question 27

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

These were set out in detail in our answer to question 26 above.

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?

Yes – and for other legal services. This is the most basic and essential protection. It would be insanity not to require it.

Question 29

Do you have any views on what PII requirements should apply to Special Bodies?

They should be adequate. The bodies themselves should decide what is adequate having regard to the type of work they do.

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?

If it is largely solicitor owned and employs solicitors, it is going to be extremely difficult for the public to distinguish between this type of body and a regulated solicitors firm. We do think that thresholds should be imposed.

Question 31

Do you have any alternative proposals to regulating entities of this type?

There will be some "back door" regulation where referrals are made from the regulated firm. Otherwise, clients will have patchy regulatory protection depending on who is doing the work and this will be the most difficult issue to address as we outlined in our answer to question 16. As you have identified, it is unlikely that LPP will attach to advice even if given by a solicitor. Overall, we think this type of entity should be required to have adequate PII cover.

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?

No.

Question 33

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

Yes – client confusion around protections would otherwise be rife especially as many of these firms will be providing services to the most vulnerable members of society. Also, a single matter may combine reserved and non-reserved work which would add to the confusion.

Thank you for completing the **Consultation questionnaire form**.

Please save a copy of the completed form.

Please return it, along with your completed **About you form**, as an email attachment to consultation@sra.org.uk, by **21 September 2016**.

Alternatively, print the completed form and submit it by post, along with a printed copy of your **About you form**, to

Solicitors Regulation Authority
Regulation and Education - Policy - Handbook 2017
The Cube
199 Wharfside Street
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B1 1RN

International Underwriting Association

Consultation: Looking to the future - flexibility and public protection

Consultation questionnaire form

This form is designed to be completed electronically—in MS Word. Please save it locally before and after completing it.

Question 1

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

N/A

Question 2

Do you agree with our proposed model for a revised set of Principles?

Yes

Question 3

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

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?

We think the protection of personal data should also be included.

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?

We think that it would be beneficial to have as many case studies as possible.

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?

Yes

Question 7

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

No

Question 8

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

No

Question 9

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

With regards to Option 2: How would a conflict be known if different teams are working on the same matter.

Question 10

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

Yes

Question 11

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

No

Question 12

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

No

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?

No

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.

Yes. To assist with compliance as it drives enhanced personal responsibility.

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?

Nothing further to add from our side.

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?

The positives are that allows solicitors to find employment in more dynamic working environments and the negatives are the adequate supervision as it is unknown whether alternative providers will have proper systems and there is a risk of providing advice that is reserved by accident.

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?

As far as insurers are concerned, claim handlers could become solicitors again.

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?

We agree

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?

We agree that time has limited benefit. The challenge is whether a newly qualified solicitor that has no experience of running a business be able to obtain PI insurance.

Question 20

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

N/A

Question 21

Do you agree with the analysis in our initial Impact Assessment?

N/A

Question 22

Do you have any additional information to support our initial Impact Assessment?

N/A

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?

N/A

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?

N/A

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?

If not, what are your reasons?

N/A

Question 26

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

Yes we agree

Question 27

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

The issues we see are individual solicitors appreciate their own responsibilities. In our view they should make their employer aware to get adequate PI insurance and that the cover is adequate for the services they wish to provide.

Non-Minimum term policies may have additional restrictions on cover and lower limits of indemnity.
More restrictive dishonesty clauses raise that question whether how exclusions and restrictions be monitored that is in cover and the gaps in consumer protection?

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?

If the consumer, as defined by the FCA and receiving reserved activities advice then minimum terms contracts (MTC) should apply.

Question 29

Do you have any views on what PII requirements should apply to Special Bodies?

N/A

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?

N/A

Question 31

Do you have any alternative proposals to regulating entities of this type?

N/A

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?

N/A

Question 33

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

N/A

We have no further comments.
Arpad Kollanyi, Market Services Technician
International Underwriting Association
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The International Underwriting Association of London (IUA) represents international and wholesale insurance and reinsurance companies operating in or through London. It exists to promote and enhance the business environment for its members. The IUA's London Company Market Statistics Report shows that overall premium income for the company market in 2014 was £22.943bn. Gross premium written in London totalled £15.855bn while a further £7.079bn was identified as written in other locations but overseen by London operations. For further information about IUA and membership please visit their website, www.iua.co.uk under the section 'About the IUA'.

Thank you for completing the **Consultation questionnaire form**.

Please save a copy of the completed form.

Please return it, along with your completed **About you form**, as an email attachment to consultation@sra.org.uk, by **21 September 2016**.

Alternatively, print the completed form and submit it by post, along with a printed copy of your **About you form**, to

Solicitors Regulation Authority
Regulation and Education - Policy - Handbook 2017
The Cube
199 Wharfside Street
Birmingham
B1 1RN

Jacky Lewis

Dear Sirs,

I am writing with regard to the above consultation to outline my concerns:-

1) I believe that the proposals would result in an impossible competitive situation for solicitors firms, with regulated firms having to pay the costs of regulation against non-regulated firms with no costs of regulation.

2) I believe that having unregulated firms would be a danger to consumers.

3) I believe that unregulated firms would undermine the profession in the eyes of the public, as the common perception would be unlikely to differentiate between regulated and unregulated firms.

4) If it were the case that unregulated firms were not required to have indemnity insurance, then this again would put an unfair competitive burden on to regulated firms and would be a further threat to consumers.

5) With regard to the simplification of client accounts, again, I am against this as I think it creates more dangers for consumers.

6) I like the idea of a shorter handbook, but not at the expense of a watered down and undermined profession, which would be the inevitable result of unregulated firms.

Yours faithfully,

Jacqueline Lewis

Jacky Lewis

Family Lawyer, Accredited Family Mediator &

Collaborative Lawyer

Jane Wintermeyer

Sir/Madam,

I am writing in response to the consultation about future regulation of solicitors, in particular the proposed redraft of the Principles, Codes and Handbook including the review of Legal Professional Privilege (LPP) for those employed in house but advising others , specifically proposed at paras 149-154 of the consultation document .

I am currently the T/Force Solicitor and Head of Legal Services with North Yorkshire Police (NYP), employed in house, along with the rest of the legal department, by the Police and Crime Commissioner (PCC) for North Yorkshire, providing legal advice and representation to both the Commissioner and the Chief Constable for North Yorkshire under an agreed SRA waiver of Rule 4, granted to all force solicitors following application by the Association of Police Lawyers (APL) in 2014.

This waiver currently applies to all 43 police forces across the country. In many forces however the legal team are employed by the Chief Constable and in reverse, currently provide legal advice to PCCs.

We in NYP are also, in line with government policy, working closely in collaboration with West Yorkshire, South Yorkshire and Humberside Police and also embarking on a close collaboration with the legal departments of Durham and Cleveland Police both of which arrangements are under various formal and statutory collaboration agreements. All of this legal work is not for profit and similar to mutual aid and collaboration is enabling increased effectiveness and efficiency including financial savings in a time of continuing austerity.

If a tranche of legal advice (to the non employing client department) is not to be protected by LPP it would make our work incredibly difficult and would impact hugely on the future of collaboration. As a public body we are also subject to FOI and although existing exemptions could be used, the removal of LPP would mean that highly sensitive operational legal advice would have little or no protection which could ultimately impact on public safety.

I am aware that both the APL and Police and Crime Commissioners Legal Advisors Network (PACCLAN) subcommittee have submitted responses but I would like to add our voice from North Yorkshire Police.

Due to this submission being so near the deadline I have not had time to fill in the ‘About you’ form but have added my SRA number below. I am happy to be contacted in relation to this response but would prefer not to be named when responses are published.

Thank you.

Jane Wintermeyer

Collar Number 3840

T/Force Solicitor and Head of Legal Services

Joint Corporate Legal Services
North Yorkshire Police

Javaid Ramzan

Consultation: Looking to the future - flexibility and public protection

Consultation questionnaire form

This form is designed to be completed electronically—in MS Word. Please save it locally before and after completing it.

Question 1

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

No.

Question 2

Do you agree with our proposed model for a revised set of Principles?

Yes.

Question 3

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

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?

The SRA is committed to regulating in the public interest, and as the proposed Principles will apply to all solicitors irrespective of the jurisdiction from which they practise, the requirement to comply with legal and regulatory obligations and to deal in an appropriate way with regulators and ombudsmen should be removed or copied from the draft proposed Code for Firms and re-inserted into the new SRA Principles, especially as the SRA Principles underpin the way in which regulated individuals should at all times conduct themselves both in a professional and personal capacity.

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?

There would be considerable benefit in providing guidance, perhaps to include case scenarios to demonstrate how acting or failing to act in a specific way might demonstrate compliance with the Principles and especially the conflicts and related confidentiality provisions.

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?

Yes.

Question 7

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

No.

Question 8

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

Draft SRA Code of Conduct for Firms

a) Confidentiality and disclosure

(i) Rule 6.4 It is not clear which 'matter' the duty of disclosure is referring to here, i.e. is this, as appears to be intended, the matter upon which instructions are to be given or does this include any of a number of a client's open matters? Suggested amendment: 'You disclose to the client all information of which you are aware which is material to the matter upon which you are instructed except when …'

(ii) Rule 6.5 – Suggest amendment as below to remove ambiguity as to the matter to which the confidential information relates: 'You do not act for a client ('A') in a matter where that client ('A') has an interest adverse to the interest of another current client or a former client ('B') for whom your business or employer holds confidential information which is material to client ('A') in that matter, unless …'

(iii) Recommend SRA provide guidance as to what could amount to 'real risk' failing which this would be left open to interpretation which could significantly increase the likelihood of a breach of the duty of confidentiality arising resulting in client detriment.

(iv) It is unclear from the way in which Rule 6.5 has been drafted if a solicitor would be compliant with this requirement where s/he initially sought the client's informed consent to act under Rule 6.5(b) but where consent was withheld/withdrawn the solicitor then continued to act under Rule 6.5(a). This should be provided for in the proposed new Codes.

(v) Suggest reinsert requirement for solicitor to be satisfied it is reasonable in all the circumstances to act with effective measures in place.

b) Client information and publicity

(i) Recommend Outcome 8.5 is included as the regulatory publicity statement is a key client protection to signpost clients to the SRA.

Question 9

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

It seems to be a drafting error in both Option 1 and 2 that client conflicts no longer extend to conflicts arising in any 'related matter', ('related matter' also has been removed from the 'own interest' conflict definition) the effect of which would be to allow solicitors to act in two or more sets of related matters provided there was no breach of duties of confidentiality. Is this deliberate or an oversight?

Subject to the above, I prefer Option 1. That option is reflective of the conflicts provisions within the existing SRA Code of Conduct 2011 and also as set out in the earlier Solicitors Code of Conduct 2007 and, before that, The Guide to the Professional Conduct of Solicitors 1999.

Option 1 continues to allow solicitors to assess and determine on a matter by matter basis the importance of a client conflict in the context of the retainer when taken as a whole and so, e.g the conflict or significant risk of a conflict may relate to an issue agreed by both (or all) clients to be minor and not affecting the solicitor's duty to act at the same time in the best interests of both (or all) clients on the key aspects of the retainer upon which there is consensus amongst all clients.

Option 2 would result in solicitors having to refuse to accept all new instructions or terminating retainers in any existing matter as soon as an actual conflict arose in circumstances where, under the existing provisions, a solicitor could properly act under O3.6 or O3.7.

Where the actual conflict here related to an aspect of the matter which did not adversely affect the clients' agreed common purpose it would not be in the best interests of all clients for the solicitor to cease to act for one or all clients because an actual conflict occurred. This would be compounded further by clients having to pay legal fees for alternative solicitors to be instructed and brought up to speed before any progress could be made on the clients' matters. Where a delay in securing alternative legal representation, through no fault of the clients, prevented them from being able to bring a legal claim/defend any such claim within any prescribed limitation period the delay here could also result in a wasted costs liability and access to justice denied for the clients.

Question 10

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

Subject to comment for Question 9, yes.

Question 11

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

No.

Question 12

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

Yes.

See comment for Question 9, i.e. to re-insert ‘related matters’ into the definition for an ‘own interest’ conflict and ‘client conflict’.

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?

See comments for Question 9.

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.

No response required.

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?

No response required.

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?

No response required.

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?

No response required.

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?

No response required.

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?

No response required.

Question 20

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

Yes. Clients range from private individuals who have never before used the services of a solicitor to multi-national corporate clients that have a relationship with the firms they instruct and are sophisticated users of legal services and there are clients that fall between these two extremes. It is a fundamental protection for all clients that they are aware that those that provide legal services are regulated and by whom and so I would passionately argue that regulated entities should continue to comply with the present SRA requirement to publicise that they are authorised and regulated by the SRA together with the related information dependent upon the entity's legal status.

Equally important is the requirement for clients to be informed of the circumstances in which they can challenge the firm's bill and also when and how to raise a complaint with the Legal Ombudsman. A significant number of clients might for a variety of reasons lack the capability and financial standing to being a professional negligence claim against their solicitors. Where there is a complaints handling process in place which is free for clients and has been set up to address poor service complaints, and refer conduct issues to the SRA, it is only fair, right and proper in the public interest that the SRA continue to require this information to be provided to clients of law firms.

Question 21

Do you agree with the analysis in our initial Impact Assessment?

Yes.

Question 22

Do you have any additional information to support our initial Impact Assessment?

No.

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?

Yes.

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?

No response required.

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?

If not, what are your reasons?

Yes.

Question 26

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

Yes.

Question 27

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

No.

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?

No response required.

Question 29

Do you have any views on what PII requirements should apply to Special Bodies?

No response required.

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?

No response required.

Question 31

Do you have any alternative proposals to regulating entities of this type?

No.

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?

No.

Question 33

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

Yes.

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199 Wharfside Street
Birmingham
B1 1RN

Jeremy Baker

Response to SRA Consultation, "Looking to the future – flexibility and public protection", September 2016

1. We do not support the proposal that the Solicitors' Code of Conduct be replaced with two separate, shorter and simplified codes, namely a code for solicitors and a separate code for firms.

2. The primary purpose of the regulatory framework for solicitors is to protect the public interest and the interests of clients. The current proposals will however erode both, and damage the public trust in solicitors.

3. The starting-point for the proposals is stated to be to meet alleged "unmet legal need". Whether or not this exists in the form claimed, if the intention is to allow it to be met through creating a new hybrid between solicitors' firms and unregulated firms employing solicitors, this is not justified or proportionate in the light of these harms that will result.

4. The proposals to allow solicitors to work for unregulated entities providing unreserved legal services to the public merit considerably greater thought and research. Although such solicitors will be subject to the new code of conduct for solicitors, the unregulated entities for which they work will not be subject to the new code of conduct for firms. It is only the latter which will continue to uphold (largely) the current protections for clients and the public. Such unregulated entities will not be subject to any SRA code of conduct, nor any SRA powers of enforcement. This has serious implications for client protection, legal professional privilege, and professional supervision.

5. The proposals will be highly likely to lead to the creation of a two-tier profession, with clients and the public unable to distinguish between the two. This is not such a problem for those who instruct a regulated firm, as they will have the full scale of protection, but when those who instruct an unregulated entity believing that they have, or will acquire, the same protections, then encounter difficulties, they will feel 'let down' and quite possibly misled as to the nature of the unregulated entity and their rights in relation to it.

6. Even if such clients receive advice from a solicitor working in an unregulated entity, they would have none of the protections that clients in regulated firms have and will continue to have. These protections include such serious matters as legal professional privilege for their advice, professional indemnity insurance and the Compensation Fund in case of their adviser's negligence or default, the prevention of conflicts of interest which could undermine the independence and confidentiality of their advice, contractual protections in terms of who their retainer is with, and professional supervision and standards for their advisers. The ability for solicitors to provide

advice within unregulated entities is likely to undermine the standing of the solicitors' profession.

7. This risk, and the potential fall-out when client disappointment sets in, is much heightened by the fact that unregulated entities will be allowed to advertise the fact that they employ solicitors. This can only result in the public and clients thinking (whether justified or not) that such employed solicitors will have some role in overseeing their work, and in remedying errors etc. When this is discovered not to be so, the name/brand of "solicitor" turns out to be at the heart of their confusion and misapprehension.

8. Any responsible system of regulation must strive to avoid such significant risks of misleading the public. Therefore, the proposals must be reconsidered in this respect.

9. Nor is it as easy as the SRA assumes to ensure that solicitors employed by an unregulated entity do not undertake reserved work, because of the overlaps in practice between areas of legal activity. The boundary between reserved and unreserved legal services is not clear-cut and can be quite difficult to draw.

10. We are also very concerned that the proposals are being 'sold' to local government legal departments on the basis of confusion about the scope of their current role.

11. Rule 4 of the SRA Practice Framework Rules 2011 allows local government solicitors to act for another organisation or person to which or to whom the employer is statutorily empowered to provide legal services.

12. Section 1 of the Local Authorities (Goods & Services) Act 1970 allows local authorities to provide for each other administrative, professional or technical services for the purposes of functions conferred on the client authority.

13. This means that solicitors employed by local authorities may give legal advice to any other local authority (as also to parish councils, and other public bodies designated as such) for the purposes of their statutory functions.

14. Hence, the suggestion that the SRA's proposed changes are necessary in order for local government solicitors to do this is patently incorrect and misleading.

15. But in any event, the SRA's consultation proposal would not allow 'reserved work' to be carried out for the public under its new regulatory regime for solicitors employed by non-solicitor entities in any event. Therefore, even if there is a regulatory problem with current activities in relation to 'reserved work', it would not be solved by the SRA's proposals.

16. The proposals should not proceed in their current form, and should be seriously reconsidered with particular reference to the points made in paras. 1-9 above.

T.W. Mortimer, J.D.I. Baker and S.S. Talijancic

Practising Solicitors, Civic Centre, Tannery Lane, Ashford, Kent. TN23 1PL.

21 September 2016.

Jill Braham

I am very opposed to these changes.

I have grave concerns about the detrimental effect they would have on the provision of legal services to the public and the real damage which will result to the reputation of the legal profession.

The SRA's current proposals would result in:

- a two tiers service to the public: one tier being those working in a regulated organisation; and the
- other tier being those who are working in an unregulated one.

- clients of the unregulated organisations having significantly less protection and redress than
- under the present regime.

- unregulated providers not having any indemnity insurance,

- unregulated providers not being subject to regulation around conflicts of interest

- unregulated providers not having legal professional privilege

- unregulated providers not claiming or making payments into the Solicitors Compensation Fund.

This whole package of inadequately thought out and ill-conceived proposals would undermine standards, increase consumer confusion and ultimately cause significant damage to the standards of the solicitor profession.

Jill Bramham

Solicitor (not currently practising but working for an LPC provider)

John Oakley

I have read with interest the above consultation.

By way of background I am an in-house Solicitor in a public sector legal department, and have a number of points for consideration.

I support the ethos that people and small businesses need to be able to access the legal advice that they need, at an affordable price, and that the SRA as regulator, has a duty to consider how the SRA can help to address this.

My concern is that the proposed approach set out in the consultation may cause more confusion than assistance to potential clients when deciding on where to obtain their legal advice, and understanding the implications (e.g. whether they are protected by the Compensation Fund, Legal Professional privilege and conflict of interest requirements). The SRA, therefore will need to issue greater guidance to citizens as well as to Solicitors to avoid much of the confusion the two tier code may create.

As an in-house public sector lawyer I am extremely interested in what changes will be made to the SRA Practice Framework Rules, especially how they will reflect the diverse range of business models being adopted by the public sector, and in particular the interpretation of Rule 4 and the interrelation with the Local Authorities (Goods and Services) Act 1970 & the Legal Services Act 2007. The consultation documents does not seem to address this.

I hope this assists in the consultation and that there will be further opportunities to contribute on the SRA proposals in regards to this matter, as they develop.

Kind regards,

John Oakley

Head of Commercial Law

Legal Services

Resources

Postal Point CHO 241

Hertfordshire County Council, County Hall, Pegs Lane , Hertford,SG13 8DE

Consultation: Looking to the future - flexibility and public protection

Response ID:726 Data

2. Your identity

Surname

Pitt

Forename(s)

Jonathan Ranger

We may publish a list of respondents and a report on responses. Partial attributed responses may be published. Please advise us if you do not wish us to attribute your response or for your name or the name of your firm or organisation to appear on any published list of respondents.

Attribute my/our response and publish my/our name.

Please identify the capacity in which you are submitting a response. I am submitting a response…

on my own behalf as an employed solicitor

3.

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

I have no practical experience of the application of the test, but I do work with students from our local universities to help them prepare themselves for their legal careers. On their behalf I would say that best practice should be to ensure that students are not led to undergo expensive training in cases where it should be clear they will not pass the suitability test

4.

2. Do you agree with our proposed model for a revised set of Principles?

I am deeply concerned about the risk to the public inherent in having legal services supplied by regulated and non-regulated entities. I believe it is crucial that the designation of the individual or organisation makes it clear whether it is regulated or not regulated. The Law Society has suggested amendments to Principles 2 and 3 which I endorse. I would go further. I believe that the very fact we use the term 'Practising Solicitor' as having a different status to 'Solicitor' is confusing to the public. I would propose that the only people entitled to call themselves 'Solicitor' should be those with a current practising certificate. I would also prefer a different designation for those who have a solicitor qualification but work for an unregulated entity (and would be prepared to accept this in my own case).

5.

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

As stated in the previous reply, I endorse the amended principle proposed by the Law Society, as the new Principle seems to water down the obligation in a manner that does not seem to serve any useful purpose.

6.

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?

I have indicated that I have great concern about the proposed dilution of the Solicitor brand. I agree with the Law Society that Principles 5 and 10 should be retained. This is again about the public perception of their legal adviser and what they can expect. The requirement to provide a proper standard of service should be maintained as should the requirement to protect client money and assets, because these are central to what the public expect and need from the profession.

7.

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?

i was involved in the consultation over the last version of the Handbook on behalf of my Local Law Society. We were greatly concerned at the move to outcomes-focused regulation and were assured that the indicative behaviours would ensure that the profession understood what was expected of it. Now after only a few years these indicative behaviours are to be abandoned. If they are to go, then there must be some alternative serving the same purpose, and guidance and/or case studies should be applied in all cases. I would welcome guidance and case studies to help me identify what obligations I have in relation to client money, and what types of client money may be identified, in the case of the in-house lawyer. I have read with interest the examples set out in the Law Society's response, and all seem to me to be valid cases where guidance would be needed.

8.

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?

I would agree that you have achieved the aim of developing a short Code, but it seems to me to lack some focus. I would prefer to have clearer guidelines, even if they are more proscriptive, and do not feel comfortable, when it comes to regulation, with an approach that is so open to interpretation. It seems that one should not want to catch practitioners out, but rather ensure that they do not fall foul of the rules in the first place. Quite apart from the risk to the public, the process sounds to me likely to be more costly and time-consuming.

9.

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

No

10.

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

I approve the examples given by the Law Society in its response and would particularly support their comments in relation to the problems around undertakings. This is such an important part of day to day legal work that it really should be covered in the Code.

11.

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

I think Option 2 is too restrictive, and Option 1, while just about workable, could be a bit more restrictive. in particular, I would like to see Outcome 3.7 retained. When I was in private practice, I came across numerous examples of one party to a marriage seeking to charge joint property for, say, their sole business purposes and it is essential in the interests of justice for there to be some checks and balances in place, which 3.7 (a) provided. Often the dynamic of the relationship will be more influential than the advice, but none the less the advice should be a requirement.

12.

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

As indicated in my reply to question 6, the Code is shorter, but not as focused as I would have liked. But I do not work in an SRA regulated firm, so am not able to address this point further.

13.

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

No

14.

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

I agree with the Law Society that an undertaking should be attached to an individual Solicitor in order to be enforceable. However, this should be coupled with a clear obligation on the undertaker to disclose any fact that might render the covenant of the undertaking ineffective or less effective (eg. because he or she is not a solicitor or is otherwise not authorised to give such an undertaking.

15.

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?

I endorse the specific issues raised by the Law Society in its response. Most significant to my mind is their suggested rewording of 1.4. It is inequitable for the solicitor to be liable if innocently unaware of the deception of others.

16.

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.

I have no problem with the intention to retain COLPs and COFAs. I think there is more that could be done to ease the burden on those who are given these roles, particularly where the firm is small. I have more concern that the reporting culture has made it almost impossible for the practitioner sensing potential trouble getting any meaningful confidential advice from his or her peers. I quite understand how the abuse of such networking might in some cases put the public more at risk, but this has to be weighed against the potential for the public to be better protected as a result of timely advice by a more experienced practitioner. If appropriate safeguards were devised, I think a relaxation of reporting rules could be beneficial to the public.

17.

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

Other than to look again at the question of reporting obligations, as explained in the previous question, I do not have other suggestions.

18.

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?

I have operated in-house for 25 years. I have always considered my role to be internal - that is to say, I advised and helped the board keep the business on the legal straight-and-narrow. I had no public face as a solicitor at all. I have not therefore practiced at the controversial edge of what a solicitor may or may not do in relation to the public. As a sole practitioner in-house, I think this is a good thing. I can meet with the profession's professional development requirements, and have succeeded in retaining my professional independence, but I do not have the advantages and protections of my colleagues in private practice. I think there is a grave risk to the public in this proposal. I have no objection to the principle of legal advice being delivered by other entities, but fear that insufficient thought has been given to the risks to the public if nomenclature is not made significantly tighter. I have already proposed that the title of 'solicitor' should be more restricted, and this applies even more so to the alternative legal services firms - they should not be able to hold themselves out as solicitors.

I further believe that we are playing fast and loose with one of the prize assets of our economy - the international reputation of our legal services. A personal anecdote - I represent my local law society in its relations with its 'twin', the Bar Association of the town of Lille in France. I have had friendly relations with a large number of individual French lawyers over many years. But as relations have become more familiar, it

has become apparent that they do not consider me as a 'proper' solicitor, or a legal equal, because I practice in-house. They cannot understand how I can be effectively regulated, or maintain any independence, in the role I occupy. If we further dilute what the role of Solicitor may comprise in England and Wales, we run the risk that the uncertainties could dilute the brand and diminish the large sums the practice of our profession brings into the country.

19.

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

Personally, I am close to retirement and am unlikely to take advantage of greater flexibility. Indeed, after having been in-house for 25 years, I would welcome the chance to practice in a firm of solicitors again, but in reality my future career is likely to go in a different direction.

20.

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?

This restriction should be retained.

21.

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?

I believe the current structure is necessary. There is a significant risk to the public if newly qualified solicitors were allowed to set up their own practice straight after qualification. Three years post qualification is the minimum that should be permitted.

22.

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

Yes, this is very important, but equally important is that unregulated firms should be required to display detailed information about the reduced protections available to consumers using their services (I note the parallel of the health warning on cigarettes!). As in the case of cigarettes, this would need legislation, as it is beyond the scope of the SRA, but the SRA should be very mindful of the need to protect the public as a wider range of legal services are made available to it.

23.

21. Do you agree with the analysis in our initial Impact Assessment?

I support the comments made by the Law Society in its response.

24.

22. Do you have any additional information to support our initial Impact Assessment?

I have no additional information to add, save in relation to my concern about the international impact on the reputation of our legal services, set out earlier in this response.

25.

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?

Yes

26.

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?

They should not be permitted to hold client money personally.

27.

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? If not, what are your reasons?

Yes. But the solicitor must be required to declare the absence of the protections of PII and the Compensation Fund if they are offering unreserved services to the public out of an alternative legal services provider.

28.

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

If a Solicitor working in an unregulated entity offers services to the public, he or she should be required to have PII cover in place, or should otherwise be under a clear obligation to warn the public of the absence of these protections.

29.

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

While the SRA could, as I suggest, require the individual solicitor to warn clients that Compensation Fund and/or PII cover was not available, the SRA cannot require the unregulated employer to do so, and this leaves a big gap wherein the public could be deceived. It may need legislation to cover this (I have mentioned the health warning on cigarettes as a parallel.

30.

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?

Yes, the principle should be clear that providers of reserved legal activities to the public or a section of the public should have PII, whoever or whatever they are.

31.

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

There should be consistency in what protection is available to the public. The Law Society in its response has proposed that the common standard should be MTC Level PII and I agree with this view.

32.

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?

No, I believe that this will inevitably be confusing to the public.

33.

31. Do you have any alternative proposals to regulating entities of this type?

Simply that regulation should be consistent for all providers, so that the public is not misled, confused or even tricked.

34.

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?

I think the SRA will find it very difficult to intervene, as it would apparently have no control over the entity, only over the solicitor. The Law Society rightly asks how issues of ownership of records etc could be resolved. In practice, the SRA would have to insist that such solicitors retain a complete record of all disclosible material and that their contracts with their employer permit them to do so, to prevent any

measures to circumvent the SRA's powers.

35.

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

Yes

Consultation: Looking to the future - flexibility and public protection

Response ID:342 Data

2. Your identity

Surname

Makin

Forename(s)

Josh

We may publish a list of respondents and a report on responses. Partial attributed responses may be published. Please advise us if you do not wish us to attribute your response or for your name or the name of your firm or organisation to appear on any published list of respondents.

Attribute my/our response and publish my/our name.

Please identify the capacity in which you are submitting a response. I am submitting a response…

on my own behalf as an employed solicitor

3.

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

No

4.

2. Do you agree with our proposed model for a revised set of Principles?

No

5.

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

No

6.

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?

I believe that the current set of Principles should remain, at the very least, unamended.

7.

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?

Conflicts of interest
Your duty to your client

8.

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?

Not in the proposed new format

9.

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

Difference and separation in the duties owed between an individual solicitor and the firm.

10.

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

No

11.

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

I think they are appropriate and helpful.

12.

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

No. I believe there is a difference in delivering a short and concise code and delivering one which removes much of what was useful, such as the do's and don'ts in the form of the Outcomes and IBs that I very much rely upon regularly.

13.

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

Two codes for solicitors and firms.
Creating of two tier system. I think that is absolutely ridiculous and will have a significant impact on a client's ability to access justice when the creation of a two tier system will create a price war between the two types of firms.

14.

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

15.

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?

Yes. I do not believe there should be separate codes for the same. There will likely be much repetition and no need for the same.

16.

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.

Yes. These roles assist me in being able to raise any issues and/or concerns that I have, as well as also assisting that person in being able to deal with the same. I believe that these roles are extremely important.

17.

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

Perhaps give them more guidance, Outcomes, IBs and case studies and/or training

18.

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?

I am extremely concerned about this.
On the face of it, it would offer the client more opportunity to seek legal assistance in non-reserved legal services and perhaps at a cheaper rate due to the fact that such ALSBs will have less overheads than a regulated firm.

Despite this, I do not think it will work in practice. Firstly, I think it will create a price war between regulated and non-regulated firms whereby they will be looking to undercut each other in order to secure work. There is a lot of competition in the market already and I think a lot of larger firms will struggle (speaking from someone who works in a small high street firm).

I also believe that it would not be in the client's best interests to introduce this two-tier of legal services. A client will be faced with the decision to obtain legal advice based on their affordability for the same and when faced with a cheaper quote from a new firm, perhaps ran by NQ solicitors, the level of service that is going to be given to them simply is not going to be what is needed. I think this will hamper a client's ability to access justice, all with the short sighted view of saving them fees in the short term, which may come back to haunt them later on.

19.

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

Not likely.

20.

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?

n/a

21.

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?

I believe the current rules are suitable and that this should not be changed. It is important that a supervisor has undertaken the appropriate training and/or experience to be able to supervise and manage. This should not be removed, allowing an NQ to set up their own firm.

22.

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

Yes

23.

21. Do you agree with the analysis in our initial Impact Assessment?

Yes

24.

22. Do you have any additional information to support our initial Impact Assessment?

No

25.

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?

yes

26.

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?

They should not be allowed to do so.

27.

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? If not, what are your reasons?

Agreed however, I dispute need for two tier / ALSB in first place.

28.

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

Agreed. Believe need PII for ALSP

29.

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

30.

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?

Yes

31.

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

32.

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?

no

33.

31. Do you have any alternative proposals to regulating entities of this type?

34.

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?

35.

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

Judith Gower

I am extremely concerned about the proposed changes. I work for a local authority and as such am the

solicitor for a consortium (on one large project) of Fire and Rescue Authorities of which my own council

is the lead member. If the plans go ahead then the advice I give to members will not attract legal

professional privilege apart from to my own fire service, I will be seen to be in an unregulated

environment and “second class” as to a firm of private solicitors.

It would appear that the changes are to force all local authorities to become an ABS whether they

want to or not.

I do not believe that solicitors should be allowed to work in unregulated firms as it will erode the

confidence the public has in solicitors. Newly qualified solicitors need supervision as qualifying is purely

the beginning of the journey in becoming a good solicitor.

Removal of some of the overarching principles and shortening the handbook will lead to uncertainty.

I am not in favour of the proposed changes.

Kind Regards

Judith Gower

Legal, Governance and Monitoring

2nd Floor – High Street Buildings

High Street

Huddersfield

HD1 2ND

Dear Sirs/Madam,

Response to SRA consultation: Looking to the future - flexibility and public protection

On 1st June 2016, the SRA released a consultation "Looking to the Future - Flexibility and public protection" in which it proposes that the current Solicitors Code of Conduct should be replaced with two separate codes, namely a Code of Conduct for Solicitors and a Code of Conduct for Firms. The SRA's aim in proposing two separate codes is to ensure that every solicitor is absolutely clear about their personal obligations and responsibility to maintain professional standards and that firms have clarity about the systems and controls they need to provide good legal services for the consumers.

In addition to such changes, the SRA further proposes to afford solicitors greater flexibility in providing an opportunity for them to freely deliver services outside of regulated firms. These proposals seek to address the growing concerns in respect of access to justice for both the public and small businesses, who currently find themselves unable to access legal advice at an affordable price.

With regards to the creation of two separate codes of conduct, Kirklees Council would welcome such changes, however currently there are no in-house specific provisions contained within the code. As such the proposed code may include provisions, which should only apply to solicitors in private practice and the Local Authority would ask the SRA to give consideration as to whether such provisions should be nuanced to avoid any unintended consequences.

The current proposals would be likely to lead to a two tier profession through the creation of a second class of solicitors, who deliver unreserved work through unregulated entities but without the necessary consumer protection. Solicitors that provide non-reserved legal services

to the public through an unregulated alternative legal services provider would not be required to meet the minimum terms and conditions for Professional Indemnity Insurance set by the SRA or to contribute to the Solicitors Compensation Fund as their clients would not have access such redress. It is proposed that such solicitors would be required to ensure that their clients understood the protections available to them, however this does not mitigate the fact that consumer protection is significantly diminished. It cannot be ignored that ordinary people, such as the residents of the Borough of Kirklees, are likely to be adversely affected without a clear mechanism for redress.

Furthermore, whilst the proposals suggest that an unregulated entity would be unable to use the terms 'solicitors firm' or 'solicitors' this does not mitigate the potential for confusion. It is anticipated that very few individuals would be able to distinguish between a regulated firm of solicitors and an unregulated law firm and therefore be unable to appreciate the differing protection afforded to them should things go wrong.

In practice, as we understand it, the proposals would mean that any in-house solicitor could provide advice and assistance to the public provided they are not carrying out one of the reserved legal activities. Whilst on the face of it, this could be regarded as an attractive option to enable in-house solicitors to provide advice to other bodies and authorities without the need to obtain a waiver, it is likely to result in increasing conflict of interest situations. Furthermore, the potential for liability exposure cannot be underestimated and there is a risk that such liability would have to be covered by the Council's insurance. Additionally, any advice given in these circumstances would not be covered by legal professional privilege which is a great disadvantage to the proposals. What is more, it is unclear from the proposals as to whether an in-house solicitor would be able provide services to more than one local authority or body, therefore clarification is required so that any impact can be determined. More generally, it is concerning that legal work undertaken by the Local Authority and therefore partially funded by the tax payer could be delivered via an unregulated firm in the future, which is unlikely to instill public confidence.

Kirklees Council would echo the concerns raised by The Law Society in suggesting that the proposals are misconceived and have the potential to be damaging upon the profession rather than enhancing standards and improving access to quality services as the SRA would hope.

Yours faithfully

Julie Muscroft

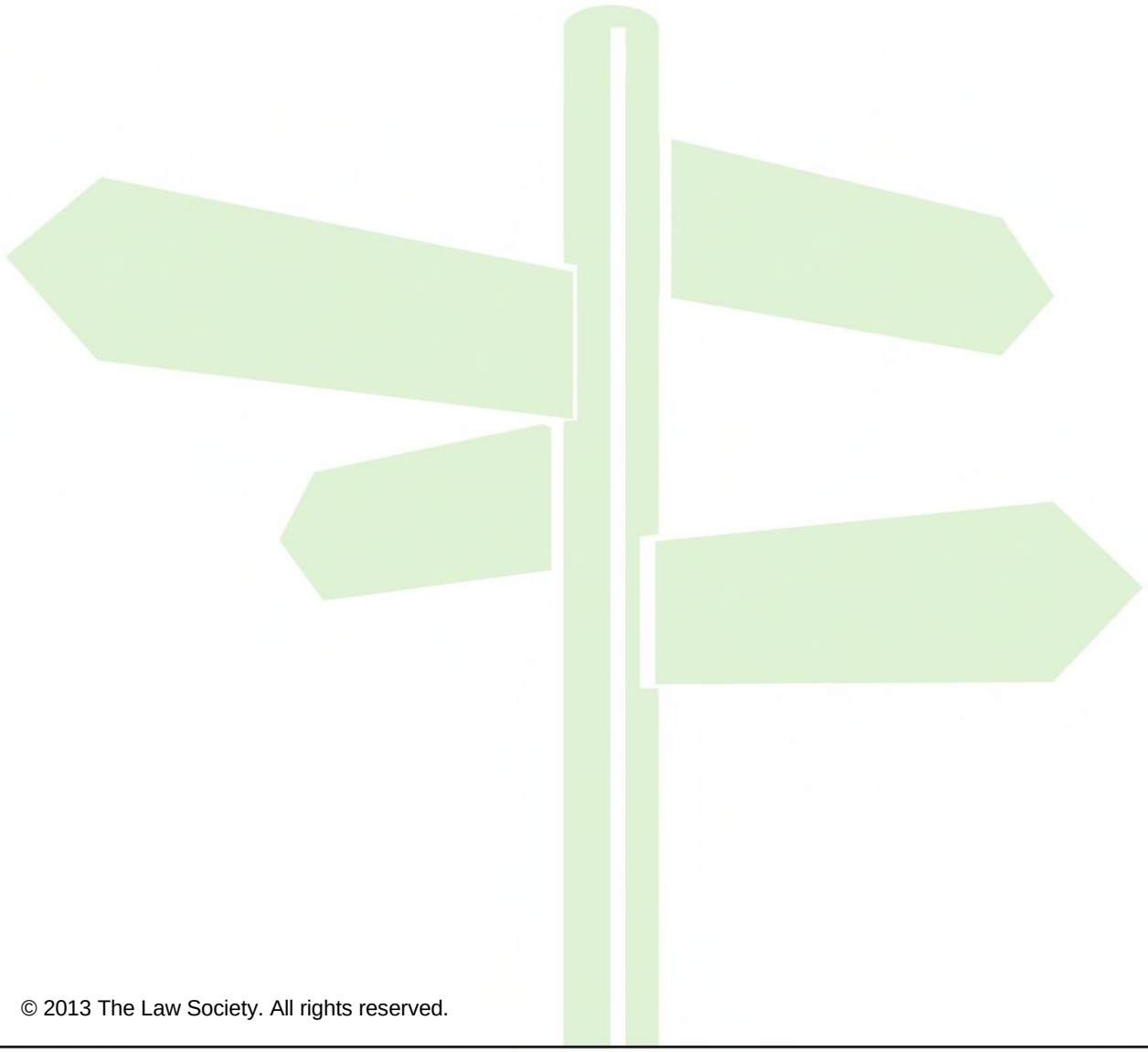
Assistant Director – Legal, Governance & Monitoring

The Law Society

Looking to the Future: flexibility and public protection

JLD response to SRA consultation

September 2016)



Looking to the Future: flexibility and public protection

Junior Lawyers Division

RESPONSE

About the Junior Lawyers Division

The Junior Lawyers Division of the Law Society of England and Wales (the "JLD") represents LPC students, LPC graduates, trainee solicitors, and solicitors up to five years qualified. With a membership of approximately 70,000, it is important that we represent our members in all matters likely to affect them either currently and in the future.

Consultation response

The JLD has responded to each of the SRA's questions below, but wishes to raise the following key points more generally:

Dual Codes

There is not a specific question on whether respondents support the implementation of separate codes for individuals and organisations. The JLD would like the SRA to consider the disproportionate effect this may have on junior solicitors. It makes sense that the content of a code of conduct should be worded appropriately to cover the individual and the organisation, and so a logical step is that there be a slightly different code for each. However the proposal fails to consider what happens when the two conflict – which takes precedence and who is more culpable? Most solicitors are employees, bound to follow instructions from their seniors. Whilst there is no question that each individual solicitor should consider themselves bound by a code of ethics and there are certainly incidents in which a solicitor should say 'no', regardless of the consequence, but what happens when an ethical question is ambiguous, and the more junior person feels under pressure? This is a real issue for junior lawyers, who are sometimes asked to work on matters they are uncomfortable with but are in a position in which they may not have job security or been working somewhere long enough to accrue any employment rights, and feel they have no choice.

"Qualified to Supervise"

The JLD considers the qualified to supervise requirement to be essential in ensuring that junior solicitors have the time to hone their skills, and fully understand their responsibilities, before they are placed in a position in which they could be wholly liable for the decisions they make. We strongly oppose the removal of this. Further, given that the SQE (the structure and content of which has not been finalised) is wholly untested, the JLD considers that it would be inappropriate at this time to remove the 'qualified to supervise' rule when no one in the legal profession can yet

vouch for the robustness of the SQE in producing NQs equipped with all the knowledge and skills they would need to set up their own practice.

As set out in our response to question 19 below, we consider that, given that the SRA, in discussions with the JLD and other parties, sought to rely on the continuance of the "qualified to supervise" requirement in seeking support for the SQE, the Handbook Review has not been considered with the concurrent SQE proposal in mind. We ask that this be addressed by the SRA as a matter of urgency, given that the next consultation on the SQE is imminent.

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

The JLD understood the desire to remove the administrative burden of requiring students to enrol with the SRA and pass the suitability test before undertaking the LPC, but have continually expressed concerns that students are committing huge sums of money as well as several years of their time in education and training sometimes not knowing or understanding the test and how it may prevent them from becoming a solicitor until they get to the point of admission. This is unacceptable. The JLD believes that additional guidance is required and the SRA need to do more to ensure that students are aware of the requirements of the suitability test in order to avoid problems for firms and trainee solicitors at the point of qualification. We do note that this is not entirely down to the SRA and students, need to take some responsibility for this but we would like to see the SRA working with universities to provide guidance at an early stage. We suggest that this be signposted clearly on the portal for applications to undertake the LPC, including some sort of "checkbox" that the student has considered the test and do not believe they need to apply for an early assessment at the time of their application.

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

Whilst the JLD is keen to see a concise set of modern Principles that apply across the profession and are relevant today, we do not want to see a “watering down” or the loss of some of the important and necessary 2011 Principles, such as the current Principle 10 - to protect client money and assets. This is surely a fundamental principle for client protection.

It should, however, be noted that we would not wish to sacrifice clarity for concise Principles. The Principles are fundamental to the profession and ensuring the protection of clients.

As an overarching comment, whilst we agree that the 2011 SRA Handbook is not perfect, we do consider that wholesale changes are necessary every 5 years because this is likely to lead to further confusion and not clarity.

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

We would like this to be more personal in that the public should have sufficient confidence in each individual solicitor because otherwise this could bring the profession into disrepute (at least as far as someone with a bad experience with one

solicitor may believe). The application and consideration of this Principle becomes more complicated when viewed in the context of the ongoing expansion and flexibility in the way in which legal services can be provided.

Clients need to have confidence in the individual providing legal services as well as the firm the individual is an employee of. Given the proposed separation of a Code for solicitors and a Code for firms, we consider this appropriate.

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?

As mentioned above, we are concerned that current Principle 10 has been deleted from the draft 2017 Principles. We would also like to see current Principle 5 re-instated because we do not believe that this is adequately covered by the other remaining Principles.

Assuming the above principles are re-instated, we are not sure what it adds to reduce the current Principles from 10 to 8. The current Principles are not, in our view, controversial or too extensive so we are not clear what removing a couple of them does to improve clarity. It just appears like unnecessary de-regulation from the Solicitors' Regulation Authority.

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?

Whilst we appreciate that it would not be possible to provide guidance and case studies for *all* possible scenarios, we believe the following three scenarios/ groups will need a case study with specific guidance:

1. A solicitor working in an unregulated firm providing unreserved legal services to the public.

2. How common interactions, such as undertakings, will work with the new "two-tier" profession we believe will be created as a result of the SRA's current proposals.

3. The changes for in-house solicitors.

4. How an individual solicitor might act where, the firm considers it has complied with the Code applicable to it, but the solicitor is concerned about the application of the individual Code to them, in relation to a task which they are being asked to perform or facilitate.

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?

In line with our comments above, the SRA should be less concerned with making a short, focused (ie concise) Code for solicitors and should be more concerned with creating a clear and specific system of regulation to ensure that clients are protected and solicitors (and firms) know what is required of them in order to satisfy that regulatory burden (ie a "minimum standard").

We are concerned that parts of the new Code for solicitors are too vague and provide insufficient guidance for solicitors as to what is required of them. This, we fear, will give the SRA considerably more discretion than they already have and require individuals to keep incredibly detailed notes on every rational thought they take during a matter. Further, a shorter Code, in terms of number of words is neither clearer nor easier to understand if, as a result of its brevity it needs to be supplemented with lots of guidance in order to have relevance.

We would also like the SRA to consult on all points at the same time in order that we can see the "final" proposed model and the links between them. A piecemeal approach to regulatory reform is unhelpful and, in our view, does not work.

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

See our response above to Question 6.

If anything, there are considerable things missing from the proposed Code for solicitors but we are unable to fully consider this without knowing the full extent of the SRA's regulatory reform proposals and the links between the various elements of regulation in our profession. Not to mention the ongoing review of the Competition and Markets Authority, which could lead to a completely different picture in terms of legal services. As such, it is impossible to say presently how relevant this Code will be, and where the gaps are.

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

As mentioned above, it is extremely difficult for us to identify what is "missing" from the Code for solicitors as this may appear in other areas of the SRA's regulatory reform programme.

We would like to see the current Indicative Behaviours (IBs) being kept, in some form or another. This may be covered within the scenarios and specific guidance in due course but, having studied the 2011 SRA Handbook during our studies, it was sometimes the IBs that made the current Outcomes clear as they provide examples of what may or may not acceptable. We agree that the SRA's analysis that the IBs are heavily relied upon, but would argue that an even shorter code with even less detail is not the answer to this.

Moreover, we consider that the theme that "brevity is better" running throughout this consultation is flawed, in that in order for this new Code to work, there will need to be supplemental guidance. The Code isn't being shortened, instead, some of the information within it is simply being moved to a separate document, which makes it harder to find for the solicitor in practice on a day to day basis. We consider that there is a great deal of practical value in the information all being in one place, which solicitors can print out, or have to hand on their shelf, just as they might have any other volumes which they use often in their day to day practice.

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

Whilst Option 1 largely replicates the current position, we do not believe that Option 2 would be workable in practice. It would be difficult to always successfully identify such conflicts, even at large corporate firms with whole conflicts teams. This would be considerably harder for smaller firms and sole practitioners.

We would be interested to see how in-house solicitors would approach this in practice given that the new Code for solicitors is expressly intended to apply to them also.

Overall, we are not sure what benefit there is in changing the current regime, particularly to make it more restrictive as Option 2 does.

Question 10 - Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?
Our answers to Question 6 to 8 apply to this question.

We also consider that the Code for firms should either repeat all the relevant bits of the Code for solicitors or just cross-refer to the other. The current drafting repeating some bits but cross-referring at other points is confusing.

It is also extremely unclear how the two Codes will work with (or against) one another or be applied and enforced in relation to one another. How will firms, and individuals demonstrate compliance or non-compliance with their respective Codes and what will this mean in a situation where a firm or solicitor's behaviour is being called into question.

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

See our responses to 6 and 7 above.

It is more a case of additional guidance and clarity that is required rather than things need taking out. We also need to be able to consider the regulatory reform as a whole.

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

Again, as above, it is not possible to provide a considered response to this question without seeing all the guidance and regulatory reforms proposed. A piecemeal approach to regulatory reform will not work. We consider that the SRA needs to look at this again in the context of broader changes to the provision of legal services which may come about as part of the work of other bodies, including the CMA.

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?

Proposed rule 6.4 is in the Code for firms but refers to the obligation being on individuals. This is inconsistent.

Clarity is also needed for subjective wording such as “competent”, “attributes” and “properly arguable”. In our view, the Code needs to be objective (insofar as practically possible) and clear enough that solicitors (and firms) can easily see what regulatory requirements they are required to satisfy and in order to ensure consistency across the profession, particularly amongst firms, as this is surely the most important point for clients to be able to know they will get at least a certain standard of professionalism and protection when receiving legal advice.

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.

Whilst we believe the COLP and COFA roles are a good thing and should remain, we are conscious that this implies a reduction in the need for individual solicitors to have extensive knowledge and to be able to make important decisions regarding such matters.

However, it is particularly good for junior solicitors to be able to raise such issues with those more qualified and with specialist knowledge to make necessary decisions. These roles provide a "go-to" person for questions, particularly where a junior solicitor may disagree with their immediate supervisor, and an obligation on those individuals to take a junior solicitor's concerns seriously.

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?

We understand that the Law Society is shortly going to publish its 2015 Regulation Survey which could further inform both the SRA and ourselves and enable us to provide a fuller response in due course.

Whatever changes are proposed/ made to the current roles, the SRA must ensure there are clear guidelines for who is responsible and how the system must work in practice.

Once again, we wonder where the current role of COLP/COFA will fit in with the outcome of the CMA review.

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?

We are very concerned with this proposal. We do not wish to see such de-regulation by the SRA as this causes significant risks for clients.

In our view, clients do not understand the distinction between reserved and unreserved activities at present and merely want to know that if they go to a solicitor they can expect a certain minimum, ethical and regulated standard. The sole protection for consumers in this proposal seems to be based on this arbitrary distinction that consumers (and indeed many solicitors) do not understand.

This proposal will result in a “two-tier” profession. It raises a number of issues, the worst of which is that smaller firms, who must remain regulated entities to carry out

reserved activities, will have an increased regulatory burden when compared to large businesses (or parts of them) who are unregulated. As such, the effect will be disproportionate.

Not only is this distinction confusing for clients to understand, it is likely to stifle competition and the availability of legal services at a reasonable cost. For everyday matters such as conveyancing, which is generally required by most individuals at some point during the course of their lives, this could increase costs and prevent access to legal services rather than assisting, or make it no longer a viable option for certain providers, despite it currently being a key source of revenue.

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?

We believe that some junior lawyers who are finding it difficult to find a job in a traditional solicitors firm could seek to take advantage of this flexibility. However we believe they may do so naively, and not understanding the responsibility which they would be required to take on due to the fact that they are not in a regulated firm and protected by a structure designed to ensure that they are only held responsible for those matters which are within their control and capability. Please see our response to question 19 below. A junior solicitor, may be an employee of a business and will still be bound by the Code, even though their employer will not be (indeed, their employer may have no knowledge or recognition of such a Code) , which could create serious difficulties for a junior lawyer in particular.

In light of this, the JLD would not seek to actively encourage its members to take advantage of such opportunities at this time, as we consider there to be a risk that they are disproportionately, to the detriment to junior lawyers.

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?

We agree with this proposal. Any relaxation of this position would concern us greatly as it could be to the detriment of clients and create even more confusion between regulated/ unregulated. However, as mentioned above, relying too heavily on the distinction between reserved and unreserved activities as a means of consumer protection is dangerous, given that in reality this will have no effect – consumers will expect the same level of service and ethical practice from anyone who seeks to call themselves a "lawyer". Once more, we refer to the reviewing being undertaken by the Competition and Markets Authority, including the comments in its Interim Report (to which the JLD submitted a response). We invite the SRA to look at this issue again in the context of the outcome of that review.

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?

As representatives for the junior members of the profession, we are alarmed by this proposal, and we consider the continuance of the "qualified to supervise rule" to be absolutely essential. We are surprised that the reasoning for proposing its removal is the “results” of the “data analysis” that indicates newly qualified solicitors do not pose

a significant risk to the delivery of a proper standard of service. The reason newly qualified solicitors are seen not to be a risk is because their work is supervised (to varying degrees based on the value of such work) by more senior solicitors who have a vast amount more experience.

It would be extremely risky for the SRA to relax the current requirements (essentially, three years' post-qualification experience plus 12 hours management training) because to do so would be a considerable risk to clients; if any such newly qualified solicitors decided to set up their own practice.

Whilst we do not think that many newly qualified solicitors would seek to do that, for we hope that most understand their limitations, we believe that they might, if felt under pressure by the jobs market or by employers who do not properly understand the full responsibilities involved in providing legal services, including the ethical duties we owe to society as a whole.

Not only do we feel that this initial three year period post-qualification is essential for a solicitors' training and experience, we consider it is often the make or break point for many young people entering the profession. The experience gained in such years forms the foundations for our careers, either within the legal profession or outside of it. It is absolutely essential for the profession, and to the longevity of the provision of high quality legal services in our jurisdiction.

We also consider the timing of such a proposal to be wholly inappropriate in light of the SRA's proposal to implement a Solicitors' Qualifying Exam (**SQE**). The SRA will recall that in responses to its consultation on the SQE proposal, concerns were raised as to the quality of the newly qualified solicitors resulting from this proposal. The SRA sought to address some of these concerns during engagement meeting in part by reassuring stakeholders that the "qualified to supervise" requirement would remain. Indeed, this was used to justify the idea that perhaps less time training in a firm was needed – newly qualified solicitors had three years post qualification to develop. As such, we are astonished to see this proposal here, and consider that the SRA has misled respondents to the SQE consultation in this regard. Is it that the SRA has not considered the handbook review in the context of the SQE? In any event, we ask that the SRA address this, and confirm the position regarding the "qualified to supervise" requirement in its next consultation on the SQE due in October, as the environment in which newly qualified solicitors will practice in goes to the heart of the standard to which the SQE must be measured.

Until the SQE has been implemented and tested as to quality, the JLD considers it would be completely irresponsible to remove the "qualified to supervise" requirement. Neither the SRA, nor indeed anyone else has any idea whether the solicitors coming out of the SQE process will pose a risk to consumers or not.

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

Yes. However, the distinction between regulated and unregulated firms will become more crucial and the SRA will, based on the current proposals, have no power to ensure that unregulated firms explain the distinction to their clients or prospective clients, which is a major concern. We believe this will cause increased confusion for clients.

We would also be interested to know what level of “detail” the SRA is proposing that regulated firms should display together with guidance on how and where this should be presented.

We also consider that it is, in part, also the SRA’s job as regulator to ensure that clients are aware of the differences it makes to be regulated by the SRA and not. This should not just be a responsibility for regulated firms.

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

Whilst we do not disagree that some form of regulatory reform is probably necessary given the changes to the profession over the past decade, we do not consider that enough factual, measurable evidence has been sought to form (or back up) the Impact Assessment. This is currently just an opinion based on a few findings which are not extensive nor detailed enough.

Such important changes to the regulatory system could have a long-lasting (possibly catastrophic, in our view) impact on the profession and how it develops over the next 5 to 10 years in particular. This is, of course, a considerable concern for junior members of the profession at a key time in many of our careers.

We would therefore ask the SRA to take a step back and consider the regulatory reform proposals extremely carefully and collate a lot more evidence, carrying out a lot more surveys, before proposing changes as a whole rather than in a piecemeal way, which is unhelpful as the proposals cannot all be properly considered in this way.

Our fundamental concern is client understanding and knowledge together with ensuring legal services are available for all those who require them. This, we note, is more likely to have an impact on smaller firms.

Based on the current proposals (as a result of the Impact Assessment), we believe that more confusion would be caused, although we do agree there are a few good proposals hidden amongst the changes.

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

We have not carried out any surveys or polls to provide any further information to support. We would like the SRA to conduct more surveys and data analysis and present this all at once before implementing any proposed regulatory reforms.
As mentioned above, we also believe that the SRA has not looked at the impact of these proposals within the context of other changes to the legal profession, including the SRA's own proposal to implement the SQE and also the CMA interim report.

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?

As mentioned above, we see the protection of client money as a current Principle of great importance. It is essential that both client money and assets are protected at all times in the best manner possible. For this reason, we do not think it wise to allow

those working in alternative legal service providers to hold client money 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?

On the basis that in-house solicitors (and alternative legal service providers - see above) are only permitted to often non-reserved legal activities to the public, we agree that they should not be permitted to hold client money in their own name. We acknowledge that the position may need to be different for Special Bodies, who often provide legal services to vulnerable people, but the overarching principle should be that client money needs to be protected and it is difficult for us to agree to client money being held outside of a client account of a regulated firm because the SRA otherwise have little power to enforce action and clients therefore are not adequately protected.

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? If not, what are your reasons?

It would not be very sensible of the SRA to allow clients of unregulated firms access to the Compensation Fund when they, by virtue of being unregulated, would not have to take out professional indemnity insurance or contribute to the Compensation Fund. In addition, such firms would not be subject to the same rules and principles so it seems, to us, hard to justify giving their clients access to the Compensation Fund. However, it is a major concern that clients (of any firm) could go to a solicitor and not be adequately protected if and when things go wrong. There is a clear gap in client protection and this is another concern of ours with the proposed creation of a “two tier” profession.

What is even more concerning is that unregulated firms will not have to tell their clients that they are unregulated and have no access to such protection. It would take a rather prudent individual (with no knowledge of the legal system or the regulatory system) to understand this difference; particularly in a situation where the unregulated firm is under no obligation to make such things clear at the outset. In our view, most clients for whom this will be a concern do not appreciate the regulatory distinctions and differences in consumer protection that would be afforded to them based on the firm they choose to provide them with legal services. In fact, the distinctions are hard to understand for those in the profession trying to review the SRA’s proposed changes to the regulatory system.

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

No. Professional indemnity insurance provides the cornerstone of protection for clients in today's legal (and various other professional) markets. It is there for when things go wrong to protect both the firm and the client who has lost out. Whilst no-one would wish such mistakes to happen, at times, they do happen. It is a fact of professional life.

It is not acceptable, in our view to expect clients to check whether solicitors (or their firms) have professional indemnity insurance before instructing them. The insurance is fundamental to public trust in the profession.

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

Based on the SRA's current proposals, there would be two options for solicitors carrying out unreserved work from within an unregulated firm. These are to have no professional indemnity insurance or to have professional indemnity insurance. As stated above, we consider it fundamental that solicitors have professional indemnity insurance to provide clients with the protection they expect if things go wrong. This is much the same if you went to an accountant, doctor or surveyor; you would expect they have insurance cover in place in case things go wrong, although you are not generally concerned whether the individual holds the insurance or the firm or body they work for does. It is important that when professionals are working with the public that they are adequately protected.

The proposals are made more difficult if a "two-tier" profession emerges within firms who carry out unreserved and reserved activities. Surely it is not appropriate for those carrying out unreserved activities to not have insurance in the same firm as those carrying our reserved activities.

If the proposals proceed as planned, it would be for clients to make a decision on the protections they have when instructing a solicitor. This is not, necessarily, a bad thing but the SRA are going to have to do a serious amount of work to ensure that clients are aware of the distinctions and options available to them as a result. We do not consider that it is good for anyone, consumers or legal service providers, if the market got to the point where a business saw no benefit in being regulated.

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?

Yes. As set out above, we believe such protection is fundamental for clients and cannot see a reason for such a requirement not to be retained, in particular where such Special Bodies are often providing services to vulnerable clients.

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

We consider that equivalent professional indemnity insurance requirements should apply to Special Bodies as do to traditional law firms. Clients should be afforded equivalent protection in a consistent manner, despite the differences between traditional law firms and Special Bodies. It is the clients that are important, not the structure of those providing legal advice to them.

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?

We are not sure what an arbitrary threshold does to protect clients. Arguably it is just another potential area for confusion.

It is not helpful for there to be regulated and unregulated providers offering the same service but with different standards of consumer assurance and protections.

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

We want to see a consistent approach across regulation. As mentioned above, we are concerned that the SRA are creating a "two tier" profession and this, in our view, is detrimental to both clients and the profession. It will not, in our view, assist in lowering the cost of all legal services, only some (ie those which become unregulated) and this poses a significant risk for clients who often will not understand the regulatory system in sufficient detail to make a decision based on all the pros and cons of a "two tier" system. Opening up the market and increasing competition is a valiant aim, but to do so in a way which misleads consumers as to the level of protection they have, and paving the way for businesses to take advantage of this is in no one's interest.

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?

It is not clear from the SRA's proposals how this would work in practice. In theory, the SRA should be able to intervene where the solicitors are caught by the regulatory system as individual solicitors. However, it may be difficult to enforce this within an unregulated firm. It is also potentially unfair, given that most solicitors are also employees, and so are bound to do as their employers order. As mentioned above, this affects junior solicitors disproportionately, as they have very little power to influence the decisions and working practices of an organisation, or even their own practice.

We note the considerable obligations in the proposed Code for solicitors to provide the SRA with information and co-operate with investigations. Presumably the SRA would use this power but we would be interested to hear more about the SRA's proposals in this respect. This again highlights the need for the SRA to consider the regulatory system as a whole rather than by piecemeal consultations.

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

Yes. There is no reason to change this. To do so seems to be de-regulation for its own sake.

Junior Lawyers Division
September 2016

Consultation: Looking to the future - flexibility and public protection

Response ID:534 Data

2. Your identity

Surname

Matthews

Forename(s)

Katherine

We may publish a list of respondents and a report on responses. Partial attributed responses may be published. Please advise us if you do not wish us to attribute your response or for your name or the name of your firm or organisation to appear on any published list of respondents.

Attribute my/our response and publish my/our name.

Please identify the capacity in which you are submitting a response. I am submitting a response…

on my own behalf as a solicitor in private practice

3.

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

No

4.

2. Do you agree with our proposed model for a revised set of Principles?

Yes but reserved activities should be widened

5.

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

Yes

6.

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?

No

7.

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?

Conflicts and Confidentiality particularly;y if you are proposing a two tier Code for firms and individuals

8.

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?

No. One Code would be better specifying where individuals need to comply as necessary.

9.

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

No

10.

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

Guidance will be essential

11.

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

This will lead to confusion in my view in particular for those practitioners without knowledge of the previous Codes

12.

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

yes save the detail about confidentiality and conflicts needs more detail and guidance

13.

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

14.

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

15.

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?

Reserved regulated activities needs to be broadened.

16.

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.

yes in the absence of a viable alternative

17.

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

18.

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?

Confusion and a loss of reputation and possible standards to the legal profession generally

19.

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

Not likely

20.

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?

The categories of reserved legal services should be widened to provide more protection for the public who do not understand the distinction

21.

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?

22.

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

I think non regulated firms should display what they cannot do and the risks the consumers run by doing business with them and more done by the SRA to promote the regulated firms and the benefits

23.

21. Do you agree with the analysis in our initial Impact Assessment?

24.

22. Do you have any additional information to support our initial Impact Assessment?

25.

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?

26.

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?

27.

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? If not, what are your reasons?

yes otherwise what is the point of regulation?

28.

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

29.

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

30.

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?

31.

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

32.

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?

This distinction is likely to confuse the public.

33.

31. Do you have any alternative proposals to regulating entities of this type?

34.

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?

Everything must be done to maintain standards in the profession and make a positive distinction from those not legally qualified or regulated

35.

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

yes

Kathryn Pettitt

I have read with interest the above consultation.

I am an in-house Solicitor in a local authority legal department. I have not responded to the detailed questions that you have raised in the consultation document but do have some general comments on the proposals.

I support the ethos that people and small businesses need to be able to access the legal advice that they need, at an affordable price, and that the SRA as regulator, has a duty to consider how the SRA can help to address this.

My concern is that the proposed approach set out in the consultation may cause more confusion than assistance to potential clients when deciding on where to obtain their legal advice, and understanding the implications (e.g. whether they are protected by the Compensation Fund, Legal Professional privilege and conflict of interest requirements). This arises from the two code approach and the proposals concerning regulation of only those bodies providing reserved legal advice. The SRA, therefore will need to issue greater guidance to citizens as well as to Solicitors to avoid much of the confusion the two tier code may create.

As an in-house public sector lawyer I am extremely interested in what changes will be made to the SRA Practice Framework Rules, especially how they will reflect the diverse range of business models being adopted by the public sector, and in particular the interpretation of Rule 4 and the interrelation with the Local Authorities (Goods and Services) Act 1970 & the Legal Services Act 2007. The consultation document does not seem to address this.

I hope this assists in the consultation and that there will be further opportunities to contribute on the SRA proposals in regards to this matter, as they develop.

regards,

Kathryn Pettitt

Chief Legal Officer

Resources

Response on behalf of Kent Law Society to the SRA Consultation: Looking to the Future – Flexibility and Public Protection

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

   No, but we believe that information about the suitability test should be made available to students at an early stage in order to make it obvious to those students who have been guilty of unacceptable conduct in the past that they cannot join the profession and also to explain to them the level of conduct to which they are expected to adhere.

2. **Do you agree with our proposed model for a revised set of principles?**

   We do not agree that the Code of Conduct needs changing. The Code of Conduct and principles are simple and workable. Furthermore, the two new Codes of Conduct are supplied by the SRA without the SRA's intended additional guidance. The SRA fails to explain how it would deal with enforcement, particularly to ensure that solicitors employed by an unregulated entity do not undertake reserved work, bearing in mind that the boundary between reserved and unreserved work is not as clear cut as the SRA assumes.

   It was only in 2011 that the SRA introduced a new Code of Conduct which it claimed was a substantial improvement on the previous one and which represented a new way forward, based on outcomes focused regulation and indicative behaviours. Only five years on, the SRA now states (paragraph 46 at the consultation) that its own Code of Conduct is "long, confusing and complicated" and that it is (paragraph 48) "detailed and prescriptive". The SRA also states (paragraph 46) that it can make the "line between individual and entity responsibilities blurred and difficult to apply". The SRA goes on to make numerous other criticisms of its own code. It is astonishing that, only five years after a new Code of Conduct was imposed and trumpeted as the way forward, it is now condemned as totally inadequate by those who drafted it. This casts a doubt over the SRA's competence and its suitability to regulate the profession at all.

   Furthermore, the wording is vague and this is likely to make it harder for regulated firms and individual solicitors to determine whether they are in breach of the code or not. It would also give the SRA too much power to determine whether there is a breach when the position is not clear-cut.

   Finally, there is a degree of overlap between the two codes, most noticeably in the areas of conflict, confidentiality and client information/identification. It is not clear which would take precedence in the event of a conflict between the two codes.

3. **Do you consider that the new principle two sets the right expectations around maintaining public trust and confidence?**

   No. It makes no sense for regulated individuals and firms to be placed under a regulatory obligation in respect of non-regulated individuals and providers: the loose wording of principle 2 means that regulated individuals and providers would have to support unregulated entities, despite the much higher levels of client protections afforded by regulated entities.

4. **Are there any other principles you think we should include, either from the current principles or which arise from the newly revised ones?**

   We are concerned that two of the principles which the SRA proposes to jettison are the requirements to "provide a proper standard of service to your clients" and to "protect client money and assets". These are extremely important principles and we do not know why the SRA sees fit to abandon them. There should also be a specific reference to the importance of confidentiality.

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?**

   See answers to 2 and 4. In addition, the SRA should provide guidance for the scenario of a practising solicitor working in an unregulated entity and told to represent a client who has clear conflicts with existing clients of that entity. It appears that, in such a situation, the solicitor would be able to represent the client, which is unacceptable.

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

   No.

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

   No.

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

   See answer 4 above. Also, the SRA wrongfully proposes to remove outcome 8.3 of the current Code which bans unsolicited approaches in person or by telephone to members of the public. This ban provides essential protection to vulnerable clients – e.g. at a police station. The SRA claims that it is justified in removing the prohibition because protection is provided by 1.2 in the proposed new Code for solicitors and 1.1 in the Code for firms – but these only ban the solicitor/firm for abusing their position by taking "unfair advantage of the clients or others", which is a weaker form of protection.

   We are also concerned that solicitors in a regulated firm might well not accept an undertaking from a solicitor in an unregulated entity, due to the lack of protection if things went wrong. Undertakings are an essential part of the practice of law and anything which casts doubt over their worth (as the SRA's proposals would) would cause obstruction and delay to the legal process.

9. **What are your views on the two options set out for handling actual conflict or significant risk of conflict between two or more clients and how do you think they will work in practice?**

   We prefer option 1 because there will be circumstances where there is an actual conflict and yet the solicitor should still be able to act – e.g. in conveyancing transactions. While we accept that option 2 is simpler in that it simply bans a solicitor acting where there is a client conflict, option 1 probably deals with the realities of

work situations in a practical way. We should add however that even option 1 needs redrafting in our view because it appears weaker than the current rule and affords less public protection.

10. Have we achieved our aim of developing a short focused code for SRA regulated firms that is clear and easy to understand?

No – see answers to 2 to 9.

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

No. On the contrary, the Code needs more detail.

12. Do you think that there is anything specific missing from the Code that we should consider adding?

See answers to 2 to 9.

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?

Yes. See answers to 2 to 9.

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

Yes.

(a) In responding to this question, please set out the ways in which the roles COLP/COFA either assist or do not assist with compliance?

Subject to answer 15, we accept that these roles do work best in smaller and medium sized firms and that, in larger firms, the roles can be too wide. Nonetheless, we think that it is important that one person is responsible for each of these roles at a firm and it is of course always up to the firm to create a structure to spread the work out if necessary.

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

In larger firms, there are more resources by way of compliance software and support for the COLP and COFA, whereas our members report that, in small and medium sized firms, the roles are usually allocated to partners and not non-fee earners, as most firms usually cannot support a non-fee earner at high management level. More support for COLPs and COFAs is therefore required. The SRA helpline that is offered should be more practical, and the advisers able to give more comprehensive advice.

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?

We are strongly opposed to the SRA's proposal to allow solicitors to deliver non-reserved legal services to the public through unregulated entities and to describe

themselves as “practising solicitors”. This proposal, if implemented, would cause high levels of confusion among consumers, create two tiers of solicitor and very substantially damage public protection. Clients of an unregulated entity would be exposed to a much greater risk because of the lack of regulatory controls and oversight. It is astonishing that the SRA can describe this proposal as being about “public protection”.

The current position is that a non-regulated entity can of course employ a solicitor to do legal work, but that solicitor cannot be described as a practising solicitor and cannot provide legal services to the public as a solicitor: she is there to provide legal services for her employer. This arrangement works wells.

There is no doubt whatever that, if the SRA’s proposal were allowed, consumers would think that they would have the same protections that would apply if they instructed a regulated firm of solicitors. In fact, of course, they would have no such protection for the following reasons:

- Legal professional privilege would apply to the solicitor but not to the unregulated entity.
- Rules on conflict and confidentiality would apply to the individual solicitor but not the unregulated entity.
- The unregulated entity would have no professional indemnity insurance.
- The unregulated entity would have no access to the Compensation Fund.
- The unregulated entity would not be subject to LeO.

Dealing with each of these in turn, the question of legal professional privilege is extremely important. In the Prudential case in 2013, the Supreme Court decided that legal professional privilege applied only to qualified solicitors and barristers. Our members report that some of their clients, who had previously instructed unregulated entities, were shocked to discover that confidential advice which they had received from that unregulated entity was not covered by legal professional privilege and therefore had to be disclosed in court or employment tribunal cases. The SRA’s proposal would make this situation much worse because consumers would no doubt believe that legal professional privilege applied when instructing the solicitor and, while it would indeed apply to the individual solicitor, it would not apply to the unregulated firm. In practice, this would cause serious confusion and uncertainty as to the extent to which legal professional privilege applied. The SRA appears to overlook the fact that the right of legal professional privilege is a right of clients, not lawyers.

The same point applies in relation to the rules on conflict and confidentiality: the individual solicitor would be bound by these important rules but the unregulated entity that employed her would not. How this would be resolved? How would the consumer know whether information he supplied to the unregulated entity would remain confidential or not and how would conflicts be dealt with?

Again, the consumer would assume that the solicitor employed by an unregulated entity would have insurance for negligence claims, but this would not be the case and the unregulated entity could be uninsured and unable to pay out on claims. The same point applies in relation to the Compensation Fund. No doubt solicitors and unregulated firms would not have to make payments into the Compensation Fund, with the result that firms authorised by the SRA would have to make increased contributions to the fund.

In addition, unregulated entities would not have to employ COLPs and COFAs which would of course save them money but reduce client protection. The consequence of the SRA's changes would be that the burden of regulation would be shifted disproportionately on to regulated smaller firms and sole practitioners, making reserved activities such as litigation potentially more expensive still for consumers.

Finally, the individual solicitor would be subject to LeO but the unregulated firm would not – how would this be resolved in practice?

The SRA says that it would be up to the unregulated entity to decide if it wanted to tell consumers that it employed a (regulated) solicitor. This is an obvious recipe for confusion among consumers, most of whom would be unable to grasp the significance of the distinction. The SRA claims (paragraph 17) that this would increase consumer choice because the consumer could instruct a solicitor in an unregulated firm but an uninformed choice is no choice at all and the SRA's proposals would simply cause confusion among consumers. For most consumers, an assessment of regulatory status (and the protections therefore available) does not play an important part in their choice of provider of legal services. Few consumers are likely to distinguish between a regulated firm of solicitors and an unregulated law firm and understand the difference in protections they provide.

Client protections are complicated and not easily understood. In practice, the overwhelming majority of clients would not be able to properly comprehend the implications of buying their legal services from an unregulated provider.

There is to be no prohibition against unregulated firms advertising that they employ solicitors. Furthermore, the term "lawyer" is not a protected title and can be used by anyone when supplying unreserved legal services.

There is to be apparently no obligation on unregulated entities to have systems in place for dealing with client files, including retention of files when the matter is complete or the entity closes down, undermining the abilities of the solicitor employed by an unregulated entity to comply with their own obligations.

The SRA states that these changes would promote innovation, reduce costs for consumers and allow "unmet" legal need to be met. The SRA fails to identify what "unmet" legal need is supposed to mean. In reality, of course, there certainly is "unmet" legal need – as a result of the virtual abolition of legal aid over the last 20 years.

In addition, an unintended consequence is that a solicitor employed by an unregulated entity may be able to circumvent the ban on unregulated entities offering reserved work. She could do this by making an application to the judge to act as a paid McKenzie Friend on behalf of her client. At present, such work is reserved and can only be exercised by a solicitor or other regulated lawyer. Bearing in mind the extent to which litigants in person are clogging up the courts, judges would probably treat such applications favourably, entirely undermining the SRA's intention of leaving in place the restrictions on who can conduct reserved work.

The SRA's real purpose here is of course to cut the cost of legal services (paragraph 16 of the consultation). It is probably true that these changes would result in some services being provided more cheaply because no doubt unregulated entities would employ solicitors who would describe themselves as regulated solicitors. Unregulated entities would not of course have to bear the expense associated with regulation and no doubt could provide services at lower cost – and with far less client

protections being afforded to the public. Succeeding in its aim of cutting the cost of public services does not, however, justify severe damage to the reputation of the legal profession and severe erosion of public trust in it, let alone the serious damage to public protection which these changes would undoubtedly cause. The solicitors profession in England and Wales has already suffered reputational damage abroad as a result of the SRA's "reforms" over the last few years, particularly in the USA and in Europe and there is no doubt that these reforms, if implemented, would result in foreign jurisdictions regarding the profession as lacking in integrity (particularly in relation to issues over conflicts of interest) and no longer upholding the high standards which it used to.

17. How likely are you to take advantage of the greater flexibility around where solicitors can practise as an individual or as a business?

Not at all – we have no desire to be complicit in the damage to public protection which these proposals would entail.

18. What are you 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?

We agree with this proposal.

19. What is your view on whether the current "qualified to supervise" requirement is necessary to address and identify the risk and/or is fit for that purpose?

We strongly oppose this proposal. The current rule 12 requires a solicitor to have three years' post-qualification experience and to have undertaken a management course before setting up as a sole practitioner. The SRA proposes that newly qualified solicitors should be allowed to set up their own unregulated firms. This would undoubtedly severely undermine the reputation of the profession and severely damage public confidence and public protection. The only solicitors who would want to set up their own firms as newly qualifieds would be those who had failed to perform adequately at their own firms and who therefore felt they had no choice but to set up their own firms as no-one else would employ them. There is simply no merit in any of the SRA's arguments. The SRA claims that newly qualifieds do not present a significant risk to delivery of a proper standard of service and that it has no evidence that newly qualifieds pose a danger. That is entirely untrue: the SRA's own research shows that the solicitors which cause most problems for the public are those at the beginning and at the end of their careers. Research conducted by Nottingham Law School for the SRA indicates that solicitors require four years post-qualification experience to be confident of their legal expertise. In practice, newly qualifieds generally do not cause problems because they are carefully supervised by more senior solicitors in the firm and their work carefully checked to ensure that any errors are corrected before the work is finalised for the client. In the absence of such checks, there is no doubt that newly qualifieds would make numerous mistakes, thus causing serious damage to public protection.

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

In principle, this sounds sensible because it would enable regulated firms to be able to advertise the fact that they provide protection that non-regulated entities do not have. In practice, however, it is hard to see how this could be done in a way which

would be succinct and easy to display to consumers eg on headed notepaper. The information could of course be included in the regulated firms' Terms of Business, but most consumers would regard this as "small print" and would be unlikely to pay much attention. The SRA should issue guidance as to what information should be displayed and how extensive it should be. A further difficulty is that, even if the SRA did this, the SRA has no power to require unregulated entities to display information informing the public that they offer no public protection and so it is hard to see how this proposal would enable consumers to make informed choices.

21. Do you agree with the analysis in our initial impact assessment

Although the new Code of Conduct is apparently intended to make it easier for firms to comply with regulation, we have highlighted in our answers above how this is unlikely to be the case, given how loosely worded the new Code is and the uncertainties left by some of the redrafting of the current Code. The SRA, in putting forward these reforms, refers to the existence of "unmet" legal need, but fails to define that. There is no evidence that the SRA's changes would result in unregulated entities satisfying these alleged "unmet" legal needs or that they would do so at lower cost. The real unmet legal need at present has resulted from the near abolition of legal aid.

The impact assessment also fails to recognise the serious risk to consumers by way of loss of client protection.

22. Do you have any additional information to support our initial impact assessment?

See answer 21 above.

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?

Yes. Clearly, if a regulated solicitor was employed in an unregulated entity, consumers would no doubt believe that any money handed over to that solicitor was protected in the way that client money is in regulated firms. In fact, any money handed over by the consumer to unregulated entity would not be protected at all and, for example, if that entity went into liquidation, then its bank and other creditors would be able to seize that money. For the purposes of public protection, therefore, solicitors working in unregulated entities should not be allowed to hold client money.

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?

They should not be allowed to hold client money personally, for the reason set out in answer to question 23. Special bodies include trade unions, law centres and Citizens Advice Bureaux. These bodies have been subject to transitional arrangements in the Legal Services Act 2007, meaning that while the solicitors they employ are regulated by the SRA, the body remains unregulated. The SRA's suggested new approach is to treat special bodies in the same way that it currently treats multidisciplinary practices (where reserved activity is SRA regulated and non-reserved activity is not subject to the SRA handbook). These bodies play an important role in providing access to justice for vulnerable people who may not be able to afford access to legal services. As well as considering the impact of the proposals on bodies such as law centres, the SRA needs to carry out a detailed analysis of the impact on the market

and other providers in the market by extending proper regulation to these providers.

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?

Yes. Such solicitors would not be required to contribute towards the Compensation Fund and so should not be allowed to benefit from it.

(a) If not, what are your reasons?

See above. In addition, work carried out by unregulated entities would clearly result in clients being exposed to much greater risks due to lack of controls. If unregulated entities were able to rely on the Compensation Fund, the fund could be depleted by substantial claims. Allowing unregulated entities to rely on the Compensation Fund would of course mean that regulated solicitors would have to contribute more to the Compensation Fund, which would be unfair. Of course, we should add that points like this expose the huge problem with the SRA's proposals which the SRA seems unable to grasp: that the existence of unregulated entities employing practising solicitors would expose the public to serious risks and loss of protections. The SRA claims that they have no objection to allowing consumers to "lose" their protection in exchange for reduced price. This fails to recognise that consumers usually do not recognise and understand the distinctions between regulated firms and unregulated entities and the benefits of the relevant protection.

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

We do not agree with this. If the solicitor is to be described as a practising solicitor and held out as such by the unregulated entity which employs her, then clearly that solicitor should have individual professional indemnity cover. Not to require this would cause confusion to consumers and serious damage to public protection. Consumers would no doubt assume that any solicitor was fully insured for any errors and losses and consequently should be insured. Clearly, a solicitor would not be able to comply with principle 6 to act in the best interest of the client, without PII cover in place.

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

See answer 26 above. There is a serious risk of a solicitor working in an unregulated firm not taking out PII cover. As this is expensive, not having it would enable the unregulated entity to charge clients less – but the consequence would be that, in the event of a claim, consumers might have no redress as the unregulated entity could go out of business. Furthermore, the unregulated entity could include in its contractual arrangements with the consumers a term that the unregulated entity cannot be sued for an amount greater than the value of the retainer. This would of course significantly reduce public protection. Again, the SRA assumes that consumers would understand the level of protections or lack of protection offered – in reality most consumers are unlikely to understand this and will be driven entirely by price.

28. Do you think 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?

Yes. It is particularly important that, when providing reserved legal activities, PII should be in place. Not to require it would be to cause confusion among consumers and cause serious damage to public protection.

29. Do you have any views on what PII requirements should apply to special bodies?

PII requirement should be the same as for regulated firms.

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?

The imposition of arbitrary thresholds is likely to make decision making even more confusing for consumers. Regulation should be applied consistently to all providers of legal services in order to protect consumers. As we have already pointed out, it is against the public interest for there to be regulated and unregulated providers offering the same service with differing levels of protection.

31. Do you have any alternative proposals for regulating entities of this type?

See answer to 30 above.

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?

This only goes to highlight how ludicrous the SRA's proposals are. It would indeed be from a practical point of view very difficult for the SRA to intervene into the practice of an individual solicitor working at an unregulated entity and the SRA identifies at paragraph 161 some of the problems. There is really no way round this and it only helps to highlight how deeply flawed and impractical the SRA's entire proposals are.

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

Yes. The SRA correctly identifies at paragraph 169 the problems with departing from this position.

20 September 2016

Keystone Law

Consultation: Looking to the future - flexibility and public protection

Consultation questionnaire form

This form is designed to be completed electronically—in MS Word. Please save it locally before and after completing it.

Question 1

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

No

Question 2

Do you agree with our proposed model for a revised set of Principles?

In part. We should like to see the following principles kept and we think they benefit the profession and the client and could not see how a solicitor should be allowed to act in contravention of these principles:

- provide a proper standard of service
- act in the best interests of each client
- protect client money and assets
- keep the affairs of the client confidential.

Question 3

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

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?

See question 2 above.

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?

Yes. When and how to cease acting for a client.

If solicitors are permitted to act as such through non regulated entities, then there needs to be guidance to deal with confidentiality. The solicitor could find himself in a situation where he is unable to make a disclosure to other parts/persons within his business because they are not regulated at all. By way of further example the Solicitor might have to carve his confidential client details out of the business continuity processes of the non regulated employer. If so, that would be illogical.

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?

In the main. It is not clear when new Section 8 would apply. It refers to when providing legal services. Surely it would apply more widely in the context of running a firm. For example, as drafted, it is not clear if it applies to starting up a firm. We submit it should.

Question 7

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

No

Question 8

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

Yes. What happens in the event of a conflict between the Code for solicitors and the Code for firms. Ideally the chances of any such conflict would be removed and then this concern falls away. To remove any chance for a conflict there would need to be changes to the rules on conflict and confidentiality.

Question 9

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

We favour option 1. We are concerned though about the potential dilution of the prevention of a conflict of interests. Indeed even the current position is not without its shortcoming. Naturally there are two arenas of potential conflict: the persons advising should be free from conflict and so should the firms in which those persons work. It should be noted that there are (and will continue to be) an increasing number of non-solicitors providing legal advice. The prevention of conflicts of interest is vital for all providers of advice and for all persons being advised. We submit that the rules on conflicts need to extend to all advisers in any capacity and not just solicitors or non solicitors working in regulated law firms.

Further, we submit that the rules on conflicts need also to be extended to all entities providing legal advice. There is no logic to preventing two parts of a regulated firm from acting on opposites sides of a matter and allowing two parts of a non regulated firm to act on opposites sides of a matter.

If this is not possible, then we submit that imposing different rules on regulated firms and non regulated firms concerning conflicts is anticompetitive. On this basis it would be better to remove such anticompetitive fetter, providing the firm is able to ensure no harm comes to the client.

Question 10

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

In the main.

Question 11

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

As above.

Question 12

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

As above

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?

Yes. Rule 7.6 (for solicitors) imposes an ongoing obligation to ensure all information disclosed to the SRA is correct. There needs to be a distinction between information which must be kept up to date, such as office addresses and persons within the firm, and information which the SRA seeks to know as at a point in time, such as turnover.

Rule 8.1 (for solicitors), we submit a requirement to comply with AML rules would be adequate.

Rule 8.8 (for solicitors), we submit that the additional wording about charges, circumstances and interest removes clarity rather than adds it. Publicity should be accurate and not misleading in all respects.

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.

Yes, further we do not understand why there should not be a requirement for a COLP and COFA within an unregulated business in which solicitors are practising. A solicitor or group of solicitors practising within a non-regulated business. Confidentiality, for example, cannot be left to individual solicitors, but there will need to be some input and responsibility from the unregulated business itself. Further conflicts will need to be managed, as it must surely be the case that conflicts attach to the entity, whether regulated or non-regulated and thus that two solicitors in the same non regulated entity may not be on opposite sides of the same matter.

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?

No response offered

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?

We agree that persons who are a solicitor should be free to undertake all kinds of work in all kinds of ways. We welcome the proposal that they be allowed to practise in a regulated capacity and a non-regulated capacity. However, it needs to be very clear to clients what type of entity they are retaining. We do not believe the client understands the difference between the term solicitor and other terms such as lawyer, associate, paralegal etc. Indeed, even these terms are misleading. A client can engage a lawyer or associate (for example) within a regulated firm or within a non regulated business. We would like to see the SRA look at this again and to see what clear distinctions can be drawn between regulated and non regulated firms. This may perhaps need to be part of a wider review of regulation affecting the providing of legal advice (both regulated and unregulated). For example, could styles and scope of the legal and trading names of businesses offering legal advice be regulated, could the publicity rules for regulated firms require certain prominent statements? The desirable outcome is that that any prospective purchaser of legal services would know at first glance, and not by looking at the “small print”, whether a regulated or a non regulated firm is being engaged.

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?

Unlikely, though we expect it will be unregulated businesses who take up this opportunity.

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?

We think this is a good idea.

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?

We don't think this is required. If there is a requirement that work done be of a good standard then it should be up to firms to decide how they achieve that.

Question 20

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

No, but we do think they should be required to provide a link to where clients can find this information out within their terms and conditions. This needs to be tied in to the need, as mentioned earlier, to ensure clients can, within seconds, differentiate regulated and unregulated firms.

Question 21

Do you agree with the analysis in our initial Impact Assessment?

No response offered

Question 22

Do you have any additional information to support our initial Impact Assessment?

We suggest the issue of fees be looked at again. We think PC fees should apply to all solicitors and that turnover fees on the firm should be abolished. The introduction of firm fees was a retrograde step in our view and a return to the previous (ie PC fees only) regime is suggested.

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?

Yes. Only regulated firms should be able to hold client money.

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?

They should not be able to hold client money under any conditions. Holding client money affects the entire organisation and it is not practicable to ring fence a section (ie a solicitor) and allow him/her to hold funds. Inevitably funds will be held by the non-regulated business and inevitably, in all but the smallest non-regulated businesses, non solicitors will be dealing with client funds entirely free of regulation. Client funds need to be backed by PII and that needs to be for the entire operation.

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?

If not, what are your reasons?

It should be available to those who contribute. If alternative providers contribute then they should have access. Contribution though should be restricted to regulated firms, some of which might be alternative providers.

Question 26

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

Yes, subject always to the need to make it very clear that services provided by such a person are not insured. The distinction between regulated and unregulated services must always be crystal clear.

Question 27

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

The difficulty is as already mentioned, to achieve crystal clarity between regulated and unregulated services.

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?

No response offered

Question 29

Do you have any views on what PII requirements should apply to Special Bodies?

No response offered

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?

Yes, subject to where such non regulated entities are providing legal services then they should not be able to claim any link or similarity to the regulated firm. As above there needs to be clear distinction and, for example, similar names or styles would mean the client is not clear as to whether the services are being provided by a regulated or an non regulated entity.

Question 31

Do you have any alternative proposals to regulating entities of this type?

No response offered

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?

No response offered

Question 33

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

Yes.

Thank you for completing the **Consultation questionnaire form**.

Please save a copy of the completed form.

Please return it, along with your completed **About you form**, as an email attachment to consultation@sra.org.uk, by **21 September 2016**.

Alternatively, print the completed form and submit it by post, along with a printed copy of your **About you form**, to

Solicitors Regulation Authority
Regulation and Education - Policy - Handbook 2017
The Cube
199 Wharfside Street
Birmingham
B1 1RN

Consultation: Looking to the future - flexibility and public protection

Response ID:686 Data

2. Your identity

Surname

Kiteley

Forename(s)

Mark

We may publish a list of respondents and a report on responses. Partial attributed responses may be published. Please advise us if you do not wish us to attribute your response or for your name or the name of your firm or organisation to appear on any published list of respondents.

Attribute my/our response and publish my/our name.

Please identify the capacity in which you are submitting a response. I am submitting a response…

on behalf of my firm.

Please enter your firm's name:: Kiteleys Solicitors

3.

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

I have read, and concur with, the response to the consultation submitted on behalf of the Law Society and adopt their response to this question.

4.

2. Do you agree with our proposed model for a revised set of Principles?

No.

I have read, and concur with, the response to the consultation submitted on behalf of the Law Society and adopt their response to this question.

5.

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

I have read, and concur with, the response to the consultation submitted on behalf of the Law Society and adopt their response to this question.

6.

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?

I have read, and concur with, the response to the consultation submitted on behalf of the Law Society and adopt their response to this question.

7.

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?

I have read, and concur with, the response to the consultation submitted on behalf of the Law Society and adopt their response to this question.

8.

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?

I have read, and concur with, the response to the consultation submitted on behalf of the Law Society and adopt their response to this question.

9.

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

I have read, and concur with, the response to the consultation submitted on behalf of the Law Society and adopt their response to this question.

10.

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

I have read, and concur with, the response to the consultation submitted on behalf of the Law Society and adopt their response to this question.

11.

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

I have read, and concur with, the response to the consultation submitted on behalf of the Law Society and adopt their response to this question.

12.

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

I have read, and concur with, the response to the consultation submitted on behalf of the Law Society and adopt their response to this question.

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I have read, and concur with, the response to the consultation submitted on behalf of the Law Society and adopt their response to this question.

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I have read, and concur with, the response to the consultation submitted on behalf of the Law Society and adopt their response to this question.

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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?

I have read, and concur with, the response to the consultation submitted on behalf of the Law Society and adopt their response to this question.

16.

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.

I have read, and concur with, the response to the consultation submitted on behalf of the Law Society and adopt their response to this question.

17.

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

I have read, and concur with, the response to the consultation submitted on behalf of the Law Society and adopt their response to this question.

18.

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?

I have read, and concur with, the response to the consultation submitted on behalf of the Law Society and adopt their response to this question.

19.

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

I am not.
I have read, and concur with, the response to the consultation submitted on behalf of the Law Society and adopt their response to this question.

20.

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?

I have read, and concur with, the response to the consultation submitted on behalf of the Law Society and adopt their response to this question.

21.

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?

I have read, and concur with, the response to the consultation submitted on behalf of the Law Society and adopt their response to this question.

22.

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

Yes of course.
I have read, and concur with, the response to the consultation submitted on behalf of the Law Society and adopt their response to this question.

23.

21. Do you agree with the analysis in our initial Impact Assessment?

I have read, and concur with, the response to the consultation submitted on behalf of the Law Society and adopt their response to this question.

24.

22. Do you have any additional information to support our initial Impact Assessment?

I have read, and concur with, the response to the consultation submitted on behalf of the Law Society and adopt their response to this question.

25.

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?

I have read, and concur with, the response to the consultation submitted on behalf of the Law Society and adopt their response to this question.

26.

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?

I have read, and concur with, the response to the consultation submitted on behalf of the Law Society and adopt their response to this question.

27.

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? If not, what are your reasons?

I have read, and concur with, the response to the consultation submitted on behalf of the Law Society and adopt their response to this question.

28.

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

I am appalled at the proposal which will inevitably lead to those looking for a quick buck to avoid insurance, and when the inevitable claims follow, there will be overwhelming confusion on the part of specific clients and the public as to what is meant by using a "solicitor" and how to access legal services in general. The SRA argument that those best suited to step into the skills gap are the very solicitors at present presented from doing so is poorly reasoned. It is precisely because of a solicitors training, insurance and regulation that he or she is best placed to offer legal services.

29.

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

As per my answer to q26, and the detailed and sensible response to this question within the law society response.

30.

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?

I have read, and concur with, the response to the consultation submitted on behalf of the Law Society and adopt their response to this question.

31.

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

I have read, and concur with, the response to the consultation submitted on behalf of the Law Society and adopt their response to this question.

32.

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?

I have read, and concur with, the response to the consultation submitted on behalf of the Law Society and adopt their response to this question.

33.

31. Do you have any alternative proposals to regulating entities of this type?

I have read, and concur with, the response to the consultation submitted on behalf of the Law Society and adopt their response to this question.

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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?

I have read, and concur with, the response to the consultation submitted on behalf of the Law Society and adopt their response to this question.

35.

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

I have read, and concur with, the response to the consultation submitted on behalf of the Law Society and adopt their response to this question.

Consultation: Looking to the future - flexibility and public protection

Response ID:334 Data

2. Your identity

Surname

Genilde

Forename(s)

Guerra

We may publish a list of respondents and a report on responses. Partial attributed responses may be published. Please advise us if you do not wish us to attribute your response or for your name or the name of your firm or organisation to appear on any published list of respondents.

Attribute my/our response and publish my/our name.

Please identify the capacity in which you are submitting a response. I am submitting a response…

on behalf of my firm.

Please enter your firm's name:: Kravitz & Guerra, PA

3.

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

I am very proud to be a Solicitor !

4.

2. Do you agree with our proposed model for a revised set of Principles?

yes

5.

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

yes

6.

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?

7.

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?

8.

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?

yes

9.

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

10.

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11.

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

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16.

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.

17.

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

18.

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?

19.

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

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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?

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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?

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

23.

21. Do you agree with the analysis in our initial Impact Assessment?

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22. Do you have any additional information to support our initial Impact Assessment?

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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?

26.

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?

27.

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? If not, what are your reasons?

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

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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?

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

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

Consultation: Looking to the future - flexibility and public protection

Response ID:210 Data

2. Your identity

Surname

Raynor

Forename(s)

Kurt Nicholas Andrew

We may publish a list of respondents and a report on responses. Partial attributed responses may be published. Please advise us if you do not wish us to attribute your response or for your name or the name of your firm or organisation to appear on any published list of respondents.

Attribute my/our response and publish my/our name.

Please identify the capacity in which you are submitting a response. I am submitting a response…

on my own behalf as an employed solicitor

3.

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

4.

2. Do you agree with our proposed model for a revised set of Principles?

5.

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

The removal of the principles that solicitors should 'provide a proper standard of service to your clients', 'act in the best interests of each client' and 'protect client money and assets' has negative implications for consumer protection and the maintenance of professional standards.
The Principles should continue to refer to the solicitor's duty to keep the affairs of the client confidential.

6.

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?

7.

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?

8.

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?

The creation of separate codes of conduct distinguishes the responsibilities of an individual solicitor, wherever he or she is working, and those of a regulated entity. The creation of two codes is not an issue. However, the approach creates two tiers of solicitors: those working in a regulated entity and those working in an unregulated entity, with consequential risks to consumer protections and professional standards which risk damaging the standing of solicitors and creating confusion for consumers;
Although both of the draft Codes focus on brevity and simplicity, they provide less certainty about what is and is not permitted. Some solicitors might prefer a more definitive approach so that compliance is clearer and there is less discretion for the SRA to determine when there is a breach, which could result in enforcement action that might have been avoidable if the Codes were clearer. It is difficult to take an

informed view on how the new Codes would work in practice be without seeing the associated guidance which the SRA has not published alongside the draft Codes.
The language of the draft Codes is imprecise and could mean that members currently practising in a fully compliant way could find themselves accused of a breach after the proposed new codes come into force.
There is some overlap between the two draft Codes, most noticeably in areas such conflict, complaints and client information/identification. If this is not addressed, it is not clear which would take precedence where such inconsistencies exist.

9.

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

10.

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

11.

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

The consultation makes clear that solicitors employed by an unregulated entity would continue to be regulated as individuals and would be subject to conflict rules. However, as the conflicts rules will not apply to unregulated entities, in practice they will not have much effect if any on the unregulated entities whilst the regulated entities will be subject to the same level of restriction as they are now or, potentially, a greater level depending on which of the two options on conflicts is adopted by the SRA.
The SRA offers two options for dealing with conflicts:
- Option 1 largely replicates the 2011 Code, in prohibiting a solicitor from acting where there is a conflict or significant risk of such a conflict, unless specified circumstances are met and protections are provided.
- Option 2 would narrow the ability to act given that it provides for a complete bar on acting where there is an actual conflict, and protections to be put in place if there is a significant risk of a conflict.
Option 2 may be unworkable because it is not always possible to identify that an actual conflict exists and a solicitor may unwittingly act in a conflict situation. Because the non-regulated colleagues of regulated solicitors would not be subject to conflict rules, there is a risk of confusion to consumers, a very favourable competitive advantage to unregulated entities and lack of a fundamental consumer protection for clients of unregulated entities.

12.

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

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

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16.

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.

Consideration of these questions will benefit from the input of current COLPs and COFAs who are best placed to identify unnecessary requirements while firms and sole practitioners will also wish to consider how valuable the roles themselves are.

17.

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

18.

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?

There is insufficient evidence to support these proposals or the expected benefits from their implementation, which are stated to include improved access to quality services at affordable prices, enhanced professional standards, and increased employment opportunities.
In particular, the proposals could have undesirable and/or unintended consequences as follows:
Reputation and standing of solicitors
The proposals may result in two tiers of solicitors. Those working in unregulated businesses are unlikely to be able to give advice which is legally privileged, will not be required to have PII, clients will not have the benefit of compensation fund and the protection of the principles governing conflicts of interest. Not only is this likely to create consumer detriment and confusion but it is likely to damage the reputation of the title of solicitor.
Legal Professional Privilege (LPP)
LPP should attach to clients seeking advice from a solicitor holding a current practising certificate wherever he or she practises and any attempts to dilute or make LPP more difficult to obtain or enforce could erode the concept of LPP, which is a cornerstone of the justice system and a key right of clients. This could also undermine the standing of the solicitor profession both at home and abroad. It is not right in principle for LPP to be a distinguishing factor between regulated and unregulated service providers.
It is likely that in-house solicitors working in an unregulated entity, for example a local authority, providing advice to individuals or organisations other than the unregulated entity would not have the protection of LPP.
Conflicts and confidentiality
The proposals will result in confidentiality only applying to individual solicitors working in an unregulated entity, including in an in-house team, but not to the entity or to other employees. There is a risk that a solicitor may unwittingly act in a conflict situation and that clients may not be aware of a potential or real conflict of interest or of the fact that the entity is not subject to the rules on conflict. It also results in making regulated entities less attractive because they will be competitively disadvantaged versus unregulated entities.
Consumer protections - Professional Indemnity Insurance (PII) and the Compensation Fund
Under the SRA's proposals, solicitors working in unregulated entities would not be required to have PII and their clients would not have access to the Compensation Fund if things go wrong. This risks eroding a key element of current client protection. The proposals risk creating two tiers of client protections - with different rules and protections applying to solicitors' clients depending on the kind of entity in which the solicitor is working.
The SRA proposes that solicitors working from unregulated entities would be required to make sure that their clients understand whether and how the services they provide are regulated and the protections available to them. Even for those working within the legal sector, insurance and client protections are complicated topics which are not easily digested and understood and clients cannot be expected to fully comprehend the implications of purchasing their legal services through an unregulated provider. The proposals also risk undermining or depleting the existing Compensation Fund as solicitors working from unregulated entities would not have to contribute to the Fund; this would seem likely to mean that solicitors working in regulated entities would have to make additional contributions to secure the Fund's viability, increasing the regulatory burden on them and exacerbating the two tier profession that could result from the proposals.
Consumer confusion about status
Under the proposals, solicitors holding a current practising certificate would be able to use their title whether providing legal services to the public through a regulated or unregulated entity. While a provider

would not be able to use the term 'solicitors firm' or 'solicitors' unless the entity was regulated by the SRA,this would seem unlikely to mitigate the risk of consumer confusion especially where the unregulated entity described itself as a 'law firm' or 'legal services firm' or advertised that they employ solicitors. Consumers will lose the assurance they currently have as to quality and protections when they engage a solicitor. It is inappropriate that consumers will have to undertake fairly substantial due diligence. This will additionally undermine the standing of the profession internationally.
Annual practising certificate (PC) fees
There is no information on this point and the SRA needs to undertake and publish an analysis of the projected impact of its proposals on the PC fee, and in particular the turnover based firm fee. The SRA should not close this consultation until this information is available.
Supervision
Newly qualified solicitors without any experience would be able to set up their own unregulated firms. Newly qualified solicitors working in an unregulated entity would no longer have the requirement of support and guidance from more experienced solicitors. This will increase the risks to clients as well as putting newly qualified solicitors themselves at risk, and negatively impact on the standing of the solicitor profession Damage to standards will increase incrementally as this applies year on year and fewer solicitors in unregulated entities have ever received supervision.

19.

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

20.

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26.

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?

Consideration of this question will benefit from the input of current in-house teams and relevant local employers.

Consideration of this question will benefit from the input of special bodies, such as law centres, which play an important role in providing access to justice for vulnerable people who may not be able to afford access to legal services.

27.

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? If not, what are your reasons?

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Consultation: Looking to the future - flexibility and public protection

Consultation questionnaire form

This form is designed to be completed electronically—in MS Word. Please save it locally before and after completing it.

The Law Centres Network is the membership body for Law Centres in England, Wales and Northern Ireland, each of which is a not-for-profit legal practice providing legal help and advice in civil law, with a particular focus on social welfare law. Law Centres support the rule of law and, as part of it, universal access to justice. In particular, they target their services at the most disadvantaged and vulnerable people and groups in society, helping make their rights a reality and aiming to tackle the root causes of their poverty or disadvantage.

Law Centres are embedded in local communities and run by committees of elected local people drawn from community, legal sector and health sector organisations. The Law Centres Network ('LCN', the trading name of the Law Centres Federation) has coordinated and represented Law Centres collectively since 1978. There are currently 44 Law Centres across the UK represented by the Network. They are primarily funded by a mix of civil legal aid contracts, local authority grants or contracts and fixed-term project grants from charitable trusts and foundations.

LCN members work with clients who are vulnerable, often because of social, cultural and/ or economic disadvantage. A good training for those involved in assessing improper or unprofessional activities must include understanding the context within which clients can be vulnerable when involved in a legal action.

No less important is to understand the complexities that solicitors face in managing not only the action but also the needs, expectations, behaviours and responses of a vulnerable client. This can result in cases taking longer, needing more careful attention and producing high degrees of pressure for the solicitor. It is within this context of complex casework and client base, with pressures on solicitors that we submit our Response.

The resources of LCN are limited: this Response focusses on those aspects in the consultation that are of significance or otherwise important to ourselves and Law Centres.

Question 1

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

LCN members have not reported particular issues.

Question 2

Do you agree with our proposed model for a revised set of Principles?

This is our response for Questions 2 to 4.

LCN has no strong views on the need for further principles to be added to the revisions. We believe the priority is in ensuring a level of quality and consistency in how they are applied by individuals, firms and legal bodies. This is affected by the resources that the SRA has available to apply to implementation.

We would have welcomed an illustration as to how the reduced principles could impact on the interpretation of risk, behaviour and disciplinary actions in the work of SRA staff.

The SRA recently closed a consultation on how staff will in future interpret and implement behaviours and disciplinary actions and we would welcome information in due course, as to how those changes have worked, plus the implications for SRA, if any, in that interpretation when applied to the proposed revised principles.

Question 3

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

As above

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?

As above

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 to Questions 5 to 13

LCN have no specific comments on the Codes or casestudies other than as set out in Questions 1 above.

We would observe that, should the changes go ahead, individual solicitors who are not responsible for applying the Firm Code of Conduct should be required after 36 months active practice, to know, understand and be able to demonstrate familiarity with that Code also: as they are the owners and managers of the future.

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?

As above

Question 7

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

As above

Question 8

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

As above

Question 9

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

Referring to the two ‘Conflict of Interest’ drafts, the first option more clearly directs a solicitor as to what s/he must do in practise: the second option is simpler and puts the onus more on the solicitor in terms of outcomes. If only for that reason this could cause solicitors to more often err on the side of caution.

The second option appears a plainer read but does not deal directly with the perception of conflict: perception of conflict can be a difficult area for practitioners, particularly those developing experience within the professional practice and is what has made the issue so grey at the edges in the past.

Question 10

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

We have few anecdotal reports or comments relating to use of the Code. Amongst those , one is a view that the Code of Conduct can be unwieldy to work with in practice and that removing the indicative behaviours is to be welcomed.

Question 11

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

We have no comment on this point

Question 12

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

We have no comment on this point

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?

We have no comment on this point

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.

LCN members do not have direct experience of implementing these roles which are not required within Law Centres.

We support the principle of clear and delineated responsibility within solicitor led practices that are defined in these two roles: these work best when accompanied by clearly written and defined roles and responsibilities for decision making authority across senior staff including managing or financial partners, COLPs COFAs etc.

We represent a network of member agencies and charitable companies that have a range of skills in innovative roles to deliver services. The LCN believes in the adaptability of knowledgeable staff and that the skills, tasks and knowledge required in the COLP/COFA roles can be effectively and reasonably identified and shared amongst more than two people.

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?

LCN members do not have direct experience of implementing the COLP / COFA roles. However, our members support the development of forums for discussion of the compliance roles, and the sharing of best practice in relation to compliance. The LCN would encourage increased training to be delivered by the SRA / TLS to be available for all individuals involved in compliance type roles, whether these fall within the COLP / COFA definition, or as in our members case, more widely. Furthermore, such training, peer support and forums should be available to those who may be looking to move into those roles in the 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?

The LCN recognises that the intention to open up and liberalise the manner in which legal advice is tailored and delivered, is one driver to these proposals. The LCN is broadly supportive of opening up delviert options and supports the principle that the SRA seeks to achieve in broadening quality solicitor activity: however we have concerns as to how this can be achieved.

The LCN and our members have considerable experience of the consumer/client need for solicitors to be able to work with an approach that is multi-channelled, addressing different levels of requirements. In our experience, this regularly occurs when working with a client base with complex problems and needs and is undertaken by staff members in Law Centres every day.

Legal help, particularly when provided to disadvantaged groups and / or vulnerable people, is frequently inextricably linked, for the service user, with a need for other support. For example, this might be in engaging with government systems and social support structures, in using financial acumen, or in providing legal advice and representation that falls outside of the definition of reserved legal activities.

Central to any proposed changes to relax regulatory oversight of solicitors for service users, we would expect a level of protection from risk of these service users. Measures should incorporate the proportionate risk to consumers, with the need for quality of work, clarity of information and who supervises: these are essential to maintain trust and confidence in the services that solicitors can deliver.

We are concerned that the proposals (Section 3) do not address the means by which any resultant changes in the perception of solicitors will be monitored, even on a trial basis, for their effectiveness in delivering the desired outcomes.

The consumer protection and information issues for vulnerable groups were raised in the recent consultation around the Separate Business Rule and consequent changes and have some parallels to these

proposals. There may be some learning to be gained in enquiry into how and why those changes have worked for consumer advantage: and in the circumstances in which legal service providers may successfully take up new models to broaden the reach of solicitors.

Access for those from disadvantaged groups or vulnerable users

We support the wish to make the 'legal services industry' and the access to the same more open, clear and more easily understood by the general population and specifically for those who are unfamiliar with social and legal systems.

However, solicitors delivering advice are regularly perceived by the general public as more knowledgeable than non-solicitors, whether or not they have less experience, or are practising or non-practising solicitors. As a result, solicitors can be in a powerful position, particularly with those from disadvantaged groups. We believe that that power must be contained in benchmark standards to be required of individuals, whether delivering regulated or non regulated services. That may mean considering incorporating certain elements of the proposed 'Firms' Code of Conduct, when practising solely in non-regulated entities as would be the case if those individuals opened up a company or firm to do regulated work.

Managing a balance of increased availability and consumer access to knowledgeable solicitors, with clarity on different roles and information remedies together with proportionate enforcement mechanisms, is recognisably a difficult one. In the absence of a monitoring and evaluation system it is reasonable to anticipate that any unorthodox employment of solicitors (for example as a consultant, or on zero hours contracts) could operate in some situations to the detriment of both inexperienced solicitors and consumers and go unnoticed, particularly where those solicitors could be exploited because of their own status or characteristics.

We have considered the impact of combining these measures across all those in the consultation, including the proposals to reduce the requirements for post qualification experience in running a firm. We recommend that there may be some further consideration needed to understand how to protect against consumer risk with a combination of i) the current difficulty in newly qualified Solicitors gaining (regulated) employment, ii) alternative legal providers (ALPs) with no quality mark

arrangements, iii) employing lawyers who have limited actual authority in the organisation, iv) the intention to leave the responsibility of communication of the differences in regulated and non-regulated (Section 4) to the individual solicitor's judgement and responsibility, and v) in the absence of the grounding of an experienced firm or recognised responsible agency.

Turning to the detail of the scenarios described to illustrate the potential for ALPs (paragraphs 85-88): as drafted, these suggest strong and liberalising principles of expanding solicitors' influence. Our concern arises when we consider particularly the following aspects and the impact on those consumers who for reasons beyond their control are disadvantaged in most legal and social systems and might need to take advantage of unregulated advice:-

a) The need to maintain the reputation of a solicitor as having integrity and control in all the work undertaken for any client when that client could move between a regulated firm and a non-regulated ALP, during the course of the same case;

b) Clarity: the Section 4 message that the individual solicitor, not the ALP involved, will find the way of communicating content about non-regulated work. That needs clarity as to where the responsibility for 'non-legal' Consumer Act communication mechanisms and protection lies. The expectation is that communication will sit with the solicitor yet the protection mechanisms and control may well be in the control of ALP owners. Studies indicate that consumers' expectation is that a solicitor who is regulated is responsible for redress and expect work undertaken by solicitors to carry the same protections (and are often disappointed to find they do not). It may need more work to consider any conditions or mandatory guidance required of the solicitor, as with the consumer communication guidance relating to the Separate Business Rule.

c) The different complaints information to convey where different stages of a piece of work are to move between non-regulated work (ALP) and then referred to a regulated agency (that is, a linked firm, or linked business). This can make up a complex basket of information to relay to a consumer base that finds the legal world complex and opaque and that has a limited level of experience of the differences between regulated and non-regulated activities. There may be an impact, even where consumers are informed that legal regulation does not apply, if

there is an upsurge of complaints received by the Legal Ombudsman against solicitors in these situations: the likelihood that this will increase the percentage of cases that are not within remit is there.

d) An expectation that proposals could encourage new providers to speculate: this is reflected particularly in (paragraph 85) scenarios d and f which we consider could have considerable drawbacks for the inexperienced consumer.

A scenario could be the setting up a service quickly as a loss leader to test the market in high volume work, for low cost advice. This could have any or all of the following factors:

. the use of a low experience/skills staff base,
. attract users with the incentive of 'solicitors advice'; lack of solicitor control in real terms,
. with no minimum quality standards, client care values are compromised in less profitable cases in order to maintain a low cost base,
. adopts a business model to identify and 'filter' better, more profitable cases into an associated regulated

It is foreseeable for such projects to collapse or close quickly should the model be unsustainable or unworkable. It is possible to anticipate at the lower fee-earning end of the 'market' that speculators may exploit inexperienced practitioners who need work. A solicitor can of course withdraw from the position where there are concerns as to how the ALP is working but in reality there is more likely to be difficulty for an individual at the outset of their working life, to take the decision to resign.

The end result of such a scenario is consumers are disadvantaged in having been attracted by the incentive of 'solicitor's advice' and may lose funds in the ALP collapse. Where those funds are not recoverable through consumer processes or not recoverable within strict timeframes that are required in regulated legal matters, then the consumer may well be prevented from seeking alternative representation which has a direct impact and feels let down by this particular failure of access to justice.

We anticipate that there are unlikely to be resources within SRA to monitor effectively the potential for such events in the unregulated

market other than via complaints received by LeO.

Whilst we recognise the point raised by the SRA, that such scenarios may or may not be taking place with the use of non-practising solicitors. However, if practising solicitors get caught up in these situations, we consider that can have a substantial result of further undermining trust in the profession and reducing consumer confidence in seeking reasonable and affordable help that has includes a benchmark quality standards.

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?

We are not likely to use this option

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?

We agree that the position should remain, following the considerations set out in response to Question 16

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?

A minimum requirement of active practise is necessary for the essential skills, knowledge, judgment and expertise to supervise a complex service. Many inexperienced or vulnerable consumers use legal services in times of distress and uncertainty. A person with a major responsibility for running such a service should have sufficient prior practise and experience and should not be in a position to run a regulated business immediately on qualification.

There does not appear to be any evidence of detriment or disadvantage in the current requirement of 36 months' experience, as opposed to any other time frame proposed. Accordingly, the LCN does not recognise a need for this regulation to change.

On the point that complaints to LeO are not high amongst practitioners in that post qualification range: that may be related to the fact that complainants often complain about the firm or company involved, rather than the individual practitioner, and accordingly, it is unclear whether the complaints data in the name of firms or companies accurately reflects the range of experience / qualification of those concerned.

Question 20

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

LCN agree with the principle that communications should be less about tutoring consumers in what is regulated and what is not: and more about addressing the need to be clear, accurate, consistent and appropriate to the audience. However we have concerns about how it is proposed to be achieved within the diagram illustrated: In particular the aim for [including] *"the solicitor brand, the "regulated by the SRA" brand and consumer facing brands…"* in messages to a range of consumers or clients of mixed legal services which would need to be managed by those familiar with communicating messages.

We have addressed and repeat here our response to Question 16 and our concerns for the potential impact on consumer protection and redress in light of exploitation of the relaxation around employment of solicitors in non-regulated entities

Additionally there is potential for confusion when a service moves between different 'brands' or between regulated and non-regulated services, within linked companies. Even with knowledgeable consumers, experienced in how systems processes work, confusion can arise with a build-up of complex communication messages: although others may be able to absorb and have no problems.

For the reasons discussed earlier around consumer communication, we would encourage the continuing provision (already started by the SRA) of more information and advice to enable all solicitors, whether recently or more qualified, to gain confidence in communication. This should include as a minimum; taking responsibility for and managing expectations, clarity and simplicity of explaining legal matters and the practical issues in managing and implementing such a practice.

Question 21

Do you agree with the analysis in our initial Impact Assessment?

We recognise and support the key intentions of finding a means to enable those who cannot access legal services at an affordable cost, to do so.

There are an increasing range of measures under development including public legal education, increased use of transparent fee charging scales, comparison websites, and open data that can be useful to build a more informed and guided client/consumer population in how and when to use solicitors.

Our concerns are addressed under Question 16 and relate to that lack of trial evidence or likely impact of potential providers who may use the opportunities presented to exploit inexperienced consumers and solicitors. Furthermore, that any disadvantage is likely to disproportionately impact those vulnerable and disadvantaged groups.

Question 22

Do you have any additional information to support our initial Impact Assessment?

No

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?

No: they should be able to be responsible and manage control mechanisms in situations where solicitors with other providers do the same, who receive client money.

This is not least because the provision proposed in paragraph 128 could cause problems for the solicitor in certain employments where they have no control over assets of the client.

That the solicitor will be responsible for any personal misconduct relating to client money and assets (a wider definition than client money) is understood. That this could happen in situations where solicitors do not have regulatory controls enabling them to hold client money (a narrower definition) when a disagreement arises with an employer, leaves this open for a very defensive position to be taken by such employees or even a head in the sand approach, none of which is to the client advantage.

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?

Our view is that there is no evidence based reason to move from the current position: where there is one solicitor responsible for the implementation of SAR within the Special Body, the client account is in the name of that person.

Solicitors can and do hold and manage client money and this delivers regulatory control and oversight. There is anecdotal support for this as accountants and regulated banks know, recognise and understand the position and regulations under which solicitors hold client money.

We are holding discussions on this topic with the SRA.

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?

If not, what are your reasons?

The problem is that, whilst the consultation paper recognises there is a clear line between individual and entity regulation, the clients that some of the providers will represent, (for example in mixed business models that will be lawful) will continue to come across a distinctly unclear line as to when non-reserved legal activities move to reserved legal activities (regulated) and then move back to non-regulated activities.

Whilst recognising that it is the responsibility of the solicitor to continue to explain the differences, this is likely to be an area for consumer confusion. This would be an increased problem where the solicitor is part of a team, supervising some activities and not others, and for example, moving between one legal entity and an ALP. It is unrealistic to expect clients (who are arguably at their most vulnerable when involved in the contentions of a legal case) to expect to recognise and remember the stages and actions that are on one side of that line and another. The problem lies with activities being defined by the definition of reserved legal activities that does not include the essential work, advice and support, particularly in social welfare civil law, that is delivered as pre-representation preparation. We of course recognise that resolving that problem is not within the remit of the SRA.

We consider that clients should be entitled to call on the Fund where the activities involved (in an ALP or regulated firm) represents a continuous course of casework development from that essential preparation (including client care letters, exploratory research, correspondence and investigation to make a judgment on casework) and moves into the narrower definition of reserved legal activities.

Question 26

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

We have not a view on this as yet.

Question 27

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

As above

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?

Yes

Question 29

Do you have any views on what PII requirements should apply to Special Bodies?

We consider that there should not be a one-model for all situations, minimum terms and conditions recommended by the SRA for solicitors. We are in discussion with the SRA on PII requirements.

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?

It is not desirable to introduce thresholds that do not have a defined purpose or recognised outcome: however if no thresholds are introduced, we would encourage monitoring and evaluation of the potential for consumer confusion around the protections available, particularly where an entity is dominated by solicitors but not SRA regulated

Question 31

Do you have any alternative proposals to regulating entities of this type?

As above

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?

We consider that the ability to intervene into an individual solicitors practice should be maintained, whether employed or in a freelance capacity, in any entity, unless and until there is compelling evidence that it is not necessary.

Question 33

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

Yes

Thank you for completing the **Consultation questionnaire form**.

Please save a copy of the completed form.

Please return it, along with your completed **About you form**, as an email attachment to consultation@sra.org.uk, by **21 September 2016**.

Alternatively, print the completed form and submit it by post, along with a printed copy of your **About you form**, to

Solicitors Regulation Authority
Regulation and Education - Policy - Handbook 2017
The Cube
199 Wharfside Street
Birmingham
B1 1RN

Consultation: Looking to the future - flexibility and public protection

Consultation questionnaire form

This form is designed to be completed electronically—in MS Word. Please save it locally before and after completing it.

Introduction

About LawWorks

LawWorks (the operating name for the Solicitors Pro Bono Group) is pleased to respond to the SRA consultation.

LawWorks is a charity which encourages, supports and celebrates pro bono by solicitors, law schools and law students across England and Wales. We are generously supported by the Law Society and by over 100 members (financially and in-kind), including international and City firms, regional, medium and small firms, and in-house solicitors and organisations.

The focus of our work is on supporting and developing local independently run pro bono advice clinics and connecting smaller charities and not-for-profit organisations in need of free legal advice with volunteers from amongst our membership. This year we have been piloting more in-depth pro bono advice, casework and representation ('secondary specialisation') including supporting solicitors to represent at 1st-tier social security appeal tribunals and, with the charity Together for Short Lives, establishing clinics in hospices for children with life-limiting conditions (and associated casework on social care and housing issues).

We support our members and clinic volunteers with training, information, networking opportunities and a range of online resources and materials. Our annual Pro Bono and Student awards recognise and celebrate the pro bono commitment of our members and law students.

The SRA consultation and pro bono

The SRA consultation provides an opportunity for LawWorks and others to highlight the importance of pro bono in enabling access to justice, and to identify some of the relevant regulatory and related issues.

A theme to our response is that current regulations and regulatory approaches more often inhibit than enable pro bono and the provision of free legal advice. We believe that recipients of legal pro bono should be treated as equally as 'consumers' as those

who pay for legal services (or where legal services are indirectly paid for – e.g., through legal insurance or no-win no-fee arrangements). However, we believe it is possible to provide appropriate protections for pro bono customers (beneficiaries) while also applying more flexible and 'light-touch' (and enabling) regulation. Given the overarching policy objectives in the Legal Services Act (LSA) 2007, we believe that regulatory barriers to pro bono are most often an 'unintended consequence' or a result of confusion, lack of clarity or of too narrow an interpretation.

Context is relevant and important – the key point being that solicitors provide pro bono voluntarily, in good faith and without financial remuneration, most often for vulnerable individuals (or charities and not-for-profit organisation supporting them) not eligible for legal aid and otherwise unable to pay. Whilst there can be a 'business case' for pro bono (which LawWorks supports and promotes), with appropriate safeguards (including applying the Pro Bono Protocol) we see this as a virtuous circle, no different from many factors and motivations for ethical corporate social responsibility policies.

Our response is restricted to matters relating specifically to pro bono and we do not address or comment on many important issues and proposals included in the consultation. The power and contribution of pro bono reflects the profession's integrity, values and robustness. In seeking a regulatory framework which enables pro bono, our response should not be taken as endorsing proposals described or intended as promoting more affordable or innovative legal services. In this regard, we note in particular the Law Society's response to the consultation and the broader issues and concerns it identifies.

There are 'barriers' to pro bono which are either outside of the direct authority of the SRA (e.g., Financial Conduct Authority requirements for pro bono consumer debt advice), or which the SRA alone may not be able to change (particularly restrictions on in-house pro bono related to the LSA 2007). However, we hope the SRA in championing access to justice (and under the auspices of the policy objectives in the 2007 Act), will support - and join forces with – broader efforts to enable and maximise the profession's pro bono commitment and contribution.

Question 1

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

N/A

Question 2

Do you agree with our proposed model for a revised set of Principles?

Question 3

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

N/A

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?

LawWorks believes that current principle 5 ('provide a proper standard of service to your clients') should be retained.

While recipients of pro bono legal work do not pay for the legal services they receive, but they are 'clients' and 'consumers' whose interests should be protected and promoted. The Principles should apply equally to all consumers - e.g., regardless of whether they pay or are beneficiaries of voluntary free legal services) – this is reinforced by new Principle 6 (a slight change in wording from current Principle 4): 'Act in the best interest of each client'. For the avoidance of doubt, we would welcome explicit reference being made to this, in the context of pro bono legal work, in guidance.

The Joint Pro Bono Protocol for Legal Work ('the Protocol') was developed to promote and support consistently high standards of pro bono work, seeking to build upon (and not replace) professional codes of conduct. The Protocol was developed under the auspices of the Attorney General's Pro Bono Coordinating Committee and has been endorsed by the Law Society of England and Wales, the Bar Council of England and Wales and the Chartered Institute of Legal Executives (CILEx). The Protocol uses the title 'lawyer'.

The Protocol states that pro bono legal work 'should always be done to a high standard', and includes (for example):

- 'When a lawyer is requested to agree to undertake a piece of pro bono legal work the lawyer should hive his/her decision within a reasonable time;
- The terms on which the legal pro bono work is undertaken including the circumstances in which the relationship may be terminated should be made clear at the outset;
- The pro bono legal work should only be undertaken by a lawyer who is adequately trained, has appropriate knowledge, skills and experience and, where necessary, adequately supervised for the work in question;
- The lawyer undertaking a piece of pro bono legal work (and where appropriate his or her supervisor) should have no less than the minimum level of legal expertise and experience as would be required if the particular work in question was paid work;
- Once a lawyer has agreed to undertake a piece of pro bono legal work the lawyer (and if appropriate his or her firm) must give that work the same priority, attention and care as would apply to paid work' [emphasis added].

We hope pro bono will be referenced in the guidance (supported by case studies), both providing a positive steer and recognition by the SRA of its importance, and to

address matters raised in our consultation response (see below).

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?

LawWorks believes that it would be helpful to have case studies and guidance on pro bono and pro bono scenarios. As the SRA will be aware, there is significant need for free legal advice services. For example, 84 per cent of registered clinics in the LawWorks clinics network have seen an increase in demand for free legal advice since the introduction of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). Similarly, the economic climate of recent years has contributed to a growing need for free legal advice and support among disadvantaged members of the community, and by the not-for-profit organisations that support them.

At a time of high demand for pro bono services, it is vital that the new Code does not create any unnecessary barriers to the delivery of such services, while providing proportionate protections for consumers of pro bono legal advice. As seen with the regulation of in-house solicitors, the SRA Practice Framework Rules 2011 (PFRs) created uncertainly and ambiguity around what can and cannot be delivered by pro bono in-house lawyers. Nervous about breaching the PFRs, in-house solicitors and their organisations have sometimes taken an overly cautious approach and interpretation, creating avoidable barriers for pro bono volunteering. Rule 4.10 of the PFRs and the interpretation of the phrase "...part of your employer's business" given in Guidance Note (X) is an example of where unclear and ambiguous wording has restricted the delivery of pro bono advice.

It is important that the SRA consider the full implications on the delivery of pro bono advice when formulating the new Code, and spell out clearly and unambiguously what can and cannot be delivered.

Pro bono legal advice is delivered in a wide variety of models, with new innovations emerging as the profession responds to the free legal needs of individuals and communities. LawWorks would be happy to work with the SRA to identify particular pro bono case studies to reflect the broad range of service delivery models. The guidance should reflect common issues that currently arise in the development of new pro bono services and cause particular concerns, for example around supervision, conflict of interest policies, and insurance.

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?

There is need for clarification around pro bono work, for example a specific section within the guidance on pro bono and the SRA's regulatory approach to pro bono activity delivered by regulated volunteers.

We would welcome a general statement by the SRA that it is supportive of pro bono legal activity and will apply the regulations proportionately where pro bono legal work is being delivered in good faith. This would give potential volunteers and their firms or employers the confidence to engage in pro bono work where they may previously have been deterred, for example for fear of accidentally breaching the regulations while trying to provide much needed, free legal advice.

Ensuring a high quality of legal work provided on a pro bono basis could still be guaranteed through regulations setting out the professional standards solicitors must meet when giving advice.

We agree that the proper handling of conflicts of interests is a critical public protection. However, the current conflict of interest rules can be disproportionate in certain pro bono advice settings, e.g., in the context of a 30 minute, one-off initial advice clinic session where no ongoing relationship is formed, there is less need to undergo a formal conflict of interest check with the volunteer's firm. This can be contrasted to a situation where a firm takes on a pro bono client on an ongoing basis and where the firm's internal conflict of interest checks would be appropriate. A presumption that there will be no conflict of interest in certain pro bono settings unless the individual solicitor is personally conflicted would be more appropriate and proportionate.

Question 7

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

N/A

Question 8

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

See our response to Question 4.

Question 9

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

As detailed in our response to Question 6, we believe there should be a more straightforward conflict of interest regime in certain one-off, initial pro bono advice settings which would be more appropriate and proportionate in practice.

Question 10

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

N/A

Question 11

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

N/A

Question 12

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

As we propose in response to question 5, we would welcome specific clarity in the guidance on the application of principles and of rules in the context of consumers of pro bono legal activity.

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?

N/A

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.

We encourage the SRA to give consideration to this issue in situations where Special Bodies come under the full regulation of the SRA at the end of the transitional period. For many not-for-profit bodies , where there is no financial element to the solicitor-client relationship and either no money is held or transferred, or the amounts involved are small (e.g., meeting the cost of a GP letter in support of a social security benefit appeal), these requirements would place a heavy burden on already stretched volunteer-run entities. For bodies providing free legal services, he regulatory or reporting obligations on bodies should be proportionate and minimised.

We would also highlight to the SRA the wide variety of governance structures which exist in the non-profit sector and hope that consideration of the compatibility of the proposals with each is being explored to avoid any unintended consequences of the changes.

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?

N/A

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?

In the context of pro bono we echo the SRA's acknowledgement that the Practice Framework Rules (PFRs) go beyond the requirements of Legal Services Act 2007 (LSA), and are confusing and difficult to understand. LawWorks would like to use the opportunity of this consultation to highlight the impact of the regulatory restrictions on in-house lawyers in the context of pro bono, and highlight a need for the SRA to change the PFRs to allow in-house solicitors to provide pro bono advice in reserved legal areas.

Section 15 of the LSA prevents the delivery of six categories of reserved legal activities by in-house counsel to anyone other than their employer, where such activities are carried out as part of their employer's business. Although in-house lawyers are free to provide pro bono advice in other areas, the current regulatory landscape restricts in-house lawyers who want to do areas of pro bono work that fall within the definition of 'reserved legal activity' and can be seen to be connected to their employer's business.

LawWorks believes that the current restrictions on pro bono work are an unintended consequence of the LSA and that section 15 of the LSA be amended to permit the undertaking of pro bono by in-house counsel for reserved legal activities. We would welcome the SRA's support for this change.

The PFRs has a specific provision for pro bono work: rule 4.10 states that in-house lawyers can provide services in connection with reserved legal activities to the public on a pro bono basis provided that it is not done as part of their employer's business. However, the SRA has given a broad interpretation to the phrase '…part of your employer's business', as detailed in Guidance Note (X) of the PFRs.

We believe that the SRA interpretation of the LSA is too restrictive. The wide definition of employer's business creates a deterrent for in-house teams doing pro bono work. In-house lawyers are unlikely to take on any reserved legal matters for pro bono clients because they feel that the work will be in some way connected to their employer and therefore be caught by the legislation. We are therefore pleased to see that the SRA are considering removing provisions in the current PFRs that place restrictions on in-house solicitors, and we would encourage the SRA to support removing entirely the restriction on in-house solicitors providing pro bono advice in reserved legal areas.

As a minimum, we encourage the SRA to narrow the scope of guidance note (X). LawWorks would argue that the situations outlined in this guidance note should not be classified as part of an employer's business - such as: where the employer requires an in-house lawyer to undertake pro bono legal work; where the employer provides management, training, supervision or professional indemnity insurance in relation to such work; or where an employer publicises the pro bono work or rewards the employee in any way in relation to such work. Through our engagement in this field we see that a growing number of companies have strong Corporate Social Responsibility (CSR) programmes, and volunteering is seen as something the

organisation supports. This is not necessarily core business, but it is something that the company facilitates staff involvement in and therefore would constitute part of the employer's business in the SRA's wide interpretation of the LSA.

Allowing in-house teams to provide advice to pro bono clients in reserved legal areas would enable an increase the provision of pro bono legal advice and assistance to charities and individuals unable to afford to pay and not eligible for legal aid.

The SRA states that it would like to put in-house solicitors on an equal footing with other solicitors; amending the regulatory framework so that in-house solicitors can provide advice to pro bono clients in reserved legal areas is relevant to achieving this. In supporting changes to the regulatory framework, we are not proposing that beneficiaries of legal pro bono should have less protection than other consumers of legal services. However, there should be an appropriate balance between regulations which protect the interests of consumers and those which unreasonably or unintentionally deny or inhibit access to free legal services.

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?

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?

LawWorks supports individuals unconnected to an entity authorised by the SRA being able to provide pro bono. This can include solicitors on career breaks looking to maintain their skills and experience by volunteering between employment. Currently, LawWorks is required to apply for waivers from the sole practitioners' rules to allow for this pro bono work to be delivered. Having this specifically allowed in the regulations (in pro bono contexts) would be more efficient and give individuals on career breaks the appropriate reassurances that their volunteering is not breaching the rules. This is a further example where a lack of clarity, or unintended consequences, creates barriers to the delivery of pro bono advice.

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?

N/A

Question 20

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

We would encourage the SRA to consider the implication of these requirements for special bodies providing free legal services and for other pro bono settings, particularly where advice is being delivered through a variety of models. For example, how would these requirements apply in telephone or 'Skype' pro bono advice clinic settings?

Where volunteers are trying to support particularly vulnerable clients where potentially they have low literacy levels or English is not the client's first language, it's unclear how this additional requirement would offer any added reassurance or support to the client.

Question 21

Do you agree with the analysis in our initial Impact Assessment?

We would ask that particular consideration be given to how change may impact on the provision (directly or indirectly) of pro bono legal services.

Question 22

Do you have any additional information to support our initial Impact Assessment?

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?

N/A

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?

N/A

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?

If not, what are your reasons?

N/A

Question 26

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

N/A

Question 27

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

N/A

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?

It should be a requirement for Special Bodies to have PII to ensure protection for their clients. However, current requirements could be clearer and practice more efficient.

LawWorks has to regularly apply for waivers on behalf of the pro bono clinics in our network to allow for 'reasonably equivalent' cover as opposed to the 'qualifying insurance' otherwise needed. It would be more efficient for the new regulations to make this the default in the context of pro bono services.

Clarification is needed on what 'reasonably equivalent' cover means. A lack of clarity can delay the development of new pro bono advice services because legal volunteers, and their firms or employers, are nervous to sign up to new services where 'reasonably equivalent' is not clearly defined and are therefore unsure that they are adequately covered to meet regulatory requirements.

Question 29

Do you have any views on what PII requirements should apply to Special Bodies?

N/A

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?

N/A

Question 31

Do you have any alternative proposals to regulating entities of this type?

N/A

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?

N/A

Question 33

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

N/A

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B1 1RN

Lawyers in Charities

Consultation: Looking to the future - flexibility and public protection

Consultation questionnaire form

This form is designed to be completed electronically—in MS Word. Please save it locally before and after completing it.

Question 1

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

We believe that it is important that diversity within the profession and ensuring that there is a high standard for entrants into the profession is of fundamental importance. Students should therefore be provided with clear advice as to the type of behaviour that will be expected of them as solicitors. They should also be made fully aware of how previous conduct may affect or restrict their entry into the profession at an early stage.

Question 2

Do you agree with our proposed model for a revised set of Principles?

We agree that there should be a consistent model for all solicitors wherever they work. However, we have some concerns with the proposed model. In particular, we support the recommendations made by the Law Society in their consultation response and agree that New Principle 2 should be redrafted as “Ensure that your conduct upholds public confidence in you and in other regulated individuals and firms.”

Question 3

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

We support, as indicated above, a consistent approach for all legal advice providers that would maintain public trust and confidence in the profession. However, we support the Law Society's submission on this issue and agree that New Principle 2 should be redrafted as "Ensure that your conduct upholds public confidence in you and in other regulated individuals and firms."

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?

Current principle 5 (“provide a proper standard of service to your clients”) and current principle 10 (“protect client money and assets”) should not be deleted as we believe that these are both key principles of the profession. We are also concerned about the lack of reference to confidentiality in the Principles and would encourage its specific inclusion.

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?

As charity lawyers, we would welcome the inclusion of relevant case studies, such as a scenario exploring how an in-house charity lawyer would provide advice to third parties pro-bono.

Equally, in the changing financial landscape, charities are looking to collaborate financial resources; accordingly, it would be helpful to consider a scenario where one charity provides legal advice to another charity within the sector. How would these services be managed, charged out and how would any conflicts and risks be managed?

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?

We welcome the SRA's decision to put in-house solicitors on an equal footing with other solicitors, bound by the same core standards, but we note that the new Code is unclear in places. We have detailed our concerns in relation to specific issues in our answers to other question responses.

Question 7

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

We believe that further detail and guidance are needed to provide clarity. We have detailed what further detail and guidance we think would be appropriate in relation to our answers to other questions in this consultation response.

There is nothing specific we can identify which needs to be removed.

Question 8

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

We have not considered this question in this response.

Question 9

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

We agree with the Law Society's consultation that the second option, is likely to be unworkable as it is not always possible for an individual solicitor to be certain that a genuine conflict exists, and this is especially acute for in house solicitors. Conflicts as experienced by in house solicitors, particularly for our members who work in not for profit organisations, are very different from the traditional private practice concept and it is wholly impractical for us to be expected to manage conflict on a day to day basis in such a black and white manner.

Any option for handling conflicts must take into account the fact that conflicts may arise at an organisational level, which for our members may affect their employers, the employer's institutional funders, the employer's subsidiaries and affiliates, branches and fundraising committees, regulators or other external institutional stakeholders, or at an individual level, affecting e.g. trustees, colleagues, service users, recipients of public facing legal services, individual donors and volunteers.

The same solicitor may, and is permitted by professional rules, to advise both the charity and its pension fund trustees, or the charity and its trading subsidiaries. In neither case will the two organisations or groups necessarily share the same interests or agenda, and yet option two would potentially require the lawyer to down tools and on expensive external legal advice, which the charity may be very reluctant to pay for, or unable to justify to its trustees, given that it already employs its own lawyers.

In this complex landscape, as charity solicitors, we are often faced with situations where there are overlapping conflicts of interest or conflicting duties, including obligations which we have to our in-house clients, to the users of the services that our charities serve and to diverse regulatory bodies, including but not limited to the SRA. This therefore creates several potential difficulties, both in identifying conflicts and in dealing with those conflicts when they arise. We believe that the proposal for a complete bar on acting would not resolve such issues, as detailed above.

It is highly unlikely that our client/s, whether you see these as being our employers or our colleagues/line managers/trustees/recipients of public facing legal advice, will understand the technical point on which an in house lawyer is required to stop advising, in the same way that partners in a law firm would understand why n individual lawyer has to refuse to act. Option 2 could place an in house lawyer in a very invidious situation, probably (even more so in a commercial environment), where they are regarded as being difficult, unhelpful, or at worst failing to do their job, or have to refuse to provide advice to a beneficiary who is vulnerable and in need of charity assistance.

In our own members' experience as in house legal advisers, many conflicts resolve themselves over time without active intervention, and are successfully managed on the basis of Option 1. Any alternative risks increasing legal costs for charities, creating practical day to day difficulties for in house legal services, and hindering public access to charitable legal advice services.

Question 10

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

We welcome the SRA's decision to put in-house solicitors on an equal footing with other solicitors, bound by the same core standards, but we note that the new Code is unclear in places. We have detailed these uncertainties in our responses to the other consultation questions.

Question 11

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

We believe that further detail and guidance are needed to provide clarity. We have referred to the matters to be clarified in our other consultation response questions. There is nothing specific we can identify which needs to be removed.

Question 12

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

We have not considered this question in this response.

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?

We have not considered this question in this response.

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.

We have not considered this question in this response.

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?

We have not considered this question in this response.

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?

We have very serious general concerns about allowing solicitors to deliver non-reserved legal services to the public through unregulated providers. If charity solicitors were to carry out such non-reserved activities, this could result in increasing conflict of interest situations and resulting potential liability exposure. Please see our response to consultation question 9 above regarding the potential conflicts of interests that charity solicitors may face.

We are very concerned about the implication in paragraph 88 and paragraphs 149-154 of the consultation that legal professional privilege may not be available to solicitors working in the alternative legal sector, including any working in ASBs setup by charities, which may be attracted by the lower running costs and greater flexibility which you have identified by you as being the main drivers for the new Code.

Firstly, we would question the legal basis for the statements in these paragraphs. As we understand it, legal privilege is an ancient common law principle which underpins the very nature of the relationship between a solicitor and client, wherever and however he or she practices, regardless of whether or not s/he is paid for his/her services. Some of our members are of the view that primary legislation would be required to achieve the aims of these paragraphs, while the writer of this submission cannot see how even primary legislation can remove such a fundamental principle.

Even if you have the ability to make this change, we cannot support the creation of a two tier profession, where some solicitors offer their client this fundamental protection and other do not. Or perhaps it is the creation of two tier clientele, where some clients may discover their lack of protection rather too late in the day. This is a highly technical subject, even for lawyers and we do not believe that any amount of communication to clients by ASBs will equip ordinary members of the public to understand the implications of this change, when seeking legal advice. We are particularly concerned about the potential impact on the vulnerable, disabled and mentally incapacitated service users and other people who come to charities for legal advice clinics and other public advice facilities.

Charities often rely on in-house solicitors to be a cost-effective way of receiving advice and achieving their charitable objectives in a variety of different ways. One example of this includes consideration of potential legal options and advice on current or potential litigation. If solicitors and volunteers employed to provide public facing legal advice services provided by charities are not can use unregulated solicitors to were to not have the protection of legal professional privilege this would mean that charities would have no choice but to always instruct external solicitors, which would result in the charity being forced to incur increased costs or even being forced to act without seeking legal advice because the charity is not in a position to pay for such costs.

Even if charities do not themselves set up ASBs, this proposal opens the door to the idea that some solicitors are less able to protect their clients than others, on the rather random criterion of what type of organisations they work for. What is to

prevent you from extending this approach to all in house legal advisers at a future date, and what is the benefit to the public of this approach?

As solicitors working for many of the main providers of free public legal advisory services in England and Wales, we ask you to think again, so as to avoid creating a situation in which our already disadvantaged service users and wider beneficiary groups are not doubly disadvantaged simply because they can afford to seek advice from solicitor working for law firms.

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?

Two possible scenarios where charity lawyers may take advantage of this flexibility would be in providing pro-bono advice and in providing advice to other charities within the sector. We refer you to our consultation answers above, particularly in relation to questions 9 and 16, regarding the potential difficulties and restrictions that might become barriers which prevent charity solicitors from taking up such opportunities.

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?

We have not considered this question in this response.

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?

Whilst we accept the SRA commentary at paragraphs 100 and 101 that time served and a 12-hour training session are not sufficient to prove competence to supervise, not adopting either is surely creating further risk. We would suggest that the SRA considers a new system of supervision (which is clearly required to protect the consumer) which would more adequately evidence competency to supervise.

Question 20

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

We have not considered this question in this response.

Question 21

Do you agree with the analysis in our initial Impact Assessment?

Improving the accessibility of information for consumers so that they can make informed decisions about legal services is clearly worthwhile. However, the initial Impact Assessment does not appear to take into account the serious risk to consumers of the new arrangements.

Question 22

Do you have any additional information to support our initial Impact Assessment?

We have not considered this question in this response.

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?

We have not considered this question in this response.

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?

We have not considered this question in this response.

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?

If not, what are your reasons?

We are concerned that some consumers will not be able to make a claim on the Compensation Fund as a result of the decision to allow solicitors to practise from unregulated entities. As solicitors working in charities, we are particularly concerned that the rights of the charities we serve and the individuals who benefit from the services delivered by those charities should be protected.

Question 26

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

We do not agree that individual solicitors providing advice to the public should be able to operate from unregulated alternative legal service providers without mandatory PII cover. It is clearly not in the best interests of solicitors or their clients for them to be uninsured.

Question 27

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

If the individual solicitors providing advice to the public from unregulated alternative legal service providers choose not to have PII cover, this is clearly not in the interests of the solicitors or the clients; if they do decide to take it out, it may not be affordable and/or the level acquired might be misleading to clients. This is particularly of concern in the charitable sector, where the clients are using legal services may be in particularly vulnerable positions.

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?

Yes. Regulation should apply consistently and fairly to the provision of legal services in order to protect consumers.

Question 29

Do you have any views on what PII requirements should apply to Special Bodies?

To the extent that Special Bodies provide legal services to the public, those clients should be entitled to PII protection in the same way as clients of traditional law firms.

Separately, at paragraph 95 of the consultation we have seen reference to Special Bodies becoming regulated entities. We are not sure that most charities would have the resources to do this, so we would want charities to be able to "opt in" to this, rather than be compelled to do so.

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?

We have not considered this question in this response.

Question 31

Do you have any alternative proposals to regulating entities of this type?

We have not considered this question in this response.

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?

We agree that it could prove difficult to separate the practice of the solicitor from the unregulated entity within which he or she is working, making it difficult for the SRA to intervene into a solicitor's individual practice in this scenario.

Question 33

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

Yes, we agree with this proposal

Thank you for completing the **Consultation questionnaire form**.

Please save a copy of the completed form.

Please return it, along with your completed **About you form**, as an email attachment to consultation@sra.org.uk, by **21 September 2016**.

Alternatively, print the completed form and submit it by post, along with a printed copy of your **About you form**, to

Solicitors Regulation Authority
Regulation and Education - Policy - Handbook 2017
The Cube
199 Wharfside Street
Birmingham
B1 1RN

Consultation: Looking to the future - flexibility and public protection

Response ID:565 Data

2. Your identity

Surname

McGrath

Forename(s)

Helen

We may publish a list of respondents and a report on responses. Partial attributed responses may be published. Please advise us if you do not wish us to attribute your response or for your name or the name of your firm or organisation to appear on any published list of respondents.

Attribute my/our response and publish my/our name.

Please identify the capacity in which you are submitting a response. I am submitting a response…

on behalf of a representative group
Please enter the name of the group.: Lawyers in Local Government

3.

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

LLG are unaware of any issues in respect of the practical application of the test at an individual or employer level. LLG recognise and support high standards within the profession and the need to retain these by meeting the criteria within the Suitability Test 2011.

4.

2. Do you agree with our proposed model for a revised set of Principles?

We welcome the simplification of the principles, but note particularly the removal of the principle to "protect client money and assets". While this could be considered to be a behaviour consistent with acting in the best interests of each client, the presence of specific accounts rules and the apparently high incidence of Solicitors who are brought before the SDT for failing to handle client assets correctly, leads us to conclude that this is valuable to retain as a separate principle. This is particularly important to Local Authorities as clients of external Solicitors, as our assets are in fact public assets and tax payers' money, which we have a duty to manage appropriately.

Local authorities are subject to the Public Sector Equality Duty under the Equality Act 2010 in a way that many regulated entities are not, the presence of a principle around equality, diversity and inclusion is therefore welcomed.

5.

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

The simplified approach is welcomed and presents a clear and defined set of principals easily understood by the public and profession.

6.

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?

The absence of the principal of Trust is noteworthy.

7.

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?

It will be of particular use to receive guidance from the SRA as to the application of the new Codes and Practice Framework Rules (in due course) to the conduct of reserved and non-reserved activities by local authority legal teams, using existing local government powers under the Local Authorities (Goods and Services) Act 1970.

8.

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?

The simpler, more focussed code is to be welcomed. In terms of in house practice, as highlighted below in our response to Question 8, it is in the interests of both the SRA and in house Solicitors to have clarity as to what is meant by "public or a section of the public", specifically in the context of local authority employed Solicitors who wish to provide advice to other bodies within the powers set out by the Local Authorities (Goods and Services) Act 1970. We cannot understate how important this is to understand.
We feel the drafting of 6.4 could be clarified in terms of the phrase "information material to the matter".

9.

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

Section 8.4 references referrals of disputes to ADR - we are not aware that this is a current requirement. What happens if we do not agree to use the scheme operated by that body? It would be useful to receive some further clarity around this

10.

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

While it is perhaps not a matter to be immediately included in the code, it is in the interests of both the SRA and in house Solicitors to have clarity as to what is meant by "public or a section of the public", specifically in the context of local authority employed Solicitors who wish to provide advice to other bodies within the powers set out by the Local Authorities (Goods and Services) Act 1970. Section 8.1 may need to be amended accordingly.

11.

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

Option 2 provides a far more simplified approach to Option 1 the latter of which may give rise to grey areas and unforeseen complications during the progress of a matter which could ultimately prejudice one party more than the other.

12.

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

No comment

13.

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

No Comment

14.

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

No Comment

15.

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?

No Comment

16.

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.

No Comment

17.

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

No Comment

18.

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?

In terms of local government lawyers, this proposal would enable us to deliver non-reserved legal services to other public sector bodies, the third sector and the public through the medium of a trading company (in line with the applicable local government legislation around charging and trading). In reality, the larger proportion of the work undertaken by local authority legal teams is in fact reserved activities and so we would question whether this would be a particularly appealing avenue, as it may be more profitable in the medium to long term to create an ABS instead.
While alternative legal service providers may choose to employ Solicitors to supervise the non-reserved work, it seems unlikely that this will be an immediate reaction to the changes, as the costs for the businesses will increase, including in relation to the costs of compliance. We feel these changes are unlikely to have a large impact on provision through alternative legal service providers.

The question raised at paragraph 89 is important in relation to whether privilege would still apply to advice provided by an alternative legal service provider, employing Solicitors in some roles.
We note that Annex 5 to the Consultation at page 26 includes a scenario where the new approach to regulation would allow individual in house Solicitors the ability to provide non reserved legal advice to the public. This of course does not recognise the additional step required by local authorities in providing services to the public of establishing a trading company. We do not agree that this is a likely scenario, despite the interest shown by a number of local authorities around becoming an ABS. A large part of local authority's work is advocacy and property transactions, which as highlighted above are reserved legal activities.
Furthermore, if such advice would not be privileged we would be extremely concerned as to the implications of that for recipients of such advice. Legal professional privilege is an essential element of a functioning legal system.

19.

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

As above

20.

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?

Local authority employed Solicitors operate to provide non-reserved and reserved activities, primarily to their employer. The local authority itself is not an entity authorised by the SRA. Where the core work of a local authority employed Solicitor is reserved activities, they do so on the basis set out at paragraph 8 of the consultation document.

As stated previously in our response, the point which is vital for us to understand is the extent to which other local authorities, public and third sector bodies fall within "public or section of the public". The SRA has received a copy of the opinion of James Goudie QC in response to a request for an opinion from Lawyers in Local Government and the Local Government Association, as to whether such bodies would fall within "public or section of the public". This was unequivocal in its conclusion that the above wording did not prohibit local authority employed Solicitors from providing reserved legal activities to the types of body indicated above. In discussion, the SRA has highlighted that the Legal Services Board is able to request guidance on this wording (which originates from the Legal Services Act 2007) from the government.

We feel that this is of such importance, that the SRA [and LLG] should jointly approach the LSB to make such a request of the government as soon as possible, so that this can be clarified and the outcome of the SRA's regulatory review can reflect this new information.

21.

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?

While recognising that the requirement does not apply to local government legal teams, the existing requirements seem overly prescriptive and ultimately not fit for purpose. As the SRA recognises in paragraph 101, the requirement to have practised for at least 36 months within the last 10 years is no guarantee of their current knowledge of the law, nor their ability to effectively supervise another.

22.

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

For individuals and organisations which do not habitually instruct Solicitors, the legal advice itself can be sufficiently daunting for them, let alone the consumer rights they enjoy as users of such services. We feel it is therefore very important that consumers have an easy way of accessing information in relation to the protections afforded to them, particularly in the context of a fast paced and changing market.

23.

21. Do you agree with the analysis in our initial Impact Assessment?

While it is difficult to predict with 100% certainty how the market will respond to the proposed changes, the conclusions drawn seem logical. However, as highlighted above, the assumptions made in relation to how local authority legal teams may react to the changes are flawed and do not recognise the specific legislative environment in which local authorities work, nor the nature of the work we undertake.

24.

22. Do you have any additional information to support our initial Impact Assessment?

As above

25.

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?

Yes

26.

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?

In house Solicitors would not normally be responsible for holding client money, as they are an arm of the

client organisation and will work closely with the finance department. Where providing services to external bodies, they should be holding money in accordance with the SAR or not at all (i.e. arranging for direct payments between the purchaser and seller on a land transaction). However, this is not what many external bodies are used to (if they have dealt with traditional firms) and in the interests of opening up the market place to alternative service delivery models, it seems sensible to provide this option especially when in house solicitors comply with all accounts training.

27.

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? If not, what are your reasons?

We agree with the proposed approach, but also see there are risks in not providing this or similar recourse for clients of solicitors working in alternative legal services providers.

28.

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

We agree with the proposed approach, but would welcome the inclusion of an obligation that applies now under the Practice Framework Rule 4.2(b) whereby a Solicitor should ensure that their employer carries sufficient indemnities for the nature of the work being undertaken.

29.

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

This does potentially create a situation where a consumer receives negligent advice, suffers a loss and is unable to recover their losses from the alternative legal services provider. This is clearly not a desirable outcome.
Please see response to question 26.

30.

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?

Yes, these are treated differently to non-reserved legal activities for a valid reason, that they are potentially high risk and high value. It would be counter intuitive to allow them to continue to provide services to the public, in a similar way to other Solicitors, without some form of insurance or indemnity behind them.

31.

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

We do not have specific views on this point

32.

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?

We agree with the SRA's view that it is not desirable. It is inconsistent with the legislative requirements and would be inconsistent with the approach otherwise being adopted in terms of opening up the market.

33.

31. Do you have any alternative proposals to regulating entities of this type?

None

34.

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?

None

35.

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

We agree with the proposal

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DX No: 715299 Leeds 33
Our Ref: SRA Consultation
Your Ref:

03 October 2016

Solicitors Regulation Authority
Regulation and Education - Policy - Handbook 2017
The Cube
199 Wharfside Street
Birmingham
B1 1RN

Dear Sirs

Re Consultation: Looking to the future - flexibility and public protection

The proposal to simplifying the rules is to be welcomed. The concern for the Council relates to potential removal of Rule 4.15 of SRA Practice Framework Rules 2011.

It is clear from the statements made by the LSB in their 'Statement of Policy on section 15(4) of the legal Services Act 2007: regulatory arrangements for in-house lawyers (February 2016), that they envisage a scheme where restrictions placed upon this group in relation to their practice has to be justified under the 4 principles set out in that document.

Specifically in relation to local government lawyers, and I assume all other in-house lawyers, we have always ensured that such employees maintain the highest professional standards and we would continue to support any proposal that requires the maintenance of that expectation.

However, any proposal to restrict the ability of local authority lawyers to act for other public bodies should be resisted. Currently, the Council's in-house solicitors, in common with a number of other local authority in-house teams provide legal services to other public bodies including other local authorities as well as schools and academies. Although this is a minor part of our practice, this produces cost efficiencies for the public sector, especially at this time of significant reductions to Revenue Support Grants as well as funding to other public bodies.

It is clear that the Government's intention is that public bodies should achieve greater efficiencies in the way that services are delivered. Any restrictions introduced under the new

regime that limits this level of cooperation can only be regarded as retrograde and counter to government policy.

As we understand the impact of the current proposals, Rule 4.15 will be repealed, and local authority in-house solicitors will be permitted to provide non-reserved legal services to any other organisation, or indeed any member of the public, subject to solicitors being individually responsible under the revised Code of Conduct. If our understanding is correct, then we would support these proposals.

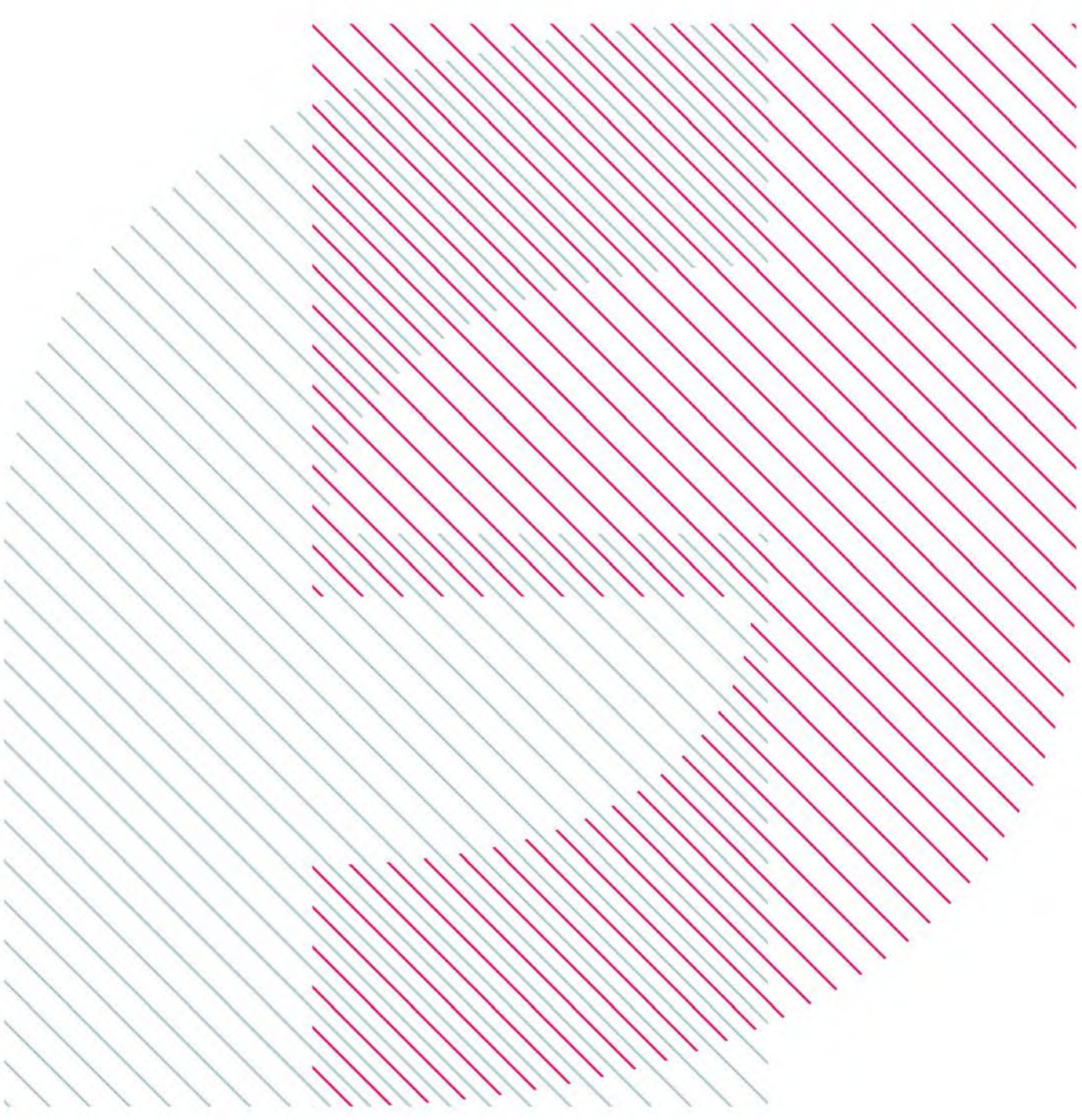
It is also our understanding that it would not be necessary for in-house teams to create an alternative business structure (ABS) for these purposes, and again if our understanding is correct we would support these proposals.

Yours faithfully

Catherine Witham
City Solicitor

LEGAL OMBUDSMAN

Looking to the future – flexibility and public protection



Legal Ombudsman September 2016

Response on behalf of the Legal Ombudsman

Introduction

1. The Legal Ombudsman was established by the Legal Services Act (2007). Our role is two-fold: to provide consumer protection and redress when things go wrong in transactions within the legal services market; and also to feed the lessons we learn from complaints back to the profession, regulators and policy makers to allow the market to develop and improve.

2. The Legal Ombudsman welcomes the opportunity to respond to the Solicitors Regulation Authority's (SRA) consultation, which sets out their vision of the future of regulation of solicitors, to ensure that future regulation is targeted, proportionate and suited to the future legal environment.

3. This paper combines our responses to:
   - Looking to the future – Flexibility and Public Protection
   - Looking to the future – SRA Accounts Rules Review

4. There are two key areas of the Flexibility and Public Protection consultation which are of particular interest to the Legal Ombudsman: the proposal to allow authorised persons to practice as part of an unregulated legal service provider's company; and the impact arising from no longer making the compensation fund available to their clients, whilst also removing any requirement for providers to have professional indemnity insurance.

5. The Legal Ombudsman supports the wider policy objective behind the proposal, which is to provide greater flexibility for solicitors to deliver their services, and therefore give consumers greater access to competent and affordable legal advice when needed.

6. While we support the principle behind these proposals, we do have concerns about the impact on the principle of entity-based regulation, the wider system of redress, and how they will work in practice. However, as it is not clear how many firms and solicitors are likely to adopt this model the depth of the impact on the Legal Ombudsman does need to be clarified.

7. In particular we have serious concerns about:
   - The lack of clarity about, and the potential difficulties in, determining our jurisdiction.
   - The risk to consumers due to the removal of the compensation fund and professional indemnity insurance.
   - The viability of the small claims court as an alternative to the Legal Ombudsman.

In our view, if the proposals remain the same, the jurisdictional issues can only be addressed by amending the Legal Services Act. We look forward to working with the SRA to address this in the future if needed.

8. When the Legal Ombudsman was set up it was envisaged that an ombudsman for the sector would simplify the existing system for redress and reduce confusion among consumers. This has happened. Complaints about solicitors, barristers, licensed conveyancers, claims management companies, and other regulated bodies are now dealt with by us.

9. However, we know that the system for redress is still far from perfect and could be simpler for consumers. Therefore, when we consider proposals such as this we always look at whether they simplify or maintain the existing arrangements, or if they are likely to lead to further complication and confusion.

10. At this stage we believe that the proposals will complicate the system of redress and create confusion for consumers and service providers. In our response below we look at the impact on our jurisdiction and ability to enforce our decisions, as well as looking at a range of practical issues which are likely to arise.

11. The proposals primarily create difficulty for us because our jurisdiction is over the authorised individual (solicitor) rather than the firm or anyone else who works there. While technically a consumer still has access to the Legal Ombudsman for the work of the solicitor it will rarely be so straightforward. We envision difficulties in understanding who has actually undertaken work for the consumer, whether this can be evidenced, and whether we have powers to request evidence. Further, as it will be the solicitor who is held responsible for the complaint (including paying any redress or case fees) this also raises questions about whether we would want to enforce decisions against individual solicitors.

12. In addition we do not agree with the SRA view that the redress alternatives (such as the voluntary ADR and the Consumer Rights Act) provide enough safeguards for consumers, and therefore we believe that the proposals to remove access to the compensation fund and the requirement for professional indemnity insurance creates further significant risks to consumers.

13. The consultation acknowledges that the information available to consumers is essential to the success of the proposals. We do question how much consumers will consider the relationship they are entering into. In our experience consumers rarely appreciate the difference between a regulated and unregulated practice, and choice is often driven by cost and word of mouth rather than an assessment of the protections available to them. Consumers only become concerned with protection issues if a problem arises with the service they receive.

14. We believe that if a consumer brings a complaint about the service they have received, they will expect all elements of the case to be investigated. As we have highlighted in our response there are likely to be situations where we will have to

carefully pick which elements of a case we can investigate, and situations where we will hold a solicitor to one standard (for example on conflict of interest issues) but not be able to comment on the actions of the wider firm.

15. We are also concerned about the tensions the proposals will create between the professional obligations of the individual solicitor and the way an unregulated firm may be run. While a solicitor retains many of their obligations, such as competence, conflict of interest, complaint handling, these are not requirements for an unregulated firm. What should a solicitor do when these obligations come into conflict? If these issues are raised in the course of an investigation they are likely to lead to interesting questions for us, and a solicitor could ultimately be found to have provided an unreasonable service (due to their professional obligations).

16. Given the concerns we have raised we look forward to hearing from the SRA as to whether these issues can be addressed. In particular, we would be interested to work with the SRA and Ministry of Justice to see if there are ways that we can address the jurisdictional issues that are set out below.

Looking to the future – flexibility and public protection

Q.8 Do you think there is anything specific missing from the code that we should consider adding?

17. We note that the proposed code of conduct has removed the ban on firms making unsolicited marketing approaches to members of the public, instead replacing it with two broader requirements under 1.2 (not taking unfair advantage of clients) and 8.8 (ensuring publicity is not misleading). We do not think that outcomes 1.2 and 8.8 are sufficient to prevent firms engaging in unsolicited marketing techniques.

Q. 9 What are your views on the two options set out for handling actual conflict or significant risk of conflict between two or more clients and how do you think they will work in practice?

18. We do not have any comment on the proposed drafting of the conflict of interest rules. However, we would like to comment on how they are likely to apply under the alternative legal services provider model.

19. As we understand it within an unregulated firm a solicitor (beginning an instruction with a client) would be under an obligation to conduct conflict of interest checks at the beginning of an instruction. However, another unregulated employee would not be under an obligation to conduct checks. We also understand that conflict of interest checks are often undertaken via the case management system, therefore

we question whether unregulated firms will have the systems in place to allow solicitors to meet their professional obligations.

20. In our experience consumers have an expectation that when a solicitor works for them their information will be confidential and they will work in their best interests. Therefore, while the code of conduct may be clear about a solicitor's obligations, we believe it will be difficult for consumers to understand why one part of an organisation is required to conduct these checks and another is not. Further, if a solicitor's documentation sets out that they will conduct checks we believe that many consumers will expect this to be a firm wide policy, unless they are expressly told differently.

21. From a service perspective we would of course expect solicitors to conduct these checks at the beginning of an instruction, and also at any point where they may have concerns in this area. In certain circumstances we may also consider it to be poor service if a solicitor does not make it clear about the lack of checks elsewhere in the firm.

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

22. We appreciate that the proposals to allow solicitors to provide legal services through alternative legal service providers will provide the opportunity to develop more innovative ways to practice, and potentially provide services at a lower cost due to the lower levels of regulation.

23. The consultation rightly states that consumers will still have recourse to the Legal Ombudsman if they have received a service from a solicitor, regardless of the fact that they are working in an unregulated practice. Under the Legal Services Act (the Act) s.128(1) it states that a *"respondent is within this section if, at the relevant time, the respondent was an authorised person in relation to an activity which was a reserved legal activity (whether or not the act or omission relates to a reserved legal activity)."*

24. There are several key issues to consider here:
    - Will consumers know they have received a service from a solicitor and will the documentation be clear enough for us to investigate?
    - When do we have jurisdiction, and when may this be in question?
    - Will it be possible to enforce Legal Ombudsman decisions?
    - What practical issues could arise?

A. Will consumers know they have received a service from a solicitor?

25. While consumers in theory have access to the Legal Ombudsman, their ability to bring a complaint may be limited if it is unclear who has actually undertaken the work on their behalf.

26. Under s.5.2 of the individual code of conduct solicitors are required to tell clients about which services provided by them, or a "separate business", are regulated. However, it is unclear whether this creates an obligation to ensure consumers are aware that a solicitor is undertaking, or contributing to their work. We could envisage a situation where a consumer receives a service from an unregulated firm but does not receive clarity about who is doing the work; for example, if the title "solicitor" is not used in communication. In this situation a consumer may not know even know that they can bring a complaint to the Legal Ombudsman.

27. In addition, if the documentation is unclear about who has undertaken work for a consumer then it will make it difficult for us to establish jurisdiction and investigate a complaint.

28. We believe it is important that there is a mechanism to ensure that consumers are told when a solicitor is involved in their work.

B. *When will the Legal Ombudsman have jurisdiction?*

29. If the authorised person is the only person providing the service then our jurisdiction is straightforward based on s.128 of the Act.

30. However, we would have to carefully consider our jurisdiction in the following scenarios:

30.1 Situation: Both a solicitor and a case worker contribute to a legal service. The solicitor had ownership of the work and the client care letter was in their name.
Jurisdiction: We have clear jurisdiction over the work of the solicitor, but as we do not have jurisdiction over the unregulated firm we would need to consider whether the work of the case worker falls within our remit. We would look carefully at the work that has been done by each person. However, if the solicitor signed the client care letter we may be more likely to consider that they are responsible for the whole matter.
Outcome: In this scenario we would be likely to investigate the whole complaint, taking a holistic view of the service, and putting in place an appropriate remedy.

30.2 Situation: Both a solicitor and a case worker contribute to a legal service. It is unclear who owns the piece of work either because the documentation was unclear or the client care letter was a generic letter from the firm.
Jurisdiction: As above the work of the solicitor clearly falls within our jurisdiction, but as the firm does not we would have to consider whether the work of the case worker falls within our remit, and whether we can identify which person has done different aspects of the work.
Outcome: In this case, because we cannot attribute the ownership of the file to the solicitor, we are likely to only investigate areas of the complaint that the solicitor has been directly involved in. It may also be difficult for us to determine who has responsibility for a particular aspect of a service. For example, if the consumer did not receive a cost update, if there is more than

one person involved in the work, it could be difficult to attribute any service failing to a specific person. This could lead to an unsatisfactory outcome for the consumer who is unlikely to understand why we would have to be selective, and any decision and remedy would not be reflective of the overall service from the firm.

30.3 Situation: A solicitor supervises the work of a team of case workers. The solicitor does not do the actual day to day work but manages the team, checks files are progressing and deals with questions about how matters should progress.
Jurisdiction: Our jurisdiction covers the acts or omissions of a solicitor, but at this point it is unclear whether an "act" could include supervision. We may have to consider how much involvement the solicitor had with the individual case and, for example, whether they gave clear instructions about how a case should progress. Another challenge could be whether the supervision can be evidenced to allow us to investigate.
Outcome: Again in this situation it could lead to an unsatisfactory outcome for the consumer, either because we cannot establish a close enough link between the solicitor and the work, or because there is not enough evidence of the solicitor's role.

31 One of the key issues we will need to resolve is the extent to which we have jurisdiction when a solicitor is supervising the work of others. This is a question which occasionally arises at the moment; for example, with solicitors working in law centres or advice bodies. Our current position is that we will investigate a complaint if we can establish a sufficient link between the solicitor and the case worker. However, if these proposals move ahead then we will take further advice to assess how far our jurisdiction extends. The individual code of conduct is helpful in this respect as s.3.5 makes it clear that solicitors are accountable for the work of those they supervise. However, in reality we must be guided by the Act and how far this limits our jurisdiction.

32 In summary whilst we will always look at a complaint brought by a consumer, the proposals as they stand will be frustrating for both us and consumers as our jurisdiction is likely to be unclear or seriously limited. We are concerned that this could have a negative impact on how consumers view the effectiveness of the Legal Ombudsman, particularly if substantial numbers decide to adopt this model of working. In addition, the Legal Ombudsman will have to undertake a significant amount of work to establish jurisdiction in these cases, which would of course come at a cost to the wider profession.

33 Finally, unless our jurisdiction is clear then signposting by solicitors and unregulated firms is likely to be incorrect and consumers are less likely to make their way to the Legal Ombudsman in the first place.

C. Will it be possible to enforce our decisions?

34 As well as our ability to investigate, it is important to consider whether our enforcement powers would work with this new model. By "enforcement powers" we mean our ability to enforce our decisions via the courts if the solicitor does not adhere to our decisions. We currently enforce approximately 150 cases per year. Our jurisdiction is over the authorised individual and therefore any decisions would be in their name as well. This would mean that any published ombudsman decisions and case fees would be in their name as well.

35 While we may investigate a complaint against an authorised individual if they, or the firm, decided not to comply with the decision, we would have to carefully consider whether to enforce the decision. Currently we enforce decisions against regulated firms on a regular basis. This is done on behalf of the consumer at no cost to them. However, as we could not enforce a decision against an unregulated firm we would have to consider whether it is appropriate to take action against the individual. For example, we would have to check whether an individual has the personal assets and ability to pay any remedies, and also whether we want to formally take action against an individual when we may feel that it is the firm who is at fault. It should be noted that it costs the Legal Ombudsman around £300 per case to initially establish whether a person has the assets and ability to pay if our enforcement action is successful.

36 In the consultation, alternative redress options are mentioned including ADR and the Consumer Rights Act. As participation in ADR under the regulations is voluntary we do not consider that this provides a sufficient safeguard for consumers whose complaints fall outside of our jurisdiction.

37 Under the Consumer Rights Act we understand that there are two possible routes for redress; a section 75 claim or a claim against a trader for the standard of service they have received. A section 75 claim can only be made for misrepresentation or breach of contract. So a claim may be possible if a consumer has paid for a service which has not been provided but is unlikely to be successful where there is a problem with the way the service has been delivered.

38 As we understand it complaints which cannot be resolved directly with a trader could end up at the small claims court. Although the small claims court is set up to be a consumer friendly process we believe the following points should be taken into consideration:

38.1 Ombudsman schemes in general are set up to be an alternative to the court process, recognising the courts can be costly, time consuming and stressful for consumers. The Clementi report[1] proposed the establishment of a statutory ombudsman scheme for the legal sector because he recognised the need for an independent scheme to move away from the fragmented nature

[1] http://webarchive.nationalarchives.gov.uk/+/http://www.legal-services-review.org.uk/content/report/chapter-c.htm "Report of the review of the regulatory framework for legal services in England and Wales, Chapter C"

of complaints handling and redress mechanisms. While the small claims court is an option it seems to move us a step away from the vision of the Clementi report rather than working towards further reforming the system of redress.

38.2 As the Legal Ombudsman has the statutory power to make decisions against authorised persons the enforcement process is relatively straightforward and quick, is rarely challenged by solicitors, and is free to consumers. Conversely, consumers will be responsible for the small claims court process. This does come at a cost to them, the process can be defended by the trader and is likely to take significantly longer than our processes.

38.3 As we understand it, the small claims court usually operates based on the value of a claim. However, not all complaint remedies awarded by this office have a monetary value. They include, for example, remedies to return a file, progress work in a timely manner, put things right for a consumer and apologise. It is unclear if a small claims court would deal with issues of this type. We know from our experience and research[2] that consumers are not necessarily after a financial reward when they complain about their solicitor but look for an acknowledgement that something has gone wrong and an apology, neither of which are likely through the small claims court.

38.4 It is unclear whether a Legal Ombudsman decision against an authorised individual could be used as evidence in a claim against a trader.

38.5 We have already noted that the small claims court is likely to be a stressful process for many. In addition, we understand that the process is usually completed online, which will put certain consumers at a disadvantage. Therefore, we would be interested to see the results of the equality impact assessment on the use of the small claims court as an option for redress.

39 While the small claims court looks like a viable option, the process is likely to be much more challenging for consumers and there may be situations where they are unable to obtain the redress they need to resolve their situation. We know that consumer confidence in complaining about legal providers is lower than in other sectors and that a significant proportion of those who are dissatisfied with the service they have received become “silent sufferers” and do not go on to make a complaint[3]. We would be particularly worried about the proportion of silent sufferers increasing.

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[2] http://www.legalombudsman.org.uk/downloads/documents/publications/Complaints-Combined-executive-summary-YouGov.pdf “YouGov report: Consumer experiences of complaint handling in the legal services market”

[3] http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/Howconsumersareusing.pdf “Legal Services Consumer Panel: Tracker Survey 2016”. This is an annual survey. The 2016 survey indicated that 43% of consumers were confident in complaining about their lawyer, compared with

D. What practical issues could arise?

40 As we have already noted above, a successful investigation will depend on clear documentation and evidence which shows who has been involved in the work. Without this our jurisdiction and ability to investigate could be frustrated.

41 Another interesting question is who owns the client file: the firm or the solicitor? Under s.147 and 149 of the Act the Legal Ombudsman can require solicitors to provide information, and if not provided it can enforce the requirement through the courts. However, in an unregulated firm it is unclear whether we would be able to use these powers, particularly if a solicitor does not have ownership of a file, as we can only ask solicitors to produce information that a High Court could compel someone to provide. In a scenario where either the solicitor or unregulated firm refused to cooperate with us we could still investigate (if we considered it fair to do so). However, we would draw inference from the solicitor's failure to provide the required information.

42 It would be helpful to know if the SRA has considered this situation and identified any solutions?

43 In addition under s.145 of the Act solicitors are obliged to cooperate with the Legal Ombudsman. An interesting scenario arises if a solicitor is willing to cooperate but is prevented by the unregulated firm. We would be likely to make a misconduct referral to the SRA on this basis, and we may also conclude that they have not provided a reasonable level of service as they had failed to comply with their professional obligations.

44 Finally, we also need to ensure that we have sufficient data to make an initial assessment about whether a complaint is within our jurisdiction. We currently receive a regular data feed of regulated firms from the SRA, and we would also require details of the unregulated firms where solicitors are based.

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

45 We believe that it would be useful for firms to display information about the consumer protections available. We do not think that this needs to be overly detailed but should provide reassurance that protections are available, what they broadly cover, and how they can be accessed if needed. We would be happy to work with the SRA on this if required.

46 This section of the consultation also looks at the existing consumer protections which are available, including the Legal Ombudsman, the Consumer Rights Act and ADR bodies.

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supermarkets (67%) and banks (52%). It also indicated that 35% of those who were dissatisfied with the service from their lawyer did not go on to make a complaint.

47 We do not agree with the SRA analysis in this section. We have highlighted that access to the Legal Ombudsman may not be as straightforward as envisaged, and we also have concerns about the use of the Consumer Rights Act and small claims court as an alternative mechanism. The consultation proposes the availability of ADR across all sectors as a further alternative mechanism for resolving disputes. However, it does not take into account that the use of ADR schemes is voluntary.

48 We would be concerned if these proposals went ahead on the basis that the Consumer Rights Act and ADR provide sufficient safeguard for consumers. We believe that there are clear deficiencies in this proposal.

Q.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?

49 We broadly agree that solicitors working in an unregulated firm should not be allowed to hold client money in their own name. However, we would note that as our jurisdiction is over the solicitor, if client money was held in the solicitors name (perhaps via an ESCROW account) then it would be easier in some circumstances for consumers to obtain their redress. If these proposals move forward it would be useful to look at this point in more detail.

Q.25 Do you agree with our proposal that the SRA Compensation Fund should not be available to clients of solicitors working in alternative legal service providers? What are your reasons?

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

50 We will consider the question of the Compensation Fund and Professional Indemnity Insurance (PII) together as we believe that they are a key part of the consumer protections which are available at the point when all else fails.

51 The Legal Ombudsman also deals with complaints about claims management companies where the safety net of PII or any sort of compensation fund does not exist. We have had a number of occasions were firms have closed down in this sector and a consumer's only potential redress is to join the list of creditors to a firm, therefore effectively leaving them without any resolution to their issues, even if we make a decision of poor service. This is an unsatisfactory position for consumers and could perhaps lead them to question the usefulness of a scheme when there is no way for a resolution to be enforced. We would be concerned if this was to happen in the legal jurisdiction on a regular basis as well.

52 Both the fund and PII are vital sources of compensation for consumers particularly if a firm closes down unexpectedly. Without these options a consumer would have no ability to recover funds which have been paid on account to a firm. This could

be substantial. While the small claims court may be an option if a firm is trading, we do not believe it would be a viable option if a firm has closed (unless the consumer is able to track down individual company directors) and therefore the only viable option would be for the Legal Ombudsman to enforce a decision against the authorised individual.

53 PII is a vital protection for both consumers and solicitors in situations where a large remedy is required. While some unregulated firms may choose to take out insurance, others may not, which again would either leave the solicitor or the consumer exposed. In addition, even if an unregulated firm had appropriate insurance, it would not include the standard term to pay Legal Ombudsman awards.

54 Our data does not record if remedies are paid via the compensation fund or indemnity insurance. However, we have looked at the number of investigated

Examples:

Immigration: *Miss A instructed a firm when she needed assistance in making applications for child dependency visas for her two nieces. She agreed a fixed fee of £2,750 including VAT, which was paid in advance.*

The firm failed to complete the work and closed several months later. She complained that the firm had failed to communicate with her or progress her case.

After reviewing the available information, including evidence of Miss A's attempts to contact the firm, we concluded that the firm had failed to complete the work they had been instructed and paid for. We decided the firm should refund the original fee and compensate her with £150 in recognition of the frustration and inconvenience they caused her.

As this remedy involved both a refund of fees and compensation Miss A had to contact both the firm's insurers and the SRA Compensation Fund.

Personal Injury: *Mr B instructed a firm to make a claim against the NHS, paying a fixed fee of £1,000 + VAT. The firm closed down several months later and he complained that they had not progress his case at all.*

We concluded that the firm had completed some of the work. However, they had not actually submitted his application. We instructed the firm to refund £250 plus VAT to recognise that all the work had not been completed.

As the firm had closed Mr B approached the SRA Compensation Fund.

complaints where a firm has closed, and a remedy has been awarded. Last year[4] we dealt with just over 600 complaints[5] where the firm had closed or been intervened with. In 63 cases we decided that either a refund or reduction in fees was required. In 15 cases financial compensation was required, and in 153 cases compensation for emotional impact was required. While the majority of payments were less than £1,000, payments over this amount were required in 77 cases.

55 The examples above highlight the importance of the availability of both indemnity insurance and the compensation fund, and show how customers of an unregulated firm could be affected by the absence of these.

56 It would be useful to know if the SRA has any recent data on payments from the compensation fund which would help to assess the potential risk to consumers? A 2014 report by Economic Insight showed that, in 2014, £200,000 was claimed from the Compensation Fund under "theft of client money". This was separate to conveyancing and probate claims, and potentially indicates that the fund is vital to consumers. Is there any further analysis of this amount or payments from later years which would help to assess the risk?

57 While we appreciate that working for an unregulated firm will include minimising the regulatory costs to the individual solicitor, we believe it is important that the SRA provides assurances that there is minimal risk to consumers if they are left without the protection of the compensation fund and PII. Without this further information we remain concerned about these proposals and the potential impact on consumers.

Q.28 Do you think that we should retain a requirement for special bodies to have PII when providing reserved legal activities to the public?

58 At this stage the proposals for the special bodies are at an early stage and therefore it is difficult to comment in detail about issues such as PII.

59 As a general principle PII is important as it protects both the consumer and the special body. However, clearly any requirements in this area must be proportionate and ensure that the services provided by special bodies are not endangered in any way.

Looking to the future – SRA Accounts Rules Review

Q.2: Do you agree with our proposals for a change in the definition of client money?

60 The consultation proposes changing the definition of client money so that fees which are paid in advance, or that are for payments to third parties (excluding

[4] April 2015 to March 2016

[5] This does not include conveyancing complaints and wills and probate complaints.

payments such as Stamp Duty Land Tax or estate monies), no longer have to go into a client account. We do not have any comment on the proposed drafting of the definition of client money. However, we would note the following concerns with the proposals:

60.1 It is difficult to assess the rationale for the change without a clearer understanding of the impact and cost to solicitors of the current arrangements.

60.2 We are concerned that consumers whose fees would previously have gone into the client account will now lose important protections that are available to them. While the compensation fund will still be available to consumers, it does effectively create an extra hurdle for them to jump through to access their funds.

60.3 The consultation suggests that a change in the definition of client money will have an impact on the level of claims to the compensation fund, and that this would need to be assessed at a later stage. We would like assurances that consumers' access to the compensation fund will not be reduced and that they will receive a full refund in these circumstances. In addition, we suggest considering a fast-track process for claims of this sort.

60.4 The consultation also suggests that some consumers will be protected by s.75 claims under the Consumer Rights Act. While this approach could be used, it is most useful when a consumer has paid for a service that they have not received. This will only happen in limited cases and most complaints we see relate to the service not being of the required standard. We do not think this scenario would be covered by s.75. Finally, this option would of course be limited to those who have paid by credit card, and consumers paying by other methods would not have this protection.

Summary

Thank you for the opportunity to comment on the proposed changes to the SRA Handboook.

As you can see, we do have concerns, particularly about the proposed alternative legal services provider model; but we would be happy to work with you to try and identify if there are ways to overcome these challenges.

For any questions about our response please contact alex.moore@legalombudsman.org.uk

LEGAL RISK LLP
SOLICITORS

Solicitors Regulation Authority

Email: consultation@sra.org.uk

Contact: Frank Maher
Our Ref: FRM SRA
Your Ref:
Date: 20 September 2016

Dear Sirs

Response to the SRA Consultation on the SRA Handbook Review: Looking to the Future - flexibility and public protection

This is the response of Legal Risk LLP to the consultation.

Introduction

We are an SRA-regulated firm of solicitors, specialising in advice primarily to law firms on professional regulation and professional indemnity. Our clients include a cross-section of the profession, from the largest global firms to high street practices, and include ABSs as well as traditional practices.

General

We have considered the response submitted by the City of London Law Society dated 14 September 2016. We agree with it and share their concerns. In this response we confine our comments to additional matters.

We are particularly concerned by the proposal for alternative legal services providers for the following reasons –

- Determining the regulatory framework by reference to reserved legal activities is irrational, as there is no logic, only accident of history, underlying the scope of those activities;
- They could legitimise bogus law firms, allowing criminals to control them, and consumers may be unable to distinguish them from SRA-regulated firms;
- Elderly and vulnerable clients would be put at risk and damage consumer interest;

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- Such entities may in any event be subject to regulation by other regulators from which SRA-regulated firms are exempt;
- The SRA's supervisory role for anti-money laundering purposes may become more difficult to administer.

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

Solicitors are at present prohibited - by Outcome (1.8) in the SRA Code of Conduct 2011 - from limiting liability below the compulsory minimum for professional indemnity insurance (broadly £2m for individuals and partnerships, £3m for incorporated practices and ABSs). This is not addressed in the draft Codes of Conduct.[1]

As the threat of a reduction in the Minimum Terms and Conditions looms large, it is important that this is addressed at the earliest opportunity: solicitors are presently prohibited from limiting liability below the minimum, but claims may be made in future when cover is reduced, arising from work already done.

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

We agree with the CLLS's preference for the first option. However, we draw attention to the apparent conflict with the CCBE Code of Conduct. At present, the SRA European Cross-border Practice Rules 2011 implement many provisions of the CCBE Code, but do not address conflicts of interest. Chapter 3 of the SRA Code of Conduct 2011 contains two exceptions in O(3.6) (which is not really an exception) and O(3.7), but Article 3.2 of the CCBE Code contains no exceptions. This is not addressed in the draft Codes in the consultation paper.

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

The SRA proposes two different regulatory regimes based upon whether or not solicitors will offer reserved legal activities.

Professor Stephen Mayson's strategic discussion paper, *The Regulation Of Legal Services: Reserved Legal Activities – History And Rationale* (August 2010), identified in outline that there were no valid, historical policy reasons forming the underlying basis for the current reserved legal activities.

[1] Annex 7 says 'to potentially include within other regulatory arrangements instead'.

Professor Mayson also identified that there are areas of practice which are regulated, but are not reserved legal activities, such as immigration.

It follows that any division of the current regulatory regime based on whether a solicitor conducts reserved legal activities is irrational and unlikely to comply with the regulatory objectives in sections 1 and 28 of the Legal Services Act 2007.

The threats posed by such changes are, in our view, significant. The effect of the proposal to allow solicitors to practise through unregulated alternative legal services providers would be to allow the equivalent of unregulated Alternative Business Structures (ABSs), without requiring those owning or controlling them to satisfy the SRA Suitability Test. It would pose a significant increase in the risk of criminals controlling law firms. The SRA itself has identified the risk of bogus law firms under the current regulatory regime.[2] These proposals have the potential to legitimise them.

It would be easy to design notepaper for an alternative legal services providers which would readily confuse consumers, without breaching any law or regulation. A solicitor employed by the provider could legitimately add the title 'solicitor' to the signature block.

We can readily envisage private client services being provided through small alternative legal services providers to consumers who will be unlikely to appreciate that there is no insurance, no compensation fund, and, virtually no regulatory oversight or protection. This is a particular concern, as the Law Society has recently identified that financial abuse of the elderly is on the rise.[3]

It is also noteworthy that the SRA's prohibition on providing banking facilities, currently in rule 14.5 of the SRA Accounts Rules 2011 and rule 3.3 of the draft rules, would not apply to alternative legal services providers; although the provisions of the Financial Services and Markets Act 2000 would still apply,[4] alternative legal services providers would operate without regulation by the SRA.

It is therefore difficult to see how the proposal complies with the regulatory objective of 'protecting and promoting the interests of consumers' in section 1 (1) (d) of the Legal Services Act 2007.

Nor is it clear that reform would invariably reduce regulation. Solicitors regulated by the SRA have certain exemptions from regulation – under the Financial Services and Markets Act 2000 (e.g. consumer credit and insurance mediation) and in relation to claims management activities. Paradoxically, therefore, the proposals might result in supervision by one or more other regulators, and possibly with more onerous requirements.

The SRA's role as supervisor (on behalf of the Law Society) under the Money Laundering Regulations 2007, currently under review, poses some difficulty for it, at a time when the Government is

[2] http://www.sra.org.uk/risk/resources/risks-associated-bogus-firms.page
[3] http://www.lawsociety.org.uk/news/blog/close-to-home-spotting-elder-abuse/
[4] See https://www.handbook.fca.org.uk/handbook/PERG/2/6.html

consulting on additional controls in connection with the implementation of the Fourth EU Anti-Money Laundering Directive[5] and when the National Crime Agency has identified the threat of solicitors as professional enablers:[6] the scope of regulatory compliance under the Money Laundering Regulations 2007[7] is not coextensive with reserved legal activities. Individual solicitors would be subject to SRA supervision, when the organisations employing them would not, and the proposed regime would not afford the SRA any control over those organisations, in stark contrast to the ABS regime.

Yours faithfully

FRANK MAHER
Partner
For Legal Risk LLP

[5] See the Consultation on the transposition of the Fourth Money Laundering Directive https://www.gov.uk/government/consultations/transposition-of-the-fourth-money-laundering-directive
[6] National Strategic Assessment of Serious and Organised Crime 2016, at para.110, http://www.nationalcrimeagency.gov.uk/publications/731-national-strategic-assessment-of-serious-and-organised-crime-2016/file
[7] See Regulation 3

Sent by email only to: consultation@sra.org.uk

21 September 2016

Dear Sir/Madam

Looking to the future: flexibility and public protection

The Panel welcomes the SRA's work on simplifying its handbook and paving the way for more future-proof regulation. We support a move that brings SRA rules closer towards principle based regulation alongside the development of clearer outcomes. However where there is greater risk of detriment for consumers posed by room for interpretation, there is a need for more prescriptive rules. We would also caution against relying too heavily on information remedies to mitigate these risks. Using a legal service can be an incredibly overwhelming experience and overloading consumers with information at the wrong stage, or in the wrong manner, may deter people from fully engaging – particularly those who are more vulnerable. This will be a continuing challenge for the SRA and providers to grapple with.

Maintaining professional standards

Principles and codes of conduct

Reducing and making the principles clearer is to be commended and it appears the ethos of the Principles is maintained. What will be of great value is an exploration of how the SRA interprets these in its supervision and enforcement actions, particularly how it ties in with the extensive work around a Question of Trust and appropriate disciplinary actions. It also provides clearer direction for those working in-house.

We welcome clarity within the codes of conduct, although there are some areas where the SRA has the opportunity to prescribe clear and good consumers outcomes for example under client information and publicity. As drafted the requirement is to ensure clients are in the position to make an informed decision, but there is no requirement to provide a likely overall cost ahead of engagement. The Panel has previously made repeated calls for price transparency, and argued for better costs information to enable consumers to make truly informed decisions. This is an opportunity for the SRA to answer those calls.

Requirement to be "qualified to supervise"

At present, any solicitor operating as a sole practitioner or a lawyer manager in an authorised body, or employed by a law centre, must be "qualified to supervise" by having completed 12 hours of management skills training, and been entitled to practise as a lawyer for 36 months in the past 10 years. The SRA has proposed redefining these requirements b but left it open as to what they should be. The Panel would agree that there should be a minimum qualification level but with a lack of research into this it is difficult to advocate for a particular threshold. Whatever is in place ultimately will need to ensure minimum standards, as well as avoid excluding those returning to work or bringing experience from other services.

Consumer protection and information remedies

Increasing flexibility

At present, a solicitor can only provide legal services to the public if they are doing so through an SRA-authorised organisation. A solicitor can only carry out reserved legal activities to the public from an unauthorised firm if that firm does not provide legal services to the public. A solicitor also cannot provide non-reserved legal activities to the public unless permitted to do so. Unregulated legal professionals are free to and do carry out unreserved legal activities from unauthorised firms, for example will-writers or estate administrators. However, it is the SRA's view that solicitors are '*the people who are arguably best placed to deliver quality non-reserved legal services*'.

The SRA proposes to enable solicitors to make more of the solicitor 'brand' by:

- Removing restrictions on solicitors delivering non-reserved legal services to the public through an alternative legal services provider (unauthorised), while using the solicitor title.
- Solicitors will be subject to the new Solicitors Code.
- Solicitors will have to inform clients of the protections open to them, which depend on whether they work in an authorised or unauthorised firm.

The proposals are designed to improve flexibility of practise for solicitors, and the Panel understand that this is to encourage more diverse delivery methods of reserved and unreserved legal activity. We are supportive of a move to greater flexibility and can see the advantages, particularly where solicitors work with Law Centres or charities, or the ability to remove the practising/non-practising label.

The Panel's concern here is that although the SRA is looking to promote the solicitor 'brand' as a means by which consumers can choose their service, in reality this is hampered by the two distinct types of service created through the revised practising arrangements. One, of solicitor providing reserved legal activities through an authorised firm, and another of a solicitor providing only unreserved legal activities through an unauthorised firm. While their training and qualification may have met the same standards, the two models do not offer the same service or level of client protection, as the current proposals do not require solicitors working in unauthorised firms to have PII or access to the compensation fund. For those unfamiliar with using a solicitor, there is a sizeable risk of confusion as we know that consumers are unclear about regulatory distinctions as they currently stand. There are further questions raised in relation to access to the Legal Ombudsman where the solicitor is operating in an unregulated firm, given that any work carried out under the supervision of the solicitor (by a paralegal for instance) would, at present, seem to fall outside of the Legal Ombudsman's remit. We would expect to see clear guidance around this area, as this potentially undermines the notion of there being more protection than that from an unregulated provider.

When one factors in the existing information asymmetries between providers and consumers, the frequency with which this is a distress purchase, and behavioural biases which make consumer decisions prone to errors this additional issue tips the allocation of risk unfairly towards consumers. Finding the right balance when it comes to who bears the risk is crucial to achieving well-functioning markets, as consumers will only drive competition if they are confident that regulation will protect them. The Panel has written previously on the levels of risk consumers should reasonably be expected to assume.[1]

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1 http://www.legalservicesconsumerpanel.org.uk/ourwork/Financial%20Protection/2013%2006%2010%20riskandresponsibility.pdf

Compensation fund and PII

The proposals currently set out that clients of solicitors working outside of a regulated firm will not be able to make a claim on the compensation fund under any circumstances. The proposals also set out that any solicitor working in an unauthorised firm will not be required to take out PII. While we support the drive to devise a more proportionate regulatory regime, the Panel remains concerned about the risk of consumer confusion around what protections are available and that the solicitor is unable to take or hold client money. These solicitors may not hold client money, but they are still open to negligence or fraud. While the Panel is keen to avoid unnecessary regulations, we cannot see that consumers should be relying on existing consumer protection legislation when a more accessible and lower cost alternative is available through the compensation fund. We believe that there should be the option for these solicitors to contribute a lesser amount to the compensation fund, reflecting the fact that the level of risk is lowered – but not altogether removed – by not handling client money. The Panel believes that Special Bodies should also be required to have PII however this should reflect the level of risk appropriately.

Across all these areas, there will need to be clear and simple ways to explain the differences in services available and protections afforded between solicitors working in different circumstances. We would ideally like to see 'informed consent' be given a glossary definition, and to see some consumer research carried out in order to establish the most effective ways of gaining informed consent from consumers. This is something we raised in response to the SRA's guidance on the separate business rule (SBR) in the context of managing referrals between regulated and unregulated businesses. Having this evidence would provide the profession with clear examples of what good looks like in this instance, particularly for vulnerable consumers whose information needs may differ. This would also support the firm's ability to evidence informed consent if required to by the SRA. There needs to be serious consideration given to just how much information is required to be given to the consumer, at present it looks to be too much.

Sole solicitors

The drive to increase flexibility has yet to be extended to sole solicitors, as the proposal currently stands to maintain the status quo for solicitors providing services to the public or a section of the public. The Panel can see that the two Codes proposed serve different purposes, and it makes sense to require a sole solicitor to be a part of a firm. However, increasingly new business models are emerging and, in the right circumstances, these can benefit consumers. The SRA will need to deal with these, and here it has an opportunity to ensure a minimum standard of regulation and protection across the board.

Lastly, we would urge collaboration with other regulators to tackle the risk of consumers falling down the gaps in terms of accessing legal services and having access to redress. Information solely from one regulator about their piece of the puzzle is not sufficient. All regulators involved must get together and agree boundaries and work to ensure there are no gaps for consumers to fall through. They should ensure that there are clear explanations to consumers about all aspects of service from both reserved and unreserved activities, from both regulated and unregulated (by the SRA) firms. This must be a combined effort to describe clearly the entire landscape to consumers so that they can make informed choices.

If you have any queries or would like to discuss this further, please contact the Panel Associate, Stephanie Chapman.

Yours faithfully,

Elisabeth Davies
Chair

Consultation: Looking to the future- flexibility and public protection

Response by Leicestershire Law Society

About Leicestershire Law Society

Leicestershire law Society was founded in 1860 as an organisation for local solicitors. Its current objects include representing the interests of its members locally and nationally. Further information can be found on our website www.leicestershirelawsociety.org.uk.

Response

Overall we support the published Response of The (national) Law Society. In particular we query whether it is really necessary to implement major regulatory reform amidst everything else currently happening both within the profession and in the country. Our view is that the proposed new shorter code is not especially simpler or more intelligible and even if it were to be we have concerns about the proposed new two tier profession of regulated and unregulated entities.

Whilst we accept the desire to make the legal services market more competitive and that reducing prices is one way to do this what is proposed will not address the most extreme unmet legal need of those who cannot afford to pay at all. Furthermore customers attracted by the lower prices offered by the proposed unregulated entities will not appreciate that the reduced cost represents a diluted service and the absence of former “givens” such as Professional Indemnity Insurance and the Compensation Fund. It is proposed that clients of unregulated firms will be told that, for example, legal professional privilege may be compromised but we think it is naive to assume that the lay client will fully understand the effect of that.

We are also concerned about the position and roles of solicitors engaged at the proposed unregulated entities. The “law firm” will be a commercial venture with a need to minimise staff costs and the solicitors recruited are likely to be from the least expensive sector of the market namely newly or recently qualified or returning after absence for ill health or acting as a carer. Thus we have issues about these individuals desperate for job in a saturated market taking on full regulatory COFA and COLP responsibilities without supervision and at a junior level under paymasters who have other priorities. The entrepreneur boss may not be greatly interested in the solicitor’s duties as an officer of the Court for example but the matter may be of crucial importance to the client. The outward, public facing role of this solicitor is very different from the traditional In House lawyer who normally functions at an internal and more senior level.
There are also Equality & Diversity implications. We are pleased to note that the new Code retains the objective of encouraging a diverse profession but the requirements for diversity monitoring will presumably only apply to regulated entities.

Also if unregulated firms do not have to contribute to the Compensation Fund and regulated firms have to make up the shortfall the smaller regulated firms may not be able to afford the additional contributions. These small regulated firms may also lose out on unreserved work if larger firms are able to hive that off to their own unregulated entities. That is of particular importance here in Leicester where small firms and sole practices owned and run by ethnic

minority solicitors offering specialist advice such as immigration and mental health and acting for very vulnerable individuals such as asylum seekers are in many ways the lifeblood of the community.

Thus we endorse the conclusion of The Law Society that before proceeding further with the changes proposed the SRA should undertake further research into whether the new Code will in fact be easier to follow and reduce practice costs and the full equality and diversity implications for legal service users and providers.

Leicestershire Law Society
Non contentious business sub committee
September 2016

Response to SRA Consultation 'Looking to the Future' by Linden Thomas, Solicitor, University of Birmingham

The University of Birmingham Law School provides a range of pro bono services to the public. Pro bono advice is given by undergraduate law students, supervised by qualified solicitors and barristers. I am a solicitor employed by the University of Birmingham to coordinate its Law School's pro bono activities and to supervise pro bono advice.

In May 2016 I wrote a paper for a forthcoming book on the future of legal education. The paper highlights the difficulties that the current regulatory provisions pose to solicitors practising in University law clinics and sets out proposals to address these challenges. The first draft of that paper is set out in its entirety below.

I am submitting the attached paper in response to the 'Looking to the Future' consultation. Many of the issues raised in the paper address questions posed by the consultation. The paper also outlines how many of the current and proposed arrangements affect (or will affect) solicitors practising in university law clinics and the operation of university pro bono programmes. I set out below some key points in response to the consultation document. Please refer to the attached paper for further details and a full explanation of the rationale for making these recommendations. I would be happy to be contacted in order to discuss any of the points raised in this paper in further detail.

Key Points

1. A survey carried out on behalf of LawWorks (the operating name of the Solicitors' Pro Bono Group) in 2014 confirmed that at least 70% of university law schools now undertake some form of pro bono work.[1] Many of these clinics are supervised by in-house solicitors who are employed by the universities. University law clinics provide a significant amount of pro bono advice and assistance each year to a large number of clients. However, the current regulatory arrangements pose numerous problems for university clinics. In particular, the restrictions in relation to insurance and the conduct of reserved activities deter innovation and stymie the development of new initiatives aimed at increasing access to justice.

2. There appears to have been minimal engagement between university law clinics and the SRA to date. The SRA should engage with university law clinics when developing the new Code of Conduct, in order to ensure that future regulatory provisions do not continue to inhibit scope of activities the clinics can undertake. This is particularly important given: the number of clients seeking advice from university clinics; the vital role that these clinics play in addressing unmet legal need and facilitating access to justice; and the peculiar nature of university governance structures which mean that models that would work for most other corporate bodies may be unsuitable or unfeasible for many higher education institutions.

3. Guidance and case studies on different models of university pro bono clinics should be made available.

[1] https://www.lawworks.org.uk/solicitors-and-volunteers/resources/lawworks-law-school-pro-bono-and-clinics-report-2014

4. The proposed clarity on individual and organisational responsibilities would be welcomed. In particular, greater clarity in relation to individual responsibility of in-house solicitors would be helpful, including in the context of pro bono services provided to the public.

5. It is unclear from the consultation documentation whether, where a solicitor provides advice on behalf of a University legal services clinic (which is part of the University and not a separate legal entity), this would render the University an 'alternative legal services provider'. Guidance should be provided on this.

6. Requiring insurance that is 'reasonably equivalent' to that required by the SRA is unhelpful. The definition is opaque and there is a lack of guidance to assist with its interpretation. This will continue to be the case should universities be required to have 'reasonably equivalent' insurance as special bodies. Full details of the challenges posed by the 'reasonably equivalent' test are set out in the attached paper (pages 6-7).

7. Clarity on the definition of 'reserved legal activity' is needed and guidance should be provided on the boundaries between advice and 'the performance of ancillary functions' in relation to 'the conduct of litigation' (pages 7-14).

8. The SRA should allow solicitors employed in University law clinics (and other in-house solicitors) to undertake reserved legal activities on a pro bono basis. The scope of Rule 4.10 is currently prohibitively broad. It is difficult to envisage any situation in which an in-house solicitor undertaking pro bono work could do so in a manner that does not form part of his or her employer's business. Failure to allow such work to be undertaken on a pro bono basis greatly restricts the ability of universities to develop their pro bono programmes in order to address unmet legal need. For example, there are many well recognised and successful schemes across the country, under which students conduct advocacy on behalf of litigants in person (such as the Free Representation Unit). Where solicitors employed by universities are unable to conduct reserved activities under the current regulatory framework they are also prohibited from supervising students undertaking reserved activities. The current transitional provisions do not encompass new initiatives. As a result of these restrictions, new projects involving student representation and advocacy will not be developed despite the potential such schemes have to respond to recognised areas of legal need and notwithstanding the universally recognised success of existing schemes (see pages 7-14).

9. It should not be assumed that the Alternative Business Structure model is an appropriate way of addressing the regulatory limitations on university law schools. Nor is requiring universities to become 'special bodies' a viable alternative. Universities are extremely large, multi-faceted organisations with complex internal governance structures. Law clinics often form a small part of the law school, which in turn, is a small part of a large institution. The prospect of an entire university becoming an entity authorised by the SRA is impractical and unfeasible for many institutions. Setting up a separate legal entity for this purpose is also an unrealistic alternative for many. The reasons for this are set out in detail in the attached (see pages 11-13).

10. I presented the conclusions reached in the attached paper at a Clinical Legal Education Organisation (CLEO) Conference in June 2016 (see pages 16-19). CLEO is an organisation which provides a forum for solicitors, barristers and academics working in university pro bono clinics across the UK to meet and share best practice. It was agreed at that meeting that I would lead a team of representatives from universities across England and Wales to draft a 'Handbook for Clinical Practice'. This project is currently in the preliminary stages.

11. A review of the regulatory framework should not be considered in isolation. Whatever regulatory requirements are ultimately brought into force, it is imperative that the SRA's telephone helpline provides consistent and meaningful guidance on interpretation of the new Handbook. This has not been my experience of that service to date.

Law Clinics in England and Wales: A Regulatory Black Hole

By Linden Thomas, Solicitor and CEPLER Manager,

University of Birmingham

There is a wealth of literature addressing the pedagogical merit and social justice impact of clinical legal education, and quite right too. As other chapters in this book attest, clinic has many such virtues to extol. As a relative newcomer to the field, I have had no difficulty finding answers in the literature on clinic to my many questions about why law students ought to be given the opportunity to practice law and to reflect upon their experiences during their studies.[2] I have also been fortunate enough to meet with peers from around the globe to share experiences as to how, as practitioner teachers, we are able to optimise the learning experience that clinic offers and how our pro bono projects can be configured to have the greatest possible degree of positive social impact.[3] Yet, there is one fundamental question about clinic that I struggled to find the answer to: how is it that universities are allowed to provide legal services to the public at all? As clinical legal educators, we focus on education and justice and how both can be improved. Yet, historically, we have not spent much time considering the regulatory framework under which we operate and whether it is fit for our purposes (or vice versa).

There are a multitude of regulatory challenges and restrictions facing clinics in England and Wales. These issues not only stymie innovations in clinic but can also leave solicitors practising in law schools feeling isolated, exposed and unwittingly vulnerable to regulatory and criminal sanctions. They can also prevent clinics from providing much needed legal services to some of the most vulnerable in our society. The latter problem becomes more acute when considered against the backdrop of significant cuts to public funding for legal advice and representation,[4] concerns

[2] For example, The International Journal for Clinical Legal Education publishes extensively on the pedagogy of clinic. See: < http://www.northumbriajournals.co.uk/index.php/ijcle> last accessed 31 May 2016

[3] Conferences hosted by organisations such as the Global Alliance for Justice Education facilitate such discussions. There is also a wealth of literature on the social justice impact of clinics. See for example: Frank S. Bloch (ed), *The Global Clinical Movement* (OUP 2011)

[4] The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) came into force on 1 April 2013, heralding significant changes to legal aid system. Public funding is no longer available for legal advice or

regarding funding related closures of high street law firms and third sector advice agencies that offer advice on areas of social welfare law[5] and the significant rise in the number of litigants in person representing themselves in court proceedings.[6] Never have pro bono services been in greater demand.

In this chapter I will set out numerous examples of the regulatory and legislative difficulties and uncertainties faced by law clinics in England and Wales and outline the impact they can have on clinicians and their institutions. I will explain why it has become essential for law schools to grapple with the regulatory framework in which they work and to engage proactively with the regulators to ensure that our position is made known. Failure to do so will, for all except perhaps the most well-resourced clinics, have negative repercussions on those members of the public whom the clinics aim to assist and will limit the opportunities for legal practice experience that we can afford our students.

Although many of the regulatory requirements detailed in this chapter are specific to England and Wales, examples of innovation in regulation and the sharing of regulatory best practice that empowers and enables clinics to provide legal services has the potential to be as valuable when shared internationally as good pedagogy and social justice practice. It is yet another sphere of clinical legal education in which we may be able to learn from one another and improve our offering.

Part One: Regulation of legal services in England and Wales

The current regulatory framework for the legal profession in England and Wales derives from the Legal Services Act 2007 (LSA), which introduced the ability for non-lawyers to invest in, own and manage legal practices through regulated entities commonly referred to as alternative business structures. The LSA was intended to allow for innovation in the legal services market and to enable legal advice to be delivered in conjunction with other professional services.

One of the acts of the LSA was to establish the Legal Services Board (LSB) as the body responsible for overseeing the regulation of legal services in the jurisdiction.[7] Section one of the LSA sets out "regulatory objectives" which the LSB must act in accordance with, to the extent that it is reasonably practicable to do so.[8] The regulatory objectives include: protecting and promoting the public

representation in many areas, including: nearly all private family law matters; asylum support; consumer and general contract; and most areas of welfare benefits and employment law.

[5] See for example, 'Law Centre Closures' (*Legal Action Group*, 12 February 2014) <http://www.legalactiongroupnews.org.uk/law-centre-closures/ > last accessed 31 May 2016; and Catherine Baksi, 'Civil Legal Aid: Access Denied' (*The Law Society Gazette*, 7 April 2014) <http://www.lawgazette.co.uk/law/civil-legal-aid-access-denied/5040722.fullarticle > last accessed 31 May 2016

[6] See for example: Sarah-Jane Bennett 'The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO): One Year On: Final Report' (The Bar Council, 2014); *Lindner v Rawlins* [2015] EWCA Civ 61; and House of Commons Justice Committee, *Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012*, (Eighth Report of Session 2014-15, 4 March 2015, HC311)

[7] Legal Services Act 2007 (LSA), s 2

[8] LSA, s 1 and s 3

interest; improving access to justice; and increasing public understanding of the citizen's legal rights and duties.[9]

The LSB has oversight of ten separate bodies, known as the 'approved regulators', which in turn regulate different types of lawyers, including solicitors, barristers and legal executives.[10] In the case of solicitors, the approved regulator is The Law Society of England and Wales. The LSA requires approved regulators to separate their representative function from their regulatory function.[11] As The Law Society is the representative body for solicitors it cannot therefore also adjudicate on regulatory matters. Consequently, the Solicitors Regulation Authority (SRA) was established in 2007 as a separate operating division of The Law Society and acts as the independent regulator of solicitors and law firms.

Approved regulators are also required by the LSA to act in a way which is compatible with the regulatory objectives. The SRA sets out its commitment to do so in the 'additional information' section to the introduction to the SRA Handbook in which it states that:

> *"We are confident that the contents of this Handbook, coupled with our modern, outcomes-focused, risk-based approach to authorisation, supervision and effective enforcement will:*
> *a) benefit the public interest;*
> *b) support the rule of law;*
> *c) improve access to justice;*
> *d) benefit consumers' interests;*
> *e) promote competition;*
> *f) encourage an independent, strong, diverse and effective legal profession;*
> *g) increase understanding of legal rights and duties; and*
> *h) promote adherence to the professional principles set out in the Legal Services Act 2007."*[12]

As the majority of lawyers working in university law clinics in England and Wales are solicitors, a consideration of the regulations affecting other types of lawyer is outside of the scope of this chapter.

Part Two: The regulatory status of law clinics and clinicians

In England and Wales, the vast majority of university law clinics are part of their institution's law school. Some clinics are modules delivered as part of the school's curriculum.[13] Others, as is the case at my own institution, are entirely extra-curricular activities run by the school. Some are a combination of both of the aforementioned. Therefore, subject to some recent exceptions, which are addressed below, clinics are not usually separate legal entities. Solicitors working in university

[9] LSA, s 1
[10] A full list of the 'authorised regulators' and the different types of lawyers they regulate can be found at: 'Approved Regulators' <http://www.legalservicesboard.org.uk/can_we_help/approved_regulators/index.htm> last accessed 31 May 2016
[11] LSA, s 30
[12] 'SRA Handbook' (Solicitors Regulation Authority, April 2016)
[13] Elaine Campbell, 'Regulating Clinic: Do UK Clinics Need to Become Alternative Business Structures Under the Legal Services Act 2007?' (2014) 20(1) IJCLE < http://www.northumbriajournals.co.uk/index.php/ijcle/article/view/19> 520, 526 last accessed 31 May 2016

law clinics are typically employed by the university and the university is the legal entity on behalf of which the clinic's legal work is conducted. These solicitors are therefore likely to be classed as 'in-house solicitors' for regulatory purposes because the Solicitors Practice Framework Rules[14] provide that a person may practice as a solicitor "as the employee of another person, business or organisation, provided that you undertake work only for your employer, or as permitted by Rule 4 (In-house practice)". [15] The reference to Rule 4 is crucial here because Rule 4.10 permits in-house solicitors to provide pro bono legal advice to a client other than their employer where the following conditions are met:

a) the work is covered by professional indemnity insurance reasonably equivalent to that required by the SRA;

b) either: no fees are charged; or the only fees charged are those received from the opposing party by way of costs if the client is successful and all costs are paid to charity; and

c) the solicitor does not undertake any reserved legal activities, unless the provision of relevant services to the public or a section of the public (with or without a view to profit) is not part of your employer's business.[16]

Whilst the requirement not to charge fees for the services provided is almost certainly not going to pose a problem for those acting on a pro bono basis, the remaining two provisions raise a myriad of questions for solicitors supervising university law clinics. I shall address each of these restrictions in turn below.

Sure, I'm insured…aren't I?

In order for an in-house solicitor to give advice to members of the public on a pro bono basis, he or she must have insurance that is reasonably equivalent to that required by the SRA.[17] The SRA Indemnity Insurance Rules require solicitors in private practice to obtain insurance complying with the Minimum Terms and Conditions (MTC) of insurance that are set out at Appendix 1 to the Solicitors Indemnity Insurance Rules.[18] The MTC are extensive, spanning 12 A4 pages and consisting of eight clauses and numerous sub-clauses. They set out the basis for arguably the most extensive liability cover for professional indemnity available in the UK insurance market. They include many terms that a university's insurance policy is exceedingly unlikely to contain. For example, they provide that the insurer may not decline cover due to misrepresentation, even in cases of fraudulence. Provisions such as this mean that a university's professional indemnity insurance is almost certainly not going to be comparable with an MTC compliant policy. Indeed, it is unlikely that it would even be possible for a university to obtain cover that is comparable to the MTC, given that it expressly applies to private legal practice.[19] The issue for universities therefore is: how to determine

[14] The SRA Framework Rules are part of the SRA Handbook
[15] 'Solicitors Practice Framework Rules 2011' in *The SRA Handbook* (Solicitors Regulation Authority, April 2016), Rule 1.1(e) (SRA Framework Rules)
[16] The above is paraphrased. SRA Framework Rules (n14) Rule 4.10 for the full wording
[17] Ibid
[18] SRA Indemnity Insurance Rules, Appendix 1
[19] Ibid clause 1.1

whether insurance cover which cannot be directly compared with the MTC is 'reasonably equivalent' for the purpose of Rule 4.10. Clearly, a clause by clause comparison would be fruitless.

Disappointingly, the SRA provides no guidance on the meaning of the phrase "reasonably equivalent". Nor does it give any indication as to what a reasonably equivalent insurance policy ought to include. Unhelpfully, the SRA ethics helpline also declines to adjudicate on whether a specific clause or policy will satisfy the reasonably equivalent test.[20] University clinics are therefore left to reach decisions in isolation, unsupported and without assistance or guidance from the regulator. Some sensible assumptions can of course be made. For example, it is likely that the overall indemnity cover provided by university insurers for any one event will be a relevant factor to be balanced against the risk and value of cases being taken on by the clinic. However, given the highly bespoke and specific nature of the MTC, no favourable interpretation of the reasonably equivalent test will be without risk. This situation is deeply unsatisfactory. The risk is placed firmly on the university and, anecdotally, I am aware that some universities have been extremely loathe to reach a determination on the issue, thereby threatening the future of their legal clinic. It is difficult to see how, in providing so little support and/or guidance for pro bono services that serve a fundamental role in meeting unmet legal need, the regulator is successfully discharging its legislative duty or its publically declared intention to 'benefit the public interest' and 'support the rule of law'.[21]

Reserved Legal Activities

The LSA ring-fences certain activities, known as "reserved legal activities", which can only be carried out by persons who are authorised to do so, or who are otherwise exempt.[22] Those activities that are reserved are listed at section 12 of the LSA and include exercising a right of audience and conducting litigation,[23] both of which form part of the offering of many law clinics. It is a criminal offence to carry out a reserved legal activity without being either an authorised person or exempt.[24]

As set out above, an in-house solicitor doing pro bono work may only undertake reserved legal activities where the provision of those services to the public is not part of his or her employer's business.[25] The impact of this provision has been to significantly limit the capabilities of university law clinics to provide legal services beyond advice. I have calculated that there are five options available to universities wishing to circumvent this restriction; however, each of these options is encumbered by numerous shortcomings.

1. Limit the work your clinic does to work that is not reserved

The most risk averse approach for universities is to limit the work undertaken by their clinics to activities that are not reserved. In practice, this is likely to mean clinics offering either verbal or written advice only. To do otherwise is to risk straying into 'reserved' territory. However, it is not always clear where the boundaries between advice and reserved activity lie.

[20] The SRA has a professional ethics helpline that offers advice on the SRA Handbook, and therefore also the Practice Framework Rules. I called it when considering the issue of whether my institution's professional indemnity insurance was reasonably equivalent to the MTC.
[21] Ibid (n 8 and N 11)
[22] LSA, s 13
[23] LSA, s 12
[24] LSA, s 14
[25] Rule 4.10 Framework

Schedule 2 of the LSA sets out a definition for each type of reserved activity. By way of an example, the 'conduct of litigation' is defined as:

> (a) the issuing of proceedings before any court in England and Wales,
>
> (b) the commencement, prosecution and defence of such proceedings, and
>
> (c) the performance of any ancillary functions in relation to such proceedings (such as entering appearances to actions).[26]

This definition raises more questions than it answers. First, the definition of 'court' for these purposes is said to *include* First-tier and Upper Tribunals.[27] In England and Wales, the majority of employment law issues fall within the jurisdiction of the Employment Tribunal, which is separate to the aforementioned tribunals. Some clinicians have argued that at present, Employment Tribunal litigation therefore falls outside of the scope of this type of reserved activity.[28] However, the definition of 'court' in Schedule 2 is inclusive, as opposed to exclusive. This means that the majority of courts in England and Wales, including County Courts, the Court of Appeal and the Supreme Court are not expressly listed. However, on any reasonable interpretation they must surely fall within scope. Therefore, whilst the status of Employment Tribunal litigation may be unclear, it would certainly be a risky approach to treat employment tribunal litigation as not being a reserved activity.

A further question raised by this definition is, exactly what activity falls within the scope of 'conduct of litigation'? The remit of paragraph c above is extremely broad. 'Performance of any ancillary functions' could include conducting settlement negotiations or drafting without prejudice correspondence on behalf of a client. It may also include advising clients who are representing themselves in proceedings as well as helping them to draft letters pertaining to their ongoing litigation or to prepare submissions for hearings. Advice to an individual representing himself or herself in bringing or defending a claim can be extremely valuable, particularly if little or no advice was sought before proceedings were commenced. Advice to a litigant in person on practical matters such as understanding a court order, drafting a witness statement or preparing a bundle of documents can be extremely useful in helping them to present their case to its full potential. Similarly, commercial legal advice on the potential value of a claim, the associated costs and risk analysis and how to conduct settlement negotiations are all areas that law clinics can potentially advise on without taking over conduct of the case. Finally, advice on the substantive law involved in a claim and its merits is invaluable. Sometimes an individual will have initiated a claim before having sought such advice. Yet this input, even after proceedings have commenced, may result in a significant reduction in stress, costs and time for all parties and for the court, for example, if a client is advised they have an unmeritorious claim and therefore decide to withdraw. In each of these situations, there is also huge potential for student learning on substantive law, procedure, ethics and the interplay between law and commerciality. Yet, many law schools may choose not to provide advice on some or all of these areas to self-represented parties in litigation, in case such advice should stray into the 'performance of ancillary functions'. LawWorks reported in June 2015 that

[26] LSA, Schedule 2
[27] LSA, s 207
[28] This point was discussed by clinical practitioners from across the UK at the November 2014 Clinical Legal Education Organisation conference.

significant numbers of in-house counsel have chosen to avoid giving pro bono advice on any matters which have become, or may end up becoming, contentious.[29]

Assuming the regulation on this point is to remain unchanged, some detailed guidance from the regulator as to where advice ends and conduct of litigation begins would be extremely useful and may encourage clinics to engage in types of work currently deemed to be out of scope, or alternatively, it would at least give them comfort that their decision not to do so is justified.

2. Only do reserved legal activity that does not form part of your employer's business

Rule 4.10 expressly allows for in-house solicitors to undertake reserved legal activities where the provision of relevant services to the public or a section of the public (with or without a view to profit) is not part of their employer's business. Upon my initial reading of the Rule, I concluded that as my employing university does not (and indeed, cannot) provide reserved legal activities to the public as part of its normal course of business, there would be no issue with me doing so on a pro bono basis. The university's in-house legal team provides reserved activities only to the organisation itself, not to the public, and the normal course of business for a university is teaching, research and some commercial activities such as conference facilities etc. It does not include conducting litigation or exercising rights of audience on behalf of the public.

I telephoned the SRA's professional ethics helpline to check my understanding and received confirmation that my interpretation was correct. However, I have subsequently realised that this is not the case. Guidance note (x) to Rule 4, lists 12 factors that are relevant when determining whether the reserved activity is part of the employer's business. Factors include 'the extent to which the employer relies on or publicises the work' and 'the extent to which the work complements or enhances the employer's business'.[30]

The Rule is also referred to in a practice note issued by The Law Society on 'In-house pro bono practice: regulatory requirements'. This states that:

> *"the SRA tends to take a wide interpretation of what constitutes 'part of your employer's business'. For example, this has included the in-house lawyer's employer requiring him or her to undertake pro bono legal work or where the employer provides management, supervision or training in relation to such work, publicises any pro bono efforts or pays any premium for an indemnity insurance policy to cover the pro bono work."*[31]

Given that: law school clinics are endorsed and funded by the university; supervising solicitors are specifically employed to provide pro bono advice, which is covered by insurance funded by the university; and law schools are likely to use the educational and employability opportunities afforded by the clinic to market to potential students and to promote the university's public engagement work, it seems certain that the clinic itself would be deemed to form 'part of the

[29] 'LawWorks response to Legal Services Board consultation: 'Are regulatory restrictions in practicing rules for in-house lawyers justified?' (LawWorks, June 2015) < https://www.lawworks.org.uk/solicitors-and-volunteers/resources/lawworks-response-legal-services-board-consultation-are> last accessed 31 May 2016

[30] SRA Framework Rules (n14) Guidance note (x) to Rule 4

[31] 'In-house pro bono practice: regulatory requirements' (The Law Society, February 2016) < http://www.lawsociety.org.uk/support-services/advice/practice-notes/in-house-pro-bono-regulatory-requirements/> last accessed 31 May 2016

employer's business' and therefore no law school solicitor will be able to rely upon this provision to undertake reserved activities.

My consideration of the interpretation of this Rule highlighted two key issues. First, as currently drafted, the Rule is prohibitively broad. It is difficult to envisage any situation in which an in-house solicitor undertaking pro bono work could do so in a manner that would not form part of the employer's business if the work was in anyway endorsed by the employer. Given that pro bono work undertaken by an in-house lawyer is likely to fall within the employer's broader corporate social responsibility agenda, this is almost certainly going to be the case. This restriction places considerable limitations on the services that in-house lawyers can provide. To prevent all in-house lawyers from conducting litigation or exercising a right of audience is to deny them the ability to assist clients with some of the highest levels of need and vulnerability.

The second issue brought to the fore was the inadequacy of the guidance provided by the SRA helpline on the issue. The advice I was given was patently wrong. I return to the issue of guidance provided by the regulator below.

3. Rely on the exemption at section 23 of the LSA

A third option is for law schools to rely upon the exemption at section 23 of the LSA. This exemption provides that during a transitional period not for profit bodies are able to 'carry on any activity which is a reserved legal activity'.[32] At the end of this transitional period not for profit bodies will need to be authorised as alternative business structures (see numbered paragraph 4 below) if they wish to continue to carry out reserved activities.[33] The LSA defines a not for profit body as

> *"a body which, by or by virtue of its constitution or any enactment–*
>
> *(a) is required (after payment of outgoings) to apply the whole of its income, and any capital which it expends, for charitable or public purposes, and*
>
> *(b) is prohibited from directly or indirectly distributing amongst its members any part of its assets (otherwise than for charitable or public purposes)".*[34]

Given that nearly all universities are charities, they are likely to fall within this definition.[35] Therefore, those universities that were delivering reserved activities before the LSA came into force, can continue to do so for the time being. However, this provision poses two challenges for clinics. First, section 23 allows not for profit bodies to "carry on" undertaking reserved activity. It does not allow not for profit organisations to begin performing reserved activity. This means that no clinics wishing to start delivering reserved activities for the first time will be able to rely on the exemption.

[32] LSA, s 23 n.b., this section also applies to community interest companies and trade unions, neither of which are likely to be relevant to university law clinics.
[33] LSA,s 106
[34] LSA, s 207
[35] Most English universities are exempt charities under the Charities Act 1993. They are regulated by the Higher Education Funding Council for England (HEFCE). See for example: 'Key Charitable Information' <http://www.birmingham.ac.uk/university/governance/publication-scheme/charitable.aspx > last accessed 31 May 2016

Second, it is clearly stated in the statute that the exemption is transitional. It is not the legislator's intention that not for profit organisations are to be allowed to carry out reserved activities without authorisation under the LSA indefinitely. Yet, further details as to when the transitional period might come to an end and what this will mean for not for profit organisations are not forthcoming. Section 23 of the LSA came into force on 1st January 2010, meaning that law schools and other not for profit organisations have been in a state of regulatory limbo since that time. The LSB website says that it does "not anticipate further work on this issue before autumn 2016, meaning that there would be an additional period after this date before the transitional protection would come to an end".[36] Prior to that, it had been indicated the period could be over by 2015.[37] This level of uncertainly cannot be conducive to innovation on the part of universities. Why would a university already delivering reserved legal activities branch into new areas of work or recruit new staff to supervise new pro bono projects when the length of the transitional period is so uncertain? It is difficult to establish the business case for doing so.

Yet, for reasons outlined below, universities have not been queuing up to become alternative business structures either, notwithstanding the certainty of continuity of service provision that this would offer. Perhaps one reasons for this is that whilst the alternative options are still unknown, a "watching brief" remains preferable.[38] As Campbell hypothesised in 2014:

"Perhaps the transitional grace period will be extended indefinitely. Perhaps the regulator will carve out an exemption for law school clinics. Perhaps the Ministry of Justice will take heed of the calls for a complete overhaul of legal regulation".[39]

Whatever the eventual outcome, a period of uncertainty that has gone on for more than five years and appears set to continue indefinitely does not encourage innovation or expansion of service provision by law school clinics. Once again, the regulator's action, or rather, inaction, falls shorts of meeting the regulatory objectives to protect and promote the public interest and to improve access to justice.[40]

4. Set up an alternative business structure

The option that provides the greatest degree of certainty for clinics wishing to undertake reserved legal activities is to become an alternative business structure. Yet, to date, only two law schools out of a total of 99 in England and Wales have chosen to pursue this option.[41]

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[36] Legal Services Board, 'Transitional Protections from ABS Licensing' <http://www.legalservicesboard.org.uk/projects/alternative_business_structures_and_special_bodies/index.htm> last accessed 31 May 2016

[37] Legal Services Board, 'Regulation of special bodies/non-commercial bodies' (December 2013) 3 <http://www.legalservicesboard.org.uk/projects/alternative_business_structures_and_special_bodies/index.htm > last accessed 31 May 2016

[38] Elaine Campbell and Carol Boothby, 'University law clinics as alternative business structures: more questions than answers?' (2016) 51(1) The Law Teacher 132

[39] Ibid (n 12) 530

[40] LSA, s 1

[41] Nottingham Law School and The University of Law. Total number of law schools taken from figures in D Carney, F Dignan, R Grimes, G Kelly and R Parker *The LawWorks Law School and Pro Bono Clinic Report 2014* (LawWorks, 2014) < https://www.lawworks.org.uk/solicitors-and-volunteers/resources/lawworks-law-school-pro-bono-and-clinics-report-2014 > last accessed 31 May 2016

What is an alternative business structure?

As set out above, in order to perform reserved legal activities a person must either be authorised or exempt. There are two ways in which a person can be authorised.[42] First, an individual or another legal entity, such as a corporate body, can be authorised by a regulator to do so. The majority of law firms are authorised in accordance with this provision. Organisations that do not provide legal services to the public can still employ solicitors to provide in-house legal services to the organisation itself. These organisations do not need to be authorised. Indeed, it would not make sense to subject corporate entities such as universities to the same SRA reporting requirements and regulatory restrictions as law firms, when provision of legal services is delivered internally. However, the individual in-house lawyers will themselves need to be authorised persons in order to carry out any reserved activity for their employer.[43] In-house lawyers will be so authorised by virtue of holding a current practising certificate granted by the SRA and can therefore undertake reserved activities such as conducting litigation and appearing in court or tribunal on behalf of their employer. As explained above, under Rule 4.10 of the Practice Framework Rules, they cannot provide reserved activities to the public, even on a pro bono basis.

The second option therefore, is for the employing organisation to become what is commonly known as an alternative business structure (ABS). An ABS is an entity delivering legal services that is managed or part owned and controlled by non-lawyers. In order for the ABS to perform reserved legal activities, it must be licensed to do so by a regulator.[44]

The process of becoming an ABS is not cheap. The application fee for applying to become an ABS includes an initial payment of £2,000, plus £150 for each candidate that is subject to approval. Where costs exceed the amount of the initial payment, a day rate of £600 will be charged.[45] However, it is not necessarily the one-off setup costs that are likely to be prohibitive for law schools. It is the administrative burden of getting to that point and the ongoing compliance requirements. Many law school clinics (including my own) are run by just one solicitor. They form a small part of the law school and an even smaller part of the university. My own university employs over 6000 people and has over 27,000 students enrolled at any one time.[46] It is an exempt charity with three key decision making bodies and a multitude of regulations and ordinances.[47] The efforts required to navigate the institution's internal governance procedures and gain approval for turning the entire university into an ABS would be herculean and the business case for doing so, when viewed at an institutional level, is almost non-existent. An alternative then, would be to establish a separate legal entity at least partially controlled by the University to deliver the clinical offering and turn that into an ABS. This was the approach adopted by Nottingham Trent University. However, Nottingham Trent's Legal Advice Centre is a well-resourced clinic, which employs three solicitors.[48] The

[42] LSA, s 18
[43] LSA, s 15 and Explanatory Notes to the Legal Services Act 2007, paras 70-73 < http://www.legislation.gov.uk/ukpga/2007/29/notes > last accessed 31 May 2016
[44] LSA, s 18
[45] Solicitors Regulation Authority 'Fee Policy 2015/16' <http://www.sra.org.uk/mysra/fees/fee-policy-2015-2016.page > last accessed 31 May 2016
[46] 'The Impact of the University of Birmingham' (Oxford Economics, April 2013)
[47] For further information see: 'Our Governance' <http://www.birmingham.ac.uk/university/governance/index.aspx > last accessed 31 May 2016
[48] <http://www.ntu.ac.uk/legal_advice_centre/about_us/index.html > last accessed 31 May 2016

infrastructure needed to comply with the regulatory requirements once an ABS may be prohibitively onerous for many other law schools. For example, once licensed, the LSA requires an ABS to appoint a head of legal practice[49] and a head of financial affairs and administration.[50] This may be an ask too many for law school solicitors with already heavy caseloads as well as teaching, research and other administrative responsibilities. It also seems wholly unnecessary when it is taken into account that most law school clinics will not handle any client money, as all work is delivered on a pro bono basis. ABS clinics may also no longer be able to rely on their university's professional indemnity insurance as a separate entity and may need to source their own, adding an additional recurring cost to the provision of the service.

One potential advantage to law school clinics being separate legal entitles from their university, is that it may offer them freedom from the aforementioned university bureaucracy. Indeed, this appears to have been a relevant factor for Nottingham Trent University's clinic as the Director of their Legal Advice Centre revealed that "We think it will give the Centre greater autonomy within the University structure, enable us to develop more effectively and clarify management structures."[51] Yet, this autonomy is unlikely to be attractive for less well-resourced clinics that are highly integrated with their law schools and rely upon school resources and academic colleagues for support. This autonomy may also been unappealing to universities wishing to retain control where the clinic delivers assessed clinical modules which form part of a degree programme. It is also likely to be unattractive to clinical staff who may be obliged to transfer their employment from the university to the ABS. Campbell and Boothby have summarised these concerns as including: uncertainty over terms and conditions of employment and pension arrangements; and divisions between legal academics and legal clinicians.[52]

In conclusion then, there is a very real possibility that the administrative complexities and the financial and personnel demands that setting up an ABS involves will mean that only the largest and most well-resourced law school clinics will be prepared to take this step. Law schools certainly have not been jumping at the possibility to date. If the transitional period is brought to an end and becoming ABS as the only option available, it could herald the end of many law school clinics delivering reserved activities at all. Whilst the regulators and legislators have rightly made consumer protection paramount, any such regulations must be balanced against practicality, affordability and the consequential impact on access to justice. For many law school clinics, transformation into an ABS is the regulatory equivalent of using a sledgehammer to crack a nut.

5. Partner with external organisations to supervise and deliver reserved activities

A final option, which will permit law students to undertake reserved legal activities, is to arrange for them to undertake placements or externships with external organisations, such as the local law centre or Citizens' Advice Bureau. Students can work under supervision from lawyers employed by the external organisation to assist the clients of that organisation. This approach can offer the

[49] Re-termed a compliance officer for legal practice (COLP) by the SRA
[50] Re-termed a compliance officer for finance and administration (COFA) by the SRA
[51] Richard Owen, 'Alternative business structures and university law clinics: Q & A with University of Law and Nottingham Law School' (2015) 49(2) The Law Teacher 257
[52] Ibid (n 37)

student experience of work in a busy practice environment and can, in turn, offer a valuable additional resource to the host organisation. Many law schools already deliver arrangements of this nature as part of their current pro bono offering. However, this approach does have its limitations. First, although students can be a useful resource to a third sector organisation, there are costs associated with supervising them, not least the staff time required to do so. Some host organisations may therefore require a financial contribution from the university to supervise the service and even then, are likely to limit the number of students they can take. This therefore means that such an arrangement is unlikely ever to be able to rival the student numbers that can participate in an internally delivered clinic. Furthermore, clinics run by universities will have student learning at their core and the mode of delivery and supervision will reflect this. Understandably, the same cannot be said of third sector organisations seeking to balance ever-shrinking budgets with ever-growing demand for their services. Therefore, the style of supervision and the opportunity for reflection are likely to be impacted where supervisors are not employed by the university and, for similar reasons, meaningful assessment of a student's performance by an external supervisor is likely to be challenging and may face scrutiny from university exam boards. In conclusion then, whilst partnering with external organisations ought to be encouraged as part of a law school's pro bono offering, it cannot be seen as a panacea for the regulatory restrictions on the delivery of reserved activities.

Part three: Legislative limitations on specific areas of advice

The restrictions on clinics are not limited solely to in-house solicitors wishing to undertake reserved activity. There are some areas of significant legal need which are out of bounds entirely for the majority of university law clinics, even those wishing to provide an advice only service.

Debt advice

On 1st April 2014 the Financial Conduct Authority became responsible for the regulation of consumer credit activity. The previous regime, under which solicitors were covered to provide advice on debt and consumer credit under a group licence issued to The Law Society and administered by the SRA, was abolished. The consequence of this change is that solicitors are no longer permitted to provide debt advice on a pro bono basis at legal advice clinics.[53] A wide range of debt-related legal advice falls within the scope of this restriction, including: debt counselling; debt adjusting and debt administration. The FCA has offered some guidance, for example, as to what advice will amount to debt counselling.[54] The guidance reveals that the line between permitted advice and debt counselling is finely balanced and consequently, prudent law clinics are likely to avoid giving debt-related advice entirely. This is unsurprising given that to advise on such issues without authorisation, permission or exemption is a criminal offence.[55]

[53] 'Briefing: Regulation of Consumer Credit and Debt Advice' (LawWorks, January 2015) < https://www.lawworks.org.uk/solicitors-and-volunteers/resources/briefing-regulation-consumer-credit-and-debt-advice > last accessed 31 May 2016 N.b., there are some limited exemptions to this rule for not for profit organisations such as law centres that had their own group licences immediately prior to 31 March 2014. Law clinics run by universities are not covered by any such exception.

[54] Financial Conduct Authority Handbook (PERG 17.7) < https://www.handbook.fca.org.uk/handbook/PERG/17/7.html >last accessed 31 May 2016

[55] Financial Services and Markets Act 2000, s 23 [1A]

The consequences of this prohibitive regulation have been far reaching. In January 2015 Lawworks[56] reported that:

"In the period April 2013 to March 2014, 29,279 people accessed the LawWorks Clinics Network and debt advice constituted 7% of all advice delivered… As a result of the removal of the group licencing regime, LawWorks clinics not covered by limited permission (to our knowledge 61 [out of 78] clinics in our network that previously offered pro bono debt advice services are not covered by limited permission) have had to suspend all debt advices services..."[57]

Disappointingly, the FCA will not introduce a waiver to cover pro bono clinics. It has stipulated that this can only be done by way of legislative amendment.[58] Whilst Lawworks and The Law Society have confirmed they are petitioning for this, change has not been forthcoming.

Immigration advice

Under the Immigration and Asylum Act 1999 it is a criminal offence for a person to provide immigration advice or services in the UK unless their organisation is regulated by the Office of the Immigration Services Commissioner (OISC) or is otherwise covered by the Immigration and Asylum Act 1999.[59] Members of certain professional bodies, such as the General Council of the Bar and the Law Society of England and Wales, may give immigration advice without being regulated by OISC. Therefore, solicitors and barristers are able to provide immigration advice and services without needing to be regulated by OISC. However, the popular university law clinic model of using external solicitor and barrister volunteers to supervise advice, which is then sent out on behalf of the university, will fall foul of these provisions. The legislation only permits those who are "acting on behalf of, and under the supervision of" a person who is regulated or a member of a relevant professional body to provide immigration advice or services.[60] Where advice is being sent from the university, rather than from the supervising lawyer's firm or chambers, the students cannot be said to be acting on their behalf and thus, will be unwittingly committing a criminal offence; as will the university and potentially any senior member of staff who permitted the offence.

These two examples of restrictions on advice that can be offered by university law clinics evidence that the SRA is not the only regulator with which the clinical legal community would do well to engage with more proactively. It is difficult to imagine that it was the intention of these regulators to render areas of significant legal need outside of the scope of provision for so many pro bono providers. Certainly the need in these areas is acute. A report issued in January 2016 revealed that average UK household debt rose by a staggering 42% from summer 2015 to winter 2015, increasing to £13,520[61] and in a 2015 report on the impacts of LASPO on onward immigration appeals by the

[56] LawWorks is the operating name of the Solicitors Pro Bono Group, a charity working in England and Wales to connect volunteer lawyers with people in need of legal advice, who are not eligible for legal aid and cannot afford to pay and with the not-for-profit organisations that support them.
[57] Ibid (n 52)
[58] Ibid (n 52)
[59] Immigration and Asylum Act 1999, s 84 and s 91
[60] Immigration and Asylum Act 1999, s 84(2)(e)
[61] 'Family Finances Report Winter 2016' (*Aviva*, January 2016) <http://www.aviva.com/media/thought-leadership/report-library/ > last accessed 31 May 2016

Ministry of Justice noted that practitioners working in that area felt that the greater amounts of pro bono work being carried out post-LASPO were not presently sustainable. [62]

Part four: Regulatory requirements and expectations on students

Another area in which the regulatory framework governing clinics is opaque is in relation to the provisions that allow students to engage in clinical activity, insofar as they exist. For example, I struggled for a considerable period of time to understand why law students have rights of audience to represent clients in Employment Tribunal and Social Security Tribunal hearings.[63] Eventually I stumbled across the following in the Guidance Note to Rule 4 of the SRA's Practice Framework Rules:

> *"Examples of situations where you will be practising as a solicitor, and will therefore need a practising certificate, include:*
>
> *… (f) you undertake work which is prohibited to unqualified persons under the provisions of Part 3 of the LSA, unless you are supervised by, and acting in the name of, a solicitor with a practising certificate or another qualified person"*[64]

Part three of the LSA deals with reserved activities. It would appear that an unqualified student without a practising certificate may carry out reserved work if he or she is being supervised by a solicitor who is entitled to carry out reserved activities and it is that solicitor's name on the Tribunal record. I am not aware of any comprehensive publically available guidance on the regulatory provisions pertinent to student volunteers.

Part Five: The role of the regulator

As I have alluded to frequently throughout this chapter, there is a dearth of regulatory guidance available for university law clinics. In 2011 the SRA launched a new Code of Conduct, which moved away from the previous rules based approach to regulation and, instead, introduced outcomes-focussed regulation (OFR) with a view to offering "good firms more flexibility in how they operate their business".[65] OFR sets out the outcomes to be achieved, but does not stipulate how organisations must arrive at that outcome.

A reduction in red tape is typically considered to be a positive step. However, in the case of regulation, it risks stifling innovation, unless it is coupled with meaningful guidance and assistance with interpretation. Well-resourced law firms with internal compliance specialists may be in a position to take calculated risks when interpreting the SRA Handbook, but the same cannot be said for university pro bono clinics with stretched resources, competing pressures on staff time, unwieldy institutional governance, a conservative attitude to risk and staff who, albeit usually legal practitioners, are not compliance experts. Indeed, many law school solicitors come from private

[62] Anita Krishnamurthy and Karen Moreton, 'Monitoring the early impacts of the Legal Aid, Sentencing and Punishment of Offenders Act (2012) on onward immigration appeals' (Ministry of Justice, 2015)
[63] Many law schools work in conjunction with a charity called the Free Representation Unit (FRU) <http://www.thefru.org.uk/ > last accessed 31 May 2016
[64] SRA Framework Rules, Rule 4
[65] 'Outcomes-focused regulation - transforming the SRA's regulation of legal service' (*Solicitors Regulation Authority*, 28 July 2010) < http://www.sra.org.uk/sra/consultations/OFR-consultation.page > last accessed 31 May 2016

practice law firms where someone else took care of compliance matters. Setting up and/or running a law school clinic should not be so challenging, daunting and fraught with risk that is so difficult to quantify. The regulatory provisions set out in this chapter have been pieced together as a result of my own research from a wide variety of publically available sources and helpful discussions with more experienced clinicians. It has been neither simple, nor speedy. It has frequently been frustrating and the findings have undoubtedly limited the scope of some pro bono activity I would otherwise have wished to provide. Furthermore, the lack of authoritative guidance on this this subject leaves me with the constant niggling concern that there is something I have missed, that one terrible day a piece of regulation will come to my attention that reveals I have been doing it all wrong after all.

If the SRA wishes to further the LSA's regulatory objectives and promote, amongst other things, access to justice; increasing understanding of legal rights and duties; and promoting adherence to the professional principles set out in the Legal Services Act 2007 it should take the following steps:

1. **Engage with law school clinics when developing regulation:** At present law school clinics fall into a regulatory black hole. They are not referred to expressly in the regulation and there is no bespoke guidance available on the regulatory matters directly concerning them. Yet they provide a significant amount of pro bono advice and make a fundamental contribution to meeting several of the LSA's regulatory objectives.[66]

2. **Provide bespoke guidance on the regulatory provisions relating to university clinics:** I have set out the compelling case for such provision elsewhere in this chapter. In 2014 LawWorks reported that at least 70% of UK law schools (approximately 69 schools) are now involved in pro bono work. This signified a 5% increase in the total number of law schools delivering pro bono work since 2010.[67] There is an ever-increasing critical mass of law schools that would benefit from such guidance.

3. **Offer a helpline that provides meaningful, consistent and reliable guidance and bears accountability for the guidance offered:** The refusal to adjudicate or assist with interpretation of SRA rules by ethics helpline advisors exacerbates the isolation and uncertainty experienced by law school clinicians. The lack of accountability for incorrect advice given also means that practitioners may be loathe to rely on any representations that are made. This unwillingness on the part of the advisors and any inaccuracies in advice may be exacerbated by the lack of available guidance and the current failure to cater for law school clinics outlined at 1 and 2 above. A recognition of the regulatory framework surrounding law schools clinics and associated guidance is likely to assist SRA advisors as much as it will clinicians themselves.

<u>Part Five: Where do we go from here? The role of law schools</u>

[66] In 2014-15 32% of clinics in the LawWorks network were university law school clinics. These clinics received 11,100 enquiries over the course of the year. Ibid (n 40) There are of course also numerous university pro bono activities which are not delivered through LawWorks clinics.
[67] Ibid (n 40)

Whilst it is evident that more can, and should, be done on the part of the regulator to support university law clinics, the onus cannot rest solely with the SRA. Dialogue is a two-way process and university law schools need to be better at concerning themselves with the prevailing regulatory environment and how it affects them. The regulatory restrictions detailed in this chapter highlight the need for positive action on the part of clinicians in England and Wales to engage proactively with regulators. The time for rallying ourselves is now. The SRA has indicated that in Spring 2016 it intends to consult on yet more changes to the SRA Handbook. It proposes to conduct a review that will look at how it regulates individuals and organisations, such as firms.[68] University clinics need to ensure their voice is heard. The SRA has made a public commitment that its programme of regulatory reform will aid pro bono work.[69] We need to ensure that this includes pro bono work done by universities.

It is also incumbent upon law school clinicians to share information and knowledge concerning regulation amongst themselves. At present, despite the severe consequences of falling foul of the many of the regulations I have detailed, these regulations are not well-publicised amongst clinicians. Whilst those clinics that are part of the Lawworks clinic network may benefit from its guidance notes, there is at present no comprehensive national manual or guide for law school clinics on relevant regulatory issues. Consequently, it would be very easy to remain ignorant of their existence. If an individual does not know that a particular regulatory restriction exists, he or she will not know to look into it. There is therefore a very real risk that at some point a university will accidentally provide pro bono services unlawfully, resulting in criminal liability, as well as reputational, professional and personal embarrassment for the individuals and institution concerned. The latter will also impact on university law clinics more broadly. We share a collective interest, and responsibility, in ensuring that this does not happen.

It is not only in relation to the regulatory framework that law schools would benefit from a greater degree of discussion and disclosure. There are numerous other compliance issues affecting clinics which we do not commonly discuss as a collective. For example, many law schools work in partnership with solicitors firms and barristers chamber to deliver pro bono services. There is a wealth of regulatory provisions and data protection issues governing these relationships. Yet, we do not habitually discuss what these issues are or share our means of dealing with them. If one university has developed a model collaboration agreement or memorandum of understanding, it seems pointless for other universities to dedicate time and resources to developing one too. Similarly, some law schools have purchased bespoke case management systems, others use cloud based systems. The introduction of any such system raises numerous IT security and SRA compliance issues. It seems sensible to share our knowledge, our recommended due diligence, our concerns and our understanding of the prevailing legislation on such matters.

With these challenges in mind, I propose that clinicians in England and Wales ought to work together to create a 'Handbook for Clinical Practice' which would address and share regulatory best practice in relation to all these issues and more. It would be in the interests of both new and experienced

[68] 'Looking to the future: Flexibility and public protection - a phased review of our regulatory approach' (*Solicitors Regulation Authority*) <https://www.sra.org.uk/sra/policy/future/position-paper.page > last accessed 31 May 2016

[69] 'SRA's regulatory approach will aid pro bono' (*Solicitors Regulation* Authority, 2 November 2015) <https://www.sra.org.uk/sra/news/press/regulation-aids-pro-bono.page > last accessed 31 May 2016

clinicians to have an agreed framework as to how we ought to operate. Such a handbook could set out the compliance risks facing clinics and propose solutions. Perhaps this would also be the best vehicle for engaging the SRA in order to seek its input on and endorsement of chapters dealing with compliance with the SRA Handbook. The drafting of the handbook would also provide a forum for sharing experiences of the barriers to service provision and innovation posed by current regulation and may encourage the much needed engagement with the regulator by law school clinics.

Whilst the thought of drafting such a document might not seem like a particularly exciting task, its existence would ultimately free clinicians up to do what we do best and what we ought to be spending the majority of our time doing: educating law students and delivering services that increase access to justice.

Lindsay Harris

Generally I am in favour of more competition provided that certain safeguards are in place:

- I think there needs to be regulation similar to the duty to treat customers fairly in the financial services sector and to minimise unscrupulous practice. In that sense I see the regulation as being something which is 'portable' so it follows the business which is providing it – whether regulated or unregulated and whatever its size – its purpose being to make sure customers are treated fairly and, in particular, are fully informed about the legal service before they decide to instruct a business.

- In treating customers fairly I think it is fundamental that all customers should be told what remedies/financial recourse (including insurance cover) is available if things go wrong. (For example if I open a bank account I know my savings are protected up to a certain amount).

Less of a concern for larger businesses who would have more than adequate insurance cover irrespective of a requirement to do so, but I can see that smaller businesses could operate through a limited liability entity, cut costs by not having insurance and then leave customers 'high and dry' if a claim was made. Often claims only come to light some years after the advice is given. Also it is not always about money.

- There is a suggestion that the SRA needs to clarify that legal professional privilege will apply to advice given by solicitors in unregulated businesses. I had thought this would apply anyway under the common law but, if there is any uncertainty, it is fundamental that this is retained to ensure that customers (wherever the solicitor they instruct is working) are treated fairly and that there is a level playing field between regulated and unregulated firms.

Thank you.

Kind regards

Lindsay

Lindsay Harris

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21 September 2016

Dear Sirs

Response to the SRA Consultation on the SRA Handbook Review: Looking to the future – flexibility and public protection

1 Introduction

1.1 This letter contains Linklaters' response to the SRA consultation: "Looking to the Future – flexibility and public protection", which was published on 1 June 2016. It reflects and in large part endorses or reproduces the responses, provided by the City of London Law Society ("CLLS") including its suggested mark-up of the two draft Codes of Conduct which this Firm has actively participated in preparing.

1.2 In responding to this consultation, we have taken into account the impact and relevance of the proposals both to our own Firm and to the legal profession as a whole and, critically, our view of the likely impact of any changes on the full spectrum of consumers of legal services. Our response comprises some general observations on some of the key points raised in the consultation, together with answers to the specific questions raised in it.

1.3 This response is structured in three parts: some general observations in Part One, responses to consultation questions in Part Two and a mark-up of suggested changes to the drafting of the code (endorsing the mark-up provided by the CLLS) in Part Three.

Part One - general observations

2 Structure, style and context

2.1 The consultation paper is very long and does not draw out the substance of the SRA's key proposals at all clearly. It would be helpful if these types of consultations are structured differently so that each key change is set out and accompanied by a specific question. As with any consultation exercise, the quality of the information and questions presented will determine the degree to which professionals are able meaningfully to engage with the underlying issues and provide properly considered, constructive responses. We hope that future consultations will reflect this feedback.

2.2 It is difficult to provide well-rounded responses to the consultation when it is presented in isolation of other regulatory reforms which are currently in progress, because they may inform views on the current consultation. A number of examples occur to us:

2.2.1 it would be helpful to understand the status of the proposals which were included in the "Training for Tomorrow" consultation because if those proposals now stand, we would want to consider whether the cumulative effect of those, together with the proposals in the current consultation, risk even greater reputational damage to the profession;

2.2.2 we note that the Competition & Markets Authority published its Legal Services Market Study interim report on 8 July (during the period for this SRA consultation). That report suggests that in the consumer/SME market it is greater transparency about pricing and quality (in the form of consumer feedback), rather than liberalising the use of the solicitor title, which would drive competition. It would be helpful to know whether the SRA proposes to take this into account in deciding what to do next;

2.2.3 the outcome of the independence debate is not yet known and an important part of that debate is whether the regulatory model should change so that the SRA regulates individuals to a base level whilst the Law Society regulates the entry standards, competency and ethics of the profession of solicitors; and

2.2.4 the LSB's recently published consultation relating to the creation of a single legal services regulator to replace the SRA and other regulators (A vision for legislative reform of the regulatory framework for legal services in England and Wales – September 2016).

3 Unmet legal need

The consultation does not fully explain what evidence there is for unmet legal need and we think that the SRA needs more clearly to identify the scope of the problem. We fully support enhancing access to justice across all communities and we agree that if unmet legal need is a problem, then appropriate measures should be introduced to address it. But to understand the best way to do so, the nature, extent and reasons for the problem need to be clear.

We think that it is important that further thought is given to exactly how the SRA's current proposals will address the perceived problem; for example, if the problem for consumers is price (which is what the CMA's interim report suggests) then it is difficult to see how further deregulation will assist, because it would seem that the unregulated legal services market which already exists is not addressing unmet legal need. In particular, we think that greater thought needs to be given to whether removing a requirement for entity regulation around solicitors will indeed reduce costs and, as a direct consequence, reduce legal fees for the consumer. Put differently – is the form of deregulation being proposed actually the right solution to the (unquantified) problem?

4 Damage to the Solicitors Profession and English Law Globally

We feel strongly that removing an entire layer of regulation (i.e. entity-based regulation) of solicitors practising outside of regulated law firms will expose consumers who use a solicitor practising within an unregulated entity to much greater risks, in a number of different ways identified in this response. This is inevitable, and it is unlikely that even the most sophisticated consumer will have the time, resource or inclination properly to understand the nature and implications of those risks.

In addition, this form of deregulation may well result in a more general trend within the legal sector to provide advice through unregulated entities (so that previously regulated entities have the opportunity to compete on a more level playing field), which may result in a general shift in the legal services market and overall increase in levels of risk in taking legal advice. A corresponding increase in risk to the reputation of the solicitors profession would also then be inevitable.

We think that a more important question (quite aside from that of whether deregulation in this way involves increased risks, to which we think that answer is, undoubtedly, yes) is whether deregulation will actually address the problem that the SRA is attempting to address (namely unmet legal need) and, if it does, whether it is worth the inherent risks of the proposal to achieve that result. Our view is that there is, at present, insufficient evidence to show that deregulation will address the issue and therefore we do not think that it is worth taking the risk.

The cumulative effect of these proposals, particularly when taken with TFT, could well be a general "dumbing down" of compliance standards amongst (the deregulated) parts of the solicitors profession, which will necessarily drag down the reputation of the profession across the board. This, in turn, has the potential gradually to erode the unique nature of the solicitor/client relationship so that clients become "mere customers" and solicitors "mere service providers". In decades to come, a decline of this kind may well change the standing of the profession, and therefore the strength and reputation of the practice of English law globally.

5 Privilege

The SRA asserts (on the basis of advice to the SRA from Counsel) that legal advice given by solicitors, to members of the public, working in unregulated businesses will not attract privilege. We worry about the impact this may have on the perception of privilege more generally and the adverse impact it will have on consumer protection. Changing the regulatory regime so that the advice of only certain solicitors attracts privilege, depending on where they work, could be viewed by some as eroding legal professional privilege in principle, which we believe would be adverse to the public interest.

The SRA has suggested that the availability of privilege might be addressed by individual solicitors contracting with and providing legal advice to their clients directly but this may not be an attractive or realistic proposition for City firms (should they choose to hive their unreserved work across to an unregulated entity) or their unregulated competitors. Sophisticated clients will, we think, want to contract with and rely on the advice of the law firm, not an individual they may not know, and the individual solicitor's personal assets might still be at risk, notwithstanding any indemnities from his/her employer.

Clients have not often had to think about privilege when instructing solicitors to date, as any legal advice from them would attract privilege. Clearly privilege is important to clients but how important it is to them, and when, is currently difficult to quantify. In some circumstances, privilege may not be important to clients – for example, accountants give tax advice and this does not attract privilege. A requirement to give clear and transparent information on whether advice given by a solicitor, working in an unregulated business, attracts privilege will be key – however, we have reservations as to whether:

(a) such information will always be read/understood/capable of evaluation at the right time by consumers (even if sophisticated), see further below; and

(b) whether, for example, a junior solicitor in an unregulated business will have sufficient influence to compel his/her unregulated employer to provide it properly.

6 Limits of Transparency Information

We doubt that all clients, even sophisticated clients but particularly those clients at the less sophisticated end of the spectrum (who arguably have a much greater need for the consumer protection provided by a solid regulatory framework) will read and properly understand the implications of the transparency information given to them by unregulated providers. Even if transparency information is read, it may be too difficult in some cases to evaluate the salient points at the time it is given. In addition, we think that the SRA's emphasis and reliance on the giving of transparency information increases the risk of "mis-selling" by some unregulated providers, who may not get the detail right or will fail to draw a client's attention to the most pertinent information in any particular case. It may also be difficult for consumers properly to understand the implications of taking advice from an unregulated entity if the consumer does not have a proper description of the disadvantages when compared with taking advice from a regulated entity. There is unlikely to be any incentive for an unregulated entity (or associated solicitor) fully to explain the disadvantages so that the consumer understands the nuances and can make a properly informed decision. If this were to result in a significant number of claims, some unregulated providers may become insolvent – which then has the obvious potential to damage both to the consumer and the solicitors profession.

The consultation implies that it will be for solicitors in regulated entities to use their consumer protection strengths as an "advertisement tool". Given that "solicitor" already has a meaning in the English culture, we think the burden should instead be on unregulated entity solicitors to explain that, in their case, solicitor does not mean what the consumer might assume. This would not, however, be a welcoming message at the start of a trusted adviser relationship and goes to the unworkability of these proposals in relation to producing a level playing field. More generally, it does not seem appropriate that the body of institutions who are willing to continue to be held to a higher regulatory standard have to suffer the burden of justifying the advantages of it to consumers.

In short, these proposals may have the impact of transferring to the consumer the burden of choosing the right sort of legal service – from a regulated or unregulated firm - against the backdrop that those most in need of protection in practice may be unable to do so. Because the term "solicitor" has such resonance already, that burden of deconstructing what it means in different circumstances is a heavy one, and we suggest an impossible one for most clients.

7 Unlevel Playing Field

Creating a two tier regulation system for solicitors in regulated firms versus unregulated firms would potentially mean that accountancy firms, consulting firms and foreign law firms employing solicitors would compete with traditional law firms for unreserved work whilst having the benefit of more liberal regulation. They will escape entity-based regulation on conflicts (in many circumstances, with informed client consents), information security, PII and risk management obligations not only to the detriment of consumers but to the law firms competing with them. This seems to us to highlight the need for the SRA to press Government to revisit the list of reserved activities in the Legal Services Act 2007, and to consider whether it forms the right basis for a risk-based approach to regulation.

In relation to conflicts, we think the SRA should clarify its thinking on the position – can an unregulated provider act, with client consents, for buyer and seller of a business provided the same solicitor was not on both teams for example? This seems possible as the SRA conflict rules would only bite at the individual level except where those individuals might otherwise breach SRA Principles (e.g. obligation to act in client's best interests) by agreeing to represent a client in circumstances where he/she could be negotiating terms with/against a colleague?

Part Two – responses to consultation questions

1 Have you encountered any particular issues in respect of the practical application of the Suitability Test (either on an individual basis, or in terms of business procedures or decisions)?

Yes, we feel strongly that the reporting thresholds in the Suitability Test are set too low and, as a result, the reporting regime requires notifications of scenarios which, in reality, are not pertinent to a person's role and duties as a solicitor. The reporting of trivial matters wastes SRA resources, takes up COLP time and causes unnecessary anxiety for the person concerned. The regime prevents firms from taking a pragmatic and proportionate approach to reporting trivial matters because failure to report is treated by the SRA as prima facie evidence of dishonesty.

In addition, the Suitability Test does not describe the standards expected of solicitors or define what "suitability" means; it simply provides a (non-exclusive) list of things that need to be reported. This approach to setting the standards upon which reporting is predicated is very unhelpful and makes it difficult to provide a definite framework within which practitioners know that they must operate.

We believe that the SRA needs to introduce a more appropriate reporting threshold, with more clearly defined parameters for what they consider "suitability" to mean. We would support a comprehensive review and consolidation of all SRA reporting obligations, with an appropriately high and consistent materiality threshold being introduced across the board.

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

We feel strongly that the Principles should include a reference to confidentiality (assuming that they apply to, for example, administrative staff as well as to regulated firms and solicitors). It is important that the Principles make clear that everyone who works in a law firm is responsible for protecting clients' information. We do not think that an issue as important as confidentiality should be relegated just to the Codes, not least because they will not apply directly to all staff.

We suggest either introducing a new Principle 7 or adding further language to Principle 6 stating that you must protect your client's confidential information.

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

The existing formulation (currently in Principle 6) is well understood and we favour its retention, in the absence of a good reason to change it (which is not explained in the consultation paper).

We have two observations on the revised formulation. Using the word "ensure" could set a higher standard than the existing obligation to "maintain" and is, in our view, unrealistic and the reference to "those delivering legal services" would catch non-lawyers providing other services in the

unregulated sector alongside solicitors which, we think, is too wide. A better formulation in this Principle would be to refer to upholding public confidence in "you and your profession".

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

See our response to question 2 above.

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

On balance, we do not favour the development of guidance or case studies because they carry the inherent danger that they become a form of "unofficial" regulation, which may create uncertainty and confusion. We note that the SRA is not replicating the existing Indicative Behaviours because of feedback that they create confusion; we think that further guidance and case studies may well do the same. We also think that they are contrary to the stated aim of simplification of the handbook. The critical issue is that the Codes need to be clear, which should then avoid the need for additional guidance, even if that may be at the expense of brevity.

If the SRA is going to produce guidance then it should consult with stakeholders on the guidance before it is introduced. That said, we think that it may be appropriate for our representative bodies, not regulators, to issue any guidance or case studies the profession may find helpful, in a manner which supports solicitors and does not gold-plate regulation.

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

We do not agree that the existing combined Code is "long, confusing and complicated". Brevity is not necessarily synonymous with clarity and the introduction of new terminology can easily create ambiguities.

Our experience (within our Firm's risk and compliance team) of compliance issues in our Firm does not suggest that our lawyers are disconnected from their ethical responsibilities. Our Risk department advises on the full range of compliance issues, including in relation to conflicts analysis. Our lawyers receive regular training on their regulatory obligations and so are alive to regulatory compliance issues, proactively seeking further guidance when they need it. The fact that they do seek that guidance does not mean that they are abrogating their professional responsibilities to either the Firm or its central Compliance/Risk team; in fact, the opposite is true and it demonstrates that they are aware of their personal regulatory responsibilities.

We can see the sense in creating a split Code if the SRA is going to permit solicitors to use their solicitor title advising the public in unregulated firms but we have concerns that this may then necessitate a substantial re-education and training programme in all firms, for no obvious benefit and at considerable cost. We can also see that some of our in-house lawyer client contacts may find a split Code easier to navigate, and therefore it may be easier to understand what the SRA expects of them as solicitors.

More generally, we are concerned that the Code for Solicitors may not contain enough detail to support individual solicitors in unregulated entities who are the ones most at risk of challenges to their professional requirements.

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

See our further comments and mark up of the Codes in Part Three.

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

See our further comments and mark up of the Codes in Part Three.

9 What are your views on the two options set out for handling actual conflict or significant risk of a conflict between two or more clients and how do you think they will work in practice?

We are very strongly in favour of Option 1, with the amendments set out in the attached mark-up in Part Three.

The two existing exceptions (auction and substantially common interest) are very important to, and frequently used by, many of our clients and we would like to see these explicitly replicated in the new rule. We would not wish instead to rely on SRA assurances that there is no conflict/significant risk of one in the circumstances covered by those exceptions. Although that may be the case on some scenarios, in others that will not be the case which is why the current exceptions are required.

So far as the introduction of a new "informed consent" exception is concerned, we think that a sophisticated client exception requiring informed consent could be a useful extension to the conflict rule, offering greater flexibility to clients and helping to alleviate some of the level playing field concerns referred to in our answer to question 16 below.

We think that this type of exception will only be appropriate for sophisticated clients who understand and can properly assess the implications, such that consent, if given, is fully informed.

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

See response to question 6 above and further comments and mark up of the Codes in Part Three.

11 In your view is there anything specific in the Code [for SRA regulated firms] that does not need to be there?

See our further comments and mark up of the Codes in Part Three.

12 Do you think that there is anything specific missing from the Code [for SRA regulated firms] that we should consider adding?

See our further comments and mark up of the Codes in Part Three.

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?

See our further comments and mark up of the Codes in Part Three.

14 Do you agree with our intention to retain the COLP and COFA roles for recognised bodies and recognised sole practices? [14a. In responding to this question, please set out the ways in which the roles either assist or do not assist with compliance.]

On balance, we are in favour of retaining the roles.

We do not believe the roles have given us any additional benefits, over and above having a Head of Compliance/Risk or General Counsel or similar, as we have had for many years.

Whilst, in principle, we accept that, for many firms, reminding partners and employees of the firm's obligation to report breaches (through the COLP and COFA) strengthens the compliance function, it may have been limited by the SRA Handbook omitting a requirement on partners and employees to report to the COLP and COFA, leaving that to the firm's own policies.

The COLP role has become well known across the legal sector, but the COFA role less so, in part owing to its confusing title: the COFA is not (as COFA) responsible for finance, nor is it responsible for administration. This is a drawback if the role is to be taken seriously day to day by the rest of the firm for whom simplicity of roles and titles is important.

So long as the SRA Accounts Rules required an external audit, the COFA role was largely redundant in practice especially as most firms of any size have a well defined finance director role. Now that the requirement for an external audit is being abolished this, is not, we believe, the right time to abolish the COFA role, as the COFA may have a more useful function in the future than the past.

Whatever the correct interpretation of the remit of the COFA (see below), the bulk, if not all, of a firm's compliance with the Companies Act (as modified for LLPs) on accounting matters confusingly remains with the COLP; the COLP has to be a solicitor, as much of compliance concerns technical legal matters, but he/she has responsibility to the SRA for the bulk of accounting compliance, even though the firm, if of any size, will have a professionally qualified accountant as finance director.

Given that all firms have had to establish structures to support the COLP/COFA roles, we see no real benefit in now abolishing them.

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

Taking up the point in our answer to question 14 above, we would like to see the addition of an obligation in the SRA Handbook on partners and employees to notify possible breaches to the COLP/COFA. We also suggest consideration of whether, if an individual partner or employee does so, he/she is deemed to discharge his/her responsibility under the Handbook to the SRA (similar to how reporting obligations work under the Proceeds of Crime Act 2002).

It would also be helpful to clarify confusion over the COFA role (and consequently COLP role also as, on the drafting of Authorisation Rule 8.5, they are mutually exclusive), in particular:

(a) Responsibility for compliance with the SRA Accounts Rues is clear, but confusingly the COFA is not responsible for the Accounts provisions of the SRA Overseas Rules, so the COLP is – that does not seem explicable.

(b) It is sometimes asserted that as financial instability might imperil the safety of client money, so the COFA's role extends to financial stability. We think it should be as the COFA is usually the finance director (or, at least, UK finance director) but, if that is the correct current interpretation, it is also unclear where the dividing line lies between COLP and COFA at present.

(c) We can see an argument that responsibility for all aspects of the keeping of financial records, production of annual accounts, financial compliance, including compliance with the Companies Act (as modified for LLPs) on accounting matters, financial stability and payment of taxes by the firm should rest with the COFA, not the COLP. Finance directors often do not understand why such responsibility rests with the COLP, who is a solicitor.

(d) The title, COFA, is confusing – for what part of "administration" is he/she responsible?

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

Our views, endorsing those of the CLLS, are as follows:

(a) **Damage to solicitors profession** – See paragraph 4 above. It is clear that the proposals will establish a two tier system and the existence of unregulated firms, with no requirements as to client confidentiality or conflicts at a structural level, could undermine consumer confidence in the profession.

(b) **Unfair conflicts regime** – We think it is unfair (and potentially detrimental both to the consumer and to all City/commercial law firms like our Firm) that non-SRA regulated firms will benefit from a more liberal conflicts regime as a result of the fact that the conflicts rules may apparently only bite at an individual, but not entity level (thus potentially allowing, for example, the entity to act for both parties to a transaction, albeit through different individual solicitors). We think it is important that the SRA clarifies its thinking on the conflicts position – do you consider that an unregulated provider could act for buyer and seller of a business provided the same solicitor was not on both teams? If that is going to be possible, might the individual solicitor in some (if not all) circumstances risk breaching SRA Principles (e.g. obligation to act in the client's best interests) by agreeing to represent a client in circumstances where he/she could be negotiating terms with/against a colleague? These are important questions on which further clarity is needed.

(c) **Privilege** – See paragraph 5 above. The loss of privilege is a clear threat posed by the proposal which, to date, has not been in point because any legal advice from a solicitor would attract privilege.

(d) **Transparency information solution flawed** – See paragraph 6 above. It will be important that information provided by the unregulated sector is clear and unambiguous in its explanation of the (clear) disadvantages of and risks associated with instructing an unregulated entity, as opposed to a regulated one. We question whether, in practice, consumers will actually be provided with sufficiently clear information to make a properly informed choice and, even if they are, we doubt that even the most sophisticated clients will take the time properly to understand the full implications of the transparency information given to them. For example, would any client (however sophisticated),

properly understand the difference between PII on Minimum Terms and Conditions and PII on market norm terms?

(e) **Entity-based regulation as a kite mark** – The value of entity-based regulation has, to date, not needed to be tested because it is currently a necessary part of any law firm offering. We think that sophisticated clients will expect it to continue to be part of the offering; they expect to contract with properly run businesses with sound risk management systems/controls and stringent confidentiality obligations. We do not think, for example, that they would want to contract with or rely on the advice of an individual solicitor working for an unregulated provider (e.g. as a mechanism to ensure privilege).

(f) **Unrealistic burden on individual solicitors** – The new Code places solicitors under a number of obligations with which it may be very difficult properly to comply in isolation from the position taken by the organisation for which they work. Rules 8.6 to 8.9, for example, give individuals obligations in respect of client information and publicity. In both cases, the Code for Firms does not contain equivalent obligations. Further, if a solicitor is working for an unregulated entity, how can solicitors realistically comply with obligations such as these – particularly if they are in a minority, and relatively junior?

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

At present we think that is unlikely. The separation of certain activities into an unregulated entity would be very complex and for general risk management purposes, we would want to replicate many of the systems/controls that we already have in place which also ensure compliance with SRA rules and which clients expect us to have in place as part of our offering. Other problematic issues would be the potential loss of privilege, the view of other local law societies/bars/regulators and the possible impact on the "designated professional body" regime under FSMA, which may necessitate further authorisations by the FCA.

That said, if these proposals go ahead we will need to continue to monitor developments in the market because they may put us at a competitive disadvantage.

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

We are not in favour of solicitors being permitted to practise, using their solicitor title, for entities which are not regulated by the SRA; we favour maintaining the position whereby sole practitioners must be SRA authorised, as entities, to provide reserved activities to the public.

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?

The principle behind the requirement is important but it does not actually reflect the modern day reality of the proliferation of multi-office and multi-national firms. For those types of firms, it would make more sense to require that each office of an authorised firm be supervised by a suitably qualified and experienced practitioner. Some overseas Codes, in Hong Kong for example, go

further and are more specific about what supervision means in practice which might also be a sensible extension of the current SRA rule.

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

We think that the regulatory emphasis should be on ensuring that solicitors who work in unregulated entities give consumers detailed information about the protections which are not available to them but which would be available if they used a regulated provider. For example, we think that consumers (including sophisticated consumers) will assume that when they are being advised by any solicitor, the advice they receive will be privileged and appropriately insured. If this is not the case, because the consumer is contracting with an unregulated entity, the solicitor providing the services should be obliged to make this very clear. This would clearly place significant compliance burdens on individual solicitors employed by unregulated entities, particularly if they are junior and the employer is a large enterprise, which gives rise to the concerns already raised about whether this will be done properly and the risks to the consumer if it is not.

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

We are concerned that you may not have given sufficient weight to the risks summarised in paragraph (viii) on page 45 of your Impact Assessment, namely (a) consumer confusion around different protections and (b) the erosion of the solicitors profession. In addition, we query whether risks to client confidentiality have been given enough emphasis.

Further, we are not convinced that consumers would necessarily benefit from the proposed changes in the ways summarised in paragraph (vii) of your Impact Assessment. In particular, we do not think that consumers are likely to have a better understanding of the legal services market as a consequence – in fact, the opposite is very likely to be true. Consumers (even sophisticated consumers) will make assumptions about the benefits/protections available to them when advised by a solicitor, and these may not be countered by detailed transparency information – which could be too difficult to absorb, impossible to evaluate at the time of instruction and places the onus on the consumer to do due diligence on the unregulated provider which they are unlikely to be equipped and/or have the time to do.

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

No.

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?

Yes, we agree with your specific proposal that solicitors who work outside of an "authorised body" should not personally hold client money. But this does not appear to prevent the organisation in which the solicitor is employed holding client money, and so an unauthorised vehicle to which an SRA authorised law firm chooses to hive-off its unreserved work could hold client money notwithstanding the fact that the individual solicitor/principals and employees of that entity could not hold client money in their own names. Such an unregulated law firm would not appear to have any obligation to comply with the SRA Accounts Rules when holding client money, even if it was an all solicitor owned business. If our analysis is correct, this lacuna in the draft rules could

present a considerable risk to the clients of such an unregulated solicitors firm, and to therefore to reputation of the profession.

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?

We have no strong views on this.

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? [Question 25a. If not, what are your reasons?]

We have no strong view on this but we would be concerned if the compensation fund were to be available to firms which did not have PII obligations because it could increase the chances of inappropriate claims being made on the fund.

We think that it is likely that consumers will assume that they have access to the fund and so the information given by solicitors working for alternative providers will need to be very clear that the protection is not available. Our concerns about transparency of information are outlined above.

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

No, we feel strongly that appropriate PII cover should be compulsory, even for the unregulated sector, if a solicitor is advising. It is critical that any consumer of legal advice (from either an regulated or unregulated entity) has complete confidence that there is appropriate PII available on the minimum terms and conditions in the event of an error by the solicitor.

27 Do you think that there are difficulties with the approach we propose, and if so, what are these difficulties?

Yes, we think that the SRA's approach (unfairly) places the onus on consumers to undertake due diligence in relation to insurance cover for unregulated providers. It is unlikely that any consumer (regardless of how sophisticated) will be properly equipped to evaluate the comparative benefits of commercial insurance cover with the same amount of PII cover on the minimum terms and conditions required by the industry. Consumers should be able to assume that, when they are advised by a solicitor, this automatically brings them certain protections, including minimum PII on industry-wide standard terms.

28 Do you think that we should retain a requirement for Special Bodies to have PII when providing reserved legal activities to a public or a section of the public?

Yes.

29 Do you have any views on what PII requirements should apply to Special Bodies?

No. See our answer to question 24 above.

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?

Not imposing threshold standards would simply be an inevitable consequence of your proposals to allow solicitors to practice as solicitors for unregulated entities. We are not in favour of this.

31 Do you have any alternative proposals to regulating entities of this type?

We think that solicitors should only be able to provide services to the public, as solicitors, through SRA regulated entities. We believe the SRA should focus on revisiting the definition on reserved legal services and working with all relevant parties to achieve a re-draft of these.

32 Do you have any views on our proposed position for intervention in relation to alternative legal service providers, and the individual solicitors working within them?

It is not clear what your proposed position is but we expect you to act in the best interests of consumers, including by use of your intervention powers, if necessary.

33 Do you agree with our proposal that all work within a regulated body or an RSP should remain regulated by the SRA?

Reluctantly (as there is some logic to making this distinction), yes. The alternative is too complex and is confusing for clients. Realistically, we would not, for example, wish to operate a different approach to conflicts depending on whether work was reserved/unreserved and any law firm wishing to do this is bound to run into difficulties – as work on a matter can involve a blend of the two and/or flip from one to the other.

Part Three: mark-up with drafting comments

See attached mark-up and explanatory comments endorsing the response by the CLLS.

Yours faithfully

For and on behalf of
Linklaters LLP

Liverpool Law Society Response to the SRA Consultation document – Looking to the Future – Flexibility and Public Protection

LLS represents over 2,500 members of the legal profession in the Merseyside area. Members are solicitors, barristers and academics. This paper has been produced by the Society's Regulatory Committee. It sets out the LLS response to SRA's consultation, "Looking to the Future – Flexibility and Public Protection".

LLS understands that the SRA's aim is to increase the supply and variety of legal services to benefit consumers. However, LLS remains unconvinced that the new proposals are the right way to achieve this.

There is very real concern amongst LLS members that the current proposals will create a two tier system amongst the providers of legal services and place individual solicitors working in unregulated organisations in an invidious position.

LLS is also concerned that unsophisticated consumers will not fully appreciate the different legal offerings available, in particular insofar as insurance protection and legal professional privilege is concerned and the very idea that consumers will be able to navigate their way through what are two very fundamental offerings by the use of price comparison websites is frankly quite ridiculous. At the outset of the legal representatives appointment in respect of unreserved business protections such as legal professional privilege and insurance in the event of a claim are unlikely to be high on the client's agenda and if clients don't appreciate the value of those protections they are unlikely to be willing to pay more to acquire them. Ultimately, the consumer is likely to take the view a solicitor is a solicitor, both are offering the same service but one, the one from the unregulated firm, is cheaper and that will be the deciding factor. Your average consumer is unlikely to enquire why that is the case provided the extent of the service offered is the same and the unregulated firm is unlikely to promote the fact its lower cost base is because it doesn't have the benefit of professional indemnity insurance or that a regulated firm does provide additional protections. Of course, as the SRA does not regulate those firms it cannot insist that information is provided.

If preserving the solicitor brand is at the heart of what the SRA does one cannot help but wonder how it can be said that the proposal under consultation achieve that. One of the cited reasons for change is that under the existing regime solicitors must practise through a firm authorised by one of the legal regulators. That is not strictly true. Persons qualified as solicitors can practise in non- regulated firms but cannot call themselves solicitors. The SRA argues that it would be better from a consumer protection point of view if that position was changed to allow individuals to call themselves solicitors, and thus be brought under the regulatory umbrella but without being able to police the entity for whom the solicitor works and the obvious limitations that imposes there is a real danger that the solicitor brand will be damaged and consumers of legal services will suffer. This will not just affect solicitors in unregulated firms but the profession as a whole.

Question 1

Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

LLS is encouraged that the SRA are actively looking at the entity requirements and policy entry into the profession.

The current suitability would benefit from an overhaul. It is too rigidly applied and can leave applicants waiting for a long time for a decision. A quicker judgment call is needed, particularly where any issues as to whether an applicant is suitable relate to historical matters.

Question 2

Do you agree with our proposed model for a revised set of Principles?

It is noted that the five Principles that solicitors had to adhere to in 2007 was increased to 10; now it is proposed to reduce them to just six. LLS has no major problem with the revised Principles per se but

feel that frequent regulatory changes create uncertainty, particularly when some of the proposed Principles are very similar to their forerunners. LLS also expressed concern at the removal of the requirement to provide a proper standard of service.

Question 3
Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

LLS appreciates the SRA's concern that there ought to be some regulation of how solicitors behave in their private lives but needs a better understanding of how this Principle will be applied, particularly in private practise. We expressed real concern when responding to the SRA Consultation- A Question of Trust about the potential for abuse and for members of the profession to be embroiled in the expense of regulatory investigation and the fear of sanction in relation to matters that do not touch and/or impact on their profession lives and ability.

The consensus of opinion is that there ought to be clearer guidance as to: how this Principle will operate; what its parameters are and at what stage a potential issue ought to be reported. LLS would like to see the comprehensive feed back from the SRA roadshows on A Question of Trust.

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?

LLS is keen to understand the rationale behind the proposed exclusion of the requirement that solicitors ought to give a proper standard of service.

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?

The view of LLS is that generally, the case studies deal with fairly tidy issues that have obvious answers and there are not enough of them. There will be many among the profession who favour a more prescriptive code and at one time this is what the SRA was itself advocating. If firms are to look to interpret the rules themselves case studies involving real and more complex scenarios would be helpful. Also it is important that these studies are regularly up dated and reflect the problems encountered by the profession.

There is a case study which suggests appropriate information a solicitor in an unregulated firm might tell a client about how he is regulated but this does not in LLS's view go far enough and would not allow a client to make an informed decision. LLS do however recognise that lay clients are unlikely to fully comprehend the intricacies of legal professional privilege, professional indemnity insurance or the Compensation Fund or be that interested in those factors at the point of instruction, which is precisely the reason why we say the idea that the changes can support the SRA's aims of protecting consumers of legal services and promoting the solicitor brand is a nonsense.

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?

LLS considers that, whilst the proposed Code is short, it is broad rather than focused. There are many grey areas and some of the more complex situations that solicitors might encounter are not dealt with in the case studies.

Question 7
In your view is there anything specific in the Code that does not need to be there?

No.

Question 8
Do you think that there is anything specific missing from the Code that we should consider adding?

As mentioned at Question 5 above, without more complex case studies, the Code is so broad that it will be difficult for solicitors to apply with any certainty. The Toolkit will be very important and LLS considers that it needs to be a living document, with new scenarios being added on a regular basis.

LLS also considered that it might be helpful for the Code to signpost the existence of issues relating to prohibited referral fees, for the benefit of new entrants to the market who are unfamiliar with LASPO.

Question 9
What are your views on the two options for handling conflicts of interests and how they will work in practice?

LLS considers that whilst option two is clearer and easier to apply, option one is more consistent with the drive to remove barriers relating to the provision of legal services and foster consumer choice.

Ultimately, LLS favours option one but has concerns about the difficulties that it could create for individual solicitors in unregulated firms, who will have to decide what to do if someone else in their firm is acting.

Question 10
Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

Again, LLS considers that the Code would benefit from clarification by further case studies covering more complex situations.

Question 11
In your view is there anything specific in the Code that does not need to be there?

No.

Question 12
Do you think that there anything specific missing from the Code that we should consider adding?

See above.

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?

See above.

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.

LLS agrees with the retention of the COLP and COFA roles because it feels that they greatly assist with regulatory compliance.

The roles centralise the responsibility for compliance and make it easy for people to know who to contact in their organisation when they have an issue. It also places the onus upon a designated person to keep themselves and others up to date.

LLS recognises that the COLP role might be less effective in firms where the role holder is not involved in policy making within the organisation.

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?

LLS recognises that, at times, there can be too much responsibility placed upon people in the COLP/COFA roles. However, the availability of COLP/COFA insurance and the Ethics Helpline already go some way to alleviating that difficulty.

Question 16
What is your view of the opportunities and threats presented by the proposal to allow solicitors to deliver non-reserved legal services to the public through alternative legal services providers?

Please see above.

In addition, the LLS is very concerned about the vulnerability of individual solicitors in unregulated entities. Whilst they will be required to make sure their client understands whether and how the services the solicitor provides are regulated and the protections available to them, the new Code is note prescriptive and will be left to the individual's discretion. The concern is that they will be put under pressure by their employers not to go beyond the very basic information that they are required to give to clients about the level of protection afforded to them by their unregulated firm, thereby potentially exposing themselves to a professional conduct investigation but not their employer.

The new proposal rather than clarify the legal services market for consumers will make it a very confusing place. Even if the information is full unless the solicitor points out the difference between choosing a regulated firm and an unregulated firm- which he is not obligated to do under the code, how can consumers make an informed decision. On a related note, The Code does not specify how the information is to be provided. Is it sufficient to hide it in the small print of the T&Cs? Lets face it unregulated firms are unlikely to highlight in their marketing material.

Ultimately, LLS is concerned that, whilst one of the aims of the proposed reforms is to improve the solicitor brand, they have the potential to have a very damaging effect upon the reputation of the legal profession.

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?

LLS recognises that a firm's costs base is likely to be considerably lower if it does not have to deal with regulation. It therefore follows that those members of the profession working in low profit areas will be required to look at taking advantage of the greater flexibility i.e. their hands are likely to be forced by competition.

The LLS meeting to discuss the reforms suggested that there was no appetite for the proposal to increase flexibility.

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)?

LLS agree with the proposal.

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?

LLS strongly feel that the current requirement ought to be amended rather than removed wholesale. Its removal would be a step in the wrong direction. It is a valid point that the number of years qualified is not a robust measure if the competence of the individual to supervise others but that is not an argument for removing the requirement for experience as a qualifying factor. The suggestion is a newly qualified solicitor could set up business as a sole practitioner whereas most practitioner attest that the real learning takes part on the job.

There is a related point: the recent proposals to change the entry requirements into the profession which include the possibility of on the job training. Is the SRA seriously suggesting that a new entrant to the profession who had received no on the job training would be qualified to supervise. We trust not.

LLS consider that there ought to be solid requirements about the minimum standard that is required of a supervisor.

Question 20
Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

No – LLS is opposed to an absolute obligation in this regard. Regulated firms might well want to point out that the level of protection that they offer to clients compares favourably with that of unregulated firms. However, other regulated firms might be more concerned that a recital of available protections at the introductory stage might well give clients a very negative perspective of the firm. LLS suspects it will depend on the firm's client base, will differ from client to client.

Question 21
Do you agree with the analysis in our initial Impact Assessment?

LLS notes that overall, the SRA's initial Impact Assessment comes to the view that these proposals are positive because they have the potential to help increase the supply and variety of legal services to benefit consumers. However, as mentioned above, LLS remains unconvinced that the new proposals are the right way to achieve this.

LLS considers that the proposals have potentially serious implications in areas such as: client protection, legal professional privilege, professional supervision, competition and the reputation of the solicitor profession. As set out above, there are also a number of areas of ambiguity in the proposals which will require further clarification through case studies etc.

Question 22
Do you have any additional information to support our initial Impact Assessment?

No.

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?

Yes.

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?

LLS considers that they should only be permitted to hold client money personally if they are required to follow the same rules as a regulated entity.

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?

Yes.

Question 26
Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

LLS has concerns about this proposal because of the brand and consumer protection issues identified above. Also, unregulated firms might not pay for cover if it is not an actual requirement and individual solicitors might end up taking the hit when they are sued personally.

Also, this is likely to create a big divergence in cost base between unregulated and regulated firms. Professional indemnity insurance is for many firms is biggest overhead because it is the most generous professional indemnity policy on the market.

The contradiction in the SRA's approach to insurance in this proposal and its approach to professional indemnity insurance generally cannot be ignored. The profession has been lobbying for years to remove some of the provision in the policy to but the cover provided overall on a footing with other professions. This has always been met with resistance because of concerns about weakening the solicitor brand and watering down consumer protection. Here the SRA is saying it is fine for solicitors to practice under the title solicitor and assume all the benefits of the brand without having professional indemnity insurance.

Question 27
Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

Yes – see above.

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?

Yes.

Question 29
Do you have any views on what PII requirements should apply to Special Bodies?

N/A

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 practitioners?

LLS is of the view that, if a firm is predominantly providing legal services to the public, it should be regulated. Ergo, there ought to be a threshold.

Question 31
Do you have any alternative proposals to regulating entities of this type?

No.

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?

LLS is of the view that, on a practical level, it is difficult to see how this will work.

Question 33
Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

LLS is not sure that this is necessary.

www.lccsa.org.uk

19 April 2017

CONSULTATION BY SRA : LOOKING TO THE FUTURE – FLEXIBILTY AND PUBLIC PROTECTION

The London Criminal Courts Solicitors' Association (LCCSA) represents the interests of specialist criminal lawyers in the London area. Founded in 1948, it now has over 700 members including lawyers in private practice, Crown prosecutors, freelance advocates and many honorary members who are circuit and district judges.

The objectives of the LCCSA are to encourage and maintain the highest standards of advocacy and practice in the criminal courts in and around London, to participate in discussions on developments in the criminal process, to represent and further the interest of the members on any matters which may affect solicitors who practice in the criminal courts and to improve, develop and maintain the education and knowledge of those actively concerned with the criminal courts including those who are in the course of their training.

The LCCSA has decided to only respond to those questions which are pertinent and within the ambit of knowledge and concerns.

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Introduction/Foreword:

While we recognise that the legal marketplace is changing and arguably some modernisation may be required the wholesale approach to be adopted by the SRA in this paper is undesirable. As we represent only criminal practitioners we have focussed on those matters which we think may have the most bearing on our members. We have though seen The Law Society response dated 8th September 2016 and on questions where we are silent we adopt their viewpoint.

Question 8: Do you think that there anything specific missing from the Code that we should consider adding?

We have very real concerns that the new code provides inadequate protection to some of the most vulnerable members in the population namely those who find themselves subject to criminal proceedings. A disproportionate number of prosecutions are brought against those who suffer from mental illness or drink or drug addictions. Even though who do not are at their most vulnerable when arrested and charged with a criminal offence.

As we understand Outcome 8.3 which concerns unsolicited approaches to members of the public is to be abolished and replaced with 1.2 and 1.1 in the respective codes for individual solicitors and firms. The new wording is ambiguous and vague referring to not abusing your position by taking unfair advantage of clients or others. We already have an extensive and growing problem with unsolicited approaches from certain unscrupulous firms particularly to those in custody who they visit on a flimsy pretence. Then at court, defendants are being approached on a daily basis as they enter court thereby undermining the government funded the duty solicitor scheme.

If this regulatory reform is to proceed, the problem will in our view significantly worsen like a 19th century gold rush. This is because more firms and individuals will be tempted to engage in such practices having regard to the increasingly harsh realities of legally aided criminal practise.

The SRA approach on this issue is in fact even more surprising having regard to recent moves by the SRA to address the concerns of the criminal legal community. Indeed we understand the SRA and The Law Society are due to meet to discuss this issue and hence the abolition of Outcome 8.3 is counter-productive.

We also share concerns raised by The Law Society and other bodies with regard to undertakings provided by solicitors working in unregulated entities. While an undertaking is provided by an individual solicitor, a lack of protections for those working outside regulated businesses will undermine the undertakings given. Those within the regulated sector may be less inclined to accept undertakings from those outside in case things go wrong.

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?

This is another area of huge concern for the LCCSA and its membership. Permitting alternative legal services providers to employ solicitors to provide non-reserved legal services while holding themselves out as solicitors is in our view fraught with danger and will weaken the overall solicitor 'brand'. Furthermore we do not agree that regulation of individual solicitors working within an ABS structure provides adequate protection to the consumer.

Our stance is predicated on a number of points. It is likely that larger practices will increasingly become ABS's attracted by throwing off the shackles of regulation thereby reducing the income which the SRA accrues from practising fees. In turn this will place pressure on the smaller and medium sized practices which remain regulated as inevitably practising fees increase.

Consumers will not necessarily understand the fine distinction between the regulated and unregulated entities. Their rights to compensation will be diminished when things go wrong in the unregulated sector; conflicts of interest between solicitors in such entities will not exist; and we question the extent to which the client's dealings will be protected by legal privilege.

Too much emphasis has been placed by the SRA on price and this ignores many of the equally and often more important drivers such as reliability and reputation. Arguably having avoided a two tier system in criminal legal aid we are now faced with the makings of such a market across the board.

Solicitors advising from within a non-regulated entity will not have the same level of supervision and support usually found within regulated firms. Indeed it is very likely non-regulated entities will recruit disproportionately young and inexperienced solicitors so as to provide the cut price service which the SRA apparently finds so desirable and necessary.

It appears the general public are equally unenthusiastic with the SRA's approach given the results of a recent Ipsos-Mori poll reported in The Law Society Gazette. Only just over 20% of respondents thought solicitors work should not be regulated the majority therefore sharing our concerns.

Question 17: How likely are you to take advantage in the greater flexibility around where solicitors can practice as an individual or as a business?

Criminal law firms are unlikely to be able to take advantage of any new opportunities as advocacy remains a reserved activity and as such solicitors in ABS's will not be able to undertake advocacy.

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?

A qualified to supervise rule is an important protection ensuring solicitors who set up in practice alone have the necessary experience. We agree some reform is required concerning the type of training to be undertaken but it is our understanding that those with less practising experience attract a disproportionate number of complaints and are more likely to fall foul of solicitor's accounts rules.

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?

We agree that individual solicitors in unregulated entities should not be able to hold client monies in their own name. Indeed the notion they should do so is simply inappropriate.

Question 26: Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

In our view individual PII cover should be mandatory for solicitors in unregulated entities. We recognise though the difficulties of arranging such cover when lawyers often work in teams and it is difficult to separate the conduct of one individual from another. Therein lays the problem of permitting solicitors to work for unregulated entities and hold themselves out as so. Again the survey we have mentioned above and which was recently reported demonstrates that the general public agree that businesses in which solicitors work should have professional negligence insurance – 90% of those surveyed held this view.

Luis Andrade

I am an in-house Solicitor in a public sector legal department, and have a number of points for consideration having read the Consultation

I support the ethos that people and small businesses need to be able to access the legal advice that they need, at an affordable price, and that the SRA as regulator, has a duty to consider how the SRA can help to address this.

However my concern is that the proposed approach set out in the consultation may cause more confusion than assistance to potential clients when deciding on where to obtain their legal advice, and understanding the implications (e.g. whether they are protected by the Compensation Fund, Legal Professional privilege and conflict of interest requirements). The SRA, therefore will need to issue greater guidance to citizens as well as to Solicitors to avoid much of the confusion the two tier code may create.

As an in-house public sector lawyer I am extremely interested in what changes will be made to the SRA Practice Framework Rules, especially how they will reflect the diverse range of business models being adopted by the public sector, and in particular the interpretation of Rule 4 and the interrelation with the Local Authorities (Goods and Services) Act 1970 & the Legal Services Act 2007. The consultation documents does not seem to address this.

I hope this assists in the consultation and that there will be further opportunities to contribute on the SRA proposals in regards to this matter, as they develop.

Kind regards

Luis Andrade

The Law Society

Response to SRA Consultation: Looking to the future – flexibility and public protection

September 2016

Response to SRA Consultation:
Looking to the future – flexibility and public protection
September 2016

Introduction

1. The Law Society of England and Wales ('the Society') is the professional body for the solicitors' profession in England and Wales, representing over 165,000 solicitors. The Society represents the profession to Parliament, Government and regulatory bodies and has a public interest in the reform of the law.

2. The response to this consultation, "Looking to the Future - flexibility and public protection", should be considered together with the Society's response to the SRA's consultation, "Looking to the Future: Accounts Rules Review", which reviews the accounts rules.

3. On 1 June 2016, the SRA released a consultation "Looking to the Future-flexibility and public protection" which proposes that the Solicitors Code of Conduct be replaced with two separate, shorter and simplified codes, a code for solicitors and a code for firms. This is one of a number of consultations that have been or will be released by the SRA reviewing the regulatory framework for solicitors and firms. Other consultations which may be released over the next year or so include the SRA's review of the solicitors qualifying exam and further consultations on the SRA's handbook, and possible changes by government to the framework for regulation of legal services.

4. There are other contemporaneous consultations and reviews of the legal services market including a consultation on the review of the SRA Accounts Rules; and a Ministry of Justice consultation into changes to the regime governing alternative business structures, which closed on 3 August 2016.

5. There is also a market study of the supply of legal services in England and Wales by the Competition and Markets Authority (CMA) for consumers and small businesses, which is due to report by January 2017.

6. The current regulatory framework was put in place following the Clementi Review which included an in-depth review and analysis of the legal services market. The regime which was implemented is less than 10 years old, and in some aspects less than five years old but is nevertheless undergoing radical and extensive, multi stakeholder reviews which potentially overlap. These piecemeal changes create uncertainty, threaten viability and increase risk of irreversible harm.

7. Stability and certainty of the legal system is vital to the economy and the legal services market. The legal services market directly contributes £25.7 billion[1] to the UK economy, and when the UK legal services market grows by 1%, 8,000 jobs are created and £379 million is added to the whole of the economy[2].

8. The impact of regulation on costs is recognised and the Government's Principles of Regulation[3] emphasise that regulation is only justified where, among other criteria, analysis of the costs and benefits demonstrates that the regulatory approach is superior by a clear margin to alternative self-regulatory or non-regulatory approaches. Further there is a general presumption that regulation should not impose costs and obligations on business, social enterprises, individuals and community groups unless a robust and compelling case has been made.

9. In the interim report on its legal services market study, the CMA sets out high level criteria for assessing the impact of regulatory change and the direct costs of regulation are identified as a factor. The CMA also stated that there were "risks with a wholesale change to a regulatory framework. There is a risk of harming competition, for example, if such a change results in extending, rather than reducing, the scope of regulation beyond the currently reserved activities without justification. It is likely that wholesale reform would result in significant design and transition costs and a period of regulatory uncertainty".

10. This is of particular concern at the present time when the country as a whole and the legal framework is going through a period of unprecedented uncertainty and instability following the referendum decision for the UK to leave the European Union. Unless there is a clear and significant harm that requires addressing urgently, it would be more reasonable to put any such regulatory framework changes on hold at least until the immediate issues around Brexit are addressed.

11. Where other services or markets have been subject to such wide ranging reviews, there has often been a trigger event (such as the 2008/9 financial crisis) or significant, clamorous public complaints (utilities market). This is not

[1] 'Economic value of the legal services sector', Law Society Research Unit, March 2016 (http://www.lawsociety.org.uk/support-services/research-trends/a-25-billion-legal-sector-supports-a-healthy-economy/)

[2] £25.7bn is the real (constant 2012 prices) gross value added (GVA) by the sector in 2015 and the correct basis for considering the sector's contribution to overall gross domestic product. The turnover of the sector in 2015 (as used by the Legal Services Board, was £30.2bn is the Office for National Statistics nominal turnover figure for the sector. Turnover is higher than GVA because it includes goods and services used by the legal services sector but produced by other sectors and because it has not been converted to 'real' terms.

[3] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/468831/bis-13-1038-Better-regulation-framework-manual.pdf

the case with the legal services sector. **The Society is of the view that there is insufficient evidence of significant clear and present "harm" generated by the current system which would require systemic and radical reform such as is proposed.** The Society believes that the proposals are poorly evidenced and misconceived in that they will demonstrably beyond reasonable doubt create consumer confusion and harm, will not address the actual unmet legal needs, nor assist with access to justice. We are not aware of any in-depth analysis, study or investigation of the impact of the proposals or likely achievement of the articulated objectives.

12. The primary purpose of the regulatory framework is to protect the consumer and the public interest. The current proposals will on the contrary erode consumer protections and have serious implications in a number of areas which we consider later in this submission. Furthermore, the proposals are substantially incomplete and lacking in clarity and guidance. This is likely to give rise to additional costs and add to the regulatory burden on regulated solicitors and firms, in particular smaller firms that are most likely to provide legal services to smaller businesses and individual consumers.

Summary of concerns with the specific proposals

13. The Society considers the SRA's proposals to be misconceived. We have significant concerns with:
    - the definition and evidence for "unmet legal need" which is the basis of the case for the proposals, as described in **the Initial Regulatory Impact Assessment**;
    - **the substance and content of some of the proposals**; and
    - **the consultation process** by which the SRA is seeking views on its programme of change.

14. Notwithstanding our overriding concern that the proposals are misconceived, we have in good faith reviewed the specific proposals with our members to ensure that there is a complete response representing the breadth of views of the profession.

The Initial Regulatory Impact Assessment

15. The principal reason articulated in the consultation for the proposals appears to be that the reforms would address the challenge of unmet legal need, which it is posited has arisen primarily because of a lack of flexibility and innovation leading ultimately to unaffordable costs. We have examined the evidence for unmet legal needs which is relied on and found that the evidence is neither robust nor sufficient. This is corroborated by the fact that, in their Interim Report, the CMA did not find it necessary to make a market investigation reference under section 131 of the Enterprise Act 2002. We

have set out in Appendix 1 a full analysis of the evidence on which the SRA's proposals are based and why it is flawed and even dangerous to use it for these purposes.

The substance and content of the proposals

16. We have significant concerns with the substance and content of the proposals, not least for consumer protection. The proposals will enable solicitors to work for unregulated entities providing unreserved services to the public. Such solicitors will be subject to a new code of conduct for solicitors but the organisations they work for will not be subject to the SRA's proposed new code of conduct for firms which will continue to uphold a range of current protections for clients and consumers. Such organisations will not be subject to any SRA Code or enforcement powers. This has potentially serious implications in a number of areas including client protection (and confusion), legal professional privilege and professional supervision. It will in our view lead to the creation of a two tier profession with a significant risk that the SRA's proposals will undermine the positive reputation held in relation to England and Wales solicitors and in the long-term, undermine the global competitiveness of UK law. We provide further details below.

The consultation process

17. The Society is concerned that consultees have been asked to respond to a consultation paper with inadequate detail of what is actually being proposed and what the consequences of the proposed changes are likely to be.

18. In particular, there is no clearly defined vision for the future of the regulatory framework, nor will it be possible to have this until the CMA has completed its market study and the Government has clarified if and when it will bring forward a further consultation on regulatory independence, which it is considering in the context of the CMA's preliminary findings[4]. The Code of Conduct and Principles are the most simple and workable aspects of the current regulatory regime and in least need of change. There are more significant related aspects still to be presented including the practice framework itself, the authorisation rules and enforcement. However, all are intrinsically linked and without an understanding of the related changes in all these areas, we question the efficacy of this partial consultation. In particular, as is made clear in the economist's report published by the SRA as part of the consultation[5], the planned guidance to support the profession in its efforts to understand what is clearly intended to be a very different regulatory regime has importance that cannot be underestimated,

[4] https://www.gov.uk/government/speeches/legal-services-regulation
[5] Looking to the Future - flexibility and public protection, Annex 6: Economist's Report

particularly in the light of the removal of the indicative behaviours. The profession is simply not in a position to make fully informed comments on the proposals and reach a judgment on the impact of the new practice framework and how effective the new Codes of Conduct would be without being provided with the intended additional guidance, which will replace the provisions in the Code that have been removed, and with all necessary information as to how the new form of regulation will be supervised and enforced.

19. Under the Gunning Principles:

    - consultation must take place when the proposal is still at a formative stage;
    - sufficient reasons must be put forward for the proposal to allow for intelligent consideration and response;
    - adequate time must be given for consideration and response; and
    - the product of consultation must be conscientiously taken into account.

20. We have serious concerns that the Gunning Principles are not being followed in this case.

21. In addition, the consultation has not provided any information or modelling on how the changes would be likely to change the balance of firms that would remain fully regulated by the SRA and what the consequent impact on the practising certificate (PC) and/or firm fees might be, and thus the balance of regulatory burden. This has the potential to impact the number of firms offering reserved services and ultimately impacts competition in the market and the cost of services especially at the small firm end of the market. This also raises diversity implications because solicitors from a black, Asian or other ethnic minority background are over-represented as sole practitioners and in firms with fewer than five partners[6].

22. The codes are shorter and simpler and the overarching Principles have been reduced from 10 to 6, losing the principle "provide a proper standard of service" amongst others. This is both a standards and client protection issue. Furthermore the language in the codes is so lacking in specificity that firms will spend more time trying to establish what will comprise compliance; there will also clearly be a wide margin of discretion for the regulator to decide what constitutes compliance.

23. The lack of detail in the consultation on the prior points makes it difficult to form a comprehensive view of the costs and benefits of the proposals.

[6] http://www.lawsociety.org.uk/support-services/research-trends/annual-statistics-report-2015/

24. Most seriously, there does not appear to have been any consideration of the international implications of the proposals for the reputation of the profession or, in practical terms, how the proposals would impact international firms.

25. The consultation paper is noticeably lacking in detail on how the SRA would deal with issues of enforcement, particularly with respect to ensuring that solicitors employed by an unregulated entity do not undertake reserved work, not least because (i) issues commonly cross between areas of legal activity and (ii) the boundary between reserved and unreserved services is sometime less clear cut than the terms would suggest. As observed by Mayson and Marley, "reserved instrument activities" is not a familiar concept even for some solicitors. The intention of relying on the distinction as a basis for distinguishing between entities that need or do not need to comply with the Code of Conduct is likely to lead to confusion and uncertainty.

26. In conclusion, the piecemeal approach to the regulatory review as a whole and the fact that this current consultation is just one of a number of linked consultations, means that it is particularly problematic to have any real understanding of how the new regime will work. The Society believes that it is difficult to properly review the issues when very significant elements of the new framework remain unclear including the future structure of the PC and firm fees, the practice framework rules and the section of the handbook that deals with enforcement.

Our concerns

<u>The Initial Regulatory Impact Assessment</u>

27. All consumers should have access to justice, regardless of social background or wealth. There are clearly unmet legal needs in certain sections of the population but the most significant unmet legal need relates to the removal of legal aid provision. Many consumers, in particular among the most vulnerable communities, do not have the means to pay for legal services at any price point and for them there is no realistic prospect of addressing their legal need without some restoration of publicly funded legal services.

28. Not all issues which have a legal element rationally require legal advice and not all consumers who have a legal issue wish to seek legal advice. There are many issues which may have a legal perspective but which consumers are often content to self-manage. This is a positive and healthy societal approach. It is not in the interests of consumers, the markets or society to encourage excessive and unnecessary use of legal processes to deal with simple matters – e.g. technically receiving a parking fine potentially results in

a "legal need". However it would not be rational or justified to take legal advice each time a parking fine is administered.

29. We are concerned that the evidence for unmet legal need which is the driver of the proposals is not robust and was not designed from a qualitative perspective to be used for justifying substantial regulatory reform. Our detailed analysis of the evidence for unmet legal need as articulated and relied upon for the proposals under discussion is contained in Appendix 1 to this response.

The substance and content of the proposals

Implications of the proposals for consumer protection, perceptions of the profession and the global competitiveness of UK law

30. While it is asserted that the proposals would be likely to deliver improved access to quality services at affordable prices, enhanced standards, increased employment opportunities and a strengthened solicitor brand, we believe the opposite is more likely.

31. In particular, we believe the SRA's proposals would lead to
    - weaker consumer protection because of the implications for:
        - legal professional privilege;
        - professional indemnity insurance and the Compensation Fund;
        - prevention of conflicts of interest;
    - creation of a two tier profession and greater client confusion;
    - lower professional standards;
    - other significant issues including:
        - contract protection;
        - disproportionate impact of regulation on smaller firms and sole practitioners;
        - impact on in-house practitioners;
        - impact on special bodies;
        - overlap between the two Codes of Conduct.

32. In this way, the proposals create a risk of significant damage to the standing of the solicitor profession at home and internationally.

Weaker consumer protection

33. As discussed above, the proposals would enable solicitors to work for unregulated entities providing unreserved legal services to the public. Such solicitors would be subject to the proposed new Code of Conduct for Solicitors but the entities they work for would not be regulated.

34. Despite receiving advice from a solicitor, clients of unregulated firms provided by a solicitor working in an unregulated entity would have none of the protections that clients in regulated firms have and will continue to have.

35. This has potentially serious implications with respect to legal professional privilege, professional indemnity insurance (PII) and the Compensation Fund, prevention of conflicts of interest, contractual protections, professional supervision and standards and the standing of the solicitor profession. We summarise the differences in protection at Appendix 2 and will discuss some of these points below and in the scenarios at Appendix 3 and Appendix 4.

Legal Professional Privilege

36. Legal professional privilege (LPP) is one of the most important rights recognised by English law. Having existed for over 400 years, LPP is treated under English law as a fundamental common law right and as a human right. It is a necessary corollary of the right of every person to seek legal advice and it plays a crucial role in ensuring the proper administration of our justice system. Accordingly, it is a precious right, vigorously protected by our judiciary and usually treated with the utmost respect by Parliament when it legislates. Despite the central position that LPP occupies in our justice system, it can easily be overlooked that this is a right, not of lawyers or the legal profession, but of clients. As noted in Passmore, "all privileged communications are necessarily confidential ones; but it by no means follows that all confidential communications are privileged, since it is only the confidential relationship between lawyer and client that can give rise to such a claim."[7]

37. A serious concern stems from the proposals regarding LPP. Clients of unregulated firms, despite receiving their advice from a solicitor with a practising certificate, will not have the benefit of LPP. In general, in order that communications may be protected by LPP, the advice given must be from a solicitor with a current practising certificate. The problem in this context however would arise as the contract / retainer would be between the consumer and the unregulated entity, not the individual solicitor. In order for the advice from a solicitor in an unregulated entity to attract privilege, the contract / retainer would have to be between the individual solicitor and the client, not the firm. Although it would be theoretically possible to make arrangements to circumvent the issue, the client would then only have redress against the individual solicitor and not the firm if the advice was negligent or wrong. We take the view that such arrangements would be inherently problematic and risky, for solicitors and clients, and furthermore not in keeping with the solicitor's role as an officer of the court. These proposals therefore present a substantial risk that by using an unregulated

[7] Privilege. Sweet & Maxwell [London; 2013]

provider, consumers would find that they do not benefit from protections which they had assumed they would, or only become aware of the lack of protection when they have a significant legal issue for which they want to be able to claim LPP but find they cannot. In such situations, it will be too late for the consumer to do anything about it. There are many completely foreseeable issues around lack of privilege, including confidentiality and insurance. We have prepared a scenario exploring the issues, which is contained in Appendix 3.

38. LPP is under attack in a number of ways and the Society is very involved in the fight to protect LPP. Under the principles of the rule of law and access to justice, LPP should be capable of attaching to advice to clients from a solicitor holding a current practising certificate wherever he or she practises and we are extremely concerned by any attempts to dilute LPP or make it more difficult to obtain or enforce. A situation where clients are unclear or misinformed about their entitlement to a right to LPP is also clearly unacceptable.

39. Finally, we do not believe that it is right in principle for LPP to be a distinguishing feature of the regulatory framework or a distinguishing factor between regulated and unregulated service providers. If one part of the solicitor profession is unable to give legally privileged advice, this is a slippery slope that could erode the concept of LPP; a cornerstone of the justice system, a key right of clients and a major factor in the high standing of the solicitor profession at home and abroad.

Professional Indemnity Insurance (PII) and the Compensation Fund

40. The proposals allow solicitors to operate from unregulated entities without mandatory PII in place. This risks eroding a key element of current client protection, and would also leave the individual solicitors concerned exposed to significant personal liability if they chose to operate without PII. The PII regime also plays an important quasi-regulatory role in encouraging good risk management and behaviours.

41. Additionally, clients of unregulated entities will not have access to the Solicitor's Compensation Fund. Arguably, clients of an unregulated entity would be exposed to much greater risk due to the lack of regulatory controls and oversight. We note that in view of higher risks with unregulated firms it would not be prudent to expose the Fund to the risk of a potentially significant pool of claims that could deplete the Fund's reserves. However the result is a significantly eroded client protection regime.

42. The proposal to counter this is that solicitors working in an unregulated entity would be required to make sure that their clients understood whether and

how the services they provide are regulated and the protections available to them. We would point out that even for those working within the legal sector, insurance and client protections are complicated topics and not easily digested and understood. It is highly likely that even with such a requirement in place, the overwhelming majority of clients will not fully comprehend the implications of purchasing their legal services through an unregulated provider.

Prevention of conflicts of interest

43. Under the proposals, solicitors providing services through an unregulated provider would be regulated as individuals and would be subject to the requirements set out in the Code of Conduct for Solicitors around conflict and confidentiality. However, this would not be true for the unregulated entities themselves or for non-regulated individuals employed by them. Unregulated entities would therefore be able to act in situations where regulated firms would not, creating an uneven playing field, and creating a risk of conflicts in the unregulated entities that would not be present had the client engaged a solicitor in a regulated firm. In such situations, the client might not be aware of a potential or real conflict of interest or appreciate that the unregulated entity was itself not subject to the rules on conflict.

44. The protection of confidential information is a fundamental feature of the solicitor's relationship with clients. As the SRA says in its guidance, "It exists as an obligation both as a matter of the common law and as a matter of conduct." Equally, a solicitor who acts in the face of a conflict of interest involves not only breaching their fiduciary duty to their client, but is putting at risk the important principle that justice must not only be done but be seen to be done. There is a real risk to the perception of justice if a solicitor is seen to act whilst having a conflict of interest.

45. It seems invidious that unregulated entities employing solicitors should not have to comply with a regulatory conflict of interest policy given the concept of conflicts of interest is recognised globally as a serious ethical issue that corporations and government bodies strive to address in many ways, from legislation to internal rules and codes. There is clearly a danger of downgrading professional standards with this proposal and consequentially a seriously negative impact on the standing of the profession internationally where conflict of interest is taken very seriously by Bar Associations. There is agreement internationally on the principle that lawyers should not act when the interests of their clients may conflict. The Council of Europe Recommendation on the freedom of exercise of the profession of lawyer lists the avoidance of conflicts of interest as one of the principle duties of lawyers

towards their clients[8]. A European Parliament resolution recognises that certain rules which are necessary in the specific context of a profession – including the avoidance of conflicts of interest – are not to be considered restrictions of competition within the meaning of Article 81(1) EC Treaty.[9]

46. Furthermore, clients would certainly be at risk. The Society would point to the 2016 Online Survey of Legal Needs, which found that:

- for 48% of issues, respondents checked if their main advisor was regulated (more likely for those aged >55);

- for 38% of issues, respondents did not. Of the 38% of issues where regulatory status was not checked, in over half of cases (52%) the respondent assumed the advisor would be regulated and therefore did not check; in 17% of cases they did not think regulation was important; in 8% of issues they did not know what regulation meant and in a further 8% they did not know how to find information about regulation.

47. There are also inherent risks to solicitors themselves in that a solicitor working in an unregulated entity might unwittingly act in a conflict situation.

48. The proposals will also act as a push to firms to become unregulated for fear of losing clients to unregulated competitors. This has been identified as an issue by some firms we have consulted. It has been suggested that a US style system for conflicts might be adopted generally, however although this might alleviate the position, the US system requires an extraordinary number of waivers and additional paperwork.

Creation of a two tier profession and greater client confusion

49. The SRA's proposal would effectively divide the profession in two by creating a second class of solicitors, delivering unreserved work through unregulated entities and without protections that have been traditionally available to those who consult solicitors.

50. Clearly this scenario will create confusion to consumers. Apart from confusion regarding the client protections available, we believe it will be difficult for consumers to differentiate the type of firm they are instructing. While an unregulated entity will not be able to use the term ‘solicitor's firm’ or ‘solicitors’, it would be able to use titles that included the words "law", "legal services" or "lawyers" and as they are unregulated, there will be no

[8] Recommendation No. R 2000-21 of the Committee of Ministers to member states on the freedom of exercise of the profession of lawyer

[9] European Parliament resolution on scale fees and compulsory tariffs for certain liberal professions, in particular lawyers, and on the particular role and position of the liberal professions in modern society (2001)

means to require them to publicise the fact that the entity is not regulated. There is no prohibition against unregulated firms advertising that they employ solicitors, which would be even more confusing. The situation would be further muddied by the fact that "lawyer" is not a protected title and, as things stand, can be used by any person when supplying unreserved legal services.

51. The potential for consumer confusion is clear. Many consumers are unlikely to appreciate the distinction between a regulated 'solicitor's firm' and an unregulated 'law firm' or 'legal services firm' and the differences in the protections available when supplied with the same service by unregulated and regulated providers.

Lower professional standards

52. We have mentioned above a number of proposals which we believe will have a lowering effect on professional standards, such as the erosion of LPP, and the elimination of the regulatory conflicts regime and PII. However, there is a further proposal which would mean that newly qualified solicitors with no experience would be able to set up their own unregulated firms. It is very common for regulators to prevent newly qualified professionals, such as in medicine, from setting up on their own immediately after qualification because of their lack of experience and the risk of consumer detriment. Our understanding is that the SRA has conducted research that shows that the most problematic solicitors are those at the very beginning and very end of their careers. For example, research conducted by Nottingham Law School for the SRA suggests that it is not until they have gained four years of post qualified experience that new entrants are more confident of their legal expertise and turn their attention to developing a wider skill set, as part of their aspirational career trajectory[10].

53. If that support and supervision were not available it could place clients at risk, as well as risking the standing of the solicitor profession itself, at home and internationally. We provide more detail on this important subject in our response to Question 19.

54. In 'Mapping the Moral Compass', Richard Moorhead and others[11] have examined how individuals, systems and cultures combined to increase or reduce ethical risk in the context of lawyers working in-house in business and government. They estimated that 30-40% of in-house lawyers sometimes experienced ethical pressure to advise on unlawful and/or unethical

[10] http://www.sra.org.uk/documents/SRA/research/sra-cpd-final-report-september.pdf
[11] C Godinho, S Vaughan, P Gilbert and S Mayson - http://www.ucl.ac.uk/laws/law-ethics/cel-events/ELIHL-survey-report

practices; in 10-15% of the sample, such pressure was described as 'elevated'. The research establishes links between a stronger commercial orientation and weaker ethical inclination, with other conceptions of the in-house role, such as 'neutral adviser' and 'exploitation of uncertainty' can also be problematic. The research indicates that behaviour is not always consistent with the approach required under professional codes. Stronger ethical infrastructures, as well as individual, team and professional orientations are all associated with more ethical and more professional in-house lawyers.

55. In addition to the above, the prospect of intervention is a powerful incentive for compliance. The SRA would not be able to intervene in an unregulated entity. The effect of this lack of enforcement power could have serious implications on the behaviours of the entity and, by extension, the solicitors within it.

Other significant issues arising from the consultation

56. There are a number of areas of ambiguity in the proposals that require further clarification from the SRA. These include:

Contract protection

57. It is important to note that the terms of business of a regulated entity can be restricted in a way that an unregulated entity's terms may not. There is case law to the effect that retainers with a regulated solicitors' firm cannot be terminated without cause[12], the solicitor has a duty to warn clients of matters which fall outside the normal scope of the retainer and to inform the client of problems identified or new information learned during the course of a retainer.[13] These obligations on solicitors' firms as determined by the courts underpin the values of an independent legal profession, imposing restrictions that curtail commercial incentives for contractual terms that are not beneficial to the client.

58. Conversely, there are no such restrictions on an unregulated entity's terms of business. The protection currently afforded to clients is open to erosion if the courts were to take the view that unregulated entities are not subject to the same contractual restrictions even if a solicitor employed by the entity carries out the work.

59. On a separate point, although solicitors would be subject to the principles contained in the Code of Conduct for Solicitors, there would be no obligation on the unregulated entity to have systems in place for dealing with client

[12] Buxton v Mills-Owens [2010] EWCA Civ 122
[13] Credit Lyonnais [2002]EWHC 1510; Mortgage Express v Bowerman [1996] 2 All ER 836

files, including retention of files when the matter is complete or the entity closes down. This could undermine a solicitor's ability to comply with their obligations to their client under the Code.

Disproportionate impact of regulation on smaller firms and sole practitioners

60. Under the current fees structure, 60% of the net funding requirement for the Law Society and SRA is received from practising fees paid by solicitor firms. The remaining 40% is collected from individuals' PC fees.[14]

61. Practising fees are charged to solicitor firms according to each firm's annual turnover in the accounting period prior to October (when fees are collected). A payment structure with turnover bandings is published annually by the SRA.[15] The proportion of turnover charged declines as turnover increases. However, the 200 firms with the highest revenue contribute over 40% of total fees paid by all firms (estimate for the year 2014-15) due to the scale of their turnover.

62. Unreserved work accounts for the majority of solicitor firms' turnover. Hence if solicitor firms' unreserved work were switched to unregulated providers, the turnover base that underpins practising fees paid by firms would be reduced (perhaps markedly). As a result, total fees received from firms, under the current bandings, would fall.

63. There is no information about any prior analysis of the projected impact of its proposals on fees, in particular the turnover based firm fee. Without this information, and an assessment of the impact on the SRA's costs, it is impossible to derive a full picture of what the consequences of the proposals might be.

64. We understand that some firms feel they will have no choice but to establish unregulated entities through which to provide unreserved services, in order to remain competitive. As stated above, we have real concerns about how these changes might ultimately affect the fees for smaller firms who may, collectively, find themselves making up the shortfall in fees.

65. Unintended consequences could be a proportionately higher burden of practising fees on smaller firms and sole practitioners, who do not find it cost effective (or possible) to split their business between regulated and unregulated services. This is likely to result in higher costs for consumers at

[14] Details of the funding arrangements are contained in the document: http://www.legalservicesboard.org.uk/projects/independent_regulation/PDF/2015/20150723_SRA_TLS_To_LSB_Section_51_Application.pdf. Practising fees also go to fund the levies that the Law Society Group pays under the Legal Services Act to fund the Solicitors Disciplinary Tribunal, Legal Services Board, and Legal Ombudsman.

[15] For example the 2014-15 fee structure: http://www.sra.org.uk/mysra/fees/fee-policy-2014-2015.page

the less economically well off end of the market for regulated (and possibly unregulated) services as a result.

Impact on In-house practitioners

66. By ceasing to separate out core regulatory provisions for in-house solicitors, the SRA will put in-house solicitors on an equal footing with other solicitors. The Society welcomes this acknowledgment that in-house solicitors are (as they always have in fact been) an equal part of the profession. However, we suggest that there needs to be a review of the Code to ensure that in-house solicitors are not caught by any provisions which should only apply to solicitors in private practice or vice versa. There are currently no in-house specific provisions in the code and this seems to be likely to raise issues in the future because in-house roles are very different from private practice.

67. It is proposed that in-house solicitors should no longer be prevented from only acting for their employer. This is intended to enhance access to justice for consumers. In practice, this change will mean that any in-house solicitor can provide advice and assistance to the public, provided they are not carrying out one of the reserved legal activities. In the case of local authority in-house solicitors, this may be attractive as it could permit them to provide advice to other bodies and authorities without having to obtain a waiver. However, this will result in increasing conflicts of interest situations, with the need to comply with the Code of Conduct for Solicitors. They will also face potential liability exposure, which will realistically have to be covered by their employer's indemnity. In addition, they too will not be able to provide advice which is covered by LPP.

68. With respect to in-house solicitors, it is difficult to envisage in what circumstances they would wish to act for third parties, or in what circumstances they would be permitted to do so. Many employers prohibit employees taking on other work as it is not in their interests for them to do so.

69. We have received specific feedback to the proposals from in-house lawyers working in Local Government, who are not in favour of the new proposals for a number of reasons. They remain concerned about the lack of clarity as to whether they can provide service to more than one local authority or body. These proposals do not address the issue. In addition the unregulated entity proposals are unattractive for the following reasons: they wish to remain regulated and intend to carry out unreserved work, the lack of LPP; the lack of regulation of conflicts rules; the fact that public procurement rules prevent local authorities from engaging unregulated firms; and because they are concerned that legal work that is partially funded by the tax payer through Council Tax could be delivered via an unregulated firm. Those

clients/consumers should receive the same quality of work and protections as consumers of regulated firms.

Impact on Special Bodies

70. The consultation is being used as an opportunity to address the position of 'special bodies' – not for profit organisations such as trade unions, law centres and Citizens Advice. These bodies have been subject to transitional arrangement provisions in the Legal Services Act 2007, meaning that while the solicitors they employ are regulated by the SRA, the body remains unregulated. The SRA's suggested new approach is to treat special bodies in the same way that it currently treats multi-disciplinary practices[16]. Special bodies play an important role in providing access to justice for vulnerable people who may not be able to afford access to legal services. We believe that, as well as considering the impact of the proposals on bodies such as Law Centres, there needs to be a detailed analysis of the impact on the market, and other providers in the market, of bringing these providers into the regulated sphere.

Overlap between the two Codes of Conduct

71. There is overlap between the two Codes, most noticeably in areas such as conflict, complaints and client information/identification. It is not clear which would take precedence in the event of there being a conflict between the two Codes.

[16] MDPs - alternative business structures providing a mixture of legal and non-legal services - where reserved activity is SRA regulated and non reserved activity is not subject to the provisions of the Handbook.

Consultation questionnaire form

Question 1: Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

The content of the test itself is fair and discharging the burden of the suitability test is straightforward in administrative terms but it is unclear what level of scrutiny is given to these returns to ensure that only those who are suitable are admitted to the profession. Further information regarding this process would be welcome as a way of showing greater transparency of the regulatory process.

The Law Society is aware of concerns regarding the timing of the suitability test. The Society was supportive of the removal of student enrolment prior to the start of the Legal Practice Course as it was unnecessarily costly and bureaucratic. However, the Society noted at the time that there may be issues which arose as a result of this and that it was essential that students have proper information to alert them to any likely problem at an early stage. There were also notable benefits to the previous arrangement. First, they enabled any concerns about a student's character to be addressed before the student embarked on the period of recognised training, at which point there has already been a significant outlay in time and money. Secondly, the requirement to undergo the process placed students on notice that their conduct may seriously affect their ability to pursue a legal career. It offered them an opportunity to engage at an early stage with the implications of being a professional. While it is accepted that each individual must take responsibility for their behaviour and should take advantage of the information available on the SRA website about character eligibility, it is not realistic to expect a student to understand the complex technicalities for reaching the SRA's suitability standards.

Unfortunately, although students can request an early appraisal of any issues that may cause problems regarding their suitability, the Society understands that it is not widely understood what this process is and when it should be applied for. The Society is aware, anecdotally, of situations arising whereby firms are routinely having to query trainees when they begin their placements and deal with issues, which the person concerned had not recognised must be declared, at this late point. There may also be situations where firms do not check, which raises issues about client protection. This represents a waste of a significant outlay in time and money on their part.

Clear and appropriate information regarding the suitability test should be made available to students at an early stage in order to make it obvious to students where previous conduct may prevent them from joining the profession and to give them a clear idea of the conduct they will be expected to demonstrate over the ensuing

years if they wish to join the profession.

Question 2: Do you agree with our proposed model for a revised set of Principles?

The Society has concerns with some aspects of the proposals as set out below.

New Principle 1: Uphold the rule of law and the proper administration of justice

This is current principle 1. We welcome its retention. However, we would reiterate that it is important to understand what "the rule of law" truly means. While a solicitor who is acting illegally may damage trust in the profession, it does not follow that the solicitor is also failing to uphold the rule of law. We would refer to The Rule of Law by Lord Bingham[17] which advances eight principles by way of expansion of the basic concept, the latter being: "that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts." These are primarily obligations of the state, not of individuals.

New Principle 2: Ensure that your conduct upholds public confidence in the profession and those delivering legal services

This is a reworking of current principle 6 ("behave in a way that maintains the trust the public places in you and in the provision of legal services") but brings in a new obligation with respect to providers generally.

There are two substantive changes.

First, the absence of any reference in the new wording to the importance of regulated individuals behaving in a way that retains public trust in them personally.

Secondly, it is illogical for regulated individuals and firms to be placed under any regulatory obligation with respect to non-regulated individuals and providers, and the proposed loosely worded reference could deter regulated individuals and firms from pointing out why the public should have greater confidence in the regulated sector, for example because of their professional training and the higher levels of client protections.

We propose that the new Principle be redrafted as follows:

*Proposed alternative wording for New Principle 2: Ensure that your conduct upholds public confidence **in you and** in other regulated individuals and firms"*

New Principle 3: Act with independence

[17] The Rule of Law by Tom Bingham, Penguin Books, 2011.

This is a reworking of current principle 3 ("not allow your independence to be compromised"). The Society does not have any concerns with the revised wording.

New Principle 4: Act with honesty and integrity

This is a reworking of current principle 2 ("act with integrity").

The Society has concerns with this proposed new principle not least because a requirement to be honest, including with respect to client money, is significantly weaker than a requirement to protect it, as required by current principle 10 ("protect client money and assets"), which it is proposed to remove. This proposal is presumably to facilitate the other proposal that solicitors working in unregulated entities should not be able to hold client money in their own name.

The absence in the new principles of any reference to the importance of protecting client money and assets raises concerns from the perspective of professional standards and consumer protection. Arguably, such protection would become even more important in an unregulated entity which do not and would not have to comply with the SRA's accounts rules. We therefore believe the new set of principles should retain an explicit reference to the protection of client's money and assets, ideally in a separate principle.

New Principle 5: act in a way that encourages equality, diversity and inclusion

This is a reworking of current principle 9 ("run your business or carry out your role in the business in a way that encourages equality of opportunity and respect for diversity"). The substantive change is the addition of a reference to inclusion. However, the word "act" seems a significant watering down of the current wording and the Society would prefer to retain "run your business or carry out your role" in place of "act".

We are also concerned that, while equalities legislation will apply to unregulated entities, this Principle will not. The SRA should address this issue in its equality impact assessment.

New Principle 6: Act in the best interest of each client.

This is a minor change to the wording of existing principle 4 ("act in the best interests of each client"). The Society does not have any concerns with this wording.

Question 3: Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

As noted above, we are concerned that the wording of the new Principle 2 does not refer to the importance of regulated individuals' behaviour in a way that retains public trust in them personally.

We would prefer absolute clarity and therefore propose that the new Principle be redrafted as follows:

*Proposed alternative wording for New Principle 2: Ensure that your conduct upholds public confidence **in you and** in other regulated individuals and firms"*

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?

Current Principles

The SRA is proposing the removal of four current principles:

a. Current principle 5 ("provide a proper standard of service to your clients")

The Society believes that this Principle should be retained as this is central to the profession and reflects the high level of quality that consumers can expect from a regulated individual. Its removal gives rise to concerns from the perspective of professional standards and consumer protection.

b. Current principle 7 ("comply with your legal and regulatory obligations and deal with your regulators and ombudsmen in an open, timely and co-operative manner")

The Society does not object to the removal of this principle.

c. Current principle 8 ("run your business or carry out your role in the business effectively and in accordance with proper governance and sound financial and risk management principles")

The Society does not object to the removal of this principle, provided that current principle 10 is retained.

d. Current principle 10 (“protect client money and assets")

As noted above, the removal of this principle raises concerns from the perspective of professional standards and consumer protection. Arguably, such protection would become even more important in an unregulated entity which does not have to comply with the SRA's accounts rules. We therefore believe that the new set of principles should retain an explicit reference to the protection of client money and assets, ideally in a separate principle.

The loss of principles 5 and 10 cause particular concern. In addition to the reasons cited above, these principles are so closely associated with what consumers have come to expect of a solicitor that they might be said to epitomize the brand on which consumer confidence is in large part founded. We can see only risks and no benefits in removing what are often seen as two hallmarks of the profession from the core principles.

At Appendix 3, we provide a scenario showing what could happen in a worst case scenario.

Other Principles arising from the newly revised ones

While confidentiality is arguably implicit in the principle that regulated individuals should "act in the best interest of each client", the Society believes it would be helpful to include a specific reference given its importance to consumers and to compliance with professional standards.

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?

We take the view that it would be helpful to the profession to provide a thorough and developed suite of scenarios, particularly as it is proposed that the indicative behaviours be removed from the Codes. As examples of the types of scenarios which we would consider to be useful, we suggest the following:

- A scenario that deals with a sole practitioner who establishes an unregulated entity in order to provide unreserved legal services. The scenario would cover how this practitioner might manage the operation of a regulated and separately unregulated business in practice. It would be particularly interesting to understand how the sole practitioner can guard against client confusion when practising in the circumstances set out above.

- A scenario that explores a practising solicitor working in an unregulated entity who is asked to represent a client who has clear conflicts with existing clients of that entity. We understand that in such a situation the solicitor would be able to represent the client. It would therefore be valuable to understand the parameters around management of such conflicts.

- A scenario that outlines whether, under the new proposed Codes of Conduct, a solicitor firm of conveyancers can act for a buyer and a seller, or for a borrower and a lender, in a conveyancing transaction and be compliant with 6.1-6.5 of the proposed Code of Conduct for Solicitors.

- A scenario that explores the impact of the proposals on the giving and receiving of undertakings ie between a solicitor in an unregulated entity and a solicitor in a regulated entity. Undertakings are the oil in the engine of legal transactions and help ensure they can take place. If in such circumstances, a solicitor in an unregulated entity were to breach an undertaking, what would be the consequences in terms of reparations to the affected consumer? Under what, if any, circumstances would undertakings from an unregulated firm be acceptable to regulated firms and others?

- A scenario that explores a solicitor who owns and practises through an unregulated entity who wishes to place advertisements online and in a newspaper. It would be useful to understand in more detail what the advertisement can say about the unregulated firm employing solicitors with and without practising certificates.

- A scenario that explores how an in-house lawyer (perhaps working for a local

authority) might provide legal services to the public. How this service would be managed, charged out, and how conflicts and risks would be managed.

- A scenario that explores how a solicitor working in an unregulated firm would manage conflicts, bearing in mind that they would be bound by the conflict rules from the solicitors code but may be working with colleagues who are totally unfamiliar with the concepts of conflict, confidentiality and disclosure.

- As set out in our answer to Question 20, we believe it would be helpful for the SRA to provide a case study on the information that should be displayed about consumer protections, including the level of detail required and expectations as to the prominence of the information presented.

Our consultation with some firms indicates that they are concerned about the removal of indicative behaviours from the handbook because of their usefulness in indicating how the regulated community can best comply with their regulatory requirements.

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?

As the Code's purpose would be to forestall misconduct, there is a balance to be struck between excessive detail and brevity. Clarity is important but so is predictability.

We know that our members, particularly those from smaller firms, like certainty. Many members would rather have a definitive 'do this' or 'don't do that' approach, so that compliance is more straightforward and there is less scope for genuine misunderstandings or disputes with the regulator. Without such certainty, disputes with the regulator about whether or not a particular behaviour is acceptable are more likely, as is uncertainty about the circumstances in which enforcement action will be triggered.

In addition, we are concerned that the language used in the Code is often vague or loosely constructed. This creates a risk that behaviour that is clearly within the current Code may be regarded as incompatible with the new Code and that a member carrying on practice in a fully compliant way now might be in breach under the new Code. There is real concern that both of the new Codes would give the SRA too much discretion. There is clearly a need for the SRA to provide more information and ensure that it acts in a consistent way and to make an explicit commitment to those subject to regulation that it will be consistent, fair, open, transparent and predictable about the circumstances in which it will decide to take or not to take action.

We understand that guidelines are planned and should mention the concerns of many that they are not yet available.

Specific examples of where the Code is lacking in clarity are set out in our answer to Question 13.

Question 7: In your view is there anything specific in the Code for all solicitors that does not need to be there?

No. On the basis of the partial information provided about the new regulatory framework and the SRA's approach, the Society has not so far identified anything specific in the proposed new Code that should be removed.

On the contrary, as noted in our response to Q6, we believe the Code needs more detail and guidance in order for it to be effective and provide clarity to the regulated community.

We would also reiterate that, without the full picture in relation to the new framework and the SRA's approach, it is difficult to reach a definitive judgment on the proposals.

Question 8: Do you think that there anything specific missing from the Code for all solicitors that we should consider adding?

It is not possible to respond to this question with any real certainty as we have not seen the guidelines or other parts of the proposed regulatory reforms.

However, on the basis of what has been set out so far, we have identified three issues on which the Code should be revised:

Unsolicited approaches to clients

The Society is extremely concerned by the proposed removal of Outcome 8.3 in the current Code, which states: "you do not make unsolicited approaches in person or by telephone to members of the public in order to publicise your firm or in-house practice or another business;".

Solicitors who make such unsolicited approaches to clients are not acting in the client's best interests, but rather their own. This explicit prohibition provides an essential protection for clients who are at their most vulnerable when such approaches are made – at the police station, court or prison. Its removal would undermine the protection currently provided to clients in this situation, which prohibits the solicitor from carrying out this behaviour.

The prohibition that the consultation proposes to remove also supports the Government's Duty Solicitor scheme by helping to ensure that anyone arrested can exercise their right to free legal advice from the duty solicitor. Removal of the prohibition would undermine the efficient running of the scheme.

The justification for proposing the removal of the prohibition is that it is "*covered by new 1.2 in the Code for Solicitors and new 1.1 in the Code for Firms to a certain extent.*"

The relevant clauses are as follows:

- new 1.2 in the Code for Solicitors: "*You do not abuse your position by taking unfair advantage of clients or others.*"
- new 1.1 in the Code for Firms: "*You do not abuse your position by taking unfair advantage of clients or others.*"

Clearly, the new clauses carry significantly less weight than the current explicit prohibition. We believe their wording is too weak and unclear to provide certainty to the public, members of the profession and the Legal Aid Agency that unethical behaviour is prohibited and will not be tolerated.

We therefore recommend that the Code of Conduct for Solicitors, RELs and RFLs, and the Code of Conduct for Firms should maintain the current wording of Outcome 8.3, which explicitly prohibits such unethical behavior.

Firms being reasonable or forming reasonable views

A number of references to firms being reasonable or forming reasonable views have been dropped. We would argue that if a solicitor acts reasonably but makes a mistake, it is right in such circumstances that being reasonable should not provide a defence to a request for an injunction or other mandatory order or costs. However, it would also seem unfair to make the actions of the solicitor in such a situation a potential offence that is subject to disciplinary consequences.

Systems to identify and deal with potential conflicts

We note that references to systems to deal with potential conflicts and confidentiality have been lost within the new drafting of the Codes of Conduct. We believe that this causes a problem. We assume that the omission has taken place because there would be general rules about systems. In our experience, and the case law supports this, the biggest single problem for firms in these areas is poor systems, particularly systems for picking up conflicts, or systems for establishing where special protections will be needed to protect confidential information. The SRA approach therefore, while being logical, would quite possibly be unhelpful to firms.

Undertakings

We have particular concerns about the position where a solicitor in an unregulated provider gives an undertaking to a solicitor in a regulated firm or to others who would need to place reliance on it. Undertakings have become a crucial element of the practice of law in the UK and are used to expedite matters that, in the absence of an undertaking, would cause considerable delay and inconvenience to the practitioner and the client.

Even though an undertaking relates to an individual solicitor, the Society has significant concerns regarding an undertaking provided by a solicitor employed by an unregulated provider. We believe that solicitors in a regulated firm would be highly unlikely to accept an undertaking from an unregulated provider due to a lack of protections if things go wrong.

We take the view that undertakings are sufficiently important to warrant protection in both of the codes, making clear that they are not just an enforceable agreement, but that breach can give rise to disciplinary proceedings.

Please also refer to our response to Question 5 which includes a suggested scenario

in relation to undertakings.

Question 9: What are your views on the two options for handling conflicts of interests and how they will work in practice?

The need for clarity around handling of conflicts is paramount. One particularly difficult area is conflicts relating to buyers and sellers in conveyancing transactions. We refer to our suggestion for a specific scenario to be created on this topic in our response to Question 5.

We read the two options set out in the consultation as follows:

- Option 1 largely replicates the 2011 Code, in prohibiting a solicitor from acting where there is a conflict or significant risk of conflict, for example as would exist if an individual solicitor were to act for a buyer and a seller, unless specified circumstances are met and protections are provided;

- Option 2 would narrow the ability to act given that it provides for a complete bar on acting where there is an actual conflict, and requires protections to be put in place if there is a significant risk of a conflict.

We would take the view that Option 2 would quite possibly be unworkable as it is not always possible to identify where a conflict exists. It is too restrictive and unnecessary. Because of the difficulty in identifying where conflicts exist, this option would present risks from a consumer protection perspective.

It may be helpful to set out our thinking to both options in more detail, at the same time commenting on some of the more subtle changes in emphasis:

<u>Option 1</u>

The proposed new rule 6.1 reproduces the old outcome 3.4 dealing with a conflict between the solicitor's own interests and those of the client. It is proposed that there should be an absolute bar to acting (as in the current Code). Under general law such a conflict could be waived. We are not aware of any pressure to change this.

The proposed new rule 6.2 effectively reproduces old outcomes 3.5 to 3.7, and deals with conflicts between clients. In addition to dropping indicative behaviour, it makes a number of changes to the existing rules. First (in 6.2 (a)), the old rule that if someone was to act for more than one client, the clients had to have 'a substantial common interest'. This is to be replaced by saying that the clients need both 'an agreed common purpose and a strong consensus how that purpose is to be obtained'. We take the view that this is weaker, because it allows one firm to act for more than one client on a matter even if the clients have little or no common interest in the matter. There is no explanation for the change.

A further protection has been changed (6.2(iii)). Under the old rules the solicitor had to be satisfied that it was reasonable to act for all clients. This has been dropped. We find this somewhat unsatisfactory, particularly as it would affect less sophisticated clients, who might not understand the implications of giving consent. There is a restatement of the need for the benefits to the clients having to outweigh the risks, but the old requirement was that this was something the solicitor had to have been satisfied about whereas the new requirement is a pure objective test.

Three old protections have been dropped. The first (outcome 3.7 (a)) was that the solicitor had to explain the risks of acting for more than one party and be satisfied that all clients understood this; this was similar to what happens when, for example, one spouse agrees that a house should be mortgaged to support a loan to the business of the other spouse. We would argue again that dropping this is wrong although it may be argued that no consent can be 'informed' without an explanation process (but this should be made clearer). The second (outcome 3.7 (c)) was that other than the matters for which client consent had been given there was no other client conflict. We can see that this protection added little. The third is that without specific client consent, no individual could act for more than one client on the matter. We assume that this was dropped because the issue has been picked up in the code for individuals.

Finally, these conflict rules are to apply to both firms and individuals, in more or less identical terms. But, recognising that some parts of the rule need to apply to individuals, the question remains as to how the application of the whole of the rule works? Is it to be the responsibility of each solicitor on engagement to see that informed client consent has been given? We do not foresee that this would be straightforward. It would be wrong for the senior lawyers acting to be able to just pass responsibility onto the firm, irrespective of what they know or do. We feel that more precise drafting would be beneficial.

<u>Option 2</u>

This would be a complete bar on acting where there is an actual conflict, and protections where there is a significant risk of a conflict. The protections would be (a) informed client consent in writing, (b) where appropriate, putting in place effective safeguards to protect confidential client information, and (c) ceasing to act for one or more of the clients if an actual conflict arises.

This is justified, in paragraph 64, as taking an 'approach which recognises the safeguards around the current exceptions are really about preventing potential conflicts from becoming real ones'. This is incorrect. The existing safeguards were drafted recognising that the parties may have an essentially common interest but still have opposite interests in some respects. These are just examples of a situation that arises not infrequently in a commercial law practice. We understand that when the original rule was drafted, one example which was being held in mind was a solicitor acting for all the partners on forming a partnership, or all owners, when

drafting articles of association. The clear common interest is obvious, but behind it individuals will often have different views on their personal rights in many respects. What a solicitor might typically do is say that he or she will raise the issues where interests may differ and ask the clients to agree how to deal with them and then, in effect, just be the scribe. However, narrowing the scope of the mandate in this way will not always work. Similar issues can be found in drafting a trust deed. We fear that Option 2 would create very real difficulties in these types of situations and could be a recipe for uncertainty.

Also Option 2 seems to abolish the ability in Option 1 and the current rules for a firm to act for more than one client in pursuit of the same object (often where an intermediary is doing some sort of controlled auction for shares in a company or some sort of property). We can see no reason to open this up to uncertainty.

Question 10: Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

We refer to our answer to Question 6.

Specific examples of where the clarity of the proposed new Code could be improved are set out in our answer to Question 13.

Question 11: In your view is there anything specific in the Code for SRA regulated firms that does not need to be there?

No. On the basis of the information provided so far about the new regulatory framework and the SRA's approach, the Society has not identified anything specific in the proposed new Code for SRA regulated firms that should be removed.

On the contrary, as noted in our response to Q10, we believe the Code needs more detail and guidance in order for it to be effective and provide clarity to the regulated community.

We would also reiterate that, without the full picture in relation to the new framework and the SRA's approach, it is difficult to reach a definitive judgement.

Question 12: Do you think that there is anything specific missing from the Code for SRA regulated firms that we should consider adding?

We would repeat our point that without seeing all of the guidance which the SRA intends to publish, it is difficult to respond to this question with any real certainty. On the basis of what is available, we would suggest the following:

We note the absence of 1.3 from the Code – the provision about undertakings. It is unclear whether entities should not be giving undertakings, or that an undertaking has to be attached to an individual solicitor to be enforceable.

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?

Remarks in relation to drafting on Confidentiality and disclosure

Proposed rule 6.3 in the Code of Conduct for Solicitors (and proposed rule 6.1 in the Code of Conduct for Firms) tracks existing outcome 4.1 (and its equivalent) provided the definition of client continues to cover former clients (ie by replacing "clients" by "clients or former clients". We would expect that to be the case but note that proposed rule 6.5 expressly refers to former clients so an explicit reference to former clients is also needed in proposed rules 6.3 and 6.1 in the Code of Conduct for Solicitors and the Code of Conduct for Firms respectively.

Proposed rule 6.4 (about the duty to disclose) incorporates existing outcomes 4.2 and 4.3. There is an oddity in the new rule in the version of the draft code which applies to firms, as the draft rule expressly says that it only applies to individuals. But if it only applies to individuals why does it need to be in the rule for firms? The underlying point of course is that in cases like Kelly v Cooper (a case about estate agents), the courts have made it clear that there is no general assumption that information known to one person in a firm is to be attributed to another.

We note that proposed rule 6.4 has two additions to outcomes 4.2 and 4.3. The first is that a solicitor does not need to pass on information to the client which the solicitor has reason to believe will cause the client serious physical or mental injury. This seems to apply only where the client is an individual, and not (for example) where the client is a company of which the vulnerable person is a controller or director. The second is to reflect general law about the mistaken disclosure of information in a privileged document which need not be disclosed to a client. This reflects case law. In the case of these new exceptions, saying that they are exceptions to the duty to disclose is not at all the same as saying that disclosure cannot be made, which is surely what is intended (certainly in relation to the second of them).

Proposed new rule 6.5 (not acting if to do so puts client confidential information at risk) largely tracks existing required outcome 4.4. This area is the one which has led to most of the recent reported cases on conflicts and confidentiality, although the cases do not refer to the SRA Code of Conduct. It is worth noting that the existing rule was altered some time ago to refer to having ‘information barriers which comply with the common law’. The proposed new rule just refers to measures which result in ‘there being no real risk of disclosure’. This reflects the common law and is consistent with the way in which the new Code of Conduct is drafted.

We would make a couple of points on proposed rule 6.5. The first is that having introduced a reference to former clients (which proposed rule 6.3 does not do) it

then uses the term inconsistently so that, on the face of it, a former client consent is not enough to escape the prohibition on acting, although a current client consent does. Secondly, we are puzzled why this rule, with its references to effective measures, applies to individuals?

Further points in relation to drafting: Code of Conduct for Solicitors

- The paragraph below the Principles on page 45 of the consultation, implies (when it says 'They apply to conduct and behaviour relating to your practice') that the Code does not apply to a solicitor's private life. This should be clarified.

- As worded, by comparison with the provisions in the current Code that this would replace[18], rule 1.4 could be read as meaning that the solicitor is responsible if their client misleads the court or others, or is responsible for other acts or omissions, even if the solicitor was not aware that any mischief was taking place. In light of this, we suggest that rule 1.4 should be reworded as follows:

  1.4 You do not mislead or attempt to mislead your clients, the court or others, either by your own acts or omissions or ***by knowingly*** *allowing or being complicit in another person misleading the court or others* ~~*the acts or omissions of others (including your client)*~~*.*

  We would also note that rule 1.4 must be read in the context of the wider requirement that solicitors must always act in good faith and that misleading anyone whilst acting as a solicitor would potentially breach that requirement in addition to rule 1.4.

- rule 2.4 appears to originate from the Bar Standards Board Code of Conduct. Read in isolation, 'properly arguable' could be confusing for solicitors. It might be interpreted as not being able to put forward instructions which may lack credibility, as opposed to arguments with no legal basis. We assume that guidance will clarify this point.

- rule 3.1 is poorly worded.

- rule 3.4 The term 'Client's attributes' is vague and lacking any legal meaning. It is therefore inappropriate for a Code of Conduct. Moreover, it is unclear what that word encompasses that would not be covered by "needs and circumstances".

- rule 4.2 'Others' might more helpfully read "Others, for example lenders, trustees etc."

[18] O(5.1) "You do not attempt to deceive or knowingly or recklessly mislead the court"; and O(5.2) "You are not complicit in another person deceiving or misleading the court."

Further points in relation to drafting: Code of Conduct for Firms

- In the Code of Conduct for Firms, Cooperation and information requirements section, the text needs to clarify what is meant by 'you'.

- rule 4.2 of the Code of Conduct for Firms, greater clarity is needed on what is meant by 'competent'.

- It is disappointing that rule 7.1 provides very little detail to shed light on applicable outcomes in the SRA Code of Conduct for solicitors and RELS 2017.

Finally, rule 7.8 in the Code of Conduct for Solicitors requires guidance to accompany it. The current code says that a solicitor has to act reasonably to take action. It now depends what 'remedial action' means. We also wonder if the SRA can require a solicitor to take action in these circumstances or if this falls outside its jurisdiction.

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.

There are arguments on both sides and this is an issue requiring debate and careful consideration.

Recognised bodies and recognised sole practices need to ensure compliance and, in particular, that an understanding and appreciation of professional standards and ethics are properly embedded. Arguably, by specifying COLP and COFA roles, the regulator relieves those regulated of the need to decide how best to achieve this. It has also been suggested by practitioners that the COLP and COFA roles have served to reduce the ethical knowledge and awareness of individual practitioners. This potential is mentioned in the findings section of the SRA commissioned Independence, representation and risk report, where it is suggested that the perception of COLPs and COFAs as the 'holder' of professional values raises 'the question of whether such has the potential for individual lawyers to become less aware of, and less interested in, their own professionalism, professional identity and professional obligations.[19]

However, it could be argued that those regulated should determine for themselves how they comply with regulatory requirements and the SRA should find ways of promoting and regulating individual professionalism. Alongside this, any individuals tasked with responsibility for ensuring compliance must demonstrate and maintain the necessary skills and experience, and be subject to appropriate accountability and responsibility controls.

We recommend that the SRA conducts and acts on a survey of individual COLPS and COFAs aimed at identifying specific ways of reducing the burden of reporting, while ensuring that the regulatory framework helps to promote individual professionalism, professional identity and professional obligations.

[19] Independence, Representation and Risk: An Empirical Exploration of the Management of Client Relationships by Large Law Firms: Claire Coe and Dr Steven Vaughan, commissioned by the SRA, 2015.

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?

The Society will shortly publish its 2015 Regulation Survey. Of those who responded to this survey, 91% were the Compliance Officer for Legal Practice (COLP) at their firm. The findings from the survey could inform the nature of further support for this post. Responses indicate the need for clear, unambiguous and effective regulation. In this context it is worthwhile noting the following:

- there was a decline since the 2012 survey in the proportion of firms that thought that the SRA's enforcement procedure is understood by the industry as a credible deterrent and being used in a way that serves to better protect consumers;

- compared with 2012, a smaller proportion of firms agreed that guidance supplementing Handbook regulatory rules is useful, and that principles, outcomes and indicative behaviours provide sufficient guidance on compliance obligations;

- keeping up to date with changes to outcomes and indicative behaviours was the most commonly reported problem with OFR reported by firms; and

- changes to the regulatory regime which would introduce a principles based code only with outcomes and indicative behaviours removed were predicted to negatively affect professional and ethical standards on balance (and particularly so amongst large firms).

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?

We refer to our comments in our introduction and in the sections that follow.

It is possible that some commercial firms, wishing or feeling compelled to take advantage of the liberalisations offered by the new rules may decide to split the provision of their legal operations into two entities: a traditional firm, which would continue to carry out all reserved[20] work, perhaps retaining only a small percentage of the firm's current partners, solicitors and other staff; and a new unregulated entity, which would carry out all unreserved work and employ solicitors with practising certificates as well perhaps as some solicitors without a practising certificate.

In principle, while clients of the new unregulated entity would be less protected than clients of a traditional firm there would be some cost benefits for such firms in taking such steps. The new unregulated entity would not be required to pay entity regulatory and compliance costs, practising certificate costs for non-practising solicitors, contribute to the Solicitors Compensation Fund, take out professional indemnity insurance, employ COLPs, COFAs and other compliance staff, or comply with client account rules.

Furthermore, foreseeable unintended consequences would be that the regulatory burden and cost moves across to smaller firms and sole practitioners who are less able to divide their businesses between regulated and unregulated work; as BAME solicitors are over-represented among smaller firms, this will have diversity implications. This will result in a further restriction on access to justice and increase unmet legal needs as the smaller firms service the less well off demographic.

If many firms elected to go down this route, the Regulator would have to take steps to avoid a significant reduction in income. This would seem likely to lead to higher PC and firm fees, which would have significant negative financial consequences for sole practitioners and firms that chose not to change their business model. In particular, this would be likely to have a disproportionately negative impact on smaller firms for which the cost of changing their business model was not justified by the size of their client base or the high proportion of reserved work they undertake; such firms would have to operate at a competitive disadvantage because their entire business (including reserved and unreserved work) would be subject to the regulatory regime.

In addition, this would also have the effect of making reserved activities such as conveyancing and litigation potentially significantly more expensive for consumers as

[20] http://www.legalservicesboard.org.uk/can_we_help/faqs/Reserved_Legal_Activities.htm

the payment base for regulatory costs to be captured would be very much smaller than now. In addition, regulatory costs would be disproportionate for small and medium-sized firms, which generally carry out a mix of reserved and unreserved activities and may not have a big enough client base/business to justify splitting their business into two separate entities, one regulated and one not. Small and medium sized firms would therefore be likely to have to operate at a competitive disadvantage because their entire business (ie reserved and unreserved work) would be subject to the regulatory regime and its costs, whereas unregulated entities would fall outside this and have lower costs as a result. Ironically, the largest law practices, servicing the largest corporates, would be likely to pay proportionally less than the smallest firms servicing individual consumers; the proposals therefore threaten the viability of established small firms, which may result in forced close down and insolvencies with negative consequences for the communities they serve, especially where the firms concerned conduct legal aid work - exacerbating the ability of vulnerable communities to access justice. There would also be negative implications for competition and for the reputation of the profession.

Another unintended consequence is that solicitors may circumvent the restriction on unregulated entities offering reserved work by making applications to judges to act as paid McKenzie Friends on behalf of their clients. The right to appear before and address a court, including the right to call and examine witnesses, and the right to carry out the conduct of litigation are reserved legal services, and as such it can only be exercised lawfully by a lawyer who is regulated by an approved regulator.

A McKenzie Friend can ask the court to be allowed to conduct litigation if the litigant in person is unable to do so. This means that under the current proposals a solicitor who works in an unregulated firm (who under the new rules would not be able to exercise rights of audience by virtue of being employed in an unregulated entity) can ask a judge to allow them to conduct litigation as an unregulated McKenzie Friend. Faced with qualified solicitors making requests to act as paid McKenzie Friends, Judges may be inclined to treat such applications favourably to avoid dealing with the scenario that the case is run by a litigant in person with the consequential impact that has on the length of the case and the quality of the legal arguments and process. However, this potential workaround would inevitably sow further confusion for both consumers and those working within the legal profession, and inevitably degrade the position of the solicitor as an officer of the court, as well as erode legal professional privilege.

It also raises the question as to whether a solicitor who is permitted by the Judge to work in this capacity should be regulated for that work. The Judicial Executive Board are currently considering prohibiting those McKenzie Friends who are allowed to litigate from being able to claim costs from the other side. If this were to happen it would further confuse the status of solicitors who apply to have the same status as a McKenzie Friend who gains permission to litigate.

There appears to have been no analysis of the list of the consequential risks that

would result from allowing solicitors to deliver non-reserved legal services to the public through unregulated providers comprehensively identified in Table 1 of the Economist's report. It would be useful to have an analysis of how these risks would be mitigated.

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?

Not applicable.

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?

We agree with the 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 authorised entity. We would be concerned about relaxing this provision and thereby allowing the creation of structures that would avoid the requirement for entity regulation altogether and allow solicitors to provide reserved legal services on a consultancy/freelance basis. Any such relaxation would put clients of sole practitioners outwith current protections for clients and consumers and create consumer confusion.

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?

Current Rule 12 effectively requires that a solicitor needs to have three years Post-Qualified Experience (PQE) and to have undertaken a management course before they are able to set up a business as a sole practitioner. This requirement overlaps to a certain extent with the authorisation rules, which allow the SRA to assess the skills and knowledge of an individual of an applicant. However, Rule 12 sets out a clear requirement about the experience an applicant should have before setting up a new firm.

We are surprised that the consultation states that data analysis indicates newly qualified solicitors do not pose a significant risk to the delivery of a proper standard of service and would be interested to see this data. Current rules prevent newly qualified solicitors setting up in business on their own and therefore we are not clear what evidence would be available about their ability to deliver proper services in this type of situation. Furthermore, research has indicated that those who have been practising for less time are more likely to have complaints raised against them, indicating experience is a factor in complaints being raised against solicitors (Pearn Kandola 2010, p30).

We agree that the current requirement to undertake a 12 hour unspecified course on management skills may not be effective. However, lack of understanding of regulatory requirements and particularly the accounts rules is often the cause of solicitors appearing before the SDT following serious regulatory failings and in many cases loss of client money. Making sure that those setting up a new firm have a good understanding of the regulatory requirements, whether it is through a prescribed course or some other method, would seem to us to be essential.

We believe that some form of the 'qualified to supervise' rule should remain, although we agree it would be sensible to move any requirements to the authorisation rules. We believe that there should be a clear rule that prevents newly qualified solicitors from setting up a firm until they have sufficient experience and that those wishing to set up a firm should be required to demonstrate an adequate knowledge of the regulatory requirements.

In considering this question, the Society has been mindful of the conclusions of the independent, comprehensive case file review commissioned by the SRA 'to identify whether there is disparity in the way the SRA applies its policies and procedures in dealing with BME practitioners as compared to others with a view to identifying

potential improvements to such practices, policies and procedures to maximise fairness and consistency…'[21] The current proposals would seem to contradict the findings of that report.

[21] http://www.sra.org.uk/sra/equality-diversity/reports/independent-comparative-case-review.page

Question 20: Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

We believe that it is crucial that consumers understand the protections that they have with regulated provider versus non regulated providers. The proposed new Code of Conduct for Firms does not include any requirements in relation to this matter, and we recommend that the requirement set out at paragraph 8.9 of the Code of Conduct for Solicitors is mirrored in the Code for Firms.

Prospective clients should be clear about the protections in place when they decide to engage a solicitor. Outcome 8.9 of the SRA 's proposed Code of Conduct for Solicitors requires the solicitor to 'make sure that clients understand whether and how the services you provide are regulated and about the protections available to them'. This requirement does not differ substantively from Outcome 1.7 in the current Code of Conduct, which applies to firms and solicitors: 'you inform clients whether and how the services you provide are regulated and how this affects the protections available to the client.'

The SRA asks whether it should require firms to display 'detailed' information about consumer protections. The meaning of 'detailed' is not explained. It is therefore not clear under what circumstances firms could be confident that they have met the requirement. We would urge the SRA to issue guidance for firms on the information that should be displayed, including the level of detail required and expectations as to the prominence of the information presented. This could be in the form of case study examples, to aid solicitors in considering how to present information on consumer protection to the public.

We note the fact that the SRA is only able to impose any requirement of this kind on regulated firms highlights an imbalance between the information that might be available to consumers who use unregulated legal service providers and which would be available to clients of regulated firms.

While the SRA does not have any power to require unregulated entities to display information and the protections available to consumers, it does have a duty to ensure that its actions do not increase consumer confusion.

Question 21: Do you agree with the analysis in our initial Impact Assessment?

Question 22: Do you have any additional information to support our initial Impact Assessment?

The initial impact assessment provides an overview of the thinking behind the changes proposed in the consultation but there is limited empirical evidence to back up some of the assumptions made in the assessment. A comprehensive equality assessment has not yet been made and is essential before any of the proposals are adopted.

Please see Appendix 1 for our detailed analysis of the initial impact assessment.

Code of Conduct for Firms

The new Code is designed to make it easier to comply and reduce the burden of regulation for firms. However for smaller firms, in particular, good guidance will be essential to help make it easier to comply. Alongside this is the need to have in place, and well understood, a credible enforcement approach. Without these, there is a risk that the new code will not reduce the burden on small firms but, on the contrary, will increase the burden.

The current approach to guidance is patchy and while there are good examples such as the recent toolkit for continuing competence which has been widely welcomed, the guidance on consumer credit left many questions unanswered. It would be helpful to see the guidance that will be made available in order to assess whether it will plug the gap for small firms left by the removal of more detailed rules and indicative behaviours, as soon as possible.

Where a regulator provides guidance and toolkits, there is a risk that they quickly become understood as regulation and treated as such, stifling innovation and adding to costs. However, that risk has not been identified in the assessment. There is no information on how the proposals would be enforced, which would help to assure the profession and the public that the regulations would be enforced in an effective and proportionate manner.

The current enforcement function was previously identified as a problem area in 2012/2013 by the LSB and is still not rated as satisfactory. Given the ongoing issues and the importance of the enforcement function to the success of these changes, it would be helpful to have assurance as to how performance in this function will be improved.

It is noted in the consultation that regulatory changes may create some costs. However, there is little indication of the likely scale of these impacts. This is an area whether further work is needed, to ensure the costs do not outweigh any benefits.

One of the benefits highlighted is that the new Code will be online, freely accessible and searchable. As this is the case with the current Code, we do not believe this can be seen as a particular benefit of a new Code.

Changes in Practice Framework Rules

One of the main drivers behind the changes in the PFR is the concept of unmet legal need. This has been exemplified in the impact assessment by the small proportion of people and firms seeking advice about a 'legal' matter and the number of people without wills. Research indicates there are number of reasons why people do not seek legal advice, cost being only one of them. Many people are happy to resolve their own 'legal' problems, indeed there has been a Government drive for them to do so, e.g. raising of small claims limit, creation of Ombudsman etc. Others do not perceive a problem as being a 'legal' problem. Similarly, the reasons for people not having a will are varied, with the reason cited most often, is that 'an individual has nothing to leave'. There is no doubt that for some the cost of legal advice is a factor in not seeking advice but the SRA provide no empirical evidence that:

- alternative legal providers will enter into markets where there is significant unmet legal need;
- services will be provided at a significantly lower cost by unregulated providers.

The scenarios provided on the possible impacts in the market are limited at best and do not appear to take account of information available on the unregulated market. For instance, the SRA considers it likely that will writers will employ solicitors to provide legal advice through their firms. However, the vast majority of specialist will writers are small providers or sole practitioners[22]. Similar assumptions are made about unregulated providers carrying indemnity insurance, while this is common in certain areas of the unregulated market, this is not the case in other areas (Ibid).

There is an assumption that if the regulatory requirements are removed, alternative legal service providers will enter the market and innovate which will in turn drive down costs and reach new consumers. In reality, the CMA's initial assessment is the regulatory framework is not inhibiting innovation.

The assessment does not recognise the serious risk to consumers of these new arrangements. There is a limited recognition that some consumers may suffer as a result of a lack of client protections within alternative legal providers. No evidence is offered as to how this conclusion has been reached. Nor, as noted above is there any clear quantification of the benefits.

[22] Unregulated Legal Service Providers: Understanding supply-side characteristics, p 17 https://research.legalservicesboard.org.uk/wp-content/media/Economic-insight-in-depth-unregulated-research.pdf)

The SRA recognises that there may be some impact on smaller firms, who may not be able to take advantage of the reforms either for logistical reasons e.g. size; monetary reasons e.g. unable to invest in setting up a new business and lack of expertise. The suggestion that the rational response is for firms to close or sell their businesses is unhelpful and in itself may create an unmet need. There must be a risk that reserved legal services deserts are likely if these proposal are implemented.

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?

The Law Society does not support the proposal for solicitors to provide certain legal services through alternative legal service providers for the reasons set out in this response. Clearly, client money and assets need to be protected at all times and in all circumstances.

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?

The consultation proposes that, in line with the arrangements for solicitors working in alternative legal services providers (ALSPs ie unregulated providers), in-house solicitors and solicitors in special bodies should not be permitted to hold client money in their own name. This means that there would be no rules/protections with respect to the handling of client money in these entities[23]. There is, however, a distinction between solicitors working in special bodies and in-house solicitors[24]/solicitors working in ALSPs. In the former, in contrast to the proposed position with in-house solicitors/ALSPs, solicitors are able to deliver reserved legal services direct to the public. This brings the authorised person within the scope of legal services specific regulation. Reserved activities generate a significant proportion of the claims against solicitors and, as such, carries a higher risk profile requiring the application of proportionate protections. It should be noted that special bodies can deliver identical services to traditional firms.

It is also noteworthy that special bodies play a distinct role in the legal services market, in that they particularly provide legal services to vulnerable people. Any disparity in safeguards offered by special bodies will create an inconsistency in the level of consumer protection offered to vulnerable clients. We accept that protection should be proportionate to risk (including tailoring regulatory measures to reflect client base) and should not impose unnecessary burdens but consider that solicitors working for special bodies should be permitted to hold client money personally and be subject to the requirements of the Accounts Rules.

In line with the fact that in-house solicitors and ALSPs will be permitted to only offer non reserved legal services to the public and in recognition of the fact that the regulatory net is based on reserved activities, we agree that solicitors working therein should not be permitted to hold client money in their own name.

[23] The SRA's impact assessment details that it has granted waivers to its current rules to permit businesses employing solicitors in-house to hold client money – so this is a live issue.
[24] In-house solicitors offer, and will continue to offer, reserved legal services activities but only do so in relation to their employer – the SRA proposal for change is that they could in future provide non reserved legal services to the public.

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? If not, what are your reasons?

We have discussed elsewhere in this response our concerns relating to the SRA's proposal to allow solicitors to practise from unregulated entities. In the event that the proposed framework is established however, we agree that if solicitors operating from unregulated entities are not required to hold professional indemnity insurance (PII), their clients should not have access to the Compensation Fund. It would not be prudent to open the Fund to claims arising from work done by solicitors in unregulated entities, which are not subject to the Accounts Rules, Code of Conduct for Firms, and do not have mandatory PII protection which is itself a driver of effective risk management. Where work is not carried out through a regulated firm, clients are arguably exposed to much greater risk due to the lack of these controls and regulatory oversight. Denying access to the Fund for these clients guarantees that the Fund cannot be depleted by a potentially significant pool of claims. The Fund is owned by solicitors and its reserves are a result of contributions they have made subject to the existing rules confining payouts to claims arising from work carried out within a regulated firm.

Despite this, we do recognise the significant decrease in consumer protection and other practical issues that will arise if clients of solicitors working in unregulated entities do not have access to the Compensation Fund. We have explored these issues in more detail below, as we are concerned that the SRA has not fully considered all the repercussions of allowing solicitors to practice from unregulated entities, including the impact on the Compensation Fund.

The consultation proposes that clients of solicitors working in unregulated entities should not have access to the Compensation Fund on the basis that their solicitor would not be able to hold client money or carry out reserved work. However, it is not the case that claims to the Fund are solely linked to misuse of client money, breaches of the Accounts Rules (which apply only to firms not regulated by the SRA) or reserved work. A gap in consumer protection will be created where solicitors commit fraud when carrying out unreserved work (to take as examples: deliberately selling ineffective family trust deeds, forging documents, or convincing a client to alter a will in order for the solicitor to inherit money) as the client would not be eligible to claim from the Compensation Fund in relation to this loss. The SRA's most recent published analysis of claims paid by the Compensation Fund[25] does not include a full breakdown of the areas of work from which the claims arose, and it may be that the SRA does not collect data at this level of detail. Without this information, there cannot be any proper consideration of the potential detriment to consumers of removing access to the Compensation Fund in relation to claims arising from unreserved work.

[25] Economic Insight - SRA Compensation Fund review (2014)

The consultation states that there is no objection in principle to allowing consumers to trade off the protections they receive (including access to the Compensation Fund) where they perceive they receive benefits in relation to this trade off, such as reduced prices or greater accessibility to a service.[26] However, a crucial related issue in allowing consumers to exercise such preferences is whether consumers are able to appreciate or understand the differences in consumer protection between different providers. Research suggests that consumers often do not recognise these distinctions.[27] One could therefore question the wisdom of removing access to the Compensation Fund for consumers who may not realise the importance of this protection until the time they come to make a claim. As discussed in detail in response to Question 27 below, requiring solicitors to provide information to clients on the protections available may not overcome the confusion created by the SRA's proposals and the potential for significant consumer detriment of removing access to the Compensation Fund. In addition, we are unaware of any economic analysis which confirms the changes in the regulatory regime will result in reduced prices and/or greater accessibility of service.

The SRA will also have to address the practical implications of removing access to the Compensation Fund for clients of solicitors working in unregulated entities.

First, the SRA's approach to calculating contributions to the Compensation Fund (currently £548 for firms, and £32 for individuals) will have to be reviewed if solicitors operating from unregulated firms would no longer have to contribute. Currently, 50% of annual Compensation Fund contributions are paid by firms, and 50% by individual solicitors. Contributions to the Compensation Fund would be significantly reduced if substantial numbers of solicitors chose to operate from unregulated firms (and hence did not pay the individual solicitor levy), and/or even a relatively small number of large firms, due to the higher percentage of non-reserved work they carry out, moved non-reserved work to an unregulated provider (and hence did not pay the firm contribution).

However, it is vital that the remaining contributions to the Fund are sufficient to meet the demands on it. It is the long standing approach of the Fund to maintain a minimum reserve fund as a contingency against unexpected numbers of claims or unexpectedly large claims, which includes forecasting contribution requirements to avoid the position of the contribution spiking and then dropping significantly in consecutive years. Given that the impact assessment notes how little can be known about the extent to which solicitors may choose to operate from unregulated entities/firms may decide to hive off non-reserved work, it is difficult to assess to what extent Fund contributions will be impacted, and how the contributions structure should be altered. It would clearly be undesirable to change contribution structures on a continual basis to take account of changing numbers of firms and

[26] Looking to the Future - flexibility and public protection, Annex 6, p.97
[27] Looking to the Future - flexibility and public protection, Annex 5, pparagraph 28

individuals contributing to the Fund. Indeed, it is difficult to envisage how funding arrangements can be amended to enable fair contributions. Smaller firms, who due to the nature of the work they undertake are unable to hive off unreserved work to another entity, would most likely end up paying increased contributions to make up the shortfall to the Fund caused by larger firms and their solicitor employees moving out of SRA regulation. It is problematic that the review of Compensation Fund contributions will not occur until a later date. This makes it very difficult to obtain a full picture of the impact of the proposals and to able to comment fully.

Second, it is unclear how contributions would be collected when a solicitor moves between regulated and unregulated firms. The administration involved tracking solicitors and collecting levies on a tranched basis would clearly not meet the objective of reducing regulatory burdens on solicitors, or administrative costs of the regulatory regime which are ultimately borne by consumers.

Third, the proposed framework would beg the question as to why a solicitor in a regulated firm who carries out only unreserved work and does not hold client money, should have to contribute to the Fund. While it would be impractical to police the collection of contributions in this way, this in addition to the issues raised above demonstrates inconsistencies in the proposed approach and raises questions about the fairness of the proposals in the way that regulation will apply to individuals solicitors and different profiles of firms.

Question 26: Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

We do not agree that individual solicitors should be able to operate from unregulated entities without mandatory PII cover. We are strongly opposed to the proposal in principle.

All work done by a solicitor in private practice is currently covered by the firm's PII. The current arrangement provides unrivalled protection for the consumer, providing assurance that if anything goes wrong they will receive fair settlement, regardless of the type of work undertaken or the circumstances in which the work is carried out. It is unacceptable for individuals to be left destitute or without some level of redress arising from a solicitor's negligence. Mandatory PII cover is fundamental to both consumer protection and the maintenance of public trust in the profession.

There is also a potential risk that a firm with a poor claims record that would affect its ability to obtain PII could be attracted by the proposal as it would allow them to carry out unreserved work from a new unregulated entity without PII in place. Arguably these are the firms whose clients would need the protection the most. We also struggle to understand how solicitors would be able to comply with Principle 6 to act in the best interests of their client, without PII cover in place. It is clearly not in the best interests of the client for their solicitor to be uninsured, as this impacts the client's ability to recover any losses. If the SRA agrees that in order to comply with principle 6, solicitors would in reality be compelled to purchase PII, one must question why the SRA's proposals do not attach PII requirements to individual solicitors. We request clarity from the SRA on this point.

Part of the SRA's reasoning for this proposal is that it would be unclear how a solicitor in an unregulated provider, who may be working as part of a team, is supposed to separate out their own insurance requirements from those of their team. We would argue that it is precisely the fact that the SRA is seeking to differentiate and separate out the role of a solicitor, their high professional standards and regulation of the solicitor from the unregulated entity itself, that has necessitated addressing the issue of individual insurance.

As demonstrated in response to Question 27, the proposal creates unnecessary complexity and uncertainty, and any possible benefits would be outweighed by the significant reduction in client protection.

Question 27: Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

Under the SRA's proposals, solicitors carrying out unreserved work from unregulated entities would have two options:

1. Choose to have no PII cover

Given that there is no requirement to do so, solicitors working in an unregulated entity could choose not to obtain PII. As PII is one of the most costly elements of regulation, there is a real possibility that some solicitors may choose to operate uninsured. This would be particularly alarming in the case of a sole practitioner. Solicitors who choose to operate uninsured without due regard to the personal liability they could incur in the absence of PII cover, would be placing themselves in a potentially ruinous situation. PII protection does not exist purely for the benefit of the public, but also for the benefit of solicitors, as confirmed by the House of Lords in *Swain v The Law Society*.[28]

There would also be nothing to prevent a solicitor's terms of engagement specifying that they cannot be sued for an amount greater than the value of the retainer. This dilution of clients' existing financial protections is not acceptable. Consumers could be left facing hardship as a result of the actions of solicitors regulated by the SRA. The reputation and strength of the solicitors' profession as well as the credibility of the SRA would suffer if clients go uncompensated as a result of a solicitor having no PII cover. This damage would not be possible to repair.

The SRA's proposal is made all the more alarming when one considers the amount of claims by solicitors' firms on their PII that could relate to unreserved work. It is clearly not in solicitors' or clients' interests for there to be no insurance cover in relation to work which, although unreserved, still carries significant exposure to claims.

As stated in response to Question 26, we also struggle to understand how solicitors would be able to comply with Principle 6 to act in the best interests of their client, without PII cover in place.

The Law Society considers that all solicitors in all circumstances should be subject to mandatory PII cover, and would urge the SRA to reconsider the proposal.

2. Choose to obtain PII cover

Solicitors working in an unregulated entity and such entities themselves may wish to

[28] [1983] 1 AC 598

purchase insurance against negligence claims in any event.

A solicitor in an unregulated entity could try to obtain cover on their own behalf, or the entity might take out insurance to cover all the solicitors it employs. In both of these scenarios, there is uncertainty as to the availability, suitability, and affordability of PII that could be purchased on the open market.

First, the wide SRA minimum terms and conditions (MTC) protection would not be replicated in standard commercial PII arrangements. While solicitors' clients are currently protected by comprehensive PII cover (which also includes run off cover), the gaps in coverage between the SRA MTCs and a standard PII policy negotiated by the solicitor or entity would leave solicitors' clients with less protection than the current entitlement, or than when instructing a solicitor from a regulated entity. The SRA has not provided sufficient justification for reducing consumer protection in this way and the resulting asymmetry is confusing.

Second, the potential cost to solicitors or the unregulated entity of purchasing PII is difficult to estimate. Underwriters write risk on the basis of claims exposure. The market currently prices in risk to premiums, so firms with low exposure by reference to the work they undertake (e.g. crime, legally-aided work and employment law) already pay lower premiums than firms undertaking high risk work (e.g. conveyancing). If a firm carrying out predominately unregulated work chose to move out of SRA regulation, there may be limited scope for premium reduction because the risk remains unchanged. Moreover, participating insurers take comfort in the fact that those they insure are SRA-regulated and that the SRA has the power to intervene if necessary. The PII regime plays a role in regulating solicitors as firms with poor claims records will face higher premiums and could face difficulty obtaining insurance at all. Insurers may consider that the claims exposure is increased in an unregulated entity where there is no regulatory oversight of business processes. In the case of solicitors purchasing PII on an individual basis, they would also lose the benefit of lower premiums as a result of the ability to bulk purchase PII to cover the work of the entire firm.

It is therefore by no means certain that unregulated entities or individual solicitors would be able to purchase PII at an affordable cost. Indeed, the SRA's impact assessment makes no attempt to forecast the availability and price of PII for those who would wish to purchase it. There is no analysis or evidence to show that premiums would be reduced; or that reduced premiums would in any event provide greater access to justice as a result. The proposal risks creating considerable consumer detriment for an uncertain and unquantifiable benefit arising from an aspiration for increased access to legal services.

Third, the proposal appears to be based on the assumption that clients will understand the fact that their solicitor does not have insurance, or is insured to a lesser degree than that required by SRA-mandated insurance. Clients differ significantly in their experience of acquiring legal services and their ability to

understand and specify their preferences and requirements. Business consumers who are regular users of legal services may understand their protections and even actively seek to determine whether the level of protection is appropriate for their matter, but the same cannot be said for infrequent, unfamiliar users of legal services. Indeed, there is evidence to suggest that the consumer protection landscape in the legal services market is poorly understood.[29] There is considerable scope for consumer confusion through a mistaken belief that in gaining advice from a solicitor through an alternative legal services provider they are subject to the same protections as if that solicitor worked in a regulated provider. The proposals will only serve to increase the confusions around the different protections attached to services, and lead to decreased confidence in the legal profession and irreparable damage to its standing.

This confusion will not be overcome by requiring solicitors in these circumstances to make sure that their clients understand whether and how the services they provide are regulated and the protections available to them (proposed Outcome 8.9). It is alarming that the case study provided by the SRA[30] suggests that Outcome 8.9 would be met if the solicitor explained the business does have compulsory insurance, but does not state the level of such cover. There would be nothing to prevent a solicitor or unregulated entity from obtaining cheap and ineffectual 'nominal' cover simply to be able to inform clients that they hold PII.

The consultation states that there is no objection in principle to allowing consumers to trade off the protections they receive under different service/provider models where they perceive they receive benefits in relation to this trade off, such as reduced prices or greater accessibility to a service.[31] Again, this incorrectly assumes that consumers understand the difference between regulated and unregulated entities, and appreciate differences in consumer protection in each case, while evidence suggests they may not. [32]

[29] Looking to the Future - flexibility and public protection, Annex 5, pparagraph 28
[30] Looking to the Future - flexibility and public protection, Annex 9, page 204
[31] Looking to the Future - flexibility and public protection, Annex 6, page 97
[32] Looking to the Future - flexibility and public protection, Annex 5, pparagraph 28

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?

Yes. The Society believes that regulation should apply consistently and fairly to the provision of legal services in order to protect consumers. It would not be in the consumer and the wider public interest for solicitors to offer the same service but with different standards of consumer protections according to whether they were employed by a regulated firm or by a Special Body.

Special bodies play an important role in providing legal services to vulnerable people and it is especially important that clients entrusting matters of significant importance to their solicitors have access to appropriate redress. If reserved activities undertaken by Special Bodies fall within SRA regulation, these bodies should be required to maintain PII.

Question 29: Do you have any views on what PII requirements should apply to Special Bodies?

Under the current Practice Framework Rules, solicitors employed by Special Bodies must have a 'reasonably equivalent' level of cover to that required by the SRA Indemnity Insurance Rules. This provides clients of Special Bodies with equivalent protection to that provided to clients of SRA-regulated entities.

The Law Society believes that clients of Special Bodies should be entitled to PII protection in the same way as clients of traditional law firms. Requiring Special Bodies to obtain MTC level PII has the advantage of ensuring that there is consistency in the level of consumer protection offered to clients.

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?

Question 31: Do you have any alternative proposals to regulating entities of this type?

The Society's concerns about the proposal that solicitors should be permitted to deliver non-reserved legal services to the public through alternative legal services providers would not be overcome by the imposition of a threshold on non-SRA regulated firms. Indeed the introduction of an arbitrary threshold could make matters even more confusing for clients. Our concerns around the proposal to allow solicitors to work in unregulated providers and its impact on client protection and the reputation and standing of solicitors would remain for these firms. In conclusion, the Society believes that regulation should apply consistently and fairly to all legal services (individuals and entities) in order to protect buyers of legal services and it is not in consumer and the wider public interest for there to be regulated and unregulated providers offering the same service but with different standards of consumer assurance and protections.

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?

It is not clear what the proposed position is on intervention into a solicitor's individual practice within an unregulated entity. The SRA has the power to do this. However, as has been highlighted, it could prove to be difficult to untangle the practice of the solicitor and the unregulated entity thus making this difficult. It would therefore seem unlikely that the SRA would use this power often. However, the SRA does not appear to be ruling out the possibility.

We are unclear how the SRA's additional powers to request information could help it in investigations where intervention was not an option, for the reasons described above. We consider that the same issues would arise as to the information owned by the unregulated entity (and as such presumably outside the jurisdiction of the SRA) and that owned by the solicitor.

Question 33: Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

We agree that all work within a recognised body or an RSP should remain regulated by the SRA.

Appendix 1: The Initial Regulatory Impact Assessment: Unmet legal Need

1 Pleasance and Balmer wrote:

> "*Legal need is a contested concept. It has been used to refer to occasions when people experience legal problems but fail to obtain the services of lawyers to assist with resolution. However it is generally recognized that legal mechanisms do not always provide the most appropriate route to solving problems that raise legal issues. Attempts to define legal needs have therefore come to place emphasis on understanding of options and preferences."*[33]

2 All consumers should have access to justice, regardless of social background or wealth. There are clearly unmet legal needs in certain sections of the population but the most significant unmet legal need relates to legal aid removal. For those consumers it is questionable that they would be able to afford to obtain legal advice at any cost point. The evidence relating to other unmet legal need is not so robust as to provide definitive evidence to justify changing the regulatory framework.

3 Not all issues that have a legal element require legal advice and not all consumers who have a legal issue wish to seek legal advice. There are many issues which may have a legal perspective but which consumers are often content to self-manage. There are many sources of self-help advice, including online and from official; bodies such as Citizen's Advice Bureaux, which help citizens decide if they have a problem that they may need legal advice to resolve, whether from a legal adviser who specialises in the problem such as a solicitor or one of the many other organisations who may be able to help (for example https://www.citizensadvice.org.uk/law-and-rights/legal-system/). This is a positive and healthy societal approach. It is not in the interests of consumers, the markets or society to encourage excessive and unnecessary use of legal processes to deal with simple matters – e.g. technically receiving a parking fine potentially results in a "legal need", although it would not be rational or justified to take legal advice each time a parking fine is administered.

4 However, there are pockets of the legal services sector where there are access to justice concerns and these should be addressed as they affect the most at risk and vulnerable consumers.

[33] https://research.legalservicesboard.org.uk/wp-content/media/How-People-Resolve-Legal-Problems.pdf

5 In summary, there are different levels of legal need across society, with the serious unmet legal need residing at the least affluent levels of society where the removal of legal aid across many areas has created serious unmet legal need.

6 With the implementation of the Legal Aid, Sentencing & Punishment of Offenders Act, ordinary people are finding it increasingly difficult to access justice because of issues including the steady erosion of legal aid, the ongoing programme of court closures and increases in court fees, as well as changes to the rules regarding the ability of clients to recover legal costs.

7 The impact on the most vulnerable is a major concern for the Society, which continues to campaign for an improvement in the current state of access to justice so that this unmet legal need can be met. The Society recently launched a campaign to raise awareness of the fact that legal aid advice for housing is disappearing in large areas of England and Wales, creating legal aid deserts. We are also working with the Bar Council and others to examine the potential for some of the gap to be addressed through a Contingent Legal Aid Fund .

8 While the consultation asserts that the proposals would have this effect, we do not believe that the analysis of the available evidence in the Initial Regulatory Impact Assessment (IRIA) bears this out.

9 When legal need is defined by presenting respondents with a list of issues ranging from very minor (and which individuals judge to be so and are content to deal with themselves) to very serious issues, and include issues that have traditionally been catered for by the not-for-profit sector (until the impacts of the Legal Aid, Sentencing & Punishment of Offenders Act started taking effect), a finding that solicitors are not used for every legal need identified does not constitute evidence that there are substantial amounts of actual unmet need generally. Ours is not an increasingly litigious society and we should not be taking action that would encourage the seeking of legal advice where rationally no legal action should be taken.

- **IRIA paragraph 21 states that "Many individual people and small businesses are unable to access legal services from a solicitor at a cost they can afford."**

10 This is an over simplification. Research demonstrates that cost is not the primary reason why consumers decide against seeking help from a professional adviser. According to the Legal Services Board's 2012 Legal Needs Survey, people do nothing about legal issues mainly because they lack awareness about what can be done or where to go for help. Reasons are primarily related to the type of legal need, complexity of the need and previous experience. Incidence of taking action increases as the seriousness of the problem increases. For those who deal with matters themselves, cost was found to be an issue but not the overriding issue. The main reasons were that they didn't think the problem would be difficult to resolve (24%), confidence in their ability to handle the matter alone (17%), the fact that they had

enough time to handle the matter alone (11%), whereas only 9% thought it would cost too much to seek advice from a professional.

11 These findings are corroborated and, added to, by the 2016 Online Survey of Legal Needs commissioned by the Legal Services Board (LSB) and the Society. While the survey does not purport to be nationally representative of people with legal needs, its large sample size of legal issues (16,000) means that it provides a robust basis for exploring problem resolution strategies. The fact that its findings are corroborated by other research also lends weight to the survey.

12 According to the 2016 Online Survey, almost half of issues considered were handled by respondents themselves or with help from family and friends and fear of cost was a reason for just one in ten of this group. Of those one in ten, 43% did nothing to find out about the actual costs of advice or assistance. This indicates that a substantial issue relating to cost is perception.

13 Multivariate modelling of the 2016 survey data demonstrated that the factors with the greatest influence on issue handling strategy were not cost but rather:

- type of issue;
- whether or not the respondent characterised the issue as legal; and
- the respondent's perception of the severity of the issue.

- **IRIA paragraph 21 states that "Fewer than one in ten people experiencing legal problems instruct a solicitor or barrister."**

14 This is highly selective use of available evidence and significantly understates the use of solicitors. The evidence is an analysis by Pleasence and Balmer of 2012 Civil and Social Justice panel data, which focuses on 15 civil justice issues.

15 However, this research did not examine more common transactional issues. According to the LSB's 2012 Legal Services Benchmarking survey, which did examine transactional issues as well as civil justice issues (28 issues in total), 42% of respondents with a legal problem had taken some form of advice from a solicitor.

16 The Legal Services Consumer Panel's 2015 tracker survey estimated that 34% of a nationally representative sample of the public had used a legal service in the previous two years; of these, 62% had used a solicitor in the previous two years.

17 In the Pleasence and Balmer study, cited in the consultation, the top three reasons for not instructing a lawyer identified by respondents for civil justice issues were:

- no need (48%);
- cost (23%); and
- the issue was not considered to be sufficiently important (6%).

18 The authors of the report concluded that 'The findings confirm the complexity of behaviour, and the importance of problem severity, problem type and perceptions/understandings. Our findings do not suggest any broad crisis of access to justice, with market rationing operating to channel more severe problems towards advice and formal process and some inaction appearing entirely rational. However, the legal services market and civil justice system do not ensure fair and equal access to justice, with deficiencies attributable largely to the difficulty of enabling vulnerable populations with limited capability and resources (e.g. those with health problems, low levels of education and/or lower income) to access appropriate help in a complex legal services market in which innovations to broaden service reach have often emanated from outside of the traditional legal professional sphere.'

19 As the proposals have the potential to increase complexity, it is unclear how they would stimulate the type of innovation that could reasonably be expected to address access issues for those with limited capability and resources.

20 As regards capability, the economic rationale supporting the proposals refers to some proposed 'consumer-facing guides' (public and business guides) which the regulator intends to produce: to reduce the information asymmetry between consumers and providers of legal services; reduce search costs for consumers; allow consumers to influence quality improvements and place pricing pressure on providers; and boost demand for legal services. Without further information on the form of these guides, and on how they will be tested against users' actual needs, it is impossible to assess their likely success.

21 Given the importance of public legal education in helping to address access issues identified by experts, much more clarity and specificity about the proposed guides should have been included with the consultation. Without that detail, it is impossible to judge how the guides will mitigate against increased complexity. We know from research commissioned by the LSB that an independent legal advice and guidance site was thought to be more useful than published guides; that 'just in time' aids are more useful to consumers than 'just in case' aids; and that better understanding of legal services consumers decision making is required in order to identify the types of tools and aids that would in practice be most useful to consumers. It is unlikely that a set of guides published by the regulator would fully meet potential consumers' information needs in a more, not less, complicated market.

- **IRIA paragraph 21 states that "The picture is very much the same for small businesses, the majority of whom have little contact with solicitors or law firms. Over half of small businesses that experience a problem try to resolve it on their own. Accountants are consulted more often than lawyers when small businesses need advice."**

22 This statement is based on the Legal Services Board's 2015 survey of small businesses (<50 employees) 'Understanding the legal needs of small businesses'. While the report's findings have been summarised, some of the complexities detailed therein are worth highlighting.

23 Business demand for specific types of legal services varies by size of firm and, again, reasons other than cost play a part. For the smallest of small firms, other deterrents include:

- the problem/s not necessarily requiring legal advice;
- the owner/s of the problem not knowing who to approach;
- fear of loss of reputation within the industry and the loss of future work; and
- having 'coping' strategies.

- **IRIA Paragraph 21 states that "This demonstrates substantial legal need not currently being met by regulated lawyers, including solicitors."; and paragraph 82 states that "This indicates there is substantial legal need not currently being addressed from existing suppliers"**

24 The consultation does not include any quantification of the volume or value of need that is not being met. The term 'substantial' appears not to have accounted for the range of different reasons that deter people from seeking legal advice (from solicitors or otherwise). Those who identify cost as a deterrent to seeking advice are a minority and other factors are more important in decision making.

25 Even if it were the case that more people and small businesses would seek the advice of a solicitor if solicitor prices were lower, the consultation does not provide an analysis that demonstrates how savings made by the fact that unregulated entities employing solicitors would not have to meet the costs of regulation will reduce the price paid by consumers substantially. There is no answer to the question 'how much cheaper will these proposals make services'? This is a fundamental point which has not been addressed.

- **Paragraph 82 of the Initial Regulatory Impact Assessment states that: "Our proposals are intended to allow greater competition and choice in areas of law with growth potential because there is unmet legal need. We know for example that a significant proportion of the population do not have a will. In the case of small firms, the most common problems relate to trading, employment and taxation ... The vast majority of firms in this sector currently have little contact with a legal adviser. Less than one in ten small firms either employed in-house lawyers or had a retainer with an external provider. Over half of firms experiencing a problem tried to resolve it themselves, more often seeking advice from an accountant than a lawyer. This indicates there s substantial legal need not currently being addressed from existing suppliers of legal services."**

26 The consultation does not appear to have identified the specific areas with growth potential. An assumption that where there is an unmet need, there is

potential for growth, cannot be correct when ‘need’ has been so broadly defined. To identify areas with potential for growth, there would be a need to develop a much better understanding of the extent to which the different reasons for not seeking professional help to date apply to different types of need. The idea also seems to assume that it is possible to provide professional services at the lowest levels of affordability. Without an understanding of which areas are likely to be attractive to alternative legal businesses, it is very unlikely that impacts can have been properly assessed.

27 The consultation asserts that stronger entry, expansion and competition will lead to increased choice in the market for unreserved services in areas with growth potential, which have not been identified. However, the economist’s report supporting the proposal indicates that this will not happen if: (i) consumers’ do not see solicitors’ and others’ services as substitutes, or (ii) solicitors’ activity is not switched to alternative legal services suppliers. The conclusion that ‘unmet need’ will be addressed assumes that the ‘unmet need’ is in sectors of the unreserved market where the above two conditions do not pertain.

28 The approach taken in the consultation to tackling ‘unmet need’ rests on reducing cost, but as noted already the body of research points to other factors being more influential on people’s choices about problem resolution. The consultation does not appear to consider these complexities. For example, on the consumer side, the 2016 Online Survey of Legal Needs commissioned by the LSB and the Society, showed that doing nothing was most strongly associated with the following types of issue: personal injury; clinical negligence; work injury; unfair treatment by the police; and discrimination. Many of these areas are subject to government initiatives to deter people from using a lawyer.

29 Furthermore, handling an issue alone or with informal help was most closely associated with consumer and probate issues. Probate is a reserved area and the main motivations for people handling consumer issues alone were that (i) respondents thought they would be easy to resolve and (ii) they had time available. Taking these examples, it is also unlikely that the proposals would help to improve take-up of advice. On the other hand, a perverse incentive might arise for solicitor firms to reduce the supply of reserved services, including some firms stopping reserved activity altogether, thereby reducing the supply of reserved services.

30 The 2016 Online Survey indicates that over two-thirds of the issues presented to respondents were not thought of as a ‘legal issue 'at first. An element of this percentage is likely to result from the very broad definition of ‘legal issue’, which includes matters such as consumer issues that people are generally content to deal with themselves. However, clearly there is also an actual lack of understanding of legal rights, processes and forms of redress. Consumer facing guides, as proposed by SRA, would be unlikely to address the capability need identified by Pleasence and Balmer.

31 In terms of severity of problems, the highest mean average scores achieved in the 2016 Online Survey concerned homelessness issues, problems with rented property, clinical negligence, domestic violence, immigration and divorce/dissolution.

32 The lowest average scores related to consumer issues and making wills. The SRA's sweeping approach to describing 'substantial unmet need' includes issues that people would still do nothing about even if costs were lowered.

- **IARA paragraph 82 states that: a "significant proportion of people don't have a will"**

33 Will making is already open to competition between reserved and unreserved providers, and many unreserved providers opt into self-regulation. In its interim report on a market study on the supply of legal services in England and Wales, the CMA noted that "There are a large number of suppliers of wills and probate services. There is also some variation in the types of providers consumers can choose. Despite this there is some evidence that competition may not be working as well as it could be. There are clear asymmetries of information between the consumers of wills and probate services and the providers. It does not appear to be easy for a consumer to assess their level of legal need or the likely price and quality of available suppliers." As noted, the Society will be working with the CMA to support more information being supplied to clients, while ensuring that critical client protections remain in place.

34 It is not at all clear how the issues identified by the CMA would be addressed by the proposal to allow solicitors to set up or work in an unregulated entity).

35 Will-making is known to be associated with age[34] and cost is not the main reason for people not making wills. According to Moneywise, the main reason people do not make wills is apathy:

- 25% of people without one say they plan to have one written when they get older; and

- 11% say it has never occurred to them to write one.

36 Although the Moneywise research indicates that 'many people are also worried about the costs involved', the organisation points out that wills 'can be relatively inexpensive at around £120 for a single person and £200 for a couple'

[34] 90% of people aged 75-84 had a will in 2015 up from 82% in 2013 (http:www.willaid.org.uk/press/research) compared with 11% of those aged 18-24 in 2013 (http://www.wills-advice.co.uk/top-five-reasons-young-people-make-will/). 2010 research by ICM for TLS found that 7% of 18-25 year olds had a will compared to 20% of 25-34 year olds, 41% of 35-44 year olds, 55% of 45-54 year olds, 64% of 55-64 year olds and 81% of 65 years olds.

(without mentioning the DIY options available). This aligns with the finding highlighted earlier that will issues are, on average, perceived as low severity and that perceived severity is a major determinant of problem resolution strategy (from the 2016 Legal Services Board / Law Society Legal Needs survey).

- **IARA paragraph 82 states that "Over half of firms experiencing a problem tried to resolve it themselves, more often seeking advice from an accountant than a lawyer."**

37 The proposals might help solicitors retain work from small businesses that might otherwise go to an accountant and may possibly improve the take-up of legal advice by small businesses because they would enable solicitors to work in accountancy practices and other organisations with closer links to the small business community. The potential for increased choice is again underpinned by the idea (in the SRA economist's paper) that stronger entry, expansion and competition in the market for unreserved services would arise. However, the economic rationale accepts that this will not happen if (i) purchasers do not see alternative legal providers and traditional providers as substitutes and (ii) solicitors' activity is not switched to alternative legal services suppliers.

38 The authors (Blackburn et al) of the LSB's 2015 survey of small businesses, cited in the consultation, deduce that, in general, the demand for specific types of legal services will vary by size of firm and certain services will be required earlier on as the business grows. They go on to say: "What we cannot establish at this stage, however, is whether the demand for legal services is being fully met or constrained by other factors".

39 The survey's findings indicate that small firms are thought to use their accountants more frequently than any other provider because it is a necessary relationship for taxation and compliance purposes and it is set within an 'institutional' trust framework. Small business owners do not regard lawyers as part of their natural business problem resolution strategies and are not accessing legal services because of perceived and real barriers. In contrast, accountants benefit from both institutional and relational trust because of the frequency of contact and a greater understanding amongst firms of what accountants provide.

Appendix 2: Consumer protections for clients of solicitors working in regulated firms and unregulated providers if the proposals were implemented

	Client instructs solicitor in a regulated firm [reserved and/or non-reserved activities]	**Client instructs solicitor in an unregulated firm** [non- reserved activities only]
Conflicts	The solicitor is bound by the conflict rules in the Code of Conduct for Solicitors which stipulate that the solicitor cannot act in a conflict situation. The firm is subject to the conflict rules in the Code of Conduct for Firms.	The solicitor is bound by the conflict rules in the Code of Conduct for Solicitors, but the firm is not subject to the Code of Conduct for Firms. *Risks to consumers:* • *A solicitor will be able to represent a client who has clear conflict with existing clients of that entity. No conflict rules apply to entity/other employees risks solicitor acting in a conflict situation (e.g. no firm conflict management systems);* • *A solicitor with 2 clients in conflict can pass one client to another solicitor or person in the firm and avoid the conflict rules which apply under the Code of Conduct for Solicitors.*
Confidentiality	Code of Conduct for Solicitors and Code of Conduct for Firms both contain confidentiality requirements. The following rules apply to regulated entities: • where appropriate, you put in place effective safeguards to protect your clients' confidential information; • you do not act for a client in a matter where	Code of Conduct for Solicitors contains confidentiality requirements, but the entity is not subject to the Code of Conduct for Firms. The rules opposite do not apply. Common law rules of confidentiality would apply. It would be for the individual solicitor to ensure they are complying. *Risks to consumers:* • *Risk of disclosure of confidential information from lack of controls at firm level, particularly where the*

	that client has an interest adverse to the interest of another current client or a former client for whom you hold confidential information which is material to that matter unless all effective measures have been taken which result in there being no real risk of disclosure of the confidential information.	*firm acts for 2 clients who would be regarded as a conflict under the SRA rules.*
Legal Professional Privilege (LPP)	Applies fully.	LPP does not attach to the entity. *Risks to consumers:* • *Clients are unable to prevent sensitive legal advice being disclosed and used against them in court;* • *A situation where clients are unclear or misinformed about their entitlement to a right to LPP is undesirable.*
Standard consumer protections are available but there are special issues which impact provision of legal advice: • *Issue of enforcement and therefore access to redress - query whether public enforcers such as Trading Standards would interfere in the provision of legal advice (more concerned with higher profile issues such as sale of unsafe products);* *Risk to consumers:* • *If the entity/solicitor does not have the ability to pay any compensation owed, the client is left without redress in the absence of PII cover;* • *Potentially greater freedom for unregulated entities' terms of business to include terms that are in their commercial interest and are not beneficial to the client.*		
Regulatory protections (before event/ongoing)		
Education and training requirements	For the first three years of practice, supervision is required and a solicitor may not set up on	Newly qualified solicitors with little experience could set up an unregulated firm.

	their own.	*Risk to consumers:* • *Risks to delivery of a proper standard of service. Evidence that experience is a factor in complaints being raised against solicitors (Pearn Kandola 2010, p30).*
Firm business and managerial standards	Yes.	No - firm not subject to Code of Conduct for firms.
Provide information about protections	Yes.	Yes - must state whether PII is in place, and make clear that there is no access to the Compensation Fund. *Risk to consumers:* • *Evidence of poor understanding of protections, so question whether consumers will take note of and understand the reduced protections and how these may affect them.*
Regulatory protections (redress)		
Access to Legal Ombudsman	Yes. Must inform client of right to complain about the solicitor or the firm to the Legal Ombudsman.	Yes. Must inform client of right to complain about the solicitor, but not about the unregulated provider, to the Legal Ombudsman.
Holding client money	Yes, and must comply with SRA Accounts Rules. PII or the Compensation Fund would in principle be available in the event of a LeO judgment against an insolvent firm.	Solicitor cannot hold client money, but no restriction on the employing entity holding client money. However, in practice, while anti-moneylaundering legislation does not prevent unregulated entities setting up client accounts, banks may be reluctant to do so because of the compliance costs associated with these accounts. *Risk to consumer:* • *No access to Compensation Fund in event of dishonesty resulting in loss of client money;*

		• *No guarantee of proper procedures and safeguards in unregulated entities for holding any client money?* • *If the entity loses this money/goes insolvent, client may not be able to recoup the money;* • *A LeO judgment against the solicitor would be enforceable but in practice only if the solicitor had the means to pay.*
PII protection	Yes - the regulated firm must hold PII on SRA-mandated minimum terms and conditions.	Solicitor/ unregulated entity not required to hold PII. If solicitor/entity does not purchase PII, client must fall back on standard consumer protections. *Risk to consumers:* • *If the entity/solicitor does not have the ability to pay any monies owed in the event of a successful claim and there is no PII in place, the client is left without redress;* • *If the entity/solicitor has obtained PII, this may not be on the SRA minimum terms and conditions of PII, resulting in less comprehensive cover and affecting the client's ability to obtain redress;* • *A standard PII policy held by the firm would not include run-off cover, resulting in no redress for a client who brought a claim after the entity had closed down.*
Access to Compensation Fund	Yes.	No. *Risk to consumers:* • *No redress for loss caused by solicitor dishonesty in relation to unreserved work.*
Sanctions for misconduct	Yes.	Yes.

Appendix 3: Scenario illustrating the risks to a client in engaging a solicitor working in an unregulated provider

This scenario is based upon information made available by the SRA in its Looking to the Future consultation on 1 June 2016. This consultation contains the draft codes of conduct for solicitors and firms but not the supporting guidance. Further relevant detail is also awaited in the Practice Framework Rules consultation.

What happens

- **Client engages an unregulated provider**

Z, a company, engages an unregulated provider, Small Business Law (SBL), to help it buy a small business. At the introductory meeting, SBL takes money on account from Z and advises that a lawyer will need to be involved. Subsequently, SBL allocates the case to a solicitor employed by SBL to work on the acquisition.

- **SBL's solicitor explains to the client the implications of engaging an unregulated provider**

In line with the obligation to act in the client's best interest, SBL's solicitor explains the client protection implications of engaging an unregulated provider rather than a regulated firm. This includes the lack of Legal Professional Privilege (LPP) and the consequences of the fact that Z's client money is already held in an account managed by SBL. Additionally, SBL's solicitor explains the conflict rules applicable to regulated individuals and emphasises that these mean that SBL's solicitor is not allowed to represent any other clients whose interests would conflict with those of Z. Finally, SBL's solicitor informs Z that SBL has a separate division that is acting for the seller of the business but that this will save money for Z and that confidentiality will not be a problem as there are sufficient firewalls in place preventing information "leaking" to the seller. Z is not deterred from retaining SBL by any of the above information.

- **The client transfers a large sum to SBL but then decides not to proceed**

The day before the sale is scheduled to take place, Z transfers a very large sum of money to SBL. However, late that afternoon, Z becomes aware that the target business has undisclosed liabilities and decides to withdraw the proposal to buy the business.

On examining the papers, Z identifies that SBL's solicitor appears to have provided a poor service because the liabilities had been disclosed during the due diligence work previously carried out.

The risks to the client

- **Risk to the client arising from the use of an office account**

Z asks SBL to return its money but is advised that the money was placed in an office account which had a large overdraft. As soon as the large deposit was placed in the account, the bank had contacted SBL to say that its overdraft limit had been reduced by the sum of the deposit. The money therefore cannot be accessed.

- **Risk to the client arising from the lack of professional indemnity insurance[35]**

Z has heard of professional indemnity insurance (PII) and therefore decides to makes a formal claim for professional negligence only to discover that SBL does not hold any form of PII.

- **Risk to the client arising from the lack of legal professional privilege[36]**

In the meantime Z is sued by the seller of the business. As the case progresses, Z is forced to disclose the advice and information that Z had received from SBL. Z's new solicitor explains that, as Z did not engage SBL's solicitor via a direct retainer, communications and documents that passed between SBL and Z do not attract legal professional privilege.

Z loses the case and is required to pay the seller compensation and the seller's costs.

- **Risk to client because SBL does not have to observe conflict rules**

In the course of the case, Z becomes aware that information provided in confidence to SBL has been shared with the seller. While SBL's solicitor had made it clear that he would keep Z's affairs confidential he subsequently left SBL and, after leaving, did not have any control over the files held by SBL.

Z's new solicitor advises that there may have been some legal obligations on SBL to maintain confidentiality with respect to the information provided. However, as there is no evidence that SBL's solicitor, ie the solicitor that advised Z originally, had acted in breach of SRA rules, Z's only remedy will be to claim compensation from SBL through the courts. Z could also report the matter to the Information Commissioner's Office.

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[35] Professional indemnity insurance (PII) is insurance that covers civil liability claims arising from a solicitor's work in private legal practice. These claims most commonly involve professional negligence.

[36] Legal professional privilege (LPP) is a privilege against disclosure, ensuring clients know that certain documents and information provided to lawyers cannot be disclosed at all. It recognises the client's fundamental human right to be candid with his legal adviser, without fear of later disclosure to his prejudice. It is an absolute right and cannot be overridden by any other interest. LPP does not extend to everything lawyers have a duty to keep confidential. LPP protects only those confidential communications falling under either of the two heads of privilege - advice privilege or litigation privilege. For the purposes of LPP, a lawyer only includes regulated solicitors and employees of a regulated firm, barristers and in-house lawyers.

- **Risk to the client because the SRA cannot handle complaints about SBL**

Z decides to complain about SBL to the SRA. However, the SRA advises that, despite its name, SBL is not regulated by the SRA and the SRA cannot take any action against SBL. While Z is able to complain about SBL's solicitor to the SRA and the Legal Ombudsman (LeO), Z is not able to complain about SBL because it is an unregulated provider.

Z decides to make a complaint to LeO about SBL's solicitor

- **Risk to the client because the Legal Ombudsman (LeO) is unable to investigate Z's complaint**

In the meantime, LeO contacts Z in relation to the complaint about SBL's solicitor, ie the solicitor that advised Z originally. The individual no longer works for SBL and has tried without success to get access to the files on the case held by SBL. LeO has taken the pragmatic view that without this information, the individual cannot properly respond and the complaint therefore cannot be properly investigated.

LeO informs Z that it is taking no further action.

Appendix 4: Scenario illustrating the practical consequences for a solicitor working in an unregulated provider

X is a solicitor working in an unregulated organisation that provides non-reserved legal services. The organisation is not regulated by the SRA or any other approved regulator. When taking on a new client, X makes it clear that, whilst she is personally regulated by the SRA as an individual practising solicitor, the organisation she works for is not. In particular, X will need to maintain records showing that, in line with the Code of Conduct for Solicitors, she has provided clients with appropriate information about whether and how the services she provides are regulated and the protections, if any, available to clients. The information provided will need to inform clients about their right to complain about her services and her charges and how such complaints can be made. The information will also need to set out the distinction between reserved and unreserved work so that the client understands from the outset that circumstances may arise in which X will no longer be able to provide services to them.

X is required to maintain an up to date understanding of the Code of Conduct for Solicitors and what she is required to do in order to comply with its requirements. In particular, this requires X to have a good understanding of the distinction between reserved and unreserved work, so that she does not fall foul of the regulatory prohibition on solicitors conducting reserved work in an unregulated entity. X will also need relationships in place with a number of solicitors who, subject to availability, would be able to take over any reserved work that arose.

Senior management of the unregulated organisation decides that it cannot afford to take out professional indemnity insurance (PII). While X is not required by the SRA to have PII for her work as it is being carried out in an unregulated entity, X decides that she would like to put something in place to mitigate the risk and so that she is not at a disadvantage to regulated solicitors offering the same service from a regulated firm. It is unlikely that X will be obtain the high level of PII coverage required by the SRA for qualifying insurance, as insurers are unlikely to offer these terms outside of the regulated market. X will also need to be clear as to her engagement / contract with the unregulated provider and the extent, if any, to which the organisation will provide a guarantee of her work and how such guarantees impact on her own liability.

Legal professional privilege would not attach to communications between a client and the organisation for the purpose of seeking legal advice or providing it to the client. However, some clients are aware of the importance of LPP and, where this is the case, X will need to have a direct retainer from the client in order for the legal advice to attract LPP, although in practice, we envisage this may be difficult to set up. X will need to keep a careful record of what advice she provides that is capable of attracting privilege and what is not. As a regulated individual, X is not allowed to hold client money in her own name. However, the unregulated firm she works for is able to hold and handle money for and on behalf of clients without having to comply

with the SRA's rules. Clients will need to be made aware that the individual solicitor will not hold the money and of the implications in relation to the compensation fund.

In addition to keeping abreast of regulatory changes, X will remain responsible for meeting regulatory continued competence training requirements, particular to ensure that she maintains professional standards and complies at all times with the regulator's requirements and does not act in any way such as to bring the profession into disrepute. This is likely to involve a certain amount of costs that she will have to meet herself.

Finally, X will need to maintain records of all of the work she handles while employed by the organisation to ensure that she can respond effectively should a client complain or pursue litigation against her after she is no longer employed by the organisation.

Solicitors Regulation Authority

Consultation: Looking to the future - flexibility and public protection

Consultation questionnaire form

This form is designed to be completed electronically—in MS Word. Please save it locally before and after completing it.

Question 1

Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

The content of the suitability test is fair and covers all relevant issues.

Question 2

Do you agree with our proposed model for a revised set of Principles?

We do not understand what the SRA is trying to achieve by reducing the number of Principles from 10 to 6. The 10 principles work well and offer protection to the solicitor, the firm and clients. A reduced number of Principles will have a de minimis impact on the size of the Handbook when compared with the greater risk if certain of the Principles are removed.

The absence in the new principles of any reference to the importance of protecting client money and assets is of concern from the perspective of professional standards and consumer protection. We assume that this proposal is to facilitate the other proposal that solicitors working in unregulated entities should not be able to hold client money in their own name. We think current Principle 10 should be retained.

We comment below on each of the proposed new Principles:

Principle 1 – **Uphold the rule of law and the proper administration of justice**

This is the same as the current Principle 1 and we agree that it should be kept

Principle 2 – **Ensure that your conduct upholds public confidence in the profession and those delivering legal services**

This is a changed version of current Principle 6 "behave in a way that maintains the trust the public places in you and in the provision of legal services".

The changes

1. remove any reference to the importance of regulated individuals behaving in a way that retains public trust in them personally; and
2. has the effect that regulated individuals and firms will be placed under a regulatory obligation with respect to non-regulated individuals and providers. Why should that be?

New Principle 3: Act with independence

We have no objection to this.

New Principle 4: Act with honesty and integrity

What is the reason for adding in honesty? Is there a difference between acting honestly and acting with integrity?

A requirement to be honest, including with respect to client money, is significantly weaker than a requirement to protect it, as required by current principle 10 ("protect client money and assets") See our comments above as to why Principle 10 should remain.

New Principle 5: act in a way that encourages equality, diversity and inclusion

We have no particular concerns although note the addition of the word "inclusion" in comparison to the current Principle 9.

New Principle 6: Act in the best interest of each client.

No concerns

Question 3

Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

See our comments above in response to question 2

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?

As stated above, our preference would be for all current 10 Principles to be retained particularly if the Code is being pared down. Principles are perceived as being more important and we cannot see any benefit in removing/reducing the number of Principles as proposed.

However, if a reduction is appropriate, then we would not object to the removal of current principle 7 ("comply with your legal and regulatory obligations and deal with your regulators and ombudsmen in an open, timely and co-operative manner") and current principle 8 ("run your business or carry out your role in the business effectively and in accordance with proper governance and sound financial and risk management principles ")

Current Principle 5 ("provide a proper standard of service to your clients") and current Principle 10 ("protect client money and assets") should remain, being the bedrock of professional standards and client protection.

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?

Guidance and/or case studies will undoubtedly be required on a whole range of subjects particularly as there would no longer be any indicative behaviours to refer to. They will also need to be regularly reviewed and updated.

We are concerned that case studies were promised when the COLP and COFA roles were introduced and yet only 3 have ever appeared on the SRA website!

It seems to us that the SRA should already be well equipped to work out what areas of the Code solicitors find difficult to interpret through for example the calls to the Ethics Helpline, investigations/disciplinary findings, SDT decisions and/or COLP material breach reports. However, notwithstanding a number of requests made by the writer of this response to the SRA for examples of anonymised material breach reports, for use in training and discussion at MLS' COLP and COFA forums, no information has been provided. If this is because the data is not being kept, then we must question why not? As a risk based regulator, this data is crucial. If it is kept but not provided for some other reason, we again wonder why but also question whether the SRA will in fact deliver on its promise to provide guidance and to effectively communicate this guidance to the profession. Greater visibility /transparency and information sharing is needed from the SRA.

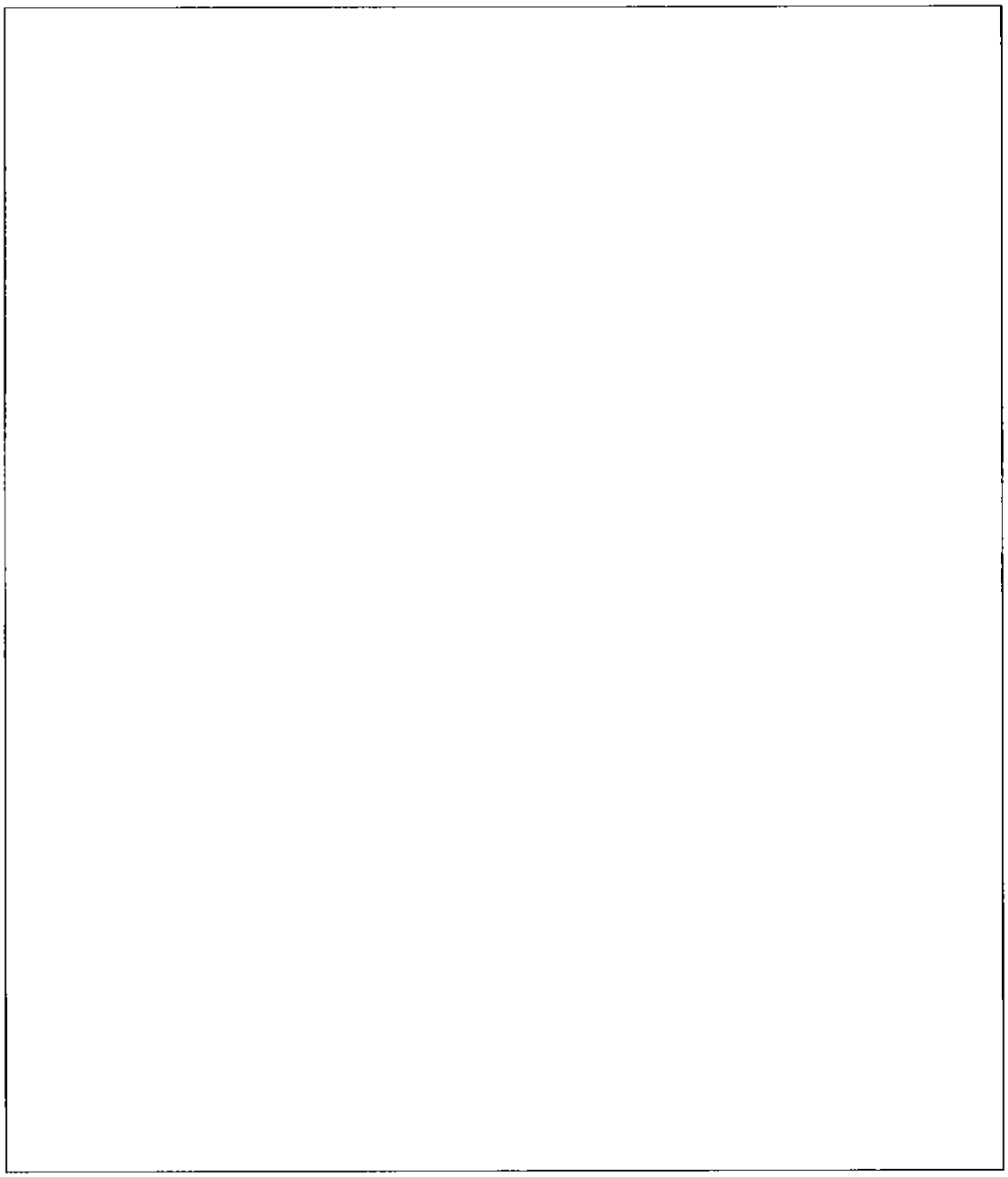
Day to day queries to risk and compliance teams upon which case studies/guidance would be appreciated include:

1. Conflicts (particularly in conveyancing transactions)
2. Confidentiality and disclosure/Chinese Walls
3. Financial benefits and accounting to clients/obtaining informed consent
4. Client identification

In-house solicitors would also need more guidance/case studies (see para 13 of our general comments attached for examples).

Whilst this might be stating the obvious, any guidance/case studies will need to be easy to access on the SRA website.

As already stated, our concern is that if firms' risk and compliance officers/ individual solicitors have to trawl through case studies (and which may not fit with their particular scenario), time /cost will not be saved (and will most likely increase).



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?

In light of the additional guidance/case studies that will be required to support the Code, we remain to be convinced that the SRA will have achieved its aim of a shorter, focused Code.

2 separate codes may well be clearer for in-house/solicitors in unregulated businesses but not necessarily for the traditional law firm/solicitors working in it. Firm and individual codes "muddies the water" and creates confusion and potential conflict between employer and employee in traditional law firms.

We can see a valid argument for giving a solicitor in practice more responsibility for his/her own conduct but the vague nature of the drafting does not tell the individual solicitor enough and they will not necessarily have the knowledge of what was considered acceptable under previous codes.

Firms who may have a large number of unqualified staff will find it difficult to explain what is expected of them whereas currently the one Code applies to all thus making it easier to provide a consistent message and apply best practice. It is hard enough currently for individuals to understand what is expected. The new proposals do not make this any clearer or easier to understand.

Smaller firms may find it more difficult to impose the firm's view/approach on best practice. Without the certainty of clear rules, disputes with the regulator about whether or not a particular behaviour is acceptable are more likely, as is uncertainty about the circumstances in which enforcement action will be triggered.

This is where consistency of approach to enforcement will be essential as will clear communication and yet we have not seen the SRA's proposals in this respect. Current experience of the enforcement section is that there is very little consistency so significant changes will need to be made internally at the SRA to ensure this is improved.

Question 7

In your view is there anything specific in the Code that does not need to be there?

No.

Question 8

Do you think that there anything specific missing from the Code that we should consider adding?

1. Current Outcome 8.3 - "you do not make unsolicited approaches in person or by telephone to members of the public in order to publicise your firm or in-house practice or another business;"

   We are very concerned at the proposed removal of this Outcome and do not feel that new clauses 1.2 (solicitors) and 1.1(firms) are robust/clear enough to inform solicitors/firms that cold calling/other unsolicited approach is unacceptable. This should be spelt out in black and white. The case study regarding this is also of concern as it fails to address/even mention the significant amount of legislation around this topic that would be required to be adhered to in order to be compliant.

2. A number of references to firms being reasonable or forming reasonable views have been dropped. If a solicitor acts reasonably but makes a mistake, it would seem unfair to make the actions of the solicitor in such a situation a potential offence that is subject to disciplinary consequences.

3. Reference to compliance with other legislative requirements has been removed. It is appreciated that any solicitor **should** know that he/she is bound to comply with legislation as well as the Code but we feel the Code and profession would benefit from having this spelt out to them.

Question 9

What are your views on the two options for handling conflicts of interests and how they will work in practice?

As we understand the proposals, Option 1 largely replicates the 2011 Code, in prohibiting a solicitor from acting where there is a conflict or significant risk of conflict, for example as would exist if an individual solicitor were to act for a buyer and a seller, unless specified circumstances are met and protections are provided;

Option 2 would narrow the ability to act given that it provides for a complete bar on acting where there is an actual conflict, and requires protections to be put in place if there is a significant risk of a conflict.

We do not think it necessary to introduce any more uncertainty on conflicts and if the current code works in this respect, then that should remain.

We do not understand why the reference to "substantially common interest" has been replaced with "an agreed common purpose and a strong consensus on how that purpose is to be achieved".

The removal of the need for the solicitor to be satisfied that it was reasonable to act for all clients is also of concern.

Outcome 3.7 (a) - that the solicitor had to explain the risks of acting for more than one party and be satisfied that all clients understood this has also been dropped . Again we do not understand the reasoning why.

Question 10

Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

See our comments to question 6 above.

Question 11

In your view is there anything specific in the Code that does not need to be there?

No

However, clause 3.7 of the firm code states "You provide to the SRA an information report on an annual basis or such other period as specified by the SRA in the prescribed form and by the prescribed date."

We recognise that an annual information report needs to be submitted but note that in relation to an annual information report for ABSs requiring details of all breaches, the SRA has never produced a prescribed form for such a report and so effectively this requirement is being honoured in the breach. Will the SRA take this opportunity to produce such a prescribed form now or change the requirements?

Question 12

Do you think that there anything specific missing from the Code that we should consider adding?

This is difficult to say without seeing all the guidance that the SRA has indicated it will provide. We repeat our concerns that the currently published case studies do not assist in clarifying what is expected nor do they address the grey areas which the profession find hard to interpret and where guidance would be of most benefit.

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?

We refer to comments made above and to the following:

Code of Conduct for Solicitors

The paragraph below the Principles on page 45 of the consultation, implies (when it says 'They apply to conduct and behaviour relating to your practice') that the Code does not apply to a solicitor's private life. This should be clarified.

As worded, by comparison with the provisions in the current Code that this would replace, rule 1.4 could be read as meaning that the solicitor is responsible if their client misleads the court or others, or is responsible for other acts or omissions, even if the solicitor was not aware that any mischief was taking place. In light of this, we suggest that rule 1.4 should be reworded as follows:

1.4 You do not mislead or attempt to mislead your clients, the court or others, either by your own acts or omissions or ***by knowingly*** *allowing or being complicit in another person misleading the court or others the acts or omissions of others (including your client).*

Rule 3.4 The term 'Client's attributes' is vague and lacking any legal meaning. Moreover, it is unclear what that word encompasses that would not be covered by "needs and circumstances".

Code of Conduct for Firms

Reference in 7.1 to provisions in the solicitors Code which apply is difficult to justify. If a clearer Code for firms is the aim, then it should set out clearly the rules which apply to them and not try to cut corners. This is precisely the issue which in-house solicitors had when trying to work out which provisions in the current code applied to them and the SRA is now seeking to do the same but with firms affected this time.

We consider that given the importance of such issues as complaints handling, client ID , client information and publicity and referrals, they should feature clearly in the firm Code.

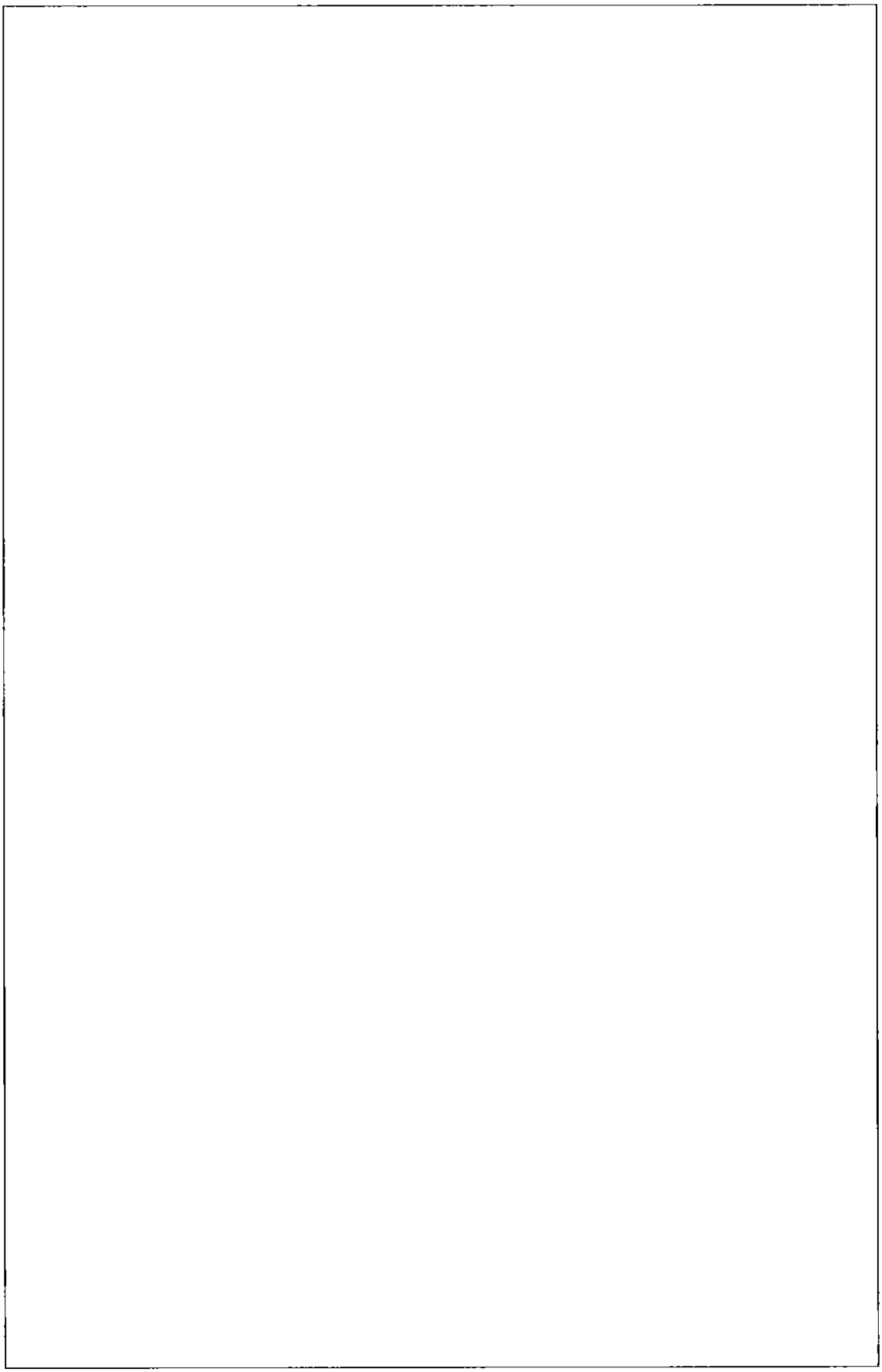
Firm Code 2.1(c) – this appears to be much wider than the current provisions and causes concern as to how a firm can "ensure" that employees.....do not cause a breach.

Indeed, a number of references to eg firms acting reasonably/taking reasonable

steps etc appear to have been removed.

7.2 of the solicitors code – "you are able to justify your decisions and actions in order to demonstrate compliance with your obligations …" does not feature in the firm code and we question why? Moreover, what does justification look like?

If there are to be 2 codes, they should at the very least try to mirror each other as closely as possible eg in numbering/headings to make it easier for those advising on compliance in firms to check against both sets of Codes.



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.

Yes although we can see an argument for removing the need for the role for sole practitioners.

The roles work well in having a designated person in a firm responsible for co-ordinating a risk management strategy.

More individuals are now being reported for breaches as a result of COLPs feeling obliged to do so whereas in the past the matter may have been only dealt with internally/swept under the carpet.

The general consensus is that it would be a step back if the roles were removed.

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?

- Provide more data openly and transparently eg in relation to breach reports thus enabling firms to benchmark and understand what issues are being reported to the SRA and how the SRA treats such reports.
- Improve consistency of decision making in relation to enforcement approach
- Minimise change to the regulatory obligations!

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?

We are not sure that the proposals do in fact provide many opportunities, or threats, to existing legal practice which are not already, in reality, available to existing or new entrants to the market. They do however risk causing confusion to the public, with yet more and different forms of regulation. They also risk exposing the public to reduced protection which we are not convinced the public will understand.

For existing legal service providers, most are already able to provide non-reserved legal services through other businesses if they wish. There are numerous examples of solicitors' practices already being part of a wider business. Although that business failed for other reasons unrelated to their regulation, the Parabis group is probably the most well-known example of a regulated firm which offered other services in different, but related businesses with common ownership. They were not the only practice doing so. For years, regulated businesses have had interests in estate agency, medical reporting etc.

All those practices have done is to ring-fence the legal service element of their wider business in a standalone regulated practice. These proposals do not change those opportunities and indeed, insofar as solicitors are employed by unregulated businesses and are held out as solicitors, regulation increases since that solicitor will then need individual regulation in the unregulated business.

The main change will be the ability for qualified lawyers, in unregulated businesses, to be held out as solicitors. We consider it is a fallacy to believe that clients will understand the differences between regulated and unregulated businesses and that such regulation will improve the solicitor brand if Alternative Legal Structures do employ solicitors. We expand upon this below. By using the solicitor brand in an unregulated business it will, in our view, inevitably lead to examples of businesses whose behaviour is not in accordance with the behaviour expected of the regulated profession and the lack of regulatory protection will, in the longer term, damage the brand. We consider the proposals to be retrograde and do not understand the need which they are said to be addressing.

Nor are we convinced that those setting up Alternative Legal Structures will in fact seek to employ solicitors, or at least not as solicitors to be held out as such. We consider that the cost of regulation of an individual will potentially be seen as an unjustified or unnecessary expense and that in reality those solicitors who are, or become employed, will not be held out as practicing solicitors. Rather they will be employed, at a lower cost, and described as a non-practicing solicitor, much as they are now.

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?

As set out above, we do not consider there is a structural impediment to carrying out non reserved activities from a non regulated business at present. Therefore those who wish to do so can do so already, and presumably will do so.

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?

We consider that whatever approach is adopted, it ought to be adopted consistently so as to reduce potential confusion to the public. We consider that the suggested approach is going too far in terms of providing opportunities to those who are presently not regulated if the rules continue to require organisation level regulation for a sole practitioner.

The solicitor themselves will, in accordance with the proposals, be regulated as an individual and that ought to be approach taken, as it will be with an employed lawyer working at an ALS

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?

Supervision is a different skill to black letter law. It is a skill not generally developed as part of training.

We accept that there are those with many years' experience who ought not supervise a practice. Equally there are those who are newly qualified who would be very capable of supervising a practice. Time served is not a guarantee of suitable experience or skills.

However there does need to be a cut off and we do consider that those with more experience tend to be in a better position to supervise those without experience. Therefore we agree that a threshold should be retained and if the current threshold is reduced, it will bring with it increased risks for the public.

The supervision requirements however need review in themselves given the changes in the CPD regime and the need to ensure suitable management experience in addition to legal training.

Question 20

Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

In principle yes, although we are unsure how much regard the client will have to that information. A client is already routinely provided with reams of paper upon inception of a retainer and it is clear that few pay detailed regard to all of the information within a retainer letter. We do not believe that clients will, at inception of a relationship, generally consider these issues and the volume of information given is already so significant that it can be off putting.

How, for instance, can a client be given a clear explanation of the differences in insurance provision between a regulated business and an ALS? There are many nuanced differences between a minimum terms policy (the value of run off, the inability to decline cover etc.) and an open market policy. They will be very hard to properly explain to an unsophisticated client.

Whilst we are of course supportive of the aim to explain matters to clients, we do not accept that setting out more information will in fact lead to unsophisticated clients being better informed. Sophisticated clients are more likely to be alive to these issues and to understand them in any event.

We have one significant concern, which we come back to below. We are concerned for the position of a regulated individual working, and being held out as a solicitor, within an unregulated business. The individual will have a personal obligation to provide information about regulation to the attention of the client. Doing so however may be something which the proprietor of the unregulated business does not wish to be provided, or which they wish to be "toned down". How does the regulated individual deal with the pressure which might be placed on them in that respect? The relationship of employer and employee is a classic case of potential undue influence. The regulated individual could easily fall into a position of conflict between their duties as an employee and their regulatory responsibilities.

Question 21

Do you agree with the analysis in our initial Impact Assessment?

We have no specific comments but query the need to provide so much information to consumers, or clients as we describe them. Legal services are normally a distressed purchase. We consider that find a solicitor works well and that firms are already good at advertising their services.

Unregulated services will be able to advertise their services and should do so as they wish, but without further assistance from the profession or the SRA.

Question 22

Do you have any additional information to support our initial Impact Assessment?

No

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?

Yes. We cannot identify circumstances where there is a need for a regulated individual to hold client money or assets.

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?

Again, we cannot identify circumstances where this is likely to be necessary.

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?

If not, what are your reasons?

Yes, we agree. The protection is something which is part of the brand and it ought to be limited to those who instruct the profession, so a regulated business.

Question 26

Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

We do not think that minimum terms compliant insurance will be commercially available at reasonable cost for an individual solicitor practicing in an unregulated business. For that reason alone we agree that it ought not be a regulatory requirement that such insurance is available.

However we are very concerned about the potential personal exposure of the regulated individual in the unregulated business. In most cases they are unlikely to be able to influence what insurance is purchased by a wider business, yet they may be facing personal exposure for the acts or omissions of the business during the period in which they were held out by the business as a solicitor. That liability will exist beyond the period of their employment and, given the effect of s.14A Limitation Act 1980 could easily last for many years. The only safe period after which an individual will know that no claim could be made will be the long stop of 15 years. Will an employer pay for continuing cover after an employee leaves, or will they arrange for run off cover? Even if they do, who will be responsible for any excess under a policy if a claim does arise? Again, we consider there is a risk of conflict between the employed solicitor and the business.

Nor do we consider that these are unusual potential exposures. Where a solicitor is not held out as a solicitor, the liabilities are likely (and rightly) to be those of the business and the client will need to consider the businesses' ability to pay when instructing that business. Where however that business markets itself partially by reference to the solicitor brand, by employing a regulated individual who is held out as solicitor, it is quite conceivable that a personal liability will fall to the solicitor. The Court of Appeal imposed personal liability on a surveyor where his employer no longer had insurance as long ago as Merrett v Babb [2001] 3 WLR 1. We do not consider that appropriate consideration has been given to such issues.

Question 27

Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

See answer to question 26

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?

We consider this is an issue for special bodies to address. However, if it is true thaf waivers are regularly being given to such special bodies, the rules should be revised to allow practice in accordance with the waivers rather than having rules which are regularly revised by way of waiver.

Question 29

Do you have any views on what PII requirements should apply to Special Bodies?

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?

Yes.

Question 31

Do you have any alternative proposals to regulating entities of this type?

No

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?

We do not see how the SRA can intervene in a business it does not regulate.

Question 33

Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

Yes

Thank you for completing the **Consultation questionnaire form**.

Please save a copy of the completed form.

Please return it, along with your completed **About you form**, as an email attachment to consultation@sra.org.uk, by **21 September 2016**.

Alternatively, print the completed form and submit it by post, along with a printed copy of your **About you form**, to

Solicitors Regulation Authority
Regulation and Education - Policy - Handbook 2017
The Cube
199 Wharfside Street
Birmingham
B1 1RN

RESPONSE TO SRA'S LOOKING TO THE FUTURE CONSULTATION

MANCHESTER LAW SOCIETY

This response is being submitted on behalf of Manchester Law Society ("MLS") members to the SRA's consultation paper "Looking to the Future". By way of background, MLS has a membership of just under 3000 solicitors and firms. It is one of the Joint S Local Law Societies along with Birmingham, Bristol, Liverpool and Leeds. MLS has an active COLP and COFA Forum which meets every 2 months.

Initial Overview – A Solution Looking for a Problem?

Before responding to the specific questions in the consultation, we feel it necessary to make a number of initial observations. When considering the responses to the questions, we ask that the SRA considers them in light of these preliminary points:

1. The proposals are a solution looking for a problem. There is a distinct lack of evidence supporting the need for such radical changes. No evidence has been produced to show that the current Code and Principles do not work in practice.
2. The Code and Principles currently do not add to the length of the Handbook significantly. It is the other rules that make the Handbook unwieldy.
3. Having assimilated OFR, the 2011 Code and its several subsequent updates, the proposed revamp is unnecessary and unhelpful. Evolution rather than Revolution is preferable.
4. In an attempt to accommodate solicitors in unregulated businesses and/or in-house solicitors, it is felt that the SRA has forgotten about/not fully considered the impact on traditional solicitors in traditional law firms. An alternative would be for a separate Code/guidance for those in the unregulated sector and some changes to the Practice Framework/Authorisation rules. Please also see para 13 below regarding in-house solicitors.
5. The proposals are premature. It is understood that the Competition and Markets Authority ("CMA") final report on the Legal Services Market is expected in December 2016. Rushing into making such significant proposals at this stage in the knowledge that a highly relevant report is due to be published is cavalier particularly when , what is likely to be an informative report , is awaited.
6. It is very difficult for the profession to respond in a "vacuum" without being able to see the full picture including proposed changes to the Practice Framework Rules , the promised additional guidance and the SRA's enforcement policy, to name but a few.
7. The language in the proposed new Codes is so vague that firms and individual solicitors will spend even more time than they do now trying to work out if they are compliant or not, thus creating confusion and an increase in costs. The example case studies currently provided are at best unhelpful and at worst misleading or wrong.
8. Providing training in traditional firms will become more complex because of the vague language and also who the Code(s) will apply to. It opens up the possibility of conflicts between the firm and employees in situations where the firm seeks to apply a universal standard across the board but an individual solicitor argues that it does not fit with

his/her interpretation of their personal obligations. It will also add to complexity for training non-qualified staff.

9. Once appropriate guidance is provided, we question whether we will end up with a Handbook that is significantly shorter or clearer.
10. In the end, no matter how the Code is drafted, good honest solicitors will do their utmost to uphold the standards set for them (and yet may still find they are in breach because of the vague nature of the Code and/or as a result of the SRA taking a different view on enforcement). Our concern is that the proposed changes will only ultimately benefit the unscrupulous/incompetent/inexperienced.
11. The primary purpose of our regulatory framework is to protect the consumer and the public interest. There is a risk that the current proposals could erode consumer protections and undermine trust in the profession.
12. Why are no questions asked about Legal Professional Privilege? It is a potentially very significant issue and despite addressing it themselves, the consultation does not ask those responding to provide views. Any proposed impact upon LPP should be subject of proper consultation. Our overriding concern is that it will be very difficult for clients to understand the potential significance of the absence of LPP at the time of incepting a retainer with an unregulated business. Potential issues of conflict between the employer and a regulated employee arise with LPP as with insurance.
13. As regards solicitors practicing in-house, it is good that under the SRA proposals the whole code would apply to all solicitors but there are some things which need to be looked at from an in-house perspective. The first is defining who the client is for an in-house solicitor. For example, an in-house solicitor may be employed by an organisation with various group companies so query if the solicitor is advising Topco or all of the companies in the group. What if the in house solicitor is asked to put something in place for the whole group which benefits some companies in the group but could adversely affect other companies in the group? This is linked to the conflict issue for in-house solicitors. More detail needs to be given by the SRA, either in the code or in case studies, to deal with this. Second, the position relating to pro bono advice is still not clear – query if in house solicitors need to get waivers and what about PII? The position needs to be clear as the current regime deters in-house solicitors from giving pro bono advice. In summary, the SRA proposals generate more questions than answers for the in-house solicitor.

Our response is not, and should not be seen as a vested interest criticising the proposals in order to safeguard their profession, or the status quo. Quite the contrary. We understand the potential issues and feel we are especially well placed to comment upon them, and to identify areas of genuine potential concern/risk for clients.

Please see responses to the specific questions attached

Manchester Law Society

21 September 2016

Consultation: Looking to the future - flexibility and public protection

Response ID:180 Data

2. Your identity

Surname

Cronshaw

Forename(s)

Martin

We may publish a list of respondents and a report on responses. Partial attributed responses may be published. Please advise us if you do not wish us to attribute your response or for your name or the name of your firm or organisation to appear on any published list of respondents.

Attribute my/our response and publish my/our name.

Please identify the capacity in which you are submitting a response. I am submitting a response…

on my own behalf as an employed solicitor

3.

1. Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

4.

2. Do you agree with our proposed model for a revised set of Principles?

5.

3. Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

The removal of the principles that solicitors should 'provide a proper standard of service to clients', 'act in the best interests of each client' and 'protect client money and assets' will have a negative implications for consumer protection and the maintenance of professional standards.
The Principles should continue to refer to the solicitor's duty to keep the affairs of the client confidential.

6.

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?

7.

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?

8.

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?

The creation of separate codes of conduct distinguishes the responsibilities of an individual solicitor, wherever he or she is working, and those of a regulated entity. The approach creates two tiers of solicitors: those working in a regulated entity and those working in an unregulated entity, with consequential risks to consumer protections and professional standards which risk damaging the standing of solicitors and creating confusion for consumers;
Both draft Codes focus on brevity and simplicity, they provide less certainty about what is and is not permitted. I would prefer a more definitive approach so that compliance is clearer and there is less discretion for the SRA to determine when there is a breach, which could result in enforcement action that might have been avoidable if the Codes were clearer.

It is difficult to take an informed view on how the new Codes will work in practice without seeing the associated guidance which you have not published with the draft Codes.
The language of the draft Codes is imprecise and could mean that Solicitors currently practising in a fully compliant way could find themselves accused of a breach after the proposed new codes come into force.
There is some overlap between the two draft Codes, most noticeably in areas such conflict, complaints and client information/identification. This must be addressed, so it is clear which would take precedence where such inconsistencies exist.

9.

7. In your view is there anything specific in the Code that does not need to be there?

10.

8. Do you think that there anything specific missing from the Code that we should consider adding?

11.

9. What are your views on the two options for handling conflicts of interests and how they will work in practice?

The consultation makes clear that solicitors employed by an unregulated entity would continue to be regulated as individuals and would be subject to conflict rules.
However, as the conflicts rules will not apply to unregulated entities, in practice they will not have much effect if any on the unregulated entities whilst the regulated entities will be subject to the same level of restriction as they are now or, potentially, a greater level depending on which of the two options on conflicts is adopted by the SRA.
Your draft offers two options for dealing with conflicts:
- Option 1 largely replicates the 2011 Code, in prohibiting a solicitor from acting where there is a conflict or significant risk of such a conflict, unless specified circumstances are met and protections are provided.
- Option 2 would narrow the ability to act given that it provides for a complete bar on acting where there is an actual conflict, and protections to be put in place if there is a significant risk of a conflict.
Option 2 may be unworkable because it is not always possible to identify that an actual conflict exists and a solicitor may unwittingly act in a conflict situation. Because the non-regulated colleagues of regulated solicitors would not be subject to conflict rules, there is a risk of confusion to consumers, a very favourable competitive advantage to unregulated entities and lack of a fundamental consumer protection for clients of unregulated entities.

12.

10. Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

13.

11. In your view is there anything specific in the Code that does not need to be there?

14.

12. Do you think that there anything specific missing from the Code that we should consider adding?

15.

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?

16.

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.

I am not a COLP or COFA. Consideration of these questions will benefit from the input of current COLPs and COFAs who are best placed to identify unnecessary requirements while firms and sole practitioners

will also wish to consider how valuable the roles themselves are.

17.

15. How could we improve the way in which the COLP/COFA roles work or to provide further support to compliance officers, in practice?

18.

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?

There is some evidence to support these proposals or the expected benefits from their implementation, which are stated to include improved access to quality services at affordable prices, enhanced professional standards, and increased employment opportunities. But I feel the downside is greater than any expected benefit.

In particular, the proposals could have undesirable and/or unintended consequences as follows:

1. Reputation and standing of solicitors
The proposals may result in two tiers of solicitors. Those working in unregulated businesses are unlikely to be able to give advice which is legally privileged, will not be required to have PII, clients will not have the benefit of compensation fund and the protection of the principles governing conflicts of interest. Not only is this likely to create consumer detriment and confusion but it is likely to damage the reputation of the title of solicitor.

2. Legal Professional Privilege (LPP)
LPP should attach to clients seeking advice from a solicitor holding a current practising certificate wherever he or she practises and any attempts to dilute or make LPP more difficult to obtain or enforce could erode the concept of LPP, which is a cornerstone of the justice system and a key right of clients. This could also undermine the standing of the solicitor profession both at home and abroad. It is not right in principle for LPP to be a distinguishing factor between regulated and unregulated service providers.
It is likely that in-house solicitors working in an unregulated entity, for example a local authority, providing advice to individuals or organisations other than the unregulated entity would not have the protection of LPP.

3. Conflicts and confidentiality

The proposals will result in confidentiality only applying to individual solicitors working in an unregulated entity, including in an in-house team, but not to the entity or to other employees. There is a risk that a solicitor may unwittingly act in a conflict situation and that clients may not be aware of a potential or real conflict of interest or of the fact that the entity is not subject to the rules on conflict. It also results in making regulated entities less attractive because they will be competitively disadvantaged versus unregulated entities.

4. Consumer protections - Professional Indemnity Insurance (PII) and the Compensation Fund

Under the SRA's proposals, solicitors working in unregulated entities would not be required to have PII and their clients would not have access to the Compensation Fund if things go wrong. This risks eroding a key element of current client protection. The proposals risk creating two tiers of client protections - with different rules and protections applying to solicitors' clients depending on the kind of entity in which the solicitor is working.

The SRA proposes that solicitors working from unregulated entities would be required to make sure that their clients understand whether and how the services they provide are regulated and the protections available to them. Even for those working within the legal sector, insurance and client protections are

complicated topics which are not easily digested and understood and clients cannot be expected to fully comprehend the implications of purchasing their legal services through an unregulated provider. The proposals also risk undermining or depleting the existing Compensation Fund as solicitors working from unregulated entities would not have to contribute to the Fund; this would seem likely to mean that solicitors working in regulated entities would have to make additional contributions to secure the Fund's viability, increasing the regulatory burden on them and exacerbating the two tier profession that could result from the proposals.

5. Consumer confusion about status

Under the proposals, solicitors holding a current practising certificate would be able to use their title whether providing legal services to the public through a regulated or unregulated entity. While a provider would not be able to use the term 'solicitors firm' or 'solicitors' unless the entity was regulated by the SRA,this would seem unlikely to mitigate the risk of consumer confusion especially where the unregulated entity described itself as a 'law firm' or 'legal services firm' or advertised that they employ solicitors. Consumers will lose the assurance they currently have as to quality and protections when they engage a solicitor. It is inappropriate that consumers will have to undertake fairly substantial due diligence. This will additionally undermine the standing of the profession internationally.

6. Annual practising certificate (PC) fees

There is no information on this point and the SRA needs to undertake and publish an analysis of the projected impact of its proposals on the PC fee, and in particular the turnover based firm fee. The SRA should not close this consultation until this information is available.

7. Supervision

Newly qualified solicitors without any experience would be able to set up their own unregulated firms. Newly qualified solicitors working in an unregulated entity would no longer have the requirement of support and guidance from more experienced solicitors. This will increase the risks to clients as well as putting newly qualified solicitors themselves at risk, and negatively impact on the standing of the solicitor profession Damage to standards will increase incrementally as this applies year on year and fewer solicitors in unregulated entities have ever received supervision.

19.

17. How likely are you to take advantage in the greater flexibility about where solicitors can practice as an individual or as a business?

20.

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?

21.

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?

22.

20. Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

23.

21. Do you agree with the analysis in our initial Impact Assessment?

24.

22. Do you have any additional information to support our initial Impact Assessment?

25.

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?

26.

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?

Consideration of this question will benefit from the input of special bodies, such as law centres, which play an important role in providing access to justice for vulnerable people who may not be able to afford access to legal services.

27.

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? If not, what are your reasons?

No - it would reduce protection and diminish the standing of the profession

28.

26. Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

Yes - it should remain cover via the firm

29.

27. Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

30.

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?

Yes

31.

29. Do you have any views on what PII requirements should apply to Special Bodies?

32.

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?

33.

31. Do you have any alternative proposals to regulating entities of this type?

34.

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?

35.

33. Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

Yes

Martin Ross

Consultation: Looking to the future - flexibility and public protection

Consultation questionnaire form

This form is designed to be completed electronically—in MS Word. Please save it locally before and after completing it.

Question 1

Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

Don't' know

Question 2

Do you agree with our proposed model for a revised set of Principles?

No

Question 3

Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

No

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?

All the current principles.

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?

All changes from the current Code.

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?

No, leaves many ambiguities. Will make life very difficult for solicitors who work for unregulated entities. Will be subject to rules to which their employer is not subject. Huge pressures likely upon those solicitors to ignore professional rules.

Question 7

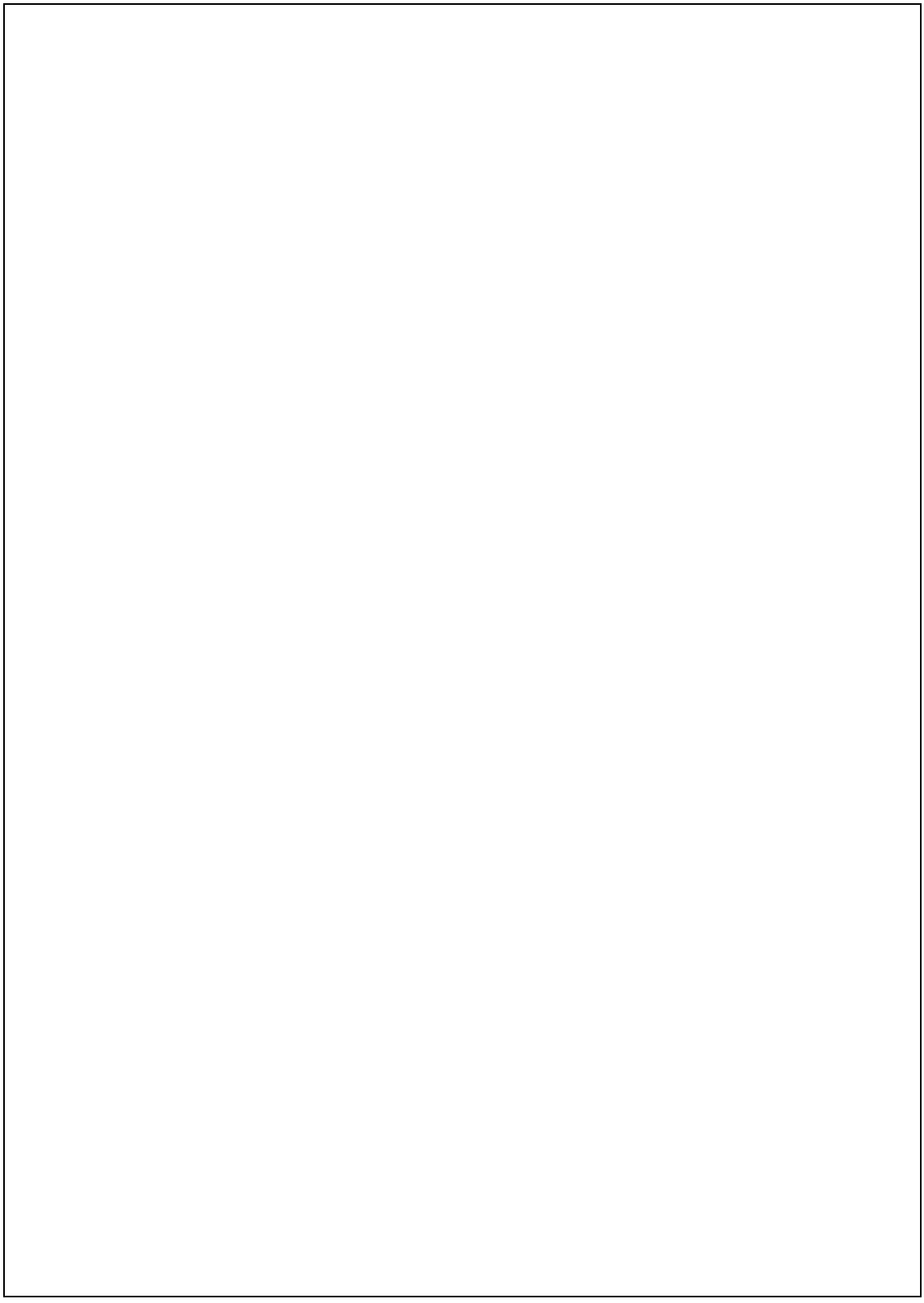
In your view is there anything specific in the Code that does not need to be there?

Opposite. You are not dealing with a child's ABC. Code is far too brief for Such a complex area where protection of the public and confidence in the administration of the law is at stake. You are taking huge risks for little, if any, benefits.

Question 8

Do you think that there anything specific missing from the Code that we should consider adding?

I see no need to tear up the 2011 Code of Conduct.



Question 9

What are your views on the two options for handling conflicts of interests and how they will work in practice?

What evidence is there that the current system is not working properly? Do you have any evidence? If not, should you not first obtain evidence? Or is this proposal just a “leap in the dark”?

Question 10

Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

No, see above. By its very brevity leaves huge uncertainty. We are solicitors, who have studied long and hard and had to pass difficult exams. We are not semi literate GCSE failures who have to be told what to do in two syllable words. Please stop treating us as idiots who need to be spoon fed.

Or is your purpose actually far more sinister? These proposals are being made short and simple because that is what our new masters—the get rich quick businessmen who you are setting up to take over the solicitors profession---are demanding from you?

Question 11

In your view is there anything specific in the Code that does not need to be there?

NO

Question 12

Do you think that there anything specific missing from the Code that we should consider adding?

I see no convincing evidence that the 2011 Code has failed. If it is not broke please don't try to fix it.

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?

The whole of it. I see no need for it. Please return to the 2011 Code.

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.

I did not see a particular need for them when you introduced them but they do not seem to have done too much harm so I am happy to keep them.

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?

Don’t know.

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?

Legal professional privilege may not be available to their clients.
Great confusion to the public. Confusion already exists because many members of the public believe that will writers have professional qualifications in wills and have indemnity insurance if something goes wrong. Neither is required and frequently is missing.
This proposal will magnify public confusion hugely.
It will also reduce confidence in the whole legal profession and ultimately in respect for law and the ability to redress wrongs through legal channels.

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?

since I hope these proposals are not adopted the question is hypothetical.

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?

don't' fully understand this but is this not discrimination against sole practitioners?

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?

It may not be fit for purpose. When something is not fit for purpose does one not do one's best to make it fit for purpose? Is your reaction going to be: "we haven't yet made it work so let's abolish it altogether?"

Question 20

Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

Probably most already do that. That is not the issue. The issue is: Why are you proposing to take away those protections by giving away part of your regulatory territory to cowboys some of whom will undoubtedly take the public's money and then run?

Question 21

Do you agree with the analysis in our initial Impact Assessment?

No

Question 22

Do you have any additional information to support our initial Impact Assessment?

No

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?

Probably not. Client money would inherently seem safer if held by a regulated solicitor compared to unregulated entity.

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?

don’t know

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?

If not, what are your reasons?

No. All solicitors should be able so long as they hold a current practising certificate and can call himself/herself a practising solicitor, to be able to offer the same protections to clients.

Question 26

Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

no. all practising solicitors should be subject to the same obligations.

Question 27

Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

Yes, many.

Client confidentiality.

Conflict of interest;

Taking away existing client protections;

Not requiring it to be made crystal clear by these unauthorised entities that they do not offer the same protections as SRA regulated firms. (which of course you cannot do because the work you have given them is no longer under your jurisdiction). So, a recipe for disappointment, injustice and anger from those who thought they were protected but when a problem arises find they were not (because it was not in the interest of that entity to inform them that they were entering into a contract which was not protected by indemnity insurance, they had another client, client B (a very good client of theirs) whose interest was adverse to client A's interest and when a conflict arose the firm would always prefer client B over client A.

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?

don’t know.

Question 29

Do you have any views on what PII requirements should apply to Special Bodies?

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?

Don’t know

Question 31

Do you have any alternative proposals to regulating entities of this type?

Why not try to build on and improve the current system?No

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?

No

Question 33

Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

Yes.

Thank you for completing the **Consultation questionnaire form**.

Please save a copy of the completed form.

Please return it, along with your completed **About you form**, as an email attachment to consultation@sra.org.uk, by **21 September 2016**.

Alternatively, print the completed form and submit it by post, along with a printed copy of your **About you form**, to

Solicitors Regulation Authority
Regulation and Education - Policy - Handbook 2017
The Cube
199 Wharfside Street
Birmingham
B1 1RN

Consultation: Looking to the future - flexibility and public protection

Response ID:695 Data

2. Your identity

Surname

Heath

Forename(s)

Matthew Alan

We may publish a list of respondents and a report on responses. Partial attributed responses may be published. Please advise us if you do not wish us to attribute your response or for your name or the name of your firm or organisation to appear on any published list of respondents.

Attribute my/our response and publish my/our name.

Please identify the capacity in which you are submitting a response. I am submitting a response…

on my own behalf as an employed solicitor

3.

1. Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

No

4.

2. Do you agree with our proposed model for a revised set of Principles?

Generally yes

5.

3. Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

No.

I would want the conduct of all solicitors to uphold public confidence in solicitors but why a broader extension to all those delivering legal services?

6.

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?

The SRA states that the Principles set out high level ethical principles that comprise the fundamental tenets it expects all those that it regulates to uphold. This includes solicitors and other individuals it authorises, and firms and their managers, owners and employees. The Principles might therefore apply to persons who are not subject to a Code of Conduct.

Accordingly, I think the Principles ought to cover matters such as openness with the regulator and ombudsman, maintaining client confidentiality, protection of client money and assets and (for those in a managerial position) taking reasonable steps to ensure that the business of the firm for which they are responsible is organised so that it can be controlled effectively.

7.

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?

a case study could focus on exploring what it means to be independent

8.

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?

Almost, I still have difficulty applying certain aspects to the in-house role and without the guidance and case studies etc its impossible to give a definitive view as to whether you have achieved your objective.

9.

7. In your view is there anything specific in the Code that does not need to be there?

none found yet

10.

8. Do you think that there anything specific missing from the Code that we should consider adding?

Dealing with members of the public. As an in house lawyer I might have to deal with members of the public (eg clients who complain to my company about its services or litigants in person).

11.

9. What are your views on the two options for handling conflicts of interests and how they will work in practice?

I don't think that Option 2 works for inhouse solicitors. Our organisations are made up of many distinct legal entities in the UK and overseas and there is sometimes a conflict as between group enities but always an agreed common purpose.

12.

10. Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

Not read in detail but looks OK

13.

11. In your view is there anything specific in the Code that does not need to be there?

Not sure

14.

12. Do you think that there anything specific missing from the Code that we should consider adding?

Not sure

15.

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?

No

16.

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.

Not in a position to comment

17.

15. How could we improve the way in which the COLP/COFA roles work or to provide further support to compliance officers, in practice?

N/A

18.

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?

My employer is a business regulated by the Financial Conduct Authority and we have considerable experience in seeking good consumer outcomes. The whole organisation needs to be aligned to this through vision, mission, values, behaviours and regulation (of the company and senior management and control functions) to make it effective. In terms of legal business, if a non-authorised employer were to provide legal services (unreserved) to consumers then individual solicitors would be subject to the SRA principles (eg to act in the best interests of each client, maintain trust in the provision of legal services etc) but the non-authorised employer senior management would not be. This seems to me to place such solicitors in a very difficult position, and the risk of poor consumer and regulatory outcomes appears high.

19.

17. How likely are you to take advantage in the greater flexibility about where solicitors can practice as an individual or as a business?

Not at all

20.

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?

Agreed

21.

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?

The prescriptive rule is not necessary

22.

20. Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

yes

23.

21. Do you agree with the analysis in our initial Impact Assessment?

More information does not necessarily lead to more understanding by consumers.

24.

22. Do you have any additional information to support our initial Impact Assessment?

no

25.

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?

yes

26.

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?

I don't think that holding client money personally is desirable

27.

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? If not, what are your reasons?

Whilst the proposals increase consumer choice I don't see that they increase consumer protection. Consumer's will likely be unclear as to when the compensation fund is available to them. Regulated firms though should not have to contribute to a fund that also covers unregulated firms.

28.

26. Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

Yes

29.

27. Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

no

30.

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?

Not able to comment

31.

29. Do you have any views on what PII requirements should apply to Special Bodies?

N/A

32.

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?

Yes

33.

31. Do you have any alternative proposals to regulating entities of this type?

No

34.

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?

The description of intervention powers again highlights the difficulties with consumer protection in the proposals

35.

33. Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

No view

Matthew Humphreys

Consultation questionnaire form

This form is designed to be completed electronically—in MS Word. Please save it locally before and after completing it.

Question 1

Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

I have no issues in respect of the suitability test

Question 2

Do you agree with our proposed model for a revised set of Principles?

No it seems misguided I see no reason to change the principles on which young solicitors have been trained and which embody the ethical considerations central to all practising solicitors.

Question 3

Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

No, the removal of the principles that a solicitor should provide a proper standard of care to client, act in the best interest of each client and protect client money and assets seems to be a betrayal of the aims a professional should strive for.

The existing principles make clear a solicitor's professional responsibilities

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?

See comments above. I endorse the Law Society's concerns about the abolition of existing Principle 5, 8 and 10.

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?

The proposals are wrong and misconceived

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?

No you have NOT produce a rule book for professionals but an amoral charter without any guidance or indication as to where the line is drawn. Regulation should embody some degree of certainty. These proposals as written do not do that.

Question 7

In your view is there anything specific in the Code that does not need to be there?

No the existing code is fine

Question 8

Do you think that there anything specific missing from the Code that we should consider adding?

Leave it alone. Your proposals are wrong. I endorse The Law Society's response to this question

Question 9

What are your views on the two options for handling conflicts of interests and how they will work in practice?

No. The options are untenable, and weaken public protection and will leave consumers confused. If it is accepted that to act for one or more clients where there is actual conflict or a significant risk of conflict is wrong then that needs to be said. We do not believe that is a proper way to train young lawyers or for the profession as a whole to behave.

Question 10

Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

No you are destroying the solicitors profession without adequate protection for clients or to prevent damage to the reputation of the legal profession

Question 11

In your view is there anything specific in the Code that does not need to be there?

Do not introduce your changes. They are all unnecessary.

Question 12

Do you think that there anything specific missing from the Code that we should consider adding?

Yes Do not make your proposed changes. This apart, there are no proper provisions covering how undertakings are to be dealt with within unregulated undertakings. This needs to be clarified

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?

Yes your code is wrong, and I endorse the comments of the Law Society. Your approach creates two tiers of solicitors, those working in a regulated entity and those working in an unregulated entity, with consequential risks to consumer protections and professional standards which will damage the standing of solicitors and create confusions for solicitors and their clients

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.

I also endorse The Law Society's call for careful consideration of the roles of the COLP and COFA. There is thin dividing line between over regulation and sufficient regulation to inspire public confidence. The prospect of solicitors practising in unregulated entities without any form of internal supervision causes us concern.

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?

Yes provide clear and detailed guidance

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?

Not a good idea. We have also seen The law Society's response and endorse those comments.

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?

We consider that this is to be avoided because of the lack of protection for the public.

It may be appropriate for a separate regulator to be set up to act as overall “light touch” regulator for these alternative models in addition to solicitors’ firms. This would create a more appropriate system of dual regulation whereby the solicitors’ profession would have as a selling point the additional level of regulation inherent to the profession.

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?

I agree with this.

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?

I endorse the Law Society's response

Question 20

Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

The better model would be to require all unregulated entities to highlight the lack of protection to its consumers. That is where the danger lies to consumers. See my comments above suggesting a separate “light touch” regulator.

Question 21

Do you agree with the analysis in our initial Impact Assessment?

No it ignores reality. The better model would be to require all unregulated entities to highlight the lack of protection to its consumers. That is where the danger lies to consumers. See the Law Society's detailed response

Again see my comments above concerning a separate regulator.

Question 22

Do you have any additional information to support our initial Impact Assessment?

No it is wrong. I am persuaded by The Law Society's analysis of the Impact Statement and we commend that analysis.

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?

Yes It would clearly not be appropriate for a solicitor in an unregulated entity to hold client money in their own name; not least because the SRA is proposing the abolition of Principle 10: You must protect client money and assets.

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?

Should not be allowed. We support the Law Society's response

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?

If not, what are your reasons?

Yes but they should not be allowed to hold themselves out as solicitors. We endorse the comments of the Law Society. Two tier in this context means two tier.

Question 26

Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

No all solicitors should have PII cover or they should not be allowed to use the title solicitor.

Question 27

Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

Many see comments above We endorse the Law Society's comprehensive response on this topic.

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?

Yes

Question 29

Do you have any views on what PII requirements should apply to Special Bodies?

The same as apply to all solicitors

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?

If you are regulating them they should be held to the same standards as solicitors. We endorse the Law Society's comprehensive response on this topic.

Question 31

Do you have any alternative proposals to regulating entities of this type?

No. We endorse the Law Society's comprehensive response on this topic.

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?

They seem dangerous and weaken consumer protection. We endorse the Law Society's comprehensive response on this topic.

Question 33

Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

Yes, unless regulation is returned to the Law Society.

Thank you for completing the **Consultation questionnaire form**.

Please save a copy of the completed form.

Please return it, along with your completed **About you form**, as an email attachment to consultation@sra.org.uk, by **21 September 2016**.

Alternatively, print the completed form and submit it by post, along with a printed copy of your **About you form**, to

Solicitors Regulation Authority
Regulation and Education - Policy - Handbook 2017
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16 September 2016

Our ref: 20168

Dear Sirs

Response to the SRA Consultation on the SRA Handbook Review: Looking to the future - flexibility and public protection (June 2016)

This is Mayer Brown International LLP's response to the above consultation.

We refer you to the response of the City of London Law Society Professional Rules and Regulation Committee dated 14 September 2016.

We support and adopt that response.

Yours faithfully

Mayer Brown International LLP

Mayer Brown International LLP

Mayfield Bell

Consultation: Looking to the future - flexibility and public protection

Consultation questionnaire form

This form is designed to be completed electronically—in MS Word. Please save it locally before and after completing it.

Question 1

Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

Question 2

Do you agree with our proposed model for a revised set of Principles?

There is a lack of clarity about how the Principles would apply if solicitors were allowed to provide non-reserved legal activities through unregulated firms. In particular:

- Principle 2: what is the meaning of the 'profession' in this context? Is it limited to solicitors, or to regulated firms, or does it include all providers of legal services?
- Principle 3: what would 'independence' mean in relation to a solicitor who works for an unregulated firm, or a regulated firm which is created to be the regulated entity serving a larger unregulated organisation?
- Principle 5: what responsibilities will this impose on a solicitor working in an unregulated firm, who may have little or no ability to influence its wider business practices?

Question 3

Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

No. It implies that solicitors and regulated firms are responsible for maintaining trust and confidence not only in themselves but also in all others delivering legal services (i.e. unregulated firms). If the SRA is not itself prepared to take responsibility for unregulated firms, it cannot expect solicitors and regulated firms to do so. See also the comments on the meaning of 'profession' above.

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?

The notion of ‘independence’ in Principle 3 is a vestige of an earlier era when solicitors (along with barristers and a few others) were directly and personally regulated. It does not sit easily in the world of regulated and unregulated firms and should now be subsumed into Principle 6 (the duty to act in the best interests of the client).

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?

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?

No. Generalisation is not the answer to complexity. For example, paragraph 8.7 (pricing) makes no reference to the uncertainties inherent in quoting for certain kinds of work. The risk for solicitors, of course, is that too much discretion in the interpretation of the rules will lie in the hands of the SRA itself.

Question 7

In your view is there anything specific in the Code that does not need to be there?

Question 8

Do you think that there anything specific missing from the Code that we should consider adding?

If solicitors are to be allowed to provide non-reserved legal activities through unregulated firms, there will be confusion in the minds of consumers as to what the title 'solicitor' actually means (see further on this below).

Furthermore, consumers will not (until it is too late) realise the implications of dealing with an unregulated firm if they are allowed to assume that every solicitor carries the same degree of client protection. In particular, consumers may not realise they will not have the benefit of (a) mandatory insurance (b) recourse to the compensation fund and (c) protection for client money.

The only tool available to the SRA to deal with this confusion will of course be the hold it has over individual solicitors working in unregulated firms. Therefore such solicitors should be required by the Code to use a title such as 'solicitor (unregulated firm)' or 'solicitor (non-SRA firm)' on their business cards and on all emails and other correspondence. This will alert clients to the fact that outcomes in dealing with different types of solicitor will not always be the same.

Furthermore, the Code should require solicitors in unregulated firms to provide written information to prospective consumers about the specific protections which they will lack in dealing with that firm before any contract is entered into.

Question 9

What are your views on the two options for handling conflicts of interests and how they will work in practice?

The first option is the only workable option, because there are occasions (for example, in some high-value financing work) where clients' interests are technically in conflict and the measures set out are put in place to deal with that conflict.

Question 10

Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

See comments above on the code for solicitors.

Question 11

In your view is there anything specific in the Code that does not need to be there?

Question 12

Do you think that there anything specific missing from the Code that we should consider adding?

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?

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.

The requirement for RSPs to be appointed as COLPs and COFAs is unnecessary bureaucracy as they will be primarily liable as managers anyway. In small and medium-sized firms there will be too much of a temptation to see the COLP or COFA as the 'person who does compliance', whereas the purpose of streamlining the Codes is presumably to encourage their wider understanding.

Arguably it should only be in larger firms that the roles ought to be retained in order to ensure that detailed compliance procedures are put in place and are followed.

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?

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?

This should have been the first question in the consultation.

The SRA proposals are founded on a misconception. It has taken the view that because there is an emerging 'alternative legal services market' which is largely unregulated, the answer is to take away such regulation as already exists rather than extend the scope of regulation to alternative providers. This will not assist the uninformed consumer, whose only real protection against poor service is, after all, regulation.

Secondly, the SRA's proposals could lead to regulatory arbitrage. Firms which are currently wholly regulated by the SRA will have an incentive to carve out reserved legal activities into a separate entity which continues to be regulated by the SRA. This will be kept as small as possible in terms of turnover and activity in order to minimise the costs associated with it. This is the model which will be familiar to those in the insurance and banking industries.

Finally, the SRA is fundamentally mistaken in thinking that its proposals will enhance the solicitor 'brand'. The word 'solicitor' will come to have two meanings, depending on whether or not the individual concerned works in a regulated or an unregulated firm. The SRA will have a limited power to control individual solicitors working in unregulated firms (and by its own admission, the process will be complex) but this will have no bearing at all on the protections available to the consumer. The result will be confusion in the minds of the consumer about what a solicitor is, leading to the brand being debased rather than improved.

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?

The SRA is naively optimistic about the potential for its proposals to drive down costs for the consumer and widen employment opportunities for solicitors. If unregulated firms are already able to provide non-reserved legal activities without employing solicitors, what reason could there be for them to want to take on the cost and increased regulatory risk of bringing in a solicitor just because they can under these reforms?

Indeed, such firms, and perhaps even solicitors themselves, are likely to see the title 'solicitor' as a burden to be avoided rather than the badge of a trusted professional.

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?

This in itself is not objectionable. However, it is less clear why non-reserved legal activities must also be regulated in the same way (Question 33 below).

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?

It is outmoded for the reasons given in the consultation.

Question 20

Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

This should not be a requirement on regulated firms (although they should certainly be free to compare themselves against unregulated firms if they so wish). Rather, solicitors in unregulated firms should be required to carry a 'cigarette packet' warning in their title and provide written information as to the lack of protection offered by their firms, as outline above in answer to Question 8.

Question 21

Do you agree with the analysis in our initial Impact Assessment?

Question 22

Do you have any additional information to support our initial Impact Assessment?

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?

This is the correct approach if the unregulated firm itself is free to avoid controls on client money. The lack of protection should be made clear by solicitors in those firms.

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?

Solicitors in these bodies should not have a more favourable position than solicitors in private practice. If the entity itself cannot be regulated, it should not be holding client money. This is consistent with the SRA's own position on RSPs (above).

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?

If not, what are your reasons?

This must be correct if unregulated firms are not contributing to the compensation fund. Again, the lack of protection would need to be spelt out clearly by solicitors in such firms.

Question 26

Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

Yes – again the lack of mandatory cover should be made clear by solicitors working in unregulated firms.

Question 27

Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

The difficulty (not just in relation to PII, but in the other protections that will not be available to consumers of legal services from unregulated firms) lies in making those consumers aware of that lack of protection. The SRA makes much of consumers being in a position to make an informed choice, yet if these proposals are implemented the only mechanism it will have for making information available will be through solicitors working in unregulated firms.

The response to Question 8 has indicated how this could be done. However, the requirement for solicitors to carry a 'cigarette packet' warning in their title and to provide a written statement to prospective consumers of the protections that they will lack will make those solicitors undesirable to unregulated firms. As a result, the 'freedoms' claimed for these proposals may well turn out to be illusory.

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?

Yes: if the focus is on consumer protection rather than the particular structure of the legal services provider, Special Bodies should also have PII.

Question 29

Do you have any views on what PII requirements should apply to Special Bodies?

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?

Threshold requirements would be too easily avoided. The only sensible approach is of course for all legal services to be regulated to the same extent, regardless of the colour, size or shape of the provider, whereas the logic of the SRA's approach is that it should only be concerned with high-level entry and competence requirements and the regulation of a rather archaic list of reserved legal activities.

Question 31

Do you have any alternative proposals to regulating entities of this type?

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?

The SRA itself acknowledges that the grounds for intervening in these situations will be fraught with difficulty. The best solution is to prevent these situations from arising at all by not proceeding with the proposed reforms.

Question 33

Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

This outcome seems to be inconsistent with the SRA's more general approach of limiting itself merely to entry and competence standards and reserved legal activities for all other firms.

Thank you for completing the **Consultation questionnaire form**.

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Please return it, along with your completed **About you form**, as an email attachment to consultation@sra.org.uk, by **21 September 2016**.

Alternatively, print the completed form and submit it by post, along with a printed copy of your **About you form**, to

Solicitors Regulation Authority
Regulation and Education - Policy - Handbook 2017
The Cube
199 Wharfside Street
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Consultation: Looking to the future - flexibility and public protection

Response ID:313 Data

2. Your identity

Surname

Barron

Forename(s)

Michael John

We may publish a list of respondents and a report on responses. Partial attributed responses may be published. Please advise us if you do not wish us to attribute your response or for your name or the name of your firm or organisation to appear on any published list of respondents.

Attribute my/our response and publish my/our name.

Please identify the capacity in which you are submitting a response. I am submitting a response…

on my own behalf as a solicitor in private practice

3.

1. Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

i am not aware of having taken any suitability test.

4.

2. Do you agree with our proposed model for a revised set of Principles?

Yes

5.

3. Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

No. As a solicitor i am not responsible for ensuring that my conduct upholds public confidence in those delivering legal services other than solicitors. Principle 2 should finish after the words "the profession" Unfortunately the SRA is the Solicitors Regulation Authority and while it busies itself regulating solicitors , providers of competing legal services are not regulated at all.

6.

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?

No.

7.

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?

No, I think guidance and case studies are confusing and lead to uncertainties. I think the Codes should be left as simple as possible with the Courts left to interpret them as and when the SRA's decisions are challenged in the Courts as they no doubt will be frequently.

8.

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?

Not entirely. You should delete Principle 5 which is totally meaningless.

9.

7. In your view is there anything specific in the Code that does not need to be there?

Yes, Principle % which is totally meaningless and the words "and those delivering legal services" in Principle 2.

10.

8. Do you think that there anything specific missing from the Code that we should consider adding?

The Code of Conduct for Solicitors should make it clear that a solicitor who is qualified in England and Scotland and who holds practising certificates in both jurisdictions can choose to be regulated by the Law Society of Scotland alone and that would passport the dual qualified solicitor to hold himself out as a solicitor in England and perform legal work in the reserved area.

A previous SRA consultation paper alleged that dual qualified solicitors had the choice of regulation in Scotland and England but this was not true.

11.

9. What are your views on the two options for handling conflicts of interests and how they will work in practice?

i prefer Option 2 as i believe that a solicitor should never act where there is a conflict of interest.

12.

10. Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

Yes, subject to the same comments i made on the Code for individuals.

13.

11. In your view is there anything specific in the Code that does not need to be there?

The words "and those delivering legal services" in Principle 2 and the whole of Principle 5.

14.

12. Do you think that there anything specific missing from the Code that we should consider adding?

The Code of Conduct for Firms should make it clear that a Scottish firm of solicitors composed of partners and employed solicitors who are qualified in England and Scotland and who hold practising certificates in both jurisdictions can choose to be regulated by the Law Society of Scotland alone and that would passport the Firm and its dual qualified solicitors to hold themselves out as solicitors in England and perform legal work in the reserved area.

15.

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?

See answer 12.

16.

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.

No comment.

17.

15. How could we improve the way in which the COLP/COFA roles work or to provide further support to

compliance officers, in practice?

No comment.

18.

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?

I think it is totally inappropriate to allow a solicitor to hold himself out as a solicitor in delivering any legal services to the public through an entity which is completely unregulated. I would agree that a solicitor could deliver any legal services including reserved legal services through an entity which was regulated by another legal regulator in the UK such as the Law Society of Scotland.

19.

17. How likely are you to take advantage in the greater flexibility about where solicitors can practice as an individual or as a business?

No unless the new rules allow a dual qualified English/Scottish solicitor in a Scottish law firm to hold himself out as an English solicitor in England and practise in all areas of the law including reserved areas.

20.

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?

No comment.

21.

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?

No comment.

22.

20. Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

Yes but only if they are permitted to emphasise that other providers of legal services are not required to have any such protections for the public.

23.

21. Do you agree with the analysis in our initial Impact Assessment?

No; i would say that almost no "consumers" (i.e. clients) pay attention to any consumer information. The SRA seems intent on drowning solicitors in a sea of bureaucracy while inferior unregulated legal advisers sun themselves on the beaches of non-regulation, all to the detriment of clients.

24.

22. Do you have any additional information to support our initial Impact Assessment?

No. It seems to me that the SRA has a vested interest in finding that clients want increased "consumer" information while those with practical experience on the front line have a different experience.

25.

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?

Yes.

26.

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?

They should never be permitted to hold money in their own name.

27.

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? If not, what are your reasons?

Yes, unregulated legal service providers should pay for their own compensation fund.

28.

26. Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

yes.

29.

27. Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

Yes, a solicitor working for an unregulated person while not insured will bring the profession into disrepute when his "consumer" finds that solicitor is unable to pay for damage caused by his negligence but that consumer deserves to reap the consequences of his own actions, provided it has been made clear to him how limited his protections are.

30.

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?

Yes.

31.

29. Do you have any views on what PII requirements should apply to Special Bodies?

the same as those which apply to SRA regulated entities.

32.

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?

No those entities should be subject to the same thresholds as SRA regulated entities.

33.

31. Do you have any alternative proposals to regulating entities of this type?

See answer 30.

34.

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?

Yes individual solicitors working within alternative legal services providers should always be subject to intervention from a regulator.

35.

33. Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

yes.

MICHAEL J NATHAN

106 WIMBLEDON PARK ROAD
LONDON SW18 5UA

20 September 2016

This is my response to the SRA Consultation

Looking to the future - flexibility and public protection

I am responding to the SRA consultation

I have seen the comprehensive response submitted by The Law Society on 8 September 2016 and I adopt that response as my own. I do not agree with the proposals in their entirety, except where it is clear in this response that my views differ. The Law Society's response can be found at this link:

http://www.lawsociety.org.uk/policy-campaigns/consultation-responses/looking-to-the-future-consultations-law-society-response/

Consultation Questions
My replies to the SRA Consultation Paper have been completed below the relevant 33 questions set out in the Consultation Questionnaire form provided in electronic format by the SRA, and these are contained below on the accompanying pages.

Michael J Nathan

Consultation questionnaire form

This form is designed to be completed electronically—in MS Word. Please save it locally before and after completing it.

Question 1

Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

I have not encountered any issues in respect of the suitability test

Question 2

Do you agree with our proposed model for a revised set of Principles?

No it seems misguided I see no reason to change the principles on which young solicitors have been trained and which embody the ethical considerations central to all practising solicitors.

Question 3

Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

No, the removal of the principles that a solicitor should provide a proper standard of care to client, act in the best interest of each client and protect client money and assets seems to be a betrayal of the aims a professional should strive for.

The existing principles make clear a solicitor's professional responsibilities

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?

See comments above. I endorse the Law Society's concerns about the abolition of existing Principle 5, 8 and 10.

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?

The proposals are wrong and misconceived

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?

No you have NOT produce a rule book for professionals but an amoral charter without any guidance or indication as to where the line is drawn. Regulation should embody some degree of certainty. These proposals as written do not do that.

Question 7

In your view is there anything specific in the Code that does not need to be there?

No the existing code is fine

Question 8

Do you think that there anything specific missing from the Code that we should consider adding?

Leave it alone. Your proposals are wrong. I endorse The Law Society's response to this question

Question 9

What are your views on the two options for handling conflicts of interests and how they will work in practice?

No. The options are untenable, and weaken public protection and will leave consumers confused. If it is accepted that to act for one or more clients where there is actual conflict or a significant risk of conflict is wrong then that needs to be said. I do not believe that is a proper way to train young lawyers or for the profession as a whole to behave.

Question 10

Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

No you are destroying the solicitors profession without adequate protection for clients or to prevent damage to the reputation of the legal profession

Question 11

In your view is there anything specific in the Code that does not need to be there?

Do not introduce your changes. They are all unnecessary.

Question 12

Do you think that there anything specific missing from the Code that we should consider adding?

Yes Do not make your proposed changes. This apart, there are no proper provisions covering how undertakings are to be dealt with within unregulated undertakings. This needs to be clarified

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?

Yes your code is wrong, and I endorse the comments of the Law Society. Your approach creates two tiers of solicitors, those working in a regulated entity and those working in an unregulated entity, with consequential risks to consumer protections and professional standards which will damage the standing of solicitors and create confusions for solicitors and their clients

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.

I also endorse The Law Society's call for careful consideration of the roles of the COLP and COFA. There is a thin dividing line between over regulation and sufficient regulation to inspire public confidence. The prospect of solicitors practising in unregulated entities without any form of internal supervision causes me concern.

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?

Yes. Provide clear and detailed guidance

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?

Not a good idea. I have also seen The law Society's response and endorse those comments.

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?

I consider that this is to be avoided because of the lack of protection for the public.

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?

About your only good idea

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?

I endorse the Law Society's response

Question 20

Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

The better model would be to require all unregulated entities to highlight the lack of protection to its consumers. That is where the danger lies to consumers

Question 21

Do you agree with the analysis in our initial Impact Assessment?

No. It ignores reality. The better model would be to require all unregulated entities to highlight the lack of protection to its consumers. That is where the danger lies to consumers. See the Law Society's detailed response

Question 22

Do you have any additional information to support our initial Impact Assessment?

No it is wrong. I have noted The Law Society's analysis of the Impact Statement and I commend that analysis.

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?

Yes It would clearly not be appropriate for a solicitor in an unregulated entity to hold client money in their own name; not least because the SRA is proposing the abolition of Principle 10: You must protect client money and assets.

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?

Should not be allowed. I support the Law Society's response

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?

If not, what are your reasons?

Yes but they should not be allowed to hold themselves out as solicitors. I endorse the comments of the Law Society. Two tier in this context means two tier.

Question 26

Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

No all solicitors should have PII cover or they should not be allowed to use the title solicitor.

Question 27

Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

Many see comments above. I endorse the Law Society's comprehensive response on this topic.

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?

Yes

Question 29

Do you have any views on what PII requirements should apply to Special Bodies?

The same as apply to all solicitors

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?

If you are regulating them they should be held to the same standards as solicitors. I endorse the Law Society's comprehensive response on this topic.

Question 31

Do you have any alternative proposals to regulating entities of this type?

No. I endorse the Law Society's comprehensive response on this topic.

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?

They seem dangerous and weaken consumer protection. I endorse the Law Society's comprehensive response on this topic.

Question 33

Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

Yes, unless regulation is returned to the Law Society.

Thank you for completing the **Consultation questionnaire form**.

Please save a copy of the completed form.

Please return it, along with your completed **About you form**, as an email attachment to consultation@sra.org.uk, by **21 September 2016**.

Alternatively, print the completed form and submit it by post, along with a printed copy of your **About you form**, to

Solicitors Regulation Authority
Regulation and Education - Policy - Handbook 2017
The Cube
199 Wharfside Street
Birmingham
B1 1RN

Michael Morris Franks
William Sturges LLP
14-16 Caxton Street

London SW1H 0QY
20 September 2016

This is my response to the SRA Consultation

Looking to the future - flexibility and public protection

I am responding to the SRA consultation

I have seen the comprehensive response submitted by The Law Society on 8 September 2016 and I adopt that response as my own. I do not agree with the proposals in their entirety, except where it is clear in this response that my views differ. The Law Society's response can be found at this link:

http://www.lawsociety.org.uk/policy-campaigns/consultation-responses/looking-to-the-future-consultations-law-society-response/

Consultation Questions
My replies to the SRA Consultation Paper have been completed below the relevant 33 questions set out in the Consultation Questionnaire form provided in electronic format by the SRA, and these are contained below on the accompanying pages.

Michael Morris Franks

Consultation questionnaire form

This form is designed to be completed electronically—in MS Word. Please save it locally before and after completing it.

Question 1

Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

I have not encountered any issues in respect of the suitability test

Question 2

Do you agree with our proposed model for a revised set of Principles?

No it seems misguided I see no reason to change the principles on which young solicitors have been trained and which embody the ethical considerations central to all practising solicitors.

Question 3

Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

No, the removal of the principles that a solicitor should provide a proper standard of care to client, act in the best interest of each client and protect client money and assets seems to be a betrayal of the aims a professional should strive for.

The existing principles make clear a solicitor's professional responsibilities

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?

See comments above. I endorse the Law Society's concerns about the abolition of existing Principle 5, 8 and 10.

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?

The proposals are wrong and misconceived

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?

No you have NOT produce a rule book for professionals but an amoral charter without any guidance or indication as to where the line is drawn. Regulation should embody some degree of certainty. These proposals as written do not do that.

Question 7

In your view is there anything specific in the Code that does not need to be there?

No the existing code is fine

Question 8

Do you think that there anything specific missing from the Code that we should consider adding?

Leave it alone. Your proposals are wrong. I endorse The Law Society's response to this question

Question 9

What are your views on the two options for handling conflicts of interests and how they will work in practice?

No. The options are untenable, and weaken public protection and will leave consumers confused. If it is accepted that to act for one or more clients where there is actual conflict or a significant risk of conflict is wrong then that needs to be said. I do not believe that is a proper way to train young lawyers or for the profession as a whole to behave.

Question 10

Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

No you are destroying the solicitors profession without adequate protection for clients or to prevent damage to the reputation of the legal profession

Question 11

In your view is there anything specific in the Code that does not need to be there?

Do not introduce your changes. They are all unnecessary.

Question 12

Do you think that there anything specific missing from the Code that we should consider adding?

Yes Do not make your proposed changes. This apart, there are no proper provisions covering how undertakings are to be dealt with within unregulated undertakings. This needs to be clarified

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?

Yes your code is wrong, and I endorse the comments of the Law Society. Your approach creates two tiers of solicitors, those working in a regulated entity and those working in an unregulated entity, with consequential risks to consumer protections and professional standards which will damage the standing of solicitors and create confusions for solicitors and their clients

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.

I also endorse The Law Society's call for careful consideration of the roles of the COLP and COFA. There is a thin dividing line between over regulation and sufficient regulation to inspire public confidence. The prospect of solicitors practising in unregulated entities without any form of internal supervision causes me concern.

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?

Yes. Provide clear and detailed guidance

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?

Not a good idea. I have also seen The law Society's response and endorse those comments.

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?

I consider that this is to be avoided because of the lack of protection for the public.

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?

About your only good idea

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?

I endorse the Law Society's response

Question 20

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The better model would be to require all unregulated entities to highlight the lack of protection to its consumers. That is where the danger lies to consumers

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Should not be allowed. I support the Law Society's response

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?

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Many see comments above. I endorse the Law Society's comprehensive response on this topic.

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Yes

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Middlesex Law Society

Solicitors Regulation Authority
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The Cube
199 Wharfside Street
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Date: 20th September 2016

Dear Sirs

RE: RESPONSE TO SRA CONSULTATION ON THE NEW HANDBOOK AND ACCOUNTS RULES

The Middlesex Law Society has over 400 firms and membership engaged in a wide range of firms and activities. Also we believe we are home to the highest number of ethnically diverse small firms in the country. We have a high number of firm closures in recent years following withdrawal of legal aid generally and criminal legal aid in particular. We are also concerned to note the high incidence of conduct failures many of which occur in relation to the management of firm's client banking accounts.

In order to retain the trust and confidence of the public we serve our members believe it is essential that there should be no confusion or ambiguity as to what their professional title means. If the title solicitor is presented to the public then whatever the business format it should mean the same thing for any user and carry the same obligations. There is a single basis for regulating the solicitors' profession which ensures that all members comply with the same standards and offer to clients the same level of assurance and protection in case of default. Neither users of services nor practitioners can know at the outset of any case where it will lead. The SRA consultation cuts across this principle at many different levels and undermines public protection.

Whilst our members are in favour of simplicity and clarity in their conduct rules they do not believe that can necessarily always be achieved through brevity. We believe that the measures proposed will harm disproportionately our small firm members, newly qualified members and solicitors from ethnic minorities. We believe this will harm them also in relation to firms with larger resources who may not offer better quality services over the longer term but may compete in the short term. This is made possible by relaxation of requirements for supervision and any effective means of enforcement for breaches of competition and other laws which harm smaller firms and sole practitioners.

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The majority of our members undergo a client account audit each year and that provides an important endorsement for their integrity by setting standards for handling client money. Even if the change in the definition of 'client money' proposed by the SRA were to result in a short term cash flow benefits to our members the potential damage to the reputation of the profession as a whole were it to occur would do serious harm to other members.

Society relies upon the SRA as our independent regulator to put its resources to ensure that it is carrying out its duties to regulate to the best possible standards. Our members who pay for this want it carried out efficiently at the best price possible. We are not persuaded that SRA has in any way accomplished its fundamental purpose or is in any position to take on the objective of expanding its role into unregulated markets. We do not believe that this was intended or agreed under the Legal Services legislation.

We are not convinced that the SRA understands the variety of cultures and practices that operate in the unregulated markets and warn that the public should not be enticed and put at risk by deregulating in the way that is suggested. We do not believe this would solve any of the complex problems caused by withdrawal of legal aid. Our experience in the markets we serve would suggest that 'unmet need' is highest amongst those who are unable to afford legal help of any kind at any price.

At present any solicitor who is qualified can offer services to any unregulated business (without paying any fees to SRA) with the restriction that they should not use the professional title of 'solicitor'. That title is clearly linked to authorisation and a full range of regulatory protection which prevents harm for the public. Watering this down will do nothing to reduce 'unmet need' and everything to facilitate serious harm to the public.

There are many practices that operate in the unregulated market using methods of 'selling' non essential services and charging fees and extras. There are a number of former solicitors - struck off or who have left the profession as regulated firms will not employ them- who operate in these markets. These types of firm are anathema to the regulated profession. For solicitors to compete in this market and operate using similar methods can only bring the reputation of solicitors into disrepute. It does not appear that any research has been carried out into this aspect.

The SRA is, in our view, using its powers to intervene in the legal services market and manipulate regulation to create a new and distinct market. The ethics of a profession is to provide services to meet need –rather than create demand and the proposal is contrary to this principle. A clear example of the way in which business practice has led to harm and mistrust is the case of motor insurance premiums. These are reported to be higher because of a 'compensation culture'. That culture, if it exists, has been fed by an unregulated cold calling and other market practices that lack transparency or accountability. The new proposed code does not prohibit cold calling.

In relation to the Accounts Rules we agree that simplification and modernisation of the rules is overdue. Some of our members were initially attracted to the redefinition of 'client money' but now see that it involves a high risk and that the trust of the public in the profession could easily be harmed by any case default whether accidental or deliberate. We favour clear definitions for 'legal costs' and 'disbursements' that are clear and easily understood and do not throw additional risk on the Compensation Fund. Above all they must be capable of being enforced effectively.

There are many examples in our geographic area of solicitor default and we believe these would be increase and be made worse by the change proposed. Other proposals in the Accounts Consultation we consider to be sensible.

Overall, we judge the proposals to be ill thought through and undeveloped in large areas of crucial importance. This includes enforcement, regulator costs for all the changes and how future funding costs will be allocated between the different parts of the solicitor markets that would be created.

Solicitors should not be sub- divided in their regulation in the way the SRA has suggested and the proposals should be presented as a whole rather than broken down in the hope of gaining limited approval by stages.

The tinkering with the regulatory system in place should cease and the regulator should be focused on running its operations in a transparent and efficient manner at reasonable cost. Relevant information in relation to matters proposed has not been not been provided to the profession. In order to build trust the SRA should disclose the information it has in relation to regulation of the profession under its current Code and tell the profession what it knows of the unregulated markets where it wishes to extend its jurisdiction.

Yours faithfully

ARIYA SRIHARAN

President

Consultation: Looking to the future - flexibility and public protection

Consultation questionnaire form

This form is designed to be completed electronically—in MS Word. Please save it locally before and after completing it.

Question 1

Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

Taking this as a reference to the Suitability Test, no.

Question 2

Do you agree with our proposed model for a revised set of Principles?

Yes.

Question 3

Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

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?

No. The four you propose to drop are implicit in what you propose to retain.

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?

1 Incorporating the existing indicative behaviours, to the extent still applicable, into guidance would help ensure consistency in the exercise of proper professional judgement, particularly as many of the indicative behaviours have come to be used as prime guidance aids by many people in the 5 years since they were introduced.

2 Case studies should not just deal with clear cut matters. To support your goal of increasing flexibility in the way standards can be met they should cover situations where the exercise of proper professional judgement does not necessarily lead to one conclusion only to the exclusion of another justifiable one and be clear that this is acceptable.

3 Specific areas for guidance (and case studies as appropriate) include

3.1 Conflicts of interest generally but with specific focus on the areas of common interest and clients competing for the same objective with detailed guidance on how to satisfy the conditions;

3.2 Confidentiality and disclosure and in particular whether the new express reference to " another **current** [the bold is ours] client or a former client" in standard 6.5, in place of the reference to "Client B" in the corresponding outcome 4.4 of the current Code, is intended to allow flexibility (subject to the stated conditions) to represent more than one client in related current matters where the clients have adverse interests. In our experience many solicitors and firms consider existing outcome 4.4 as generally only relevant to situations where "Client B's" information does not relate to a current Client B matter, as otherwise what might loosely be termed an information conflict is likely to arise as regards the related matters through it being impossible to reconcile the conflicting duties to act in the best interests of each current client. The glossary to the existing Code of course refers to the term "client" as including a former client where the context permits. We believe that, in the absence of a redraft of proposed standard 6.5, guidance should warn that information barriers will rarely permit you to act for two or more **current** clients with adverse interests. An exception would be where you can comply with the conditions under proposed standard 6.2 (b) and the only adversity in the clients' interests is competition for the same objective.

3.3 The meaning of standard 4.1 of the draft Code for individual solicitors and in particular whether existing indicative behaviour 1.20 (keeping a financial benefit only where you can justify keeping it…… and the client has agreed you can keep it) can be treated as no longer part of SRA guidance . Many have long considered that indicative behaviour as going far further than an obligation to account (as referred to in existing Outcome 1.15), the proposed standard 4.1 and the general law on

fiduciary duty and

3.4 What should be done in the event of any conflict between duties under the different proposed Codes for individual solicitors and for firms.

4 The **structured** approach taken for example in your Consumer Credit Guidance first issued on 22 December 2015, supplemented by **toolkit and case studies**, is a particularly helpful approach for issues of that level of complexity and regulatory novelty.

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?

Yes, subject to the points made elsewhere in this submission and on the basis that this response is restricted to solicitors in private practice and traditional firms such as our own.

Question 7

In your view is there anything specific in the Code that does not need to be there?

No.

Question 8

Do you think that there anything specific missing from the Code that we should consider adding?

No.

Question 9

What are your views on the two options for handling conflicts of interests and how they will work in practice?

Option 2 should not be used. We see difficulties with the exercise of effective professional judgement to determine whether instructions present an actual conflict or merely a significant risk of that. The temptation, particularly under the Code for individual solicitors where commercial incentives may conflict with ethical imperatives, will be to see matters as presenting no more than a risk of conflict to be cured by consent. In practice such consent may not be considered properly "informed" particularly when judged by a disappointed client with the benefit of hindsight. That is not going to be in the best interests of each client and is likely to generate complaints. Take, for example, a solicitor who might decide to act for the vendor and purchaser of a house where the vendor insists that the title is clean and all matters agreed and the purchaser confirms there are no known points of disagreement . The solicitor forms the initial view that, whilst there is risk of conflict inherent in transactional work, there is as yet no actual conflict given what he is told and he hopes his role will be exclusively clerical rather than partly advisory. But the solicitor must of course act in the best interests of each client and not surprisingly something material arises during the conveyancing process which requires negotiated resolution. Leaving the clients to sort the difficulty out between themselves is on the facts unrealistic and one or both clients is going to have to be disengaged as the solicitor can neither ignore the point nor take one client's side against the other. Such instances, which would not be rare given the uncertainties of transactional work, will add to clients' costs and inconvenience and invite accusation that the solicitor should have treated the work from the outset as, by its nature, presenting actual rather than mere risk of conflict. The accusation would be likely to have substance as conflict is of course born in the existence of separate duties to act in the best interests of two or more clients and in transactional work those separate duties conflict in the vast majority of cases.

We are also concerned that Option 2 represents a major change in what, via the current Code, has become the accepted requirement for solicitors facing a potential conflict of interests but without fully reconciling the proposed new requirement with the general obligations of fiduciaries under common . This increases the risk of confusion and erosion of client interests inherent in Option 2.

Question 10

Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

Yes, subject to the points made elsewhere in this submission.

Question 11

In your view is there anything specific in the Code that does not need to be there?

No.

Question 12

Do you think that there anything specific missing from the Code that we should consider adding?

No.

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?

1 Please see our observations at paras 3.2 and 3.3 in Question 5 above, which you might prefer to consider as drafting rather than explanation matters.

2 We think that incorporating information safeguards as a condition to the common purpose exemption within standard 6.2 is going to cause confusion and risk abuse. If a firm or solicitor is having to put in place information safeguards to protect clients' information it is likely that the information will be relevant to the matter in hand. But secrecy between clients in the same matter is unlikely to be consistent with those clients having a genuine common purpose in relation to that matter and "strong consensus on how that matter is to be achieved". In our experience the existing common interest exemption generally only works in practice where the clients are happy to share all information which is relevant to the matter in pursuit of their common purpose and that that is likely to remain the case. There may of course be cases where it is appropriate to put in place information safeguards to protect general client confidential information that is not relevant to the common purpose but requiring that does not need to be a pre-condition to use of the common purpose exemption.

3 We wonder why you refer to "significant risk" in relation to conflicts e.g. at standard 6.1 and " real risk" in relation to confidential information at 6.5. Is there intended to be a difference between the two descriptions of risk level? If so this should be explained. If not, use of one term only would save risk of confusion.

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

Yes , provided that firms and their COLPs and COFAs set the right tone to ensure that the roles cannot be seen as in any way diminishing the responsibilities of individuals for compliance with the Handbook.

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?

N/A.

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?

We recognise the importance of consumer choice in relation to legal service providers but that must be informed choice which is not made under risk of confusion over the status of the chosen provider. We fear that a proposal that allows solicitors to use that title, whether they are working through a regulated entity or not provided they hold a practising certificate, but prevents the provider from using the term " solicitors' firm" or "solicitors" will not prevent that confusion. Nor will mere statements of regulated or unregulated status on websites, emails and letters etc which will often be treated as "small print" by consumers who risk wrongly inferring levels of protection from the simple fact that they are dealing with a solicitor. In other words many consumers will not make the distinction and not realise that they are in fact dealing with an unregulated ALSP , albeit in part perhaps via a regulated solicitor.

That risk of confusion and the proposed two level profession risks damage to the brand and reputation of solicitors generally, including those who continue to work within the regulated sector either because they undertake reserved legal activity or choose to offer clients the full protection of entity regulation.

Once the idea of a two level profession is established it is hard to imagine where it will lead and what unintended consequences may flow. For example it is not fanciful to envisage that the law may deny the benefits of legal professional privilege to clients of ALSPs and that, once begun, that erosion will spread to deny the protection to clients of regulated firms as well.

We understand why you are proposing abolition of the need for PII under minimum terms and Compensation Fund contribution for solicitors working in ALSPs. We do however believe that these aspects of your proposals exemplify the considerable erosion of consumer protection and the risk of consumer confusion that will result from those proposals. Provision of information to consumers about whether and how services to be provided will be regulated will not always lead to informed choice by consumers. For example, some consumers may draw unwarranted comfort, via historic links and assumptions about protection associated with the word " solicitor", from instructing an ALSP employing solicitors. This is a particular risk for the vulnerable.

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?

For our practice this is unlikely in the foreseeable future.

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?

No comment.

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?

Allowing newly qualified solicitors with no experience and no supervision structure to set up their own unregulated firm risks adverse impact on clients and on the reputation of solicitors generally. This remains the case despite advances in the nature of training which does not and cannot set out to provide the basis for the levels of sound judgement that come from experience gained in working after qualification in a **gradually** less supervised way.

We, therefore, consider that the current requirement is necessary.

Question 20

Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

Yes.

Question 21

Do you agree with the analysis in our initial Impact Assessment?

We agree with the goals of clearer rules, costs reduction, targeted and proportionate regulation and the removal of unnecessary barriers to competition. We encourage appropriate innovation but point out that the proposed changes, which are material, follow relatively quickly after the move to outcomes focused regulation ("OFR"). Material change has cost and training implications for the profession and we would hope that the latest changes, if adopted, will last longer than those which arose on the adoption of OFR.

We are concerned about the key risks referred to above and in particular in answer to question 16 and fear that your impact assessment does not recognise the extent of these.

Question 22

Do you have any additional information to support our initial Impact Assessment?

No.

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?

Yes.

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?

No comment.

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?

If not, what are your reasons?

Yes, but without prejudice to our comments at question 16 above.

Question 26

Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

Yes, but without prejudice to our comments at question 16 above.

Question 27

Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

No, but without prejudice to our comments at question 16 above.

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?

No comment.

Question 29

Do you have any views on what PII requirements should apply to Special Bodies?

No comment.

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?

Yes, but without prejudice to our comments at question 16 above.

Question 31

Do you have any alternative proposals to regulating entities of this type?

No.

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?

No.

Question 33

Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

Yes.

Thank you for completing the **Consultation questionnaire form**.

Please save a copy of the completed form.

Please return it, along with your completed **About you form**, as an email attachment to consultation@sra.org.uk, by **21 September 2016**.

Alternatively, print the completed form and submit it by post, along with a printed copy of your **About you form**, to

Solicitors Regulation Authority
Regulation and Education - Policy - Handbook 2017
The Cube
199 Wharfside Street
Birmingham
B1 1RN

Monica Patel

I have read with interest the above consultation.

By way of background I am an in-house Solicitor in a public sector legal department, and have a number of points for consideration.

I support the ethos that people and small businesses need to be able to access the legal advice that they need, at an affordable price, and that the SRA as regulator, has a duty to consider how the SRA can help to address this.

My concern is that the proposed approach set out in the consultation may cause more confusion than assistance to potential clients when deciding on where to obtain their legal advice, and understanding the implications (e.g. whether they are protected by the Compensation Fund, Legal Professional privilege and conflict of interest requirements). The SRA, therefore will need to issue greater guidance to citizens as well as to Solicitors to avoid much of the confusion the two tier code may create.

As an in-house public sector lawyer I am extremely interested in what changes will be made to the SRA Practice Framework Rules, especially how they will reflect the diverse range of business models being adopted by the public sector, and in particular the interpretation of Rule 4 and the interrelation with the Local Authorities (Goods and Services) Act 1970 & the Legal Services Act 2007. The consultation documents does not seem to address this.

I hope this assists in the consultation and that there will be further opportunities to contribute on the SRA proposals in regards to this matter, as they develop.

Kind regards,

Monica Patel

Solicitor

Commercial Law Group - Legal Services

Resources

Moninder Bhamra

Consultation questionnaire form

Question 1: Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

The content of the test itself is fair and discharging the burden of the suitability test is straightforward in administrative terms but it is unclear what level of scrutiny is given to these returns to ensure that only those who are suitable are admitted to the profession. Further information regarding this process would be welcome as a way of showing greater transparency of the regulatory process.

The Law Society is aware of concerns regarding the timing of the suitability test. The Society was supportive of the removal of student enrolment prior to the start of the Legal Practice Course as it was unnecessarily costly and bureaucratic. However, the Society noted at the time that there may be issues which arose as a result of this and that it was essential that students have proper information to alert them to any likely problem at an early stage. There were also notable benefits to the previous arrangement. First, they enabled any concerns about a student's character to be addressed before the student embarked on the period of recognised training, at which point there has already been a significant outlay in time and money. Secondly, the requirement to undergo the process placed students on notice that their conduct may seriously affect their ability to pursue a legal career. It offered them an opportunity to engage at an early stage with the implications of being a professional. While it is accepted that each individual must take responsibility for their behaviour and should take advantage of the information available on the SRA website about character eligibility, it is not realistic to expect a student to understand the complex technicalities for reaching the SRA's suitability standards.

Unfortunately, although students can request an early appraisal of any issues that may cause problems regarding their suitability, the Society understands that it is not widely understood what this process is and when it should be applied for. The Society is aware, anecdotally, of situations arising whereby firms are routinely having to query trainees when they begin their placements and deal with issues, which the person concerned had not recognised must be declared, at this late point. There may also be situations where firms do not check, which raises issues about client protection. This represents a waste of a significant outlay in time and money on their part.

Clear and appropriate information regarding the suitability test should be made available to students at an early stage in order to make it obvious to students where previous conduct may prevent them from joining the profession and to give them a clear idea of the conduct they will be expected to demonstrate over the ensuing

years if they wish to join the profession.

Question 2: Do you agree with our proposed model for a revised set of Principles?

The Society has concerns with some aspects of the proposals as set out below.

New Principle 1: Uphold the rule of law and the proper administration of justice

This is current principle 1. We welcome its retention. However, we would reiterate that it is important to understand what "the rule of law" truly means. While a solicitor who is acting illegally may damage trust in the profession, it does not follow that the solicitor is also failing to uphold the rule of law. We would refer to The Rule of Law by Lord Bingham[17] which advances eight principles by way of expansion of the basic concept, the latter being: "that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts." These are primarily obligations of the state, not of individuals.

New Principle 2: Ensure that your conduct upholds public confidence in the profession and those delivering legal services

This is a reworking of current principle 6 ("behave in a way that maintains the trust the public places in you and in the provision of legal services") but brings in a new obligation with respect to providers generally.

There are two substantive changes.

First, the absence of any reference in the new wording to the importance of regulated individuals behaving in a way that retains public trust in them personally.

Secondly, it is illogical for regulated individuals and firms to be placed under any regulatory obligation with respect to non-regulated individuals and providers, and the proposed loosely worded reference could deter regulated individuals and firms from pointing out why the public should have greater confidence in the regulated sector, for example because of their professional training and the higher levels of client protections.

We propose that the new Principle be redrafted as follows:

*Proposed alternative wording for New Principle 2: Ensure that your conduct upholds public confidence **in you and** in other regulated individuals and firms"*

New Principle 3: Act with independence

[17] The Rule of Law by Tom Bingham, Penguin Books, 2011.

This is a reworking of current principle 3 ("not allow your independence to be compromised"). The Society does not have any concerns with the revised wording.

New Principle 4: Act with honesty and integrity

This is a reworking of current principle 2 ("act with integrity").

The Society has concerns with this proposed new principle not least because a requirement to be honest, including with respect to client money, is significantly weaker than a requirement to protect it, as required by current principle 10 ("protect client money and assets"), which it is proposed to remove. This proposal is presumably to facilitate the other proposal that solicitors working in unregulated entities should not be able to hold client money in their own name.

The absence in the new principles of any reference to the importance of protecting client money and assets raises concerns from the perspective of professional standards and consumer protection. Arguably, such protection would become even more important in an unregulated entity which do not and would not have to comply with the SRA's accounts rules. We therefore believe the new set of principles should retain an explicit reference to the protection of client's money and assets, ideally in a separate principle.

New Principle 5: act in a way that encourages equality, diversity and inclusion

This is a reworking of current principle 9 ("run your business or carry out your role in the business in a way that encourages equality of opportunity and respect for diversity"). The substantive change is the addition of a reference to inclusion. However, the word "act" seems a significant watering down of the current wording and the Society would prefer to retain "run your business or carry out your role" in place of "act".

We are also concerned that, while equalities legislation will apply to unregulated entities, this Principle will not. The SRA should address this issue in its equality impact assessment.

New Principle 6: Act in the best interest of each client.

This is a minor change to the wording of existing principle 4 ("act in the best interests of each client"). The Society does not have any concerns with this wording.

Question 3: Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

As noted above, we are concerned that the wording of the new Principle 2 does not refer to the importance of regulated individuals' behaviour in a way that retains public trust in them personally.

We would prefer absolute clarity and therefore propose that the new Principle be redrafted as follows:

*Proposed alternative wording for New Principle 2: Ensure that your conduct upholds public confidence **in you and** in other regulated individuals and firms"*

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?

Current Principles

The SRA is proposing the removal of four current principles:

a. Current principle 5 ("provide a proper standard of service to your clients")

The Society believes that this Principle should be retained as this is central to the profession and reflects the high level of quality that consumers can expect from a regulated individual. Its removal gives rise to concerns from the perspective of professional standards and consumer protection.

b. Current principle 7 ("comply with your legal and regulatory obligations and deal with your regulators and ombudsmen in an open, timely and co-operative manner")

The Society does not object to the removal of this principle.

c. Current principle 8 ("run your business or carry out your role in the business effectively and in accordance with proper governance and sound financial and risk management principles")

The Society does not object to the removal of this principle, provided that current principle 10 is retained.

d. Current principle 10 (“protect client money and assets")

As noted above, the removal of this principle raises concerns from the perspective of professional standards and consumer protection. Arguably, such protection would become even more important in an unregulated entity which does not have to comply with the SRA's accounts rules. We therefore believe that the new set of principles should retain an explicit reference to the protection of client money and assets, ideally in a separate principle.

The loss of principles 5 and 10 cause particular concern. In addition to the reasons cited above, these principles are so closely associated with what consumers have come to expect of a solicitor that they might be said to epitomize the brand on which consumer confidence is in large part founded. We can see only risks and no benefits in removing what are often seen as two hallmarks of the profession from the core principles.

At Appendix 3, we provide a scenario showing what could happen in a worst case scenario.

Other Principles arising from the newly revised ones

While confidentiality is arguably implicit in the principle that regulated individuals should "act in the best interest of each client", the Society believes it would be helpful to include a specific reference given its importance to consumers and to compliance with professional standards.

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?

We take the view that it would be helpful to the profession to provide a thorough and developed suite of scenarios, particularly as it is proposed that the indicative behaviours be removed from the Codes. As examples of the types of scenarios which we would consider to be useful, we suggest the following:

- A scenario that deals with a sole practitioner who establishes an unregulated entity in order to provide unreserved legal services. The scenario would cover how this practitioner might manage the operation of a regulated and separately unregulated business in practice. It would be particularly interesting to understand how the sole practitioner can guard against client confusion when practising in the circumstances set out above.

- A scenario that explores a practising solicitor working in an unregulated entity who is asked to represent a client who has clear conflicts with existing clients of that entity. We understand that in such a situation the solicitor would be able to represent the client. It would therefore be valuable to understand the parameters around management of such conflicts.

- A scenario that outlines whether, under the new proposed Codes of Conduct, a solicitor firm of conveyancers can act for a buyer and a seller, or for a borrower and a lender, in a conveyancing transaction and be compliant with 6.1-6.5 of the proposed Code of Conduct for Solicitors.

- A scenario that explores the impact of the proposals on the giving and receiving of undertakings ie between a solicitor in an unregulated entity and a solicitor in a regulated entity. Undertakings are the oil in the engine of legal transactions and help ensure they can take place. If in such circumstances, a solicitor in an unregulated entity were to breach an undertaking, what would be the consequences in terms of reparations to the affected consumer? Under what, if any, circumstances would undertakings from an unregulated firm be acceptable to regulated firms and others?

- A scenario that explores a solicitor who owns and practises through an unregulated entity who wishes to place advertisements online and in a newspaper. It would be useful to understand in more detail what the advertisement can say about the unregulated firm employing solicitors with and without practising certificates.

- A scenario that explores how an in-house lawyer (perhaps working for a local

authority) might provide legal services to the public. How this service would be managed, charged out, and how conflicts and risks would be managed.

- A scenario that explores how a solicitor working in an unregulated firm would manage conflicts, bearing in mind that they would be bound by the conflict rules from the solicitors code but may be working with colleagues who are totally unfamiliar with the concepts of conflict, confidentiality and disclosure.

- As set out in our answer to Question 20, we believe it would be helpful for the SRA to provide a case study on the information that should be displayed about consumer protections, including the level of detail required and expectations as to the prominence of the information presented.

Our consultation with some firms indicates that they are concerned about the removal of indicative behaviours from the handbook because of their usefulness in indicating how the regulated community can best comply with their regulatory requirements.

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?

As the Code's purpose would be to forestall misconduct, there is a balance to be struck between excessive detail and brevity. Clarity is important but so is predictability.

We know that our members, particularly those from smaller firms, like certainty. Many members would rather have a definitive 'do this' or 'don't do that' approach, so that compliance is more straightforward and there is less scope for genuine misunderstandings or disputes with the regulator. Without such certainty, disputes with the regulator about whether or not a particular behaviour is acceptable are more likely, as is uncertainty about the circumstances in which enforcement action will be triggered.

In addition, we are concerned that the language used in the Code is often vague or loosely constructed. This creates a risk that behaviour that is clearly within the current Code may be regarded as incompatible with the new Code and that a member carrying on practice in a fully compliant way now might be in breach under the new Code. There is real concern that both of the new Codes would give the SRA too much discretion. There is clearly a need for the SRA to provide more information and ensure that it acts in a consistent way and to make an explicit commitment to those subject to regulation that it will be consistent, fair, open, transparent and predictable about the circumstances in which it will decide to take or not to take action.

We understand that guidelines are planned and should mention the concerns of many that they are not yet available.

Specific examples of where the Code is lacking in clarity are set out in our answer to Question 13.

Question 7: In your view is there anything specific in the Code for all solicitors that does not need to be there?

No. On the basis of the partial information provided about the new regulatory framework and the SRA's approach, the Society has not so far identified anything specific in the proposed new Code that should be removed.

On the contrary, as noted in our response to Q6, we believe the Code needs more detail and guidance in order for it to be effective and provide clarity to the regulated community.

We would also reiterate that, without the full picture in relation to the new framework and the SRA's approach, it is difficult to reach a definitive judgment on the proposals.

Question 8: Do you think that there anything specific missing from the Code for all solicitors that we should consider adding?

It is not possible to respond to this question with any real certainty as we have not seen the guidelines or other parts of the proposed regulatory reforms.

However, on the basis of what has been set out so far, we have identified three issues on which the Code should be revised:

Unsolicited approaches to clients

The Society is extremely concerned by the proposed removal of Outcome 8.3 in the current Code, which states: "you do not make unsolicited approaches in person or by telephone to members of the public in order to publicise your firm or in-house practice or another business;".

Solicitors who make such unsolicited approaches to clients are not acting in the client's best interests, but rather their own. This explicit prohibition provides an essential protection for clients who are at their most vulnerable when such approaches are made – at the police station, court or prison. Its removal would undermine the protection currently provided to clients in this situation, which prohibits the solicitor from carrying out this behaviour.

The prohibition that the consultation proposes to remove also supports the Government's Duty Solicitor scheme by helping to ensure that anyone arrested can exercise their right to free legal advice from the duty solicitor. Removal of the prohibition would undermine the efficient running of the scheme.

The justification for proposing the removal of the prohibition is that it is "*covered by new 1.2 in the Code for Solicitors and new 1.1 in the Code for Firms to a certain extent.*"

The relevant clauses are as follows:

- new 1.2 in the Code for Solicitors: "*You do not abuse your position by taking unfair advantage of clients or others.*"
- new 1.1 in the Code for Firms: "*You do not abuse your position by taking unfair advantage of clients or others.*"

Clearly, the new clauses carry significantly less weight than the current explicit prohibition. We believe their wording is too weak and unclear to provide certainty to the public, members of the profession and the Legal Aid Agency that unethical behaviour is prohibited and will not be tolerated.

We therefore recommend that the Code of Conduct for Solicitors, RELs and RFLs, and the Code of Conduct for Firms should maintain the current wording of Outcome 8.3, which explicitly prohibits such unethical behavior.

Firms being reasonable or forming reasonable views

A number of references to firms being reasonable or forming reasonable views have been dropped. We would argue that if a solicitor acts reasonably but makes a mistake, it is right in such circumstances that being reasonable should not provide a defence to a request for an injunction or other mandatory order or costs. However, it would also seem unfair to make the actions of the solicitor in such a situation a potential offence that is subject to disciplinary consequences.

Systems to identify and deal with potential conflicts

We note that references to systems to deal with potential conflicts and confidentiality have been lost within the new drafting of the Codes of Conduct. We believe that this causes a problem. We assume that the omission has taken place because there would be general rules about systems. In our experience, and the case law supports this, the biggest single problem for firms in these areas is poor systems, particularly systems for picking up conflicts, or systems for establishing where special protections will be needed to protect confidential information. The SRA approach therefore, while being logical, would quite possibly be unhelpful to firms.

Undertakings

We have particular concerns about the position where a solicitor in an unregulated provider gives an undertaking to a solicitor in a regulated firm or to others who would need to place reliance on it. Undertakings have become a crucial element of the practice of law in the UK and are used to expedite matters that, in the absence of an undertaking, would cause considerable delay and inconvenience to the practitioner and the client.

Even though an undertaking relates to an individual solicitor, the Society has significant concerns regarding an undertaking provided by a solicitor employed by an unregulated provider. We believe that solicitors in a regulated firm would be highly unlikely to accept an undertaking from an unregulated provider due to a lack of protections if things go wrong.

We take the view that undertakings are sufficiently important to warrant protection in both of the codes, making clear that they are not just an enforceable agreement, but that breach can give rise to disciplinary proceedings.

Please also refer to our response to Question 5 which includes a suggested scenario

in relation to undertakings.

Question 9: What are your views on the two options for handling conflicts of interests and how they will work in practice?

The need for clarity around handling of conflicts is paramount. One particularly difficult area is conflicts relating to buyers and sellers in conveyancing transactions. We refer to our suggestion for a specific scenario to be created on this topic in our response to Question 5.

We read the two options set out in the consultation as follows:

- Option 1 largely replicates the 2011 Code, in prohibiting a solicitor from acting where there is a conflict or significant risk of conflict, for example as would exist if an individual solicitor were to act for a buyer and a seller, unless specified circumstances are met and protections are provided;

- Option 2 would narrow the ability to act given that it provides for a complete bar on acting where there is an actual conflict, and requires protections to be put in place if there is a significant risk of a conflict.

We would take the view that Option 2 would quite possibly be unworkable as it is not always possible to identify where a conflict exists. It is too restrictive and unnecessary. Because of the difficulty in identifying where conflicts exist, this option would present risks from a consumer protection perspective.

It may be helpful to set out our thinking to both options in more detail, at the same time commenting on some of the more subtle changes in emphasis:

<u>Option 1</u>

The proposed new rule 6.1 reproduces the old outcome 3.4 dealing with a conflict between the solicitor's own interests and those of the client. It is proposed that there should be an absolute bar to acting (as in the current Code). Under general law such a conflict could be waived. We are not aware of any pressure to change this.

The proposed new rule 6.2 effectively reproduces old outcomes 3.5 to 3.7, and deals with conflicts between clients. In addition to dropping indicative behaviour, it makes a number of changes to the existing rules. First (in 6.2 (a)), the old rule that if someone was to act for more than one client, the clients had to have 'a substantial common interest'. This is to be replaced by saying that the clients need both 'an agreed common purpose and a strong consensus how that purpose is to be obtained'. We take the view that this is weaker, because it allows one firm to act for more than one client on a matter even if the clients have little or no common interest in the matter. There is no explanation for the change.

A further protection has been changed (6.2(iii)). Under the old rules the solicitor had to be satisfied that it was reasonable to act for all clients. This has been dropped. We find this somewhat unsatisfactory, particularly as it would affect less sophisticated clients, who might not understand the implications of giving consent. There is a restatement of the need for the benefits to the clients having to outweigh the risks, but the old requirement was that this was something the solicitor had to have been satisfied about whereas the new requirement is a pure objective test.

Three old protections have been dropped. The first (outcome 3.7 (a)) was that the solicitor had to explain the risks of acting for more than one party and be satisfied that all clients understood this; this was similar to what happens when, for example, one spouse agrees that a house should be mortgaged to support a loan to the business of the other spouse. We would argue again that dropping this is wrong although it may be argued that no consent can be 'informed' without an explanation process (but this should be made clearer). The second (outcome 3.7 (c)) was that other than the matters for which client consent had been given there was no other client conflict. We can see that this protection added little. The third is that without specific client consent, no individual could act for more than one client on the matter. We assume that this was dropped because the issue has been picked up in the code for individuals.

Finally, these conflict rules are to apply to both firms and individuals, in more or less identical terms. But, recognising that some parts of the rule need to apply to individuals, the question remains as to how the application of the whole of the rule works? Is it to be the responsibility of each solicitor on engagement to see that informed client consent has been given? We do not foresee that this would be straightforward. It would be wrong for the senior lawyers acting to be able to just pass responsibility onto the firm, irrespective of what they know or do. We feel that more precise drafting would be beneficial.

<u>Option 2</u>

This would be a complete bar on acting where there is an actual conflict, and protections where there is a significant risk of a conflict. The protections would be (a) informed client consent in writing, (b) where appropriate, putting in place effective safeguards to protect confidential client information, and (c) ceasing to act for one or more of the clients if an actual conflict arises.

This is justified, in paragraph 64, as taking an 'approach which recognises the safeguards around the current exceptions are really about preventing potential conflicts from becoming real ones'. This is incorrect. The existing safeguards were drafted recognising that the parties may have an essentially common interest but still have opposite interests in some respects. These are just examples of a situation that arises not infrequently in a commercial law practice. We understand that when the original rule was drafted, one example which was being held in mind was a solicitor acting for all the partners on forming a partnership, or all owners, when

drafting articles of association. The clear common interest is obvious, but behind it individuals will often have different views on their personal rights in many respects. What a solicitor might typically do is say that he or she will raise the issues where interests may differ and ask the clients to agree how to deal with them and then, in effect, just be the scribe. However, narrowing the scope of the mandate in this way will not always work. Similar issues can be found in drafting a trust deed. We fear that Option 2 would create very real difficulties in these types of situations and could be a recipe for uncertainty.

Also Option 2 seems to abolish the ability in Option 1 and the current rules for a firm to act for more than one client in pursuit of the same object (often where an intermediary is doing some sort of controlled auction for shares in a company or some sort of property). We can see no reason to open this up to uncertainty.

Question 10: Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

We refer to our answer to Question 6.

Specific examples of where the clarity of the proposed new Code could be improved are set out in our answer to Question 13.

Question 11: In your view is there anything specific in the Code for SRA regulated firms that does not need to be there?

No. On the basis of the information provided so far about the new regulatory framework and the SRA's approach, the Society has not identified anything specific in the proposed new Code for SRA regulated firms that should be removed.

On the contrary, as noted in our response to Q10, we believe the Code needs more detail and guidance in order for it to be effective and provide clarity to the regulated community.

We would also reiterate that, without the full picture in relation to the new framework and the SRA's approach, it is difficult to reach a definitive judgement.

Question 12: Do you think that there is anything specific missing from the Code for SRA regulated firms that we should consider adding?

We would repeat our point that without seeing all of the guidance which the SRA intends to publish, it is difficult to respond to this question with any real certainty. On the basis of what is available, we would suggest the following:

We note the absence of 1.3 from the Code – the provision about undertakings. It is unclear whether entities should not be giving undertakings, or that an undertaking has to be attached to an individual solicitor to be enforceable.

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?

Remarks in relation to drafting on Confidentiality and disclosure

Proposed rule 6.3 in the Code of Conduct for Solicitors (and proposed rule 6.1 in the Code of Conduct for Firms) tracks existing outcome 4.1 (and its equivalent) provided the definition of client continues to cover former clients (ie by replacing "clients" by "clients or former clients". We would expect that to be the case but note that proposed rule 6.5 expressly refers to former clients so an explicit reference to former clients is also needed in proposed rules 6.3 and 6.1 in the Code of Conduct for Solicitors and the Code of Conduct for Firms respectively.

Proposed rule 6.4 (about the duty to disclose) incorporates existing outcomes 4.2 and 4.3. There is an oddity in the new rule in the version of the draft code which applies to firms, as the draft rule expressly says that it only applies to individuals. But if it only applies to individuals why does it need to be in the rule for firms? The underlying point of course is that in cases like Kelly v Cooper (a case about estate agents), the courts have made it clear that there is no general assumption that information known to one person in a firm is to be attributed to another.

We note that proposed rule 6.4 has two additions to outcomes 4.2 and 4.3. The first is that a solicitor does not need to pass on information to the client which the solicitor has reason to believe will cause the client serious physical or mental injury. This seems to apply only where the client is an individual, and not (for example) where the client is a company of which the vulnerable person is a controller or director. The second is to reflect general law about the mistaken disclosure of information in a privileged document which need not be disclosed to a client. This reflects case law. In the case of these new exceptions, saying that they are exceptions to the duty to disclose is not at all the same as saying that disclosure cannot be made, which is surely what is intended (certainly in relation to the second of them).

Proposed new rule 6.5 (not acting if to do so puts client confidential information at risk) largely tracks existing required outcome 4.4. This area is the one which has led to most of the recent reported cases on conflicts and confidentiality, although the cases do not refer to the SRA Code of Conduct. It is worth noting that the existing rule was altered some time ago to refer to having ‘information barriers which comply with the common law’. The proposed new rule just refers to measures which result in ‘there being no real risk of disclosure’. This reflects the common law and is consistent with the way in which the new Code of Conduct is drafted.

We would make a couple of points on proposed rule 6.5. The first is that having introduced a reference to former clients (which proposed rule 6.3 does not do) it

then uses the term inconsistently so that, on the face of it, a former client consent is not enough to escape the prohibition on acting, although a current client consent does. Secondly, we are puzzled why this rule, with its references to effective measures, applies to individuals?

Further points in relation to drafting: Code of Conduct for Solicitors

- The paragraph below the Principles on page 45 of the consultation, implies (when it says 'They apply to conduct and behaviour relating to your practice') that the Code does not apply to a solicitor's private life. This should be clarified.

- As worded, by comparison with the provisions in the current Code that this would replace[18], rule 1.4 could be read as meaning that the solicitor is responsible if their client misleads the court or others, or is responsible for other acts or omissions, even if the solicitor was not aware that any mischief was taking place. In light of this, we suggest that rule 1.4 should be reworded as follows:

  1.4 You do not mislead or attempt to mislead your clients, the court or others, either by your own acts or omissions or ***by knowingly*** *allowing or being complicit in another person misleading the court or others* ~~*the acts or omissions of others (including your client)*~~*.*

  We would also note that rule 1.4 must be read in the context of the wider requirement that solicitors must always act in good faith and that misleading anyone whilst acting as a solicitor would potentially breach that requirement in addition to rule 1.4.

- rule 2.4 appears to originate from the Bar Standards Board Code of Conduct. Read in isolation, 'properly arguable' could be confusing for solicitors. It might be interpreted as not being able to put forward instructions which may lack credibility, as opposed to arguments with no legal basis. We assume that guidance will clarify this point.

- rule 3.1 is poorly worded.

- rule 3.4 The term 'Client's attributes' is vague and lacking any legal meaning. It is therefore inappropriate for a Code of Conduct. Moreover, it is unclear what that word encompasses that would not be covered by "needs and circumstances".

- rule 4.2 'Others' might more helpfully read "Others, for example lenders, trustees etc."

[18] O(5.1) "You do not attempt to deceive or knowingly or recklessly mislead the court"; and O(5.2) "You are not complicit in another person deceiving or misleading the court."

Further points in relation to drafting: Code of Conduct for Firms

- In the Code of Conduct for Firms, Cooperation and information requirements section, the text needs to clarify what is meant by 'you'.

- rule 4.2 of the Code of Conduct for Firms, greater clarity is needed on what is meant by 'competent'.

- It is disappointing that rule 7.1 provides very little detail to shed light on applicable outcomes in the SRA Code of Conduct for solicitors and RELS 2017.

Finally, rule 7.8 in the Code of Conduct for Solicitors requires guidance to accompany it. The current code says that a solicitor has to act reasonably to take action. It now depends what 'remedial action' means. We also wonder if the SRA can require a solicitor to take action in these circumstances or if this falls outside its jurisdiction.

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.

There are arguments on both sides and this is an issue requiring debate and careful consideration.

Recognised bodies and recognised sole practices need to ensure compliance and, in particular, that an understanding and appreciation of professional standards and ethics are properly embedded. Arguably, by specifying COLP and COFA roles, the regulator relieves those regulated of the need to decide how best to achieve this. It has also been suggested by practitioners that the COLP and COFA roles have served to reduce the ethical knowledge and awareness of individual practitioners. This potential is mentioned in the findings section of the SRA commissioned Independence, representation and risk report, where it is suggested that the perception of COLPs and COFAs as the 'holder' of professional values raises 'the question of whether such has the potential for individual lawyers to become less aware of, and less interested in, their own professionalism, professional identity and professional obligations.[19]

However, it could be argued that those regulated should determine for themselves how they comply with regulatory requirements and the SRA should find ways of promoting and regulating individual professionalism. Alongside this, any individuals tasked with responsibility for ensuring compliance must demonstrate and maintain the necessary skills and experience, and be subject to appropriate accountability and responsibility controls.

We recommend that the SRA conducts and acts on a survey of individual COLPS and COFAs aimed at identifying specific ways of reducing the burden of reporting, while ensuring that the regulatory framework helps to promote individual professionalism, professional identity and professional obligations.

[19] Independence, Representation and Risk: An Empirical Exploration of the Management of Client Relationships by Large Law Firms: Claire Coe and Dr Steven Vaughan, commissioned by the SRA, 2015.

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?

The Society will shortly publish its 2015 Regulation Survey. Of those who responded to this survey, 91% were the Compliance Officer for Legal Practice (COLP) at their firm. The findings from the survey could inform the nature of further support for this post. Responses indicate the need for clear, unambiguous and effective regulation. In this context it is worthwhile noting the following:

- there was a decline since the 2012 survey in the proportion of firms that thought that the SRA's enforcement procedure is understood by the industry as a credible deterrent and being used in a way that serves to better protect consumers;

- compared with 2012, a smaller proportion of firms agreed that guidance supplementing Handbook regulatory rules is useful, and that principles, outcomes and indicative behaviours provide sufficient guidance on compliance obligations;

- keeping up to date with changes to outcomes and indicative behaviours was the most commonly reported problem with OFR reported by firms; and

- changes to the regulatory regime which would introduce a principles based code only with outcomes and indicative behaviours removed were predicted to negatively affect professional and ethical standards on balance (and particularly so amongst large firms).

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?

We refer to our comments in our introduction and in the sections that follow.

It is possible that some commercial firms, wishing or feeling compelled to take advantage of the liberalisations offered by the new rules may decide to split the provision of their legal operations into two entities: a traditional firm, which would continue to carry out all reserved[20] work, perhaps retaining only a small percentage of the firm's current partners, solicitors and other staff; and a new unregulated entity, which would carry out all unreserved work and employ solicitors with practising certificates as well perhaps as some solicitors without a practising certificate.

In principle, while clients of the new unregulated entity would be less protected than clients of a traditional firm there would be some cost benefits for such firms in taking such steps. The new unregulated entity would not be required to pay entity regulatory and compliance costs, practising certificate costs for non-practising solicitors, contribute to the Solicitors Compensation Fund, take out professional indemnity insurance, employ COLPs, COFAs and other compliance staff, or comply with client account rules.

Furthermore, foreseeable unintended consequences would be that the regulatory burden and cost moves across to smaller firms and sole practitioners who are less able to divide their businesses between regulated and unregulated work; as BAME solicitors are over-represented among smaller firms, this will have diversity implications. This will result in a further restriction on access to justice and increase unmet legal needs as the smaller firms service the less well off demographic.

If many firms elected to go down this route, the Regulator would have to take steps to avoid a significant reduction in income. This would seem likely to lead to higher PC and firm fees, which would have significant negative financial consequences for sole practitioners and firms that chose not to change their business model. In particular, this would be likely to have a disproportionately negative impact on smaller firms for which the cost of changing their business model was not justified by the size of their client base or the high proportion of reserved work they undertake; such firms would have to operate at a competitive disadvantage because their entire business (including reserved and unreserved work) would be subject to the regulatory regime.

In addition, this would also have the effect of making reserved activities such as conveyancing and litigation potentially significantly more expensive for consumers as

[20] http://www.legalservicesboard.org.uk/can_we_help/faqs/Reserved_Legal_Activities.htm

the payment base for regulatory costs to be captured would be very much smaller than now. In addition, regulatory costs would be disproportionate for small and medium-sized firms, which generally carry out a mix of reserved and unreserved activities and may not have a big enough client base/business to justify splitting their business into two separate entities, one regulated and one not. Small and medium sized firms would therefore be likely to have to operate at a competitive disadvantage because their entire business (ie reserved and unreserved work) would be subject to the regulatory regime and its costs, whereas unregulated entities would fall outside this and have lower costs as a result. Ironically, the largest law practices, servicing the largest corporates, would be likely to pay proportionally less than the smallest firms servicing individual consumers; the proposals therefore threaten the viability of established small firms, which may result in forced close down and insolvencies with negative consequences for the communities they serve, especially where the firms concerned conduct legal aid work - exacerbating the ability of vulnerable communities to access justice. There would also be negative implications for competition and for the reputation of the profession.

Another unintended consequence is that solicitors may circumvent the restriction on unregulated entities offering reserved work by making applications to judges to act as paid McKenzie Friends on behalf of their clients. The right to appear before and address a court, including the right to call and examine witnesses, and the right to carry out the conduct of litigation are reserved legal services, and as such it can only be exercised lawfully by a lawyer who is regulated by an approved regulator.

A McKenzie Friend can ask the court to be allowed to conduct litigation if the litigant in person is unable to do so. This means that under the current proposals a solicitor who works in an unregulated firm (who under the new rules would not be able to exercise rights of audience by virtue of being employed in an unregulated entity) can ask a judge to allow them to conduct litigation as an unregulated McKenzie Friend. Faced with qualified solicitors making requests to act as paid McKenzie Friends, Judges may be inclined to treat such applications favourably to avoid dealing with the scenario that the case is run by a litigant in person with the consequential impact that has on the length of the case and the quality of the legal arguments and process. However, this potential workaround would inevitably sow further confusion for both consumers and those working within the legal profession, and inevitably degrade the position of the solicitor as an officer of the court, as well as erode legal professional privilege.

It also raises the question as to whether a solicitor who is permitted by the Judge to work in this capacity should be regulated for that work. The Judicial Executive Board are currently considering prohibiting those McKenzie Friends who are allowed to litigate from being able to claim costs from the other side. If this were to happen it would further confuse the status of solicitors who apply to have the same status as a McKenzie Friend who gains permission to litigate.

There appears to have been no analysis of the list of the consequential risks that

would result from allowing solicitors to deliver non-reserved legal services to the public through unregulated providers comprehensively identified in Table 1 of the Economist's report. It would be useful to have an analysis of how these risks would be mitigated.

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?

Not applicable.

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?

We agree with the 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 authorised entity. We would be concerned about relaxing this provision and thereby allowing the creation of structures that would avoid the requirement for entity regulation altogether and allow solicitors to provide reserved legal services on a consultancy/freelance basis. Any such relaxation would put clients of sole practitioners outwith current protections for clients and consumers and create consumer confusion.

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?

Current Rule 12 effectively requires that a solicitor needs to have three years Post-Qualified Experience (PQE) and to have undertaken a management course before they are able to set up a business as a sole practitioner. This requirement overlaps to a certain extent with the authorisation rules, which allow the SRA to assess the skills and knowledge of an individual of an applicant. However, Rule 12 sets out a clear requirement about the experience an applicant should have before setting up a new firm.

We are surprised that the consultation states that data analysis indicates newly qualified solicitors do not pose a significant risk to the delivery of a proper standard of service and would be interested to see this data. Current rules prevent newly qualified solicitors setting up in business on their own and therefore we are not clear what evidence would be available about their ability to deliver proper services in this type of situation. Furthermore, research has indicated that those who have been practising for less time are more likely to have complaints raised against them, indicating experience is a factor in complaints being raised against solicitors (Pearn Kandola 2010, p30).

We agree that the current requirement to undertake a 12 hour unspecified course on management skills may not be effective. However, lack of understanding of regulatory requirements and particularly the accounts rules is often the cause of solicitors appearing before the SDT following serious regulatory failings and in many cases loss of client money. Making sure that those setting up a new firm have a good understanding of the regulatory requirements, whether it is through a prescribed course or some other method, would seem to us to be essential.

We believe that some form of the 'qualified to supervise' rule should remain, although we agree it would be sensible to move any requirements to the authorisation rules. We believe that there should be a clear rule that prevents newly qualified solicitors from setting up a firm until they have sufficient experience and that those wishing to set up a firm should be required to demonstrate an adequate knowledge of the regulatory requirements.

In considering this question, the Society has been mindful of the conclusions of the independent, comprehensive case file review commissioned by the SRA 'to identify whether there is disparity in the way the SRA applies its policies and procedures in dealing with BME practitioners as compared to others with a view to identifying

potential improvements to such practices, policies and procedures to maximise fairness and consistency…'[21] The current proposals would seem to contradict the findings of that report.

[21] http://www.sra.org.uk/sra/equality-diversity/reports/independent-comparative-case-review.page

Question 20: Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

We believe that it is crucial that consumers understand the protections that they have with regulated provider versus non regulated providers. The proposed new Code of Conduct for Firms does not include any requirements in relation to this matter, and we recommend that the requirement set out at paragraph 8.9 of the Code of Conduct for Solicitors is mirrored in the Code for Firms.

Prospective clients should be clear about the protections in place when they decide to engage a solicitor. Outcome 8.9 of the SRA 's proposed Code of Conduct for Solicitors requires the solicitor to 'make sure that clients understand whether and how the services you provide are regulated and about the protections available to them'. This requirement does not differ substantively from Outcome 1.7 in the current Code of Conduct, which applies to firms and solicitors: 'you inform clients whether and how the services you provide are regulated and how this affects the protections available to the client.'

The SRA asks whether it should require firms to display 'detailed' information about consumer protections. The meaning of 'detailed' is not explained. It is therefore not clear under what circumstances firms could be confident that they have met the requirement. We would urge the SRA to issue guidance for firms on the information that should be displayed, including the level of detail required and expectations as to the prominence of the information presented. This could be in the form of case study examples, to aid solicitors in considering how to present information on consumer protection to the public.

We note the fact that the SRA is only able to impose any requirement of this kind on regulated firms highlights an imbalance between the information that might be available to consumers who use unregulated legal service providers and which would be available to clients of regulated firms.

While the SRA does not have any power to require unregulated entities to display information and the protections available to consumers, it does have a duty to ensure that its actions do not increase consumer confusion.

Question 21: Do you agree with the analysis in our initial Impact Assessment?

Question 22: Do you have any additional information to support our initial Impact Assessment?

The initial impact assessment provides an overview of the thinking behind the changes proposed in the consultation but there is limited empirical evidence to back up some of the assumptions made in the assessment. A comprehensive equality assessment has not yet been made and is essential before any of the proposals are adopted.

Please see Appendix 1 for our detailed analysis of the initial impact assessment.

Code of Conduct for Firms

The new Code is designed to make it easier to comply and reduce the burden of regulation for firms. However for smaller firms, in particular, good guidance will be essential to help make it easier to comply. Alongside this is the need to have in place, and well understood, a credible enforcement approach. Without these, there is a risk that the new code will not reduce the burden on small firms but, on the contrary, will increase the burden.

The current approach to guidance is patchy and while there are good examples such as the recent toolkit for continuing competence which has been widely welcomed, the guidance on consumer credit left many questions unanswered. It would be helpful to see the guidance that will be made available in order to assess whether it will plug the gap for small firms left by the removal of more detailed rules and indicative behaviours, as soon as possible.

Where a regulator provides guidance and toolkits, there is a risk that they quickly become understood as regulation and treated as such, stifling innovation and adding to costs. However, that risk has not been identified in the assessment. There is no information on how the proposals would be enforced, which would help to assure the profession and the public that the regulations would be enforced in an effective and proportionate manner.

The current enforcement function was previously identified as a problem area in 2012/2013 by the LSB and is still not rated as satisfactory. Given the ongoing issues and the importance of the enforcement function to the success of these changes, it would be helpful to have assurance as to how performance in this function will be improved.

It is noted in the consultation that regulatory changes may create some costs. However, there is little indication of the likely scale of these impacts. This is an area whether further work is needed, to ensure the costs do not outweigh any benefits.

One of the benefits highlighted is that the new Code will be online, freely accessible and searchable. As this is the case with the current Code, we do not believe this can be seen as a particular benefit of a new Code.

Changes in Practice Framework Rules

One of the main drivers behind the changes in the PFR is the concept of unmet legal need. This has been exemplified in the impact assessment by the small proportion of people and firms seeking advice about a 'legal' matter and the number of people without wills. Research indicates there are number of reasons why people do not seek legal advice, cost being only one of them. Many people are happy to resolve their own 'legal' problems, indeed there has been a Government drive for them to do so, e.g. raising of small claims limit, creation of Ombudsman etc. Others do not perceive a problem as being a 'legal' problem. Similarly, the reasons for people not having a will are varied, with the reason cited most often, is that 'an individual has nothing to leave'. There is no doubt that for some the cost of legal advice is a factor in not seeking advice but the SRA provide no empirical evidence that:

- alternative legal providers will enter into markets where there is significant unmet legal need;
- services will be provided at a significantly lower cost by unregulated providers.

The scenarios provided on the possible impacts in the market are limited at best and do not appear to take account of information available on the unregulated market. For instance, the SRA considers it likely that will writers will employ solicitors to provide legal advice through their firms. However, the vast majority of specialist will writers are small providers or sole practitioners[22]. Similar assumptions are made about unregulated providers carrying indemnity insurance, while this is common in certain areas of the unregulated market, this is not the case in other areas (Ibid).

There is an assumption that if the regulatory requirements are removed, alternative legal service providers will enter the market and innovate which will in turn drive down costs and reach new consumers. In reality, the CMA's initial assessment is the regulatory framework is not inhibiting innovation.

The assessment does not recognise the serious risk to consumers of these new arrangements. There is a limited recognition that some consumers may suffer as a result of a lack of client protections within alternative legal providers. No evidence is offered as to how this conclusion has been reached. Nor, as noted above is there any clear quantification of the benefits.

[22] Unregulated Legal Service Providers: Understanding supply-side characteristics, p 17 https://research.legalservicesboard.org.uk/wp-content/media/Economic-insight-in-depth-unregulated-research.pdf)

The SRA recognises that there may be some impact on smaller firms, who may not be able to take advantage of the reforms either for logistical reasons e.g. size; monetary reasons e.g. unable to invest in setting up a new business and lack of expertise. The suggestion that the rational response is for firms to close or sell their businesses is unhelpful and in itself may create an unmet need. There must be a risk that reserved legal services deserts are likely if these proposal are implemented.

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?

The Law Society does not support the proposal for solicitors to provide certain legal services through alternative legal service providers for the reasons set out in this response. Clearly, client money and assets need to be protected at all times and in all circumstances.

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?

The consultation proposes that, in line with the arrangements for solicitors working in alternative legal services providers (ALSPs ie unregulated providers), in-house solicitors and solicitors in special bodies should not be permitted to hold client money in their own name. This means that there would be no rules/protections with respect to the handling of client money in these entities[23]. There is, however, a distinction between solicitors working in special bodies and in-house solicitors[24]/solicitors working in ALSPs. In the former, in contrast to the proposed position with in-house solicitors/ALSPs, solicitors are able to deliver reserved legal services direct to the public. This brings the authorised person within the scope of legal services specific regulation. Reserved activities generate a significant proportion of the claims against solicitors and, as such, carries a higher risk profile requiring the application of proportionate protections. It should be noted that special bodies can deliver identical services to traditional firms.

It is also noteworthy that special bodies play a distinct role in the legal services market, in that they particularly provide legal services to vulnerable people. Any disparity in safeguards offered by special bodies will create an inconsistency in the level of consumer protection offered to vulnerable clients. We accept that protection should be proportionate to risk (including tailoring regulatory measures to reflect client base) and should not impose unnecessary burdens but consider that solicitors working for special bodies should be permitted to hold client money personally and be subject to the requirements of the Accounts Rules.

In line with the fact that in-house solicitors and ALSPs will be permitted to only offer non reserved legal services to the public and in recognition of the fact that the regulatory net is based on reserved activities, we agree that solicitors working therein should not be permitted to hold client money in their own name.

[23] The SRA's impact assessment details that it has granted waivers to its current rules to permit businesses employing solicitors in-house to hold client money – so this is a live issue.
[24] In-house solicitors offer, and will continue to offer, reserved legal services activities but only do so in relation to their employer – the SRA proposal for change is that they could in future provide non reserved legal services to the public.

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? If not, what are your reasons?

We have discussed elsewhere in this response our concerns relating to the SRA's proposal to allow solicitors to practise from unregulated entities. In the event that the proposed framework is established however, we agree that if solicitors operating from unregulated entities are not required to hold professional indemnity insurance (PII), their clients should not have access to the Compensation Fund. It would not be prudent to open the Fund to claims arising from work done by solicitors in unregulated entities, which are not subject to the Accounts Rules, Code of Conduct for Firms, and do not have mandatory PII protection which is itself a driver of effective risk management. Where work is not carried out through a regulated firm, clients are arguably exposed to much greater risk due to the lack of these controls and regulatory oversight. Denying access to the Fund for these clients guarantees that the Fund cannot be depleted by a potentially significant pool of claims. The Fund is owned by solicitors and its reserves are a result of contributions they have made subject to the existing rules confining payouts to claims arising from work carried out within a regulated firm.

Despite this, we do recognise the significant decrease in consumer protection and other practical issues that will arise if clients of solicitors working in unregulated entities do not have access to the Compensation Fund. We have explored these issues in more detail below, as we are concerned that the SRA has not fully considered all the repercussions of allowing solicitors to practice from unregulated entities, including the impact on the Compensation Fund.

The consultation proposes that clients of solicitors working in unregulated entities should not have access to the Compensation Fund on the basis that their solicitor would not be able to hold client money or carry out reserved work. However, it is not the case that claims to the Fund are solely linked to misuse of client money, breaches of the Accounts Rules (which apply only to firms not regulated by the SRA) or reserved work. A gap in consumer protection will be created where solicitors commit fraud when carrying out unreserved work (to take as examples: deliberately selling ineffective family trust deeds, forging documents, or convincing a client to alter a will in order for the solicitor to inherit money) as the client would not be eligible to claim from the Compensation Fund in relation to this loss. The SRA's most recent published analysis of claims paid by the Compensation Fund[25] does not include a full breakdown of the areas of work from which the claims arose, and it may be that the SRA does not collect data at this level of detail. Without this information, there cannot be any proper consideration of the potential detriment to consumers of removing access to the Compensation Fund in relation to claims arising from unreserved work.

[25] Economic Insight - SRA Compensation Fund review (2014)

The consultation states that there is no objection in principle to allowing consumers to trade off the protections they receive (including access to the Compensation Fund) where they perceive they receive benefits in relation to this trade off, such as reduced prices or greater accessibility to a service.[26] However, a crucial related issue in allowing consumers to exercise such preferences is whether consumers are able to appreciate or understand the differences in consumer protection between different providers. Research suggests that consumers often do not recognise these distinctions.[27] One could therefore question the wisdom of removing access to the Compensation Fund for consumers who may not realise the importance of this protection until the time they come to make a claim. As discussed in detail in response to Question 27 below, requiring solicitors to provide information to clients on the protections available may not overcome the confusion created by the SRA's proposals and the potential for significant consumer detriment of removing access to the Compensation Fund. In addition, we are unaware of any economic analysis which confirms the changes in the regulatory regime will result in reduced prices and/or greater accessibility of service.

The SRA will also have to address the practical implications of removing access to the Compensation Fund for clients of solicitors working in unregulated entities.

First, the SRA's approach to calculating contributions to the Compensation Fund (currently £548 for firms, and £32 for individuals) will have to be reviewed if solicitors operating from unregulated firms would no longer have to contribute. Currently, 50% of annual Compensation Fund contributions are paid by firms, and 50% by individual solicitors. Contributions to the Compensation Fund would be significantly reduced if substantial numbers of solicitors chose to operate from unregulated firms (and hence did not pay the individual solicitor levy), and/or even a relatively small number of large firms, due to the higher percentage of non-reserved work they carry out, moved non-reserved work to an unregulated provider (and hence did not pay the firm contribution).

However, it is vital that the remaining contributions to the Fund are sufficient to meet the demands on it. It is the long standing approach of the Fund to maintain a minimum reserve fund as a contingency against unexpected numbers of claims or unexpectedly large claims, which includes forecasting contribution requirements to avoid the position of the contribution spiking and then dropping significantly in consecutive years. Given that the impact assessment notes how little can be known about the extent to which solicitors may choose to operate from unregulated entities/firms may decide to hive off non-reserved work, it is difficult to assess to what extent Fund contributions will be impacted, and how the contributions structure should be altered. It would clearly be undesirable to change contribution structures on a continual basis to take account of changing numbers of firms and

[26] Looking to the Future - flexibility and public protection, Annex 6, p.97
[27] Looking to the Future - flexibility and public protection, Annex 5, pparagraph 28

individuals contributing to the Fund. Indeed, it is difficult to envisage how funding arrangements can be amended to enable fair contributions. Smaller firms, who due to the nature of the work they undertake are unable to hive off unreserved work to another entity, would most likely end up paying increased contributions to make up the shortfall to the Fund caused by larger firms and their solicitor employees moving out of SRA regulation. It is problematic that the review of Compensation Fund contributions will not occur until a later date. This makes it very difficult to obtain a full picture of the impact of the proposals and to able to comment fully.

Second, it is unclear how contributions would be collected when a solicitor moves between regulated and unregulated firms. The administration involved tracking solicitors and collecting levies on a tranched basis would clearly not meet the objective of reducing regulatory burdens on solicitors, or administrative costs of the regulatory regime which are ultimately borne by consumers.

Third, the proposed framework would beg the question as to why a solicitor in a regulated firm who carries out only unreserved work and does not hold client money, should have to contribute to the Fund. While it would be impractical to police the collection of contributions in this way, this in addition to the issues raised above demonstrates inconsistencies in the proposed approach and raises questions about the fairness of the proposals in the way that regulation will apply to individuals solicitors and different profiles of firms.

Question 26: Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

We do not agree that individual solicitors should be able to operate from unregulated entities without mandatory PII cover. We are strongly opposed to the proposal in principle.

All work done by a solicitor in private practice is currently covered by the firm's PII. The current arrangement provides unrivalled protection for the consumer, providing assurance that if anything goes wrong they will receive fair settlement, regardless of the type of work undertaken or the circumstances in which the work is carried out. It is unacceptable for individuals to be left destitute or without some level of redress arising from a solicitor's negligence. Mandatory PII cover is fundamental to both consumer protection and the maintenance of public trust in the profession.

There is also a potential risk that a firm with a poor claims record that would affect its ability to obtain PII could be attracted by the proposal as it would allow them to carry out unreserved work from a new unregulated entity without PII in place. Arguably these are the firms whose clients would need the protection the most. We also struggle to understand how solicitors would be able to comply with Principle 6 to act in the best interests of their client, without PII cover in place. It is clearly not in the best interests of the client for their solicitor to be uninsured, as this impacts the client's ability to recover any losses. If the SRA agrees that in order to comply with principle 6, solicitors would in reality be compelled to purchase PII, one must question why the SRA's proposals do not attach PII requirements to individual solicitors. We request clarity from the SRA on this point.

Part of the SRA's reasoning for this proposal is that it would be unclear how a solicitor in an unregulated provider, who may be working as part of a team, is supposed to separate out their own insurance requirements from those of their team. We would argue that it is precisely the fact that the SRA is seeking to differentiate and separate out the role of a solicitor, their high professional standards and regulation of the solicitor from the unregulated entity itself, that has necessitated addressing the issue of individual insurance.

As demonstrated in response to Question 27, the proposal creates unnecessary complexity and uncertainty, and any possible benefits would be outweighed by the significant reduction in client protection.

Question 27: Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

Under the SRA's proposals, solicitors carrying out unreserved work from unregulated entities would have two options:

1. Choose to have no PII cover

Given that there is no requirement to do so, solicitors working in an unregulated entity could choose not to obtain PII. As PII is one of the most costly elements of regulation, there is a real possibility that some solicitors may choose to operate uninsured. This would be particularly alarming in the case of a sole practitioner. Solicitors who choose to operate uninsured without due regard to the personal liability they could incur in the absence of PII cover, would be placing themselves in a potentially ruinous situation. PII protection does not exist purely for the benefit of the public, but also for the benefit of solicitors, as confirmed by the House of Lords in *Swain v The Law Society*.[28]

There would also be nothing to prevent a solicitor's terms of engagement specifying that they cannot be sued for an amount greater than the value of the retainer. This dilution of clients' existing financial protections is not acceptable. Consumers could be left facing hardship as a result of the actions of solicitors regulated by the SRA. The reputation and strength of the solicitors' profession as well as the credibility of the SRA would suffer if clients go uncompensated as a result of a solicitor having no PII cover. This damage would not be possible to repair.

The SRA's proposal is made all the more alarming when one considers the amount of claims by solicitors' firms on their PII that could relate to unreserved work. It is clearly not in solicitors' or clients' interests for there to be no insurance cover in relation to work which, although unreserved, still carries significant exposure to claims.

As stated in response to Question 26, we also struggle to understand how solicitors would be able to comply with Principle 6 to act in the best interests of their client, without PII cover in place.

The Law Society considers that all solicitors in all circumstances should be subject to mandatory PII cover, and would urge the SRA to reconsider the proposal.

2. Choose to obtain PII cover

Solicitors working in an unregulated entity and such entities themselves may wish to

[28] [1983] 1 AC 598

purchase insurance against negligence claims in any event.

A solicitor in an unregulated entity could try to obtain cover on their own behalf, or the entity might take out insurance to cover all the solicitors it employs. In both of these scenarios, there is uncertainty as to the availability, suitability, and affordability of PII that could be purchased on the open market.

First, the wide SRA minimum terms and conditions (MTC) protection would not be replicated in standard commercial PII arrangements. While solicitors' clients are currently protected by comprehensive PII cover (which also includes run off cover), the gaps in coverage between the SRA MTCs and a standard PII policy negotiated by the solicitor or entity would leave solicitors' clients with less protection than the current entitlement, or than when instructing a solicitor from a regulated entity. The SRA has not provided sufficient justification for reducing consumer protection in this way and the resulting asymmetry is confusing.

Second, the potential cost to solicitors or the unregulated entity of purchasing PII is difficult to estimate. Underwriters write risk on the basis of claims exposure. The market currently prices in risk to premiums, so firms with low exposure by reference to the work they undertake (e.g. crime, legally-aided work and employment law) already pay lower premiums than firms undertaking high risk work (e.g. conveyancing). If a firm carrying out predominately unregulated work chose to move out of SRA regulation, there may be limited scope for premium reduction because the risk remains unchanged. Moreover, participating insurers take comfort in the fact that those they insure are SRA-regulated and that the SRA has the power to intervene if necessary. The PII regime plays a role in regulating solicitors as firms with poor claims records will face higher premiums and could face difficulty obtaining insurance at all. Insurers may consider that the claims exposure is increased in an unregulated entity where there is no regulatory oversight of business processes. In the case of solicitors purchasing PII on an individual basis, they would also lose the benefit of lower premiums as a result of the ability to bulk purchase PII to cover the work of the entire firm.

It is therefore by no means certain that unregulated entities or individual solicitors would be able to purchase PII at an affordable cost. Indeed, the SRA's impact assessment makes no attempt to forecast the availability and price of PII for those who would wish to purchase it. There is no analysis or evidence to show that premiums would be reduced; or that reduced premiums would in any event provide greater access to justice as a result. The proposal risks creating considerable consumer detriment for an uncertain and unquantifiable benefit arising from an aspiration for increased access to legal services.

Third, the proposal appears to be based on the assumption that clients will understand the fact that their solicitor does not have insurance, or is insured to a lesser degree than that required by SRA-mandated insurance. Clients differ significantly in their experience of acquiring legal services and their ability to

understand and specify their preferences and requirements. Business consumers who are regular users of legal services may understand their protections and even actively seek to determine whether the level of protection is appropriate for their matter, but the same cannot be said for infrequent, unfamiliar users of legal services. Indeed, there is evidence to suggest that the consumer protection landscape in the legal services market is poorly understood.[29] There is considerable scope for consumer confusion through a mistaken belief that in gaining advice from a solicitor through an alternative legal services provider they are subject to the same protections as if that solicitor worked in a regulated provider. The proposals will only serve to increase the confusions around the different protections attached to services, and lead to decreased confidence in the legal profession and irreparable damage to its standing.

This confusion will not be overcome by requiring solicitors in these circumstances to make sure that their clients understand whether and how the services they provide are regulated and the protections available to them (proposed Outcome 8.9). It is alarming that the case study provided by the SRA[30] suggests that Outcome 8.9 would be met if the solicitor explained the business does have compulsory insurance, but does not state the level of such cover. There would be nothing to prevent a solicitor or unregulated entity from obtaining cheap and ineffectual 'nominal' cover simply to be able to inform clients that they hold PII.

The consultation states that there is no objection in principle to allowing consumers to trade off the protections they receive under different service/provider models where they perceive they receive benefits in relation to this trade off, such as reduced prices or greater accessibility to a service.[31] Again, this incorrectly assumes that consumers understand the difference between regulated and unregulated entities, and appreciate differences in consumer protection in each case, while evidence suggests they may not. [32]

[29] Looking to the Future - flexibility and public protection, Annex 5, pparagraph 28
[30] Looking to the Future - flexibility and public protection, Annex 9, page 204
[31] Looking to the Future - flexibility and public protection, Annex 6, page 97
[32] Looking to the Future - flexibility and public protection, Annex 5, pparagraph 28

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?

Yes. The Society believes that regulation should apply consistently and fairly to the provision of legal services in order to protect consumers. It would not be in the consumer and the wider public interest for solicitors to offer the same service but with different standards of consumer protections according to whether they were employed by a regulated firm or by a Special Body.

Special bodies play an important role in providing legal services to vulnerable people and it is especially important that clients entrusting matters of significant importance to their solicitors have access to appropriate redress. If reserved activities undertaken by Special Bodies fall within SRA regulation, these bodies should be required to maintain PII.

Question 29: Do you have any views on what PII requirements should apply to Special Bodies?

Under the current Practice Framework Rules, solicitors employed by Special Bodies must have a 'reasonably equivalent' level of cover to that required by the SRA Indemnity Insurance Rules. This provides clients of Special Bodies with equivalent protection to that provided to clients of SRA-regulated entities.

The Law Society believes that clients of Special Bodies should be entitled to PII protection in the same way as clients of traditional law firms. Requiring Special Bodies to obtain MTC level PII has the advantage of ensuring that there is consistency in the level of consumer protection offered to clients.

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?

Question 31: Do you have any alternative proposals to regulating entities of this type?

The Society's concerns about the proposal that solicitors should be permitted to deliver non-reserved legal services to the public through alternative legal services providers would not be overcome by the imposition of a threshold on non-SRA regulated firms. Indeed the introduction of an arbitrary threshold could make matters even more confusing for clients. Our concerns around the proposal to allow solicitors to work in unregulated providers and its impact on client protection and the reputation and standing of solicitors would remain for these firms. In conclusion, the Society believes that regulation should apply consistently and fairly to all legal services (individuals and entities) in order to protect buyers of legal services and it is not in consumer and the wider public interest for there to be regulated and unregulated providers offering the same service but with different standards of consumer assurance and protections.

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?

It is not clear what the proposed position is on intervention into a solicitor's individual practice within an unregulated entity. The SRA has the power to do this. However, as has been highlighted, it could prove to be difficult to untangle the practice of the solicitor and the unregulated entity thus making this difficult. It would therefore seem unlikely that the SRA would use this power often. However, the SRA does not appear to be ruling out the possibility.

We are unclear how the SRA's additional powers to request information could help it in investigations where intervention was not an option, for the reasons described above. We consider that the same issues would arise as to the information owned by the unregulated entity (and as such presumably outside the jurisdiction of the SRA) and that owned by the solicitor.

Question 33: Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

We agree that all work within a recognised body or an RSP should remain regulated by the SRA.

Consultation: Looking to the future - flexibility and public protection

Consultation questionnaire form

This form is designed to be completed electronically—in MS Word. Please save it locally before and after completing it.

INTRODUCTION

The Monmouthshire Incorporated Law Society represents solicitors and other legal professionals across South East Wales.

We respond to public consultations on matters which affect the professional lives of solicitors in our region and we welcome the opportunity to respond to the SRA's Looking to the Future Consultation.

OPENING COMMENTS

We disagree with the proposals set out in the SRA's "Looking to the future" consultation. We don't believe that the SRA has made a convincing case for change, particularly with the evidence that there is "unmet legal need". This is more than the response of a profession arguing for the status quo, we have significant concerns that the proposals would:

1. leave clients and consumers with less protection; and

2. produce a two tier profession with more client confusion.

We are also concerned that solicitors will be subject to the new Code of Conduct but the organisations for whom they work may not be subject to the Code which is likely to cause confusion for solicitors and may also lead to vulnerable solicitors, especially, young solicitors coming under intolerable pressure from their non-regulated employers.

In our view, the proposals have serious adverse implications for :

(1) client protection

(2) legal professional privilege

(3) professional supervision

(4) competition and

(5) the standing/reputation of the solicitors' profession.

There are also areas of ambiguity which will need to be clarified.

MAIN CONCERNS :

1. Two tier market : solicitors who work in a regulated entity will be subject to different rules and client protection to those working in a non-regulated entity.

2. Advice provided by a solicitor within a non-regulated entity will not be subject to legal privilege : this could undermine the standing of the profession and will create confusion.

3. Solicitors working for a non-regulated entity may not be required (or able) to obtain professional indemnity insurance and clients will not have the protection of the Compensation Fund or Legal Ombudsman if matters go wrong.

4. Newly qualified solicitors may not have access to appropriate or meaningful supervision within a non-regulated business, nor will they be able to discuss regulatory issues with a COLP/COFA. This will place newly qualified solicitors at risk as well as their clients. This could also adversely affect the reputation of the profession.

5. Unregulated entities will not be subject to SRA rules relating to conflicts and confidentiality whereas the individual solicitor will be, which will create confusion. This also leaves regulated firms at a potential disadvantage. Further it removes protection for clients in unregulated entities which are considered important for regulated firms.

6. Whereas the overall proposals will undoubtedly shorten the 'rule book', solicitors prefer clarity as to what is and what is not acceptable. There is a danger that the SRA may disagree with the solicitor's interpretation of the rule where the provision is ambiguous.

7. By simplifying the Solicitors Accounts Rules as proposed there will be a greater risk of uncertainty as to whether a firm is compliant.

SUMMARY :

Whilst the SRA's purpose is to simplify the Handbook, there are many ambiguities which will create confusion, misunderstanding and/or misinterpretation. Client protection with unregulated entities will be significantly reduced (eg PI insurance, Compensation Fund access, LeO complaint handling). Clients could have different protections for the same work depending on who they instruct and many clients are unlikely to understand this, especially if unregulated entities are under no obligation to provide this information.

We are concerned that this may not be in the interests of the clients, the public or the profession.

Question 1

Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

Since the requirement was abolished for trainee solicitors to have enrolled as student members, the first time a trainee's suitability is tested is at their application for admission. We believe that this creates uncertainty after a firm has expended money and resources in recruiting and training a candidate. We would prefer to have students admitted as members and satisfy the test before they commence their period of recognised training.

Question 2

Do you agree with our proposed model for a revised set of Principles?

We do not agree with the proposed model for the revised set of Principles in particular the decision to reduce the ten mandatory principles to 6. We note that the loss of current principle 5 (provide a proper service to your clients) and current principle 10 (protect client money and assets) may cause some concern that the levels of service to clients and the protection of clients is diminished (something which is echoed throughout the consultation).

The proposed new Codes are much shorter than the current Code and with the removal of Indicative Behaviours the importance of the Principles becomes that much greater in ensuring that all solicitors adhere to consistent standards of ethical behaviour and integrity

Question 3

Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

We share the Law Society's concern that the wording of the new Principle 2 does not refer to the importance of regulated individuals' behaviour in a way that retains public trust in them as individuals.

We agree that this should be clarified and support the Law Society's proposal that the new Principle be redrafted as follows: **New Principle 2**: ***Ensure that your conduct upholds public confidence in you and in other regulated individuals and firms***

We also have a general concern relating to the removal of some of the other existing Principles resulting over-reliance on the general duty to act in each client's best interests

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?

We are concerned that the removal of the overarching principle to protect client money and assets (current principle 10), to act in the best interests of the client (current principle 4) and to provide a proper standard of service (current principle 5) are to be replaced by the suggested widely-encompassing "to act in the best interests of your client" (proposed principle 6). We are concerned that the protections for the client and levels of service may be diminished especially as there are further reductions in protections for clients throughout the consultation. We also believe that the duty to keep clients' affairs confidential is of such fundamental importance that it merits the Principle being retained rather than falling back on the more general duty to act in the best interests of each client.

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?

We agree with the Law Society's response to this Question. A thorough developed suite of scenarios would be very useful. In the absence of indicative behaviour our members would gain considerable benefit from them

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?

However, we are concerned that the language of the draft Codes is imprecise and we would welcome clarity on the obligations of the firm versus the individual.

Whilst we agree that that the Code has been shortened, we are concerned that the removal of "Outcomes" and Indicative behaviours will lead to a scenario where solicitors will find themselves unsure of their regulatory responsibilities. We are concerned that whilst the approach leads to a Code which is easier to read and digest, we are aware that many solicitors would rather have a definitive approach where compliance is clearer. We are concerned that the likely "grey areas" will lead to greater disputes between solicitors and the Regulator (increasing the costs of regulation). We are also concerned that there is the possibility where solicitors who are fully compliant now, may potentially be in breach after a new code is introduced as it would give the Regulator the unpredictable power to determine whether something is a breach.

In addition, we are concerned that the proposals will result in two tiers of solicitors i.e. those working in a regulated entity and those working in an unregulated entity with the consequence of risks to consumer protections and which will create confusion and consequent damage to the reputation and standing of the profession.

Question 7

In your view is there anything specific in the Code that does not need to be there?

There is some overlap between the two draft Codes and not all the provisions are consistent between the two, especially in areas such as conflict, complaints and client information/identification. There is also a lack of clarity on the application of the rules on LPP to unregulated entities. If this isn't addressed, it is not clear which would take precedence when such inconsistencies arise.

Question 8

Do you think that there anything specific missing from the Code that we should consider adding?

We note that at paragraph 8.9 of the proposed code for individual solicitors, a solicitor is required to provide details to clients about the protections available to them, we wonder whether it should be incumbent upon those providing advice outside of a recognised body to state what protections are not available to the client (in particular the lack of access to the SRA Compensation Fund and lack of requirement for PII cover).

It is difficult to address some of the questions in this consultation without seeing the associated guidance notes which the SRA has not yet provided.

Question 9

What are your views on the two options for handling conflicts of interests and how they will work in practice?

It is noted that unregulated organisations will not be subject to the SRA rules of conflict, although individual solicitors will. We are concerned that this would mean that unregulated entities could act in circumstances where regulated entities cannot. Whilst this obviously creates a significant disadvantage for regulated firms, we are also concerned that there is a risk of confusion to consumers and a lack of fundamental consumer protection for the clients of unregulated entities. We believe that the current rules on conflict are there for a reason and the dilution of these rules would significantly reduce client protection.

We believe that clarity is essential in the handling of all conflicts, but particularly in conveyancing transactions. The consultation sets out two options – the second option of a complete ban is in our view unworkable, as it is overly restrictive. So we will focus on option one which, in the main, largely replicates the 2011 Code, in prohibiting a solicitor from acting where there is a conflict or significant risk of conflict. However, In addition to dropping indicative behaviour, it makes a number of changes that weaken the existing rules. We feel that these safeguards should be reinstated and more precise drafting is required.

Question 10

Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

We believe that the comments in response to Question 6 above apply equally here.

Question 11

In your view is there anything specific in the Code that does not need to be there?

Please see our response to Question 7 which applies equally here.

Question 12

Do you think that there anything specific missing from the Code that we should consider adding?

We are aware that our members are concerned with the ongoing and real problem of "touting" for clients. We are concerned that there remains nothing in the Code which makes any reference to this being prohibited (indeed the publicity section of the current Code does not appear to have been repeated). We are aware that some of our members would welcome a more robust approach being taken in respect of this ongoing problem.

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?

We are generally concerned that the language of the Codes is imprecise and the removal of Outcomes and Indicative Behaviours will lead to greater uncertainty amongst solicitors in how the Codes should be interpreted.

We have concern about some specific clauses notably, the potential for conflict between the two Codes where they overlap in areas such as conflict, complaints, client information/identification and LPP.

We also agree with the specific points raised by the Law Society with regard to the drafting of the clauses set out within their response to this question.

Question 14

Do you agree with our intention to retain the COLP and COFA roles for recognised bodies and recognised sole practices?

We agree that the roles for COLP and COFA should be retained for recognised bodies although we question their value to sole practitioners. We also note that there will be no requirement for non-regulated entities to have COLPs and COFAs. We are concerned that the individual solicitor who works within a non-regulated entity will not have the advice and assistance from a COLP nor will they have the same level of responsibility for keeping records in respect of compliance with the regulatory framework. Although we accept that they would only be responsible for their own compliance under the terms of the code for individuals, the primary burden for compliance will fall on the individual and not the firm. We believe this risks vulnerable lawyers being pressurised into putting the interests of the firm ahead of the client and other breaches of the Principles.

We agree with the Law Society's recommendation that the SRA conducts and acts on a survey of individual COLPS and COFAs.

In responding to this question, please set out the ways in which the roles either assist or do not assist with compliance.

The COLP and COFA have very important roles in providing advice and guidance to solicitors and other individuals who are employed by recognised bodies. Much of that advice is given informally at the immediate time that it is required which a SRA helpline is not always able to do. Indicative Behaviours are non-mandatory, and are very useful in giving weight to advice that the COLP and COFA provide. The removal of the Indicative Behaviours is likely to make the COLP's job that much harder in having to interpret the rules and anticipate how the SRA may respond to a subsequent complaint. Greater guidance with detailed examples would be very beneficial to our members.

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?

There will be a significantly increased need for written guidance on the application of the Codes and the SRA's interpretation of the Codes given the likely "grey" areas.

The SRA's guidance at the moment is provided via a telephone helpline which can often provide quite limited advice. In cases where written advice is requested, the SRA need to respond much quicker in the future as their timelines are of little help in practice when a COLP has to provide an answer quickly. The SRA's own website states that their "desired response" to emails and letters for Professional Ethics is 95% response within 10 working days and that they are "working toward" responding within 10 working days. This far too slow and will be exacerbated if the new Codes are adopted as the logical consequence of removing so much of the detail is an increase in the number of enquiries for advice

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?

We are deeply concerned about the proposals to allow solicitors to deliver non-reserved work through alternative legal provides. We are particularly concerned with the following aspects:

- The creation of a two tier market where there are those solicitors who work within a regulated entity and those who do not. It is of concern that there will be different rules for these different solicitors as well as different client protections available depending where the individual solicitor. We are concerned that the average consumer (e.g. clients) will not understand the differences between the different types of legal advisor and this will lead to lesser protection for the public in general and significantly diminish the trust the public places in the profession in the longer term;

- Legal Professional Privilege – we are concerned that the advice given by solicitors in unregulated entities would not be covered by LPP. This would certainly be detrimental to the trust the public places in the profession. We are concerned that the average consumer would not understand when their instructions are privileged and where they are not;

- Professional Indemnity Insurance/Compensation Fund – we are concerned that solicitors working in unregulated entities would not be required to have professional indemnity insurance and clients would not have access to either the Compensation Fund or Legal Ombudsman in the event that things go wrong. This would obviously reduce the protections available to clients of unregulated entities and will cause a great deal of confusion amongst the general consumer who will be unaware of the level of protection that they have (or more likely do not have). The proposals also risk undermining or depleting the existing Compensation Fund as solicitors working from unregulated entities would not have to contribute to the Fund; this would seem likely to mean that solicitors working in regulated entities would have to make additional contributions to secure the Fund's viability, increasing the regulatory burden on them and exacerbating the two tier profession that could result from the proposals.;

- Supervision – the changes to the supervision requirement mean that newly qualified solicitors with no experience would be able to set up their own unregulated firms. The assistance newly qualified solicitors obtain under existing requirements is essential for both the individual solicitors as well as the future of the profession as a whole and we are concerned that young solicitors may be vulnerable to pressure from unregulated bodies where the

burden of compliance and risk falls on the individual solicitor and not the firm

- Conflicts/Confidentiality – We are concerned that unregulated organisations will not be subject to SRA rules of conflict and confidentiality although solicitors who work for them will. This may lead to situations where unregulated entities can act where a regulated entity would not be able to as they would have to comply with the rules of conflict/confidentiality. We are concerned that this would leave regulated firms at a commercial disadvantage and removes significant protections for consumers/clients.

- Quality – Solicitors currently are required to meet the academic and vocational stages of training before being admitted as a solicitor. In the vast majority of cases that means a degree and the GDL if not a qualifying law degree plus the LPC followed by a two year period of recognised training. Individuals who work for unregulated organisations will not face the same requirements and may not meet the same high standards with the inevitable decline in the quality of advice given to clients. That decline in quality will lead to higher claims but with fewer protections for the clients when things do go wrong and we believe this will ultimately damage the reputation and standing of the solicitors' profession.

- Annual practising certificate (PC) fees - There is no information on this point and the SRA needs to undertake and publish an analysis of the projected impact of its proposals on the PC fee, and in particular the turnover based firm fee. The SRA should not close this consultation until this information is available.

As a general comment, we believe there is insufficient evidence to support these proposals or the expected benefits from their implementation, which are stated to include improved access to quality services at affordable prices, enhanced professional standards, and increased employment opportunities.

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?

Whilst we as a Society would not be involved in taking advantage of the greater flexibility, we are aware that our members (either in business or individually) would have to consider setting up alternative business structures to carry out non-reserved legal work in order to compete with businesses which are likely to enter the market (out of necessity to compete rather than choice). Unfortunately, the two-tier system which will be imposed would mean that a regulated entity would not be able to compete financially with a non-regulated entity. We echo our previous comments in respect of the two tier proposals and the likely detriment to consumers which will flow from the proposals.

We also believe that the two-tier system will give rise to added uncertainty and confusion for clients. Although it is likely that the large commercial and specialist firms will hive off their unreserved legal work into separate businesses, in practice it is likely to be much more complicated. Many corporate transactions include real property transfers which can only be carried out by a regulated body. Clients are likely to be very confused and unhappy at receiving two engagement letters for what seems to them to be the same transaction, with different requirements and protections for each.

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?

We acknowledge that it is right to maintain the position reserved legal services for the public can only be conducted by an entity authorised by the SRA (or another approved regulator).

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?

We believe that the current rule in place is necessary to address an identified risk and should remain. Whilst we agree that newly qualified solicitors do not present a significant risk to the delivery of a proper standard of service, we would suggest that this is due to the amount of supervision and training they are currently given. A removal of the "qualified to supervise" requirement could significantly reduce the supervision newly qualified solicitors are given and could lead to a significant risk to the delivery of a proper standard of service. This will increase the risks to clients as well as putting vulnerable newly qualified solicitors themselves at risk of claims and under pressure to breach the Code, and negatively impact on the standing of the solicitor profession. Damage to standards will increase incrementally as this applies year on year and fewer solicitors in unregulated entities have ever received supervision.

In any event, we do not believe that the current requirement to undertake at least 12 hours of management training provides any real qualification for running a business.

Question 20

Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

We are not sure that the requirement for SRA regulated firms to display detailed information about the protections available to consumers is necessary. Details of the protections available to consumers are contained within client retainer documents and the client is made aware on numerous occasions of the protections available to them (indeed it would be our view that most are aware of the protections they have in any event). We are more concerned that solicitors who provide services via non-regulated bodies should be required to display detailed information about the protections which are not afforded to them by virtue of the advice being given outside of a regulated firm

Question 21

Do you agree with the analysis in our initial Impact Assessment?

There is insufficient evidence in the Consultation document to make a judgement on this.

We agree that consumers need additional information but remain more concerned that solicitors who provide legal services via unregulated bodies will not be required to provide the same level of information

Question 22

Do you have any additional information to support our initial Impact Assessment?

No

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?

We are concerned that as there is no prohibition on non-regulated entities holding client money, we are concerned that this will erode a significant protection available to clients. At least where individual solicitors are holding client money, a trust exists and client money is better protected. We are concerned that clients will not understand the difference between placing money with a regulated firm and a non-regulated entity to their significant detriment. We are also concerned that the ability of a solicitor to work within a non-regulated entity and not have to comply with stringent rules regarding the holding of client monies would put regulated firms at a significant disadvantage.

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?

We are concerned as to the impact of allowing in-house solicitors to provide legal advice to those other than their employer. We are particularly concerned that there will be no legal professional privilege in these circumstances. We are also concerned that many of the issues described in detail within this response relating to solicitors working in unregulated entities apply to in-house solicitors and Special Bodies providing legal advice.

We would also point out that special bodies have an important role in providing legal services to vulnerable people. Any disparity in safeguards offered by special bodies will create an inconsistency in the level of consumer protection offered to vulnerable clients which should be avoided. We do not believe that solicitors working for special bodies should be permitted to hold client money personally.

In line with the fact that in-house solicitors and ALSPs will be permitted to only offer non reserved legal services to the public we agree that solicitors working therein should not be permitted to hold client money in their own name.

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?

If not, what are your reasons?

Whilst we agree that the SRA Compensation Fund should not necessarily be available to clients of solicitors working in alternative legal service providers, we are concerned that clients will not be aware that the protection offered by the fund is not available until after the event (thus reducing the protections for consumers). We are also concerned with the proposals that solicitors working in alternative legal service providers may not be required to contribute to the fund. In the event (as is likely) that significant proportions of non-reserved work is conducted by alternative legal services providers (especially where regulated firms are forced to create separate businesses to provide non-reserved work competitively), there is a real risk that the fund would either be diminished to such a level where it was not fit for purpose or where regulated firms would face an increased financial burden in contributing the fund to sustain it (thereby further reducing their ability to compete in the “new” legal marketplace).

Question 26

Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

We are strongly opposed to this as we are concerned that this will reduce the level of protection available for clients. We are also concerned that it could lead to a situation where individual solicitors are personally exposed for claims in negligence where their non-regulated employer does not obtain appropriate indemnity insurance.

Question 27

Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

Please see the reply to question 26 above.

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?

Yes

Question 29

Do you have any views on what PII requirements should apply to Special Bodies?

We believe that clients of Special Bodies should be entitled to PII protection in the same way as clients of traditional law firms to ensure consistency in the consumer protection offered to clients

Under the current Rules, solicitors employed by Special Bodies must have a 'reasonably equivalent' level of cover to that required by the SRA Indemnity Insurance Rules we believe that this safeguard should remain in place.

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?

We do not agree with the suggestions within the consultation document that a significant number of firms would not be looking to leave SRA regulation. We would suggest that many firms would have to consider hiving off their non-reserved work into a separate non-regulated body simply to be able to compete in a new marketplace. However, we agree that non-SRA regulated firms which are mainly or wholly owned by SRA authorised solicitors should not have thresholds imposed upon them as it would be unfair to place them at a disadvantage to their competitors.

Question 31

Do you have any alternative proposals to regulating entities of this type?

No

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?

We believe that the position is unsatisfactory as it is not clear from the consultation document whether the SRA will have the power to intervene if, for example, a matter is being worked on by both a regulated solicitor and an unregulated individual.

We also believe that the position is unsatisfactory as it is not clear from the consultation document whether the SRA will have the power to intervene if, for example, a matter is being worked on by both a regulated solicitor and an unregulated individual We believe that the position is unsatisfactory as it is not clear from the consultation document whether the SRA will have the power to intervene if, for example, a matter is being worked on by both a regulated solicitor and an unregulated individual

Question 33

Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

We would ordinarily agree that all work of a recognised body or RSP should remain regulated by the SRA. However, we are concerned with the two tier system being proposed and the ability of a regulated entity to compete in such a marketplace. It would seem entirely unreasonable for non-reserved work of a recognised body or RSP to continue to be regulated by the SRA where work conducted by a practising solicitor in exactly the same manner (at almost certainly a significantly reduced cost) in an alternative legal practice is not.

Thank you for completing the **Consultation questionnaire form**.

Please save a copy of the completed form.

Please return it, along with your completed **About you form**, as an email attachment to consultation@sra.org.uk, by **21 September 2016**.

Alternatively, print the completed form and submit it by post, along with a printed copy of your **About you form**, to

Solicitors Regulation Authority
Regulation and Education - Policy - Handbook 2017
The Cube
199 Wharfside Street
Birmingham
B1 1RN

Consultation: Looking to the future - flexibility and public protection

Response ID:692 Data

2. Your identity

Surname

Scott

Forename(s)

Natalie

We may publish a list of respondents and a report on responses. Partial attributed responses may be published. Please advise us if you do not wish us to attribute your response or for your name or the name of your firm or organisation to appear on any published list of respondents.

Attribute my/our response and publish my/our name.

Please identify the capacity in which you are submitting a response. I am submitting a response…

on my own behalf as an employed solicitor

3.

1. Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

no

4.

2. Do you agree with our proposed model for a revised set of Principles?

yes

5.

3. Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

yes

6.

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?

no

7.

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?

no

8.

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?

yes

9.

7. In your view is there anything specific in the Code that does not need to be there?

no

10.

8. Do you think that there anything specific missing from the Code that we should consider adding?

no

11.

9. What are your views on the two options for handling conflicts of interests and how they will work in practice?

I do not agree that solicitors should act where there is any risk of a conflict, regardless of whether clients agree etc.

12.

10. Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

yes

13.

11. In your view is there anything specific in the Code that does not need to be there?

no

14.

12. Do you think that there anything specific missing from the Code that we should consider adding?

no

15.

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?

no

16.

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.

yes - however persons undertaken such roles should be subject to more action/supervision rather than the roles just being in name only.

17.

15. How could we improve the way in which the COLP/COFA roles work or to provide further support to compliance officers, in practice?

the roles should be tailored depending on the size of the organisation and the work undertaken etc.

18.

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?

I believe that the risks outweigh the gains. As a solicitor specialising in conveyancing I am becoming increasingly concerned about the lack of supervision of junior and unqualified staff undertaking conveyancing work, even in regulated firms. I believe that there will be less supervision by alternative legal service providers which in turn will put the clients at risk and undermine public confidence. Alternative legal services offering services at cut prices will affect those firms who are not able to match these prices and result in watered down legal services. The SRA are unable to satisfactorily monitor and supervise the firms already in practice therefore opening up the sector will put the clients at a greater risk.

19.

17. How likely are you to take advantage in the greater flexibility about where solicitors can practice as an

individual or as a business?

not at all

20.

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?

all persons providing legal services should be authorised and regulated regardless of their employment status.

21.

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?

I do not agree that this rule needs to be amended. I would not feel comfortable with newly qualified solicitors being able to set up in business without requisite experience.

22.

20. Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

yes

23.

21. Do you agree with the analysis in our initial Impact Assessment?

yes

24.

22. Do you have any additional information to support our initial Impact Assessment?

no

25.

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?

yes to a certain extent however each case should be decided on its merit

26.

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?

no solicitor should be allowed to hold client money personally

27.

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? If not, what are your reasons?

this will give a confusing message to clients as surely from their point of a view a solicitor is a solicitor, regardless of how or where they are employed. There is still a question of supervision, if solicitors are regulated properly then why should they not be covered by the Compensation Fund?

28.

26. Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

No

29.

27. Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

there are sometimes occasions when working for a client that you are instructed to undertake work above and beyond your initial instructions. a solicitor would be required to evaluate their insurance risk at each stage of the transaction and, if they decided that they wouldn't be covered, they may not be able to continue to act for the client. this is of no benefit to the client and means that a solicitor becomes more cautious about insurance rather than focusing on providing the service to the client.

30.

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?

yes

31.

29. Do you have any views on what PII requirements should apply to Special Bodies?

no

32.

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?

no

33.

31. Do you have any alternative proposals to regulating entities of this type?

no

34.

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?

The SRA should be able to intervene into all providers offering legal services as a matter of public policy.

35.

33. Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

yes

National Accident Helpline – response to the Solicitors Regulation Authority's 'Looking to the Future' consultation

Introduction

National Accident Helpline (NAH) is the UK's leading provider of personal injury advice, services and support, and represents 50 law firms across the UK. Part of the wider NAHL Group plc, NAH is an ethical and reputable organisation that has helped over 2 million people injured in accidents that were not their fault since being established in 1993.

We advise people on whether they have a legitimate claim and connect them with one of our specialist solicitor firms if appropriate. Through this approved network of specialist personal injury law firms (panel firms), we aim to champion consumer rights and to help those with genuine claims to seek redress and secure access to justice, thereby aiding their recovery.

This document sets out NAH's response to the Solicitors Regulation Authority's (SRA) 'Looking to the Future' consultation, the content of which is focussed on the issue of nuisance marketing and the extent to which the SRA's new Code of Conduct will be effective in tackling it. To note, given the focus of NAH's work, the observations and views outlined within this submission primarily relate to the personal injury (PI) sector. However, NAH believes they are applicable and relevant to the legal sector as a whole rather than just PI specifically.

Contact details

If you have any questions about any of the information included in this submission or would like to request further information, please contact Legal Director, Jonathan White, at Jonathan.White@nahl.co.uk or on 01536 527500.

Question 8 – Do you think that there is anything specific missing from the Code that we should consider adding?

Outcome 8.3 must be retained if nuisance marketing is to be effectively tackled

NAH has been among the leading critics of the use of unethical marketing tactics such as cold calling throughout the personal injury sector, believing they are an illegitimate practice that can cause people real distress and harm. NAH never cold calls, texts or emails and has been campaigning on this issue since 2012 – first through our Stop Nuisance Calls campaign and more recently through founding the Ethical Marketing Charter, further information on which is below.

National Accident Helpline is therefore very concerned regarding the SRA's plans to remove Outcome 8.3, which prohibited lawyers from making unsolicited approaches in person or by telephone to members of the public, from its new Code of Conduct. We believe that the replacement of Outcome 8.3 with two catch-all clauses – points 1.1 and 1.2 – in the new Code, along with broader principles 'to uphold the rule of law' and 'ensure conduct upholds public confidence in the

profession', will fail to provide sufficient protection to consumers and open the door to unscrupulous firms looking to exploit the ambiguity. This is demonstrated by the SRA's new guidance that was published alongside this consultation, which clearly highlights the permissibility of cold calling under the new regulations subject to loose and hard to enforce provisions.

NAH therefore believes it will be crucial for the SRA's new Code of Conduct to retain Outcome 8.3 if it is to uphold, rather than water down, existing consumer protections and ensure there is no increase in unethical marketing tactics throughout the legal sector. Below we outline the risks posed by removing the provision, including the detrimental impact it will have on consumers and how it threatens to undermine government, regulatory and industry-led action to tackle cold calling.

Removing Outcome 8.3 will have a harmful impact on consumers

Nuisance marketing has been shown to have a damaging impact on consumers. Independent research commissioned by NAH and conducted by Populus in 2014 highlighted the harmful effect that nuisance calls can have, as well as the extent of the issue: 56% of people find cold calls distressing; 40% receive more than nine cold calls on their landline every month; and 51% of the UK public receive cold calls from international numbers.

Cold calls also cause significant disruption to people's lives. A YouGov survey conducted for NAH in 2015 showed that Britons waste two full working days a year or a staggering six weeks (40 days) across their adult lives dealing with nuisance calls, texts and spam emails. 70% of people have also been interrupted by a cold call whilst doing something important – with 46% of people having been disrupted when spending time with family and 24% during a sensitive conversation.

Consumer Group Which? also recently reported that trueCall customers – people that have purchased a call-blocking device – received an average of 26 nuisance calls per month. Crucially, Which?'s research also showed that people with a trueCall device specially designed for older and vulnerable people received a greater number of calls, on average 38 per month, suggesting rogue firms were directly targeting these types of consumers.

NAH is therefore concerned that removing Outcome 8.3 will lead to a rise in nuisance calls – a marketing tactic that has been shown to harm consumers and which disproportionately affects the older and more vulnerable in society.

The removal of Outcome 8.3 goes directly against government and regulatory action

The Government, along with the previous Coalition administration, has made clear its opposition to cold calling and has announced a series of measures aimed at curtailing the practice. For example, in January 2016 the Government introduced new rules forcing cold callers to display their number when contacting consumers – making it far easier for people to report a complaint. This latest move followed a wave of other measures, including reducing the burden of proof on the Information Commissioner's Office (ICO) to impose fines of up to £500,000 on rogue firms, and £3.5 million of funding being allocated to explore options to expand the use of call blocking devices.

Government action has been accompanied by proactive steps from key regulatory bodies. Ofcom recently launched a text-to-register service for consumers to sign up to the TPS, whilst the ICO continues to levy significant monetary penalties – with their Joint Action Plan, first published in July 2013, underpinning this work and ensuring strong coordination between the two regulators.

Nuisance marketing was also strongly criticised by the Insurance Fraud Taskforce which reported to government last year. Within its final report, the Taskforce identified the role that nuisance calls and other forms of high-pressure marketing tactics can play in encouraging fraudulent personal injury claims. The Taskforce – with input from a broad range of organisations, representing both claimants and defendants – subsequently recommended that the Government clamp down on nuisance callers by 'developing and delivering a coherent regulatory strategy to tackle nuisance calls that encourage fraudulent PI (personal injury) or other claims'. When making this recommendation, the Taskforce was clear in its belief that a range of bodies, including the Solicitors Regulation Authority, must work in partnership with government on this issue if significant progress is to be made.

This demonstrates that the SRA's plans to remove Outcome 8.3 threaten to undermine the work that government and key regulatory bodies are doing to tackle nuisance calls and could potentially lead to an increase in fraudulent or spurious claims throughout the personal injury sector.

Industry-led efforts to tackle cold calls will be undermined by removing Outcome 8.3

The personal injury sector has rightly been singled out for particular scrutiny of its use of aggressive marketing tactics. However, in recent years the industry has begun to take a proactive approach to raising standards in the interests of consumers.

In July 2015 NAH founded and launched the Ethical Marketing Charter (EMC) – an industry-led initiative that calls on organisations in the personal injury sector to stand firmly against cold calling, texting and emailing, the unethical buying and selling of accident data, and the use of misleading advertising.

Over 60 businesses – both law firms and claims management companies – have signed up to the Charter since it was launched and it has secured support from a number of MPs from across the political spectrum and key bodies such as the Claims Management Regulator and the Legal Ombudsman. NAH will be continuing to promote the Charter over the coming months – holding the Government to account on its commitments and encouraging other organisations to sign up and take a stand against unethical marketing practices.

Organisations such as the Association of Personal Injury Lawyers, the Motor Accident Solicitors Society and the Law Society have also taken a robust stance against nuisance marketing – with the latter having also raised concerns regarding the removal of Outcome 8.3 from the SRA's Code of Conduct. Within its response to this consultation, the Law Society stated that it is 'extremely concerned by the proposed removal of Outcome 8.3' and that 'the new clauses carry significantly less weight than the current explicit prohibition'.

It is important to bear in mind that this industry-led action has been based upon and driven forward by strong opposition to nuisance marketing among legal professionals. A survey of NAH's panel firms found that 96% of respondents believed nuisance calls damage the reputation of the sector, whilst 80% supported the Government's move to strengthen the ICO's ability to issue monetary

penalties to rogue firms. This demonstrates that the SRA's plans are out of step with the views and attitudes of many businesses it is regulating.

Industry-led action has played a crucial role in boosting consumer protections and has supported the objectives of both government and regulators. Yet the SRA's proposals threaten to stall the progress that has already been made in this area by discouraging businesses to proactively raise best practice.

Scrapping Outcome 8.3 will have wider negative implications

While NAH's primary concern relates to the impact that the rule change will have upon consumers and the reputation of the legal sector, it will also have wider implications that it will be important for the SRA to consider.

Regulatory burden for the SRA

Under the new Code of Conduct it will be legitimate for law firms to make unsolicited approaches to consumers as long as they are not registered with the TPS. In an effort to uphold basic standards, the Code of Conduct prevents callers from putting members of the public under pressure, making repeated calls or providing people with misleading information.

However, in practice, these three provisions will be very challenging to either measure or enforce – leading to the SRA becoming embroiled in time-consuming and burdensome investigations that will frustrate consumers and law firms alike. Furthermore, cold calling is often closely linked and associated with other forms of bad practice, such as aggressive behaviour, promising immediate compensation and coaching consumers on how to exaggerate their injuries during medical examinations.

As a result, NAH believes that not only will it be problematic to enforce the new provisions, but that they will also proliferate wider bad practice that causes harm to consumers and creates an additional regulatory burden for the SRA – reducing its ability to clamp down on rogue firms and maintain standards.

Uneven playing field between ethical and unethical firms

The removal of Outcome 8.3 would place a number of leading law firms that have publicly committed to never cold calling consumers at a major competitive disadvantage to less scrupulous firms willing to exploit the ambiguity of the regulations.

Despite their harmful impact, nuisance calls can be a very effective form of targeted direct marketing – allowing businesses to generate a greater number of leaders in a more cost-effective way compared to more ethical tactics. NAH therefore anticipates that rogue firms will move quickly to capitalise on the rule change in an effort to expand their market share.

As outlined above, almost all of (96%) of NAH's panel law firms believe nuisance calls damage the reputation of the sector and 80% supported stronger regulatory action. However, the new provisions may lead to a race to the bottom on marketing standards throughout the sector as a whole – creating a perverse incentive for ethical firms to lower their standards in an effort to remain on an even footing with their competitors.

Consultation: Looking to the future - flexibility and public protection

Response ID:549 Data

2. Your identity

Surname

Howlett

Forename(s)

Neil

We may publish a list of respondents and a report on responses. Partial attributed responses may be published. Please advise us if you do not wish us to attribute your response or for your name or the name of your firm or organisation to appear on any published list of respondents.

Attribute my/our response and publish my/our name.

Please identify the capacity in which you are submitting a response. I am submitting a response…

on my own behalf as a solicitor in private practice

3.

1. Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

No.

I assume this question only relates to para 30-32 although the heading comes after para 30 which refers to the test, and does not include any response to paras 25-29. This may be obvious to you. It isn't obvious to me. I have serious reservations about SRA conduct as set on paras 25-29 but you do not ask about that.

4.

2. Do you agree with our proposed model for a revised set of Principles?

No

It is anodyne to the point of being pointless.

Anyone who purports to provide legal services could sign up to and advertise these words.

If they do will (be able to) the SRA stop them?

How do they help consumers identify that they are dealing with a regulated provider and the level of protection available to them?

Why not do away with everything after 1 ? Arguably everything below is included in 1.

Replace 1 with "Don't be evil"? That is simpler.

5.

3. Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

No, it is incompetently drafted.

We have to uphold pubic confidence in the profession - that's fine.

We also have to do the same for "those delivering legal services". That covers anyone delivering legal

services. It makes no reference to regulation so must include all legal services. Why do we owe an obligation to all and sundry who owe no similar obligation to us. You are the SRA not the LSRA.

6.

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?

You have reduced the number of Principles in part by combining existing Principles together - that's lazy and not honest - it isn't deregulation.

My firm places the SRA Principles at the head of our Terms of Business and above our own client care standards as a transparent reminder to clients of what they can expect of us and the value of using a solicitor.

The reduced Principles are so anodyne as to have no value for this purpose.

When we have to change them clients may well ask whether as it isn't now in the Principles we no longer have to look after their money, run our business properly or work with our regulators, and does that mean we are no longer going to do that? We will have to but we cannot show that to clients in a simple way - the 'brand' is therefore damaged.

See additional comments (assuming I am allowed to make them)

7.

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?

The published examples of guidance to the professional are simplistic and anodyne. We need help with the difficult questions not the easy ones. If that is all we are going to get it is pointless.

That should be combined with a completely different approach to the borderline between regulation and support. Firms. and solicitors should be encouraged to report breaches without fear of disciplinary or other action except in the most serious cases. This is in keeping with the enforcement of competition regulation.

The best system of regulation is that operated by the CAA & AAIB where pilots are required and encouraged to report incidents (whether or not there has been any adverse consequence) which are investigated and reported anonymously, identifying how the problem arise, and how it could have been avoided.

8.

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?

No.

9.

7. In your view is there anything specific in the Code that does not need to be there?

No

10.

8. Do you think that there anything specific missing from the Code that we should consider adding?

See 4

11.

9. What are your views on the two options for handling conflicts of interests and how they will work in practice?

Option 1 does not add substantively to Option 2 in practice. Solicitors who want to act for both will find that the conditions apply.

The safeguards for confidentiality should be the first condition as they are the most important and a precondition for informed consent.

Informed consent should include an explanation of the safeguards.

"given or evidenced" is incoherent over-drafting. What does that add to "writing". In commercial contracts "writing" is often closely defined. I have searched the leading precedent providers and cannot find the phrase "given or evidenced" at all.

12.

10. Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

No

13.

11. In your view is there anything specific in the Code that does not need to be there?

No

14.

12. Do you think that there anything specific missing from the Code that we should consider adding?

Too much.

15.

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?

Too much

16.

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.

As a COLP I find the current role confusing and of little value. The proposed changes will make it even for confusing.

17.

15. How could we improve the way in which the COLP/COFA roles work or to provide further support to compliance officers, in practice?

Abolish them in favour of individual certification and reporting obligations to a single compliance officer for each regulated entity.

18.

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?

SRA Response

The proposals are misguided:-

The SRA is exceeding its powers and ability. The proposals are contrary to SRA's obligations under Legal Services Act 2007 objectives to:

• protect and promote the public interest;
• protect and promote the interests of consumers;
• increase public understanding of the citizens' legal rights and duties.

Why?

We are told by the SRA and by Crispin Passmore that our greatest asset is our brand as solicitors. I will use brand in the way he does.

If the SRA want to undermine the brand this is probably the most effective way to do it.

Consumers may not understand the detail of the benefits of suing a solicitor but they understand that it is a "premium" brand with higher protections, and that may justify and higher price.

If they find the brand attached to a lower level of service and protection, albeit at a lower price, that will undermine the brand. Premium brands avoid going down market because it damages their reputation, e.g., Burberry.

I am wholly unconvinced by Crispin Passmore's response to my question to him "How will consumers understand the differences?" that "The market will sort it out".

Why the market will not sort it out

(De)regulations does not reduce prices

A fundamental mistake in recent LSB surveys and failure to understand market premise of "substantial legal need not currently being met by regulated lawyers, including solicitors" has resulted in misguided proposals. In particular the assumption that an even more complicated mechanism for (de)regulation will create transparent market in which consumer will have access to new legal services and understand the risks associated with different providers.

The proposition that more complicated (de)regulation (and deregulation can be more complicated than regulation as OFR has proved) increases entrepreneurship is unproven. I am old enough to remember the Bristol Law Shop run by a solicitor in the 1980s. Most significant innovation has been the result of the changing market and technology not by the SRA.

No evidence of how proposals "result in more intense competition and innovation which might ordinarily be expected to deliver lower prices, alternative pricing arrangements, higher quality and new products/services." [your words my emphasis] Until the SRA has demonstrated that it's previous reform process (as opposed to market forces) have delivered any of these things it should be wary of further extensions of them.

The recent LSB survey did not demonstrate that ABSs offered lower prices than traditional practices. In fact, the evidence in the survey demonstrates the opposite – that where there was a statistically significant difference alternative legal services providers (LSPs) were much more expensive. They may, or may not be more efficient, but that efficiency is retained as profit not passed as lower prices.

The recent LSB survey in fact demonstrated that the current market appeared to be providing a differentiated set of services and prices that reflected market conditions, e.g., that in areas of deprivation prices were lower than in prosperous areas.

The market is confused

The one thing we do know is that consumers are confused about the legal market already. As the SRA says "The consumer research also suggests that consumers rely on reputation, branding and other signals of quality when navigating the market rather than the specific differences in consumer protections that exist."

In any other sector the solution to that would be: -
a. Better information: the SRA has failed to provide that
b. Make the market simpler and easier to understand; the SRA proposed the opposite.

How does creating six new possible structure for LSPs help consumers understand these?
e.g., will we be required to provide tem with an extended version of Table 2?
e.g., a non-regulated entity may employ a solicitor. There is no obligating on the solicitor to be engaged or take responsibility for all the unregulated work done by that entity (otherwise it would be a regulated entity). How will a consumer know that the work is done by or supervised by a solicitor?

Premises is based on "availability" of information about regulation, not the actual use of information, and that the latter must be improved to balance the recognised risks of the proposals. SRA has failed to achieve that yet and should demonstrate the ability to do that first. As you say "Other things equal, more empowered and knowledgeable consumers should be able to demand higher quality services from legal providers."

What the SRA should do

There is a conflict between increasing variety and increasingly comprehensibility. SRA should demonstrates ability to regulate and improve one or other; I suggest making the current market more transparent and helping consumers make informed choices are more (cost) effective than making it more complicated and hoping consumers will catch up.

This does not include the folly of "price comparison websites". These have been demonstrated not to serve the public interest even for simple products such as gas or electricity, which comes in one type, has one delivery system and is indistinguishable as between one supplier and another. On the contrary they distort the market.

On clarity and communication the SRA has a long way to go even with its own website and in this consultation. Navigation is poor. The consultation document Annex 5 p.28 states "Our plans to improve the information that is available to help consumer choose legal services wisely is set out in our consumer support strategy.21" Footnote 21 reads "Include link to consumer support strategy." There is none. I searched the SRA website for "consumer support strategy". The only return was a link back to the same reference in the same document, and then searching through a 200 page pdf document. That is either incompetence or incapacity.

The SRA have failed to give weight to their own expert who states: -

"There is potential for misunderstanding of the new compliance arrangements, although solicitors should be better equipped than most to understand, and deal with, regulatory changes."

I started a chart of the different possible LSPs and the different regulatory and other protections available for consumers using them. I gave up, it was too complex. The SRA's Chart 2 is simplistic; it would need at least 25 more rows.

"The replacement of detailed indicative behaviours may create additional work for practitioners in determining how best to exercise their permitted discretion to best meet regulatory outcomes in their

particular circumstances, increasing the costs and time associated with compliance."

This contradicts the SRAs repeated statement that it will make it easier – it will not. The SRAs continual "reforms" mean that by the time regulated LSPs have understood, implemented and bedded in new systems we get no economic benefit because they are then changed and we have to start again.

"The 'solicitor' brand could be diminished as solicitors come to be associated with different type of providers and with varying levels of consumer protections. This will depend on consumer expectations of what is included in the provision of solicitor services, and the value they attribute to different aspects of this. "

This is the greatest risk. Managing that risk depends entirely on the public understanding of the different expectations and protections, for which the SRA proposals are wholly inadequate.

As an example of the possible damage which could be caused consider "cold calling". It is almost universally objected to, and current protections like TPS are ineffective. There is nothing in the new Code that says I should not do it. I might think it would not fit the style of marketing of my firm, but other solicitors may not. I may think it would damage the 'brand' but other solicitors may not. If it does it will damage not just those who do it but the 'brand'.
The proposal to develop "public facing guides" is untried and unproved. Until the SRA has demonstrated a capacity to properly inform the public about the existing complicated structures it has created it should not make them more complicated.

It also fails to take into account that the press will attach the word "solicitor" to any negative story whether or not is relevant. e.g., the story of a father who shot his daughter dead at a women's refuge was widely reported including in the headline that the child's mother's solicitor mistakenly sent him the address, been though the enquiry established that the address was disclosed by more than one agency, that the father had not found the address from that disclosure and there was no causal connection, https://www.theguardian.com/uk-news/2016/sep/12/safe-house-address-of-may-shipstone-murdered-by-father-accidentally-sent-to-him

The SRA has no track record of meeting that need. As someone who waded through the complicated, over-written, repetitive and jargon filled consultation documents it creates I do not believe the SRA has the capacity to do that. Indeed the heading to part of this consultation "Why rules are the new freedom" is indicative of the Newspeak to which we as solicitors have been subject.

It is indicative of the incapacity of the SRA in this area that I have for many years been recommending some clients to the guides prepared by the ICAEW, which are practical, well written and useful. However, these are written for a limited audience on a very limited range of subjects, i.e., SMEs and micro-businesses on business topics on which they are likely to require legal advice. Producing a range of good guidance for the huge range of consumers who might seek legal advice tailored to the different needs, prior knowledge and abilities for each type of problem, and then explaining the different options amongst LSPs for advice on that problem and their suitability is a huge task.

The SRA would help consumers more by following the recommendations of the LSB and helping us to simplify the information we must give to consumers.

19.

17. How likely are you to take advantage in the greater flexibility about where solicitors can practice as an individual or as a business?

I am not - I would be more likely to abandon the title and regulation by the SRA altogether in favour of a better regulator or non regulation at all.

20.

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?

It demonstrates the incoherence of the proposals - why should a solicitor not be able to contact directly and as an individual with a client (as almost any other legal services provider can)? The only reason is because the SRA's proposals are so complicated. If the individual Code is not strong enough what value does it have?

It specifically disadvantages solicitors in an area in which innovation is possible and of value to consumers, e.g., chambers type structures, in which back office functions and costs are shared.

The phrase "a tailored authorisation process for certain types of practice" suggests an even more fragmented regulatory system - and one which consumers will know nothing about.

21.

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?

No. Nobody understand what it means. The qualifying requirements are meaningless.

There should remain restrictions on solicitors practicing on their own account outside a regulated entity for a set period after qualification for consumer protection.

Making Lexcel or a similar standard mandatory would be a better protection

22.

20. Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

No - if solicitors think that these are of interest to consumers they will inform them.

We currently display the SRA Principles on our website and at the head of our Terms and Conditions because they are simple and comprehensive. We shall probably not do that with the proposed Principles as they are thin, anodyne and meaningless.

I support clearer information for consumers. However, that requires fewer obligation not more.

The SRA should not interfere in the market or presume it knows how to communicate with our clients better than we do. If they are not be deluged (as at present) with obligatory information much of which is of no interest or value to them, this needs to be given a way that recognises the type of work and the type of client.

23.

21. Do you agree with the analysis in our initial Impact Assessment?

No see responses above, specifically where you ignore risks identified by your own expert.

Repeating the same errors again is not progress.

24.

22. Do you have any additional information to support our initial Impact Assessment?

No

25.

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?

Yes

26.

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?

They should not.

27.

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? If not, what are your reasons?

This is an unfair burden on those who are not "innovative" i.e., risk taking and therefore more likely to result in claims.

28.

26. Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

No

29.

27. Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

Utter confusion for the profession and for consumers.

You will achieve the opposite of what you say you intend to achieve.

30.

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?

Yes

31.

29. Do you have any views on what PII requirements should apply to Special Bodies?

As with LLPs

32.

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?

Yes.

33.

31. Do you have any alternative proposals to regulating entities of this type?

No

34.

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?

The problem identifies the difficulties with the proposal for split regulation.

35.

33. Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

Yes. How would consumers understand anything less?

NEVIL CROSTON

Dear Sirs

I am replying to the consultation 'Looking to the Future: Flexibility and Public Protection'.

* Setting and Maintaining High Professional Standards

There can be no dispute that amongst a Regulator's function is the setting and maintaining of high professional standards. However, the proposals will have the reverse effect:

- Increased unregulated entities not subject to the jurisdiction of the SRA or any other regulator.
- Uncertainty of the framework within which solicitors operate – less clear regulatory obligations.
- Unregulated entities operating with unqualified staff – severe risks to ethical practice, protection of client monies, conflicts of interest.
- Risk of reduction to the lowest common denominator (eg, unqualified or newly admitted. In the medical or engineering world, for example, it would be completely unacceptable for unqualified or newly qualified undertaking complex procedures without appropriate experience and supervision, so why the relaxation in the law?).

* Unmet Need of Public and Small Businesses

By removing many areas of law out of scope for legal advice and assistance unmet need substantially increased.

The commercial reality is that the public and small businesses are frequently unable or unwilling to pay for advice and that will not change, whether or not the advice is within non-reserved legal services or outside regulated firms.

Price should not be the determinative factor in the provision of legal services. It is a question of whether quality and client care will be driven down.

Having been involved in a network of advisers such as the Citizens' Advice Bureau and welfare and disability organisations in Nottinghamshire, their experience was that they could not meet demand due to their own funding restrictions and they were unable to handle the volume of enquiries, particularly via telephone. Those were "free to consumer" organisations.

* Delivery of Services Outside Unregulated Firms

The proposals contain no suggestions as to who would oversee unregulated entities, particularly when things go wrong.

An internal complaints procedure is no substitute without an enforcement back up.

As there is no requirement for compulsory professional indemnity insurance of the unregulated entity this actually removes consumer protection.

Anyone working within the litigation sphere have examples of suing an entity such as a limited

company, obtaining Judgment and then being unable to effectively enforce such Judgment due to the insolvency or deliberate winding up of the entity and no insurance company who can provide redress for the client. There is the spectre of Phoenix businesses.

The proposals seem predicated on the basis that unregulated entities will be of some size. The reality is that the vast majority of such entities will be small providers.

Unregulated entities will not have to work to the same standards required of firms of solicitors in respect of protecting client money / money laundering. It will provide fraudsters even more opportunity to target unregulated entities. Misuses of clients' money and dishonesty by solicitors are rare and the client will almost always have redress. Any relaxation of regulatory compliance is dangerous.

There are clear examples of what can happen when there is relaxation of stringent requirements. Consumer experience of claims management companies in the field of personal injury and PPI, the excesses of which have never properly been reigned in, are just two examples of the tainted opinion that the public have in these areas of law.

The SRA will not be extending its reach to the unregulated entities undertaking non-reserved work. It is submitted that it is academic to say that compliance toolkits will help employers understand the obligations and responsibilities required of the solicitors that they employ. It will do nothing about the obligations, responsibilities and standards that should apply when employing solicitors:

- An unregulated provider telling the public that it employs solicitors is a simple statement. It will not explain to consumers what the experience of that solicitor is (eg, whether newly qualified or not, nor where they are in the hierarchy of management).

- Employing a solicitor or solicitors may amount to a veneer of respectability and not reflect the pressures on a solicitor (particularly somebody recently qualified) imposed by a commercial profit making entity and that the solicitor may not have the resilience to resist pressures applied by management.

The diagram at paragraph 107 of the proposals is a stark reminder of the removal of consumer protection and the gaps in alternative provider requirements, such as no ombudsman, no mandatory insurance, no access to compensation fund.

Other risks arising out of these proposals include:

- Unregulated entities will not be subject to SRA rules or equivalent relating to conflict and confidentiality where the risks to the consumer increase. (I have noted recently that there is at least one business purporting to operate as a divorce negotiator advising both sides and making Court applications. This is not a mediation model and I cannot think of a plainer example of where there is a conflict of interest in an unreserved activity. In the event of post-case disputes, the consumer is likely to be left without any remedy).

- Legal privilege – having undertaken work in the Employment Tribunal I have used the lack of legal privilege against a provider of employment law services via requests for disclosure of exchanges between the provider and their client. Remarkably, the case settled very quickly! Is that possibility really going to enhance consumer protection where such relaxation will apply to unregulated entities.

- No requirements to comply by an unregulated entity with SRA account rules or equivalent when handling client money. No stringent oversight and compliance will substantially increase the risk of misuse of client money, with a reduction in consumer protection.

- The suggestion that newly qualifieds can set up in business as sole practitioners – this is the most vulnerable sector in respect of claims (sole practitioners). Newly qualified / sole practitioners will have no peer group to refer to, no supervision or mentoring and will not have had the experience of embedded ethical behaviour and compliance. There is no good reason to change the existing rules.

- Consumers are unlikely to be able to distinguish between regulated and unregulated firms, or understand who can and who cannot do certain areas of work, what regulations apply to the entity or what effective remedy they may have in the event of negligence, etc. It will not be clear how their money is being handled and what protections there are to sever client money from the entity's money. The qualified / unqualified nature of individuals that the consumer may be dealing with will not clear.

- Whilst it may be the case that solicitors are to some extent hampered in their ability to compete with unregulated entities in non-reserved activities, in part by the stringent regulation and insurance requirements (and it is hardly surprising that other entities can compete more favourably on price alone when they have no add on costs such as a requirement for professional indemnity insurance), that is not a reason for relaxing standards and potentially leaving consumers without an effective remedy. It is scarcely believable that the skills and qualifications that we have as a solicitors' profession are not, apparently, being recognised as providing more than adequate protection for consumers in all the activities that we undertake over and above the statutory and common law consumer protection that may in theory (but not always in practice) be available to consumers.

I trust that you will take the above into account as part of the response to the consultation.

Yours sincerely

NEVIL CROSTON
Partner

Consultation – Looking to the Future – flexibility and public protection

This response has been submitted on behalf of the
Newcastle upon Tyne Law Society, College House, Northumberland Road, Newcastle upon Tyne NE1 8SF. Telephone 0191 2325654 and e mail: mail@newcastlelawsociety.co.uk

We are a long established independent local law society, with approximately 900 members operating in the north east of England covering the area from Berwick upon Tweed in the north to Durham City in the south. We have members who work in large city centre practices and those who are rural sole practitioners. We have members who work in firms that deal with legal aid and those that do none at all together with a few highly specialised practices dealing with narrow areas of work. We do not object to our response being published.

Kate Goodings
Director of Operations
Newcastle upon Tyne Law Society
19th September 2016

1. **We support and endorse the Response to this consultation submitted by the Law Society of England and Wales and dated September 2016**. We do not believe that a change from the current regulatory regime (which itself is relatively recent) is warranted on the basis of current market conditions or concerns. There is no ”ill” to be addressed here.

2. **We have the following additional comments to make.**

3. We do not believe that these changes, if introduced, will result in cheaper or more accessible services. There is already significant competition in the legal marketplace. We believe the proposals are more likely to skew the existing provision and could in fact make some legal services more expensive and more inaccessible – see para 9 below.

4. Significant concern has been expressed from many quarters that the proposals will result in a two tier legal system with solicitor/ABS firms dealing with reserved work (as currently defined) being subject to regulation and solicitor/ABS firms not dealing with such work escaping the net of firm based regulation altogether. In fact we would also be left with a third delineation – current persons or firms dealing with non reserved work who have no solicitors working for them at all eg will writers. This would be a bad outcome from many aspects not least from the point of view of consumer protection and consumer confusion. How is the poor client to be expected to distinguish between these differently regulated entities?

5. As a local law Society we are often a first point of contact when a member of the public has a problem. If the problem is with a solicitor we have a number of avenues we can refer people down. If the supplier of legal services

is unregulated, the example given above was will writers, then there is no straightforward referral that can be made. In the overwhelming majority of cases, **it is our experience that members of the public are generally unaware that if they deal with a non-regulated person they have massively reduced consumer protection. In addition most people think that <u>anyone</u> providing legal services <u>has to be a solicitor</u> and they are therefore safe to deal with them. They are surprised (and in some cases extremely concerned) to find that is not the case.**

6. Where things do go wrong with unregulated practices there is often little that can be done and whilst some in the unregulated sector are perfectly responsible there are also some who are not. Trading Standards finds it difficult to deal with these sorts of issues. We believe moving elements of work outside of the regulatory sphere risks reputational damage to the whole legal profession.

7. Given the current state of affairs we are not convinced that members of the public will sufficiently appreciate the differences in consumer protection if we were to have a two tier system of regulation, even if this was explained in some way. There would undoubtedly be a tendency for this information to be delivered through a tick box system or small print on an internet site. People may not understand or appreciate the difference between the consumer protections offered by two types of firms, even if they read the small print in the first place. We very much doubt that the information will state “If we make a mistake we do not carry insurance and you may not get your money back or any compensation if we cause you a problem”

8. There are other concerns that the Law Society has set out eg conflicts and legal professional privilege. How would all the possible ramifications that could arise form these types of issue possibly be adequately explained and understood in some form of disclosure or explanation provided at the outset of a matter.

9. The majority of legal practices have developed over a period of time to serve their local communities and clients. They offer a mixture of reserved and unreserved work. The two bands come together in a complementary fashion and form a holistic work stream. If unreserved work is able to be picked out of the system there is a danger that firms offering the full gamut of legal services – the regulated firms – will find their work reduced and the remaining services unavoidably becoming uneconomic or very expensive. If unregulated firms do not have to contribute to the Regulatory regime, money due to the SRA will reduce. Regulation will become more expensive for those that are left. The system will be skewed by non-market forces. The vast majority of small to medium sized firms need a mix of reserved and unreserved work to remain viable and to enable them to provide a wide range of services to their local communities. If this work becomes disrupted as a result of regulatory (not market driven) change, there is little they can do and they may struggle to remain profitable. A vital consumer resource will be lost.

10. We are also concerned about the impact of these proposals on regulated solicitors working in unregulated bodies. It is not hard to see how these persons could be dis-advantaged, exploited or suffer personal financial loss as a result of working in an unregulated entity. If they were negligent for example and the employer did not have PI insurance to cover the compensation, their personal liability would still remain. The Law Society is of the view that this would be an uninsurable risk.

11. Some years ago the thinking at the SRA was very much in the camp of ensuring a level playing field in regulating solicitor driven and solicitor associated practices in respect of all their legal work. The somewhat artificial distinction between reserved and non reserved work was never considered. We are not sure what circumstances or consumer concerns have made this such an issue now. There is massive competition within the legal sector and a good service offered to the vast majority of clients, who know what they are getting and are happy with the consumer protections offered. We would say "Let's maintain the status quo and keep it simple".

19th September 2016

Nick Fluck

Consultation: Looking to the future - flexibility and public protection

Consultation questionnaire form

This form is designed to be completed electronically—in MS Word. Please save it locally before and after completing it.

Question 1

Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

I have no relevant experience to answer this question

Question 2

Do you agree with our proposed model for a revised set of Principles?

No. The work of the SRA is above all to be compliant with the Legal Services Act. There is no adequate reason why the LSA principles should not be followed to the letter. Anecdotal evidence from my experience of meeting many of the profession is that the regulator is out of touch with the increasingly harsh realities of private practice, particularly in small firms, and *any* gloss on the regulatory minimum prescribed by the Act, needs to be judged even-handedly so as to be beneficial *both* to consumers and to the profession. It seems that, without admitting it, the SRA are following the LSB lead in deciding that the LSA principles should apply to any entity or person providing legal services (rather than as the Act requires authorised persons) and omitting the importance of 1. (1) (f) encouraging an independent, strong, diverse and effective legal profession.

It is vital that the rule of law be maintained. If the profession of those deeply embedded in their local communities continues to be eroded by “get rich quick merchants” or by those “innovators” who find ways of reducing their costs by skipping much of the burden of regulation imposed on “the profession” then the SRA changes will have directly contributed to weakening “the profession” (remembering that this means “authorised persons” not to encourage (literally “to put heart into”) them. Independence means independent of conflict, independent of state control and prepared to act without fear or favour. How does a proposed two tier structure deliver that?

Question 3

Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

No, it is poorly worded and calls for subjective responses. At present it is not clear to me how, for example, your proposed new category of person helping in meeting "unmet legal need" – a solicitor, almost certainly working as a contracted employee in a non-regulated environment will have the ability to deliver what you envisage as a new standard.

It is also not clear to me how moving a solicitor from private practice, working directly with the public, will do anything to deliver upon that aspiration or indeed to *increase* provision towards "unmet legal needs". It will simply direct qualified labour to work at what their employers choose to do, which in turn will usually be driven by considerations of personal or shareholder profit far more than by trying to ensure that there is appropriate accessible and skilled provision of legal services to those that need them.

Unregulated firms who choose to trade as such, will not want to employ solicitors, so it is more likely that the end result will be to take all the competent folk out and replace them with software-aided non-qualified process workers. If you think this is fanciful or a knee-jerk response, talk to any senior Bank manager or Land Registry executive (outside their organisation!) about how they see the quality and skills of their current intakes where the budget has dictated who gets hired rather than any consideration of the quality of the candidates, or indeed any efforts have been made to encourage those folk to work in an aspirational way to deliver better and better quality services to those who really need them, but don't understand them enough to select a provider other than by price.

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?

I think this is strongly driven by what you are trying to achieve. If you really believe that the consultation you have put forward will deliver a strong local legal services industry staffed by qualified regulated and authorised people then I think you may have been taking too much non-prescription medication. What you are embarking upon is the equivalent of the advent of the out of town supermarket boom from the middle sixties – all of the old retailers closed down, all of the expertise of artisan bakers butchers and candlemakers was lost for a generation or more and is only now starting to re-grow in areas where personal disposable incomes mean people will want to buy their bread fresh-baked from a local oven or their meat from a trusted quality purveyor.

You omit the importance of physical "access to justice" – at the moment, under massively increasing pressure, most high streets have a firm of solicitors in them. Those solicitors have a stake in their community, they deliver endless unannounced pro bono work, they sit on charity boards and school governing bodies, they staff health trust and care commissioning bodies – they are "trusted advisers" in every sense of the words, but they are under enormous pressure as the system is gearing up to take away and process drive whatever remaining parts of their legal practices are that can be conducted profitably or reduced to software.

It is frankly unrealistic, and I would argue ultra vires the SRA's role under the LSA 2007 for you to encourage the development of unregulated "legal services" businesses all under the fig leaf of meeting unmet legal need.

Returning to my baker's analogy – when there were a lot of small independent bakers one could always find a speciality item – a harvest loaf or a special rare baker's pride and joy – not something done for profit but for the love of the thing and to show off their skills and knowledge – then with the advent of supermarket bread for many years the choice was medium-sliced or thick-sliced – everything else was steamed white plain bread. You cannot promote skills, knowledge or learning by motivating every step you take to reducing the price for "consumers" or by enabling more and more work (so long as it can be reduced to a semi-automated process) to be done more quickly or more cheaply.

I feel my regulator is behaving dishonestly and reneging upon the covenant they should have with me to encourage me to be a better, more responsible, more highly-qualified solicitor and is instead promoting the lesser skilled, lesser paid, more limited functions that look like a "better" public offering when evaluated solely by price.

How long will it be before you realise that the ultimate death knell for quality professional legal services is the path you are choosing to follow which leads to promotion of unregulated, uninsured and unaccountable services?

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?

Absolutely not. *Compliance* in the brave new world will be something people will create structures to avoid. Why have all that needless expense in being (or hiring) qualified folk when with a little judicious dancing around one's handbag one can avoid all that time consuming, profit-eating work. Separate businesses will, as they already do, hand introduction fees to other parts of the same group, insurers will have their solicitors offer direct well-below Kemp and Kemp PI settlements assuring (mendaciously) the injured victim that they will save lots of time / money / trouble by taking their first offer.

Has it not occurred to the SRA that the apparently better showing of ABS structures in complaints-handling is because they have the mechanisms in place to game the system and ensure the punter has always compromised themselves – usually without having had a proper advice that the sheaf of standard paperwork they are sent at the outset of a matter is in part designed to protect the ABS against any future claim but that ignores the moral and ethical dimension entirely.

Once upon a time the reserved activities meant that the legal profession had a leg-up in dealing with the public and for that reason it was appropriate to ensure they were regulated so they didn't abuse the privilege.

It is a travesty that SRA does not seem to understand that an unqualified Will Writer can limit their liability to the price paid for their software-generated document, when, bizarrely, a solicitor is handicapped by their professional skills and competence and required to stand behind their document, often storing it for free, for many, many years. If you divide up the proportion of the annual indemnity premium for a small firm across their transactions and the potential length of liability they are forced to accept, by being regulated, it is astonishing that any regulated individual can make a will for less than several thousand pounds – but the public are adamant they do not want to pay for those benefits, so why should SRA force qualified and regulated people to give it to them?

I find it enormously regrettable but whether you realise it or not you are kicking off a race to the lowest regulated (or more likely non-regulated) denominator.

What about permitting regulated businesses or individuals to limit their liability to clients – even explicitly by having a two-tier pricing structure – Will with PI cover, 30 years' assurance of efficacy, £10,000 or, without, liability of the preparer limited to the price paid *no consequential loss claim permitted* £30??

What about ensuring there is no regulatory conflict? Why is it satisfactory for licensed conveyancers to act for both Seller and Buyer in a property transaction but

not for solicitors to do so?

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?

No – you have created a code which completely ignores that the bulk of those you will be envisaging may be solicitors working within unregulated structures will not have any rights of self-determination and standing up for what the code requires them to do will simply lead to their dismissal. I hope that this is the most negative construction to put upon the likely outcomes but employed or in-house solicitors working for non-regulated businesses with non-regulated owners will not have the locus standi to comply.

Question 7

In your view is there anything specific in the Code that does not need to be there?

The wording appended to principle 2 "..and those delivering legal services". This implies that an individual regulated person can influence potentially non-qualified providers in different organisations. Actually "conduct" probably doesn't work for anyone except those acting as solicitors with direct client contact in regulated businesses. It would be more clumsy, but more accurate, to say "act in a way which is calculated to uphold.." Acting is a personal duty, conduct is only relevant when observed.

Question 8

Do you think that there anything specific missing from the Code that we should consider adding?

An exemption from compliance for those employed as solicitors in non-regulated businesses where they do not have contractual freedom to act in compliance with the code. If not then your regulatory regime will be forcing some qualified and authorised persons out of employment.

I appreciate this will be difficult as it will involve openly admitting that you are putting some solicitors in an impossible position, but not doing so would be a gross dereliction of duty on the part of a regulator charged with encouraging an independent, strong, diverse and effective legal profession.

Question 9

What are your views on the two options for handling conflicts of interests and how they will work in practice?

I always believe less is more but in this case the drafting of both options is poor. You persist in using touchy feely language which will cause more trouble than it cures – for example “significant risk” or “strong consensus” – in whose judgement?

You have always overlooked the blindingly obvious – if one authorised person or entity is going to use the exemption to allow them to act for two clients where there is a potential conflict you require the clients to give their “informed” consent – from whom do you think that advice leading to that “informed” consent will be taken – the same solicitor who has almost certainly a financial incentive to act.

As for the second option I have always believed that, once a conflict is established then the conflict fatally damages the interests of both parties and the older position, where instructions for both parties would have to be declined, should prevail.

It would be a useful and practical step to establish that solicitors are entitled to charge for work undertaken to the point when a conflict is established – even if they then have to decline both sets of instructions – this has always been a grey area – on a quantum meruit basis would be better than nothing.

Question 10

Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

No. Almost every point of your proposed code involves subjective judgements and the entire cast of both codes, personal and firm, is woolly vague and unfocused and compliance simply cannot be assured to the regulated firm or professional. This is a breach of what should be a covenant between regulator and regulated to act openly, transparently and fairly.

Question 11

In your view is there anything specific in the Code that does not need to be there?

All of the vague and subjective language, the unilateral obligations and the lack of reciprocity.

Question 12

Do you think that there anything specific missing from the Code that we should consider adding?

An indemnity for any solicitor or authorised person if they are unable to comply without prejudicing their job security. There is no justification in requiring solicitors to enhance the reputation of the profession by forcing themselves into unemployment.

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?

See above under the three previous questions

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.

If you are prepared to accept that solicitors will work in unregulated businesses with no COLP or COFA how is it acceptable, if regulation is to be transparent and fair, that authorised businesses are penalised by the sometimes substantial costs of running and populating those roles and these are not, if properly performed, trivial undertakings (and yet more so for a sole practitioner).

In logic a sole practitioner is required to self-report in the event of non-compliance with regulations, financial difficulty and the like whereas compelling him to do so with another hat on seems otiose.

I am not clear that the role of either is well-performed or even that SRA has researched the benefits of them – I would be prepared to accept that the status quo ante is maintained BUT in my own view it is long past time for you to construct and run a proper evaluation of the actual regulatory benefits of these roles and publish the results.

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?

Conduct the evaluation I have outlined in question 14, accept that most COLP and COFA roles in the small businesses where SRA publicity seems to think they are most vital do not truly have the independence or employment protection for the individuals concerned to be able to exercise the roles without fear or favour.

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?

Threats: Doomsday for small local firms and great difficulties for consumers who still want to be able to visit a local solicitor.

Opportunities: Bonanza for externally funded sophisticated and unregulated businesses to pick off more profitable work, deal with it using (largely) unqualified staff who will also not be regulated in any way and the public will probably have little idea that potentially meeting their “unmet legal needs” comes at the expense of genuine accessibility to those who want to meet with and speak to a qualified solicitor – even if only to be reassured about what is being done for them, PI cover and future assurance of quality.

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?

I would plan to start a small private company and try and take all the work we presently do out of regulatory scope entirely – perhaps creating separate businesses to deal with any residual reserved activities which survive the coming onslaught or yourselves, the LSB and Government.

If regulation becomes optional unless there is a sea change in the quality efficiency and value in what you do I would choose to opt out.

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?

So I guess the “artificial separation” solution where one solicitor is hired for his qualification and works as a one man limited company or similar and therefore the true benefits or regulation are almost entirely negated and the burden is minimised – if anything goes wrong you revoke the agreement with the separate business legally qualified provider and hire a new one, leaving the ditched one to carry the can and suffer your opprobrium.

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?

If the SRA has properly evaluated the requirement as being unnecessary then it should be removed. The question would then be for how long an unnecessary requirement has been left in place.

Question 20

Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

Absolutely not. Government should require all *unregulated* firms to disclose their absence of PI cover, their lack of future assurance and their inability to legally deal with any reserved business.

The consequences of compulsorily displaying all of the protections will encourage consumers to make unjustified claims.

It is already common to find consumers who will game the system to achieve reductions in perfectly proper charges. This seems to be a largely un-investigated area but one which a concerned regulator should evaluate. The difficulty is the absence of any downside for a sophisticated client who tries it on.

In my own experience I have had a telephone call with effusive and grateful thanks from a corporate MD after a difficult but valuable save for his company from my firm and the following day the finance director called to say he would be filing a formal complaint if we did not reduce our charges by £1,500 – and even said that giving that sum as a discount should be cheaper for us than dealing with a claim.

Question 21

Do you agree with the analysis in our initial Impact Assessment?

No. It completely misses the point which any common sense view would identify. There is no benefit to an unregulated business in having solicitor employees in the first place, especially if they can hire unqualified staff to perform the same limited roles so the idea that there will be lots of unregulated businesses choosing to hire comparatively expensive qualified staff with constraints on their freedom to operate is ludicrous.

Any view of the development of successful firms will show that the number of qualified staff is dropping as it is cheaper to hire paralegals.

You need to work out what will fulfil the principles in the LSA – particularly bearing in mind:

(e) promoting competition in the provision of services within subsection (2);

(f) encouraging an independent, strong, diverse and effective legal profession;

It still escapes me why you do not note and comply with your vires by seeing your duty to promote competition is ONLY between authorised providers – not by any unregulated entity.

Question 22

Do you have any additional information to support our initial Impact Assessment?

None to support it – seems to be a lot of usual blue-sky thinking without focusing much on what has happened in the past or is, with any realistic view, likely to happen in the future.

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?

Yes – but presumably the entity could do so as it would not be constrained or regulated by you in any way and I object to your use of “alternative legal services provider” – you mean “unregulated and unqualified provider..”

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?

I have no particular view – I think being able to properly assess compliance will be very difficult.

From an organisation that couldn't be bothered to collect £90K in unpaid ABS licence renewal fees on the grounds that the cost of doing so would outweigh the benefits I have serious doubts about you being able to achieve realistic regulatory inputs in the way you envisage

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?

If not, what are your reasons?

I think this is more complex than at first appears. If an employed solicitor is instructed to do something by their employer of questionable merit for the client and the client then makes a claim, if it were determined that the solicitor should not have done the act complained of, and there is no access to the compensation fund, then the solicitor would probably be personally sued and bankrupted – and most will not be in a position to maintain PI cover.

On balance I would favour your view.

Question 26

Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

Yes but see above as to potential situations where your regulatory inputs may confirm a solicitor's personal liability.

I am strongly coming round to the idea that if solicitors are to be truly free in the market place then all of the current regulatory requirements have to become optional and the market will very quickly demonstrate which are the ne plus ultra for which successful firms will volunteer and clients will value.

Question 27

Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

Too many to mention – you will denigrate the qualification of solicitor by confusing the public between those solicitors who are regulated and insured and those who are not, you will weaken job security for qualified staff and you will still have done nothing whatever to find solutions for solicitors whose competence may be waning and are desperate to retire but cannot afford to do so and bear the costs of run-off cover.

We simply cannot afford to have a professional regulator so signally failing to understand the consequences of its proposed actions.

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?

If you do not, then this will be the thin end of a spectacularly wide wedge.

Question 29

Do you have any views on what PII requirements should apply to Special Bodies?

My gut reaction would be that all entities or individuals who are regulated by you or who, by your own rule making no longer require to be regulated by you should be required to offer PII cover but I think it is becoming clear that many firms struggle with telephone number sized PII insurance premiums and I think that the requirement for insurance should be modified to allow clients to pay a per transaction insurance fee, if they want to, rather than leaving the entire burden of providing cover (including run-off cover) to solicitors. Clients would then be free to purchase the level of cover with which they feel content.

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?

I don’t understand what you are proposing – in a modern legal services business, especially if it is publicly traded – ownership is far more transient and certainly changes faster than your ability to modify licences.

I think the presumption in 155 is naïve. The evidence is against you.

Question 31

Do you have any alternative proposals to regulating entities of this type?

You need to decide whether you will, or will not, regulate a firm. If outcome focused regulation were to be properly espoused then you would regulate only the firms that failed to meet required outcomes, without regulation.

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?

Yes – frankly you will create an unworkable structure. Your wish fulfilment aspiration to be able to hold an alternative legal services provider to account via the (perhaps lone) solicitor employee is ridiculous. Any ALS provider will simply fire the solicitor and then challenge your right to have any information – if I were running an ALS firm employing solicitors I would write into their contract as grounds for immediate termination any investigation by the regulator – as there is almost always only going to be this sort of contact from you in the event of perceived or feared wrongdoing it is likely a contract clause of this sort would be upheld – the ALS would probably say it was necessary to stop their good reputation being spoiled by association with a dodgy solicitor.

Question 33

Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

No. If you want to increase scope for “unmet legal need” to be met then you have to accept that inept regulation is part of the problem. All providers should be free to “regulation shop” without penalty or sequelae.

Thank you for completing the **Consultation questionnaire form**.

Please save a copy of the completed form.

Please return it, along with your completed **About you form**, as an email attachment to consultation@sra.org.uk, by **21 September 2016**.

Alternatively, print the completed form and submit it by post, along with a printed copy of your **About you form**, to

Solicitors Regulation Authority
Regulation and Education - Policy - Handbook 2017
The Cube
199 Wharfside Street
Birmingham
B1 1RN

Nick Coldrey

I am responding in my personal capacity to the consultation as an in-house lawyer.

Despite some efforts to recognise that in-house lawyers predominantly operate in an environment

which requires different regulation than those solicitors in private practice, the SRA have still

substantially failed to understand the extent of the difference between in-house and private practice.

In order to properly reflect the in-house environment the SRA should:

1. Have a two part consultation which is focused on either ‘in-house’ or ‘private practice’.
2. Recognise that the vast majority of in-house lawyers are simply employees, with no clients

(never having any requirement whatsoever to provide legal advice to members of the public).

3. The code of conduct for in-house lawyers who fall within #2 above should specifically

recognise that the employer (as the pseudo client) relationship that exists for in-house

lawyers.

Regards

Nick Coldrey

Legal Director & Company Secretary

Consultation: Looking to the future - flexibility and public protection

Response ID:73 Data

2. Your identity

Surname

Proudlock

Forename(s)

Nicola

We may publish a list of respondents and a report on responses. Partial attributed responses may be published. Please advise us if you do not wish us to attribute your response or for your name or the name of your firm or organisation to appear on any published list of respondents.

Attribute my/our response and publish my/our name.

Please identify the capacity in which you are submitting a response. I am submitting a response…

on my own behalf as a solicitor in private practice

3.

1. Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

no

4.

2. Do you agree with our proposed model for a revised set of Principles?

yes

5.

3. Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

yes

6.

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?

no

7.

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?

no

8.

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?

yes

9.

7. In your view is there anything specific in the Code that does not need to be there?

no

10.

8. Do you think that there anything specific missing from the Code that we should consider adding?

no

11.

9. What are your views on the two options for handling conflicts of interests and how they will work in practice?

I do not have a view on this

12.

10. Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

yes

13.

11. In your view is there anything specific in the Code that does not need to be there?

no

14.

12. Do you think that there anything specific missing from the Code that we should consider adding?

no

15.

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?

no

16.

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.

yes

17.

15. How could we improve the way in which the COLP/COFA roles work or to provide further support to compliance officers, in practice?

i have no comment on this

18.

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?

This is an appropriate and logical proposal led by consumer demand to make it easier to access legal services and to open up the market. Provided the consumer is aware of all the risks, the consumer should be able to make an informed choice.

19.

17. How likely are you to take advantage in the greater flexibility about where solicitors can practice as an individual or as a business?

100% likely

20.

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?

agree

21.

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?

I have no comment to make

22.

20. Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

Not detailed information, no.

23.

21. Do you agree with the analysis in our initial Impact Assessment?

yes

24.

22. Do you have any additional information to support our initial Impact Assessment?

no

25.

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?

yes

26.

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?

no comment

27.

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? If not, what are your reasons?

yes

28.

26. Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

yes

29.

27. Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

I think there are many details to be worked out but the principles are sound

30.

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?

yes

31.

29. Do you have any views on what PII requirements should apply to Special Bodies?

no

32.

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?

yes

33.

31. Do you have any alternative proposals to regulating entities of this type?

no

34.

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?

no

35.

33. Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

yes

Consultation: Looking to the future - flexibility and public protection

Response ID:671 Data

2. Your identity

Surname

Smith

Forename(s)

Nigel Robert

We may publish a list of respondents and a report on responses. Partial attributed responses may be published. Please advise us if you do not wish us to attribute your response or for your name or the name of your firm or organisation to appear on any published list of respondents.

Attribute my/our response and publish my/our name.

Please identify the capacity in which you are submitting a response. I am submitting a response…

on my own behalf as a solicitor in private practice

3.

1. Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

I have read and agree with the Law Society's Response dated September 2016. I adopt and support their responses to each of the questions in this questionnaire including this one.

4.

2. Do you agree with our proposed model for a revised set of Principles?

I have read and agree with the Law Society's Response dated September 2016. I adopt and support their responses to each of the questions in this questionnaire including this one.

5.

3. Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

I have read and agree with the Law Society's Response dated September 2016. I adopt and support their responses to each of the questions in this questionnaire including this one.

6.

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?

I have read and agree with the Law Society's Response dated September 2016. I adopt and support their responses to each of the questions in this questionnaire including this one.

7.

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?

I have read and agree with the Law Society's Response dated September 2016. I adopt and support their responses to each of the questions in this questionnaire including this one.

8.

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?

I have read and agree with the Law Society's Response dated September 2016. I adopt and support their responses to each of the questions in this questionnaire including this one.

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7. In your view is there anything specific in the Code that does not need to be there?

I have read and agree with the Law Society's Response dated September 2016. I adopt and support their responses to each of the questions in this questionnaire including this one.

10.

8. Do you think that there anything specific missing from the Code that we should consider adding?

I have read and agree with the Law Society's Response dated September 2016. I adopt and support their responses to each of the questions in this questionnaire including this one.

11.

9. What are your views on the two options for handling conflicts of interests and how they will work in practice?

I have read and agree with the Law Society's Response dated September 2016. I adopt and support their responses to each of the questions in this questionnaire including this one.

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15.

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?

I have read and agree with the Law Society's Response dated September 2016. I adopt and support their responses to each of the questions in this questionnaire including this one.

16.

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.

I have read and agree with the Law Society's Response dated September 2016. I adopt and support their responses to each of the questions in this questionnaire including this one.

17.

15. How could we improve the way in which the COLP/COFA roles work or to provide further support to compliance officers, in practice?

I have read and agree with the Law Society's Response dated September 2016. I adopt and support their responses to each of the questions in this questionnaire including this one.

18.

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?

I have read and agree with the Law Society's Response dated September 2016. I adopt and support their responses to each of the questions in this questionnaire including this one.

19.

17. How likely are you to take advantage in the greater flexibility about where solicitors can practice as an individual or as a business?

I have read and agree with the Law Society's Response dated September 2016. I adopt and support their responses to each of the questions in this questionnaire including this one.

20.

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?

I have read and agree with the Law Society's Response dated September 2016. I adopt and support their responses to each of the questions in this questionnaire including this one.

21.

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?

I have read and agree with the Law Society's Response dated September 2016. I adopt and support their responses to each of the questions in this questionnaire including this one.

22.

20. Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

I have read and agree with the Law Society's Response dated September 2016. I adopt and support their responses to each of the questions in this questionnaire including this one.

23.

21. Do you agree with the analysis in our initial Impact Assessment?

I have read and agree with the Law Society's Response dated September 2016. I adopt and support their responses to each of the questions in this questionnaire including this one.

24.

22. Do you have any additional information to support our initial Impact Assessment?

I have read and agree with the Law Society's Response dated September 2016. I adopt and support their responses to each of the questions in this questionnaire including this one.

25.

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?

I have read and agree with the Law Society's Response dated September 2016. I adopt and support their responses to each of the questions in this questionnaire including this one.

26.

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?

I have read and agree with the Law Society's Response dated September 2016. I adopt and support their responses to each of the questions in this questionnaire including this one.

27.

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? If not, what are your reasons?

I have read and agree with the Law Society's Response dated September 2016. I adopt and support their responses to each of the questions in this questionnaire including this one.

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26. Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

I have read and agree with the Law Society's Response dated September 2016. I adopt and support their responses to each of the questions in this questionnaire including this one.

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27. Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

I have read and agree with the Law Society's Response dated September 2016. I adopt and support their responses to each of the questions in this questionnaire including this one.

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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?

I have read and agree with the Law Society's Response dated September 2016. I adopt and support their responses to each of the questions in this questionnaire including this one.

31.

29. Do you have any views on what PII requirements should apply to Special Bodies?

I have read and agree with the Law Society's Response dated September 2016. I adopt and support their responses to each of the questions in this questionnaire including this one.

32.

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?

I have read and agree with the Law Society's Response dated September 2016. I adopt and support their responses to each of the questions in this questionnaire including this one.

33.

31. Do you have any alternative proposals to regulating entities of this type?

I have read and agree with the Law Society's Response dated September 2016. I adopt and support their responses to each of the questions in this questionnaire including this one.

34.

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?

I have read and agree with the Law Society's Response dated September 2016. I adopt and support their responses to each of the questions in this questionnaire including this one.

35.

33. Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

I have read and agree with the Law Society's Response dated September 2016. I adopt and support their responses to each of the questions in this questionnaire including this one.

Consultation: Looking to the future - flexibility and public protection

Response ID:677 Data

2. Your identity

Surname

Khan

Forename(s)

Ahsan

We may publish a list of respondents and a report on responses. Partial attributed responses may be published. Please advise us if you do not wish us to attribute your response or for your name or the name of your firm or organisation to appear on any published list of respondents.

Attribute my/our response and publish my/our name.

Please identify the capacity in which you are submitting a response. I am submitting a response…

on behalf of a local law society

Please enter the name of the society.: Northamptonshire Law Society

3.

1. Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

No

4.

2. Do you agree with our proposed model for a revised set of Principles?

No. Although the revised set of Principles are simpler, the removal of Principles 5 and 10 has negative implications for consumer protection and the maintenance of professional standards as there is no principle to protect client money and assets and to provide a proper standard of service to clients.

5.

3. Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

Principle 2 is ambiguous and unclear. It either requires simplifying or guidance needs to be given as to what it means by "those delivering legal services".

6.

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?

Yes, the Principles should continue to refer to the solicitor's duty to keep the affairs of the client confidential as notes to the new Principle 6.

7.

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?

The current Code is a "one size fits all model" and does not reflect the variety of modern solicitors practices. Case studies utilising business models in small and/or niche practices would be beneficial.

8.

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?

Having two codes creates two tiers of solicitors, those working in a regulated entity and those working in an

unregulated entity. This has risks to consumer protections, professional standards and consistency. This leads to risk to damaging the credibility of the profession and creating confusion for clients.

9.

7. In your view is there anything specific in the Code that does not need to be there?

Not that I can think of at this stage.

10.

8. Do you think that there anything specific missing from the Code that we should consider adding?

The Code does not provide certainty about what is and is not permitted. Smaller firms may prefer a more definitive approach about what can and can't be done and would benefit from greater guidance and easily accessible training, particularly on how the Code will work in practice.

11.

9. What are your views on the two options for handling conflicts of interests and how they will work in practice?

There is likely to be difficulty with this as the conflict rules will not apply to unregulated entities meaning that they don't effect unregulated entities but regulated entities may be subject to a greater level of restriction than they are now. Of the two options offered to dealing with conflicts, option 2 may be unworkable becuase it is not always possible to identify that an actual conflict exists, a solicitor may unknowingly act in a conflict situation. As non-regulated staff would not be subject to the conflict rules, this may create confusion for clients, a favourable competitive advantage for unregulated entities and lack of consumer protection.

12.

10. Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

Further guidance is required as to how it would work in practice.

13.

11. In your view is there anything specific in the Code that does not need to be there?

Not that I can think of at this stage

14.

12. Do you think that there anything specific missing from the Code that we should consider adding?

The Code does not provide certainty about what is and is not permitted. Smaller firms may prefer a more definitive approach about what can and can't be done and would benefit from greater guidance and easily accessible training, particularly on how the Code will work in practice.

15.

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?

Yes, the new Principal 2 could be drafted clearer.

16.

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.

Yes. May be an idea to have case studies and/or blogs from COLP and COFA in large firms to share best practices for smaller firms and small practitioners. The roles are a good way to identify an individual within a firm to refer matters to.

17.

15. How could we improve the way in which the COLP/COFA roles work or to provide further support to compliance officers, in practice?

See previous answer. Easy access to training and updated guidance.

18.

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?

Reputation and standing of solicitors - The proposals may result in two tiers of solicitors and there is inadequate protection for clients in respect of those working in unregulated businesses, which is likely to create confusion and detriment to the client. This is likely to damage the reputation of the title of solicitor.

Legal Professional Privilege (LPP) - There should be certainty that LPP should attach to advice from solicitors regardless of where they practice. This is to preserve the concept of LPP and not to undermine the standing of the solicitor profession. In-house solicitors in an unregulated entry are not likely to have the protection of LPP.

Conflicts and confidentiality - The proposals will result in confidentilaity only applying to individual solicitos working in an unregulated entity but not to the entity or to other employees. There is a risk that a solicitor may unknowingly act in a conflict situation which the client may not be aware of. Regulated entities will be less attractive as it puts them at a competitive disadvantage.

Consumer Protections - No requirement for solicitors working in unregulated entries to have PII and no access to the Compensation Fund would risk eroding client protections. Different rules and protections would lead to confusion with clients and uncertainty. It would be difficult giving information about protections to the client and too much for them to digest, particularly clients that are vulnerable/suffer from mental health.

Consumer confusion about status - Consumers are likely to be confused by the status of solicitors practicing from an unregulated entry becuase that entity will not be referred to as a law firm. The confusion will lead to assurance of quality and protections when they engage solicitors. Consumers will have to take additional due dilligence, which would undermine the profession locally and internationally.

PC fees - Information is required as to whether the SRA's proposals will impact on PC fees.

19.

17. How likely are you to take advantage in the greater flexibility about where solicitors can practice as an individual or as a business?

Unlikely at this stage but it remains to be seen how the marketplace will change. At the moment there are no projections as to what impact this will have.

20.

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?

Agree with the current position.

21.

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?

The changes could potentially allow newly qualified solicitors to set up in business as a sole practitioner. This will increase risk to clients as well as putting NQs at risk and negatively impact on the standing of

solicitors.

22.

20. Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

It would depend on where this information would be displayed and how detailed the information is to be. The costs of small firms updating websites and stationary etc would need to be considered.

23.

21. Do you agree with the analysis in our initial Impact Assessment?

The impact on small firms needs to be considered, particularly in relation to the cost of training.

24.

22. Do you have any additional information to support our initial Impact Assessment?

See previous answer

25.

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?

Yes. It is vital that protections are in place to safeguard client money and avoid the risk of diluting the standing of the solicitor name.

26.

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?

It would be difficult to ensure safeguards for clients and so, for this reason, they should not be permitted to do this.

27.

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? If not, what are your reasons?

What alternative forms of protection do these clients have? They need some form of protection. Also, if they are not required to pay into the Fund this may mean that solicitors in regulatd entities woould have to pay more into the Fund to ensure its viability and therefore increasing the burden on them. This would a create a unevenly sided two tier system.

28.

26. Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

Yes. However, there must be a requirement on the bodies to have insurance cover to protect clients. If there are various degrees of cover availability it may create changes to prices in PII cover in the marketplace, which may mean higher prices for regulated entities that may be a big financial burden burden for small firms and may prevent sole practitioners and new firms from opening up.

29.

27. Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

The difficulties are providing clarity and guidance to the profession and the public. The latter would be more difficult and is likely to cause confusion and damage to the credibility of the profession.

30.

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?

Yes. The client needs to have protection and certainty. The requirement to have PII should be the same regardless of the entity to ensure consistency and avoid confusion.

31.

29. Do you have any views on what PII requirements should apply to Special Bodies?

See previous answer.

32.

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?

Yes

33.

31. Do you have any alternative proposals to regulating entities of this type?

Not that I can think of at this stage

34.

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?

Yes but it is not clear how the entity would be monitored and the speed with which it could be intervened. For example, the entity may have multiple computer or case management systems making it difficult for the SRA to obtain papers.

35.

33. Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

Yes, to avoid a two tier system that would provide difficulty in protection for clients and dilution of the profession.

Consultation: Looking to the future - flexibility and public protection

Consultation questionnaire form

This form is designed to be completed electronically—in MS Word. Please save it locally before and after completing it.

Question 1

Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

No, but we were not clear that sufficient detail of how the suitability test will be applied has been given.

Question 2

Do you agree with our proposed model for a revised set of Principles?

We were not clear what was the justification for this revision so soon after the introduction of the previous Principles were promolgated. It seems to us that this chopping and changing of regulatory requirements is in no one's interest and serves only to confuse and create additional cost. In any event, the revision of the Principles seems to be largely a reworking of the old and that the major change is to impose personal conduct duties upon employed solicitors operating in ABS vehicles outside the regulated sector which we believe is a flawed concept .

Question 3

Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

We are not at all sure what is meant by the phrase “those delivering legal services”. Perhaps just as importantly in our view, the twin track code of conduct will have the contrary effect of maintaining public trust and confidence because the remedies for poor service, complaints and claims in the regulated firm will not apply to a solicitor in a non regulated entity .

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?

We feel that there is insufficient emphasis on duties of confidentiality and the critical importance of legal advice privilege. We are not satisfied that there is proper guidance upon the conflict of interests that will arise where an employed solicitor who owes clear employment duties tries to reconcile those with the personal professional duties.

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?

We think this will be helpful in all areas. for example, many of our members are concerned about the removal of indicative behaviour from the handbook because these provide a useful touchstone. Without detail and real-life examples of the application of the Principles, they become no more than a wish list of exhortations which can be open to varied interpretation.

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?

We repeat the answer above that we fear that a truncated code will be too vague and amount to little more than a wish list.

Question 7

In your view is there anything specific in the Code that does not need to be there?

No comment.

Question 8

Do you think that there anything specific missing from the Code that we should consider adding?

Like The Law Society nationally and as stated above, we are particularly concerned about the absence of guidance on conflicts of interest (particularly for individual solicitors and ABS entities who will have conflicting duties to the client and to his or her employer) and the proposed abolition of the bar on cold calling. A duty to serve my employer's best interests and those of my client are not commensurate. The removal of that bar on employed solicitors acting for third parties cannot be in anybody's interests and, as an example, confidentiality could not be maintained if the employer seeks access to instructions or advice.

Question 9

What are your views on the two options for handling conflicts of interests and how they will work in practice?

No comment.

Question 10

Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

See above.

Question 11

In your view is there anything specific in the Code that does not need to be there?

We think it impossible to reach a considered judgment in response to this question on the basis of the current consultation.

Question 12

Do you think that there anything specific missing from the Code that we should consider adding?

See previous answer.

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?

No.

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.

Like the SRA, we have mixed feedback from our members over the effectiveness and usefulness of compliance roles. On balance, we think the roles of COLP and COFA are too restrictive and bureaucratic and if as part of the SRA's consultation its aim is to reduce compliance costs then abolishing these roles and returning to a system whereby individual solicitors took responsibility for their own conduct and/or where firms could lay down their own compliance structure would be a welcome development.

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?

See the previous answer and by liaising more closely with COLPs and COFAs.

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?

The unanimous view of our members is that this would be in nobody's best interests.

For individual solicitors delivering non-reserved legal services to the public through alternative legal services providers, the threats and dangers are obvious and seem to have been completely overlooked by the SRA.

In most normal circumstances, the duties owed to a client by a solicitor will be commensurate with those owed by his or her firm. Where however the SRA are seeking to impose additional duties upon the solicitor that don't apply to the employer, the corollary of a separate **additional** duty of care owed by the individual solicitor to the client is obvious. The lessons of Merrett v Babb, Yazhou Travel Investment Co Limited v Bates and Star and Williams v Natural Life Health Foods appear to have been completely overlooked by the SRA. This will render the solicitor personally liable outwith the usual principles of vicarious responsibility.

More particularly, where these services are being delivered by an individual described as a solicitor, the public will rightly expect the self-same protections against loss and reinforcement of an ability to claim compensation against a firm of solicitors or complain. They will not see any distinction.

The real danger too from this proposal will be to open up the field to significant degrees of confusion as to what falls within reserved and unreserved activities and the movement of non-reserved legal activities into an entirely unregulated sector AND expose solicitors without full PI cover to personal ruin.

The corollary of that will be a greater regulatory burden falling on the regulated sector because, self-evidently, fee income will move from the regulated to the unregulated sector and compliance costs become proportionally greater.

We can genuinely see no advantage- and many dangers- in this proposal and much detriment both to consumers, the reputation of solicitors and pernicious personal exposure of solicitors to claims that they personally owed duties of care different from and over and above those owed by their employers.

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?

This is difficult to say, but we anticipate that some solicitors' practices will open an unregulated "No 2 Company" but we think it unlikely.

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?

The SRA itself makes the point here about the ability to opt out of regulation and consumer confusion.

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?

We believe that a qualified to supervise rule should remain in place akin to the current rule i.e. 3 years' practice together with a clear demonstration of an understanding of regulatory requirements and client protections.

Question 20

Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

This question wouldn't be necessary if it weren't the case that the SRA proposal would allow unregulated entities to ride on the public perception of protection afforded to them when dealing with a profession. It is of course ironic that in an unregulated sector, there are no powers to compel any action, but it would be far better if ABS entities were clearly identified as a high risk and as not having the same level of client financial protections.

Question 21

Do you agree with the analysis in our initial Impact Assessment?

The main private client matters for which clients consult solicitors – conveyancing and wills and probate – are very cheap and exceptionally good value for money; for example, a solicitor's costs are a fraction of those of estate agents, SDLT, court fees and funeral costs. We do not see these proposed Handbook changes as having any material impact in these areas, but we do see the creation of confusion amongst consumers about dealings with "lawyers" and not understanding distinctions between regulated firms providing properly regulated reserved activities and solicitors or others badged as "lawyers" providing non reserved .

The SRA seem obsessed with the idea that comprehensive PI cover is not in clients' best interests, but its belief that abolishing the requirement for it will benefit clients via lower fees is a myth. Gross PI premiums are lower than in 2000 and our members report premiums at up to 20% less than last year in this year's renewal yet we doubt that those lucky firms will reduce fees.

The SRA would do better to look at the impact on access to justice of Legal Aid cuts.

Question 22

Do you have any additional information to support our initial Impact Assessment?

See above

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?

They should not be permitted to hold client money at all, whether in their own name or that of the ABS.

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?

We have no comment.

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?

If not, what are your reasons?

Yes, it seems to us that if alternative legal service providers are not going to be operating in the regulated sector and therefore contributing properly and proportionately to the compensation fund, their clients should be denied benefit. The difficulty remains of course, a highlighted above, that the client will still have seen themselves as having been dealing with a solicitor and confused as to why they are denied recompense when dealing with a solicitor who is regulated by the SRA.

This will create unfairness and anomalies.

Question 26

Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

No. A fundamental and serious oversight of the SRA is the individual of duty of care owed by a solicitor to his or her client, particularly in circumstances where his or her duties are being differentiated from those of the ABS entity or where the solicitor is regulated but the ABS entity is not.

This is a dangerous concept and should not be permitted. Clients too will not understand how any regulated professional trusted with important matters- no one consults a solicitor lightly- can be permitted to practice without financial protections in place and as well as serial injustices arising, this will irreparably damage the most important part of a client's relationship with a professional- trust.

Question 27

Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

See our previous answers.

If not required to have PI cover and the majority of ABS entities are unlikely to choose to obtain it. After all, they will usually be operating behind a corporate veil.

As the facts in Merrett v Babb indicate, even where such entities have PI insurance in force, professional negligence PIs on a claims-made basis and where ABS entities have gone into liquidation, there will be no run off cover.

The simple answer is that all solicitors in all circumstances must have mandatory PI cover, including compulsory run off cover in a claims-made professional negligence system.

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?

Yes.

Question 29

Do you have any views on what PII requirements should apply to Special Bodies?

The same level as the current protections afforded to clients of solicitors' firms under the minimum terms and conditions.

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?

No, we think the entirety of these proposals is a recipe for confusion and a dilution of client financial protections and that a regulated firm of solicitors should deliver legal services through a regulated entity.

Question 31

Do you have any alternative proposals to regulating entities of this type?

No, we think the entirety of these proposals is a recipe for confusion and a dilution of client financial protections and that a regulated firm of solicitors should deliver legal services through a regulated entity. Our profession will be reputationally damaged.

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?

Yes.

Question 33

Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

No comment

Thank you for completing the **Consultation questionnaire form**.

Please save a copy of the completed form.

Please return it, along with your completed **About you form**, as an email attachment to consultation@sra.org.uk, by **21 September 2016**.

Alternatively, print the completed form and submit it by post, along with a printed copy of your **About you form**, to

Solicitors Regulation Authority
Regulation and Education - Policy - Handbook 2017
The Cube
199 Wharfside Street
Birmingham
B1 1RN

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21 September 2016

Solicitors Regulation Authority
Regulation and Education-Policy-Handbook 2017
The Cube
199 Wharfside Street
Birmingham B1 1RN

Dear Sir/Madam

The OISC has read the SRA's consultation "Looking to the Future" with interest.

We note that there are a number of proposals that potentially have an impact upon the OISC regulatory scheme and how solicitors and those they supervise will need to comply with the Immigration and Asylum Act 1999 (as amended) (the 1999 Act).

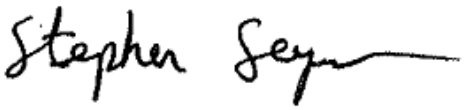
At this stage of the process, it is difficult for the OISC to gauge the precise effects of the proposed changes. Therefore, rather than provide a detailed response to the consultation, we would request that the SRA engages with the OISC to discuss issues that are likely to have an impact on the immigration and asylum sector.

From our reading of the consultation document, we are particularly interested in the following areas:

- Solicitors operating outside of regulated firms when providing advice and services in the subjects of immigration and asylum;
- The regulation of "Special Bodies" (as defined by the Legal Services Act 2007), particularly in light of the recent agreement between the OISC and the SRA as to how not for profit organisations where solicitors provide immigration advice are to be regulated;
- If "In-house" solicitors are to be able to provide advice to the public, how they will be regulated;
- The "supervision" of non-solicitors. The OISC remains concerned about the protection of clients who are being provided immigration advice and services by a "supervised" person and the further removal of requirements of solicitors that may supervise. Particularly in cases where the "supervision" is a convenience to circumvent the provisions of the 1999 Act; and
- If there are changes to the definition of RFLs, how they will be regulated to satisfy the provisions in the 1999 Act.

Clearly, this list is not exhaustive and the OISC is keen to understand the SRA's assessment of the impact of the proposed changes on the immigration and asylum sector.

Yours sincerely



Stephen Seymour
Director of Operations
On behalf of the Immigration Services Commissioner

Peninsula

Consultation: Looking to the future - flexibility and public protection

Consultation questionnaire form

This form is designed to be completed electronically—in MS Word. Please save it locally before and after completing it.

Question 1

Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)

As an unregulated business, there are no issues of compliance with the test on a company basis. To our knowledge, none of the solicitors or trainee solicitors working within the business have had any difficulties in meeting the suitability test and so we have not encountered any practical issues regarding the application of the test.

Question 2

Do you agree with our proposed model for a revised set of Principles?

Yes.

Question 3

Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

Yes but we think it is important that, in order to maintain public trust and confidence, solicitors not only conduct themselves in a way that upholds public confidence but that such behaviour is also seen to uphold that trust and confidence.

To that end we would suggest a slight amendment so that the principle reads:

"Ensure that your conduct upholds, and is seen to uphold, public confidence in the profession and those delivering legal services."

It may be advisable to add some guidance on expected behaviours so that solicitor conduct upholds confidence in *all* those delivering legal services rather than seeking to promote one provider over others.

We accept that solicitors will want to promote the value of using solicitors and would not in any way wish to stifle valid criticism of people or organisations providing poor service. However, there can be a tendency to criticise alternative unregulated providers on the assumption that they must be of a poorer standard and we believe that that can damage the faith in those delivering legal services in general.

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?

The newly proposed principles do not specifically address conduct with third parties. As there is a move towards solicitors becoming more involved in providing services in unregulated firms or working within alternative legal service providers, solicitors will be more regularly working with non-solicitors, as colleagues, representatives of other parties or unrepresented litigants (actual or potential) in person.

While it should not be necessary to include a principle of behaviour towards third parties, including not taking unfair advantage of those a solicitor deals with or promoting the proper operation of the legal system, it similarly should not be necessary to include an express principle to act honestly and with integrity or the other principles set out within the Code.

We would respectfully suggest that an additional principle might be that a solicitor must:

“not take unfair advantage of third parties in either a professional or personal capacity.”

While this is potentially implied within the 6 proposed principles, it was felt to be of sufficient importance to be emphasised previously in the Code of Conduct and we would suggest that it is worth repeating within the shortened set of revised principles. This is particularly important where solicitors are not subject to firm based regulation so are solely responsible for ensuring that their conduct meets that standard expected of a solicitor.

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?

One area where we think that guidance could be of particular benefit would be clarification on the rules on privilege where a solicitor is working in an unregulated firm but providing direct advice to their employer's client.

We appreciate that the SRA does not define the rules on privilege and is not responsible for determining if they apply but this consultation paper acknowledges that the extent of privilege is a matter that could be affected by the proposed changes and, as such, we would suggest that it might be helpful for some examples of where privilege would or would not apply, where solicitors are working for alternate providers, would assist in this area.

We note that there is some general misunderstanding and confusion in respect of the different types of privilege which feeds into the impression that privilege will generally not apply where solicitors are working for unregulated alternative legal services providers when that is not necessarily the case. Given that this is an area of some debate and confusion for people working within the sector, it is likely to be confusing to consumers looking to decide who to procure legal services from. It is important that consumers are not inadvertently misled into believing that they can only obtain privileged advice if speaking to a regulated firm when that is not accurate.

It is not the case that solicitors working in unregulated firms are unlikely to be able to give advice that is legally privileged because privilege will apply where they are giving that advice in their capacity as a solicitor. The person receiving that advice will be able to rely on privilege. The protection offered through privilege will depend on how the sector and business operates and where solicitors are providing front line services by advising consumers directly in their capacity as a solicitor then that advice would be privileged.

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?

Yes

Question 7

In your view is there anything specific in the Code that does not need to be there?

No.

Question 8

Do you think that there anything specific missing from the Code that we should consider adding?

As previously stated, our view is that solicitors should act in a way that does not take unfair advantage of third parties.

Additionally, we would suggest that consideration should be given to whether there should be a requirement to ensure that there is a realistic assessment of the merits of any action and that the likelihood of recovering the costs of pursuing such action be provided when acting for parties, and in particular claimants, so that they can make an informed choice on how to proceed.

Question 9

What are your views on the two options for handling conflicts of interests and how they will work in practice?

Our view is that the second approach is preferable with the focus being on preventing conflicts where possible and taking reasonable steps to deal with them once they are identified.

Question 10

Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

Yes.

What is important is that there is a transparency of service allowing consumers to make an informed choice when deciding on a provider and understanding what they will receive and their options at different stages.

The code helps to set out the expectations and responsibilities on firms, as well as clarifying that this does not remove the obligations on individual solicitors, and provided that firms apply the principles that the code is designed to support then this will help keep the interests of the consumer at the heart of the service provided.

Question 11

In your view is there anything specific in the Code that does not need to be there?

No

Question 12

Do you think that there anything specific missing from the Code that we should consider adding?

No.

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?

No

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.

Yes. We recognise the value and importance of Compliance roles within our own organisation however as an unregulated business we don't have formal COLP or COFA roles. We are, therefore, not in a position to comment on whether or how these roles assist with compliance in regulated firms.

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?

See answer to Q14 above.

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?

We consider the proposals to represent a significant opportunity to make the legal services sector truly responsive to the needs of consumers and put real choice back into the hands of those using the service.

Anything that increases the options for accessing a solicitor, or for a qualified solicitor to act in that capacity can only be positive.

We consider the proposal to be beneficial for the profession as a whole as it means that solicitors who have worked hard to qualify do not then have to choose between working as a solicitor and taking up paid employment in a non-regulated firm that betters suits their circumstances. It opens up more opportunity for employment as a solicitor and increases the availability and options for training.

Where a service is being provided by a qualified solicitor in circumstances where it does not have to be provided by a regulated firm then a solicitor should be able to provide it in that capacity provided that they have a valid practicing certificate.

Allowing individual responsibility goes a long way in showing faith in the solicitor "brand" and the training received to obtain that qualification. It shows that solicitors are trusted to act properly wherever they practice without the need to be specifically overseen.

The removal of the restrictions will also help to show that the focus of the industry is on the needs of the consumers and not protectionism of the traditional firms.

We do not consider that there is any greater risk of solicitors acting in breach of the code of conduct in alternate legal services providers than in regulated firms, as sole traders or in the not-for-profit sector. The recognition of this may force some of the more traditional firms to alter their view on the profession as a whole which could in turn result in true innovation.

The main risk to the profession and legal services in general will occur if there is continued criticism of alternative legal services providers based on unfounded stereotypes as this could undermine confidence in the sector and dilute the solicitor brand.

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?

Very likely. We already employ people as solicitors but have to restrict the work they do due to the current rules. We also employ people who are qualified solicitors but we cannot employ them in that capacity because the nature of their work is the conduct of unreserved matters.

These proposed changes would allow these people to act in the capacity of solicitors and undertake a full range of unreserved work without restrictions. This would increase the work we can make available to people who are training which could mean that we are able to provide greater opportunities for training contracts.

We do not consider it to be essential to have been trained as a solicitor in order to provide a high quality service to consumers, however this added flexibility will allow us to increase the options of the work our staff can provide and allow for a wider mix of skills and experience that can be drawn on to support our members. The removal of these restrictions increases our options in respect of the work our staff can do which helps to improve the inclusiveness and diversity of our workforce.

We would also be in a position to consider various options for providing services, both those we currently offer and those our members enquire about, that fall outside our core services. This would differ from our current model and would cause us to consider the merits of full regulation where appropriate.

This greater flexibility would also allow us to consider the options of meeting the wider needs of our members and determine how to best support them which we were previously unavailable to us. This gives our members more choice as to how best to meet their needs which we believe can only be beneficial.

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?

As reserved activities require stronger regulation it is appropriate for firms carrying out this work to be fully regulated, even when the individual is a sole trader, to differentiate between reserved and unreserved activities. The particular vulnerability of consumers in relation to reserved work requires this added level of protection in our view.

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?

The qualified to supervise requirement only applies to people operating in regulated firms or overseeing reserved work.

The concern is that it applies to an arbitrary period of experience without identifying if that experience is useful or relevant. Someone who has worked in the field for 36 months as a qualified solicitor may not have 36 months' worth of useful experience.

For example, you may find that a solicitor of long standing has little recent experience or no useful experience in the area that they are supervising. Conversely, someone who has worked in the field for 10 years before qualification may only have been qualified for 12 months but might be a much more suitable supervisor in a practice area and their more recent qualification might mean that they are more up to date on the latest rules and recommendations.

Qualification to supervise should be more sophisticated and should focus on the actual relevant skills and abilities rather than a simple time-served approach. The 12 hours of Management Skills Training is not indicative of an ability to supervise.

If there is to be any requirement to have undergone a specific skills course, then it would be more useful to have a training/supervision course available. Any restrictions should serve a demonstrably useful purpose and show that they are a proportionate means of achieving that legitimate aim.

Question 20

Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

Where firms are trading on the fact that they are regulated then they should explain what that means to customers, both potential and actual, to allow them to make an informed choice. However, that information has to be carefully drafted so as not to give a misleading impression as to the protections available to consumers using non-regulated firms.

Question 21

Do you agree with the analysis in our initial Impact Assessment?

We do not have any particular view on the analysis.

Question 22

Do you have any additional information to support our initial Impact Assessment?

No.

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?

Yes.

We do think that there should also be a provision in relation to authorised firms that would mean that they cannot refuse to hold money being paid on account to meet an award while a matter is going through appeal where the representatives of the other party are not able to hold the money in an account themselves.

Consideration should also be given as to whether or not a non-regulated firm can set up a client account to hold money in the firm's name where it is overseen by a solicitor if that firm is also regulated for financial matters, such as by the FCA. There could be strict rules over the circumstances in which such money can be held allowing it to be overseen by a responsible person with appropriate safeguards while not holding it 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?

The same principle should apply as Q23 above. Money should not be held personally but consideration should be given as to whether or not the money can be held by the firm if there are suitable regulations and protections in place.

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?

If not, what are your reasons?

Yes.

Question 26

Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

Yes, provided that they are satisfied that the firm for which they work has suitable firm based cover to protect their clients. This cover should be set at a reasonable and proportionate level based on the nature of the sector in which the work is carried out. In most cases, £2 million is beyond the amount reasonably needed but some areas of work may require that level of protection.

Question 27

Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

Ensuring verification of the cover and that any found issues that indicate service below the required professional standards are referred to the SRA.

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?

Yes. Work is designated as “reserved” because of the specific qualities of it. When that work is restricted in respect of who can carry out the work because of its nature, it should require additional protection, irrespective of who is carrying it out.

Question 29

Do you have any views on what PII requirements should apply to Special Bodies?

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?

Yes. There are already rules on whether a firm must or must not be regulated for the work that it does, or intends to do, as part of its business. That should trigger the need for regulation.

Clearer guidance on the issue would also assist in determining the issue.

Question 31

Do you have any alternative proposals to regulating entities of this type?

No, but there should be reviews of the work being referred across from the regulated company to the non-regulated company to ensure that clients are being correctly advised of the interest in the firm, the consequences of the referral and the option to choose to use a different firm for that work.

The restrictions need to apply to the regulated firm to ensure that they are not locking clients into receiving the service from the unregulated firm only, particularly if they have obtained the work by trading on their regulated status or by giving the impression that the regulated firm will be carrying out the work.

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?

Where an unregulated firm employs a solicitor in that capacity and wishes to make use of the fact that the individual is a solicitor then it would need to do so on the understanding that the SRA is entitled to review the work of that solicitor to ensure compliance with the Solicitor's code of conduct.

There is a difference between individual solicitor's practice and an individual employed as an in-house solicitor and any actions need to take into account those nuances.

The SRA would need to ensure any investigation or intervention was reasonable and proportionate and would need to take specific account of:

a. If another solicitor in the non-regulated firm could take over the work

b. If the work was provided on the basis that it would be completed by a solicitor or if a non-solicitor in the firm could take it over

Weight needs to be given as to whether it is unreserved work that happens to be carried out by a solicitor working for the alternative legal services provider or whether it is unreserved work carried out by a solicitor who happens to work at an alternative provider. Where a firm promises to do the work but does not promise any, or any particular, solicitor will carry out the work then the SRA's intervention has to be limited to what the individual solicitor can do. When the fact that the work will be carried out by a, or a particular, solicitor was a fundamental part of the agreement then the SRA can be involved in agreeing how issues can be rectified.

None of this will prevent the ability of the SRA to take action against an individual solicitor who was felt to be acting in breach of the code of conduct.

Question 33

Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

Yes. Firms are relying on being regulated to distinguish themselves from other firms. It requires a level of sophisticated understanding beyond what could be reasonably expected from a consumer to understand the difference between what work a firm does that is regulated and what they do that is not.

Where a body or RSP is recognised as regulated then that regulation applies to all the work they complete. There are options available to firms to separate out that work they do not wish to be regulated but where that is the case they should be competing with other firms on an even footing allowing consumers to properly understand and compare the differences between alternative providers.

Thank you for completing the **Consultation questionnaire form**.

Please save a copy of the completed form.

Please return it, along with your completed **About you form**, as an email attachment to consultation@sra.org.uk, by **21 September 2016**.

Alternatively, print the completed form and submit it by post, along with a printed copy of your **About you form**, to

Solicitors Regulation Authority
Regulation and Education - Policy - Handbook 2017
The Cube
199 Wharfside Street
Birmingham
B1 1RN

PACCLAN

I am pleased to write in my role as Chair of the national Police and Crime Commissioners Legal Advisors

Network (PACCLAN), a sub-committee of the Association of Police Lawyers, to respond to your consultation.

My understanding of the proposals as they relate to in-house solicitors are that they would cause considerable difficulty for our members in maintaining current working arrangements. It is common practice across policing that employed in-house solicitors provide legal services to the Chief Constable and Police and Crime Commissioner for their police area who are each, in their own right, corporate soles. The arrangements vary from area to area but typically take one of the following forms and which have, as applicable, the benefit of a general waiver of the existing Rule 4:

i) Solicitors employed by a Chief Constable providing legal services to both Chief Constable and Police and Crime Commissioner

ii) Solicitors employed by a Police and Crime Commissioner providing legal services to both the Chief Constable and Police and Crime Commissioner

iii) Solicitors employed by a Local Authority providing legal services to both the Local Authority and Police and Crime Commissioner

In addition, there are also arrangements (becoming increasingly more common place in line with government policy encouraging emergency service collaboration) whereby in-house police solicitors are providing legal services to other police forces and emergency services. To cite an example of such an arrangement, in my own policing area the in-house solicitors are employed by the Chief Constable and provide legal services to the Chief Constable and Police and Crime Commissioner Force (and indeed other Chief Constables and Police and Crime Commissioners on both a planned and ad hoc basis). With effect from early 2017 and the coming into effect of emergency service collaboration, legal services will in addition be provided by the Chief Constable's solicitors to Cheshire Fire and Rescue Service as part of a joint corporate services between Police and Fire under which staff are employed by the Chief Constable. I should make it clear that these arrangements are all on a non-trading/cost recovery only/mutual aid basis.

To restrict legal privilege to legal advice provided only to the employer would represent an insurmountable difficulty to current arrangements as well as preventing further public service collaboration. This would jeopardise the efficient delivery of legal services in the public sector and frustrate government policy for emergency service collaboration as reinforced through a new statutory duty in the Policing and Crime Bill currently in passage through Parliament.

In summary I would urge the SRA to preserve the current arrangements for in house solicitors (including the Rule 4 waiver for Police) in any changes it makes to the SRA handbook.

Thanking you in anticipation.

Please acknowledge receipt of this submission.

David Bryan – Head of Legal Services

Cheshire Constabulary HQ | Legal Services | Clemonds Hey | Oakmere Road | Winsford | CW7

2UA

Consultation: Looking to the future - flexibility and public protection

Response ID:291 Data

2. Your identity

Surname

pate;

Forename(s)

priti

We may publish a list of respondents and a report on responses. Partial attributed responses may be published. Please advise us if you do not wish us to attribute your response or for your name or the name of your firm or organisation to appear on any published list of respondents.

Attribute my/our response and publish my/our name.

Please identify the capacity in which you are submitting a response. I am submitting a response…

on my own behalf as an employed solicitor

3.

1. Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

no

4.

2. Do you agree with our proposed model for a revised set of Principles?

yes

5.

3. Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

No as you are opening the market at risk to the consumers and without put in place the necessary constraints to guard against abuse of public funds and confidence by undermining and undervaluing the importance of a regulated profession

6.

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?

I see nothing wrong with the current structure and would not want this to be changed

7.

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?

No since you are allowing a two tiered system to operate which will create a maze of confusion . Who is going to keep an eye within the organisation on these different entities ?

8.

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?

Not at all , you are keen to streamline the code but actually creating a more unregulated practice for this to be fairly complicated in practice

9.

7. In your view is there anything specific in the Code that does not need to be there?

The need for unregulated solicitors to work alongside regulated solicitors

10.

8. Do you think that there anything specific missing from the Code that we should consider adding?

no

11.

9. What are your views on the two options for handling conflicts of interests and how they will work in practice?

12.

10. Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

NO

13.

11. In your view is there anything specific in the Code that does not need to be there?

This code needs more consultation and revision in its entirety

14.

12. Do you think that there anything specific missing from the Code that we should consider adding?

see 11 above

15.

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?

not at this point

16.

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.

yes

17.

15. How could we improve the way in which the COLP/COFA roles work or to provide further support to compliance officers, in practice?

It is a difficult supervisory role but has rightly put the onus on firms to police themselves and there should not be any get out clauses for these roles

18.

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?

Competition in a regulated fashion for all providers of legal services is essential for the fairer and easier access to legal services for the public

19.

17. How likely are you to take advantage in the greater flexibility about where solicitors can practice as an individual or as a business?

Possibly but this would present risk management issues which would have to be countered at the outset

20.

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?

Not sure that this would be possible and feasible in the current climate

21.

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?

This is too specific and narrow

22.

20. Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

yes as part of the initial letter dealing with complaints procedure

23.

21. Do you agree with the analysis in our initial Impact Assessment?

No

24.

22. Do you have any additional information to support our initial Impact Assessment?

no

25.

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?

Yes absolutely to prevent situations of fraud

26.

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?

Not a good idea at all

27.

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? If not, what are your reasons?

Depends on what services they provide but if they hold themselves out as providers of legal services whatever their costs , the public must be provided. You can provider legal services at very competitive rates and not afford protection to the public , it must never be a case of you get what you pay for !

28.

26. Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

Yes as its too onerous , we must be able to work under the umbrella of PII cover of the firm which employs you .

29.

27. Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

Too many practical issues and expecting people to work in a honest and with an integrity that people have come to expect of solicitors . We train long and hard and holding funds or dealing with complex problems is all part and parcel of what we learn to do over a long period of time . There must be some value in going

through this rigorous training which deals with ethics and conduct along the way . How do you propose to impart to this an entity that is set up suddenly consisting of a bunch of people with some legal knowledge but without the standards that we have to adhere to .

30.

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?

Yes absolutely

31.

29. Do you have any views on what PII requirements should apply to Special Bodies?

This must apply as that is the only way to safeguard the public from rogue practices

32.

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?

Do not agree with splitting up of services to further commoditise legal services

33.

31. Do you have any alternative proposals to regulating entities of this type?

Everyone offering legal services must be regulated .

34.

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?

no

35.

33. Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

yes

Private Client Group of the Bournemouth & District Law Society

Dear Sirs

I am writing on behalf of the Private Client Group of the Bournemouth & District Law Society to voice our concerns about the SRA's Looking to the Future consultation and specifically the proposal of a two tier system of regulation.

Our sub-group represents Private Client lawyers working in private practice, primarily in traditional, high street firms. As much of our business consists of unreserved legal activities such as Will-writing; we are well-placed to identify potential problems caused by the creation of a two-tier system.

Briefly, our objections to the proposals fall into two categories – those which negatively impact on clients and the negative effect on competition.

Affecting Clients

1. Communications will not benefit from Legal Professional Privilege

It is essential to our practice that Private Client lawyers are able to have confidential conversations with clients in order to advise them appropriately. LPP is therefore essential to our line of work as clients must be confident that their communications with their lawyers are truly privileged.

The proposal that solicitors will be able to work for unregulated providers which do not benefit from LPP is a concern. It is bizarre to suggest that communications with a solicitor (with a practising certificate) will have LPP but not a secretary or other staff member who has access to files and attendance notes. This in essence dilutes the LPP provided by the solicitor and provides unsatisfactory protection to clients.

We are also concerned that members of the general public will be unable to differentiate between the first-tier solicitors whose regulated firms protect LPP and second-tier solicitors whose unregulated providers do not. Solicitors tailor their advice to clients based on their circumstances. A client who instructs a solicitor from a unregulated provider may not feel as comfortable disclosing information about their circumstances because of the lack of LPP. Accordingly, the solicitor may go on to give incorrect advice to the client. This clearly negatively impacts on the profession if clients are not able to distinguish between providers who do and do not protect LPP in the same way.

2. Unregulated providers will not be required to have Professional Indemnity Insurance

We understand that unregulated providers will be permitted under the new arrangements to operate without any form of PII. There is a small benefit in that such businesses will be able to reduce their operating costs and therefore may pass the benefit on to clients in the form of

cheaper fees. However, in a world in which wedding photographers and dance instructors need to have PII in place; it seems bizarre to allow solicitors to operate without it. We suspect that most members of the public will incorrectly assume that such businesses have PII or alternatively, that on learning that some solicitors can operate without it; will incorrectly assume that none do. What provisions are in place to make it clear to members of the public which solicitors have PII and which do not? In the same way as above there is a risk of damaging the profession as a whole if clients are not able to distinguish between regulated and unregulated providers.

3. Unregulated providers will not be answerable to the SRA or Legal Ombudsman

Although clients will be able to complain about an individual (regulated) solicitor; if said solicitor were to leave the unregulated provider the complaining client will be left in the odd position of having to pursue the individual solicitor rather than the business. This could leave the client without resolution if the solicitor were to either leave the profession or move abroad. Additionally it places a huge amount of pressure and administrative burden on the individual solicitor. We cannot see that there is any benefit to the client in having such a limited and unsatisfactory means of complaint.

4. Client Money

An unregulated provider will be able to handle client's money without having to comply with the SRA's accounting rules. Although we accept that when providing will-writing services; very little client money is handled; it will be difficult for members of the general public to differentiate between providers which have to comply with the accounting rules and those which do not. In the same way as described above this could negatively impact the profession as a whole.

Affecting Competition

There is an argument that unregulated providers will have reduced operating costs and as a result; their clients will benefit from cheaper costs than those of a regulated provider. Whilst we appreciate that reducing costs can lead to increased competition, it seems that his comes at the cost of important benefits such as LPP, reversion to the SRA and Legal Ombudsman, and PII. Although some clients might not be aware of these benefits when they instruct a solicitor, they are all important to clients and the reduction in the protections afforded to them are not balanced by the potential reduction in costs.

In fact, it is submitted that unregulated providers could simply run a "race to the bottom" and once regulated competitors began to go under; the unregulated providers could raise their prices. This would mean that clients would eventually be paying the same costs; but without the benefits afforded by regulated firms. Any increase in competition would simply benefit the unregulated providers in the short term and disadvantage members of the public in the long-term.

In summary, we find it surprising that the SRA is incentivising the provision of legal services by unregulated providers which don't have PII and compliance. Isn't the purpose of the SRA to ensure high standards and protection for clients?

Similarly it is odd that regulated providers will be penalised (via higher operating costs) for providing clients with greater protection. It begs the question; why would anyone bother to be regulated?

Although unregulated providers will not be able to describe themselves as "solicitors" the fact that they can employ and advertise solicitors blurs the distinction for members of the general public, helping them to masquerade as regulated providers. Clients will essentially be tricked into purchasing cheaper services with no protection. For example, Billingsley & Newbold Solicitors could simply set up an unregulated provider "Billingsley & Newbold Legal Services" and state that they employ solicitors. How could a member of the general public comprehensively understand how much protection they were to receive when instructing a solicitor employed by Billingsley & Newbold Solicitors/ Billingsley & Newbold Legal Services? The system would be baffling to the general public who may tar regulated and unregulated providers with the same brush and lead to the generally held belief that little protection is afforded by any solicitor.

For the above reason we believe that the two-tier system is unsatisfactory and not of benefit to the public and we request that the proposals are shelved or at least comprehensively revised in light of such criticisms.

Yours faithfully

Clare Lawson

Solicitor

Wills, Trusts and Probate

Qasim Mahmood

Dear sir.

I believe there is insufficient evidence of significant damage generated by the current system which would require such systemic and radical reforms.

The proposals are poorly evidenced and misconceived in that they will demonstrably and beyond reasonable doubt create consumer confusion and harm, will not address the actual unmet legal needs, nor assist with access to justice.

I am not aware of any in-depth analysis, study or investigation of the impact of the proposals or likely achievement of the stated objectives.

Therefore I would strongly oppose the new purposed changes as there is no need for Two tier system.

Thanks

Qasim Mahmood

Consultation: Looking to the future - flexibility and public protection

Response ID:437 Data

2. Your identity

Surname

Roche

Forename(s)

Rachel Jane

We may publish a list of respondents and a report on responses. Partial attributed responses may be published. Please advise us if you do not wish us to attribute your response or for your name or the name of your firm or organisation to appear on any published list of respondents.

Attribute my/our response and publish my/our name.

Please identify the capacity in which you are submitting a response. I am submitting a response…

on my own behalf as a solicitor in private practice

3.

1. Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

4.

2. Do you agree with our proposed model for a revised set of Principles?

5.

3. Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

The removal of the principles that solicitors should 'provide a proper standard of service to your clients', 'act in the best interests of each client' and 'protect client money and assets' has negative implications for consumer protection and the maintenance of professional standards.
The Principles should continue to refer to the solicitor's duty to keep the affairs of the client confidential.

6.

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?

7.

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?

8.

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?

The creation of separate codes of conduct distinguishes the responsibilities of an individual solicitor, wherever he or she is working, and those of a regulated entity. The creation of two codes is not an issue. However, the approach creates two tiers of solicitors: those working in a regulated entity and those working in an unregulated entity, with consequential risks to consumer protections and professional standards which risk damaging the standing of solicitors and creating confusion for consumers;
Although both of the draft Codes focus on brevity and simplicity, they provide less certainty about what is and is not permitted. Some solicitors might prefer a more definitive approach so that compliance is clearer and there is less discretion for the SRA to determine when there is a breach, which could result in enforcement action that might have been avoidable if the Codes were clearer. It is difficult to take an

informed view on how the new Codes would work in practice be without seeing the associated guidance which the SRA has not published alongside the draft Codes.
The language of the draft Codes is imprecise and could mean that members currently practising in a fully compliant way could find themselves accused of a breach after the proposed new codes come into force.
There is some overlap between the two draft Codes, most noticeably in areas such conflict, complaints and client information/identification. If this is not addressed, it is not clear which would take precedence where such inconsistencies exist.

9.

7. In your view is there anything specific in the Code that does not need to be there?

10.

8. Do you think that there anything specific missing from the Code that we should consider adding?

11.

9. What are your views on the two options for handling conflicts of interests and how they will work in practice?

The consultation makes clear that solicitors employed by an unregulated entity would continue to be regulated as individuals and would be subject to conflict rules. However, as the conflicts rules will not apply to unregulated entities, in practice they will not have much effect if any on the unregulated entities whilst the regulated entities will be subject to the same level of restriction as they are now or, potentially, a greater level depending on which of the two options on conflicts is adopted by the SRA.
The SRA offers two options for dealing with conflicts:
- Option 1 largely replicates the 2011 Code, in prohibiting a solicitor from acting where there is a conflict or significant risk of such a conflict, unless specified circumstances are met and protections are provided.
- Option 2 would narrow the ability to act given that it provides for a complete bar on acting where there is an actual conflict, and protections to be put in place if there is a significant risk of a conflict.
Option 2 may be unworkable because it is not always possible to identify that an actual conflict exists and a solicitor may unwittingly act in a conflict situation. Because the non-regulated colleagues of regulated solicitors would not be subject to conflict rules, there is a risk of confusion to consumers, a very favourable competitive advantage to unregulated entities and lack of a fundamental consumer protection for clients of unregulated entities.

12.

10. Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

13.

11. In your view is there anything specific in the Code that does not need to be there?

14.

12. Do you think that there anything specific missing from the Code that we should consider adding?

15.

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?

16.

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.

Consideration of these questions will benefit from the input of current COLPs and COFAs who are best placed to identify unnecessary requirements while firms and sole practitioners will also wish to consider how valuable the roles themselves are.

17.

15. How could we improve the way in which the COLP/COFA roles work or to provide further support to compliance officers, in practice?

18.

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?

There is insufficient evidence to support these proposals or the expected benefits from their implementation, which are stated to include improved access to quality services at affordable prices, enhanced professional standards, and increased employment opportunities.
In particular, the proposals could have undesirable and/or unintended consequences as follows:
Reputation and standing of solicitors
The proposals may result in two tiers of solicitors. Those working in unregulated businesses are unlikely to be able to give advice which is legally privileged, will not be required to have PII, clients will not have the benefit of compensation fund and the protection of the principles governing conflicts of interest. Not only is this likely to create consumer detriment and confusion but it is likely to damage the reputation of the title of solicitor.
Legal Professional Privilege (LPP)
LPP should attach to clients seeking advice from a solicitor holding a current practising certificate wherever he or she practises and any attempts to dilute or make LPP more difficult to obtain or enforce could erode the concept of LPP, which is a cornerstone of the justice system and a key right of clients. This could also undermine the standing of the solicitor profession both at home and abroad. It is not right in principle for LPP to be a distinguishing factor between regulated and unregulated service providers.
It is likely that in-house solicitors working in an unregulated entity, for example a local authority, providing advice to individuals or organisations other than the unregulated entity would not have the protection of LPP.
Conflicts and confidentiality
The proposals will result in confidentiality only applying to individual solicitors working in an unregulated entity, including in an in-house team, but not to the entity or to other employees. There is a risk that a solicitor may unwittingly act in a conflict situation and that clients may not be aware of a potential or real conflict of interest or of the fact that the entity is not subject to the rules on conflict. It also results in making regulated entities less attractive because they will be competitively disadvantaged versus unregulated entities.
Consumer protections - Professional Indemnity Insurance (PII) and the Compensation Fund
Under the SRA's proposals, solicitors working in unregulated entities would not be required to have PII and their clients would not have access to the Compensation Fund if things go wrong. This risks eroding a key element of current client protection. The proposals risk creating two tiers of client protections - with different rules and protections applying to solicitors' clients depending on the kind of entity in which the solicitor is working.
The SRA proposes that solicitors working from unregulated entities would be required to make sure that their clients understand whether and how the services they provide are regulated and the protections available to them. Even for those working within the legal sector, insurance and client protections are complicated topics which are not easily digested and understood and clients cannot be expected to fully comprehend the implications of purchasing their legal services through an unregulated provider. The proposals also risk undermining or depleting the existing Compensation Fund as solicitors working from unregulated entities would not have to contribute to the Fund; this would seem likely to mean that solicitors working in regulated entities would have to make additional contributions to secure the Fund's viability, increasing the regulatory burden on them and exacerbating the two tier profession that could result from the proposals.
Consumer confusion about status
Under the proposals, solicitors holding a current practising certificate would be able to use their title whether providing legal services to the public through a regulated or unregulated entity. While a provider

would not be able to use the term 'solicitors firm' or 'solicitors' unless the entity was regulated by the SRA,this would seem unlikely to mitigate the risk of consumer confusion especially where the unregulated entity described itself as a 'law firm' or 'legal services firm' or advertised that they employ solicitors. Consumers will lose the assurance they currently have as to quality and protections when they engage a solicitor. It is inappropriate that consumers will have to undertake fairly substantial due diligence. This will additionally undermine the standing of the profession internationally.
Annual practising certificate (PC) fees
There is no information on this point and the SRA needs to undertake and publish an analysis of the projected impact of its proposals on the PC fee, and in particular the turnover based firm fee. The SRA should not close this consultation until this information is available.
Supervision
Newly qualified solicitors without any experience would be able to set up their own unregulated firms. Newly qualified solicitors working in an unregulated entity would no longer have the requirement of support and guidance from more experienced solicitors. This will increase the risks to clients as well as putting newly qualified solicitors themselves at risk, and negatively impact on the standing of the solicitor profession Damage to standards will increase incrementally as this applies year on year and fewer solicitors in unregulated entities have ever received supervision.

19.

17. How likely are you to take advantage in the greater flexibility about where solicitors can practice as an individual or as a business?

20.

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?

21.

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?

22.

20. Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

23.

21. Do you agree with the analysis in our initial Impact Assessment?

24.

22. Do you have any additional information to support our initial Impact Assessment?

25.

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?

26.

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?

Consideration of this question will benefit from the input of current in-house teams and relevant local employers.

27.

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? If not, what are your reasons?

28.

26. Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

29.

27. Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

30.

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?

31.

29. Do you have any views on what PII requirements should apply to Special Bodies?

32.

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?

33.

31. Do you have any alternative proposals to regulating entities of this type?

34.

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?

35.

33. Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

Consultation: Looking to the future - flexibility and public protection

Response ID:159 Data

2. Your identity

Surname

norris

Forename(s)

raymond william

Would you like to receive email alerts about Solicitors Regulation Authority consultations?

We may publish a list of respondents and a report on responses. Partial attributed responses may be published. Please advise us if you do not wish us to attribute your response or for your name or the name of your firm or organisation to appear on any published list of respondents.

Please identify the capacity in which you are submitting a response. I am submitting a response...

in another capacity

Please specify: as a non-practicing solicitor

3.

1. Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

4.

2. Do you agree with our proposed model for a revised set of Principles?

no

5.

3. Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

no

6.

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?

7.

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?

8.

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?

no

9.

7. In your view is there anything specific in the Code that does not need to be there?

10.

8. Do you think that there anything specific missing from the Code that we should consider adding?

11.

9. What are your views on the two options for handling conflicts of interests and how they will work in practice?

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10. Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

no

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12. Do you think that there anything specific missing from the Code that we should consider adding?

15.

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?

I DO NOT THINK THE PROVISIONS DO ANYTHING BUT UNDERMINE THE PROFESSION AND THE SECURITY OF THE PUBLIC

16.

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.

17.

15. How could we improve the way in which the COLP/COFA roles work or to provide further support to compliance officers, in practice?

18.

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?

NOT ACCEPTABLE

19.

17. How likely are you to take advantage in the greater flexibility about where solicitors can practice as an individual or as a business?

20.

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?

21.

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?

22.

20. Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

23.

21. Do you agree with the analysis in our initial Impact Assessment?

24.

22. Do you have any additional information to support our initial Impact Assessment?

25.

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?

26.

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?

27.

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? If not, what are your reasons?

28.

26. Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

29.

27. Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

30.

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?

31.

29. Do you have any views on what PII requirements should apply to Special Bodies?

32.

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?

33.

31. Do you have any alternative proposals to regulating entities of this type?

34.

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?

35.

33. Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

Consultation: Looking to the future - flexibility and public protection

Consultation questionnaire form

This form is designed to be completed electronically—in MS Word. Please save it locally before and after completing it.

Question 1

Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

We make no comments.

Question 2

Do you agree with our proposed model for a revised set of Principles?

Generally yes, the principles reflect what solicitors do and are positively framed.

However, principle 5 is so overarching that its meaning is unclear and how it could be policed are unclear. Solicitors will be extremely unclear how to interpret and apply it, particularly in the context of acting for individual clients. Solicitors should abide by their firms' policies and solicitors' firms have duties and obligations in this area, for example, as employers and for monitoring and reporting purposes, but there is no obligation on solicitors acting for individual clients in particular.

We consider that principle 6 should be changed to “act in the best interests of clients.” The reference to “each client” seems to us to potentially contradict other proposals in the consultation, and raise issues where a clear conflict arises between clients where the solicitor is acting for more than one client; or where there is an imbalance of power between clients which certainly family law solicitors need to be highly aware of.

“act in the best interests of each client” may confuse clients in the public law children arena, or going through divorce or separation, for example, in terms of assisting them to make decisions in a child focused way and to move towards successful co-parenting.

How principle 6 works in practice is likely to require expansion especially in the family law field, building for example on existing good practice guidance in Resolution’s Good Practice Guides and the Law Society’s Family Law Protocol and Good Practice in Child Care Cases. Family law solicitors, and Resolution members in particular, will work with clients to find fair and lasting solutions/outcomes which take into account the needs of the whole family and especially the best interests of any children.

Question 3

Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

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?

Consideration needs to be given to including an overarching principle around client protection and safeguarding, including safeguarding children from harm.

There is also nothing in the principles specifically relating to outcomes.

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?

We think that the principles supported by guidance for particular areas including family would be extremely helpful.

We would strongly welcome specific consideration of supporting family law solicitors with compliance, and would be happy to discuss this further with the SRA. Family law clients have specific needs and vulnerabilities; and can be highly vulnerable. Interpreting the current Code can be difficult in the family and children context and we think that the new Codes will continue to throw up interpretation issues for them.

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?

Whilst we agree that this Code is short and focused, much of it can be interpreted in many ways by both solicitors and members of the public. Nor do we consider that it is family focused and sufficiently taking account of family law solicitors.

We do see the merits of a short set of principles and a short Code for all solicitors. But we think these both need to be supported by guidance for family law solicitors to clarify issues around interpretation and to expand for the area as necessary, as well as by a shorter explanatory version in Plain English for members of the public. We would wish to offer to our support in the development of guidance for family law solicitors.

Understanding and feeling confident about whether a client is a client in the context of different models of service is a growing issue of concern for family law solicitors.

Question 7

In your view is there anything specific in the Code that does not need to be there?

No, but some of the wording seems to us to need revisiting.

Question 8

Do you think that there anything specific missing from the Code that we should consider adding?

The areas of protection of vulnerable clients and safeguarding appear to be missing. This is not only relevant for family solicitors but also, for example, for mental health and probate lawyers and others.

Question 9

What are your views on the two options for handling conflicts of interests and how they will work in practice?

Conflict of interest is a timely and relevant issue for family law solicitors. Many consumers want to keep costs down and may initially find it difficult to understand why or are frustrated where one solicitor or one firm cannot act for both of a couple in a private family law matter, especially where they see two counsel from the same chambers used in their cases. However, it can be argued that in any divorce there is obvious/inherent conflict. Our divorce finance law allows for discretion and review unlike some other jurisdictions where lawyers are more likely to act for both clients. Consumers often feel differently once the impact of any imbalance of power is explained or becomes more evident.

We consider that both proposed options would need to be supported by category specific guidance to give solicitors confidence around compliance.

Option 1 (a) appears to us to leave the door wide open to the solicitor acting for more than one client and arguably invites such. We would be concerned about possible unforeseen consequences resulting in restrictions to access to justice and how the rule might be interpreted for public funding purposes, including in public children cases, for example, where parents seek separate representation due to the evidence which emerges during the case or where a child disagrees with their children's guardian.

Although option 1 (b) may be more directed at those dealing with commercial transactions than family cases, we find it difficult to interpret – what would trump what?

Resolution prefers option 2. It is the shorter, simpler option, and should provide sufficient flexibility, albeit that it does not define what client conflict is.

What client conflict is will depend on the strand of practice concerned. Separate guidance could be developed for different areas of work to support solicitors in making their decision on whether there is a conflict of interest or risk of such in particular types of cases, and as appropriate innovations are introduced in particular areas of practice.

Guidance for family practitioners would need to include what client conflict looks like across the various elements of family practice; what would be effective safeguarding practice; dealing with imbalances of power and advising clients on such; and how to evidence informed consent.

Question 10

Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

Yes this is a short focused code, but again there are possible issues with interpretation which would benefit from more guidance.

Question 11

In your view is there anything specific in the Code that does not need to be there?

No, not in terms of the general areas covered.

Question 12

Do you think that there anything specific missing from the Code that we should consider adding?

We have no particular comments.

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?

We think that the use of the word ‘you’ throughout the draft Code for Firms has become confused and sometimes makes no sense. It should mean the firm but ‘you’ is often used to refer to different others.

The context of clause 6.4 of the Code for Firms really needs clarification. It refers to any individual, but this seems to us to be far too wide and open to interpretation, and to require clarification and narrowing.

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.

We make no comments.

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?

We make no comments.

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?

We welcome the consultation and are generally positive about the proposals.

We believe though that the proposal will have significant implications for family law practice as much of the work involved falls within non-reserved legal activities and practice will change. It will be important to have in mind at the same time family justice reforms planned by the Ministry of Justice and HMCTS including in and out of court pathways for clients and moves to digital processes, at least for divorce, that will inevitably change the ways in which family practitioners practise; and whether those changes have any implications for family lawyer regulation and unbundled practice.

We strongly wish to see the outcome of this consultation and the proposals considered further in parallel with the outcome of the current SRA research on consumers with family law needs. Public and private family law consumers are a distinctive group with their own respective needs - they clearly have different needs to say small businesses. We are not totally persuaded that the research referenced on pages 6 and 7 of the consultation paper necessarily and fully reflects the protective needs of vulnerable family law consumers and sufferers of domestic abuse or justifies all the new proposed arrangements which may need tweaking or more substantive adaptations/checks and balances in the family area, hence the need to join up with the other research.

There are already many non-practising solicitors who wish to offer a range of legal services, for example, via interdisciplinary dispute resolution services.

Our initial view is that scenarios e. and f. in paragraph 86 of the consultation paper are as or more likely to emerge as scenarios a. to f., certainly in the family practice area - due to the lower cost environments there; and we see potential clients wanting cheap advice and/or in a vulnerable position seeking out or being drawn to non-SRA regulated firms offering what might look like a better deal than it really is.

Whilst we agree that the proposal will generally better meet need and improve the ability of consumers to access services from regulated professionals meeting core professional principles and the same standards whatever type of business they wish to use, we are also concerned that the proposal be carefully balanced with the need to provide adequate protection for both the solicitor and the client.

Under the proposals overall there will in practice be two tiers of regulated solicitors– those with access to the SRA Compensation Fund and covered by PII and those not covered by that level of insurance (the latter in non-

regulated businesses without mandatory professional insurance requirements but employing a solicitor/s and holding them out as such). This is potentially confusing for the public who cannot be assumed to fully understand and appreciate the different situations and potential consequences. Our concern is that, as with the financial services sector, consumers themselves will not necessarily be clear about exactly what they are buying and how they are protected or think about issues such as whether a solicitor is covered by PII or not. Clients in the family law sphere are usually making a crisis purchase and may also be uninformed and legally unsophisticated or particularly vulnerable.

Whatever changes are made, how to make consumers clear about insurance arrangements and encourage behavioural change in this regard is extremely challenging but needs to be better addressed.

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?

There will undoubtedly be family law solicitors including those who no longer hold a practising certificate, for whatever reason, who will find the flexibility attractive and suited to providing whatever model of practice best works for them.

We are unable to provide any data from our members at this stage and it would be premature to make predictions before the full and final detail of the changes are settled and the outcome of the current SRA research on consumers with family law needs is available.

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?

We have mixed views on this. In practice the distinction between the solicitor as an individual and as an entity is somewhat false and results in some duplication of costs. The sole practitioner provides the legal advice and services as well as being the firm i.e. they do everything themselves. The level of PII is less preferable for the sole solicitor as a separate entity, but for consumer protection purposes the proposal is probably right.

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?

We make no comments.

Question 20

Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

What is important is the reality of what protections are available in both SRA and non-regulated firms. Any business advertising itself as providing solicitor services should be required to provide the relevant information with the solicitors employed in non-SRA regulated firms taking responsibility for this being done. In practice we doubt that consumers take in this type of detailed information whether it is displayed or not. There is already confusion for clients about complaints routes with at least three beyond the firm itself (Legal Ombudsman, SRA and the new arrangements for ADR to settle complaints) and for solicitors trying to explain how they work.

Question 21

Do you agree with the analysis in our initial Impact Assessment?

We note the SRA'S view that where separate businesses would be allowed to provide legal services e.g. pre-proceedings advice in a family law case then the benefits of access to justice outweigh any potential loss in consumer protections. We are not totally persuaded that the research referenced on pages 6 and 7 of the consultation paper necessarily and fully reflects the protective needs of vulnerable family law consumers and sufferers of domestic abuse or justifies all the new proposed arrangements which may need tweaking or more substantive adaptations/checks and balances in the family area – the current SRA research on family consumer needs must be carried into further impact assessment.

We consider that there may need to be further analysis of the extent of scenarios E and F, especially F which cannot currently happen, for private family law services. We agree with the risks identified for the consumer in paragraphs 27 and 28 of the initial regulatory impact assessment which cannot be completely eliminated. We wish to see this vulnerable client group better supported to access justice, but are currently unclear about the numbers of firms which the SRA regulates now that will decide to move some or all of their legal services out of SRA entity regulation and over what period of time.

Question 22

Do you have any additional information to support our initial Impact Assessment?

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?

Yes, this makes sense. We are not sure in which situations it is envisaged this would arise or a solicitor would wish or consider it safe to do so, but this approach will make the position clear for solicitors and their employers and protect individual solicitors.

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?

We make no comments.

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?

If not, what are your reasons?

We have mixed views.

Question 26

Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

Yes, with consideration of the position of family practitioners who work on a consultancy/bank/locum/freelance basis and whether there should be any exceptions. This is a difficult area. Please see our response to question 27.

Question 27

Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

Again, our difficulty is that there will be a two tier system of regulated solicitors across SRA and non-SRA regulated firms.

Incentives to remain as a sole practitioner in the family law area are difficult to see.

Although the employer's insurance is likely to sufficiently protect the public, there could be particular issues for those individual solicitors doing family law related work not protected by their employer covering PII. For example, the position of those acting as consultants or agents on a bank system for public law children work, but not employed as locums; or seeking part time freelance work to get back into work post maternity leave may need further consideration.

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?

Yes, since Special Bodies can call on the SRA Compensation Fund.

Question 29

Do you have any views on what PII requirements should apply to Special Bodies?

These should be sufficient to ensure appropriate protection of and clarity for the consumer.

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?

We would simply comment that, unfortunately, we do not think that the public/potential clients will particularly understand the distinctions discussed in paragraphs 156 and 157 of the consultation paper, even if the term ‘solicitor/s’ is not included in the firm’s title.

Question 31

Do you have any alternative proposals to regulating entities of this type?

We have no comments.

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?

We make no comments.

Question 33

Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

We make no comments.

Thank you for completing the **Consultation questionnaire form**.

Please save a copy of the completed form.

Please return it, along with your completed **About you form**, as an email attachment to consultation@sra.org.uk, by **21 September 2016**.

Alternatively, print the completed form and submit it by post, along with a printed copy of your **About you form**, to

Solicitors Regulation Authority
Regulation and Education - Policy - Handbook 2017
The Cube
199 Wharfside Street
Birmingham
B1 1RN

Reynolds Parry Jones

Consultation: Looking to the future - flexibility and public protection

Consultation questionnaire form

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Question 1

Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

No

Question 2

Do you agree with our proposed model for a revised set of Principles?

No, we do not agree with the proposed model.

By removing the principles to provide a proper standard of service to your clients and protect client money and assets, there is now less focus on client protection.

Question 3

Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

No; Principle 2 could be subject to wide interpretation.

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?

We consider that the following Principles should remain as they focus on client protection:

1. **Provide a proper standard of service to your clients**
2. **Protect client money and assets.**

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?

The following areas are only covered briefly in the Codes:

1. **Dealing with conflicts of interest**
2. **Handling client money**
3. **Dealings with 3rd parties (e.g. introductions and referrals). This could be confusing as it is expected that some firms will create separate entities to do non-reserved work at a lower cost and with less regulation.**

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?

The Code for Solicitors is significantly shorter than the current Code of Conduct but some aspects are lacking detail and open to interpretation. Because indicative behaviours have been removed, solicitors will have to refer to multiple sources, such as case studies and the Code for Firms, for guidance.

Question 7

In your view is there anything specific in the Code that does not need to be there?

No.

Question 8

Do you think that there anything specific missing from the Code that we should consider adding?

There is insufficent information about the need to safeguard client money and assets.

Question 9

What are your views on the two options for handling conflicts of interests and how they will work in practice?

Option 2 is clearer than under the current code. It prohibits acting where there is an actual conflict. This makes it easier for a solicitor to decide whether they are allowed to act at all.

Question 10

Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

No. The Code is shorter but requires separate reference to the SRA Regulatory Arrangements and case studies to understand the requirements.

Question 11

In your view is there anything specific in the Code that does not need to be there?

No

Question 12

Do you think that there anything specific missing from the Code that we should consider adding?

It should be stated which code takes priority in cases of overlap or conflict.

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?

No

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.

Yes as there is an individual with clear responsibility for reporting to the SRA.

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?

It would be useful to have a support line that could give guidance on compliance issues. This would need to have a fast response time as most COLP/COFA reporting needs to be done within a specific time limit.

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?

Alternative Business Structures are not subject to SRA regulation.

There is potentially less protection for clients because:

1. **Work will not have legal professional privilege;**
2. **Clients will not have access to the SRA Compensation Fund;**
3. **ABS are not required to have minimum levels of PII;**
4. **Client money can be used for business purposes.**

The Law Society expects some firms to create separate entities which carry out unreserved work. These businesses will be linked to the law firm but not have the same regulatory requirements or costs. This could be confusing for clients who instruct a law firm but have work carried out by a ABS. They may not realise what protections are lost and at what stage.

The opportunities and benefits for clients are that firms can operate at a reduced cost because they do not need to meet the costs of regulatory compliance. This can result in a cost saving for clients on non-reserved work.

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?

Not likely

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?

This is a good idea because reserved work tends to carry the greatest risk for clients.

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?

The current "qualified to supervise" test is not fit for purpose because a solicitor who has been out of practice for a significant amount of time could return to practice and supervise.

Question 20

Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

Yes. This is likely to be a unique selling point for many regulated law firms.

Question 21

Do you agree with the analysis in our initial Impact Assessment?

Yes. This indicated that customers need more information from bodies such as the SRA.

Question 22

Do you have any additional information to support our initial Impact Assessment?

No

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?

Yes but funds can be held in the name of their business, in a general a business account. A solution may be to enforce a duty on solicitors to ensure that all client money is held in a separate client account.

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?

N/A

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?

If not, what are your reasons?

No. This affects client protection and could give a negative view of the profession as a whole.

The cost for access to the compensation fund should be paid by practicing solicitors who are governed by the SRA, even if their firms are not.

Question 26

Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

No. This could have a significant impact on clients and could bring the profession into disrepute if solicitors are unable to meet the costs of claims caused by their mistakes.

Question 27

Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

Yes. Cost savings could lead to greater risks to clients (e.g. buying more basic PII than permitted by SRA rules). This could bring the profession into disrepute. It may be better to require solicitors to ensure that adequate insurance is in place.

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?

Yes.

Question 29

Do you have any views on what PII requirements should apply to Special Bodies?

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?

Yes. It would be difficult decide what threshold means a firm should be regulated. It may also prevent solicitors from working together.

Question 31

Do you have any alternative proposals to regulating entities of this type?

No

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?

No

Question 33

Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

Yes. It could cause confusion and additional expense to allow law firms to follow separate regulators for different types of work. This is also unlikely to apply to most firms as work is unlikely to be separately regulated.

Thank you for completing the **Consultation questionnaire form**.

Please save a copy of the completed form.

Please return it, along with your completed **About you form**, as an email attachment to consultation@sra.org.uk, by **21 September 2016**.

Alternatively, print the completed form and submit it by post, along with a printed copy of your **About you form**, to

Solicitors Regulation Authority
Regulation and Education - Policy - Handbook 2017
The Cube
199 Wharfside Street
Birmingham
B1 1RN

Richard Butler

Dear Colleagues

I am responding to your invitation to provide feedback on the proposed changes to the Code of Conduct. I do not have time to comment on the whole proposal, but I have two very specific concerns about the 2011 Code which, as the proposals stand, will not be addressed by the proposed 2017 Code:

1 Principles – Pre-2007 equivalents of the Principles were in some cases (but admittedly not in all) explicit as to whether they applied to a solicitor when acting only in a professional capacity or whether they also applied to behaviour outside professional practice. I can see no good reason for maintaining the complete ambiguity on this issue introduced in 2007 in relation to all of the Principles. How can this ambiguity benefit either the public or the profession? Compare Solicitors Practice Rule 1(a)) which said "A solicitor shall not do anything in the course of practising as a solicitor, or permit another person to do anything on his or her behalf, which compromises or impairs or is likely to compromise or impair … the solicitor's independence or integrity". The SRA, with the benefit of representations from the Law Society, should surely make a policy decision what is intended in each case here, and then draft clearly to achieve that policy objective.

2 Conflicts of interest – Draft Code 6.2 essentially re-states O 3.5 of the 2011 Code: "You do not act in relation to a matter or particular aspect of it if there is a client conflict or a significant risk of such a conflict in relation to that matter or aspect of it …". The new Glossary defines "Client Conflict" as "a situation where your separate duties to act in the best interests of two or more clients conflict" which deploys the plural form of the defined term "client" which is defined in the 2011 Glossary as "the person for whom you act and where the context permits, includes prospective and former clients". This chameleon definition of "client" is extremely unfortunate and unhelpful to the public and to the profession. That is because, as explained by Lord Millett in Bolkiah v KPMG [1998] UKHL 52;

[1999] 2 AC 222 HL the word "client" means something different in 2017 Code 6.2 (2011 Code O3.5) as compared with 2017 Code 6.3 (2011 Code O4.1) "You keep the affairs of clients confidential unless disclosure is required or permitted by law or the client consents". In the former case "client" means "existing client" and in the latter case it means "existing or former client". The chameleon definition fogs this critical distinction and requires a person trying to understand it to look into the equitable duties of fiduciaries. My experience is that practitioners (including seasoned partners in City law firms) do not understand the distinction. This problem (which is a very important one) could be cleared up very simply by scrapping the use of the Glossary definition in the conflict of interest and confidentiality provisions and instead using the phrase "existing clients" or "former and existing clients" as appropriate.

Thank you for this opportunity to respond.

Regards

Richard Butler

39 Battlefield Road, St. Albans, Herts, AL1 4DB, United Kingdom

Response to SRA Consultation on New Code of Conduct

Richard Moorhead, Professor of Law and Professional Ethics
UCL Faculty of Laws, Centre for Ethics and Law

Submitted in a personal capacity

August 2016

Question 1 - Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

I make no comment on the suitability test.

Question 2 - Do you agree with our proposed model for a revised set of Principles?

In general the reduction of the number of principles is sensible. If the principles are key to developing a more mature, reflective practice around ethics it is likely to be helpful to set out what the principles mean in broad terms.

In particular, it is not immediately clear what is meant by integrity (appreciating that the law is not a great help here). The SRA should take the opportunity to set out what integrity means. Similarly, the meaning of independence might need to be developed. To my mind independence reflects the need for practitioners to interpret and apply the law in ways free of client (or third party or business) influence and should include a reminder that they are responsible, independently of their clients instructions, for how they advise and how they act on instructions (per Farooqi). These understandings should be set out in the Code so that the concepts have an immediate and reasonably clear meaning.

It might be helpful also to set out the ways in which independence can be protected or assisted structurally and in the course of decision-making (in guidance or case studies rather than in the Code itself).

I welcome the clarification of the 'tie-breaker' guidance on how to deal with conflicting principles and think it sensible to define that with regard to the public interest in the administration of justice. This guidance is not included in the draft Code and it should be. Indeed, I believe that it may helpfully be included as a principle itself rather than having somewhat secondary status as guidance or narrative. It is vital that this is seen prominently.

Perhaps related to the issue of integrity (or indeed independence) is a broader notion of ethics than that contained within the professional code. I note the ABA Model Rules contain the following:

> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.
>
> Commentary:
>
> [2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical

considerations impinge upon most legal questions and may decisively influence how the law will be applied.

http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_2_1_advisor.html

I think the SRA should consider whether it sees requirements of integrity (and possibly independence) as covering this ground, clarifying whether this is the case, and considering whether there is merit in having this 'permissive' element in the Code. It helps clarify that the client's best interests are not narrowly (or sensibly construed as narrowly legal for instance. I understand this rule was invoked by the ABA in its approval of the UN Guiding Principles on Business and Human Rights in 2012, and it was prominent in the debate at the IBA over the Practical Guide for Business Lawyers on Business and Human Rights.

I confess to struggling with the need for the equality and diversity requirements as principles. I agree that these are matters on which the professions, along with many elite employers, struggle and that it should be seen as a priority for regulatory and professional action but I am not sure that the place to signal that priority is through artificially elevating them to principles. By way of contrast, firms should promote ethicality and competence first, for instance, but that is not in your principles.

Question 3 - Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

I am not much persuaded of the need for this principle. Honest and integrity covers it for me, but I understand why some disagree. I think it is interesting, given the doubts about the need for this principle, that the obligation is put in positive terms. I would have thought what you are likely to be looking for if enforcing this principle is improper conduct that damages public confidence, and if I am right about that, then the principle should reflect that.

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?

See above as regards the possibility of including something along the ABA's lines. And as discussed, I would include the tie-breaker as part of the principles themselves rather than below it as guidance. Please note also that the draft Code does not contain the tie-breaker guidance, which I assume is a clerical error. But if it is not a clerical error it should be corrected: the guidance is essential. I would also be tempted to change the order of the Principles, relegating 2 and 5 to the end of the list (if they remain in).

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?

Conflicts of Interest for in-house lawyers are an interesting area. There are conflicts that arise between different corporate employees (e.g. the CEO vs the Director of Risk) and especially intra-groups (Subsid A and Subsid B). I think you might benefit from considering somewhere in the Code how the best interests of the Client manifests in a corporate (or other organizational) context.

What works in terms of effective supervision and other systems might be particularly useful, if such information can be found.

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?

I doubt this is the way the Code will be interpreted. I am also not convinced that, as useful as consultation may be, it is the only or best way to test the value of the Code. I would hope that ways can be found to pilot its application. Testing how lawyers interpret situations in the light of the Code. I would be interesting to know if there is data from the online code as to what areas are most used and clicked through to. It may be that linking Codes, and guidance and case study material and monitoring their use through web analytics could be used as an important tool for development of the Codes in future.

Question 7 - In your view is there anything specific in the Code that does not need to be there?

Nothing occurred to me save for my comments about principles that are not necessarily really needed.

Question 8 - Do you think that there anything specific missing from the Code that we should consider adding?

One matter which caught my attention was the way billing/fees was dealt with. Under the current Code, solicitors can, "only enter into fee agreements with your clients that are legal, and which you consider are suitable for the client's needs and take account of the client's best interests". This strikes me as quite an important protection which appear to be lost, unless it is contained within the requirement that, 8.6 "You give ***clients*** information in a way they can understand. You ensure they are in a position to make informed decisions about the services they need, how their matter will be handled and the options available to them." If it is perceived that this covers the problem, then I would expect it to be made clearer as the potential for lawyers to sign clients up on inappropriate fee deals is a real and substantial risk.

Question 9 - What are your views on the two options for handling conflicts of interests and how they will work in practice?

I have no comments on this.

Question 10 - Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

I attach below comments on the text of the code in comment bubbles

Question 11 - In your view is there anything specific in the Code that does not need to be there?

See above.

Question 12 - Do you think that there anything specific missing from the Code that we should consider adding?

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?

See below.

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.
No comments.

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?

I would say this wouldn't I, but I do think the time is ripe for collating through research data on how COLPs do their jobs and whether, where and why there is (or is not) consensus around best practice.

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?

Research on ethics tends to emphasise that it is the context, the structure and environment, the opportunities and incentives presented for misconduct or mismanaging competence, which is more important than the individuals. At the moment we have very little basis for understanding the relative risks posed by practice in the unregulated sector.
The ability to complain to LeO will be an important protection here.

I am not at all convinced that relying on solicitors in non-regulated businesses to advise clients of the ways in which they are regulated will provide clarity or comfort to clients. It will be interesting to see how the SRA seeks to influence this process. I am reminded strongly of the problems that arose when solicitors operating under CFAs were required to advise their clients about those agreements. The task was very difficult to carry out in a useful , and not always willingly carried out (see the Abrams and Yarrow research from way back then). Some of the complexities can be seen when your paper starts to discuss LPP and interventions. There is a not insignificant risk that organisations employ solicitors, with high pressure business models, that eventual come unstuck in the way some claims handlers have. The public may be better protected (because of access to LeO) than they might otherwise have been but the reputational impact on solicitors and the SRA might also be significant.

On balance, but without much by way of evidence, I would inclined towards taking the risk but I would also strongly encourage the SRA to consider how it understands and monitors the types of organization which solicitors find themselves working within. Some kind of risk barometer might be useful here.

Incidentally, I was not convinced by the analysis of LPP in these organisations. How speculative is your analysis here? Is it supported by case law and advice?

I was also not clear on whether this proposal was aiming to regulate out non-practising solicitors, and whether that would be achieved. Might solicitors still seek to be non-practising to avoid scrutiny by, and contribution to, LeO?

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?

Not applicable.

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?

I think this is a reasonable position.

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?

The three year limit is plainly arbitrary, but I think the SRA needs to work up (or explain better) what would replace it.

Question 20 - Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

I have discussed this above, but I have major doubts about the extent to which this will inform customer decisions rather than confuse them or be ignored by them.

Question 21 onwards

No comment

Detailed comments on the Code

Draft SRA Code of Conduct for Solicitors, RELs and RFLs [2017]

SRA Code of Conduct for Solicitors, RELs and RFLs [2017]

Introduction

The SRA Principles comprise the fundamental tenets of ethical behaviour that we expect all those that we regulate to uphold. This includes you, as well as authorised firms and their managers and employees. The principles are as follows:

You:

1. uphold the rule of law and the proper administration of justice
2. ensure that your conduct upholds public confidence in the profession and those delivering legal services
3. act with independence
4. act with honesty and integrity
5. act in a way that encourages equality, diversity and inclusion
6. act in the best interests of each ***client***

Comment [T1]: The guidance on what to do when the principles conflict should be included here.

The Code of Conduct describes the standards of professionalism that we, the SRA, and the public expect of individuals (solicitors, registered European lawyers and registered foreign lawyers) authorised by us to provide legal services. They apply to conduct and behaviour relating to your practice, and comprise a framework for ethical and competent practice which applies irrespective of your role or practice setting; although section 8 applies only when you are providing legal services to the public or a section of the public.

You must exercise your judgement in applying these standards to the situations you are in and deciding on a course of action, bearing in mind your role, responsibilities and the nature of your clients and areas of practice. You are personally accountable for compliance with the Code - and our other regulatory requirements that apply to you - and must always be prepared to justify your decisions and actions. Serious breach may result in our taking regulatory action against you. A breach may be serious either in isolation or because it comprises a persistent failure to comply or pattern of behaviour.

Comment [T2]: A key issue here is the responsibility is not diminished by being supervised, or being directed to do something which is in breach of the Code, for example, the ***Shaw v Logue*** [2014] EWHC 5 (Admin) situation. I would recommend making that plain.

The Principles and Codes are underpinned by our Enforcement Strategy, which explains in more detail our approach to taking regulatory action in the public interest.

Maintaining trust and acting fairly

1.1 You do not unfairly discriminate by allowing your personal views to affect your professional relationships and the way in which you provide your services.

1.2 You do not abuse your position by taking unfair advantage of ***clients*** or others.

1.3 You perform all ***undertakings*** given by you, and do so within an agreed timescale or if no timescale has been agreed then within a reasonable amount of time.

1.4 You do not mislead or attempt to mislead your ***clients***, the ***court*** *or others, either by your own acts or omissions or allowing or being complicit in the acts or omissions of others (including your* ***client****).*

Comment [T3]: Is this a rather different test to the one required by law, which is that one must not knowingly or recklessly mislead

Dispute resolution and proceedings before courts, tribunals and inquiries

2.1 You do not misuse or tamper with evidence, or attempt to do so.

Comment [T4]: The IBs used to refer to influencing evidence too. I wonder if that should be in here?

2.2 You do not seek to influence the substance of evidence, including generating false evidence or persuading witnesses to change their evidence.

Comment [T5]: False is narrower than misleading. Is that intentional?

Comment [T6]: Is it improper to persuade a witness to change their evidence if it was wrong?

2.3 You do not provide or offer to provide any benefit to witnesses dependent upon the nature of their evidence or the outcome of the case.

2.4 You only make assertions or put forward statements, representations or submissions to the ***court*** or others which are properly arguable**.**

Comment [T7]: There is a higher standard required for statements which allege fraud or serious wrongdoing required by law I think, and it would be better that the Code reflected this.

2.5 ***Y****ou do not place yourself in contempt of* ***court*****,** and you comply with ***court*** orders which place obligations on you.

2.6 You do not waste the ***court's*** time.

2.7 You draw the ***court's*** attention to relevant cases and statutory provisions, or procedural irregularities which are likely to have a material effect on the outcome of the proceedings.

Service and competence

3.1 You only act for ***clients*** on instructions from the ***client***, or from someone authorised to provide instructions on their behalf. If you have reason to suspect that the instructions do not represent your ***client's*** wishes, you do not act unless you have satisfied yourself that they do.

3.2 You ensure that the service you provide to ***clients*** is competent and delivered in a timely manner.

3.3 You maintain your competence to carry out your role and keep your professional knowledge and skills up to date.

3.4 You consider and take account of your ***client's*** attributes, needs and circumstances.

3.5 Where you supervise or manage others providing legal services:

(a) you remain accountable for the work carried out through them; and

(b) you effectively supervise work being done for ***clients***.

3.6 You ensure that the individuals you manage are competent to carry out their role, and keep their professional knowledge and skills up to date.

Comment [T8]: This is quite vague. I'm imagining you might be clearer about the mischief you are aiming at here.

Comment [T9]: I am a bit uncomfortable with the drafting of this one a) is a statement of fact al;though it is not entirely clear (what does accountable mean? You are strictly liable or something less onerous) and b) is a statement of something that you must do.

Client money and assets

4.1 You properly account to ***clients*** for any ***financial benefit*** you receive as a result of their instructions.

4.2 You safeguard money and ***assets*** entrusted to you by ***clients*** and others.

4.3 Unless you work in an ***authorised body***, you do not personally hold ***client money***.

Referrals, introductions and separate businesses

Referrals and introductions

5.1 ***In respect of any referral of a client by you to another person, or of*** any third party who introduces business to you or with whom you share your fees, you ensure that:

(a) ***clients*** are informed of any financial or other interest which you or your business or employer has in referring the ***client*** to another ***person*** or which an ***introducer*** has in referring the ***client*** to you***;***

(b) ***clients*** are informed of any fee sharing ***arrangement*** that is relevant to their matter;

(c) the agreement is in writing;

(d) you do not receive payments relating to a referral or make payments to an ***introducer*** in respect of ***clients*** who are the subject of criminal proceedings; and

(e) any ***client*** referred by an ***introducer*** has not been acquired in a way which would breach the ***SRA's regulatory arrangements*** if the ***person*** acquiring the ***client*** were regulated by the ***SRA***.

Separate businesses

5.2 You ensure that ***clients*** are clear about the extent to which the services that you and any ***separate business*** offer are regulated.

5.3 You do not represent a ***separate business*** or any of its services as being regulated by the ***SRA***.

5.4 You only:

(a) refer, recommend or introduce a ***client*** to a ***separate business***;

(b) put your ***client*** and a ***separate business*** in touch with each other; or

(c) divide, or allow to be divided, a ***client's*** matter between you and a ***separate business***,

where the ***client*** has given informed consent to your doing so.

5.5 Where you and a ***separate business*** jointly publicise services, you ensure that the nature of the services provided by each business is clear.

Comment [T10]: I have quite significant reservations about the ability of clients to understand separate business type issues and imagine that to stand a chance of being effective the SRA will need to specify quite closely what clients will be told – but will that then be too complex?

Comment [T11]: Can a separate business ever have solicitors working within it? If so, then a separate business *is* regulated by the SRA, up to a point. Good luck everybody explaining that to clients.

Conflict, confidentiality and disclosure

Conflict of interests

6.1 You do not act if there is a conflict of interest between you and your ***client*** or a significant risk of such a conflict.

6.2 You do not act in relation to a matter or particular aspect of it if there is a ***client conflict*** or a significant risk of such a conflict in relation to that matter or aspect of it, unless:

(a) the ***clients*** have an agreed common purpose in relation to the matter or the aspect of it, as appropriate, and a strong consensus on how that purpose is to be achieved; or

(b) the ***clients*** are ***competing for the same objective*** which, if attained, by one ***client*** will make that objective unattainable to the other ***client***:

and the conditions below are met, namely that:

(i) all the ***clients*** have given informed consent, given or evidenced in writing, to you acting; and

(ii) where appropriate, you put in place effective safeguards to protect your ***clients'*** confidential information; and

(iii) the benefits to the ***clients*** of doing so outweigh the risks to the ***clients of you acting***.

Confidentiality and disclosure

6.3 You keep the affairs of ***clients*** confidential unless disclosure is required or permitted by law or the ***client*** consents.

Comment [T12]: I wonder if solicitors can be given more help with what this means? They used to be given some example exceptions, but a statement of the law as it stands might also be useful somewhere: guidance?

6.4 Where you are acting for a ***client,*** you make that ***client*** aware of all information material to the matter of which you have knowledge, except when:

(a) the disclosure of that information is prohibited by law;

(b) your ***client*** gives informed consent, given or evidenced in writing, to the information not being disclosed to them;

(c) you have reason to believe that serious physical or mental injury will be caused to your ***client*** or another if the information is disclosed; or

(d) the information is contained in a privileged document that you have knowledge of only because it has been mistakenly disclosed.

6.5 You do not act for a ***client*** in a matter where that ***client*** has an interest adverse to the interest of another current ***client*** or a former ***client*** for whom your business or employer holds confidential information which is material to that matter, unless:

(a) all effective measures have been taken which result in there being no real risk of disclosure of the confidential information; or

(b) the ***client*** has given informed consent, given or evidenced in writing, to you acting, including to any measures taken to protect their information.

Comment [T13]: I'd be tempted to add something along the lines of, "it is clear the holding of such confidential information does not indicate a conflict of interest" but I am guessing you will say this is mere duplication of the conflict of interest point.

Cooperation and accountability

7.1 You keep up to date with and follow the law and regulation governing the way you work.

7.2 You are able to justify your decisions and actions in order to demonstrate compliance with your obligations under the ***SRA regulatory arrangements***.

Comment [T14]: Do you mean justify or justify and evidence?

7.3 You cooperate with the ***SRA***, other regulators, ombudsmen and those bodies with a role overseeing and supervising the delivery of, or investigating concerns in relation to, legal services.

7.4 You respond promptly to the ***SRA*** and:

(a) provide full and accurate explanations, information and documents in response to any request or requirement;

(b) ensure that relevant information which is held by you, or by third parties carrying out functions on your behalf which are critical to the delivery of your legal services, is available for inspection by the ***SRA***.

7.5 You do not attempt to prevent anyone from providing information to the ***SRA***.

7.6 You notify the ***SRA*** promptly if you become aware:

(a) of any material changes to information previously provided to the ***SRA***, by you or on your behalf, about you or your practice; and

(b) that information provided to the ***SRA***, by you or on your behalf, about you or your practice is or may be false, misleading, incomplete or inaccurate.

7.7 You ensure that a prompt report is made to the ***SRA*** or another ***approved regulator***, as appropriate, of any serious breach of their ***regulatory arrangements*** by any ***person*** regulated by them (including you) of which you are aware. If requested to do so by the ***SRA*** you investigate whether there have been any serious breaches that should be reported to the ***SRA***.

Comment [T15]: Something that may be missing here is an obligation to investigate circumstances which suggest there may have been a serious breach.

7.8 You act promptly to take any remedial action requested by the ***SRA***.

7.9 You inform ***clients*** promptly of any act or omission which could give rise to a claim by them against you. If requested to do so by the ***SRA*** you investigate whether anyone may have a claim against you.

7.10 Any obligation under this section to notify, or provide information to, the ***SRA*** will be satisfied if you provide information to your firm's ***COLP*** or ***COFA***, as and where appropriate, on the understanding that they will do so.

Comment [T16]: What if it becomes clear to the reporter that the COLP is not acting? Or what if the serious misconduct is by the COLP?

When you are providing services to the public or a section of the public:

Client identification

8.1 You take appropriate steps to identify who you are acting for in relation to any matter.

Comment [T17]: Not effective?

Complaints handling

8.2 You ensure that, as appropriate in the circumstances, you either establish and maintain, or participate in, a procedure for handling ***complaints*** in relation to the legal services you provide.

Comment [T18]: Why do you need this phrase?

8.3 You ensure that ***clients*** are informed in writing at the time of engagement about their right to complain about your services and your charges, and how ***complaints*** can be made.

8.4 You ensure that ***clients*** are informed, in writing:

(a) both at the time of engagement and, if a ***complaint*** has been brought at the conclusion of your ***complaints*** procedure, of any right they have to complain to the ***Legal Ombudsman***, the time frame for doing so and full details of how to contact the ***Legal Ombudsman; and***

(b) if a ***complaint*** has been brought and your ***complaints*** procedure has been exhausted:

(i) that you cannot settle the ***complaint***;

(ii) of the name and website address of an alternative dispute resolution (ADR) approved body which would be competent to deal with the ***complaint***; and

(iii) whether you agree to use the scheme operated by that body.

8.5 You ensure that ***clients' complaints*** are dealt with promptly, fairly and free of charge.

Comment [T19]: I'm not entirely in agreement with the need to advise of LeO at the outset. Why? Isn't it a bit disproportionate?

Client information and publicity

8.6 You give ***clients*** information in a way they can understand. You ensure they are in a position to make informed decisions about the services they need, how their matter will be handled and the options available to them.

8.7 You ensure that ***clients*** receive the best possible information about how their matter will be priced and, both at the time of engagement and when appropriate as their matter progresses, about the likely overall cost of the matter and any costs incurred.

8.8 You ensure that any ***publicity*** you are responsible for in relation to your practice is accurate and not misleading, including that relating to your charges and the circumstances in which ***interest*** is payable by or to ***clients***.

8.9 You ensure that ***clients*** understand whether and how the services you provide are regulated and about the protections available to them.

Comment [T20]: This is a separate point and so should have a para of its own.

Comment [T21]: I am assuming there will be quite detailed guidance on this, or it could be a recipe for confusion

Supplemental notes

Powers, commencement/transitional provisions

Annex 2

Draft SRA Code of Conduct for Firms [2017]

SRA Code of Conduct for Firms [2017]

Introduction

The SRA Principles comprise the fundamental tenets of ethical behaviour that we expect all those that we regulate to uphold. This includes all individuals and firms that we regulate, including authorised firms and their managers and employees. The principles are as follows:

You:

1. uphold the rule of law and the proper administration of justice
2. ensure that your conduct upholds public confidence in the profession and those delivering legal services
3. act with independence
4. act with honesty and integrity
5. act in a way that encourages equality, diversity and inclusion
6. act in the best interests of each ***client***

This Code of Conduct describes the standards and business controls that we, the SRA, and the public expect of firms authorised by us to provide legal services. These aim to create and maintain the right culture and environment for the delivery of competent and ethical legal services to consumers. If you are a MDP, the SRA Principles and these standards apply in relation to your regulated activities.

Sections 8 and 9 set out the requirements of managers and compliance officers in those firms, respectively.

Serious breach may lead to our taking regulatory action against the firm itself as an entity, or its managers or compliance officers, who all share responsibility for ensuring that the standards and requirements are met. We may also take action against employees working within the firm for any breaches for which they are responsible. A breach may be serious either in isolation or because it comprises a persistent failure to comply or pattern of behaviour.

Maintaining trust and equality and diversity

1.1 You do not abuse your position by taking unfair advantage of ***clients*** or others.

1.2 You monitor, report and publish workforce diversity data, as ***prescribed*** by the ***SRA***.

Comment [T22]: Why do you need this if you have 2.1a)

Compliance and business systems

2 .1 You have effective governance structures, arrangements, systems and controls in place that ensure:

(a) you comply with all the ***SRA's regulatory arrangements***, as well as with other regulatory and legislative requirements, which apply to you;

(b) your ***managers*** and ***employees*** comply with the ***SRA's regulatory arrangements*** which apply to them;

(c) your ***managers***, ***employees*** and ***interest holders*** and those you employ or contract with do not cause or substantially contribute to a breach of the ***SRA's regulatory arrangements*** by you or your ***managers*** or ***employees***;

(d) your ***compliance officers*** are able to discharge their duties under rules 9.1 and 9.2 below.

2.2 You keep and maintain records to demonstrate compliance with your obligations under the ***SRA's regulatory arrangements***.

2.3 You remain accountable for compliance with the ***SRA's regulatory arrangements*** where your work is carried out through others, including your ***managers*** and those you employ or contract with.

2.4 You actively monitor your financial stability and business viability. Once you are aware that you will cease to operate, you effect the orderly wind-down of your activities.

2.5 You identify, monitor and manage all material risks to your business, including those which may arise from your ***connected practices***.

Comment [T23]: I am wondering if it would be sensible to have a requirement to keep the effectiveness of their systems under review periodically?

Cooperation and information requirements

3.1 You keep up to date with and follow the law and regulation governing the way you work.

3.2 You cooperate with the ***SRA***, other regulators, ombudsmen and those bodies with a role overseeing and supervising the delivery of, or investigating concerns in relation to, legal services.

3.3 You respond promptly to the ***SRA*** and:

(a) provide full and accurate explanations, information and documentation in response to any requests or requirements;

(b) ensure that relevant information which is held by you, or by third parties carrying out functions on your behalf which are critical to the delivery of your legal services, is available for inspection by the ***SRA***.

3.4 You act promptly to take any remedial action requested by the ***SRA***.

3.5 You inform ***clients*** promptly of any act or omission which could give rise to a claim by them against you. If requested to do so by the ***SRA*** you investigate whether anyone may have a claim against you.

3.6 You notify the ***SRA*** promptly:

(a) of any indicators of serious financial difficulty relating to you;

(b) if a ***relevant insolvency event*** occurs in relation to you;

(c) of any change to information recorded in the ***register***.

3.7 You provide to the ***SRA*** an information report on an annual basis or such other period as specified by the ***SRA*** in the ***prescribed*** form and by the ***prescribed*** date.

3.8 You notify the ***SRA*** promptly if you become aware:

(a) of any material changes to information previously provided to the ***SRA***, by you or on your behalf, about you or your ***managers***, ***owners*** or ***compliance officers***; and

(b) that information provided to the ***SRA***, by you or on your behalf, about you or your ***managers***, ***owners*** or ***compliance officers*** is or may be false, misleading, incomplete or inaccurate.

3.9 You promptly report to the ***SRA*** or another ***approved regulator***, as appropriate, any serious breach of their ***regulatory arrangements*** by any ***person*** regulated by them (including you) of which you are aware. If requested to do so by the ***SRA*** you investigate whether there have been any serious breaches that should be reported to the ***SRA***.

Service and competence

4.1 You only act for ***clients*** on instructions from the ***client***, or someone authorised to provide instructions on their behalf. If you have reason to suspect that the instructions do not represent your ***client's*** wishes, you do not act unless you have satisfied yourself that they do.

4.2 You ensure that the service you provide to ***clients*** is competent and delivered in a timely manner, and takes account of your ***client's*** attributes, needs and circumstances.

4.3 You ensure that your ***managers*** and ***employees*** are competent to carry out their role, and keep their professional knowledge and skills up to date.

4.4 You have an effective system for supervising ***clients'*** matters.

Client money and assets

5.1 You properly account to ***clients*** for any ***financial benefit*** you receive as a result of their instructions.

5.2 You safeguard money and ***assets*** entrusted to you by ***clients*** and others.

Conflict and confidentiality

Conflict of interests

6.1 You do not act if there is a conflict of interest between you and your ***client*** or a significant risk of such a conflict.

6.2 You do not act in relation to a matter or a particular aspect of it if there is a ***client conflict*** or a significant risk of such a conflict in relation to that matter or aspect of it, unless:

(a) the ***clients*** have an agreed common purpose in relation to the matter or the aspect of it, as appropriate, and a strong consensus on how that purpose is to be achieved; or

(b) the ***clients*** are ***competing for the same objective*** which, if attained, by one ***client*** will make that objective unattainable to the other ***client***:

and the conditions below are met, namely that:

(i) all the ***clients*** have given informed consent, given or evidenced in writing, to you acting;

(ii) where appropriate, you put in place effective safeguards to protect your ***clients'*** confidential information; and

(iii) the benefits to the ***clients*** of doing so outweigh the risks to the ***clients of you acting.***

Confidentiality and disclosure

6.3 You keep the affairs of ***clients*** confidential unless disclosure is required or permitted by law or the ***client*** consents.

6.4 Any individual who is acting for a ***client*** makes that ***client*** aware of all information material to the matter of which the individual has knowledge except when:

(a) legal restrictions prohibit them from passing the information to the ***client;***

(b) the ***client*** gives informed consent, given or evidenced in writing, to the information not being disclosed to them;

(c) there is evidence that serious physical or mental injury will be caused to the ***client*** or another if the information is disclosed; or

(d) the information is contained in privileged documents that the individual has knowledge of only because they have been mistakenly disclosed.

6.5 You do not act for a ***client*** in a matter where that ***client*** has an interest adverse to the interest of another current ***client*** or a former ***client*** for whom you hold confidential information which is material to that matter, unless:

(a) all effective measures have been taken which result in there being no real risk of disclosure of the confidential information; or

(b) the ***client*** has given informed consent, given or evidenced in writing, to you acting, including to any measures taken to protect their information.

Applicable Outcomes in the SRA Code of Conduct for Solicitors and RELs 2017

7.1 The following sections of the SRA Code of Conduct for Solicitors, RELs and RFLs 2017 apply to you in their entirety as though references to "you" were references to you as a ***firm***:

(a) Referrals, introductions and separate businesses (5.1 to 5.5);

(b) Standards which apply when providing services to the public or a section of the public, namely Client identification (8.1), Complaints handling (8.2 to 8.5), and Client information and publicity (8.6 to 8.9).

Managers in SRA authorised firms

8.1 If you are a ***manager***, you are responsible for compliance by your ***firm*** with this Code. This responsibility is joint and several if you share management responsibility with other ***managers*** of the ***firm***.

Compliance officers

9.1 If you are a ***COLP*** you take all reasonable steps to:

(a) ensure compliance with the terms and conditions of your ***firm's authorisation***;

(b) ensure compliance by your ***firm*** and its ***managers***, ***employees*** or ***interest holders*** with the ***SRA's regulatory arrangements*** which apply to them;

(c) ensure that your ***firm's managers***, ***employees*** and ***interest holders*** do not cause or substantially contribute to a breach of the ***SRA's regulatory arrangements***;

(d) as soon as reasonably practicable, report to the ***SRA*** any serious breach of the terms and conditions of your ***firm's authorisation***, or the ***SRA's regulatory arrangements*** which apply to your ***firm***, ***managers*** or ***employees***;

save in relation to the matters which are the responsibility of the ***COFA*** as set out in rule 9.2 below.

9.2 If you are a ***COFA*** you take all reasonable steps to:

(a) ensure that your ***firm*** and its ***managers*** and ***employees*** or the ***sole practitioner*** comply with any obligations imposed upon them under the ***SRA Accounts Rules***;

(b) as soon as reasonably practicable, report to the ***SRA*** any serious breach of the ***SRA Accounts Rules*** which apply to them.

Supplemental notes

Powers, commencement/transitional provisions.

Consultation: Looking to the future - flexibility and public protection

Response ID:637 Data

2. Your identity

Surname

Edwards

Forename(s)

Mark

We may publish a list of respondents and a report on responses. Partial attributed responses may be published. Please advise us if you do not wish us to attribute your response or for your name or the name of your firm or organisation to appear on any published list of respondents.

Attribute my/our response and publish my/our name.

Please identify the capacity in which you are submitting a response. I am submitting a response…

on behalf of my firm.

Please enter your firm's name:: Rocket Lawyer UK

3.

1. Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

N/A

4.

2. Do you agree with our proposed model for a revised set of Principles?

Yes.

5.

3. Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

Yes.

6.

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?

What about providing value for money and transparent pricing?

7.

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?

D/K.

8.

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?

Yes.

9.

7. In your view is there anything specific in the Code that does not need to be there?

No.

10.

8. Do you think that there anything specific missing from the Code that we should consider adding?

No.

11.

9. What are your views on the two options for handling conflicts of interests and how they will work in practice?

Option 1 is preferable because it is more client focussed, providing a clear cases and safeguards for when acting for two opposing clients is permissible.

12.

10. Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

Yes.

13.

11. In your view is there anything specific in the Code that does not need to be there?

No.

14.

12. Do you think that there anything specific missing from the Code that we should consider adding?

No.

15.

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?

No.

16.

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.

D/K.

17.

15. How could we improve the way in which the COLP/COFA roles work or to provide further support to compliance officers, in practice?

D/K.

18.

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?

We have seen limited and insufficient innovation and improvement in the delivery of legal services since the Legal Services Act has come into play. It is imperative that we open up legal services to increased competition and innovation in order to meet the needs of consumers and small businesses, most of whom are not getting satisfactory access to justice.

Freeing solicitors to provide legal services direct to the public and business from any type of entity, not just law firms, will undoubtedly lead to major improvements in legal service delivery. Solicitors could create new businesses with other types of professional on an equal footing, and these multi-disciplinary ingredients are what's necessary to foster innovation. Without this freedom the legal industry will continue it's too slow progress towards modernisation.

Regulating solicitors in these new legal businesses will ensure that the quality of service is maintained, and continue to safeguard the public. Furthermore, the gains for solicitors will be considerable, providing a multitude of career options for newly qualified lawyers, rather than the single track law firm training contract, and give experienced solicitors the entrepreneurial freedom to experiment and set up many new types of legal business.

19.

17. How likely are you to take advantage in the greater flexibility about where solicitors can practice as an individual or as a business?

As an unregulated legal services provider, Rocket Lawyer is very likely to take advantage of this new freedom by hiring some solicitors to provide legal advice to our customers to supplement the law firms that we already partner with to provide this service.

20.

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?

This seems like the correct approach while there are reserved activities. Instead it makes more sense to reduce the list of reserved activities to litigation and court proceedings, leaving regulated solicitors in unregulated entities the freedom to carry out all transactional and administrative legal work.

21.

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?

Both of the current rules that govern whether a solicitor is qualified to supervise are not objective and provide no guarantee of expertise. In the absence of an objective method for qualifying solicitors to supervise, these rules should be removed to allow any qualified, practicing solicitor the right to supervise. If they are judged qualified to act as a solicitor then they should be qualified to supervise others.

22.

20. Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

Both regulated and unregulated legal businesses that use solicitors to provide legal advice should display the information about protections afforded their customers.

23.

21. Do you agree with the analysis in our initial Impact Assessment?

The more the SRA can do to inform the consumer about how they can obtain legal help, the choices available, and the fair cost of legal services, the better. Informed consumers is a crucial component of the transparent legal market place that is required to ensure access to justice for all.

24.

22. Do you have any additional information to support our initial Impact Assessment?

No.

25.

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?

Yes, is is proper that money should be held by the unregulated business not by the solicitor working for the business.

26.

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?

None.

27.

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? If not, what are your reasons?

There should be no need for customers of unregulated businesses to access the fund, as they are already protected under existing law and have easy redress through the online courts, e.g. Money Claim Online.

28.

26. Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

This seems the only practical solution, as it is important that the unregulated business that employs solicitors has the flexibility to buy the necessary level of insurance directly, rather than through the solicitor.

29.

27. Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

It could lead to insufficient insurance coverage, and so If possible, the SRA should make a Code rule that requires such solicitors to ensure that there is sufficient insurance to cover risk, without dictating who purchases the insurance.

30.

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?

Yes.

31.

29. Do you have any views on what PII requirements should apply to Special Bodies?

No.

32.

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?

Solicitors should be free to set up unregulated businesses in any way they choose, even if this does include a lot of solicitors.

33.

31. Do you have any alternative proposals to regulating entities of this type?

No. None is needed.

34.

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?

It is proper that the SRA should be able to intervene into the practices of a solicitor within an unregulated business. There should be a clear scope and rules around what the SRA can probe and what they cannot to ensure that the solicitor maintains the required information for the required time, and that these rules do not conflict with other regulation, such as the Data Protection Act.

35.

33. Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

> Yes.

I have decided to response this way as I felt that some of the questions overlap. In order to retain the trust and confidence of the public we serve I am of the view that it is essential that any change does not cause confusion and ambiguity over what our professional title means. If the title "solicitor" is presented to the public, in whatever format they operate, it should mean the same for any user and carry the same obligations. At present all solicitors are regulated in the same way, they comply with the same standards with the same level of assurance and protection in cases of default. The SRA consultation will undermine public protection and the public perception of the solicitor brand.

The proposals plan to give non-law firms the opportunity to employ regulated Solicitors and legal professionals without having to deal with any of the regulatory hurdles faced by regulated law firms. In my view this could create three issues:

a. The unregulated firm will be given an artificial competitive advantage when pricing their legal service work. Running an unregulated firm and providing legal services will be far cheaper than providing legal services through the traditional model. The proposals are likely to drive down prices, but at the expense of consumer protection.
b. The consumer will lose a lot of the protection offered by getting their legal work carried out by a firm that is not subject to regulation. The most dangerous aspect is the fact that the average consumer will have no idea of the difference between an unregulated firm and a regulated firm. Unregulated firms could include principals who have been struck off and they will be able to employ a practising solicitor.
c. Similarly to some in-house solicitors today, those who are working within unregulated firms may suffer from a lack of supervision and career guidance, which would be available to them within a regulated firm who are required to make sure that their legal professionals reach and retain certain standards. We also have specific concerns about plans to allow newly qualified solicitors to start their own law firm under the planned changes. Senior members in a law firm provide irreplaceable guidance for younger solicitors coming into the profession. The measures proposed will disproportionately harm our small firm members, newly qualified members and solicitors from ethnic minorities.

I am very concerned that unregulated firms may not be required to have any professional indemnity insurance to a sufficient level, and may not have access to the compensation fund or Legal Ombudsman service. In most case consumers will not be aware that they will not have this protection, which will weaken the current position.

If an unregulated firm is able to act without being subject to the rules on conflict of interest, the consumer will again be placed in a weak position. Again, in most cases they will have no idea that their firm may be acting on both sides of a transaction. This also gives the unregulated firm a further artificial competitive advantage where there is no transparency required or offered.

In a nutshell, that the SRA proposals as outlined in their 'Looking to the Future' Consultation are ill-conceived not thought through and are extremely likely to reduce protection for consumers of legal services. We fail to understand why the SRA deems it part of their remit to contrive a more competitive legal market, where competition and choice are already prevalent. I do not understand

why the SRA has taken it upon itself to expand its role into unregistered markets and cannot see that this was intended or agreed under the Legal Services legislation.

To introduce a system where unregulated firms would be able to provide the same service, without professional indemnity insurance, access to client money and the ability to act for both sides of a transaction is extremely dangerous to the consumer. Similar examples can be gleaned from all areas of legal services, including in particular, probate work, Will drafting, litigation and matrimonial work.

Mrs S Abraham

S Abraham Solicitors

RESPONSE TO SRA CONSULTATION

Looking to the Future - Flexibility and Public Protection

Name: Professor Sara Chandler QC (Hon)

Job: Professor of Clinical Legal Education and a supervising solicitor in the Legal Advice Clinic of London South Bank University.

Member of the Law Society Council: representing solicitors in the voluntary sector, mostly Law Centres, CAB, University Law Clinics and charities.

General introduction:

I work in a Legal Advice Clinic where we provide 3 drop-in advice sessions per week for members of the public who cannot afford to pay a solicitor. It is a pro bono service and we are part of a network of free legal advice providers in the London Borough of Southwark called Southwark Legal Advice Network. We serve any client who can reach our service, and we have clients from all over Greater London.

The service is provided by staff with practising certificates, who are solicitors or barristers, and students who are studying the Qualifying Law Degree. The students are completing a specific module called "Working in the Law" in which they receive legal skills training and gain practical experience by assisting members of the public. The Clinic also provides a Help Desk at Lambeth County Court on two mornings a week. We work with 84 student volunteers over the academic year, providing training and supervision in our clinical education programme.

I am also a trustee of Central London Community Law Centre. I have been a member of the Law Centre movement since 1980, working for 15 years in Law Centres, 5 years in legal aid firms, and 13 years in University law clinics. My expertise is in housing law, and my specialist training expertise is the learning and teaching of ethics.

I am Vice President of the Federation of European Bar Associations and so my comments on the risk of damage to the international reputation of the solicitors' profession are made with my knowledge and experience in representing solicitors in Europe.

I will answer some but not all of the questions as follows:

Question 2. Do you agree with our proposed model for a revised set of Principles?

This a simplified list of 6 principles, which does not specify how a solicitor will comply. There is a risk that such a simplified list will damage the reputation of the solicitors' profession. I know that colleagues prefer certainty, and clear rules. I also think that maximum clarity is needed in order to protect the public. There is also the international reputation of solicitors and any damage to our reputation will undermine the UK position in the global legal services market. Changes to our regulatory framework are commented on by our European colleagues and they express how important it is to have clear rules, especially in the field of ethics.

Question 3. Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

There is not a lot of detail, and so a member of the public might not know what to expect. The members of the public who attend the free legal services provided by solicitors in the voluntary sector often find systems confusing and in order to maintain trust and confidence, rules should be clear.

I agree with the Law Society in redrafting as follows: "*Ensure that your conduct upholds public confidence **in you and** in the profession and those delivering legal services*."

This ensures that the solicitor **personally** should ensure their behaviour upholds public confidence.

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?

The code should include "provide a proper standard of service" This is an important principle which protects the client. It is also a specific reference to standards to be expected.

Question 6. Have we achieved our aim of developing a short, focused Code for all solicitors, wherever they work that is clear and easy to understand?

I do not agree with the proposal that there should be two codes. All solicitors should be regulated within regulated organisations.

I believe two codes will confuse the public and lead to a profession divided into two kinds of practitioners, those within regulated organisations and those without or outside, excluded from full regulation, and providing services for which there is no full protection for their clients

I believe that these two types of regulation will lead to a lack of protection for clients. Solicitors in unregulated organisations will be at a disadvantage, at risk of being sued by their client if something goes wrong, and the organisation does not have full regulation with all the protection that entails.

Question 10. Have we achieved our aim of developing a short focused Code for SRA regulated firms that is clear and easy to understand?

I repeat my serious concern about the proposal for two types of regulation.

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?

The phrase "alternative legal service providers" seems to raise a big question. We ask "alternative to what?" Is this simply seen as alternative to private practice or alternative business structures or employment as in-house counsel? Solicitors in the voluntary sector, such as members of the Law Centres Network and those working in charities and not for profit organisations, fit in the category described as "special bodies". In discussion with other Law Centre solicitors and solicitors working in the University sector in clinics or legal

advice centres I can say that the proposal presents serious threats if they are to be regulated individually and not within regulated organisations. Client protection is an important public interest issue. Access to the SRA compensation fund will be denied, and unregulated firms will not be bound by minimum PII requirements.

There is little detail yet on special bodies which are currently entitled to deliver reserved legal services and I welcome the commitment to develop a framework which will bring special bodies under entity regulation, rather than individual regulation for solicitors working in the sector. It is not clear what criteria will be used to decide on where entity regulation would apply as appropriate and proportionate. I agree that consumer protections for the most vulnerable clients is vital but I do not agree that this should be done by regulation of individual solicitors outside of regulated entities working in unregulated organisations.

Clients may not be aware that there could be a risk of conflict of interest if their solicitor is working in an unregulated organisation. There should not be one rule for solicitors in regulated businesses and a different rule for solicitors in unregulated businesses. It is unfair for clients. Clients might not be aware of potential or real conflicts of interest, and would not get equal protection.

Question 17. How likely are you to take advantage in the greater flexibility around where solicitors can practice as an individual or as a business?

Not likely at all. I would not encourage the law students I train to seek employment in an organisation which is not regulated. It would be tempting to seek employment as a solicitor in an unregulated business, however, a newly qualified solicitor would not only be at risk to the clients they assist, but also would face considerable personal risk and exposure in an unregulated business.

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?

My view is that sole practitioners should be regulated as entities and by the SRA, not any other regulator.

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?

I agree that there is a risk that solicitors may not necessarily have the required skills to be supervisors, and that training as a supervisor is necessary, as well as recent practice experience of three years.

In my roles of training and supervising students and trainee solicitors in their practical skills while they deliver legal services to the public including advice, casework and representation at tribunals (9 years at the former College of Law, now the University of Law, and 4 years at London South Bank University) I am very certain that special skills are needed in supervising inexperienced members of the profession. I benefitted from appropriate skills training.

Question 20. Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

Yes, clear information about protection available to clients should be displayed. However, that will be yet another way of excluding solicitors working in unregulated organisations. Clients will not be able to rely on the belief that they have the same protections whenever they consult a solicitor. The paper refers to solicitors being required to ensure that their clients know what protections are available. However, two levels of protection, one in regulated firms with access to the compensation fund and much lower level for solicitors working in unregulated organisations will not protect the public in all instances.

Question 21. Do you agree with the analysis in our initial Impact Assessment?

No, I do not agree. The rationale for the proposals seems to be that the reforms would meet unmet legal need by enabling g more solicitors to provide legal services, by allowing them to work in unregulated organisations without full protection for clients. In the voluntary sector where we serve clients who cannot afford to pay for legal services, we are very clear that there are many people who in the past were eligible for legal aid and assistance, and whose cases fell within scope. Together with the rise in court and tribunal fees, new and large sections of the population are excluded from access to legal services, and their legal needs remain unmet.

Question 22. Do you have any additional information to support our initial Impact Assessment?

No, I do not support your initial impact assessment.

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?

I do not agree with solicitors working in alternative legal services providers which are not regulated as entities.

I do not believe that holding client money in any personal capacity protects the public.

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?

No they should not be allowed to hold client money personally.

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? If not, what are your reasons?

I do not agree with the proposal for alternative legal services to be unregulated entities. If the proposal is adopted then the clients of these unregulated organisations will not have the protection that other clients have, including compulsory PII and the Compensation Fund. This is not in the public interest, reduces the standing of solicitors in unregulated

organisations, and damages the reputation of the solicitors' profession domestically and internationally.

Question 26: Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

No I do not agree. In any case, I do not agree with solicitors working in unregulated entities and delivering legal services to clients. PII cover should be compulsory in order to protect members of the public. This is a public interest issue.

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?

Yes I agree. This is a vital protection for members of the public who are served by solicitors in special bodies. Many clients of special bodies are vulnerable people and need high level protection, and any suggestion that they would not have the same protection under PII is unpalatable, and unfair to clients and not in the public interest.

Question 29: Do you have any views on what PII requirements should apply to Special Bodies?

Clients of special bodies need the protection that PII brings in any case. However, it should be possible to allow less expensive PII cover when only low risk work is undertaken.

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?

It will be very difficult to intervene in an individual solicitor's practice in an unregulated organisation. It is unlikely that the individual solicitor will work in total isolation.

Question 33: Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

Yes

Professor Sara Chandler QC (Hon)

18 September 2016

Consultation: Looking to the future - flexibility and public protection

Response ID:553 Data

2. Your identity

Surname

Appleby

Forename(s)

Jessica Mary

We may publish a list of respondents and a report on responses. Partial attributed responses may be published. Please advise us if you do not wish us to attribute your response or for your name or the name of your firm or organisation to appear on any published list of respondents.

Attribute my/our response and publish my/our name.

Please identify the capacity in which you are submitting a response. I am submitting a response…

on behalf of a local law society

Please enter the name of the society.: Scarborough Law Society

3.

1. Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

4.

2. Do you agree with our proposed model for a revised set of Principles?

Scarborough Law Society Members strongly oppose the proposed revised principals.
The removal of the principles that solicitors should 'provide a proper standard of service to your clients', 'act in the best interests of each client' and 'protect client money and assets' has negative implications for consumer protection and the maintenance of professional standards.

5.

3. Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

Scarborough Law Society Members strongly believe not. The Principles should continue to refer to the solicitor's duty to keep the affairs of the client confidential.

6.

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?

Scarborough Law Society Members strongly believe not. The Principles should continue to refer to the solicitor's duty to keep the affairs of the client confidential.

The removal of the principles that solicitors should 'provide a proper standard of service to your clients', 'act in the best interests of each client' and 'protect client money and assets' has negative implications for consumer protection and the maintenance of professional standards.

7.

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?

Scarborough Law Society members consider that there should be no change to the existing Code and as such there is no need for further guidance/case studies.

8.

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?

No. Scarborough Law Society members agree that the creation of separate codes of conduct distinguishes the responsibilities of an individual solicitor, wherever he or she is working, and those of a regulated entity. The creation of two codes is not an issue.
However, the approach creates two tiers of solicitors: those working in a regulated entity and those working in an unregulated entity, with consequential risks to consumer protections and professional standards which risk damaging the standing of solicitors and creating confusion for consumers;
Although both of the draft Codes focus on brevity and simplicity, they provide less certainty about what is and is not permitted. Some solicitors might prefer a more definitive approach so that compliance is clearer and there is less discretion for the SRA to determine when there is a breach, which could result in enforcement action that might have been avoidable if the Codes were clearer. It is difficult to take an informed view on how the new Codes would work in practice be without seeing the associated guidance which the SRA has not published alongside the draft Codes.
The language of the draft Codes is imprecise and could mean that members currently practising in a fully compliant way could find themselves accused of a breach after the proposed new codes come into force.
There is some overlap between the two draft Codes, most noticeably in areas such conflict, complaints and client information/identification. If this is not addressed, it is not clear which would take precedence where such inconsistencies exist.

9.

7. In your view is there anything specific in the Code that does not need to be there?

There is some overlap between the two draft Codes, most noticeably in areas such conflict, complaints and client information/identification. If this is not addressed, it is not clear which would take precedence where such inconsistencies exist.

10.

8. Do you think that there anything specific missing from the Code that we should consider adding?

Both draft codes provide less certainty about what is and is not permitted. Scarborough Law Society members would prefer a more definitive approach so that compliance is clearer and there is less discretion for the SRA to determine when there is a breach, which could result in enforcement action that might have been avoidable if the Codes were clearer. It is difficult to take an informed view on how the new Codes would work in practice be without seeing the associated guidance which the SRA has not published alongside the draft Codes.
The language of the draft Codes is imprecise and could mean that members currently practising in a fully compliant way could find themselves accused of a breach after the proposed new codes come into force.
There is some overlap between the two draft Codes, most noticeably in areas such conflict, complaints and client information/identification. If this is not addressed, it is not clear which would take precedence where such inconsistencies exist.

11.

9. What are your views on the two options for handling conflicts of interests and how they will work in practice?

The consultation makes clear that solicitors employed by an unregulated entity would continue to be regulated as individuals and would be subject to conflict rules. However, as the conflicts rules will not apply to unregulated entities, in practice they will not have much effect if any on the unregulated entities whilst the regulated entities will be subject to the same level of restriction as they are now or, potentially, a greater level depending on which of the two options on conflicts is adopted by the SRA.
The SRA offers two options for dealing with conflicts:
- Option 1 largely replicates the 2011 Code, in prohibiting a solicitor from acting where there is a conflict or

significant risk of such a conflict, unless specified circumstances are met and protections are provided.
- Option 2 would narrow the ability to act given that it provides for a complete bar on acting where there is an actual conflict, and protections to be put in place if there is a significant risk of a conflict.
Option 2 may be unworkable because it is not always possible to identify that an actual conflict exists and a solicitor may unwittingly act in a conflict situation. Because the non-regulated colleagues of regulated solicitors would not be subject to conflict rules, there is a risk of confusion to consumers, a very favourable competitive advantage to unregulated entities and lack of a fundamental consumer protection for clients of unregulated entities.

12.

10. Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

No. Please see problems detailed above.

13.

11. In your view is there anything specific in the Code that does not need to be there?

Yes. PLease see previous replies.

14.

12. Do you think that there anything specific missing from the Code that we should consider adding?

Yes, please see previous replies.

15.

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?

16.

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.

Consideration of these questions will benefit from the input of current COLPs and COFAs who are best placed to identify unnecessary requirements while firms and sole practitioners will also wish to consider how valuable the roles themselves are.

No Scarborough Law Society members who are COLP or COFA provided a specific response/opinion to me to put forward.

17.

15. How could we improve the way in which the COLP/COFA roles work or to provide further support to compliance officers, in practice?

These roles are considered administrative by Scarborough Law Society members yet our understanding is that the post holders must be Solicitors. It would be preferable to appoint non-practising support staff into these roles.

18.

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?

There is insufficient evidence to support these proposals or the expected benefits from their implementation, which are stated to include improved access to quality services at affordable prices, enhanced professional standards, and increased employment opportunities.
In particular, the proposals could have undesirable and/or unintended consequences as follows:
Reputation and standing of solicitors
The proposals may result in two tiers of solicitors. Those working in unregulated businesses are unlikely to

be able to give advice which is legally privileged, will not be required to have PII, clients will not have the benefit of compensation fund and the protection of the principles governing conflicts of interest. Not only is this likely to create consumer detriment and confusion but it is likely to damage the reputation of the title of solicitor.

Legal Professional Privilege (LPP)

LPP should attach to clients seeking advice from a solicitor holding a current practising certificate wherever he or she practises and any attempts to dilute or make LPP more difficult to obtain or enforce could erode the concept of LPP, which is a cornerstone of the justice system and a key right of clients. This could also undermine the standing of the solicitor profession both at home and abroad. It is not right in principle for LPP to be a distinguishing factor between regulated and unregulated service providers.

It is likely that in-house solicitors working in an unregulated entity, for example a local authority, providing advice to individuals or organisations other than the unregulated entity would not have the protection of LPP.

Conflicts and confidentiality

The proposals will result in confidentiality only applying to individual solicitors working in an unregulated entity, including in an in-house team, but not to the entity or to other employees. There is a risk that a solicitor may unwittingly act in a conflict situation and that clients may not be aware of a potential or real conflict of interest or of the fact that the entity is not subject to the rules on conflict. It also results in making regulated entities less attractive because they will be competitively disadvantaged versus unregulated entities.

Consumer protections - Professional Indemnity Insurance (PII) and the Compensation Fund

Under the SRA's proposals, solicitors working in unregulated entities would not be required to have PII and their clients would not have access to the Compensation Fund if things go wrong. This risks eroding a key element of current client protection. The proposals risk creating two tiers of client protections - with different rules and protections applying to solicitors' clients depending on the kind of entity in which the solicitor is working.

The SRA proposes that solicitors working from unregulated entities would be required to make sure that their clients understand whether and how the services they provide are regulated and the protections available to them. Even for those working within the legal sector, insurance and client protections are complicated topics which are not easily digested and understood and clients cannot be expected to fully comprehend the implications of purchasing their legal services through an unregulated provider. The proposals also risk undermining or depleting the existing Compensation Fund as solicitors working from unregulated entities would not have to contribute to the Fund; this would seem likely to mean that solicitors working in regulated entities would have to make additional contributions to secure the Fund's viability, increasing the regulatory burden on them and exacerbating the two tier profession that could result from the proposals.

Consumer confusion about status

Under the proposals, solicitors holding a current practising certificate would be able to use their title whether providing legal services to the public through a regulated or unregulated entity. While a provider would not be able to use the term 'solicitors firm' or 'solicitors' unless the entity was regulated by the SRA,this would seem unlikely to mitigate the risk of consumer confusion especially where the unregulated entity described itself as a 'law firm' or 'legal services firm' or advertised that they employ solicitors. Consumers will lose the assurance they currently have as to quality and protections when they engage a solicitor. It is inappropriate that consumers will have to undertake fairly substantial due diligence. This will additionally undermine the standing of the profession internationally.

Annual practising certificate (PC) fees

There is no information on this point and the SRA needs to undertake and publish an analysis of the projected impact of its proposals on the PC fee, and in particular the turnover based firm fee. The SRA should not close this consultation until this information is available.

Supervision

Newly qualified solicitors without any experience would be able to set up their own unregulated firms. Newly qualified solicitors working in an unregulated entity would no longer have the requirement of support and guidance from more experienced solicitors. This will increase the risks to clients as well as putting

newly qualified solicitors themselves at risk, and negatively impact on the standing of the solicitor profession Damage to standards will increase incrementally as this applies year on year and fewer solicitors in unregulated entities have ever received supervision.

19.

17. How likely are you to take advantage in the greater flexibility about where solicitors can practice as an individual or as a business?

Scarborough Law Society members will not take advantage of this greater flexibility and are hopeful that it does not come into practice.

20.

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?

There is insufficient evidence to support these proposals or the expected benefits from their implementation, which are stated to include improved access to quality services at affordable prices, enhanced professional standards, and increased employment opportunities.
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21.

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?

There is insufficient evidence to support these proposals or the expected benefits from their implementation, which are stated to include improved access to quality services at affordable prices, enhanced professional standards, and increased employment opportunities.
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22.

20. Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

Yes, without a doubt.

23.

21. Do you agree with the analysis in our initial Impact Assessment?

No.

24.

22. Do you have any additional information to support our initial Impact Assessment?

You must consider all the assumed negative feedback to this consultation.

25.

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?

Yes.

26.

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?

Scarborough Law Society members do not think that this should be allowed.

27.

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? If not, what are your reasons?

Agreed. No contributions are made by alternative legal services providers to the SRA compensation fund which must benefit the clients of regulated Solicitors. Alternative legal services providers clients' should not benefit from having paid a reduced fee to their provider for the lesser quality product (without compensation fund backup)

28.

26. Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

No.
There is insufficient evidence to support these proposals or the expected benefits from their implementation, which are stated to include improved access to quality services at affordable prices, enhanced professional standards, and increased employment opportunities.
In particular, the proposals could have undesirable and/or unintended consequences as follows:
Reputation and standing of solicitors
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The SRA proposes that solicitors working from unregulated entities would be required to make sure that their clients understand whether and how the services they provide are regulated and the protections

available to them. Even for those working within the legal sector, insurance and client protections are complicated topics which are not easily digested and understood and clients cannot be expected to fully comprehend the implications of purchasing their legal services through an unregulated provider. The proposals also risk undermining or depleting the existing Compensation Fund as solicitors working from unregulated entities would not have to contribute to the Fund; this would seem likely to mean that solicitors working in regulated entities would have to make additional contributions to secure the Fund's viability, increasing the regulatory burden on them and exacerbating the two tier profession that could result from the proposals.

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Under the proposals, solicitors holding a current practising certificate would be able to use their title whether providing legal services to the public through a regulated or unregulated entity. While a provider would not be able to use the term 'solicitors firm' or 'solicitors' unless the entity was regulated by the SRA,this would seem unlikely to mitigate the risk of consumer confusion especially where the unregulated entity described itself as a 'law firm' or 'legal services firm' or advertised that they employ solicitors. Consumers will lose the assurance they currently have as to quality and protections when they engage a solicitor. It is inappropriate that consumers will have to undertake fairly substantial due diligence. This will additionally undermine the standing of the profession internationally.

Annual practising certificate (PC) fees

There is no information on this point and the SRA needs to undertake and publish an analysis of the projected impact of its proposals on the PC fee, and in particular the turnover based firm fee. The SRA should not close this consultation until this information is available.

Supervision

Newly qualified solicitors without any experience would be able to set up their own unregulated firms. Newly qualified solicitors working in an unregulated entity would no longer have the requirement of support and guidance from more experienced solicitors. This will increase the risks to clients as well as putting newly qualified solicitors themselves at risk, and negatively impact on the standing of the solicitor profession Damage to standards will increase incrementally as this applies year on year and fewer solicitors in unregulated entities have ever received supervision.

29.

27. Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

Yes - numerous. PLease see previous answers.

30.

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?

Yes.

31.

29. Do you have any views on what PII requirements should apply to Special Bodies?

Consideration of this question will benefit from the input of special bodies, such as law centres, which play an important role in providing access to justice for vulnerable people who may not be able to afford access to legal services.

32.

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?

33.

31. Do you have any alternative proposals to regulating entities of this type?

34.

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?

35.

33. Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

Seakens Solicitors

Consultation: Looking to the future - flexibility and public protection

Consultation questionnaire form

This form is designed to be completed electronically—in MS Word. Please save it locally before and after completing it.

Question 1

Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

No

Question 2

Do you agree with our proposed model for a revised set of Principles?

Nos 1,3,4 & 6 are OK. No 2 " should have the last words "and those delivering legal services" removed. Item 5 is otiose.

Question 3

Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

No. Needs to be changed as set out above.

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?

No

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?

Keep it simple

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?

Yes

Question 7

In your view is there anything specific in the Code that does not need to be there?

Delete 5 and amend 2 as shown

Question 8

Do you think that there anything specific missing from the Code that we should consider adding?

No

Question 9

What are your views on the two options for handling conflicts of interests and how they will work in practice?

Option 2 preferred

Question 10

Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

No - unnecessary

Question 11

In your view is there anything specific in the Code that does not need to be there?

All of it.

Question 12

Do you think that there anything specific missing from the Code that we should consider adding?

There should be no firm's Code. The clue is in your title:- Solicitors Regulation authority

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?

There should be no separate Code for firms. Split regulation is a recipe for disaster. It is wholly inappropriate for a learned profession.

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.

No. Unnecessary, over-burdensome on small firms and ineffective.

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?

Cannot be improved. Should be abolished.

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?

A half-baked and ill-conceived proposal which will have no benefit and cause much harm.

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?

Not at all.

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?

Far too trenchant for this forum. Your job is to regulate solicitors not dream up ridiculous schemes which imperil the profession.

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?

It remains necessary. Newly qualified solicitors are not fir to supervise from the off.

Question 20

Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

Dichotomy of regulation is absurd, ineffective, detrimental to the public interest and, frankly, stupid.

Question 21

Do you agree with the analysis in our initial Impact Assessment?

No

Question 22

Do you have any additional information to support our initial Impact Assessment?

Common sense and 50 years' experience at the coalface informs the remarks above.

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?

There should not be “alternate legal services”. You are tampering with a learned profession not a supermarket.

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?

Never.

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?

If not, what are your reasons?

Yes. See above.

Question 26

Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

No. See Solicitors Act 1974.

Question 27

Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

Yes – impractical and guided by ideology not experience.

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?

There should be no Special Bodies.

Question 29

Do you have any views on what PII requirements should apply to Special Bodies?

If this appalling iniquity is to be foisted on an unwelcoming and unbelieving profession then the same rules should apply to all.

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?

No

Question 31

Do you have any alternative proposals to regulating entities of this type?

Deny their existence then you won't have to regulate them. Simples.

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?

No, save as above.

Question 33

Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

SRA should regulate solicitors wherever they practise in UK.

Thank you for completing the **Consultation questionnaire form**.

Please save a copy of the completed form.

Please return it, along with your completed **About you form**, as an email attachment to consultation@sra.org.uk, by **21 September 2016**.

Alternatively, print the completed form and submit it by post, along with a printed copy of your **About you form**, to

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Regulation and Education - Policy - Handbook 2017
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16 September 2016

Our ref: 20168

Dear Sirs

Response to the SRA Consultation on the SRA Handbook Review: Looking to the future - flexibility and public protection (June 2016)

This is Mayer Brown International LLP's response to the above consultation.

We refer you to the response of the City of London Law Society Professional Rules and Regulation Committee dated 14 September 2016.

We support and adopt that response.

Yours faithfully

Mayer Brown International LLP

Mayer Brown International LLP

SEYMOUR GORMAN

I read a short article published in the LS Gazette and written by the President Mr. Bourns, concerning the above proposals. Mr. Bourns has suggested that I write to you with my observations.

I do not know what changes are proposed by you, but in principle I am wholly opposed to a two tier profession. What is it that you hope to achieve by such proposals? There are already far too many unregulated and unqualified bodies competing with qualified solicitors over a whole raft of legal disciplines. Why create yet another competing body ?

In the event that your proposals proceed, may I offer some suggestions for your consideration :-

1. A solicitor in an unregulated entity should have at least 20 years PQE with an unblemished

history;

2. A solicitor in an unregulated entity should not be entitled to hold clients' money

3. A solicitor in an unregulated entity should not be able to participate (whether as a partner, consultant or fee earner) in any fully regulated firm;

4. A solicitor in an unregulated entity must continue to comply with all anti-moneylaundering

regulations etc;

5. An unregulated entity should not be able to practise as a limited liability company or LLP;

6. A solicitor in an unregulated entity should not act as a training principal for trainees.

The above suggestions are some random thoughts which I trust you will find of help in your consultations.

Yours faithfully,

SEYMOUR GORMAN

(admitted to the Roll December 1963)

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By DX and email: consultation@sra.org.uk

14th September 2016

Dear Sirs

Response of the CLLS Professional Rules and Regulation Committee to the SRA Consultation on the SRA Handbook Review: Looking to the future – flexibility and public protection (June 2016)

Structure of this Response

This response is presented in two parts, Part A (General Comments and responses to the consultation questions) and Part B (Mark-up of Suggested Changes to draft new Codes of Conduct, and Explanatory Notes).

Part A records, under the heading "General Comments", the views strongly held by CLLS member firms that the proposals to allow solicitors to be employed and practise within the alternative sector raise a number of serious risks and concerns. This part of our response should therefore be viewed by the SRA as the response of the CLLS member firms more generally. It draws upon and reflects the data collected from CLLS member firms by means of the questionnaire exercise referred to in paragraph A.2 below. The CLLS represents 58 member firms, whose 15,000 solicitors make the largest contribution internationally to the financial success of English law. For more information about the CLLS, the CLLS's Professional Rules and Regulation Committee ("PRRC") and other specialist CLLS Committees, see the CLLS website.

Part B addresses the day-to-day practicalities of living with new Codes of Conduct, should the SRA decide to take its split Code idea forward (despite the reservations expressed in Part A). The mark-up of suggested changes has been put together by PRRC Committee members, each of whom are regulatory compliance experts and Heads of Compliance/Risk, GC or similar at

leading City law firms. Should the SRA proceed with its proposals, the PRRC hopes to have the opportunity to engage with the SRA constructively about the final form of the new Codes, in order that the end product works as well as possible not just for City law firms but the profession as a whole.

Part A – General Comments:

1. **Length/style of Consultation**

CLLS member firms have found it hard to decipher, from this long consultation paper, what all the relevant issues are. It is not until question 16 (of 33) that the consultation questions begin to address the substance of the SRA's proposals whilst some key facts (e.g. that an unregulated provider could act, through solicitors, for both a buyer and a seller of a business) do not get drawn out. We would have expected each key change to be accompanied by a specific question and, as a consequence, we are unclear whether some changes (e.g. the apparent obligation to now tell former clients, as opposed to simply current clients, that they may have a claim against a firm) are intentional or are drafting errors.

The net effect is that we think it could be a challenge for "ordinary" solicitors, as opposed to compliance professionals, and other stakeholders (such as insurers) to penetrate this consultation and respond to it thoughtfully. We therefore recommend that future consultations reflect this feedback and also reflect Gunning principles.

2. **Our Questionnaire**

CLLS member firms were asked to consider a shorter and more focussed questionnaire to generate the data needed to draft this response. A copy of the CLLS questionnaire is annexed. The response rate was excellent, with a number of firms sending the CLLS very considered submissions.

3. **Wider Context**

We wanted to flag that the CLLS also found it hard to comment on the SRA's proposals in the absence of the wider context of those other regulatory reforms/initiatives which have yet to be completed.

For example, when responding to the SRA's "Training for Tomorrow" consultation ("TFT"), the CLLS expressed concerns that the SRA's proposals might damage the reputation of the solicitors profession– we would like to understand, therefore, where the SRA's TFT proposals now stand in order that we can consider whether taken together with these proposals they might, cumulatively, risk greater reputational damage to the profession.

Similarly, it occurs to us that the SRA's proposals may be out of step with work being done by others. For example, the Competition & Markets Authority ("CMA") published its Legal Services Market Study interim report on 8 July, during the SRA's consultation period. The CMA's interim report suggests that, in the consumer/SME market, it is greater transparency about pricing and quality (in the form of consumer feedback) which

would drive competition – not liberalisation of use of the solicitor title. Will the SRA take this into account when considering what to do next?

In addition, the outcome of the independence debate is not yet known – an important part of that debate is whether the regulatory model should change so that the SRA regulates individuals to a base level whilst the Law Society regulates the entry standards, competency and ethics of the profession of solicitors.

Further, just as we were finalising this response, the LSB published its "vision for legislative reform of the regulatory framework for legal services in England and Wales" which, among other things, calls for a new legislative framework for regulating legal services, a fully independent regulator and activity (not title) based regulation.

How will the SRA take these issues into account when considering what to do next?

4. Unmet Legal Need

We feel unqualified to comment on statements included in the consultation regarding unmet legal need. Whilst we favour access to justice, we wonder whether much of the perceived unmet legal need can be attributed to the withdrawal of Legal Aid, in which case greater competition/more choice will probably do little to solve the problem. We think the consultation should be clearer on evidencing the unmet legal need and how the SRA's proposals will address it.

If the hurdle for putative consumers of legal services is price, which the CMA's interim report suggests, deregulation is unlikely to solve that, given we already have an unregulated legal services market which evidently is not (if there is unmet legal need) providing services at the right costs level.

In addition, we think that greater thought needs to be given to whether removing a requirement for entity regulation around solicitors will (i) reduce costs and (ii) as a direct consequence reduce legal fees to the consumer.

5. Damage to the Solicitors Profession and English Law Globally

The CLLS member firms who responded to our questionnaire unanimously agreed that there are significant issues involved with solicitors being permitted to practice using their solicitor title in unregulated entities, including around risks to client confidentiality.

In summary, CLLS member firms consider it is inevitable that removing one layer of regulation in its entirety (i.e. entity-based regulation) from those operating as solicitors will result in increased risks to consumers using those services directly; and if the deregulation for some solicitors forces solicitors in regulated entities to review their approach to regulation to seek to regain a level playing field, potentially all consumers. This could result in damage to the reputation of the solicitors profession.

The question to our mind is not whether there is risk of reputational damage – there is clearly risk of that; instead the question is whether that risk is worth taking in order to satisfy the unmet legal need identified. We see insufficient evidence that these

proposals will solve that (see above) and so do not think at this stage the risk is worth it. Other solutions should be investigated.

The cumulative effect of these proposals and of TFT could well be that consumers/competitors will form/exploit the impression that there is nothing special about being a solicitor – that solicitors are just another service provider. This impression, even if mistaken or more prevalent in only some areas of the market, could be damaging to the perception of the profession as a whole, including City/commercial solicitors internationally, and therefore the strength/reputation of English law globally.

6. Privilege

The SRA paper asserts (on the basis of undisclosed advice to the SRA from Counsel) that legal advice given by solicitors, to members of the public, working in unregulated businesses will not attract privilege. We worry about the impact this may have on the perception of privilege more generally. Changing the regulatory regime so that the advice of only certain solicitors attracts privilege, depending on where they work, could be viewed by some as eroding privilege.

The SRA has suggested that the availability of privilege might be addressed by individual solicitors contracting with clients direct but this may not be an attractive or realistic proposition for City firms (should they choose to hive their unreserved work across to an unregulated entity) or their unregulated competitors. Sophisticated clients will, we think, want to contract with the entity, not an individual they do not know, and the individual solicitor's personal assets would still be at risk, notwithstanding any indemnities from his/her employer. The CLLS has not sought advice from Counsel on the privilege aspects of the SRA's proposals, and may wish to do so should the SRA decide to move ahead as articulated in this consultation. At this point, we are, therefore, commenting principally on the practicalities only of the work-around proposed by the SRA – whilst we see contracting with individual solicitors (rather than unregulated providers) as a messy solution (and one which a number of sophisticated clients may not be attracted to), it may transpire to be feasible for some businesses. It may be complicated and reliant on carefully crafted engagement letters but this is not necessarily a concern for our part of the legal services market, or our competitors. We do, however, wonder whether the SRA's suggested workaround might mean that the individual contracting solicitor has to become a "recognised sole practitioner" - effectively making him/her an entity for the purposes of SRA rules, and thereby introducing the full weight of entity-based regulation. Is this something which the SRA has considered?

Clients have not had to think about privilege when instructing solicitors to date, as any legal advice from them would attract privilege. Clearly privilege is important to clients but how important it is to them and when is currently difficult to quantify. In some circumstances, privilege may not be important to clients – for example, accountants give tax advice and this does not attract privilege. A requirement to give clear and transparent information on whether advice given by a solicitor, working in an unregulated business, attracts privilege will be key – however, we have reservations as to whether:

(A) such information will always be read/understood/capable of evaluation at the right time by consumers (even if sophisticated), see further below; and

(B) whether, for example, a junior solicitor will have the clout to compel his/her unregulated employer to provide it properly.

7. Limits of Transparency Information

We doubt that all clients will read/understand transparency information given to them by unregulated providers, even if sophisticated. Even if transparency information is read, it may be too difficult in some cases to evaluate it at the time it is given. In addition, we think that the SRA's emphasis and reliance on the giving of transparency information increases the risk of "mis-selling" by some unregulated providers, who simply won't get the detail right or will fail to draw a client's attention to the most pertinent information in any particular case. If this were to result in a significant number of claims, some unregulated providers will go bust – which has the obvious potential to damage the solicitors profession.

The consultation implies that it will be for solicitors in regulated entities to use their consumer protection strengths as an "advertisement tool". Given that "solicitor" already has a meaning in the English culture, we think the burden should instead be on unregulated entity solicitors to explain that, in their case, solicitor does not mean what the consumer might assume. This would not, however, be a welcoming message at the start of a trusted adviser relationship and goes to the unworkability of these proposals in relation to producing a level playing field.

8. Shift of Burden and Risk to the Consumer

These proposals appear to shift to the consumer the burden of choosing the right service, against the backdrop that those most in need of protection will be unable to do so. (Indeed even the most sophisticated clients could struggle to understand the difference between PII on Minimum Terms and Conditions and PII on market norm terms). Because the term "solicitor" has such resonance already, that burden of deconstructing what it means in different circumstances is a heavy one, and we suggest an impossible one for most clients.

9. Unlevel Playing Field

Creating a two tier regulation system would potentially mean that accountancy firms, consulting firms and foreign law firms employing solicitors would compete with traditional law firms for unreserved work whilst having the benefit of more liberal regulation. They will escape entity-based regulation on conflicts (possibly), information security, PII and risk management not only to the detriment of consumers but to the City law firms competing with them. This highlights the need for the SRA to press Government to revisit the list of reserved activities in the Legal Services Act 2007, and to consider whether it forms the right basis for a risk-based approach to regulation.

Answers to Specific Consultation Questions:

1. **Have you encountered any particular issues in respect of the practical application of the Suitability Test (either on an individual basis, or in terms of business procedures or decisions)?**

We think that the reporting thresholds in the Suitability Test are set too low. For example, we wonder why the SRA would wish to know whether a solicitor has been given a PND for littering. The reporting of trivial matters such as these wastes SRA resources, takes up COLP time and causes anxiety for the individual concerned unnecessarily. It is not possible for firms/solicitors to take a pragmatic or proportionate view on trivial reporting matters, given that failure to report is treated by the SRA as prima facie evidence of dishonesty. This underlines the need for the SRA to draw the line at an appropriate level.

We favour a comprehensive review and consolidation of all SRA reporting obligations, with an appropriately high and consistent materiality threshold being introduced across the board.

Further, the Suitability Test does not describe the standards expected of solicitors, instead simply listing certain things which need to be reported. It does not therefore "speak" to individuals, does not articulate what "suitability" is and cannot therefore be used by firms as an effective training tool.

2. **Do you agree with our proposed model for a revised set of Principles?**

If the Principles are to apply to business services staff (as well as to regulated firms and solicitors), they should include a reference to confidentiality. Everyone who works in a law firm has an important role to play in protecting clients' information and this should be clear in the Principles (not relegated to the Codes, which may not apply to all staff).

This could be done by introducing a new Principle 7 or adding to Principle 6 stating that you must protect your client's confidential information.

3. **Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?**

We do not understand why the SRA is proposing to re-word what is currently Principle 6 – what might be wrong with the existing formulation is not explained in the consultation paper. The existing formulation is well understood and we favour its retention, in the absence of a good reason to change it.

We have two specific comments on the revised formulation. First, we think that use of the word "ensure" could set a higher standard than the existing obligation to "maintain" and is unrealistic. Secondly, we think that the reference to "those delivering legal services" is too wide, given that this would catch the unregulated sector. The Principle should instead refer to upholding public confidence in "you and your profession".

4. **Are there other Principles that you think we should include, either from the current Principles or which arise from the newly revised ones?**

See our answer to question 2 above.

5. **Are there any specific areas or scenarios where you think that guidance or case studies will be of particular benefit in supporting compliance with the Codes?**

On balance, we are not in favour of the SRA developing guidance or case studies, which could become additional regulation "by the back door". You have said that feedback from stakeholders suggests that individuals and firms find the status of the existing Indicative Behaviours confusing, which is why you are not replicating them in your new Codes. If you develop guidance and case studies, you risk replicating this problem. There is also a danger that issuing such guidance and/or case studies would have the practical effect of making the Handbook "long, confusing and complicated" which would defeat the SRA's aim of attempting to simplify it in the first place. The Codes need to be clear – and that may mean that they have to be longer – to remove the need for additional guidance.

Further, we think it is for our representative bodies, not our regulators, to issue any guidance or case studies the profession may find helpful, in a manner which supports solicitors and does not goldplate regulation.

If the SRA does produce guidance or case studies, we think it should consult on these, whether formally or informally with stakeholder groups, before they are issued. In this eventuality, we would like to explore with you further what role the CLLS could play in preparing/reviewing City-based case studies and guidance.

6. **Have we achieved our aim of developing a short, focused Code for all solicitors, wherever they work that is clear and easy to understand?**

Our members do not agree that the existing combined Code is "long, confusing and complicated". Further, simplification for its own sake can be dangerous – whilst superficially attractive, reducing the amount of text to read and recall, the introduction of new terminology just to reduce the number of words can easily create ambiguities. A split Code is, however, logical if the SRA is to permit solicitors to use their solicitor title in unregulated firms (as to the undesirability of which, see our General Comments above.)

That issue aside, we asked our member firms whether they were in favour of two Codes, or one. The majority of firms who responded favoured the retention of a combined Code of Conduct, stating that, in their experience, when individual solicitors think of their professional obligations, they think of ethics in a broader sense. They know what the parameters are, and consult with dedicated compliance professionals in the firm's central team when they need help – including in relation to conflicts analysis. These firms did not see how a split Code would, therefore, help to "reconnect" their lawyers as they do not consider that they are ethically disconnected. Their lawyers receive regular ethics training and know how to issue-spot, and seek further guidance when they need it. The fact that they do seek that guidance does not mean that they are abrogating their professional responsibilities to either the firm or its central Compliance/Risk team. In fact, the opposite is true – it demonstrates that they are in

touch with their personal regulatory responsibilities. In addition, the introduction of two Codes might necessitate a substantial re-education and training programme, in firms, for no obvious benefit and at considerable cost.

A minority of firms who responded thought a split Code was a good idea which, if linked to good internal training, could help to refocus individuals' attention on their personal ethical and regulatory responsibilities. In addition, our in-house lawyer client contacts may find a split Code easier to navigate and therefore to understand what the SRA expects of them as solicitors.

We are concerned that the Code for Solicitors will not contain enough detail to support individual solicitors in unregulated entities who are the ones most at risk of challenges to their professional requirements.

7. **In your view is there anything specific in the Code that does not need to be there?**

See our further comments and mark-up of the Codes in Part B of this response.

8. **Do you think that there is anything specific missing from the Code that we should consider adding?**

See our further comments and mark-up of the Codes in Part B of this response.

9. **What are your views on the two options set out for handling actual conflict or significant risk of a conflict between two or more clients and how do you think they will work in practice?**

We are very strongly in favour of Option 1, with the amendments set out in the attached mark-up.

The two existing exceptions (auction and substantially common interest) are very important to and frequently used by many of us/our clients and we would like to see these explicitly replicated in the new rule – we would not wish instead to rely on SRA assurances that there is no conflict/significant risk of one in the circumstances covered by those exceptions.

We asked our members whether they thought the SRA should consider the introduction of a new informed consent exception.

The majority of those responding thought that a sophisticated client exception, requiring informed consent, would (although some anticipated using it in limited circumstances only) be a useful extension to the conflict rule, offering greater flexibility to clients and helping to alleviate some of the level playing field concerns referred to in our answer to question 16 below. Some thought that, if a sophisticated client exception were to be introduced, it should not be available in a litigious/similar context but only where there is "indirect adversity".

In contrast, some of those responding thought that the existing exceptions are sufficiently broad. If an informed consent exception were to be introduced, they thought it would need to be made clear that it is for sophisticated clients and should be only

used sparingly – this, they thought, could be difficult to define, lend itself to abuse and therefore risk damaging the solicitors profession.

10. **Have we achieved our aim of developing a short focused Code for SRA regulated firms that is clear and easy to understand?**

See our answer to question 6 above. Also see our further comments and mark-up of the Codes in Part B of this response.

11. **In your view is there anything specific in the Code [for SRA regulated firms] that does not need to be there?**

See our further comments and mark-up of the Codes in Part B of this response.

12. **Do you think that there is anything specific missing from the Code [for SRA regulated firms] that we should consider adding?**

See our further comments and mark-up of the Codes in Part B of this response.

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?**

See our further comments and mark-up of the Codes in Part B of this response.

14. **Do you agree with our intention to retain the COLP and COFA roles for recognised bodies and recognised sole practices? [14a. In responding to this question, please set out the ways in which the roles either assist or do not assist with compliance.]**

In summary, the majority of our members are in favour of retaining the roles, although some do not feel strongly either way (principally because they are of the view that their firms have personnel in quasi - COLP/COFA roles in any event).

Our members have a range of views as to whether the roles have given them any additional benefits, over and above having a Head of Compliance/Risk, General Counsel or similar, with the majority considering that there is a benefit, albeit not necessarily substantial for City firms. A clear majority see the roles as having assisted in re-enforcing the role of Head of Compliance/Risk, General Counsel or similar, though in general such roles pre-dated the COLP/COFA regime.

Whilst, in principle, reminding partners and employees of the firm's obligation to report breaches (through the COLP and COFA) strengthens the compliance function, it has possibly been handicapped by the SRA Handbook omitting a requirement on partners and employees to report to the COLP and COFA, leaving that to the firm's own policies.

The COLP role has become well known in firms, but the COFA role less so, in part owing to the confusing title: the COFA is not (as COFA) responsible for finance, and certainly not responsible for administration. This is a drawback if the role is to be taken seriously day-to-day by the rest of the firm for whom simplicity of roles and titles is important.

So long as the SRA Accounts Rules required an external audit, the COFA role was largely otiose especially as most firms of any size have a well-defined finance director role. Now that the requirement for an external audit is being abolished this, is not, we suggest, the right time to abolish the COFA role, as the COFA may have a more useful function in the future than the past.

Whatever the correct interpretation of the remit of the COFA (see below), the bulk, if not all, of a firm's compliance with the Companies Act (as modified for LLPs) on accounting matters confusingly remains with the COLP; the COLP has to be a solicitor, as much of compliance concerns technical legal matters, but he/she has responsibility to the SRA for the bulk of accounting compliance, even though the firm, if of any size, will have a professionally qualified accountant as finance director.

Given that firms have had to establish structures to support the COLP/COFA roles, they see no benefit in abolishing them.

15. How could we improve the way in which the COLP/COFA roles work or provide further support to compliance officers, in practice?

Taking up the point in our answer to question 14 above, we suggest the addition of an obligation in the SRA Handbook on partners and employees to notify possible breaches to the COLP/COFA. We also suggest consideration of whether, if an individual partner or employee does so, he/she is deemed to discharge his/her responsibility under the Handbook to the SRA (paralleling how reporting obligations work under the Proceeds of Crime Act 2002).

We suggest clarifying confusion over the COFA role (and consequently COLP role also as, on the drafting of Authorisation Rule 8.5, they are mutually exclusive), in particular:

(A) Responsibility for compliance with the SRA Accounts Rues is clear, but confusingly the COFA is not responsible for the Accounts provisions of the SRA Overseas Rules, so the COLP is – that defies logic.

(B) It is sometimes asserted that as financial instability might imperil the safety of client money, so the COFA's role extends to financial stability. Maybe it should be; our members are divided on the point with, on balance, a majority in favour as the COFA is usually the finance director (or, at least, UK finance director) but, if that is the correct current interpretation, it is also unclear where the dividing line lies between COLP and COFA.

(C) A majority of our members consider that responsibility for all aspects of the keeping of financial records, production of annual accounts, financial compliance, including compliance with the Companies Act (as modified for LLPs) on accounting matters, financial stability and payment of taxes by the firm should rest with the COFA, not the COLP. Finance directors often do not understand why such responsibility rests with the COLP, who is a solicitor.

(D) The title, COFA, is confusing – for what part of "administration" is he/she responsible?

16. **What is your view of the opportunities and threats presented by the proposal to allow solicitors to deliver non-reserved legal services to the public through alternative legal service providers?**

Our views are as follows:

(A) **Damage to solicitors profession** – Our members think that the SRA's proposals pose a threat to the profession. See further paragraph 5 of our General Comments above. The proposed changes will establish a two tier system and the existence of unregulated firms, with no requirements as to client confidentiality or conflicts at a structural level, could undermine the profession.

(B) **Unfair conflicts regime** – The SRA's proposed changes could mean that (for example) accountancy firms will be able to employ solicitors to do unreserved work but that the SRA's conflict rules will only apply at an individual level – so a non-SRA regulated firm might act for, say, both a buyer and a seller of a business (provided the same solicitor does not act for both clients and, possibly, client waivers were in place). We think it is unfair that non-SRA regulated firms will benefit from a more liberal conflicts regime. Although we cannot currently measure/quantify the impact of this, it is potentially detrimental to all City/commercial law firms. We would reiterate here the point made at paragraph 6 of our general comments, namely that we think the SRA should clarify its thinking on the conflicts position – do you consider that an unregulated provider could act for (example) buyer and seller of a business provided the same solicitor was not on both teams? This seems possible at first blush, as the SRA conflict rules would only bite at the individual level – but might those individuals risk breaching SRA Principles (e.g. obligation to act in client's best interests) by agreeing to represent a client in circumstances where he/she could be negotiating terms with/against a colleague?

(C) **Privilege** – Clients have not had to think about privilege when instructing solicitors to date, as any legal advice from them would attract privilege. See further paragraph 6 of our General Comments above.

(D) **Transparency information solution flawed** – We doubt that many clients will read/understand transparency information given to them, even if sophisticated and transparency information provided by the unregulated sector is up to the mark. See further paragraph 7 of our General Comments above.

(E) **Entity-based regulation as a kite mark** – Clients simply have not had to think about how much they value entity-based regulation to date. It automatically comes as part of any law firm offering. That said, we think that sophisticated clients will expect it to continue to be part of the offering – they expect to contract with properly run businesses with sound risk management systems/controls and stringent confidentiality obligations. This is why we do not think they would want to contract with an individual solicitor working for an unregulated provider (e.g. as a mechanism to ensure privilege).

(F) **Unrealistic burden on individual solicitors** – We are concerned about the number of very specific obligations placed on individual solicitors, in the new

Code for solicitors, with which they cannot properly comply in isolation from the organisation in which they work. Rules 8.6 to 8.9, for example, give individuals obligations in respect of client information and publicity. In both cases, the Code for Firms does not contain equivalent obligations. Further, if a solicitor is working for an unregulated entity, how can solicitors realistically comply with obligations such as these – particularly if they are in a minority, and relatively junior?

17. How likely are you to take advantage in the greater flexibility around where solicitors can practice as an individual or as a business?

It would be possible, under the SRA's proposed new approach, for City law firms to split off the unreserved part of their business into a separate business (to avoid SRA regulation at an entity level), provided they gave their clients the right information about the protections available to them. We asked our members whether they saw this as an opportunity to "hive across" their unreserved work (e.g. corporate, M&A, commercial, financing) to a new business which those firms would effectively "self-regulate", free from the constraints and cost of SRA regulation and with the availability of US-style conflict waivers (should they want to offer them to two or more clients who may seek to instruct the firm on the same/a related matter).

The majority of firms responding thought this was a highly unattractive idea – it would be too messy for any law firm which did not genuinely intend to run two separate businesses (with separate buildings, employees, technology systems etc). In addition, for general risk management purposes, most firms would want to replicate many of the systems/controls they currently have in place which also ensure compliance with SRA rules. Additionally, if there were to be such a separation, the firm would lose the benefit of the "designated professional body" regime under the Financial Services and Markets Act 2000 and might well conclude it needed to be authorised by the FCA. There would therefore, be no savings to them in "hiving across" their unreserved business. Clients expect us to have those systems/controls and so they are part of our offering. Privilege could also be a stumbling block, as could the views of local law societies/bars/regulators in other jurisdictions.

If the SRA's proposals go ahead, it is something which City law firms, would, however, need to keep under review and to monitor developments, especially if our fears of being put at a competitive disadvantage prove correct.

18. What are your views about our proposal to maintain the position whereby a sole solicitor (or REL) can only provide reserved legal activities for the public (or a section of the public) as an entity authorised by the SRA or another approved regulator?

Our members are not in favour of solicitors being permitted to practice, using their solicitor title, for entities which are not regulated by the SRA. It therefore follows that they favour maintaining the position whereby sole practitioners must be SRA authorised, as entities, to provide reserved activities to the public.

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?

There is a requirement for a rule which ensures that every firm is supervised by someone with a minimum level of practice experience, otherwise there is a risk to the profession and consumers. Rule 12 of the existing SRA Practice Framework Rules was drafted for a time when the vast majority of firms were single site and relatively small and so having a single such person in each authorised firm made some sense. The rule does not, however, reflect the modern day reality of the proliferation of multi-office and multi-national firms. In this context, it would make sense to require that each office of an authorised firm be supervised by a suitably qualified and experienced practitioner. Some overseas Codes, in Hong Kong for example, go further and are more specific about what supervision means in practice which might also be a sensible extension of the current SRA rule.

The question about unregulated providers recruiting junior solicitors and then not being able to support them is a separate, but related issue (see further 16(F) above). In relation to your reference to emerging data suggesting that newly qualified solicitors "do not present a significant risk to the delivery of a proper standard of service", we think this is may be due to the internal management structures of SRA regulated firms, including the appropriate allocation of (less complex, less risk-inherent) work to NQs and clear guidance, briefing, monitoring and ongoing supervision by more experienced solicitors, and not because NQs are of their nature less risky practitioners.

20. Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

Given what we say in this response about the assumptions consumers make when they instruct a solicitor, we think the regulatory emphasis should be on ensuring that solicitors who work in unregulated entities give consumers detailed information about the protections which are not available to them (but would be if they used a regulated provider) – for example, we think that consumers (including sophisticated consumers) will assume that when they are being advised by a solicitor (regardless of whether the solicitor works for a regulated/unregulated entity), the advice they receive will be privileged and insured. If this is not the case, because the consumer is contracting with an unregulated entity, the solicitor providing the services should be obliged to make this clear. However, we acknowledge that this would place significant compliance burdens on individual solicitors employed by unregulated services providers, particularly if they are junior and the employer is a large enterprise.

21. Do you agree with the analysis in our initial Impact Assessment?

We think you have given insufficient weight to the risks summarised in paragraph (viii) on page 45 of your Impact Assessment, namely (a) consumer confusion around different protections and (b) the erosion of the solicitors profession. In addition, we query whether risks to client confidentiality have been given due regard.

Further, we do not think that consumers would necessarily benefit from your proposed changes in the ways summarised in paragraph (vii) of your Impact Assessment. In particular, we do not think that consumers will have a better understanding of the legal

services market as a consequence – in fact, the opposite is likely to be true. Consumers (even sophisticated consumers) will make assumptions about the benefits/protections available to them when advised by a solicitor, and these will not be countered by detailed transparency information – which could be too difficult to absorb, impossible to evaluate at the time of instruction and places the onus on the consumer to do due diligence on the unregulated provider which they are unlikely to be equipped and/or have the time to do.

22. Do you have any additional information to support our initial Impact Assessment?

We feel unable to answer this question, given that we have no dedicated resources to investigate the issues.

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?

We agree with your specific proposal that solicitors who work outside of an "authorised body" should not personally hold client money.

As we understand it, this approach does not prevent the organisation in which the solicitor is employed holding client money, and that an unauthorised vehicle to which an SRA authorised law firm chooses to hive-off its unreserved work could hold client money notwithstanding the fact that the individual solicitor/principals and employees of that entity could not hold client money in their own names. Such an unregulated law firm would not appear to have any obligation to comply with the SRA Accounts Rules when holding client money, even if it was an all solicitor owned business. If our analysis is correct, this lacuna in the draft rules could present a considerable risk to the clients of such an unregulated solicitors firm, and to therefore to reputation of the profession.

Although not of direct interest to CLLS members firms, we are also concerned about how your approach would play out for an unincorporated solicitor sole practitioner or general partnership which only engages in unreserved activities, and chooses to do so without being authorised as a "recognised sole practitioner" or "recognised body" respectively. We believe that the effect of draft rule 4.2 would be to prohibit the holding of client money by these service providers, irrespective of whether doing so was essential to the viability of their practices. If our interpretation is correct, this would deny these providers the opportunity to exploit the rule change, and put them at a commercial disadvantage as against their incorporated competitors.

In justification for your approach to the holding of client money, we note paragraph 124 of the consultation which says that the SRA considers "that it would be artificial and confusing to have different obligations on an individual solicitor compared to the business in which they are working. The compliance responsibility would place an unrealistic, disproportionate, and impractical burden on the individual solicitor." We believe this same statement is equally pertinent to a number of other obligations contained in the draft SRA Code of Conduct for Solicitors, RELs and RFLs which the SRA is seeking to impose on solicitors working in unregulated businesses, and highlights significant flaws in the regulatory approach being proposed.

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?

Given that this response is being made on behalf of City law firms, which are CLLS members, we do not feel qualified to comment on this question, and therefore defer to the in-house community.

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? [Question 25a. If not, what are your reasons?]

We neither agree nor disagree. However, we do think that consumers will assume that they have access to the fund, so transparency information given by solicitors working for alternative providers would need to make it clear that this protection is not available. As stated above, we think that consumers (even sophisticated consumers) will find the transparency information which unregulated providers will need to give them too difficult to absorb and impossible to evaluate at the time of instruction. We also think that it will place the onus on the consumer to do due diligence on the unregulated provider which they are unlikely to be both equipped and/or have the time to do. Consumers should be able to assume that, when they are advised by a solicitor, this automatically brings them certain protections.

In addition, we would be concerned if the Compensation Fund were to be available to firms which did not have PII obligations. This could increase the chances of inappropriate claims being made on the fund.

26. Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

No. Our members very strongly feel that PII cover should be compulsory, even for the unregulated sector, if a solicitor is advising. We think it is important that any user of a solicitor's services (whether through a regulated firm or an unregulated entity) should have complete confidence that there is PII available (on the minimum terms and conditions) in the event of an error by the solicitor. For example, we would be concerned if an unregulated entity providing tax or employment services could offer the services of a solicitor in circumstances where the client would have no insurance protection in the event that the solicitor was negligent.

However, an associated PII requirement may make solicitors less attractive hires for alternative providers.

27. Do you think that there are difficulties with the approach we propose, and if so, what are these difficulties?

Whilst, in theory at least, consumers can ask providers what their commercial insurance levels are and choose to proceed with a properly insured provider only, this (unfairly) place the onus on the consumer to do due diligence on the unregulated provider. As stated above, we think they are unlikely to be equipped and/or have the time to do this. Any consumer (regardless of how sophisticated) would be stretched to evaluate the comparative benefits of commercial insurance cover with the same amount of PII cover

on the minimum terms and conditions, for example. Consumers should be able to assume that, when they are advised by a solicitor, this automatically brings them certain protections – including minimum PII on industry-wide standard terms.

28. **Do you think that we should retain a requirement for Special Bodies to have PII when providing reserved legal activities to a public or a section of the public?**

Yes.

29. **Do you have any views on what PII requirements should apply to Special Bodies?**

No. See our answer to question 24 above.

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?**

Not imposing threshold standards would simply be, we think, an inevitable consequence of your proposals to allow solicitors to practice as solicitors for unregulated entities. We are not in favour of this.

31. **Do you have any alternative proposals to regulating entities of this type?**

We think that solicitors should only be able to provide services to the public, as solicitors, through SRA regulated entities. We believe the SRA should focus on revisiting the definition on reserved legal services and working with all relevant parties to achieve a re-draft of these.

32. **Do you have any views on our proposed position for intervention in relation to alternative legal service providers, and the individual solicitors working within them?**

We are not clear what your proposed position is. However, we would expect you to act in the best interests of consumers, including by use of your intervention powers, if necessary.

33. **Do you agree with our proposal that all work within a regulated body or an RSP should remain regulated by the SRA?**

Yes. We think the alternative would be too messy and very confusing for clients. Realistically, City law firms would not, for example, wish to operate a different approach to conflicts depending on whether work was reserved/unreserved and any law firm wishing to do this is bound to run into difficulties – as work on a matter can involve a blend of the two and/or flip from one to the other.

Annexure to Part A

SRA Handbook Review – Questions for CLLS Member Firms

Background:

1. On 1 June 2016, the SRA published a consultation called "Looking to the future – flexibility and public protection" – marking the first phase of the SRA's review not only of its Handbook but also its regulatory approach. The purposes of this note is to alert and seek the reaction of CLLS member firms to the principal issues this consultation poses for City law firms. For the reasons summarised below, the impact of the changes being proposed could be quite radical and has the potential to affect the entire sector (not just high street firms).

2. Whilst the SRA emphasises, in its consultation paper, the need to simplify its rules and reconnect individuals with their personal regulatory obligations, the real driving force for change is the perceived "unmet need" of individual consumers and small businesses for legal advice – which the SRA plans to address by enabling solicitors to practice in unregulated entities, delivering non-reserved* legal services.

3. This explains why the SRA needs to tackle its Code of Conduct first (notwithstanding that it is arguably the simplest part of the current Handbook), splitting it into two versions – one Code which apply to SRA regulated firms/entities and another Code which will apply to individual solicitors alone.

4. If it goes through unchanged, the SRA's review package will mean, for example, that:

   (A) firms which are currently SRA regulated will be able to "hive across" their unreserved work to entities they set up in the unregulated sector and employ solicitors in such entities (whose turnover will not be subject to the annual charge on renewal of recognised body status) to undertake that work;

   (B) existing businesses (e.g. other professional services firms) will be able to diversify into legal services, employing solicitors to deliver non-reserved legal services to clients using their "solicitor" title;

   (C) existing businesses which employ in-house solicitors will be able to use their in-house departments to provide non-reserved legal services to the public;

   (D) existing alternative legal service providers (which currently deliver non-reserved legal services to the public through unqualified staff) will be able to employ solicitors to undertake/supervise this work, so seeking what the SRA calls "brand enhancement"; and

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* Reserved legal activities are, in summary: rights of audience; the conduct of litigation; reserved instrument activities (including the preparation of transfers of and charges over real property in E&W); probate activities; notarial activities and the administration of oaths.

(E) new firms may be established to deliver non-reserved legal services, also using solicitors to undertake/supervise this work and taking the opportunity to achieve "brand enhancement".

5. In summary, solicitors who work for non-SRA regulated firms will only be subject to individual-based regulation, which does not mandate risk management, such conflicts avoidance and the purchase of PII cover, at an entity level. In addition, it may be that privilege will not attach to the advice which clients of unregulated entities receive.

6. To help to set the tone for the CLLS's response to this consultation, and subsequent consultations on the Handbook review, please answer the questions which follow – sending your response to kevin.hart@citysolicitors.org.uk by Friday, 29 July 2016.

Questions:

1. Do you think that splitting the SRA Code of Conduct will help to reconnect individual solicitors with their personal regulatory responsibilities, or do you favour the retention of a combined Code where individuals and the firm are "in it together"? In your experience, do practitioners find the existing Code of Conduct "long, confusing and complicated"?

2. Even if you do not think the SRA's proposals will affect your market, do you think the changes could pose a threat to the strength/value of the solicitor brand in general (e.g. because the consumer protections available to clients instructing unregulated firms may be significantly reduced, and some unregulated firms may lack the appropriate systems, controls and infrastructure to support the solicitors they employ in meeting their individual regulatory responsibilities)?

3. The SRA's proposed changes would mean that (for example) accountancy firms will be able to employ solicitors to do unreserved work but that the SRA's conflict rules will only apply at an individual level – so a non-SRA regulated firm could act for, say, both a buyer and a seller of a business (provided the same solicitor does not act for both clients). Do you think it is unfair that non-SRA regulated firms will therefore benefit from a more liberal conflicts regime, and how might this affect your business?

4. The SRA has put forward two alternative formulations for its reworded conflict rule. One is similar to the current rule, whilst the other does not replicate the "auction" and substantially common interest exceptions (although it is not clear whether this is just a drafting issue or whether the SRA really intends to dispense with the availability of these two exceptions). How important are those exceptions to you in practice? Further, given that the SRA is apparently consulting on substantive changes to the conflicts rules, would you like to see other changes introduced? For example, do you think that the SRA should also consider an informed consent exception, perhaps only when dealing with sophisticated clients?

5. The SRA has sought advice from Counsel on privilege and has been advised that legal advice given by unregulated firms may not attract legal professional privilege, even if that advice is given by a solicitor (although this could be subject to work arounds – e.g. if the client contracts with the solicitor rather than the firm). If this advice is right, how

important do you think this would be to your clients when deciding whether to instruct a regulated or unregulated provider?

6. If given transparency information by an unregulated firm about the protections available to them when using such a firm, do you think this will help clients (even if sophisticated) make the right choices about what they need? Do you think that solicitors working for unregulated firms should be required, as a regulatory matter, to offer minimum levels of PII to their clients?

7. It would be possible for you to split off the unreserved part of your business into a separate business (to avoid SRA regulation at an entity level), provided you give your clients the right information about the protections available to them. Do you see this as an opportunity to "hive across" your unreserved work (e.g. corporate, M&A, commercial, financing) to a new business which you would effectively "self-regulate", free from the constraints and cost of SRA regulation and with the availability of US-style conflict waivers (should you want to offer them to two or more clients who may seek to instruct you on the same/a related matter)? Why might his be attractive/unattractive to you?

8. Do you think that your clients value entity-based regulation and see it as a "kite mark"? Alternatively, do you think your clients would be happy to continue to instruct you if you became a "self-regulated" entity – bearing in mind that you could choose to maintain the same levels of PII and adopt certain risk management systems across the board?

9. The SRA is currently of the view that all work, whether reserved or unreserved, must be regulated if done by an SRA regulated firm. Do you think it should reconsider this? Are you attracted to the idea that the SRA should only regulated reserved work?

10. Whilst the SRA is minded to retain the COLP/COFA roles for all SRA regulated firms, they would like views on how these roles are working in practice, their value and how effective they are. Do you agree that the roles should be retained in broadly the current form? In your opinion, how do the roles assist with/hinder compliance? The COFA's role is currently limited to compliance with the SRA Accounts Rules, leaving all other aspects of finance and financial stability to the COLP. Given that the COFA is typically an accountant, do you agree that the role of the COFA should be extended to both the Overseas Accounts Rules and all other aspects of finance and financial stability?

Part B of CLLS Consultation Response

CLLS PRRC Comments on Draft SRA Code of Conduct for Solicitors, RELs and RFLs [2017]

The SRA Principles comprise the fundamental tenets of ethical behaviour that we expect all those that we regulate to uphold. This includes you, as well as authorised firms and their managers and employees in so far as is relevant to their roles[1]. The principles are as follows:

You:

1. uphold the rule of law and the proper administration of justice
2. ensure that your conduct ~~upholds~~ maintains public confidence in ~~the~~ you and your profession[2] ~~and those delivering legal services~~
3. ~~act with~~do not allow your independence to be compromised[3]
4. act with honesty and with integrity[4]
5. ~~act~~ perform your role in a way that encourages equality, diversity and inclusion[5]
6. act in the best interests of each ***client*** and protect their confidential information[6]

The Code of Conduct describes the standards of professionalism that we, the SRA, and the public expect of individuals (solicitors, registered European lawyers and registered foreign lawyers) authorised by us to provide legal services. They apply to conduct and behaviour relating to your practice, and comprise a framework for ethical and competent practice which applies irrespective of your role or practice setting but subject to the Overseas Rules relating to your practice outside England & Wales[7]; ~~although s~~Section 8 applies only when you are providing legal services to the public or a section of the public.

You must exercise your judgement in applying these standards to the situations you are in and deciding on a course of action, bearing in mind your role, responsibilities and the nature of your clients and areas of practice. You are personally accountable for compliance with the Code - and our other regulatory requirements that apply to you - and must always be prepared to justify your decisions and actions. Serious misconduct or a material ~~breach~~[17] may result in our taking regulatory action against you. A breach may be ~~serious~~ material[17] either in isolation or because it comprises a persistent failure to comply or pattern of behaviour.

The Principles and Codes are underpinned by our Enforcement Strategy, which explains in more detail our approach to taking regulatory action in the public interest.

Maintaining trust and acting fairly

1.1 You do not unfairly discriminate by allowing your personal views to affect your professional relationships and the way in which you provide your services.

1.2 You do not abuse your position by taking unfair advantage of ***clients*** or others relying on your advice[8].

1.3 You perform all ***undertakings*** given by you, and do so within an agreed timescale or if no timescale has been agreed then within a reasonable amount of time.

1.4 You do not mislead or attempt to mislead your ***clients***, the ***court*** or others relying on your advice[8], either by your own acts or omissions or allowing or being complicit in the acts or omissions of others (including your ***client***).

Dispute resolution and proceedings before courts, tribunals and inquiries

[NB Our litigation experts, through the CLLS Litigation Committee, note that it is proposed to delete current Outcome 5.5 and IBs 5.4, 5.5, 5.7 (b) and 5.9 and that the proposal is that this may possibly be replaced by SRA guidance. They consider that it would be useful to continue to have a specific rule equivalent to Outcome 5.5 noting that when professional obligations require solicitors to do things that are likely to be contrary to their clients' interests or wishes it is extremely valuable to have a specific rule to point to.]

2.1 You do not misuse or tamper with evidence, or attempt to do so.

2.2 You do not seek to influence the substance of evidence, including generating false evidence or persuading witnesses to change their evidence.

2.3 You do not provide or offer to provide any benefit to witnesses dependent upon the nature of their evidence or the outcome of the case.

2.4 You only make assertions or put forward statements, representations or submissions to the ***court*** or others tribunals or inquiries[8] which are properly arguable.

2.5 You do not place yourself in contempt of ***court***, and you comply with ***court*** orders which place obligations on you.

2.6 You do not waste the ***court's*** time.

2.7 You draw the ***court's*** attention to relevant cases and statutory provisions, or procedural irregularities of which you are aware and which are likely to have a material effect on the outcome of the proceedings.

[NB Generally, concerning rules relating to advocacy, it is important for these to be consistent with those applicable to barristers and, if not, can the SRA explain why

they should be different?]

Service and competence

3.1 You only act for ***clients*** on instructions from the ***client***, or from someone ~~authorised to~~who can properly[9] provide instructions on their behalf. If you have reason to suspect that the instructions do not represent your ***client's*** wishes, you do not act unless you have satisfied yourself that they do.

3.2 You ensure that the service you provide to ***clients*** is competent and delivered in a timely manner.

3.3 You maintain your competence to carry out your role and keep your professional knowledge and skills up to date.

3.4 You consider and take account of your ***client's*** attributes, needs and circumstances.

3.5 Where you supervise or manage others providing legal services:

(a) you remain accountable for the work carried out through them; and

(b) you effectively supervise work being done for ***clients***.

3.6 You ensure that the individuals you manage are competent to carry out their role, and keep their professional knowledge and skills up to date.

Client money and assets

4.1 You properly account to ***clients*** for any ***financial benefit*** you receive as a result of their instructions except where they have agreed otherwise[10].

4.2 You safeguard money and ***assets*** entrusted to you by ***clients*** and others.

4.3 Unless you work in an ***authorised body***, you do not personally hold ***client money***.

Referrals, introductions and separate businesses

Referrals and introductions

5.1 In respect of any referral of a ***client*** by you to another ***person,*** or of any third party who introduces business to you or with whom you share your fees, you ensure that:

(a) ***clients*** are informed of any financial or other interest which you or your business or employer has in referring the ***client*** to another ***person*** or which an ***introducer*** has in referring the ***client*** to you;

(b) ***clients*** are informed of any fee sharing ***arrangement*** that is relevant to their matter;

(c) the agreement is in writing;

(d) you do not receive payments relating to a referral or make payments to an ***introducer*** in respect of ***clients*** who are the subject of criminal proceedings; and

(e) any ***client*** referred by an ***introducer*** has not been acquired in a way which would breach the ***SRA's regulatory arrangements*** if the ***person*** acquiring the ***client*** were regulated by the ***SRA***.

Separate businesses

5.2 You ensure that ***clients*** are clear about the extent to which the services that you and any ***separate business*** offer are regulated.

5.3 You do not represent a ***separate business*** or any of its services as being regulated by the ***SRA***.

5.4 You only:

(a) refer, recommend or introduce a ***client*** to a ***separate business***; or

~~(b) put your ***client*** and a ***separate business*** in touch with each other; or~~[11]

(~~c~~b) divide, or allow to be divided, a ***client's*** matter between you and a ***separate business***,

where the ***client*** has given informed consent to your doing so.

5.5 Where you and a ***separate business*** jointly publicise services, you ensure that the nature of the services provided by each business is clear.

Conflict, confidentiality and disclosure

Conflict of interests

6.1 You do not act if there is an ***own interest conflict***[12] ~~a conflict of interest between you and your ***client*** or a significant risk of such a ***an own interest conflict***[12]~~.

6.2 You take reasonable steps to satisfy yourself that your business or employer has effective systems and controls to identify and monitor conflicts of interest as appropriate[13]

6.3 You do not act in relation to a matter or particular aspect of it if there is a ***client conflict*** or a significant risk of such a conflict in relation to that matter or aspect of it, unless:

(a) the ***clients*** have an agreed common purpose in relation to the matter or the aspect of it, as appropriate, and a strong consensus on how that purpose is to be achieved; or

(b) the ***clients*** are ***competing for the same objective*** which, if attained, by one ***client*** will make that objective unattainable ~~to~~by the other ***client***:

and the conditions below are met, namely that:

(i) all the ***clients*** have given informed consent, given or evidenced in writing, to you acting; and

(ii) where appropriate, you put in place effective safeguards to protect your ***clients'*** confidential information; and

(iii) the benefits to the ***clients*** of doing so outweigh the risks to the ***clients*** of you acting.

Confidentiality and disclosure

6.43 You keep the affairs of current and former ***clients*** confidential unless disclosure is required or permitted by law or the ***client*** consents and you take reasonable steps to satisfy yourself that where your business or employer holds information confidential to your clients or former clients your business or employer has effective systems and procedures to protect that confidential information[14].

6.54 Where you are acting for a ***client,*** you make that ***client*** aware of all information material to the matter of which you have knowledge, except when:

(a) the disclosure of that information is prohibited by law;

(b) your ***client*** gives informed consent, given or evidenced in writing, to the information not being disclosed to them;

(c) you have reason to believe that serious physical or mental injury will be caused to your ***client*** or another if the information is disclosed; or

(d) the information is contained in a privileged [or confidential][15] document that you have knowledge of only because it has been mistakenly disclosed.

6.65 You do not act for a ***client*** in a matter where that ***client*** has an interest adverse to the interest of another current or former ***client*** ~~or a former ***client***~~ for whom your business or employer holds confidential information which is material to that matter, unless:

(a) ~~all~~ effective measures have been taken which result in there being no real risk of disclosure of the confidential information; or

(b) the ***client*** or former ***client*** has given informed consent, given or evidenced in writing, to you acting, including to any measures taken to protect their information.

Cooperation and accountability

7.1 You keep up to date with and follow the law and regulation governing the way you work.

7.2 You are able to justify your decisions and actions in order to demonstrate compliance with your obligations under the ***SRA regulatory***

arrangements.

7.3 You cooperate with the ***SRA***, other regulators, ombudsmen and those bodies with a role overseeing and supervising the delivery of, or investigating concerns in relation to, legal services.

7.4 You respond promptly to the ***SRA*** and:

(a) provide full and accurate explanations, information and documents in response to any proper request or lawful requirement[16];

(b) ensure that relevant information which is held by you, or by third parties carrying out functions on your behalf which are critical to the delivery of your legal services, is available for inspection by the ***SRA***.

7.5 You do not attempt to prevent anyone from providing information to the ***SRA***.

7.6 You notify the ***SRA*** promptly if you become aware:

(a) of any material changes to information previously provided to the ***SRA***, by you or on your behalf, about you or your practice; and

(b) that information provided to the ***SRA***, by you or on your behalf, about you or your practice is or may be false, misleading, incomplete or inaccurate.

7.7 You ensure that a prompt report is made to the ***SRA*** or another ***approved regulator***, as appropriate, of any serious misconduct[17] in breach of their ***regulatory arrangements*** by any ***person*** regulated by them (including you) of which you are aware. If requested to do so by the ***SRA*** you investigate whether there ~~have~~ has been any serious ~~breaches~~ misconduct that should be reported to the ***SRA***.

7.8 You act promptly to take ~~any~~ appropriate remedial action requested by the ***SRA***.

7.9 You promptly inform ***clients*** ~~promptly~~ for whom you are acting[18] of any act or omission which could give rise to a claim by them against you. If requested to do so by the ***SRA*** you investigate whether anyone may have a claim against you.

7.10 Any obligation under this section or otherwise[19] to notify, or provide information to, the ***SRA*** will be satisfied if you provide information to your firm's ***COLP*** or ***COFA***, as and where appropriate, on the understanding that they will do so if necessary.

When you are providing services to the public or a section of the public:

Client identification

8.1 You take appropriate steps to ~~identify~~ establish[20] for whom you are acting

~~for~~ in relation to any matter.

Complaints handling

8.2 You ensure that, as appropriate in the circumstances, you either establish and maintain, or participate in, a procedure for handling ***complaints*** in relation to the legal services you provide.

8.3 You ensure that ***clients*** are informed in writing at the time of engagement about their right to complain about your services and your charges, and how ***complaints*** can be made.

8.4 You ensure that ***clients*** are informed, in writing:

(a) both at the time of engagement and, if a ***complaint*** has been brought at the conclusion of your ***complaints*** procedure, of any right they have to complain to the ***Legal Ombudsman***, the time frame for doing so and full details of how to contact the ***Legal Ombudsman***; and

(b) if a ***complaint*** has been brought and your ***complaints*** procedure has been exhausted:

(i) that you cannot settle the ***complaint***;

(ii) of the name and website address of an alternative dispute resolution (ADR) approved body which would be competent to deal with the ***complaint***; and

(iii) whether you agree to use the scheme operated by that body.

8.5 You ensure that ***clients' complaints*** are dealt with promptly, fairly and free of charge.

Client information and publicity

8.6 You give ***clients*** information in a way they can understand. You ensure they are in a position to make informed decisions about the services they need, how their matter will be handled and the options available to them.

8.7 You ensure that ***clients*** receive the best possible information about how their matter will be priced and, both at the time of engagement and when appropriate as their matter progresses, about the likely overall cost of the matter and any costs incurred.

8.8 You ensure that any ***publicity*** you are responsible for in relation to your practice is accurate and not misleading, including that relating to your charges and the circumstances in which ***interest*** is payable by or to ***clients***.

8.9 You ensure that ***clients*** ~~understand~~ are given clear and accessible information about[21] whether and how the services you provide are regulated and about the protections available to them.

When acting as part of a team[22]

8.10 When you are providing services to the public or a section of the public together with other individuals regulated by the SRA, any obligation under this section to take steps, establish or maintain or participate in procedures or to provide information to clients or others will be satisfied if other individuals regulated by the SRA with whom you are acting on any matter, do so on your behalf or in a manner which encompasses satisfaction of your own obligation.

Supplemental notes

Powers, commencement/transitional provisions

Explanatory Notes for the SRA on Solicitors' Code mark-up

1. It would be helpful to clarify that the Principles only apply to employees who are not solicitors insofar as they are relevant to their roles, not more generally for matters arising outside their work context, notwithstanding and subject to the impact of the "public confidence" Principle 2.

2. "Maintaining" public confidence is more appropriate than "upholding" it, the latter suggesting a more onerous positive obligation. That would be consistent with current Principle 6. The reference to "those delivering legal services" also seems far too broad when applied to the alternative unregulated sector – it is maintaining confidence in the solicitors' profession which needs to be protected, not the reputation of other multi-disciplinary/corporate service providers whose services may happen to include legal advice. Consistency with text with which the profession has become familiar would also be highly desirable here.

3. This formulation, with which the profession has become familiar, better reflects expected behaviours. A positive obligation to "act with independence" is easily capable of being misconstrued, especially by non-professional employees to whom the Principles will apply.

4. Small change but designed to ensure the obligation is a double one – i.e. to act with honesty and to act with integrity – and this is not an attempt to redefine what it means to act with integrity to require not acting dishonestly.

5. This is important to clarify that behaviour outside of a work context, especially by non-solicitor employees, is not caught by this Principle requiring encouragement to diversity and inclusion etc. (although it might separately of course impact Principle 2 if behaviour fails to maintain confidence etc.). If the SRA is trying to promote a change in this respect, it should be expressly consulting on this aspect.

6. Adding express reference to protecting confidentiality is extremely important to those non-solicitor employees bound by the Principles but not by the Code. It is also a sufficiently fundamental obligation, including for solicitors practising in unregulated entities, as to mandate its inclusion at Principles level. We have no strong views whether this is just added at the end of Principle 6 or highlighted by adding a new Principle 7.

7. Important to qualify by reference to the Overseas Rules otherwise this drafting would seem to override them.

8. Need to clarify this so it does not apply (when referring to "others" for example) to those with whom you are negotiating in the best interests of your client.

9. The word "authorised" is likely to cause confusion. Would it cover ostensible authority in a corporate context for example? This alternative provides more

clarity.

10. Client consent is needed as an exception to allow certain benefits to be retained as at present is permitted with consent. If this is not stated some would have concerns about whether consents contained in their terms of business, for example, would mean it was "proper" not to account the client for benefits received from third parties in connection with a retainer.

11. This can be deleted as it is covered by "introduce" in 5.4 (a) and therefore the text simplified.

12. Better to use the definition of own interest conflict in the Glossary. As drafted, this looks like it catches client conflicts too which is not intended.

13. This is important to ensure that within unregulated businesses a solicitor takes reasonable steps to satisfy him/herself that his/her business or employer has satisfactory conflicts management systems and controls in place in order to protect the solicitor's clients.

14. Extremely important confidentiality protection for information held within the unregulated sector – not just about a duty of confidentiality but about how the business protects information from attack, leakage and loss. Not just a key consumer protection, but also needed to support junior solicitors working, in the minority, in unregulated businesses.

15. The SRA should consider whether it is appropriate to extend this to cover confidential information which may not be privileged if, for example, it has emanated from the unregulated sector.

16. Important changes to highlight that the SRA has to make a proper and lawful request for information etc. before a solicitor is obliged to respond.

17. It is very important to retain a different level of breach, currently described in the Code as "serious misconduct" which goes way beyond material breach of the Principles or Code, as the basis for reporting breaches by other solicitors or regulated firms outside your own firm. Consider clarifying in the Glossary a definition of "serious misconduct". At present it is settled that this involves breaches involving dishonesty or which involve a serious arrestable offence as previous SRA guidance has made clear. To highlight the distinction also consider changing the terminology to "material" breaches instead of referring to "serious" breaches throughout. Many will assume that the change in terminology is intended to imply a change in substance to something more serious than material breaches.

18. It is very important that this is changed to clarify that as at present only current clients need to be notified of possible claims against you. As at present this would be done "promptly" so this has been added. If the SRA wants to change this important requirement to extend (significantly beyond what is currently expected of fiduciaries) it to cover clients for whom you have acted in the past

but are not currently advising, this should be subject to a separate consultation to which we expect PI insurers would wish to respond. Gunning principles could be relevant here, as the change is not highlighted in this consultation, nor explained.

19. It would be helpful for this to apply more generally, not just for section 7.

20. Use of the term "identify" is likely to cause confusion with anti-money laundering requirements. "Establish" would be better.

21. Solicitors cannot really ensure their clients actually "understand" what they tell them so they can only sensibly be required to provide clear and accessible information.

22. This new provision would be very helpful, especially for those operating within the unregulated sector without a COLP or risk and compliance support and also for those who operate providing services in teams alongside other solicitors to relieve individuals of having to take steps etc. themselves when someone else working with them will have done so, in effect, on their behalf.

CLLS PRRC comments on Draft SRA Code of Conduct for Firms [2017]

The SRA Principles comprise the fundamental tenets of ethical behaviour that we expect all those that we regulate to uphold. This includes all individuals and firms that we regulate, including authorised firms and their managers and employees in so far as is relevant to their roles[1]. The principles are as follows:

You:

1. uphold the rule of law and the proper administration of justice
2. ensure that your conduct ~~upholds~~ maintains public confidence in ~~the~~ you and your profession[2] ~~and those delivering legal services~~
3. ~~act with~~ do not allow your independence to be compromised[3]
4. act with honesty and with integrity[4]
5. perform your role ~~act~~ in a way that encourages equality, diversity and inclusion[5]
6. act in the best interests of each ***client*** and protect their confidential information[6]

This Code of Conduct describes the standards and business controls that we, the SRA, and the public expect of firms authorised by us to provide legal services. These aim to create and maintain the right culture and environment for the delivery of competent and ethical legal services to ***clients***~~consumers~~. If you are a MDP, the SRA Principles and these standards apply in relation to your regulated activities.

Sections 8 and 9 set out the requirements of managers and compliance officers in those firms, respectively.

Serious misconduct or material[16] breach may lead to our taking regulatory action against the firm itself as an entity, or its managers or compliance officers, who ~~all share~~ each have ~~responsibility~~ responsibilities for ensuring or taking reasonable steps to ensure that the standards and requirements are met[7]. We may also take action against employees working within the firm for ~~any~~ material breaches[16] of the principles ~~for which they are responsible~~by them. A breach may be ~~serious~~material[16] either in isolation or because it comprises a persistent failure to comply or pattern of behaviour.

Maintaining trust and equality and diversity

1.1 You do not abuse your position by taking unfair advantage of ***clients*** or others relying on your advice[8].

1.2 You monitor, report and publish workforce diversity data, as ***prescribed*** by the ***SRA***.

[Why are there no equivalent provisions to 1.3, 1.4 and 2.1-2.7 in the Solicitors' Code? These provisions seem just as applicable to authorised firms as they are to individual solicitors. These provisions could be incorporated under Paragraph 3.1 (Applicable Outcomes in the SRA Code of Conduct for Solicitors and RELs 2017).]

Compliance and business systems

2 .1 You have effective governance structures, arrangements, systems and controls in place ~~that~~ designed to ensure[11]:

(a) you comply with all the ***SRA's regulatory arrangements***, as well as with other regulatory and legislative requirements, which apply to you;

(b) your ***managers*** and ***employees*** comply with the ***SRA's regulatory arrangements*** which apply to them;

(c) your ***managers***, ***employees*** and ***interest holders*** and those you employ or contract with do not cause or substantially contribute to a breach of the ***SRA's regulatory arrangements*** by you or your ***managers*** or ***employees***;

(d) your ***compliance officers*** are able to discharge their duties under rules 9.1 and 9.2 below.

2.2 You keep and maintain records to demonstrate compliance with your obligations under the ***SRA's regulatory arrangements***.

2.3 You remain accountable for compliance with the ***SRA's regulatory arrangements*** where your work is carried out through others, including your ***managers*** and those you employ or contract with.

2.4 You actively monitor your financial stability and business viability of your regulated activities. Once you are aware that you will cease to operate, you effect the orderly wind- down of your activities.

2.5 You identify, monitor and manage all material risks to your business, including those which may arise from your ***connected practices.***

Cooperation and information requirements

3.1 You keep up to date with and follow the law and regulation governing the way you work.

3.2 You cooperate with the ***SRA***, other regulators, ombudsmen and those bodies with a role overseeing and supervising the delivery of, or investigating concerns in relation to, your legal services.

3.3 You respond promptly to the ***SRA*** and:

(a) provide full and accurate explanations, information and documentation in response to any proper requests or lawful requirements[15];

(b) ensure that relevant information which is held by you, or by third parties carrying out functions on your behalf which are critical to the delivery of your legal services, is available for inspection by the ***SRA***.

3.4 You act promptly to take ~~any~~ appropriate remedial action properly requested[15] by the ***SRA***.

3.5 You promptly inform ***clients*** ~~promptly~~ for whom you are acting[17] of any act or omission which could give rise to a claim by them against you. If requested to do so by the ***SRA*** you investigate whether anyone may have a claim against you.

3.6 You notify the ***SRA*** promptly:

(a) of any indicators of serious financial difficulty relating to you or your regulated activities;

(b) if a ***relevant insolvency event*** occurs in relation to you;

(c) of any change to information recorded in the ***register***.

3.7 You provide to the ***SRA*** an information report on an annual basis or such other period as specified by the ***SRA*** in the ***prescribed*** form and by the ***prescribed*** date. [NB SRA to provide further details of what is to be required here.]

3.8 You notify the ***SRA*** promptly if you become aware:

(a) of any material changes to information previously provided to the ***SRA***, by you or on your behalf, about you or your ***managers***, ***owners*** or ***compliance officers***; and

(b) that information provided to the ***SRA***, by you or on your behalf, about you or your ***managers***, ***owners*** or ***compliance officers*** is or may be false, misleading, incomplete or inaccurate.

3.9 You promptly report to the ***SRA*** or another ***approved regulator***, as appropriate, any serious misconduct[16] or material breach of their ***regulatory arrangements*** by any ***person*** regulated by them (including you) of which you are aware. If requested to do so by the ***SRA*** you investigate whether there have been any ~~serious~~ material breaches that should be reported to the ***SRA***.

Service and competence

4.1 You only act for ***clients*** on instructions from the ***client***, or someone

~~authorised~~ who can properly[9] to provide instructions on their behalf. If you have reason to suspect that the instructions do not represent your ***client's*** wishes, you do not act unless you have satisfied yourself that they do.

4.2 You ensure that the service you provide to ***clients*** is competent and delivered in a timely manner, and takes account of your ***client's*** attributes, needs and circumstances.

4.3 You ensure that your ***managers*** and ***employees*** are competent to carry out their role, and keep their professional knowledge and skills up to date.

4.4 You have an effective system for supervising ***clients'*** matters.

Client money and assets

5.1 You properly account to ***clients*** for any ***financial benefit*** you receive as a result of their instructions except where they have agreed otherwise[10].

5.2 You safeguard money and ***assets*** entrusted to you by ***clients*** and others.

Conflict and confidentiality

Conflict of interests

6.1 You do not act if there is an ***own interest conflict***[12] ~~conflict of interest between you and your **client**~~ or a significant risk of an ***own interest conflict***[12] ~~such a conflict~~.

6.2 You do not act in relation to a matter or a particular aspect of it if there is a ***client conflict*** or a significant risk of such a conflict in relation to that matter or aspect of it, unless:

(a) the ***clients*** have an agreed common purpose in relation to the matter or the aspect of it, as appropriate, and a strong consensus on how that purpose is to be achieved; or

(b) the ***clients*** are ***competing for the same objective*** which, if attained, by one ***client*** will make that objective unattainable ~~to~~ by the other ***client***:

and the conditions below are met, namely that:

(i) all the ***clients*** have given informed consent, given or evidenced in writing, to you acting;

(ii) where appropriate, you put in place effective safeguards to protect your ***clients'*** confidential information; and

(iii) the benefits to the ***clients*** of doing so outweigh the risks to the ***clients*** of you acting.

Confidentiality and disclosure

6.3 You keep the affairs of current and former ***clients*** confidential unless disclosure is required or permitted by law or the ***client*** consents.

6.4 Any of your individual employees who is acting for a ***client*** makes that ***client*** aware of all information material to the matter of which ~~the~~ that individual has knowledge except when:

(a) ~~legal restrictions prohibit them from passing the information to the ***client;*~~** disclosure of that information is prohibited by law

(b) the ***client*** gives informed consent, given or evidenced in writing, to the information not being disclosed to them;

(c) ~~there is evidence~~ the individual has reason to believe that serious physical or mental injury will be caused to the ***client*** or another if the information is disclosed; or

(d) the information is contained in a privileged [or confidential] [13] document~~s~~ that the individual has knowledge of only because ~~they have~~ it has been mistakenly disclosed.

6.5 You do not act for a ***client*** in a matter where that ***client*** has an interest adverse to the interest of another current or former ***client*** ~~or a former ***client***~~ for whom you hold confidential information which is material to that matter, unless:

(a) ~~all~~ effective measures have been taken which result in there being no real risk of disclosure of the confidential information; or

(b) the ***client*** or former ***client*** has given informed consent, given or evidenced in writing, to you acting, including to any measures taken to protect their information.

Applicable Outcomes in the SRA Code of Conduct for Solicitors and RELs 2017

7.1 The following sections of the SRA Code of Conduct for Solicitors, RELs and RFLs 2017 apply to you in their entirety as though references to "you" were references to you as a ***firm***:

(a) Referrals, introductions and separate businesses (5.1 to 5.5);

(b) [Include 1.3, 1.4, 2.1-2.7 as referred to above?]

(c~~b~~) Standards which apply when providing services to the public or a section of the public, namely Client identification (8.1), Complaints handling (8.2 to 8.5), and Client information and publicity (8.6 to 8.9).

Managers in SRA authorised firms

8.1 If you are a ***manager***, other than a manager based outside England & Wales with no management responsibility for your *firm's* business in England & Wales, you are responsible for compliance by your ***firm*** with this Code. This responsibility is joint and several if you share ~~management~~ responsibility with other ***managers*** of the ***firm***[14].

Compliance officers

9.1 If you are a ***COLP*** you take all reasonable steps to:

(a) ensure compliance with the terms and conditions of your ***firm's authorisation***;

(b) ensure compliance by your ***firm*** and its ***managers***, ***employees*** or ***interest holders*** with the ***SRA's regulatory arrangements*** which apply to them;

(c) ensure that your ***firm's managers***, ***employees*** and ***interest holders*** do not cause or substantially contribute to a breach of the ***SRA's regulatory arrangements***; and

(d) as soon as reasonably practicable, report to the ***SRA*** any serious misconduct or material[16] breach of the terms and conditions of your ***firm's authorisation***, or the ***SRA's regulatory arrangements*** which apply to your ***firm***, ***managers*** or ***employees***;

save in relation to the matters which are the responsibility of the ***COFA*** as set out in rule 9.2 below.

9.2 If you are a ***COFA*** you take all reasonable steps to:

(a) ensure that your ***firm*** and its ***managers*** and ***employees*** or the ***sole practitioner*** comply with any obligations imposed upon them under the ***SRA Accounts Rules***, rule [ ] of the Overseas Rules and in relation to financial controls, financial compliance, financial stability or financial viability;

(b) as soon as reasonably practicable, report to the ***SRA*** any serious misconduct or material[16] breach of the ***SRA Accounts Rules*** which apply to ~~them~~your firm and its managers and employees or the sole practitioner.

Supplemental notes

Powers, commencement/transitional provisions.

Explanatory Notes for the SRA on Firm Code mark-up

1. It would be helpful to clarify that the Principles only apply to employees who are not solicitors insofar as they are relevant to their roles, not more generally for matters arising outside their work context, notwithstanding and subject to the impact of the "public confidence" Principle 2.

2. "Maintaining" public confidence is more appropriate than "upholding" it, the latter suggesting a more onerous positive obligation. That would be consistent with current Principle 6. The reference to "those delivering legal services" also seems far too broad when applied to the alternative unregulated sector – it is maintaining confidence in the solicitors' profession which needs to be protected, not the reputation of other multi-disciplinary/corporate service providers whose services may happen to include legal advice. Consistency with text with which the profession has become familiar would also be highly desirable here.

3. This formulation, with which the profession has become familiar, better reflects expected behaviours. A positive obligation to "act with independence" is easily capable of being misconstrued, especially by non-professional employees to whom the Principles will apply.

4. Small change but designed to ensure the obligation is a double one – i.e. to act with honesty and to act with integrity – and this is not an attempt to redefine what it means to act with integrity to require not acting dishonestly.

5. This is important to clarify that behaviour outside of a work context, especially by non-solicitor employees, is not caught by this Principle requiring encouragement to diversity and inclusion etc. (although it might separately of course impact Principle 2 if behaviour fails to maintain confidence etc.). If the SRA is trying to promote a change in this respect, it should be expressly consulting on this aspect.

6. Adding express reference to protecting confidentiality is extremely important to those non-solicitor employees bound by the Principles but not by the Code. It is also a sufficiently fundamental obligation, including for solicitors practising in unregulated entities, as to mandate its inclusion at Principles level. We have no strong views whether this is just added at the end of Principle 6 or highlighted by adding a new Principle 7.

7. This more accurately reflects relevant responsibilities. It is misleading to suggest that compliance officers share the same responsibilities as managers.

8. Need to clarify this so it does not apply (when referring to "others" for example) to those with whom you are negotiating in the best interests of your client.

9. The word "authorised" is likely to cause confusion. Would it cover ostensible authority in a corporate context for example? This alternative provides more clarity.

10. Client consent is needed as an exception to allow certain benefits to be retained as at present is permitted with consent. If this is not stated some would have concerns

about whether consents contained in their terms of business, for example, would mean it was "proper" not to account the client for benefits received from third parties in connection with a retainer.

11. This change is necessary to avoid the impact that there is in effect an absolute guarantee of compliance ("effective to ensure"). Having systems and controls etc. in place which are "designed to ensure" compliance would better reflect what is intended by 2.1. Not every breach of the Code of course should also mean that there has been a breach of 2.1 just because, by definition, systems and controls have not been effective to prevent that breach.

12. Better to use the definition of own interest conflict in the Glossary. As drafted, this looks like it catches client conflicts too which is not intended.

13. The SRA should consider whether it is appropriate to extend this to cover confidential information which may not be privileged if, for example, it has emanated from the unregulated sector.

14. It is important to clarify the responsibilities of managers based outside England and Wales in international firms and who the SRA intends should be treated as having management responsibility for these purposes. Our mark up reflects what in practice we understand to be the current status quo at least so far as enforcement is concerned.

15. Important changes to highlight that the SRA has to make a proper and lawful request for information etc. before a solicitor is obliged to respond.

16. It is very important to retain a different level of breach, currently described in the Code as "serious misconduct" which goes way beyond material breach of the Principles or Code, as the basis for reporting breaches by other solicitors or regulated firms outside your own firm. Consider clarifying in the Glossary a definition of "serious misconduct". At present it is settled that this involves breaches involving dishonesty or which involve a serious arrestable offence as previous guidance has made clear. To highlight the distinction also consider changing the terminology to "material" breaches instead of referring to "serious" breaches throughout. Many will assume that the change in terminology is intended to imply a change in substance to something more serious than material breaches.

17. It is very important that this is changed to clarify that as at present only current clients need to be notified of possible claims against you. As at present this would be done "promptly" so this has been added. If the SRA wants to change this important requirement to extend (significantly beyond what is currently expected of fiduciaries) it to cover clients for whom you have acted in the past but are not currently advising, this should be subject to a separate consultation to which we expect PI insurers would wish to respond. Gunning principles could be relevant here, as the change is not highlighted in this consultation, nor explained.

Yours faithfully

THE CITY OF LONDON LAW SOCIETY

Professional Rules and Regulation Committee

Individuals and firms represented on this Committee are as follows:

Sarah de Gay (Slaughter and May, Chair)

Tracey Butcher (Mayer Brown International LLP)

Roger Butterworth (Bird & Bird LLP)

Raymond Cohen (Linklaters LLP)

Sonya Foulds (Freshfields Bruckhaus Deringer LLP)

Annette Fritze-Shanks (Allen & Overy LLP)

Antoinette Jucker (Pinsent Masons LLP)

Mike Pretty (DLA Piper UK LLP)

Jo Riddick (Macfarlanes LLP)

Chris Vigrass (Ashurst LLP)

Clare Wilson (Herbert Smith Freehills LLP)

Consultation: Looking to the future - flexibility and public protection

Response ID:681 Data

2. Your identity

Surname

Cosgrove

Forename(s)

Natalie

3. Name of the firm or organisation where you work

Sheffield and District Law Society

We may publish a list of respondents and a report on responses. Partial attributed responses may be published. Please advise us if you do not wish us to attribute your response or for your name or the name of your firm or organisation to appear on any published list of respondents.

Attribute my/our response and publish my/our name.

Please identify the capacity in which you are submitting a response. I am submitting a response…

on behalf of a Law Society board or committee.
Please enter the name of the board or committee::

3.

1. Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

It is difficult for a Society to be able to respond to a specific question and individual members of our society will respond to this point on a global basis

4.

2. Do you agree with our proposed model for a revised set of Principles?

We are concerned that this will have a negative impact on the Members firms and the individuals of the Society and for these reasons we do not think that there has been reasonable explanation as to how the profession will be protected.

5.

3. Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

We think that the Solicitor and the Solicitor alone should be responsible for setting and maintaining public trust and confidence. We are concerned that this has negative implications for consumer protection and the maintenance of professional standards.

6.

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?

The Principles should continue to refer to the solicitor's duty to keep the affairs of the client confidential.

7.

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?

N/A

8.

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?

We respond to say that it is difficult for our members to keep up with the constant changes, not least the smaller firms who are facing quite challenging times. We therefore suggest to change this again is going to affect those.

9.

7. In your view is there anything specific in the Code that does not need to be there?

Splitting the code into 2 creates something of an issue of the individual is punished due to a policy of a firm - this would be our concern. We have a responsibility to ourselves and to our firms and it is a concern that there is reducing protection to solicitors

10.

8. Do you think that there anything specific missing from the Code that we should consider adding?

There is some overlap between the two draft Codes, most noticeably in areas such conflict, complaints and client information/identification. If this is not addressed, it is not clear which would take precedence where such inconsistencies exist.

11.

9. What are your views on the two options for handling conflicts of interests and how they will work in practice?

Option 2 may be unworkable because it is not always possible to identify that an actual conflict exists and a solicitor may unwittingly act in a conflict situation. Because the non-regulated colleagues of regulated solicitors would not be subject to conflict rules, there is a risk of confusion to consumers, a very favourable competitive advantage to unregulated entities and lack of a fundamental consumer protection for clients of unregulated entities.

12.

10. Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

This is only a question that the SRA can answer. Whilst our members do not want to have rules upon rules, simplification is not always the best way forward and can sometimes breed confusion.

13.

11. In your view is there anything specific in the Code that does not need to be there?

we have no views to state

14.

12. Do you think that there anything specific missing from the Code that we should consider adding?

we have no view to state

15.

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?

We are concerned with the proposal to split the code and this would be our response

16.

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.

We have no views to make as there has been a mixed response from our Members. It has been said that these are now in place and there is a level of setting in that has now passed.

17.

15. How could we improve the way in which the COLP/COFA roles work or to provide further support to compliance officers, in practice?

Some have said that it feels a poison chalice in respect of their own working and this role. However, it has been accepted as something that must be in place. Some were unhappy with this introduction in the first place.

18.

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?

We are concerned that this will create 2 tiers of solicitors, and those working in unregulated businesses are unlikely to be able to give advice which is legally privileged, will not be required to have PII, clients will not have the benefit of compensation fund and the protection of the principles governing conflicts of interest. Not only is this likely to create consumer detriment and confusion but it is likely to damage the reputation of the title of solicitor.

19.

17. How likely are you to take advantage in the greater flexibility about where solicitors can practice as an individual or as a business?

This is a difficult question for us to respond to, as we represent our members and we could not answer for all our members on this point

20.

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?

We have concern who the other approved regulator would be and whether the same standards and reviews would be across the board. There is concern that there would be a watering down of the profession.

21.

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?

Supervision and safety netting is an absolutely integral part of a fully functioning and protective framework for the consumer. Adequate protections should be in place from all angles.

22.

20. Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

this should be set out in some way to the consumer as is the standard now

23.

21. Do you agree with the analysis in our initial Impact Assessment?

we have no comments to make

24.

22. Do you have any additional information to support our initial Impact Assessment?

25.

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?

there is a concern that accounting rules may not be stringently implemented. However, we trust that this will be plainly set out if it was introduced.

26.

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?

Our in house representatives are the local Council where this is not appropriate and therefore we are unable to provide a response to this question

27.

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? If not, what are your reasons?

We are unable to respond cohesively on this and we have asked our members to respond individually.

28.

26. Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

We would suggest that the relevant insurance is quid pro quo for protections of consumers and solicitors

29.

27. Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

30.

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?

We are concerned that there may be a choice and this would be something that we could see as being problematic. We have a mixed response, from one angle is the cost for small Special Bodies. however, the consensus is that this is the protections of both the consumer and those providing the legal services.

31.

29. Do you have any views on what PII requirements should apply to Special Bodies?

we refer to our previous answer

32.

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?

We are concerned that there may be a lack of continuity throughout the profession.

33.

31. Do you have any alternative proposals to regulating entities of this type?

We have no proposals to make save for a a global approach for continuity across the board.

34.

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?

We have no global response to make and we defer to individual responses.

35.

33. Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

We do

Consultation Response

Shelter's Response to the SRA Consultation: Looking to the future

20 September 2016

www.shelter.org.uk

Shelter helps millions of people every year struggling with bad housing or homelessness through our advice, support and legal services. And we campaign to make sure that, one day, no one will have to turn to us for help.

Shelter

Introduction

Shelter helps millions of people every year struggling with bad housing and homelessness through policy work, campaigns and services. Our services do this by giving expert housing advice on the phone, online and face to face. We attend court to defend people at risk of losing their home. We provide specialist support services to help families keep their home or settle into a new one. Our services include:

- A national network of services in 18 locations offering information, support, guidance and advice in housing, welfare benefits, and debt

- A national legal service (Shelter Legal Services) with around 40 solicitors and 25 paralegals plus support staff who are based in all of our service locations providing housing legal advice and representation. Most work is carried out under legal aid contracts including a number of Housing Duty Possession Schemes. We have a small and growing number of Conditional Fee Agreement and Damages Based Agreements cases. Shelter Legal Services has a central support team and a management/supervision structure that includes a principal solicitor and National Legal Services Manager who sits on the Operations Management Team.

- Shelter Children's Legal Service leads strategic casework including interventions in the higher courts in the name of Shelter.

- Shelter's free advice helpline, which runs from 8am-8pm, providing generalist housing advice and some casework by a team of advisers

- The Community Legal Advice, providing specialist telephone advice and casework

- Shelter's website which provides advice online

- The Government-funded National Homelessness Advice Service, which provides second tier specialist housing advice, training, consultancy, referral and information to other voluntary agencies, such as Citizens Advice Bureaux and members of Advice UK, which are approached by people seeking housing advice

- A number of specialist support and intervention projects including housing support services and Transforming Rehabilitation services for prisoners.

Response to the Consultation

1. We note that the position of Special Bodies is still unclear in the consultation and there is little to remedy the lack of clarity. There is little provision for the unique position of Special Bodies within the new codes of conduct for firms or individuals. As a Special Body that is a national charity providing legal advice services on a large scale, including reserved legal activities, we would welcome the opportunity to discuss with the SRA further its approach to regulation of Special Bodies and work with SRA innovate.

2. We do not propose to answer all the questions in this consultation. We have read and agree with the Law Society's position. We focus on the issues surrounding the regulation of Special Bodies, of which we are one.

Summary

3. We welcome an open dialogue with the SRA and the opportunity to develop a position on Special Bodies. Consumer protection and clarity should be paramount as should preserving what the consumer can expect from a solicitor legal service.

4. We consider that we, along with other Special Bodies, should work towards a joint approach that fits with the special position of the sector. It :
    - should include only practising solicitors and work managed and supervised by them
    - should be activity based and not based on RLA and NRLA to avoid confusion for the consumer and a two tier solicitor regulatory system
    - enable multi-disciplinary Special Bodies to be subject to a lighter touch regulation that reflects;
        i. the parameters of the legal work (the ability to ring fence)
        ii. be proportionate in terms of fees, cost and the Fit and Proper Person Test
        iii. the risk to sustainability and supply in the already stretched sector
        iv. the smaller risk to the consumer
        v. be strong on consumer protection and take account of other regulation e.g. by the Charity Commission, Legal Aid Agency, OISC,

Factors to consider for Special Bodies

5. We believe that the main risks to consumers who are likely to seek services from the not for profit (NfP) sector are:

- The inherent vulnerability of much of the client base. The sector's clients are individuals who are often socially excluded and in relative poverty. By virtue of the nature of the legal problems dealt with by the sector, they may be poorly housed or homeless, or at risk of domestic or other violence, or they may suffer from mental or physical health problems, or be refugees from persecution, or any combination of these factors. Again, their legal problems are such that the other side will often be the state or quasi-state bodies, with a consequent severe imbalance of resources and inequality of arms. Their legal problems tend to be of overwhelming importance. This vulnerability requires greater protection than that applied to a sophisticated client such as a large corporate body.

- With the exception of ourselves and other bodies such as Citizens Advice, and organisations such as Law Centres which concentrate on litigation services, much of the sector consists of small organisations which may not have the knowledge, resources or professional management which facilitate full regulatory compliance, and larger organisations for whom the provision of reserved legal activity is a small part of their service and where there may be tensions between legal services regulation and other regulation or organisational policy.

- The potential for tension where funders of services may be opponents in cases taken by agencies, such as where a local authority funds an advice agency which provides housing services. Even where a funder does not seek to place restrictions on how cases are taken forward, there may be (conscious or unconscious) reluctance to challenge on the part of the agency.

6. However, there are also areas where Special Bodies present low risk:

- There is less likelihood of internal pressure or incompatibility of services. Commercial companies with a legal services business may seek to use client details for cross-marketing of services such as financial or insurance products. By contrast, where Special Bodies are concerned, areas of work outside legal services provision are more likely to be other support services or policy, campaigning and fundraising. There is therefore less risk of misuse of client information for other purposes.

- They are less likely to be engaged in financial transactions on behalf of clients and to be subject to money laundering regulations

- Special bodies are generally already regulated to some degree. For example, many (including ourselves) are charities and therefore regulated by the Charity Commission.

7. There are also risks associated with regulation itself:

- Most Special Bodies are charities, often reliant on legal aid funding, and therefore run on tight margins. Additional regulation – including any fees for licensing and business costs associated with ongoing compliance – would impose additional burdens and could impact on the viability of some organisations and of the sector generally. We have already seen a diminishing sector and the growth of legal aid advice deserts. Legal aid statistics have consistently shown a drop in numbers since the watershed of LASPO in 2013.

- Organisations could well decide that regulation is not practical for them and decide to stop providing regulated activities and concentrate on other areas of service provision – with consequent implications for access to justice

8. Currently, bodies such as ourselves are in an ambiguous and uncertain regulatory position. Shelter has a distinct legal services team who undertake both reserved and non-reserved legal activities. It consists of a team of solicitors, who also manage/supervise paralegals and support staff, and who provide litigation and advice services. The team contains a principal solicitor who holds the client account and is led by a National Legal Services Manager who sits at an operational management level within Shelter. Our solicitors are personally regulated by the SRA in the conduct of both reserved and non-reserved activities in respect of their own work and that of those they supervise. Shelter also employs a separate team of advisers who conduct non-reserved activities and who are not regulated in the conduct of reserved or non-reserved activities. The burden of regulation falls directly on individual solicitors, not on the organisation that employs them. The same is true of the whole NfP sector. We are not regulated as organisations, but some of our employees are.

9. It is anomalous that private practice is regulated as an entity, both in the provision of reserved and non-reserved legal activity, whilst the NfP sector is not subject to entity regulation, but regulation of some individual employees. We do not believe

that it is necessarily clear to clients of legal and advice services whether and to what extent the services they receive are regulated, or that their expectations of the protection they should receive are variable according to the type of agency they access.

10. We do not consider it appropriate that the burden of regulation should fall on individuals rather than entities. This is so in relation to Special Bodies and to solicitors who may in the future provide unreserved legal services in non-regulated entities. This is particularly the case where, unlike in private practice, solicitors may not be in positions of seniority, management or ownership and therefore may not have power to ensure regulatory compliance or design compliant systems. There may be tensions between their regulatory and employment obligations.

11. We believe that we are unique as a national NfP organisation that provides extensive litigation services. This means that we have the resources and knowledge within our legal services team to ensure compliance in our systems. However, smaller organisations, perhaps without professional management and with volunteer trustees or management committees, may not have the resources or expertise to ensure compliance. Similarly, larger organisations where litigation services are but a small part of overall service provision may not take sufficient account of legal regulation in designing systems. In such cases it is inappropriate for the burden of non-compliance to fall on solicitors individually where they do not necessarily have the power or authority to change things. A principal solicitor has to hold client money in his own name and does not necessarily have the appropriate accountability for all financial systems. There is a risk to the client in potential regulatory failure. This includes potential organisation and client conflicts of interest.

12. In reality, the risk is unlikely to be large – the vast majority of NfP organisations that employ solicitors to provide litigation services to the public will have carefully considered the professional requirements and ensured that they have compliant systems. Nevertheless, we have experienced the tensions and the risk remains more than theoretical.

13. In addition, we consider that it is important that there is clarity in the regulation of legal services, in place of the present uncertainty that surrounds the position of solicitors in the NfP sector.

14. As far as the client is concerned, they are being advised by the solicitor on behalf of the agency, not by the solicitor as an individual. We think it important that the

client has a full understanding of how the services they receive are regulated, and they are unlikely to appreciate the current technical distinctions between entity and individual regulation according to the ownership model of the body they have approached.

15. We also consider it important to stress that the responsibility for regulatory compliance – and therefore protection of the interests of clients – falls (or should fall) on both the agency and the individual solicitor. The solicitor must always comply with professional rules; but the agency, as a responsible employer and service provider, also has a duty to ensure that its employees are able to comply and its clients are protected.

16. We therefore believe that entity based regulation should be extended to the not for profit sector, or at least that further clarity is provided for those bodies which employ solicitors and those solicitors working within that environment. We do not believe that the current uncertainty which affects the sector and, importantly, consumers accessing the sector should be extended to Unreserved Legal Service Provider as proposed. This would increase the risk for consumers, as currently most of the NfP sector already has a strong consumer protection focus and is regulated by other bodies such as the Charity Commission and Legal Aid Agency. The future ULSP sector is fundamentally commercial in focus, with lack of organisational safeguards. It could potentially legitimise the unregulated non solicitor legal sector whilst causing confusion and devaluing the professionalism of the solicitor brand and the consumer focus of Special Bodies.

Broad approach that licensing authorities should take to the regulation of Special Bodies

17. The broad approach that should be taken should reflect the needs of the consumer and the circumstances of the sector. It should be based around mitigation of the principal risks, which we have set out above.

18. For the reasons set out above, we accept that Special Bodies should be required to be licensed to provide reserved legal activities. However, account should be taken of the particular risk factors.

19. We believe that the SRA should use its discretion to vary the rules that apply generally so as to regulate Special Bodies in a way appropriate to the sector. In particular, we propose that:

- Special bodies wishing to provide reserved legal activities should be encouraged to apply for a licence which is modified to take into account the sustainability of the sector, the nature of the risk and the fact that only activity that is carried out by an authorised person (or someone they are accountable for) is authorised into ring-fenced activities.

- Given the particular ownership and governance structure of many Special Bodies, and that they are already regulated by the Charity Commission, we do not believe that it is necessary that an authorised person be on the board of trustees or similar governing body.

- For the same reasons, we do not believe an extension of a “fitness to own” / “fitness to govern” test is necessary beyond that required by the Charity Commission and / or Companies House, except that no member of the governing body should have been struck off or barred from practice by a legal regulatory body

- Where a Special Body does more than provide legal services, we do not believe it should be necessary for it to form a separate or subsidiary body to provide the legal services. There is not the same degree of risk of misuse of client information (e.g. for cross-selling) that there would be in the corporate sector, and therefore the protection of client information and confidentiality can be maintained by means of an information barrier within the organisation.

- Bodies should be required to nominate a Compliance Officer for Legal Practice to ensure regulatory compliance. This person does not need to be on the governing body, but should be of sufficient seniority to work within a governance structure that to supports the managers of the organisation to put effective arrangements, systems and controls in place to ensure compliance. Where client money is held, there should also be a Compliance Officer for Finance and Administration, and the same conditions would apply to them. These functions may or may not be performed by the same person. Fundamentally, we believe, compliance should be a matter for the body as a whole (or a ring fenced section of that body) rather than any one individual within it and enforcement should be dependent on individual conduct and accountability. It is noted that the proposed new 3.5 of the code for individuals does make the position on accountability clearer for solicitors in Special Bodies.

- If the body is licensed, then regulation should only apply to ring-fenced solicitors' services providing reserved and non-reserved legal activities. The body in its application should be able to demonstrate the appropriate business systems and controls in place to ensure accountability is clear.

- Regulation and fees should be proportionate in relation to the risk to the consumer and so consideration should be given to the fee structure and cost of regulation in so far as an already stretched NfP legal aid sector is concerned. There is a risk that small organisations and services will leave the market, creating yet more advice deserts for those who cannot afford to pay for legal services. This sector often provides initial free services as well as legal aid services.

Anomalies in the current position

20. The current position in the NfP sector is a reflection of the ambiguous state of regulation referred to at the beginning of this response. An organisation as a whole is not regulated. Solicitor employees are personally regulated, whether they provide reserved or non-reserved legal activities. Non-solicitor employees are not regulated in the provision of non-reserved activities; where they provide reserved activities under the supervision of a solicitor, it is the solicitor who is regulated.

21. In private practice and ABS, all activities are regulated, apart from distinct MDP, but under the new regime only entities providing reserved activities will be regulated. In NfPs that do not employ solicitors, no activities are regulated, and this will continue under the new licensing regime.

22. In NfPs that do employ solicitors, all reserved and some non-reserved activities are regulated. This position is clear for consumers as the solicitor title is currently recognised by everyone. We believe that this clarity will become confusion if solicitors who carry out non reserved legal activity only are regulated as individuals, but without the safeguards currently in place.

Solutions for Special Bodies

23. However, whichever solution is adopted is not ideal. To extend regulation to all legal activities of licensed Special Bodies would place an additional regulatory burden on them, which would involve additional cost burdens in an already fragile sector. It is not clear that consumers have been exposed to particular risk justifying an extension of regulation to an area currently unregulated.

24. On the other hand, to reduce regulation so that only reserved activities are regulated creates another, if different, artificial dichotomy between private practice and the NfP sector, in that non-reserved activities of solicitors would be regulated in private practice but not in the NfP sector. That does not remove the anomaly: it merely moves it, and would not result in any additional clarity for providers or consumers.

25. From the point of view of the consumer, clarity would suggest that the scope of regulation extends throughout the work of a licensed body, rather than ending with the work of an authorised individual. We consider that a client would expect that if a body is regulated in the provision of solicitor-led legal services, it is regulated in the provision of all those services, and a distinction between reserved and non-reserved activities would be illogical and confusing. Therefore, clients would see a distinction between regulated solicitor services and non-regulated advice services, rather than regulated and non-regulated activities. The body would need to be able to show clear ring-fenced activity that is supported by business systems and controls.

26. On balance we therefore consider that further work should be done with Special Bodies to come up with flexible arrangements that take account of the following:

- the risk to the consumer
- protection of and clarity for the consumer when accessing any solicitor-led legal services
- the need to minimise fees and the costs of regulation so that they do not put at risk the sustainability of the sector and access to justice for vulnerable consumers.
- the need to ensure that solicitor-led legal services that are provided within an organisation are ring-fenced so that authorised person controlled activity becomes the ring-fenced regulated activity within that body. This would extend the MDP definition.
- that PII continues to be essential for the body in the same way it operates now.

- that a fit and proper person test for ownership includes those who have been authorised to govern by the Charity Commission
- licensed terms are modified flexibly so that the business systems, structures and controls are proportionate and who is accountable is clear to the consumer, employee and management body.
- If the transitional arrangements are to continue, that the principles and codes are considered to ensure that greater clarity is provided than exists with the current hybrid of in-house and individual rules. Consideration should be given to the provision of further guidance and it is necessary to ensure that clarity of purpose is not lost through the code being oversimplified (which appears to be a real risk in the new codes). The risk of misinterpreting the code increases and more cumbersome business systems are required to ensure clarity within organisations.

Specific Questions

Note that where we have not answered questions it does not necessarily indicate agreement with the approach. We have concentrated on answering questions that touch on Special Bodies.

Q5: 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?

See general answer above. Yes guidance for Special Bodies and the NfP sector, for example concerning situations where there may be a conflict with the organisation.

Q12: Do you think that there is anything specific missing from the Code that we should consider adding?

See general answer above. Yes: if transitional protection remains in place for Special Bodies, then the code should make it clear what provisions apply and what

exemptions exist. For example, it should be stated that individuals in Special Bodies should be able to hold client money and what in-house and individual codes apply. Further clarity is required in relation to conflict (client and organisation) as well as what is meant by 3.5 under Service and Competence.

Q13: Do you have any specific issues on the drafting of the Code for Solicitors or Code for Firms or any particular clauses within them?

See Q12

Q16: What is your view of the opportunities and threats presented by the proposal to allow solicitors to deliver non-reserved legal services to the public through alternative legal services providers?

See general answer above in relation to Special Bodies (paras 4-15). There is further risk by permitting the commercial (as opposed to the NfP) sector to employ practising solicitors but not be regulated as an entity. This proposal creates further confusion by establishing a two tier system of regulation and consumer protection. The distinction is not necessarily based on risk to the consumer and can be an artificial divide for example between tribunal work and civil litigation. In addition the work cannot always be neatly divided into reserved and non-reserved legal activity and is often a continuum.

Q24: 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?

See general answer above. Special bodies hold client money and need to be able to continue to do so. Shelter is a housing charity and our legal services carry out reserved and non-reserved legal activities for those who are homeless and in housing need. Those working in Special Bodies hold client money in connection with the litigation work we carry out. This includes client damages (which are usually subject to the legal aid statutory charge) and inter partes costs and

disbursements recovered. We also act on the basis of conditional fee and damages based agreements. As a Special Body, we would welcome a client account held in the name of the body that is controlled by an authorised person.

Q 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?

Yes, as this is a consumer and solicitor protection issue. Consumers should not have a two tier system of protection as this will create confusion in what they can expect from a solicitor legal service. Solicitors should not be expected to carry the burden of regulation themselves and this puts them more at risk to external pressures.

Q 29: Do you have any views on what PII requirements should apply to Special Bodies?

The reasonably equivalent rules are adequate and should take into account the value of the risk. The cost of regulation should be proportionate to the risk and this includes fees and PII. The monetary value of any claim is likely to be relatively small for the sector.

Q32: 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?

See general answer above paras 8-16). There should be a balance that ensures that providers offer sufficient protection for the individual solicitor and the consumer and that the risk of conflict is minimised. If a category of low risk and low cost regulation with ring-fenced activities were created, this would still offer incentives, encourage competition and promote consumer protection.

Any organisation employing solicitors should have a certain level of responsibility to ensure regulation. The extent and boundaries should reflect the type of

organisation and the risk. Purely commercial organisations may present a different level of risk to NfP organisations; especially those who are regulated in other ways. Lessons should be learned from the transitional protection of Special Bodies over the last few years.

Q33: Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

No. See general answer above (paras 19 and 23-6). Special bodies must have scope to have ring-fenced services so that only those activities led by solicitors are regulated by the SRA. This allows for the particular position of some Special Bodies where solicitor led legal services are a small part of the organisations work and the other activities can be clearly ring fenced. To impose regulation on the whole organisation would prove too great a regulatory burden in terms of cost that could put at risk the sustainability of the NfP sector providing reserved and non-reserved regulated activities.

Shereen Jenkins

I am a returner to the profession having taken time out to travel and work abroad and for family matters. This is a personal response on my own behalf and does not represent any views from this firm.

I believe the proposals are demeaning to the profession and to its standing in the eyes of all other professions. Lawyers in the US suffer low public respect by their lack of regulation, or perceived regulation. In the UK this regulator seems determined to undermine the profession and effectively emasculate any public standing or credibility.

I fail to see the value in any of these proposals for the profession or the supply of legal services generally.

Shereen Jenkins

Solicitor

Response by Shoosmiths LLP to the SRA consultation:

Looking to the future - flexibility and public protection

Introduction

1. As a major national law firm, providing a wide range of legal services to consumers of all kinds, Shoosmiths has an active interest in the SRA's proposals and the impact these will have on solicitors and their clients. This is a period of rapid change politically, economically and from a regulatory perspective. We agree with the Law Society's view that it is not clear why it is necessary or timely, to propose radical and far-reaching changes in an environment of such uncertainty.

2. The OFR regime was a fundamental shift with which solicitors are now familiar. Whilst, of course any regime can be improved, it is not clear that the major changes now proposed will benefit solicitors or clients of law firms. It is our view that instead, they are likely to harm competition and introduce a period of regulatory uncertainty, alongside significant implementation costs.

3. We are concerned that proposals to allow solicitors to provide non reserved activities to the public in unregulated businesses will diminish client protections, confuse clients and impact the reputation of solicitors. It is not clear how the SRA's proposals will provide greater clarity for clients. In our view, the focus should be on educating clients about the current regime and services available, instead of introducing a regime more complex in its structure, which has the potential to reduce client understanding and consequently, their protection.

4. As the Law Society has set out in their response, there are other contemporaneous consultations and reviews of the legal services market such that as a firm of solicitors, it is difficult to assess how those changes might impact our clients, our firm and our business model. Such uncertainty is not beneficial to the good governance of firms.

5. It is not clear to what extent consideration has been given to the work that is being undertaken in other jurisdictions (e.g. Canada and Australia) and how similar challenges are being addressed, for example, by requiring firms to establish an ethical infrastructure, using a self-assessment process which builds on the work undertaken in New South Wales some years ago. Other jurisdictions are also dealing with the need to ensure access to justice, changing legal markets, greater innovation etc, yet it does not seem that there is a similar approach to allow solicitors to offer non-reserved legal services in an unregulated entity.

6. There is a concern that if, for example, regulation in England and Wales provides a lower degree of consumer protection, where clients have a choice, they may choose to use regulated professionals in other jurisdictions to the detriment of our profession.

7. We agree with the Law Society's comments about the lack of vision for the future of the regulatory framework particularly given the CMA's study and the need for the Government to clarify whether it will bring forward a further consultation on regulatory independence. It is unclear whether this is likely to be a priority given the post Brexit challenges. It is therefore very difficult to see what the consequences of the SRA's proposed changes are likely to be both for firms and for consumers.

8. We share the view of the Law Society that the piecemeal approach to the regulatory regime as a whole, and the fact that this consultation is one of a number of linked consultations, means that it is extremely difficult to have a real understanding of how the new regime will work and how it would be enforced.

9. The suggestion that it would be up to the firm to decide if it wanted to tell clients and the public that it employs solicitors is somewhat surprising. This risks consumers drawing confidence from the professional status, despite the lack of consumer protections and therefore this should not be implemented

10. We agree that people want affordable and relevant services but they also need to have services which provide appropriate consumer protection. In our view, consumers are already confused about the options available to them. Whilst cost is likely to be an issue, solicitors are increasingly identifying ways of offering legal services in affordable ways. The idea that solicitors working for unregulated entities, providing non reserved services to the public, would be of benefit to consumers poses a significant risk to the reputation of solicitors in England and Wales. In the long term, this will undermine the global competitiveness of UK law. In addition, there are serious implications for client protection, legal professional privilege and professional supervision.

Question 1

11. We have not encountered any particular issues in respect of the practical application of the suitability test. We concur with the Law Society's concerns about the level of scrutiny given to the returns.

Question 2

12. The reduction in the numbers of principles is surprising. The decision to move from 6 core duties in the 2007 code to 10 principles was a very deliberate decision by the SRA at the time, bearing in mind the FCA's approach. We note that CILEx has 9 principles which are similar to the SRA's current principles.

13. We welcome the retention of new principle 1.

14. We note the wording in principle 2 such that there is no longer any reference to the importance of a solicitor behaving in a way that retains public trust in them personally. We propose that the wording be amended to read "ensure that your conduct upholds public confidence in you and in other regulated individuals and firms."

15. We have no comment on the new principle 3.

16. With regard to principle 4, we would suggest that the requirement to be honest should be in addition to the existing requirement to protect client money and assets. The loss of principle 10 is unfortunate in our opinion, as the principle makes it very clear what the solicitor's obligations are.

17. With reference to new principle 5, this appears to water down the current wording through the use of the word "act". We agree with the Law Society's comments.

18. We have no comment on the new principle 6.

Question 3

19. We refer to our response in question 2.

Question 4

20. We believe that current principle 5 should be retained as it is central to the profession and reflects the high quality that clients can expect from a regulated individual.

21. We believe that principle 7 should remain. It was inserted to reflect the similar provision in the FCA Handbook so that it is clear to solicitors that they must be open and co-operative with the regulator and helps the regulator from an enforcement perspective. Other regulators are taking a similar approach (Nova Scotia and Jersey).

22. We believe principle 8 is useful to reinforce messages within a firm of the importance of running your business in accordance with proper governance and sound financial risk management principles. This is particularly so given the increased importance of good risk management from a business management and professional indemnity point of view.

23. We refer to our comments in question 2 relating to principle 10. We agree with the Law Society's view that given the importance of principles 5 and 10, there are only risks and no benefit to removing what are often seen as hallmarks of the profession. We agree with the Law Society's views about confidentiality.

Question 5

24. We agree that it would be helpful to provide a thorough and developed suite of scenarios. We suggest that those include scenarios on the more complex but common arrangements that fall under the provisions of LASPO.

25. As we have discussed with the SRA, we are particularly interested in the removal of IB 3.14 and the proposal to include scenarios which outline in what circumstances a firm can act for a buyer and seller, or a borrower and lender, in a conveyancing or real estate transaction. It is important to draw the distinction between private clients and sophisticated companies (often with in-house legal teams acting on lease renewal issues between a landlord and tenant). The amendment provides a more level playing field with the Council for Licensed Conveyancers and is less restrictive and more competitive than the current provision.

26. We agree with the Law Society's suggestion about a practising solicitor working in an unregulated entity in order to provide clarification around the parameters of conflict management concerning a non-regulated entity and a regulated entity. We are concerned there will be an uneven playing field.

27. A case study on information that should be displayed to ensure consumer protection would also be helpful as would a scenario that explores the impact of the proposals on the giving and receiving of undertakings.

28. Whilst we feel that the removal of the indicative behaviours is helpful, we would welcome those being replaced by guidance, case studies and toolkits. The use of the term "toolkit" may be confusing as the Law Society's toolkits provide draft policies and procedures, it is not clear what an SRA toolkit will look like.

Question 6

29. We note the SRA's comments in relation to the need for change and disagree. The Code of Conduct and Principles are the most simple and workable aspects of the current regulatory regime and the least in need of change.

30. The existing Code (certainly in terms of the outcomes) is not as restrictive or complex as is suggested although we agree that it would be helpful for there to be guidance and additional support.

31. A short Code does not automatically make it clear or easy to understand. We share the Law Society's concerns about the need for clarity and predictability. There is a strong argument for a definitive "do this" or "do that" approach to compliance which is more straightforward, both from the point of view of internal governance as well as in the easy resolution of potential issues with the regulator. (Alternative approaches are to use a self-assessment model as in NSW and Nova Scotia or the Queensland Law Society deliberative model/lawyers compass - which help solicitors develop the skills to solve ethical dilemmas.)

32. We do not agree with the view that it is necessary to introduce 2 different Codes. The introduction of 2 different codes creates a risk of failure to look at the right Code and adds an unnecessary degree of complexity and confusion.

33. The language used in a Code must be clear and unambiguous. If there are nuances between the Codes, there is a risk of conflicting messages causing misinterpretation and confusion. Behaviour which is acceptable under the current Code may be regarded as incompatible with the

new Code. The lack of information about enforcement adds to the real concern that there is too much discretion given to the SRA, which needs to provide more information.

34. The Practice Framework Rules and the Authorisation Rules would benefit from amendment and simplification to make the current regime easier. However, in our view, great care is needed when making piecemeal changes, particularly as all elements of the SRA regulatory regime are intrinsically linked.

35. The fact that the proposals are not provided with the intended additional guidance means that we are looking at the proposals in a vacuum, without information as to how the new regulatory regime will be supervised and enforced. The emphasis on reducing the size of the Code, allegedly to make it easier for solicitors, is likely to be counter-productive as it is not clear how a shorter Code achieves the SRA's stated aims. The Guide to the Professional Conduct of Solicitors 1999 is still an extremely useful reference source when trying to work out how to resolve ethical dilemmas.

36. It is not clear from the consultation what the basis is for the statement that the Code itself is not reflecting the realities of the market. There is no information provided as to which outcomes had become problematic and which waivers have been granted. For example, there have been waivers of the separate business provisions but those rules have been changed already. Further information is needed to justify this change.

37. It will be necessary to assess the impact of the new provisions on the firm, the clients, solicitors and support staff. Not only will there need to be significant changes to existing systems and controls, including our policies and procedures, but terms of business and precedents will also need amendment. We will have to train all staff on the new requirements and what they mean in practice, which is expensive.

38. The costs involved are not "relatively minor" particularly for larger firms, they will be significant. The day to day costs of compliance are already considerable, these proposals add additional costs, at a time when the profession is already facing major compliance challenges, for example, with the implementation of the Fourth Money Laundering Directive and the GDPR. It is not clear from the consultation why the SRA's changes are necessary or justified.

Question 7

39. We agree with the Law Society that there does not appear to be anything not needed in the Code.

Question 8

40. We endorse the comments of the Law Society. Outcome 8.3 is an extremely important prohibition which provides essential protection for clients at their most vulnerable. There continues to be concern about cold calling and so called 'ambulance chasing' and the removal of this prohibition is difficult to understand, particularly given the likely impact on the duty solicitor scheme.

41. The suggestion that this prohibition is covered by the new 1.2 in the Code for Solicitors and 1.1 in the Code for Firms, is surprising. Whilst many firms would never undertake such behaviour, there are still less scrupulous solicitors who will take advantage of vulnerable individuals.

42. We agree with the views of the Law Society in relation to systems that identify and deal with potential conflicts. The challenges faced by firms in this area are considerable and it is extremely helpful to have a clear provision in the Code.

43. We note the Law Society's comments about undertakings and endorse the Law Society's comments.

Question 9

44. We agree with the Law Society's views. Option 2 would be more restrictive, which conflicts with the objective of designing a Code which is less restrictive. We see no good reason to alter the existing requirements which are set out in the new proposed rule 6.1 and 6.2. It is very confusing as to how we, as a firm, should deal with the 2 sets of provisions in the two Codes.

45. We welcome the removal of IB 3.14 for the reasons that we have already raised. It is also worth noting that the rules of the Council for Licensed Conveyancers in relation to buyer and seller are less restrictive than the SRA's current provisions and from a competition point of view, it is important that there is a level playing field for solicitors and licensed conveyancers.

46. The proposal to include a complete bar on acting where there is an actual conflict would seem to be a retrograde step.

Question 10

47. We have provided answers in question 6.

Question 11

48. We believe that the Code needs more detail and guidance to provide clarity and therefore be effective. However, as the Law Society says, without the full picture in relation to the new framework, it is difficult to reach a definitive judgement.

Question 12

49. It is difficult to answer this question without seeing all the guidance which the SRA intends to publish but we note that 1.3 is omitted from the Code about undertakings, which is still an area of considerable challenge.

Question 13

Confidentiality and disclosure

50. Proposed rule 6.3 in the Code of Conduct for Solicitors (and proposed rule 6.1 in the Code of Conduct for Firms) tracks existing outcome 4.1 (and its equivalent) provided the definition of client continues to cover former clients (i.e. by replacing "clients" by "clients or former clients"). We would expect that to be the case but note that proposed rule 6.5 expressly refers to former clients so an explicit reference to former clients is also needed in proposed rules 6.3 and 6.1 in the Code of Conduct for Solicitors and the Code of Conduct for Firms respectively.

51. Proposed rule 6.4 (about the duty to disclose) incorporates existing outcomes 4.2 and 4.3. There is an oddity in the new rule in the version of the draft code which applies to firms, as the draft rule expressly says that it only applies to individuals. But if it only applies to individuals, why does it need to be in the rule for firms? The underlying point is that in cases like Kelly v Cooper, the courts have made it clear that there is no general assumption that information known to one person in a firm is to be attributed to another.

52. We note that proposed rule 6.4 has two additions to outcomes 4.2 and 4.3. The first is that a solicitor does not need to pass on information to the client which the solicitor has reason to believe will cause the client serious physical or mental injury. This seems to apply only where the client is an individual, and not (for example) where the client is a company of which the vulnerable person is a controller or director. The second is to reflect general law about the mistaken disclosure of information in a privileged document which need not be disclosed to a client. This reflects case law. In the case of these new exceptions, saying that they are exceptions to the duty to disclose is not at all the same as saying that disclosure cannot be made, which is surely what is intended (certainly in relation to the second of them).

53. Proposed new rule 6.5 (not acting if to do so puts client confidential information at risk) largely tracks existing required outcome 4.4. This area is the one which has led to most of the recent reported cases on conflicts and confidentiality, although the cases do not refer to the SRA Code

of Conduct. It is worth noting that the existing rule was altered some time ago to refer to having 'information barriers which comply with the common law'. The proposed new rule just refers to measures which result in 'there being no real risk of disclosure'. This reflects the common law and is consistent with the way in which the new Code of Conduct is drafted.

54. On proposed rule 6.5, we comment that having introduced a reference to former clients (which proposed rule 6.3 does not do) it then uses the term inconsistently so that, on the face of it, a former client's consent is not enough to escape the prohibition on acting, although a current client's consent does. In addition, we do not understand why this rule, with its references to effective measures, applies to individuals?

55. Rule 7.8 in the Code of Conduct for Solicitors requires guidance to accompany it as it depends what 'remedial action' means. We also wonder if the SRA can require a solicitor to take action in these circumstances or if this falls outside its jurisdiction.

Further points in relation to drafting: Code of Conduct for Solicitors

56. The paragraph below the Principles on page 45 of the consultation, implies (when it says 'They apply to conduct and behaviour relating to your practice') that the Code does not apply to a solicitor's private life. This should be clarified.

57. As worded, by comparison with the provisions in the current Code that this would replace, rule 1.4 could be read as meaning that the solicitor is responsible if their client misleads the court or others, or is responsible for other acts or omissions, even if the solicitor was not aware that any mischief was taking place. In light of this, we suggest that rule 1.4 should be reworded as follows:

    *1.4 You do not mislead or attempt to mislead your clients, the court or others, either by your own acts or omissions or **by knowingly** allowing or being complicit in another person misleading the court or others the acts or omissions of others (including your client).*

58. We would also note that rule 1.4 must be read in the context of the wider requirement that solicitors must always act in good faith and that misleading anyone whilst acting as a solicitor would potentially breach that requirement in addition to rule 1.4.

59. Rule 3.1 is poorly worded.

60. Rule 3.4 The term 'Client's attributes' is vague and lacking any legal meaning. It is therefore inappropriate for a Code of Conduct. Moreover, it is unclear what that word encompasses that would not be covered by "needs and circumstances".

61. Rule 4.2 'Others' might more helpfully read "Others, for example lenders, trustees etc.")

Further points in relation to drafting: Code of Conduct for Firms

62. In the Code of Conduct for Firms, cooperation and information requirements section, the text needs to clarify what is meant by 'you'.

63. In Rule 4.2 greater clarity is needed on what is meant by 'competent'.

64. It is disappointing that rule 7.1 provides very little detail to shed light on applicable outcomes in the SRA Code of Conduct for solicitors and RELS 2017.

Question 14

65. We note the Law Society's views. In our view, and certainly within our firm, the roles of COLP and COFA have been helpful in focusing individuals on their individual responsibilities and raising the profile of compliance. Given the effort put into putting them in place, it would seem a retrograde and unnecessary step to now remove them without justification. They provide a focus but our partners and staff understand that they are also responsible for compliance.

66. However, we appreciate that their effectiveness depends on their commitment and attitude to the role. Both our COLP and COFA are engaged and committed to these roles, sitting on the Management Board as well as our Executive Compliance Committee (in essence our Regulatory Affairs Board).

Question 15

67. We agree with the Law Society that there needs to be an improvement in the way in which the SRA's enforcement procedure is being used so it best serves to protect consumers and so it is understood by the profession.

68. We agree that guidance supplementing the outcomes would be useful. There is a challenge in keeping up to date with changes to outcomes and it is important that the SRA provides useful but succinct information in their Compliance News and SRA update.

Question 16

69. As already indicated, we have justifiable concerns about these proposals.

70. We have seen the Law Society's comments on legal professional privilege and concur with their comments that this is a precious right vigorously protected by our judiciary and usually treated with the utmost respect by Parliament when it legislates. It is important to note that it is a right of clients not lawyers. Clients are unlikely to fully appreciate the protections afforded by LPP.

71. The proposals present a substantial risk to clients who are likely to find themselves in real difficulties because they are unclear or misinformed about their entitlement to LPP. The worst case scenario is that a client who believed they were benefiting from LPP loses this protection.

72. Equally the proposals to allow solicitors to operate from unregulated entities without mandatory professional indemnity insurance risks eroding a key element of current client protection. Not only will that leave the solicitors exposed to significant personal liability but the PII regime plays an important role in supporting good risk management behaviours. Increasingly brokers and insurers offer risk management seminars and guidance as it is in their interest to improve risk management and reduce claims and complaints.

73. A concern with the proposal is that consumers will be extremely confused, they are already confused about the differences between solicitors, barristers, legal executives and "lawyers" given that that is not a protected title.

74. We also note the Law Society's comments on lower professional standards. We think the suggestion that newly qualified solicitors with no experience would be able to set up an unregulated firm presents a real risk to clients and the reputation of the profession, also see our response to question 19.

75. The prospect of intervention as indicated by the Law Society is a powerful incentive for compliance and the SRA would not be able to intervene in an unregulated entity. Whilst action might be taken against individual solicitors, how would those clients obtain any recourse?

76. We endorse the Law Society's comments on terms of business and, in particular, the point that insurance and client protections are complicated topics, not easily digested and understood. The amount of work undertaken by compliance professionals on ensuring that terms of business are kept up-to-date with legal and regulatory changes is considerable.

77. The danger is that individuals may be tempted by lower fees and will not appreciate the implications of buying services through an unregulated provider until their position has already been compromised.

78. The Law Society's comments on conflicts of interest are also endorsed. On the one hand, the SRA proposes to introduce greater flexibility for solicitors in relation to conflict, which is welcome, but on the other introduces an uneven playing field where unregulated firms will not have to address the risk of conflict which will be to the detriment of consumers.

79. Whilst the changes for regulated entities may well bring the SRA into line with other legal services regulators, the proposals in relation to unregulated entities do not, as the SRA's proposal will allow entities to undertake legal services without any restrictions in terms of conflict of interest.

80. The reality is that dealing with conflicts of interest (not only legal conflict but also a commercial conflict) and the risk of sharing confidential information is extremely complex and whilst the argument may run that the individual solicitor should not act, the pressures that the solicitor may be put under by the unregulated entity are such that clients will be adversely affected as will the reputation of the profession.

81. The proposal to remove the fundamental protections of not acting where there is a conflict of interest in order to protect confidential information, puts at risk the principle that justice must not only be done but be seen to be done. We endorse the Law Society's comments at paragraph 45, in particular the agreement internationally that lawyers should not act when the interests of their clients may conflict. We agree that there is a very real danger of downgrading professional standards with the consequence of serious negative impact for the standing of the solicitors' profession internationally. This may also impact solicitors from a competitive point of view where clients turn to overseas lawyers rather than solicitors who, even in regulated entities, are seen as having lower professional standards.

Question 17

82. As we are not in favour of these changes, we do not intend to provide such services through a non-regulated entity.

Question 18

83. We agree with the proposal to maintain the position whereby a sole solicitor can only provide reserved legal services for the public as an SRA authorised entity.

Question 19

84. Whilst the current requirements may not be as effective as they could be, our view is that some form of "qualified to supervise" requirement is necessary. It is not accepted that newly qualified solicitors will not pose a significant risk to the delivery of the proper standard of service and like the Law Society, we will be interested to see the data.

85. The SRA will have their own data in relation to the granting of waivers of the supervision requirements historically and a comparison between that information and the findings of the SDT would be helpful. The suggestion of removing the requirement creates a very real risk for clients and the potential impact on individual professional development would again downgrade the standards of solicitors.

86. We note the Law Society's comments about the research which seems to contradict the SRA's views as well as the comments relating to the SDT findings.

Question 20

87. We agree with the Law Society that consumers must be provided with sufficient information in a clear way so that they understand the protections they have with a regulated provider as against an unregulated provider. We agree with the Law Society's views.

Questions 21 and 22

88. We have considered the Law Society's views and concur with them. We agree that whilst the initial impact assessment provides an overview of the thinking behind the changes proposed in the consultation, there is limited evidence to back up some of the assumptions made in the assessment. A comprehensive equality assessment has not yet been made and is essential before any of the proposals are adopted.

89. We note that the new Code is designed to make it easier to comply and reduce the burden of regulation for firms. However, good guidance will be essential to help solicitors and firms to make it easier to comply. As already indicated, there must also be a credible and well understood enforcement approach. If these are not available, there is a very real risk that the new Code will not reduce the burden on firms but instead will increase it.

90. The SRA has been very clear in the past about not providing guidance and the proposal now to provide guidance is welcome. However, it is important that guidance is of real value and well drafted as otherwise firms will be left in limbo with the removal of more detailed rules and indicative behaviours. We agree with the Law Society that we do need to see the guidance as soon as possible to assess whether it will plug that gap. We agree with the Law Society about the risk of guidance and toolkits being treated as regulation, stifling innovation and adding to costs. That risk does not appear to have been identified.

91. We agree with the Law Society's concern about the lack of information about how the proposals are to be enforced. The profession and the public need to be confident that the regulations will be enforced in an effective and proportionate manner, particularly given that the LSB rates the current function as not being satisfactory. As the enforcement function is critical to the success of these changes, it would be helpful to understand how performance in this function will be improved.

92. We have already expressed our concern in paragraphs 37 and 38 about the impact of the regulatory changes on costs. This is an area whether further work is needed, to ensure the costs do not outweigh any benefits.

Question 23

93. We do not agree with the proposal and echo the Law Society's comments.

Question 24

94. No comment

Question 25

95. We have grave concerns about the proposal in relation to solicitors working in alternative legal services providers. The suggestion that the Compensation Fund should not be available leaves clients of such solicitors open to a significant lack of client protection.

Question 26

96. We do not agree that individual solicitors should be able to operate from unregulated entities without mandatory PII cover. A lack of PII leaves the client open to substantial risk of not being able to recover losses. We note the Law Society's comments about firms with a poor claims record. The problem for the consumer is that they are not in a position to assess the quality of the legal services being offered. It is for this reason that comparison websites exist and complaints information is made available. The situation will be exacerbated with unregulated legal services providers who offer services to clients who have no recourse to the Compensation Fund or PII which will damage the reputation of the whole profession.

Question 27

97. We endorse the Law Society's views and have concerns about the impact of the proposal on consumers. We do not understand the justification for it not being appropriate to impose a regulatory requirement for PII on the individual solicitor. It would be feasible in our view to require the solicitor either to obtain PII in his or her own right or to be satisfied that the unregulated entity had sufficient PII in place to provide an appropriate level of protection for the solicitor's clients.

98. We do not agree with the assumption that consumers will understand the differences between regulated and unregulated providers and the consequent differences in client protection.

Question 28

99. We agree with the Law Society that this requirement should be retained.

Question 29

100. No comment.

Questions 30 and 31

101. We agree with the Law Society that the introduction of an arbitrary threshold will not overcome the concerns about the SRA's proposals. We agree that regulation should be applied consistently to protect buyers of legal services and we are not convinced that it is in the interests of consumers or in the wider public interest, to allow regulated and unregulated providers offering the same service but with different standards of consumer protection.

Question 32

102. It is not clear from the consultation what the SRA is proposing in relation to intervention and we are not convinced that the other statutory powers would be of real assistance.

Question 33

103. We agree that all work within a recognised body or RSP should remain regulated by the SRA.

21 September 2016

Solicitors Independent Financial Advice

Consultation: Looking to the future - flexibility and public protection

Consultation questionnaire form

Question 1

Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

No

Question 2

Do you agree with our proposed model for a revised set of Principles?

I agree with the model. However, I am not sure that the expression “act with independence” is meaningful. Acting with a concept such as independence is not the same as embracing that concept. The intention must be to ensure that solicitors avoid being influenced by third parties. So a more felicitous form of words might be “act independently of any external influence”.

Question 3

Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

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?

No

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?

None immediately spring to mind, but I will keep an eye on the SRA web site.

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?

Yes, but brevity and focus should not necessarily be the sole objective. The element which has been missing in the current Code is the need to encourage the adoption by firms of efficient business structures and well-ordered management systems, on the lines of the requirements of the FSA/ FCA. I would like to have seen this included in the new Code. A well structured and well managed firm will be better able to minimise risk and ensure clients' best interests.

Question 7

In your view is there anything specific in the Code that does not need to be there?

The reference to "matter" in 5.1 (b) of there Code for solicitors. Please see my response to question 13. It is striking that in the draft document a gap has been left before the word "matter", suggesting that the draftsperson might have been in two minds as to whether this was the most appropriate word to use. I would respectfully suggest that it is not.

Question 8

Do you think that there anything specific missing from the Code that we should consider adding?

Yes. The current provision in Outcome 6.3 requiring that solicitors should ensure that clients are in a position to make informed decisions as to whether to proceed with a referral has been omitted, and I feel that it serves a very valuable purpose in ensuring that solicitors conduct due diligence on proposed referees and make this information available to their clients. The Principle that solicitors should always act in the best interests of the client requires only a subjective judgment on the part of the solicitor, and in our view it is important that the client should also be satisfied, and therefore less likely to complain about unsatisfactory experiences with referees.

Currently, in all too many firms solicitors and other fee-earners make their own decisions as to whom to refer their clients, and these decisions are often based on personal relationships and with insufficient knowledge of the credentials of the referee. In our view decisions on referrals should be taken by firms' managements on a central basis, and it should be the responsibility of firms' COLPs to co-ordinate the due diligence vetting process. In this way the risk arising from the consequences of unsuitable relationships can be minimised.

The requirement to obtain clients' informed consent to referrals to separate businesses has been retained in section 5.4 of the Code for Solicitors, and the absence of the intermediate client protection of informed decision in relation to other referrals is conspicuous.

Question 9

What are your views on the two options for handling conflicts of interests and how they will work in practice?

In my view Option 2 is clearer and more practical

Question 10

Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

Not entirely, no. Please see my response to Question 13.

Question 11

In your view is there anything specific in the Code that does not need to be there?

No

Question 12

Do you think that there anything specific missing from the Code that we should consider adding?

In my view, the new Code offers a golden opportunity to take a leaf out of the book of the FSA and FCA and to require firms to adopt management systems and controls which will assist them not only to comply with the regulations but also to become fundamentally more viable business enterprises. The FSA/ FCA principle is that well managed businesses are best placed also to be compliant businesses, and in such businesses individuals are less likely to go off on frolics of their own, thereby creating uncontrolled risk for the overall business.

The new Code achieves the objective of simplicity and brevity, but this should not be the sole objective. Solicitors' firms are about to have to fight for their existence in the post-Legal Services Act market and simply being righteous will not help them. They need to be as commercial as their competitors. To this end, the financial regulators have specific requirements in relation among other things to senior management arrangements, apportionment of responsibilities, areas covered by systems and controls, and general organisational requirements. By contrast, section 8.1 of the new SRA Code suggests that managers' responsibility is confined to compliance. The SRA is in a position not only to assist firms to be compliant but also, by means of good practice, to survive. However, the proposed new Code is sadly deficient in this respect

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?

In relation to the Code for Solicitors, I have two caveats on the drafting:

1. Section 3.6 requires the individual solicitor to ensure that the individuals they manage are competent. I would respectfully suggest that this should be the role of the firm's management rather than the individual solicitor. One of the critical flaws in the business model of many law firms is that each individual member of the firm acts in their own silo, taking their own decisions without regard to the interests of the firm as a whole – the "confederation of sole practitioners syndrome". If they are to succeed commercially, firms must be

encouraged to act of a team basis.

On the same point, I am concerned about the fact that Outcomes Focused CPD requires the individual solicitor to decide what is right for him or her, as if they were working in a vacuum. In relation to matters of competence, there is great advantage in firms' managements being able to take an overview, having regard to the optimum deployment of their human resources. After all, it will be the firms, not the individuals, who will be paying the bills for training!

2. Section 5.1 (c) reads "the agreement is in writing". What agreement? There is no previous reference in this provision to the word "agreement". Is the "agreement" the "arrangement referred to in 5.1 (b) or is this provision suggesting that an agreement with the client is required? Clarification, please.

   Also, in relation to 5.1 (b), the reference to "matter" is unfortunate, in that it perpetuates the assumption that solicitors are concerned only with transactions, and not with on-going client relationships. The wording here implies that if a solicitor is involved in a series of transactions with a client, a separate disclosure would need to be made in relation to each "matter". Why not simply say "clients are informed of any relevant fee-sharing arrangement"?

In relation to the Code for firms, I applaud the decision to provide separately for individuals and firms, but this does beg the question as to what is the "firm" to which the requirements apply. It can't be the total membership of the firm, given that the total membership is incapable of satisfying, for example, the requirement to have effective governance, to be accountable for compliance, and to identify and monitor risks. These are the responsibilities of management. But what is the management? Is it the equity partners and/ or directors or all the partners or directors, and/ or other managers? If the firm defaulted on these requirements, to whom would the SRA look? This needs to be clarified, not least because many law firm managers are uncertain as to their rights and responsibilities, and in particular do not feel that they have the authority to implement good business practices and to ensure compliance. The three-line description of their functions in 8.1 totally ignores these vital issues.

Specifically, I wonder how the firm (however this term might be defined) might be expected to comply with the requirement in Section 2.1 (c) that its managers should comply with the SRA's regulatory arrangements. The managers would clearly be expected to ensure compliance by the firm, but not vice versa!

So this goes back to my response to Question 12, about the need for proper management systems and controls, on the lines of those prescribed by the FSA/ FCA. The pursuit of brevity appears to have resulted in the wider picture being neglected.

In short, the new Code leaves firms' managements and compliance officers even more uncertain about their respective roles and their inter-relationships than they are at present. Holding seminars and providing guidance would clearly be helpful, but the importance of management needs to be made clear in the Code itself.

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.

I definitely agree. It is vital that firms should have compliance officers, to whom members of the firm can look for guidance and who can provide a conduit for the SRA.

Many compliance officers are uncertain as to their roles, but they should be responsible for:

- Keeping themselves up-to-date with regulatory requirements
- Informing other members of the firm of regulatory developments and providing an in-house resource in relation to compliance matters
- Acting as a compliance watch-dog
- Prompting management of the need for compliance-related training of staff, including money laundering
- Alerting management to its responsibilities
- Recording matters of significant concern and reporting as appropriate to the SRA
- Liaising with the SRA and any other regulators generally on behalf of their firms' managements

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?

By defining much more specifically the responsibilities of the firm's management and thereby taking the heat off the compliance officers. What firms need to understand is that the buck stops with management.

Question 16

What is your view of the opportunities and threats presented by the proposal to allow solicitors to deliver non-reserved legal services to the public through alternative legal services providers?

I approve the proposal. The public safeguard is in the individual practitioner's status as a solicitor. The solicitor brand as applied to firms is much less important and indeed can be a mixed blessing. There are notable examples of firms preferring the less traditional trans-atlantic term "lawyers".

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?

N/A. I am a non-practising solicitor consultant

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?

I agree with this proposal.

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?

I agree that the expression "qualified to supervise" is both too vague and unnecessary. In addition, as mentioned in relation to Question 13 above, the concept of management is not sufficiently well defined.

Question 20

Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

It is in firms' own interests to promote the consumer protections available to their clients, and they should be required to do so in their client-facing marketing material. However, it would not be appropriate to "display" this information in the form of a public notice, if this is what the term "display" is intended to suggest.

Question 21

Do you agree with the analysis in our initial Impact Assessment?

Yes

Question 22

Do you have any additional information to support our initial Impact Assessment?

No

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?

Yes

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?

I have no views on this question.

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?

If not, what are your reasons?

I do agree.

Question 26

Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

Yes.

Question 27

Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

I cannot envisage any difficulties.

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?

Yes.

Question 29

Do you have any views on what PII requirements should apply to Special Bodies?

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?

Yes.

Question 31

Do you have any alternative proposals to regulating entities of this type?

No.

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?

The status quo seems to be satisfactory.

Question 33

Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

Yes.

Thank you for completing the **Consultation questionnaire form**.

Please save a copy of the completed form.

Please return it, along with your completed **About you form**, as an email attachment to consultation@sra.org.uk, by **21 September 2016**.

Alternatively, print the completed form and submit it by post, along with a printed copy of your **About you form**, to

Solicitors Regulation Authority
Regulation and Education - Policy - Handbook 2017
The Cube
199 Wharfside Street
Birmingham
B1 1RN

Consultation: Looking to the future - flexibility and public protection

Response ID:360 Data

2. Your identity

Surname

Cockshutt

Forename(s)

Simon

We may publish a list of respondents and a report on responses. Partial attributed responses may be published. Please advise us if you do not wish us to attribute your response or for your name or the name of your firm or organisation to appear on any published list of respondents.

Attribute my/our response and publish my/our name.

Please identify the capacity in which you are submitting a response. I am submitting a response…

in another capacity

Please specify: non-practising solicitor

3.

1. Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

no

4.

2. Do you agree with our proposed model for a revised set of Principles?

In broad terms, yes. It is driven by the government's liberalisation of the provision of legal services, under the mantra that all competition is good (or God). This skips over the fact that when the mechanism of service provision s not understood, the overwhelming determinant of good service is price.

5.

3. Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

no comment

6.

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?

No comment

7.

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?

It is generally helpful to have consistently reported cases so that the regulator's views on interpretation or application of specific rules are widely known.

8.

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?

Certainly better than the existing Code, in that it is shorter, but the outcomes focussed approach still has the potential to create difficulties. 'Thou shalt not kill' is a more clear approach than 'Thou shalt avoid situations where thou may be required to kill unlawfully.'

9.

7. In your view is there anything specific in the Code that does not need to be there?

No comment

10.

8. Do you think that there anything specific missing from the Code that we should consider adding?

No comment

11.

9. What are your views on the two options for handling conflicts of interests and how they will work in practice?

No specific comment. Philosophically, there will always be a tension between ethics and business when a solicitor is asked to act in a situation which threatens conflict, or allows conflict in limited (informed client) circumstances. While I appreciate the rationale - and history - of how this came about, it has always struck me as a withering of the high moral ground which used to be a distinctive feature of the profession. But this stable door has been open so long the hinges creak!

12.

10. Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

Yes, better than the 2011 version, but still working as a code rather than as rules.

13.

11. In your view is there anything specific in the Code that does not need to be there?

No comment

14.

12. Do you think that there anything specific missing from the Code that we should consider adding?

No comment

15.

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?

No comment

16.

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.

Yes. I was the COLP in my last firm, and it was helpful in compliance terms to have a designated compliance role. My former firm had a reasonably sophisticated risk management policy, with risk management partners in each office, and the COLP role (and that of the COFA) was an extension of that recognised firm role. However, in firms with less well established internal governance mechanisms, the compliance role will be more important in giving 'compliance' some teeth.

17.

15. How could we improve the way in which the COLP/COFA roles work or to provide further support to compliance officers, in practice?

Consideration should be given to assuring compliance officers that honest discharge of their compliance duties, however that may affect the firm's business, cannot properly form the basis of a disciplinary/employment complaint against them. Consideration could be given to a mandatory template

form of indemnity that firms/employers must give to compliance officers.

18.

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?

It is a further watering down of the solicitor 'brand', but inevitable given the general market liberalisation determined by Government. There are sharp philosophical questions about whether market forces should be allowed free rein, and if regulated how that is to be achieved, and what measure of regulation is required. None of this is relevant to the immediate purpose of this consultation. However, the rule of law is an essential component of any system of government, and to treat it as market driven rather than principles driven is to abrogate a key component of good democratic government. Placing price above principles (which, in essence, is what a liberalised market does) foreshadows a corrupt and nepotistic system destructive of democracy and the welfare of all citizens.

19.

17. How likely are you to take advantage in the greater flexibility about where solicitors can practice as an individual or as a business?

No comment

20.

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?

Agree

21.

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?

What about sole solicitors in non-regulated entities supervising unqualified staff? Surely what will happen is that a solicitor will be employed to manage a cohort of unqualified persons carrying out legal functions. (These persons may be very competent, although not solicitor qualified.) Diluting the 'qualified to supervise' requirement increases the risk that solicitors will be commercially expected to 'bless' the work of unqualified staff in circumstances when they have limited experience to detect and correct legal work.

22.

20. Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

No: few will bother to read any detail, and while ticking a box the detail will neither enhance the solicitor brand nor protect the consumer. (Example: how many people read the detailed T&Cs online firms require accepting before their goods and services can be accessed? These are not alterable, and the choice is 'service on our terms' or no service at all. A commonplace terms is that personal date may be sued by the seller for any purpose whatsoever, to comply with the DPA. Result: since the DPA more personal data is traded than was ever the case before.)

23.

21. Do you agree with the analysis in our initial Impact Assessment?

No comment

24.

22. Do you have any additional information to support our initial Impact Assessment?

No

25.

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?

Yes. Alternative legal service provider swill seek to use client balances as collateral for debt, and this would pressure solicitors in such organisations.

26.

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?

They should not. It creates an actual or potential conflict between solicitor and employee. This is not good for the profession or the public.

27.

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? If not, what are your reasons?

Yes.

28.

26. Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

Yes

29.

27. Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

Yes: thinning of the solicitor 'brand' - not all solicitors are equal. Perhaps emphasise a firm approach?

30.

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?

Yes: there should be an equivalence of insurance cover for all solicitors, howsoever practising. It is one of the distinctive features of being a solicitor. Coupled with this, solicitors should be regulatorally protected from the consequences of acting in honest compliance with professional rules but adversely to the commercial interests of their employer.

31.

29. Do you have any views on what PII requirements should apply to Special Bodies?

No comment

32.

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?

Yes. Consistency is essential. Regulate the entity if the activity is reserved; not otherwise.

33.

31. Do you have any alternative proposals to regulating entities of this type?

No comment

34.

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?

No

35.

33. Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

Yes

Consultation: Looking to the future - flexibility and public protection

Response ID:4 Data

2. Your identity

Surname

Singleton

Forename(s)

Elizabeth Susan

We may publish a list of respondents and a report on responses. Partial attributed responses may be published. Please advise us if you do not wish us to attribute your response or for your name or the name of your firm or organisation to appear on any published list of respondents.

Attribute my/our response and publish my/our name.

Please identify the capacity in which you are submitting a response. I am submitting a response…

on behalf of my firm.

Please enter your firm's name:: Singletons

3.

1. Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

It is not always easy to know what is work done as a solicitor and what is not. To be on the safe I do work through my solicitors' firm.

4.

2. Do you agree with our proposed model for a revised set of Principles?

It sounds like I will have to follow two rule books - my firm (which is only me) and one for individuals so that migh amount to having to read two documents rather than one and thus more regulation. Hopefully not.

I am concerned that we erode the protection and status of solicitor if you let people not operating through solicitors' firms and without protection for those they fleece and from whom they steal to use the word solicitor when they do not operate through solicitors' firms.

5.

3. Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

No comment

6.

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?

7.

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?

8.

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?

Yes, it is very good indeed and easy to follow.

9.

7. In your view is there anything specific in the Code that does not need to be there?

No

10.

8. Do you think that there anything specific missing from the Code that we should consider adding?

No except perhaps emphasise a bit more the duty to the court, the professional obligation.

11.

9. What are your views on the two options for handling conflicts of interests and how they will work in practice?

No comment as being a one person practice I have just about never had a conflict situation.

12.

10. Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

Yes

13.

11. In your view is there anything specific in the Code that does not need to be there?

No

14.

12. Do you think that there anything specific missing from the Code that we should consider adding?

No

15.

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?

No

16.

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.

They have always seemed fairly pointless to me as I am the only person in the firm and I have duties to make sure I follow the rules. To require I give myself this kind of title seems pointless although obviously I have complied with it.

17.

15. How could we improve the way in which the COLP/COFA roles work or to provide further support to compliance officers, in practice?

Not really relevant to a one person solicitor's firm so no comment.

18.

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?

So this would be work that isn't litigation for example. I write contracts (and do so through my solicitor's firm). Some friends have set up on their own as consultants (not solicitor's firms) and continued to advise their clients by drafting contracts for them. they are obviously careful never to use the word solicitor as they are no longer paying for indemnity insurance and avoid all the SRA compliance requirements Practising Cert fee and the like. There has always been a bit of uncertainty for them about what they can say they are eg legal advisor, lawyer, attorney, legal consultant (we all remember the big fight with patent agents over

whether they could use the misleading attorneys word).

Under the plan instead of just giving clarity on which words those people can use when they opt out of all the regulation and admin and cost those of us who are solicitors' firms have to be subject to and pay, these people can swan off, call themselves solicitor under the new proposal but not have any of the regulation or insurance requirements (depending on what the consultation decides).... it just seems a bit unfair to those of us who instead pay up and play the game properly. Could we not instead have a list of the words those people can and cannot use and a bit more guidance on which words they can use other than solicitor which is banned?

19.

17. How likely are you to take advantage in the greater flexibility about where solicitors can practice as an individual or as a business?

I am very proud to be a solicitor and what it stands for and I would prefer to continue through my firm and I also undertake commercial litigation.
However if things got too complex with regulation and if I felt I could manage without the litigation side I could opt out under the old or new system. Anyone in the country even without a single GCSE can call themselves legal consultant just as I could set myself up as a therapist or life coach. I would rather see compulsory warnings people who are not qualified are forced to use if they advise on law. Eg a statutory instrument requiring wording such as
"Although we provide legal advice and some of our staff have a law degree we are not a solicitors' firm and are not insured" etc etc etc...If you want indemnified legal advice from a qualified solicitor go to the Law Society find a solicitor website at xxxxx"

(Practice in the question should be with an s as it's a verb by the way, not a noun)

20.

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?

Yes, we should keep that as it stands.
I do some IP work where new types of practices on the other side of the case have set up but they cannot litigate and that feels right to me and is protective of clients.

If we let any Tom Dick or Harry (or Jane, Javid or Amar) offer reserved legal services then we might as well disband the regulated profession. The public would be utterly confused and they would lose their protection.
I certainly accept in areas like family law increasingly people self represent but most of those disputes should be dealt with on line or by mediation or by on line calculators anyway not be before the courts. I am not against direct access barristers practising too but to let people who aren't solicitors litigate on behalf of others is really risky. I have a case where someone is in effect doing this on behalf of someone vulnerable (which has just ended - my client won) and that really drew out all the possible problems with this. Did that individual really appoint that person to act in their interests, how can that be proved (given there won't be a retainer or clear written engagement terms between them) etc etc etc

21.

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?

"Changes could potentially allow a newly qualified solicitor to set up in business as a sole practitioner."
I can hardly believe this is being considered nor the statement that length of time in practice does not determine competence. Ask any solicitor in the UK what their first 3 years PQE is like and they will just about all say they were having to make out they knew what they were doing but it was only after a few years they really had enough experience to be sure they would. Of course you need 3 years + to be good

enough to practise on your own. We must not change that rule otherwise clients will suffer. 3 years it not too long to wait and if you are so incompetent you cannot get a job in your first 3 years we certainly don't want you practising.

22.

20. Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

No. If you tell a customer/client your work or product may well be useful and they can sue you if they like you hardly do the profession much good and writing this from a family of psychiatrists you put a suggestion in the mind of the client that we get things wrong all the time and it is no cost to sue the lawyer whereas in fact spurious complaints can kill careers and destroy firms. We need to do no more than ensure terms of engagement set out how people can complain if they need to.

23.

21. Do you agree with the analysis in our initial Impact Assessment?

I have not had time to look at this.

24.

22. Do you have any additional information to support our initial Impact Assessment?

No

25.

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?

I agree. We need to minimise risk to the public.

26.

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?

There is no need for this at al in relation to in house solicitorsl. I have worked with in house solicitors for 30 years and it would be very rare that they would need to hold any kind of client money. The fewer people who are allowed to get their hands on other people's money the fewer risks that someone will be tempted to run off with it.

27.

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? If not, what are your reasons?

Absolutely. Solicitors are subject to full regulation and pay massive practising certificate and insurance fees and spend years qualifying at huge cost. If othes who have not had to go through all that pay all that can then just steal from their clients and we solicitors have to pay up is utterly unjust.

28.

26. Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

Yes as it confuses the picture to change things.

29.

27. Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

No comment

30.

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?

Yes

31.

29. Do you have any views on what PII requirements should apply to Special Bodies?

No

32.

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?

A trigger (eg if 50% are solicitors) in a non SRA regulated firm seems more sensible to me and is consistent with other regulated sectors. Whatever makes it harder for non regulated firms to operate as legal advisers the better.

33.

31. Do you have any alternative proposals to regulating entities of this type?

34.

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?

No comment.

35.

33. Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

Yes

SOUTH LONDON LAW SOCIETY

Response to SRA consultation

"LOOKING TO THE FUTURE"

General Remarks:

The South London Law Society is the local law society for solicitors' firms in the South London Boroughs of Wandsworth, Lambeth, Southwark, Lewisham and Greenwich.

There are approximately 400 South London firms providing legal services in the justice system. These are approximate figures which are taken from "Find a solicitor", the Law Society's website accessed by members of the public looking for a solicitor.

Members of the South London Law Society work in the majority for high street firms, partnerships with three or less partners, sole practitioners' practices and fewer than five large firms.

The South London Law Society is concerned with the proposals put forward by the SRA, in particular as it considers that the proposals, if implemented, would adversely affect consumer protection and the trust the public places in the profession. They are also likely to result in confusion for consumers where they wish to seek redress against a solicitor.

There is also scope for increasing the risks to solicitors working in unregulated practices.

We set out our comments to some but not all consultation questions in more detail below.

Consultation Questions

Question 2 - Do you agree with our proposed model for a revised set of Principles?

The Society is concerned that reducing the principles is not helpful. It is suggested that it will be absolutely clear to solicitors how they must act, but the lack of indicative behaviours/ other guidance may lead to difficulties for solicitors in deciding how to proceed in a given situation.

Removal of the requirement to protect client money and assets is a concern as this is fundamental to trust placed in the profession.

Question 3 - Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

The Society is concerned that removal of the reference to 'you' detracts from the personal responsibility all solicitors have to uphold trust in the profession.

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?

We consider that the obligation to provide a proper standard of service to clients is fundamental to the role of solicitor and justifies the trust placed in the profession. We consider it should therefore be retained.

We are also concerned about the removal of the obligation to protect client money and assets and consider this should be retained.

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?

The Society considers that the wording of the Code is loose and open to interpretation. Most solicitors with whom we have come into contact prefer certainty and clarity as to what they can and cannot do. As drafted, the code may give rise to misunderstandings.

Question 7 In your view is there anything specific in the Code that does not need to be there?

As noted above, we consider that greater detail would be welcomed by solicitors, not less.

Question 8 Do you think that there anything specific missing from the Code that we should consider adding?

Again in the interests of greater certainty, we consider a prohibition on unsolicited approaches to clients be retained. We note it is proposed current Outcome 8.3 be removed. This may lead to confusion amongst the profession and consumers.

We also consider that there is an issue in relation to undertakings and that there may be reluctance to accept an undertaking from a regulated solicitor working in an unregulated entity. We consider the Code might address these concerns, perhaps by reference to the disciplinary nature of a breach of the undertaking.

Question 10 Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

We are concerned that having different regulation of solicitors and entities, and allowing solicitors to carry out unreserved activities in non-regulated entities is liable to give rise to confusion and endanger the protection of consumers.

Question 11 In your view is there anything specific in the Code that does not need to be there?

As stated above, we consider greater detail rather than less would be appropriate.

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.

The South London constituency contains a significant number of small firms and sole practitioners for whom the regulatory burden is becoming increasingly difficult. There may be scope for some flexibility in how rules apply to smaller practices. We consider the principles behind the COLP and COFA roles need be maintained with further thought given to implementation.

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?

We consider that the proposals give rise to a number of concerns as touched on in our introductory paragraph. These include:

- Greater confusion / lack of understanding by the public, particularly when it comes to seeking redress from solicitors working in unregulated entities, particularly given the proposal for removal of the need for PII cover and lack of access to the compensation fund.
- A shift of the cost of regulation to smaller firms: if larger commercial firms move the majority of their work to non-regulated entities, paying less towards the cost of compliance, these costs could very well be placed on smaller regulated entities.
- Greater exposure to solicitors working in unregulated entities
- Possible conflicts of interest between regulated solicitors and the commercial interests of his / her non-regulated employer entity.
- Creation of a two-tier profession

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?)

We agree with this proposal.

Question 20 Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

We consider that in the interests of consumer protection detailed information about the protections available should be available and easily accessible. Guidance on the precise detail should be given.

This information could readily be provided in a SRA leaflet given to all clients at the outset of a retainer.

We have concerns about non-regulated entities not being required to provide this information – and more specifically details of the protection that are not afforded to clients of regulated solicitors not in regulated practices.

Question 21 Do you agree with the analysis in our initial Impact Assessment?

We do not agree with the premise that the proposals will contribute to meeting an unmet legal need as set out by the SRA and there seems little robust evidence to support this.

On the contrary, the unmet legal need in the UK is of those who, with the drastic reductions in legal aid and increases in court and tribunal fees are not able to engage a solicitor at any price point. We do not consider removing the need for providers of non-reserved activities to be regulated will reduce prices sufficiently, and indeed would remove many important protections for some of the most vulnerable in society.

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?

We do not agree solicitors should be able to provide services through alternative legal service providers, and as such the question should not arise.

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?

We consider that any solicitor working in a non-regulated environment (which presumably encompasses in house solicitors) should not be able to hold client money.

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? If not, what are your reasons?

As noted above we do not support any solicitors working in ALSPs for the very reason that access to the compensation fund would not on current proposals be available. We note the reasons for this but suggest that claims on the compensation fund can arise from the provision of non-reserved activities.

Question 26: Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

We strongly oppose this proposal. PII cover is a fundamental client protection and to maintaining trust in the profession. We also suggest that maintaining PII is a necessary corollary of acting in a client's best interests.

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?

Yes. Special bodies can provide reserved activities for some of the most vulnerable members of Society for whom the highest level of consumer protection is paramount.

This also goes to the principle of fair and consistent regulation for all solicitors.

Question 29: Do you have any views on what PII requirements should apply to Special Bodies?

We consider the requirements should be the same as for traditional law firms.

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?

It is not clear to us how this would operate in practice; we anticipate there would be significant practical difficulties.

Question 33: Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

We agree with this proposal.

South London Law Society 20 September 2016

Mr Gareth Ledsham, President, South London Law Society

Mr Robert Hush, Vice President, South London Law Society

Keeping South Wales Safe
Cadw De Cymru'n Ddiogel

Protecting and Reassuring
Diogelu a Thawelu Meddwl

Joint Legal Services
Gwasanaethau Cyfreithiol Cysylltiedig

Our Ref: NJW/14056
Your Ref :

20 September, 2016

By email only: consultation@sra.org.uk

Dear Sir

Re: SRA Looking to the Future

I am writing in response to your "Looking to the future" consultation on behalf of the South Wales and Gwent Joint Legal Services team ("JLS"). In JLS we currently have 10 in-house solicitor's posts and a further 3 qualified solicitors acting in an advisory capacity.

Following a waiver granted by the SRA under Rule 4, we advise the following four clients:

- Chief Constable of South Wales Police
- Police and Crime Commissioner for South Wales
- Chief Constable of Gwent Police
- Police and Crime Commissioner for Gwent Police

Whilst recognition of the work we undertake as in-house solicitors is welcomed, it is imperative that the SRA fully understand the nature of this work and does not place unduly restrictions thereon.

The proposed amendments seeks to provide a flexibility which is not sought by an in-house provision providing legal services to specifically authorised clients. In the circumstances set out above, it would be impossible to restrict legal privilege to the employer, thus exposing

Please reply to/Atebwch i :

Joint Legal Services / Gwasanaethau Cyfreithiol Cysylltiedig
South Wales Police Headquarters, Cowbridge Road, Bridgend, CF31 3SU
Pencadlys Heddlu De Cymru, Heol Y Bont –Faen, Penybont, CF31 3SU
Tel/ Ffon: 01656 869476 Fax/Ffacs: 01656 302103

the remaining three clients. It should be noted that we have reviewed the Consultation Paper from our perspective of a collaborative legal team in the police sector.

There is an obligation to consider joint legal services arrangements under s.22 of the Police Act 1996 and the Mutual Aid provisions under s.24 of the same Act. s.89 of the Police Reform and Social Responsibility Act 2011 ("PRSRA") places a duty on chief officers and policing bodies to keep collaboration opportunities under review and to collaborate where it is in the interests of efficiency or effectiveness of their own and other police force areas. The PRSRA deems collaboration so important that it provides the powers for the Secretary of State to mandate police collaboration. There are further requirements for collaboration within the emergency services currently being presented through Parliament in the Policing and Crime Bill which anticipated to receive Royal Assent in January.

Our collaboration permits joint access to increased legal resources. Each Force has a different structure and make up of specialised skill sets. By collaborating, each Force gains access to the resources not only of the actual solicitors but also the support staff, ICT and back office tools such as research facilities. The access to specialised solicitors results in reduced costs as this would often have to be outsourced.

There is a formal collaboration agreement which clearly delineates roles and responsibilities, not only of the solicitors but also the clients. The governance structure provides the control envisaged of "employer" and each client has direct control over the staff and its work. This ensures the promoting and adherence to professional principles. The collaboration is largely for cost saving efficiencies and is not seeking to mirror a profit trading entity.

The risk of conflict and confidentiality is dealt with by internal policies clearly detailing how to deal with any suspected issues and should a conflict arise, this would be outsourced to an independent third party adviser. Breach of these provisions could result in disciplinary action. Our preferred option in respect of this provision therefore, is option 1.

Your proposed amendments would seek to undermine the benefits created by collaborative working, especially in the emergency services sector. A hardship could arise from the operation of the provisions in that cost would be expended on a parallel service and thus detract from prioritising monies on front line services. By introducing a separate code, you continue to differentiate between the in-house and private practice solicitors.

We urge you consider this specific issue of collaborative working and the continued authorisation, and protection, of such under Rule 4.

Yours faithfully

Nicola White
Solicitor (Corporate)

Police & Crime Commissioner for Cleveland
Cleveland Police Headquarters
Ladgate Lane
Middlesbrough
TS8 9EH

Email: pcc@cleveland.pnn.police.uk
Website: http://www.cleveland.pcc.police.uk

Police and Crime Commissioner:	Barry Coppinger	Tel: 01642 301653
Chief of Staff (Chief Executive & Monitoring Officer):	Simon Dennis BA, Solicitor	Tel: 01642 301653
Chief Constable:	Iain Spittal	Tel: 01642 301217

By email only. consultation@sra.org.uk

3rd October 2016

Dear Sirs,

I write with regard to your recent consultation document entitled "Looking to the Future". I understand that the consultation period has closed, but I would be grateful if you could nevertheless add my observations to others who I know recently wrote to you on behalf of lawyers working within the police service.

I am a consultant solicitor working within the Office of the Police and Crime Commissioner for Cleveland. The PCC for Cleveland together with his colleagues from Durham and North Yorkshire and their respective chief constables have for some time been engaged in seeking out collaboration opportunities both for operational and back-office policing functions. Their efforts in this respect have the collective title "Evolve". I am instructed by the PCC for Cleveland to offer these submissions.

The role of collaboration between police forces has, over the past few years, become increasingly important. This is a concept promoted by central government both as a means of making best use of financial resources, and of encouraging effectiveness and efficiency by way of operational delivery. Legislative changes were first introduced in 2009 better to facilitate collaboration between police forces (the Policing and Crime Act), and the centrality of collaboration to current policing strategy was confirmed by the extensive amendments made to the Police Act 1996 by the Police Reform and Social Responsibility Act 2011.

The current statutory framework not only permits the Home Secretary to mandate collaboration between police forces, but sections 22B and 22C of the 1996 Act places both Chief Constables and PCC's under an obligation to keep collaboration arrangements under review. There are now numerous examples throughout England and Wales of collaboration arrangements between groups of neighbouring forces, and there are also collaboration arrangements which seek to involve all police forces, one example being the formation of the National Police Air Service, which was indeed mandated by the Home Secretary. More recently, a separate strand of work has been undertaken by the National Police Chiefs Council to identify areas of

"Specialist Capabilities" which might more effectively be delivered jointly and collaboratively.

The role of lawyers working within the police service has been seen as central to the development of collaboration. Operational and non-operational functions alike, delivered across two or more forces, can be far better supported by a unified team of lawyers working across the partner forces. It was better to facilitate force solicitors' involvement with and support for collaboration arrangements that an SRA waiver was sought and obtained in April 2014 in relation to Rule 1.1 (e). As you will be aware, this waiver extended to all police forces in England and Wales.

As others that have made submissions on behalf of lawyers working within the police service have already indicated to you, it is now commonplace pursuant to arrangements reflecting both the statutory provisions permitting collaboration found at sections 22 and 23 of the Police Act 1996 and the 2014 SRA waiver, for police forces and their Commissioners to have entered into agreements for the provision of legal services by solicitors employed by one chief constable to the chief constable (and Commissioner) of partner forces.

In view of what is said above as to the circumstances which led to the development of these collaborative arrangements, the SRA will understand the very significant detriment to the police service generally if the viability of such collaborative arrangements in relation to the delivery of legal services were to be undermined by implementation of certain of the proposals contained within "Looking to the Future". Of immediate concern is the prospect that solicitors employed by the Chief Constable would be deemed to be working for an unregulated entity and would not therefore, even in the context of the collaboration arrangements permitted by statute, be able to receive instructions from or provide advice to parties to a collaboration agreement other than their own employer in circumstances that would generate legal professional privilege (LPP).

You will no doubt immediately understand that the nature of the work undertaken by solicitors working within the police service is very often (perhaps routinely) of a highly sensitive nature. The advice provided can range from that concerning serious and organised crime or complex public enquiries, to extremely high value civil claims some of which are class actions. A significant number of matters dealt with by solicitors working within the police service find their way into the Administrative Court or indeed to the Appellate Courts. All solicitors working within the service (unlike the vast majority of the professional counterparts) are subject to stringent vetting procedure which reflects the sensitive nature of the work which they undertake.

Many of the more sensitive areas of business undertaken by the police service are those which are now being delivered across policing boundaries by way of collaboration. So, for example, in some areas, work to combat serious and organised crime is now being undertaken in this way, and solicitors working within those forces would be expected to work collaboratively to advise on legal compliance and to support service delivery.

The SRA will immediately appreciate that in relation to the areas of work referred to above, the absence of LPP in relation to advice and representation delivered across policing boundaries would be immensely detrimental to the effectiveness of the work being undertaken in these sensitive operational areas.

What would be deeply unfortunate is that solicitors working in disparate legal environments should be subject to the same broad brush regulatory regime. Whilst it is entirely understandable that some practitioners may wish to pursue commercial opportunities in offering services to the public within unregulated entities, it is highly unlikely that this would be true of those working within the service. There are in any event very few opportunities at law for police forces to pursue the kind of commercial ventures contemplated within the consultation paper. So, for example, unlike the Fire and Rescue Services, who were granted certain flexibilities to generate income by the Localism Act 2011, no such opportunity was extended to the police service.

It would be extraordinary indeed if in order to provide greater commercial freedom to one sector of the profession, significant detriment were caused to those working within the police service and indeed to the service itself. Any additional cost to police forces in having to outsource legal work to circumvent any of the conditions imposed by the proposed regulatory changes would place further and most unwelcome pressure on already depleted financial resources. Furthermore, any erosion of the doctrine of LPP that might apply to police lawyers working within existing collaborative arrangements is likely to be of grave concern to those providing indemnity insurance cover to those forces.

The passage in the SRA's consultation document that suggests that the proposed regulatory changes would do away with the current requirement for such a significant number of waivers to be granted to different sectors of the profession is well understood. However, the other side of this particular coin would suggest that the profession, coming as it does in such a variety of manifestations, is not amenable to a "one size fits all" regulatory framework, and that no single Code of Conduct or set of Practice Rules can be expected adequately to cater for all strands of the profession.

The Evolve group of forces and their Commissioners, have expended significant resource in putting in place certain collaboration arrangements to date, and now wish to extend and support those arrangements by the establishment of a collaborative legal services team serving both chief constables and Commissioners. What is envisaged is a regime whereby the solicitors within the team would continue to be employed by their own chief constables, but would provide advice and support in relation to their various areas of specialism to other Evolve chief constables and Commissioners. This would very much reflect arrangements in other parts of the country, and would be in line with the existing SRA waiver. For all the reasons set out above, the viability of such a proposal and its ability to support the wider collaborative agenda, would be very significantly undermined by the absence from any such arrangements of the applicability LPP. It was as recently as 2014 that the SRA effectively indicated that it understood the particular nature of the collaborative arrangements being put in place by police forces by granting the waiver in relation to Rule 1.1(e). That waiver has effectively encouraged the implementation of further

collaboration between solicitors working within the police service. It is suggested that the arrangements facilitated by the waiver are greatly to the benefit of the service, and that waiver has done nothing to undermine the regulatory propriety with which solicitors in the police service act. Where collaboration agreements exist, provisions are routinely built into the documentation providing mechanisms for dealing with conflicts of interest. Furthermore, detailed governance arrangements are clearly set out within collaboration documentation such that lines of management and accountability in relation to all the staff are unambiguous.

For all these reasons, I submit on behalf of the Police and Crime Commissioner for Cleveland and the wider Evolve group of forces that application of the regulatory changes set out within the "Looking to the Future" consultation document should not be applied to solicitors working within the police service, without appropriate allowance being made for the collaboration agenda detailed above. In short, there seems no appetite amongst solicitors working in the police service, or indeed employer Chief Constables, for any change to the current regulatory regime as it affects police service solicitors.

If I can assist further, I would be happy to do so.

Yours faithfully

Stephen Hodgson

Consultant Solicitor OPCC for Cleveland

Stephens Scown LLP

Response to SRA Consultation "Looking to the future – flexibility and public protection"

Preliminary and General Comments

1. Stephens Scown LLP is a regional solicitors' firm with offices in Devon and Cornwall and about 50 partners and 270 staff. It offers a wide range of legal services to business and private clients.

2. We have seen the Law Society's response to the consultation and broadly agree with what is said in it. This response therefore is limited to certain additional points, or points which we wish to emphasize.

3. Unmet legal need: We recognise that there is "unmet need" but consider that the principal causes of that are the increasingly very limited availability of any form of legal aid, and the high cost of litigation which was recognised by Briggs LJ who has said that:

   "a main theme of my report is the shocking fact that, following the virtual withdrawal of legal aid, civil justice is quite simply not available to the majority of ordinary individuals (or small businesses) in relation to disputes which, although moderate or small in money terms, are of course extremely important to them.

   This is because the legal costs which have to be incurred and risked are disproportionate to the value at risk, and because the culture and procedure of our civil courts make litigating without lawyers very difficult, and potentially unfair when the opponent is legally represented."

   (Law Society's Gazette, 16th May 2016)

   The consultation apparently aims to reduce costs to consumers, but does not seek to predict what costs saving the new rules might achieve. We doubt it would be significant, or that the proposed regulatory changes for solicitors set out in the consultation would have any significant impact on the "unmet need" problem by reducing the cost of legal services.

4. Permitting solicitors to offer non-reserved legal services via non-regulated entities: The introduction to the consultation argues that "it makes no sense that solicitors are banned from offering non-reserved legal services…[via non-regulated entities]. We consider this is misconceived.

   It is of course true that legal advice can already be had not just from qualified barristers or solicitors, but from all manner of unqualified advisers, reputable or otherwise. However, the existence of the legal professions, and the panoply of requirements they have to meet as regards training, qualification, regulation, insurance, the Ombudsman, etc, distinguish those professions from the unqualified advisers. It is implicit in the SRA's very existence as regulator that this is a "good thing" – even though it represents a

burden of regulation, and attendant cost, which puts up the cost of services - because this regulation is obviously in the interests of the clients of the regulated firms. Solicitors are required to practise in regulated entities because of the need for regulation, and effective regulation, and because it is impractical to regulate solicitors without also regulating the entity through which they practise. Hence the "ban".

While at first sight one sees a superficial attraction in allowing individual solicitors to "add quality" to the advice otherwise given to consumers by unqualified people employed by unregulated organisations, but without also imposing on those organisations the attendant regulatory costs, we consider that the proposal suffers from three grave defects:

(a) In the real world, solicitors working for non-regulated institutions would have insufficient influence or autonomy to be able to maintain the same professional standards as those working in regulated entities if they conflicted with the wishes, or culture or policy of their employer. At present, clients have a clear choice between regulated professionals, and non-regulated advisers. That clarity would be diluted and confused by the proposals.

(b) We doubt that in practice existing non-regulated advice providers would be particularly interested in taking up such an opportunity. However, we think it highly likely that many existing regulated entities (ie existing firms of solicitors) would take the opportunity to hive off as much unreserved work as possible into new, non-regulated entities so as to rid themselves of a substantial part of their existing regulatory burden, and its cost. While that would, by the law of unintended consequences, go some way to level the playing field between regulated and non-regulated entities, it would result in a significant reduction in existing client protections which would not be in the interests of consumers of legal services generally..

(c) While we do not believe most members of the public have any detailed understanding of the range of protections they have as clients of solicitors' firms (PII, the Compensation Fund, the Ombudsman, and the overall discipline of professional regulation) we believe that they do expect some protections, over and above the normal protections available (in theory at least) as a result of contract law, to be available.

We do not believe members of the public can be expected to understand or distinguish between the different levels of regulation and protection which the consultation envisages, and we consider that members of the public would be both amazed and perhaps horrified to discover that the SRA is promoting a changed regulatory regime which would allow a significant relaxation of the protections currently available.

5. <u>The format of the new SRA Handbook:</u> We are in favour of simplicity and clarity. However, we do not consider that the existing Handbook is "too complex". Lawyers are accustomed to dealing with much longer and more complex legislation !

There is merit in distinguishing between the obligations of firms, and individual solicitors.

As a matter of drafting, however, we think it would be better, and save duplication, to divide it into three sections (rules applicable to firms, rules applicable to individuals, and rules common to both).

We are concerned that the new draft is so general. There is a real danger that it thereby loses force. The Law Society has discussed this in detail in its response.

We are also concerned that in practice a raft of Warning Notices, Toolkits, Case Studies, etc would end up supplementing the extreme generality of the new Handbook, rather than such rules (which is what they would become) forming part of the Handbook itself. It would in practice be more difficult for a practitioner to understand regulations scattered all over the place in that way, rather than in a readily accessible Handbook. And the need for such supplementary guidance only goes to highlight the problems caused by the excessive brevity of the new draft.

Consultation Questions

6. We consider the new code is excessively brief and will generate uncertainty which will need to be resolved by replacing the detail which has been deleted.

9. Conflicts: We note and agree with the concerns expressed by the Law Society in its response. The removal of some of the indicative behaviours is particularly unhelpful on this issue., because it promotes uncertainty.

13. See our comments at para 5 above.

14. On balance, yes. This firm has a sophisticated management structure involving a main board and various committees, but the requirement for a COFA and COLP is useful in focussing attention on the need to manage finances and legal practice.

16. See above para 4

17. If the new rules come into force this firm would consider whether to hive off parts of its work to a new non-regulated entity.

20. It is agreed that information as to the protections available to clients of regulated solicitors should be made available to clients. However, it is equally important that prospective clients should understand which of those protections they would not have if they took advice from non-regulated entities.

Requiring regulated firms to publish details would only address the first requirement.

The better course would be for all solicitors (wherever they practise) to be required to draw to the attention of their clients at the point of engagement a centrally promulgated explanation of these matters (eg published by the SRA).

25. Yes.

26. The practical difficulties that would surround obtaining PII cover by solicitors employed by non-regulated entities are obvious. Insisting on it would be likely to deter solicitors from taking such employment at all and therefore frustrate the objectives of the proposed rule change.

32. We expect any intervention into the practice of a solicitor employed by a non-regulated body to be fraught with difficulty.

33. Yes. But permitting the creation of non-regulated bodies which employ practising solicitors to give non-reserved advice would open the way to any solicitor who was so minded to evade the requirement for any non-reserved activity to be carried on under regulation.

September 2016

Stephensons Solicitors

Consultation: Looking to the future - flexibility and public protection

Consultation questionnaire form

This form is designed to be completed electronically—in MS Word. Please save it locally before and after completing it.

Question 1

Have you encountered any particular issues in respect of the practical application of the Suitability Test (either on an individual basis, or in terms of business procedures or decisions)?

We have never encountered any issues or problems with the Suitability Test

Question 2

Do you agree with our proposed model for a revised set of Principles?

When the new Principles were first released we were pleased to see the inclusion of a high level duty relating to sound business management. I note the comment that downgrading some of the Principles to the Code does not render them less enforceable; nevertheless it does seem to imply a lessening of their importance.

We would like to see the Principle relating to sound business management retained at this level. Sound business practice is vital to provide a good client service. We are concerned that if this is removed from the high level principles that firms will feel free to abandon good management practices in cost cutting exercises.

The removal of the principles that solicitors should 'provide a proper standard of service to your clients', 'act in the best interests of each client' and 'protect client money and assets' has negative implications for consumer protection and the maintenance of professional standards.

The Principles should continue to refer to the solicitor’s duty to keep the affairs of the client confidentia

Question 3

Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

Yes, although I am unclear why it is necessary to amend the wording from the previous version of this Principle.

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?

See my response to Q2 above. The notion of sound business management is an important facet of the delivery of good legal services. Unless a firm is run properly according to business standards, it is impossible to deliver a good, efficient and effective service to clients.

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?

Conflicts of interest

COLP and COFA duties – guidance as to what is reportable

Guidance as to whether the code for firms or code for individuals takes precedence

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?

Doubtful. The code maybe shortened in length, but this of necessity leaves more open to interpretation and therefore risk of breach.

Question 7

In your view is there anything specific in the Code that does not need to be there?

The approach of having 2 codes creates two tiers of solicitors: those working in a regulated entity and those working in an unregulated entity, with consequential risks to consumer protections and professional standards which risk damaging the standing of solicitors and creating confusion for consumers

Question 8

Do you think that there anything specific missing from the Code that we should consider adding?

The language of the draft Codes is imprecise and could mean that members currently practising in a fully compliant way could find themselves accused of a breach after the proposed new codes come into force. Thus, more clarity and detail is required.

Question 9

What are your views on the two options for handling conflicts of interests and how they will work in practice?

a – Solicitors working in an unregulated entity may find themselves experiencing significant tension in that they personally will be subject to conflict rules, but their entity will not. E.g. for unreserved work non-Solicitors in an unregulated entity may represent someone with whom the Solicitor may be in actual conflict – how is the Solicitor to deal with such an issue when they may be powerless to stop another part of the business from acting?

B – option 1 is the preferable choice so that e.g. a firm can act on both sides of a conveyancing transaction where proper safeguards are in place.

Question 10

Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

You have achieved the aim of a shorter Code. However clarity has been sacrificed for the sake of brevity.

Also whilst the idea of the case studies is good, the reality is that they do not assist very much.

We risk the situation whereby the code has to be padded out over time by recorded decisions and further future guidance.

Question 11

In your view is there anything specific in the Code that does not need to be there?

Question 12

Do you think that there anything specific missing from the Code that we should consider adding?

There needs to be more guidance as in the previous code e.g. indicative behaviours

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?

We would be very concerned at the lack of guidance, particularly for Solicitors working in unregulated entities.

Also there needs to be clarity about which code takes precedence in the event of a conflict – the code for firms or the code for individuals?

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.

Yes, I agree with the intention to retain the roles f COLP & COFA. However can we please have clarity around the requirement to report – this is not a new issue. Under the existing code it is very unclear as to what needs to be reported and what is considered to be a major breach.

Examples using SDT or reported SRA decisions as to what is considered a reportable issue and what is not would be helpful.

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?

See response to q14

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?

Under the proposals, solicitors holding a current practising certificate would be able to use their title whether providing legal services to the public through a regulated or unregulated entity. While a provider would not be able to use the term ‘solicitors firm’ or ‘solicitors’ unless the entity was regulated by the SRA ,this would seem unlikely to mitigate the risk of consumer confusion especially where the unregulated entity described itself as a ‘law firm’ or 'legal services firm' or advertised that they employ solicitors. Consumers will lose the assurance they currently have as to quality and protections when they engage a solicitor. It is inappropriate that consumers will have to undertake fairly substantial due diligence. This will additionally undermine the standing of the profession internationally.

It is hard enough for consumers to choose between legal entities regulated by different regulators in the current sphere, without adding a further layer of confusion to the situation. In terms of improving the situation for consumers these proposals miss the mark by a country mile

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?

Totally unlikely to take advantage of this supposed greater flexibility.

Quite the reverse in fact – we are much more likely to promote the fact that we are a regulated firm which is able to give clients full protection and indemnity and to promote the brand of Solicitor in a regulated firm

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?

See responses to earlier questions – the new proposals serves only to muddy the waters for consumers.

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?

Question 20

Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

Not only should this be a requirement, but I imagine it would be something that regulated entities would positively want to do – to demonstrate their USP and to stand out from unregulated providers

Question 21

Do you agree with the analysis in our initial Impact Assessment?

Question 22

Do you have any additional information to support our initial Impact Assessment?

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?

yes

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?

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?

If not, what are your reasons?

Yes.

Question 26

Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

Yes.

Question 27

Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

I can understand the objective behind your approach i.e. to improve access to justice. However I do not think that these proposals achieve the stated aim; instead they serve only to muddy the waters by bringing additional complexity into an already complicated market.

It is unrealistic to expect an unsophisticated purchaser of legal services to distinguish a) between umpteen different regulators and b) between a traditions regulated firm and a firm which promotes itself as lawyers because they have Solicitors working for them.

A better approach would be to regulate the service provided rather than the entity which supplies it e.g. to regulate will writing or claimant representation – only by doing this can matters be simplified for consumers and the playing field between Solicitors and unregulated entities be levelled.

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?

Yes – there needs to be some aspect of a level playing field for providers, and some protection for consumers.

Question 29

Do you have any views on what PII requirements should apply to Special Bodies?

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?

Question 31

Do you have any alternative proposals to regulating entities of this type?

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?

Question 33

Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

Yes.

Thank you for completing the **Consultation questionnaire form**.

Please save a copy of the completed form.

Please return it, along with your completed **About you form**, as an email attachment to consultation@sra.org.uk, by **21 September 2016**.

Alternatively, print the completed form and submit it by post, along with a printed copy of your **About you form**, to

Solicitors Regulation Authority
Regulation and Education - Policy - Handbook 2017
The Cube
199 Wharfside Street
Birmingham
B1 1RN

Surrey County Council

Consultation: Looking to the future - flexibility and public protection

Consultation questionnaire form

This form is designed to be completed electronically—in MS Word. Please save it locally before and after completing it.

Question 1

Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

We are supportive of the need to maintain high standards in the profession and secure that all those practising as Solicitors satisfy the criteria in the Suitability Test 2011.

We have not encountered any situations where the practical application of the test has created any issues for individuals or employers.

Question 2

Do you agree with our proposed model for a revised set of Principles?

We welcome the simplification of the principles, but would not support removal of the of the principle to “protect client money and assets”. This is particularly important to Local Authorities as clients of external Solicitors. Our assets are public assets, which we have a duty to manage appropriately.

We also consider that the Principles should continue to refer to the solicitor’s duty to keep the affairs of the client confidential.

Question 3

Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

The revised principles do not refer to maintaining public trust and we consider that this should be included. The concept of being able to trust your legal advisor is distinct to having confidence in them or the profession. Both the SRA's 'Question of Trust' campaign and the wording of this Question 3 suggests that the SRA believes there is a distinction between trust and confidence. Perhaps revised principle 2 could be amended to read:

"2. ensure that your conduct upholds public confidence in the profession and **trust in** those delivering legal services"

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?

No – the reduced number and simplified approach to the principles will make it easier to apply the Principles across practice areas, including Local Government and other sectors where there may be differing levels of regulation and oversight from other bodies.

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?

It will be of particular use to receive guidance from the SRA as to the application of the new Codes and Practice Framework Rules to the conduct of reserved and non-reserved activities by local authority legal teams, using existing local government powers under the Local Authorities (Goods and Services) Act 1970, the Yorkshire Purchasing Organisation Case and existing Rule 4 of the Practice Framework Rules. Please – please see further below.

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?

The simpler, more focussed code is to be welcomed. In terms of in house practice, as highlighted below in our response to Question 8, it is in the interests of both the SRA and in house Solicitors to have clarity as to what is meant by “public or a section of the public”, specifically in the context of local authority employed Solicitors who wish to provide advice to other bodies within the powers set out by the Local Authorities (Goods and Services) Act 1970. We cannot understate how important it is to clarify this in order to enable the public sector to meet the expectations of Government, its public sector partners and the public in delivering joined up public services.

Question 7

In your view is there anything specific in the Code that does not need to be there?

Section 8.4 of the Code references referrals of disputes to ADR - we are not aware that this is a current requirement. The proposals do not address circumstances in which the particular ADR scheme is not agreed between the Parties.

Please see response to question 9 in relation to conflicts of interest.

Question 8

Do you think that there anything specific missing from the Code that we should consider adding?

It is in the interests of both the SRA and in house Solicitors to have clarity as to what is meant by “public or a section of the public”, specifically in the context of local authority employed Solicitors who wish to provide advice to other bodies within the powers set out by the Local Authorities (Goods and Services) Act 1970.

Section 8.1 would benefit from amendment to include this.

Question 9

What are your views on the two options for handling conflicts of interests and how they will work in practice?

Option 2 is preferable as it simplifies matters and protects both clients and Solicitors, by prohibiting acting in situations of actual conflicts of interest and allowing for exceptions where there is a significant risk of a conflict of interest arising, as is currently provided for.

Both versions appear to be somewhat confused as they rely on in the current definition of “Client Conflict” which refers to actual conflicts and significant risks of conflicts.

Question 10

Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

As set out above, the Code does not address the key issues which are impacting on local government legal practice.

Question 11

In your view is there anything specific in the Code that does not need to be there?

No

Question 12

Do you think that there anything specific missing from the Code that we should consider adding?

See response to Question 8 above.

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?

We do not have any further specific issues to highlight.

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.

We do not have any comments to make in relation to this question as it is not specifically relevant to local authority practise.

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?

We do not have any comments to make in relation to this question as it is not specifically relevant to local authority practise.

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?

Annex 5 to the Consultation at page 26 includes a scenario where the new approach to regulation would allow individual in house Solicitors the ability to provide non reserved legal advice to the public. This does not recognise the additional step required by local authorities before they can provide services to the public for profit of establishing a trading company.

Further, a large part of the work undertaken by local authority legal teams is reserved activities – including advocacy and property transactions - and so setting up an alternative legal service provider would be unlikely to be considered to provide a useful opportunity.

Therefore the opportunities presented by the proposal do not assist local authorities in providing non reserved legal activities with less regulation, as a trading company would still be required. Neither do the proposals address the key issue of ensuring that there is clarity that local authorities can provide reserved and non reserved legal advice to other public bodies pursuant to their existing powers. The threat from these proposals is that the opportunity for much needed certainty is lost.

The question raised at paragraph 89 is important in relation to whether privilege would still apply to advice provided by an alternative legal service provider, employing Solicitors in some roles and we believe this issue requires more consideration. If such advice would not be privileged we would be extremely concerned as to the implications of that for recipients of such advice. Legal professional privilege is an essential element of a functioning legal system.

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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?

Please see our response to question 16.

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)?

Local authority employed Solicitors operate to provide non-reserved and reserved activities, primarily to their employer. The local authority itself is not an entity authorised by the SRA.

As stated previously in our response, the point which is vital for us to understand is the extent to which other local authorities, the public and third sector bodies fall within the definition of the "public or section of the public". The SRA has received a copy of the opinion of James Goudie QC in response to a request for an opinion from Lawyers in Local Government and the Local Government Association, as to whether such bodies would fall within the definition of the "public or section of the public". This was unequivocal in its conclusion that the above wording did not prohibit local authority employed Solicitors from providing reserved legal activities to the types of body indicated above. In discussion, the SRA has highlighted that the Legal Services Board is able to request guidance on this wording (which originates from the Legal Services Act 2007) from the Government.

We feel that this is of such importance, that the SRA should approach the LSB to make such a request of the Government as soon as possible, so that this can be clarified and the outcome of the SRA's regulatory review can reflect this new information.

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?

While recognising that the requirement does not apply to local government legal teams, the existing requirements seem overly prescriptive and ultimately not fit for purpose. As the SRA recognises in paragraph 101, the requirement to have practised for at least 36 months within the last 10 years is no guarantee of current knowledge of the law, nor of the ability to effectively supervise another.

Question 20

Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

For individuals and organisations which do not habitually instruct Solicitors it is important that they have an easy way of accessing information in relation to the protections afforded to them, particularly in the context of a fast paced and changing market.

Question 21

Do you agree with the analysis in our initial Impact Assessment?

As highlighted above, the assumptions made in relation to how local authority legal teams may react to the changes are flawed and do not recognise the specific legislative environment in which local authorities work, nor the nature of the work we undertake.

Question 22

Do you have any additional information to support our initial Impact Assessment?

Please see response to question 21.

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?

Yes

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?

In house Solicitors would not normally be responsible for holding client money, as they are an arm of the client organisation and will work closely with the finance department. Where providing services to external bodies, they should be holding money in accordance with the SAR or not at all (i.e. arranging for direct payments between the purchaser and seller on a land transaction). However, this is not what many external bodies are used to (if they have dealt with traditional firms) and in the interests of opening up the market place to alternative service delivery models, it seems sensible to provide this option.

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?

If not, what are your reasons?

We think the proposed proposals create a confusing two tier market that the public will not understand.

Question 26

Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

We agree with the proposed approach, but would welcome the inclusion of an obligation that applies now under the Practice Framework Rule 4.2(b) whereby a Solicitor is required to ensure that their employer carries sufficient indemnities for the nature of the work being undertaken.

Question 27

Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

This does potentially create a situation where a consumer receives negligent advice, suffers a loss and is unable to recover their losses from the alternative legal services provider. This is clearly not a desirable outcome.

Please see response to question 26.

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?

Yes, these are treated differently to non-reserved legal activities for a valid reason, that they are potentially high risk and high value. It would be counter intuitive to allow them to provide services to the public, in a similar way to other Solicitors, without some form of insurance or indemnity behind them.

Question 29

Do you have any views on what PII requirements should apply to Special Bodies?

See question 28

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?

We agree with the SRA's view that it is not desirable. It is inconsistent with the legislative requirements and would be inconsistent with the approach being adopted in terms of opening up the market.

Question 31

Do you have any alternative proposals to regulating entities of this type?

We do not have any alternative proposals.

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?

No.

Question 33

Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

We agree with the SRA's proposal.

Thank you for completing the **Consultation questionnaire form**.

Please save a copy of the completed form.

Please return it, along with your completed **About you form**, as an email attachment to consultation@sra.org.uk, by **21 September 2016**.

Alternatively, print the completed form and submit it by post, along with a printed copy of your **About you form**, to

Solicitors Regulation Authority
Regulation and Education - Policy - Handbook 2017
The Cube
199 Wharfside Street
Birmingham
B1 1RN

Surrey Law Society

Dear Sirs

My name is Daniel Church, President of the Surrey Law Society. I am making this response on behalf of the Surrey Law Society. We wish for our response to be treated on a confidential basis.

Surrey Law Society is a membership organisation made up of 900+ solicitors and legal professionals who are based in and around the Surrey area. Part of our function as a society is to act as a conduit between our members and Chancery Lane, ensuring that vital communications are passed on to our members.
The Surrey Law Society is run by 12 committee members who meet regularly to discuss issues affecting legal professionals in Surrey. We are also in constant contact with our Law Society Council Members and the Law Society Relationship Management team.

As a committee we have discussed in great detail the proposals put forward in the SRA's 'Looking to the Future' consultation, as well as speaking directly with our membership. We are very concerned that we should retain the trust and confidence of the public we serve and believe that it is essential that any change does not cause confusion and ambiguity over what
our professional title means. If the title "solicitor" is presented to the public, no matter in what format they operate, it should mean the same for any user and carry the same obligations. At present all solicitors are regulated in the same way, they comply with the same standards with the same level of assurance and protection in cases of default. The SRA consultation will alter this and undermine public protection and the public perception of the solicitor brand.

We would like to raise the following specific concerns in relation to the proposals:

Creation of a two-tier market – The proposals plan to give non-law firms the opportunity to employ regulated Solicitors and legal professionals without having to deal with any of the regulatory hurdles faced by law firms. In our view this could create several major issues:
1) The unregulated firms will be given an artificial competitive advantage when pricing their legal service work. Running an unregulated firm and providing legal services will be far cheaper than providing legal services through the traditional model. The proposals are likely to drive down prices, but at the expense of consumer protection.

2) The consumer will lose a lot of the protection offered by getting their legal services work carried out by a firm that is not subject to regulation. The most dangerous aspect is the fact that the average consumer will have no idea of the difference between an unregulated firm and a regulated firm.
3) Similarly to some in-house solicitors today, those who are working within unregulated firms may suffer from a lack of supervision and career guidance, which would be available to them within a regulated firm who are required to make sure that their legal professionals reach and retain certain standards. We also have specific concerns about plans to allow newly qualified solicitors to start their own law firm under the planned changes. Senior members in a law firm provide irreplaceable guidance for younger solicitors coming into the profession.
4) Solicitors in unregulated firms may also come under pressure to only take on profitable work, leaving several areas underrepresented.

Professional Indemnity Insurance – We are extremely concerned that unregulated firms may not be required to carry professional indemnity insurance to a sufficient level, and may not have access to the compensation fund or Legal Ombudsman service. In most case consumers will not be aware that they will not have this protection, which will weaken the current position.

Conflict of Interest – If unregulated firms are able to act without being subject to the rules on conflict of interest, the consumer will again be placed in a weak position. Again, in most case they will have no idea that their firm may be acting on both sides of a transaction. This also gives the unregulated firms a further artificial competitive advantage where there is no transparency required or offered.

SRA Accounts Rules – The previous consultation on proposed changes to the accounts rules
brought widespread consternation from the legal profession, and these concerns remain. The
transactional difficulties that would be faced by law firms where they are not holding client money, are numerous. The conveyancing process is underpinned by the fact that solicitors hold client money, and can give undertakings. If the client money is held by a third party it is difficult to see how a transaction could proceed smoothly. Difficulties will also be faced in almost all other areas of law, and the only likely result of the removal of a client account is that transactions will take longer, will be more complicated and largely more expensive for the consumer. The potential damage to the reputation of the profession should not be underestimated.

In summary, the Surrey Law Society feel that the SRA proposals as outlined in their 'Looking to the Future' Consultation are ill-conceived and are extremely likely to reduce protection for consumers of legal services. We fail to understand why the SRA deems it part of their remit to contrive a more competitive legal market, where competition and choice are already prevalent. We do not understand why the SRA has taken it upon itself to expand its role into unregistered markets and cannot see that this was intended or agreed under the Legal Services legislation. What is the underlying unspoken purpose behind the proposed manipulation of our professional rules?

From our experience in Surrey, consumers of legal services already have a wide ranging choice when trying to select a provider. Using conveyancing as an example, there are firms who will be able to provide the service for £500+VAT, and there are also firms that will charge in excess of £2,000+VAT for the same transaction. The client currently has the ability to choose between these firms based on the level of service that they require. To introduce a system where unregulated firms would be able to provide the same service, without professional indemnity insurance, access to client money and the ability to act for both sides of a transaction is extremely dangerous to the consumer. Similar examples can be gleaned from all areas of legal services, including in particular, probate work, Will drafting, litigation and matrimonial work.

There is a growing trend towards 'dumbing' down the role of a solicitor in a legal transaction. On the whole we provide an important role in society and a fantastic level of service for our clients, at what is usually a competitive and reasonable price. Any firm which is either too expensive, provides a poor level of service or lacks transparency in their fee structure are likely to have to adapt their approach naturally. They will struggle to cope in the current market as there are plenty of firms who are offering complete transparency, and an excellent level of service at a fair price. The market is able to change for the better on its own, without the artificial intervention of the SRA's proposed changes.

If you would like any further input from me, or the Surrey Law Society, please contact me directly.

Kind regards

Daniel Church
President – Surrey Law Society

Consultation: Looking to the future - flexibility and public protection

Consultation questionnaire form

This form is designed to be completed electronically—in MS Word. Please save it locally before and after completing it.

Question 1

Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

The Solicitors Disciplinary Tribunal Stance On Its Response To Public Consultations

When responding to this and other Consultations, the Solicitors Disciplinary Tribunal ("the Tribunal") must have in mind that it should not make public statements (even in the context of consultation) which might give rise to a complaint of predetermination and/or apparent bias against the Tribunal at a future date from those appearing before it. The Tribunal is able to respond to a Consultation highlighting difficulties or issues that have been encountered while sitting to determine cases. That is an appropriate function enabling the Tribunal to pass on knowledge and experience to policy makers. However the Tribunal must not stray outside that parameter.

The observations in this response pay due regard to the Tribunal's overriding objective when managing cases, as expressed in its Practice Direction No. 6, namely to ensure that they are dealt with justly.

The Tribunal's High-Level Observations Providing Context For Its Response

The development of Entity Regulation is a trend that has the Tribunal's support. The owners/controllers of an entity should not be able to abdicate responsibility for the actions of one individual within their number. Further, the SRA's increased emphasis on encouragement of individual and entity responsibility for matters of conduct is viewed by the Tribunal as a positive development. The Tribunal notes the SRA's regulatory purpose, namely the need to provide appropriate protection to consumers of legal services and to support the rule of law and administration of justice (Annex 4, page 13). This purpose aligns neatly with the paramount duties of the Tribunal, to protect the public from harm and to maintain public confidence in providers of legal services.

It is essential to recognise that providers of legal services are businesses. They must make sufficient income to sustain their core outgoings (taxes, employment costs, building costs, and so on) before the owners/controllers receive their share of any profits (whether described as drawings, dividends, or otherwise). Regulators should be mindful that competition is unfair if the regulatory burden is greater on solicitors working within SRA-regulated entities than on those working in the unregulated market. The competitive pressure on sole practitioners and SMEs is rightly acknowledged in the Economist's Report dated April 2016 at Annex 6 of the Consultation. The Tribunal regularly decides cases involving solicitors whose small firms have

become financially unstable over a period of time due primarily to market forces. This may be because the firm has been meeting the needs of the most disadvantaged in local communities at little or no charge. Financial instability (alone or with other pressures) can cause significant damage to the physical and/or mental health of the practitioner, which in turn puts clients and maintenance of public confidence in the reputation of the profession at risk. It is noteworthy that in these circumstances the Tribunal will often receive references from clients supporting their solicitor and expressing appreciation for the valuable role played by the firm in the local community. Sole practitioners and SMEs form an essential reliable source of legal services for those who could be described as vulnerable. Such businesses are sufficiently flexible to be able to tailor their offering specifically to differentiated, often small, segments of the legal services market in ways that other regulated and unregulated entities are commercially unable and/or unwilling to consider. The clients of these firms do not always have easy access to technology, or have never been taught how to use the computer in their local library assuming that the library has not been closed. They may not speak English as their first language. They may not be able to leave the house to travel to their nearest town to visit an alternative large legal services provider because of illness or age, or lack of available public transport routes or the bus fare. They may be consumers who do not have access to credit or debit cards because they are on benefits or in debt, or for religious or moral reasons, so cannot purchase legal services online. With the passing away of Legal Aid, high-quality sole practitioners and SMEs currently fill the consumer gap at competitive prices. If those firms are, potentially, to be sacrificed as the price to be paid for an ideology that unmet consumer needs will be satisfied to an equivalent standard by the unregulated sector, the Tribunal's view is that this will amount to throwing the baby out with the bathwater. It is an approach that is not to be recommended.

To the extent that the draft Principles and the Codes of Conduct for individuals and entities reinforce professional obligations, the Tribunal approves of the content. That said, for such Principles and Codes of Conduct to "bite", they must be certain in their terms since the very nature of breaches of conduct is that individuals, with the determination and motivation to do so, will invade grey territory. In simple terms, the vaguer the Principle and/or Code, the greater the opportunity there is for abuse, and the more likely the temptation is to arise.

The notion that a solicitor may work within an unregulated entity creates obvious regulatory challenges. The reach of the SRA, and thus perforce the Tribunal, is to call into account the individual Solicitor wherever they may be in practice. It is the Tribunal's understanding that that is the intention behind and meaning of the revised Principles and Codes.

What however is to be done with the Company or entity which is the unregulated provider and which therefore by definition is outside the regulatory reach of the SRA? Key in this is protection of the consumer of the legal services concerned. They must have much-needed clarity and

transparency about the levels of protection they can expect (whether that be insurance, whether that be professional Rules of Conduct, and certainly how client protection rules will apply in relation to the management of money - client account - if those are to be available to an unregulated entity).

The Tribunal would be deeply concerned if legal professional privilege ("LPP") is at risk, touched on by the SRA in the Consultation document. At its heart, LPP is the absolute right of the client; it is not the right of the provider of the legal services as indicated by the fact that LPP can be waived only with the client's explicit consent. LPP is critical to the trust and confidence between a lawyer and their client, that the confidence of the client and the details of the professional advice given are closely protected. LPP could be dealt a fatal blow by ill-drafted Principles and Codes that do not expressly protect the same. This is particularly important in relation to solicitor/client relationships within an unregulated entity.

Question 1 - Answer

The Tribunal as a body currently has no experience of the practical application of the Suitability Test, either on an individual basis or in terms of business procedures or decisions. As a general comment, the Tribunal sees cases every year where individuals and entities have fallen short of satisfying suitability under the test. What the Tribunal cannot say with any certainty is whether those individuals and entities were "suitable" for admission at the point of application to the SRA. In some instances the Tribunal's strong suspicion is that the SRA's enquiries at that critical point were insufficiently rigorous or that clear warning signs were not heeded by those with decision-making powers.

Applications for restoration to the Roll of Solicitors are made to the Tribunal under Section 47 of the Solicitors Act 1974 (as amended). The Tribunal sets high standards before restoring a struck-off solicitor, and expects the SRA to apply a public interest approach in accordance with its duty as a regulator when deciding whether to oppose, support or remain neutral in respect of such applications. In the main the SRA is mindful of its obligations, particularly where a solicitor has been struck off for dishonesty. The Tribunal notes that the SRA has power to permit struck-off and suspended solicitors to work in approved employment. The Tribunal trusts the SRA to use its powers judiciously in these circumstances without undermining the Tribunal's sanctions imposed for public interest reasons.

As a more general drafting point, there is lack of clarity as to how conduct in the course of practice is to be distinguished from private conduct. For example, how is the consumption of alcohol in the solicitor's office in the presence of staff to be classified: is it conduct in the course of practice (taking place in the absence of clients) or conduct outside the course of practice? Lack of drafting clarity is potentially unfair, leaving outcomes to the exercise of the SRA's discretion which could easily lead to inconsistency.

Question 2

Do you agree with our proposed model for a revised set of Principles?

Question 2 - Answer

The Tribunal agrees with the SRA that a revised set of Principles should be easily understood. Principles should be expressed simply and give a clear message about the SRA's regulatory purpose and how regulation is to be applied by the SRA to meet that purpose proportionately, consistently, transparently, and fairly.

Please also see the Tribunal's high-level observations above.

It is inappropriate for the Tribunal to comment further, as it will be adjudicating on alleged breaches of the Principles if implemented.

Question 3

Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

Question 3 - Answer

On the assumption that the word “confidence” is being used in the sense of meaning “firm trust”, and in spite of the fact that the word “trust” is not included in the revised Principle, the Tribunal considers that the Principle sets appropriate expectations around maintaining public trust and confidence.

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?

Question 4 - Answer

The Tribunal has concerns around the drafting of Principle 4. As published the revised Principle links honesty and integrity in a way that may be unhelpful to clear understanding by the regulated community. In law a solicitor/solicitor's employee may behave with a lack of integrity without also behaving dishonestly (see, for example, Scott v Solicitors Regulation Authority [2016] EWHC 1256 (Admin)). Revised Principle 4 links the concepts in a way that could potentially cause confusion amongst solicitors and their clients.

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?

Question 5 - Answer

The Tribunal has noted the contents of Annex 7, the Tracking Document for the SRA Code of Conduct 2011. The document includes 23 instances where a case study may be produced and 38 (or thereabouts) instances where guidance may be produced, in addition to reference to a separate document on “waiver”.

The proposed guidance appears to be primarily around Indicative Behaviours removed from the draft Code of Conduct following feedback from individuals that they found their status “confusing”. No example guidance has been provided as part of this Consultation; it would have been helpful as a tool to supplement the case studies.

Currently Annex 9 (case studies) runs to 8 substantive pages comprising 13 separate case study examples. Assuming that each piece of guidance will cover one A4 page, and two case studies will fit onto the same size of paper, a minimum of 50 further pages could realistically be added to the individual Code of Conduct (currently drafted as 7 pages) plus Supplemental Notes and the “waiver” document. The Code of Conduct for Firms is a page shorter but will also require case studies and guidance to be added. Whilst the number of pages envisaged is shorter than the current Code, it is realistic to assume that the Codes and the case studies/guidance read together will result in a rather larger regulatory burden and cost for solicitors and firms than the Consultation suggests when read at face value. The Consultation includes no analysis from solicitor focus groups as to how long in terms of hours it might take the reasonably competent solicitor to get up to speed with the changes and maintain knowledge once acquired. This would have been useful information for comparison purposes.

The Economist’s Report dated April 2016 (Annex 6) places considerable emphasis on the importance of public-facing guides and the toolkits for solicitors in mitigation of the risks attached to simplifying the Handbook and permitting solicitors to work on non-reserved activities in unregulated entities. Simplification of the Handbook may have the unintended consequence of copious satellite documents, not held in one place, with which solicitors will have to familiarise themselves. The status of the guidance/case studies is also unclear and potentially confusing; will solicitors ultimately be prosecuted for failing to follow guidance?

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?

Question 6 - Answer

The Code is short and focused, clear and easy to understand. There are drafting and consistency points that could be improved falling outside the immediate scope of this Consultation e.g. in the "Introduction" to the draft Code for Solicitors etc. reference is made to the provision of legal services to the "public or section of the public". In the draft Code for Firms, reference is made to delivery of competent and ethical legal services to "consumers". This may be intentional or may be a consistency point to be resolved.

Please also see the Tribunal's high-level observations at Question 1 above and previous answers.

Question 7

In your view is there anything specific in the Code that does not need to be there?

Question 7 - Answer

It is inappropriate for the Tribunal to comment, as it will be adjudicating on alleged breaches of the Code if implemented.

Question 8

Do you think that there anything specific missing from the Code that we should consider adding?

Question 8 – Answer

It is inappropriate for the Tribunal to comment, as it will be adjudicating on alleged breaches of the Code if implemented.

Question 9

What are your views on the two options for handling conflicts of interests and how they will work in practice?

Question 9 - Answer

It is inappropriate for the Tribunal to comment, as it will be adjudicating on alleged breaches of the Code if implemented.

Question 10

Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

Question 10 - Answer

Please see answer to Question 6 above.

Question 11

In your view is there anything specific in the Code that does not need to be there?

Question 11 - Answer

Please see answer to Question 7 above.

Question 12

Do you think that there anything specific missing from the Code that we should consider adding?

Question 12 - Answer

Please see answer to Question 8 above.

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?

Question 13 - Answer

Please see previous answers.

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.

Question 14 - Answer

As solicitors are now familiar with the roles of COLP and COFA, and have structured their businesses to integrate the same, it would be an unnecessary regulatory burden and would incur wasted costs (in terms of time and money) to remove the roles.

The roles assist with compliance in providing clear, unambiguous reporting lines and forming a link between a firm's managers and staff and the SRA. The roles make individuals responsible for compliance in a way that is likely to be helpful to the firm and its managers and staff.

Sole Practitioners are likely to find the roles to be more of a burden than other recognised bodies and entities because there is limited scope for delegation of activities.

The SRA should give some thought to how the roles of COLP/COFA could be adapted and applied for the purposes of solicitors working within unregulated entities. There may be benefit in terms of the public interest in requiring such solicitors to fulfil some or all of the duties of a COLP/COFA within that entity. This would also go some way towards levelling the playing field with Sole Practitioners who carry out reserved and non-reserved activities and who will remain subject to SRA regulation.

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?

Question 15 - Answer

By the implementation of a more inquisitorial authorisation application process, tested by means of the provision of examples by the applicant rather than multiple closed questions.

Some form of COLP/COFA standard or certification could be introduced by the SRA to improve the functioning of the roles, and to add value as an incentive for those performing the roles.

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?

Question 16 - Answer

Please see the Tribunal's observations at Question 1 above. The Economist's Report covers both opportunities and threats in detail. The Tribunal does not take particular issue with Dr Decker's conclusions. The report is largely fair and objective.

One particular threat to the interests of those who are potentially the most vulnerable in society is the proposal to remove provisions in the current Practice Framework Rules 2011 in respect of those providing pro bono legal services. The SRA has not produced any evidence to support the assertion that the current rules relating to pro bono work are preventing the private sector from "properly delivering corporate social responsibility programmes" (page 22, paragraph 81). It is not clear what protection, if any, the SRA intends to put in place for consumers receiving pro bono work.

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?

Question 17 - Answer

This question does not apply to the Tribunal as a body. Solicitor and Lay Members will have their own views which they are able to pass on to the SRA in their personal capacities on the understanding that they do not speak on behalf of the Tribunal.

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?

Question 18 - Answer

The Tribunal can see the wisdom and potential advantages of this approach. In terms of providing confidence to consumers, such practitioners are likely to benefit from the strength of the solicitor brand coupled with SRA regulation. Those consumers will retain the benefit of LPP, access to the Legal Ombudsman, and potential redress from the Compensation Fund if client money is held. This approach provides a means of differentiation from those solicitors acting within unregulated entities. Consumers who are interested primarily in receiving legal services for the cheapest available price are unlikely to add significant value to the businesses of sole solicitors. The service expectations of those consumers may be better met by using unregulated entities (albeit that consumer protection will be considerably lower, which is unlikely to become an issue until the expected service is not provided).

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?

Question 19 - Answer

Lack of supervision as a feature in wrongdoing is the identified risk. A realistic risk–assessment uninfluenced by ideology indicates that risks will increase if the “qualified to supervise” requirement is removed.

The Tribunal understands from the Consultation document that one intention behind removal of the “qualified to supervise” provision is potentially to permit newly- and up to 36 months qualified solicitors to set up in business as sole practitioners (albeit that they would have to be regulated by the SRA).

This proposal is of concern. The Tribunal is called upon to decide cases where the SRA has included an allegation of failure to supervise against a solicitor who under current rules will be of at least 36 months post-qualification experience. In the last 12 months the Tribunal has reached decisions on 5 such allegations, with the outcome that 3 allegations were found proved beyond reasonable doubt, 1 allegation was found not proved, and 1 allegation was admitted by the solicitor. A further allegation was withdrawn by the SRA.

Out of 138 Judgments over the last 12 months, 7 included reference by the respondent solicitor to lack of supervision as an explanation for their misconduct. Lack of integrity (breach of Principle 2) was alleged in 4 of those cases, breach of Principle 6 (maintain public trust) in 3 cases, and breach of Principle 8 (running of a business in accordance with proper governance and sound financial and risk management principles) also featured. In 5 cases the respondents assured the Tribunal that they were now, or would in the future be, more closely supervised such that there would be no repeat of the misconduct. The Tribunal can and does impose conditions on practice, either alone or coupled with another sanction, indicating that supervision of some sort is required including for those qualified for more than 3 years. The SRA regularly imposes conditions on a solicitor’s practising certificate or makes a Section 43 Order against an employee where it has concerns about the level of supervision required. Evidence of the number of occasions over the last 3 years when regulatory conditions relating to supervision have been imposed by the SRA would inform this debate.

Supported by its own empirical evidence, the Tribunal considers that removing the “qualified to supervise” requirement would be dangerous in terms of client protection and public confidence in providers of legal services. It is also potentially unfair to the newly – 36 months qualified solicitors who benefit from support and supervision during that period while they learn their craft. Insight into whether support would be beneficial and the real challenges of running a business single-handedly may be lacking at this early stage of a legal career

when experience is limited. Encouragement for entrepreneurial activities and innovation can and frequently does occur within a supported environment, perhaps with the help of a mentor, and may be more likely when unburdened by the weight of running a business. Cost and knowledge factors play a part in constraining innovation (see Headline Findings From The UK Innovation Survey 2015 – Department for Business, Innovation and Skills Innovation Analysis March 2016, page 21), with cost factors being most significant. Those factors may have less significance within the supported, dynamic environment of a firm where it is in everyone's best interests for innovation to be encouraged and supported (including financially).

The default position should therefore be that the "qualified to supervise" requirement is retained. It could however include the option to apply for waiver in limited circumstances e.g. a number of years of pre-solicitor qualification experience as a FILEX with management responsibilities.

The SRA could review this default position once its new Competence Statement and accompanying CPD requirements have been in place for a sensible period, when a properly informed risk-sensitive assessment can be carried out. The Competence Statement includes requirements in respect of "Ethics, professionalism, and judgement" and "Working with other people". These competencies should cover the areas of greatest risk when starting out in business alone. The importance of financial astuteness when setting up and running a business should never be under-estimated (and its absence is the source of significant numbers of cases before the Tribunal).

Question 20

Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

Question 20 - Answer

The Tribunal sees it as a positive marketing benefit for firms and consumers of legal services that SRA-regulated firms should do so. Such information differentiates those firms from unregulated providers and makes it clear what the consumer can expect from the protective umbrella of SRA regulation.

The SRA should "nudge" firms to display such information by shifting the emphasis towards positively explaining the benefits of using an SRA-regulated firm instead of an unregulated provider. Making this a specific requirement will merely add to the regulatory burden and risk of non-compliance in what should be viewed as an opportunity.

Alternatively, the "nudge" and encouragement should be left to The Law Society, and the SRA should make no specific requirements of firms. This is more in keeping with light touch regulation.

However, whichever approach is adopted, there is a risk that provision of information will be seen as a "tick box exercise". The mere display of information is insufficient to ensure that consumers properly understand what protections they can expect if they use SRA-regulated rather than unregulated entities. The concern is that consumers who receive non-reserved legal services from solicitors within unregulated entities will assume that the mere fact that a solicitor is advising them is sufficient to give them access to the full range of protection. The Tribunal regularly receives communications (and Lay Applications) from consumers who believe that they have received advice from a solicitor when that is not the case. The reputation of the profession is made vulnerable in these circumstances, to the detriment of the majority of solicitors. The Tribunal expects that the number of such enquiries and Lay Applications will increase if the SRA's proposals are implemented.

Question 21

Do you agree with the analysis in our initial Impact Assessment?

Question 21 - Answer

Yes, in the main. It is largely informed by the Economist's Report. This should not be taken as an indication that the Tribunal accepts that the potential price to be paid by, for example, small, local law firms going out of business, is an acceptable outcome on an objective cost-benefit analysis.

The potential loss of the benefit of LPP to those receiving advice from solicitors operating within unregulated entities remains a serious concern. The loss of this protection will become meaningful to the consumer only after the event.

The analysis lacks hard data, and relies on unsubstantiated assertion e.g. the likely impact of the proposals on practising certificate fees, contributions to the Compensation Fund, PII premiums etc.

Question 22

Do you have any additional information to support our initial Impact Assessment?

Question 22 - Answer

No. The SRA has access to a very wide range of hard data from a variety of sources and in the public interest it should use its considerable resources to review the same objectively.

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?

Question 23 - Answer

Yes.

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?

Question 24 - Answer

The Tribunal's view is that in-house solicitors and those working in Special Bodies should not be permitted to hold client money personally without further research and risk-sensitive, informed analysis.

A better immediate approach would be to carry out research with in-house solicitors and those working in Special Bodies to identify whether and if so in what circumstances they perceive there to be a public interest need and benefit in such monies being held personally. There is no regulatory need to remove a mischief if it does not currently exist.

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?

If not, what are your reasons?

Question 25 - Answer

Yes. The importance of meaningful information being made available to the consumer by the solicitor working within an unregulated entity is repeated here.

Question 26

Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

Question 26 - Answer

The Tribunal's current thinking is "no".

It is difficult to identify any justification for permitting solicitors to practise without PII cover. The SRA's proposal leaves the decision to the individual solicitor and may place the individual in difficulty with an employer who is not minded to incur the cost of the premium for PII cover in order, say, to keep fee levels down and profit margins up. The SRA's proposal gives an unregulated entity all the benefits of employing a solicitor in terms of maximising the power of the brand without imposing any obligations to protect and maintain the profession's reputation. Solicitors would be placed in potentially difficult positions with their employers and their customers, with an obvious conflict in that what is best for the consumer may not be best for the employer. There would be unacceptable financial and reputational risk to the individual solicitor if they did not have at least some individual PII cover in the event of a claim. Not all claims have merit but the costs of defending the same would still have to be paid. There would also be a significant risk of damage to public confidence in the reputation of the solicitor brand in circumstances where there was no insurance. The consumer's position would, of course, be vulnerable.

The risks to the reputation of legal services providers from negligence claims in relation to non-reserved activities carried out by a solicitor are unlikely to be significantly less than those concerning reserved activities. One high-profile claim against a solicitor employed by an unregulated entity (particularly when supervising unqualified staff conducting high-volume work) has the potential to damage the reputation of all solicitors, including those who have paid for PII (and have higher overheads as a result).

An employed solicitor working within an unregulated entity would not necessarily be told what arrangements the latter had made for PII cover and could find it difficult as an employee to check that premiums had been paid, particularly in times of financial instability. The solicitor could find themselves in a relatively powerless position in that regard.

Regulated firms are required to have PII cover for their fee earners. The SRA has no jurisdiction to require unregulated entities to take out such cover. The SRA should therefore regulate what is within its power and require the individual solicitor to obtain PII cover. The solicitor in those circumstances will be in the same position as a sole practitioner in terms of payment of insurance premiums, with the added benefit of having some leverage to obtain reimbursement from the unregulated entity. The playing field between

solicitors working in unregulated entities and, say, sole practitioners would also be levelled in terms of this important overhead. It would also be easier to compare like with like e.g. as a consumer it may be better to pay a little more and instruct a sole practitioner than a solicitor in an unregulated entity. These factors could be made transparent by means of consumer comparison websites so that truly informed purchasing decisions can be made.

Question 27

Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

Question 27 - Answer

Please refer to the answer to Question 26 above.

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?

Question 28 - Answer

Yes, for the reasons given in answer to Question 26 above.

Question 29

Do you have any views on what PII requirements should apply to Special Bodies?

Question 29 - Answer

In view of the Tribunal's answer to Question 26, the "reasonably equivalent" level of cover requirement should be retained for reserved and non-reserved activities carried out by solicitors working in Special Bodies. Without further information the Tribunal cannot comment on whether the "reasonably equivalent" level of cover should be adapted to be tailored to the risks involved. It makes no economic sense for Special Bodies to pay for more cover than they might foreseeably need.

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?

Question 30 - Answer

The Tribunal's preliminary view, based on the limited non-empirical evidence provided in the Consultation document, is that a threshold approach should not be adopted. A threshold is open to abuse and manipulation by keeping the number of regulated individuals just below the limit so as to avoid regulation. However the Tribunal would have been interested to read more about the experience of those regulators who do apply a threshold in order to inform its response.

The Tribunal understands from the Consultation document that the individual solicitors themselves would in any event be regulated by the SRA which ensures that protection is in place for clients and potential consumers. Please also refer to the Tribunal's high-level observations at Question 1 above.

Question 31

Do you have any alternative proposals to regulating entities of this type?

Question 31 - Answer

The solicitors will be regulated by the SRA and on that basis there will probably be sufficient regulation in place. However, supervision and enforcement will become even more important if public confidence in the reputation of the profession is to be maintained and to avoid damage to the good name of those working within SRA-regulated entities.

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?

Question 32 - Answer

It is not at all clear from paragraphs 160-162 of the Consultation document what the SRA's proposed position for intervention in relation to alternative legal services providers and the individual solicitors working within them might be. The position seems to be that the SRA will intervene into the individual solicitor's practice if, for example, there is a suspicion of dishonesty [160], using its other powers to secure the unregulated firm's assistance with the investigation [162]. If this is the SRA's position then the Tribunal agrees with the same. It is essential that solicitors working in unregulated entities are required to meet the same high standards as those working in regulated entities to ensure consistency and protection for clients and the public, and maintenance of public confidence in the reputation of the profession. Consumers will not distinguish between regulated and unregulated entities when their expectations have not been met; their perception will be that the solicitor(s) let them down, not the entity. Those within the entity who are not solicitors and who have never been described as such will be referred to by the unhappy consumer as "my solicitor". The Tribunal can make this comment with confidence having seen the same approach adopted by Lay Applicants; they tend to call all lawyers "solicitors" even when they are something else e.g. a legal executive or barrister.

Question 33

Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

Question 33 - Answer

The Tribunal notes the SRA's position and is in agreement.

Thank you for completing the **Consultation questionnaire form**.

Please save a copy of the completed form.

Please return it, along with your completed **About you form**, as an email attachment to consultation@sra.org.uk, by **21 September 2016**.

Alternatively, print the completed form and submit it by post, along with a printed copy of your **About you form**, to

Solicitors Regulation Authority
Regulation and Education - Policy - Handbook 2017
The Cube
199 Wharfside Street
Birmingham
B1 1RN

Sussex Law Society

Consultation: Looking to the future - flexibility and public protection

Consultation questionnaire form

This form is designed to be completed electronically—in MS Word. Please save it locally before and after completing it.

Question 1

Have you encountered any particular issues in respect of the practical application of the Suitability Test (either on an individual basis, or in terms of business procedures or decisions)?

Members of the Sussex Law Society's General Committee (hereinafter referred to as the 'SLSGC') are not aware of any.

Question 2

Do you agree with our proposed model for a revised set of Principles?

Currently the ten SRA Principles embody the key ethical requirements on firms and solicitors who are involved in the provision of legal services. Both are always required to have regard to those Principles. The SLSGC firmly believes that there will be negative implications for consumer protection and the maintenance of professional standards if the following four Principles are removed, namely that solicitors should "*provide a proper standard of service to their clients"*, "*comply with their legal and regulatory obligations and deal with their regulator's Ombudsman in an open, timely and co-operative manner"*, *"run their business or carry out their role in* the *business effectively and in accordance with proper governance and sound financial and risk management principles"*, and finally, *"protect client money and assets*".

Question 3

Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

No. The current Principle (Principle 6) places a mandatory requirement upon a solicitor to "*behave in a way that maintains the trust the public places in him and in the provision of legal services"*. It is the view of the SLSGC that the new Principle 2 (replacing the current Principle 6) to "*ensure that your conduct upholds public confidence in the profession and those delivering legal services"* would impose a lesser professional requirement upon individual solicitors and/or will create greater uncertainty in regard to individual cases when a solicitor's conduct is in issue.

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?

It is believed that no changes should be made to the current Principles. They are well known and understood by members of the profession and regulators. Similarly the fact that they are mandatory.

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?

The SLSGC believes that, in the context of policing the mandatory Principles, the SRA should continue to utilise outcomes-focus regulation which is more likely to benefit and protect clients and the public at large. Such utilisation is likely to enable better individual solicitors and their firms to consider how best to achieve the right outcomes for their clients. It is believed that the proposed use of case studies will not be as effective.

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?

The creation of separate codes of conduct distinguishing the responsibilities of an individual solicitor, wherever he or she is working, and those of a regulated entity gives rise to considerable concern given that this will create two tiers of solicitors: namely those working in a regulated entity and those working in an unregulated one, with consequential risks to consumer protection and professional standards which in turn risks damaging the reputational standing of solicitors. Moreover, and worryingly, the SLSGC believes that the proposed changes will create confusion for consumers who, through being ignorant of which regulations apply to whom, may well find themselves unwittingly exposed to greater risk. The SLSGC shares the Law Society's view that the existence of two codes rather than one will result in less certainty about what is and is not permitted or alternatively required. The SLSGC believes that most solicitors would far prefer a more definite approach so that issues concerning compliance are apparent: moreover that there should be a lesser element of discretion being brought to bear by the SRA when making determinations in respect of alleged breaches of the Code. Plainly such could result in enforcement action being taken that might have been avoided if the Code or Codes had been clearer. Moreover, it is understood that there is some overlap between the two Codes, most noticeably in areas such as client information/identification, conflict and client complaints. This will need to be addressed. If it is not, then there will need to be guidance or clarity provided in regard to which requirement should take precedence where inconsistencies exist.

Question 7

In your view is there anything specific in the Code that does not need to be there?

No.

Question 8

Do you think that there anything specific missing from the Code that we should consider adding?

Please see the concluding part of answer 6 above. Moreover, and as stated earlier, the firm belief of the SLSGC is that the mandatory Principles currently numbered 5, 7, 8 and 10 should continue to apply and thus be Code Mandatory Principles.

Question 9

What are your views on the two options for handling conflicts of interests and how they will work in practice?

Option 2 may not be workable due to the fact that there are occasions when it is not possible to identify that an actual conflict situation exists. A further matter which gives raise to cause for concern is that there is a real risk of consumers being confused and those who are clients of unregulated entities suffering from a lack of adequate consumer protection, given that non-solicitors working for unregulated entities will not be subject to the conflict rules in the same way as regulated solicitors will be who work for that self-same unregulated entity.

Question 10

Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

No. The creation of what in effect will be two different types or tiers of solicitors (namely those working on the one hand for a regulated entity and on the other those working for an unregulated entity) is in the view of the SLSGC very likely to diminish consumer protection as well as professional standards which, in turn, risks creating confusion among consumers and damage to the reputational standing of solicitors: and thus public confidence in them.

Question 11

In your view is there anything specific in the Code that does not need to be there?

No. This question though may in time be answered differently by consultees once the guidance associated with the new Codes has been published by the SRA and considered carefully.

Question 12

Do you think that there anything specific missing from the Code that we should consider adding?

Please see answers above to questions 10 & 11.

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?

None, save for what has been commented upon above.

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.

The SLSGC feel that this question will be best answered by COLPs and COFAs. That said, it is believed that their introduction and the way in which they have performed their roles since then has led to a reduction in client complaints and claims against solicitors.

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?

Again the SLSGC believes that COLPs and COFAs are better placed to answer this question.

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?

As far as the SLSGC is aware, the proposition that what is proposed by the SRA will improve access to quality legal services at affordable prices, enhanced professional standards and increase employment opportunities, is not borne out or supported by any firm evidence to that effect. Conversely, the SLSGC shares the Law Society's view that the SRA's proposals may well have undesirable and/or unintended adverse consequences in respect of the following:-

- **Solicitors practising with unregulated entities are more likely to be managed in a way that may compromise them professionally and/or suffer as a consequence of there being a lack of adequate supervision. In this regard, it is of considerable concern that if unregulated entities are not going to have to be insured to cover the risk of professional negligence and, further, if their clients are not going to be able to make claims against the Solicitors' Compensation Fund, there is good reason to believe that the reputation and standing of regulated firms, and those solicitors working for them, will be much tarnished by what is believed will be an increase in the number of defaults or misdemeanours perpetrated by those who work for unregulated entities.**

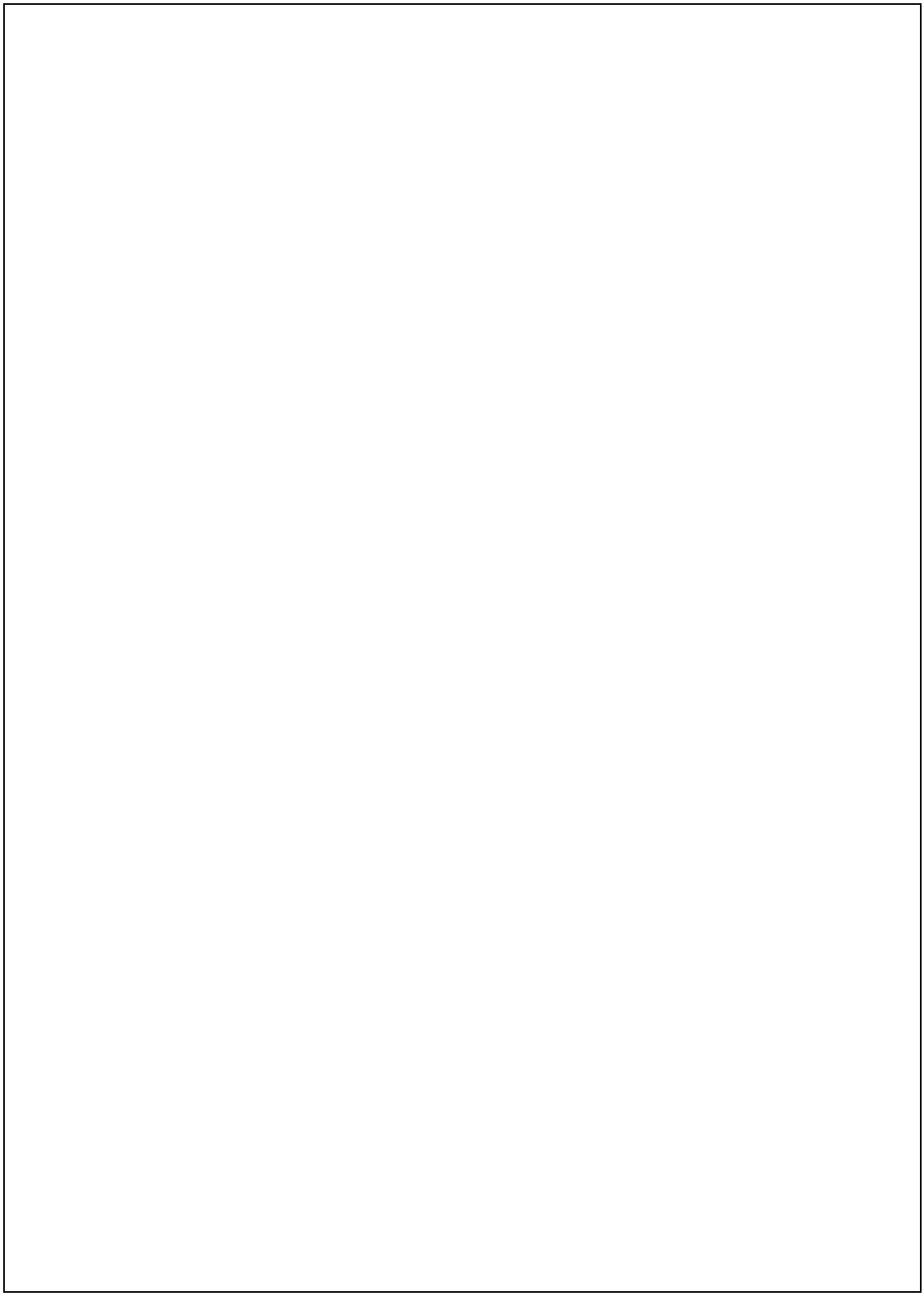
- **Advice from solicitors working for unregulated entities may not be legally privileged. Obviously this would create serious anomalies of a type which could well disadvantage clients. Moreover the whole concept of Legal Professional Privilege could well be eroded if solicitors working for unregulated entities are unable to give legally privileged advice. That may well prove to be commercially damaging, particularly for firms who act for foreign clients and large multi-nationals.**

- **The proposed changes to the supervision requirements are likely to put newly-qualified solicitors at a disadvantage and, in turn, result in more instances of poor service. Invariably they welcome the support and guidance of more experienced solicitors and this is a key driver for quality of service. If this is not available, it is probable that clients of unregulated entities as well as newly-qualified solicitors will be a greater risk. In turn this would negatively impact on the standing of 'the solicitor brand'.**

- **Solicitors working in unregulated entities may not be required to have professional indemnity insurance and this, combined with the fact that their clients may also not have access to the Solicitors Compensation Fund, nor access to the Legal Ombudsman, greatly increases the risk of there being an erosion of what are key elements for the maintenance of current client protection.**

- **It is believed that the imposition of different Codes will have the**

consequence of regulated entities judging that it would be unwise for them to accept professional undertakings from unregulated entities (or from a solicitor working for one) and if that proves to be the case there will be significant adverse consequences for conveyancing practitioners, clients and their lenders.



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?

It is believed that the majority of SLS members will not seek to take advantage in the way envisaged by this question.

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?

SLSGC believes that there should be no change to the current requirements.

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?

Please see what has been said above in answer to question 16.

Question 20

Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

Yes. MORE TO THE POINT there should be a requirement imposed upon unregulated entities to state specifically in writing which of the protections provided by regulated entities are not going to be correspondingly provided by them.

Question 21

Do you agree with the analysis in our initial Impact Assessment?

The SLSGC is unable to express a considered response to this question.

Question 22

Do you have any additional information to support our initial Impact Assessment?

Please see the answer to question 21.

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?

Yes.

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?

They should not be allowed to do so.

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?

If not, what are your reasons?

No. Unregulated entities should be required to contribute to the Fund or to a separate Fund for the benefit and/or protection of clients who suffer as a consequence of dishonesty. The SLSGC firmly believes that the reputation and standing of regulated firms will be much tarnished/diminished through the sins of those working for unregulated entities should clients suffering from dishonesty not have access to a well regulated compensation fund.

Question 26

Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

Most certainly not. The SLSGC's reasons for this view mirror the concerns set out in its answer to question 25 above.

Question 27

Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

Please see previous answers.

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?

Most certainly 'yes'.

Question 29

Do you have any views on what PII requirements should apply to Special Bodies?

Yes. The current PII requirements should apply to Special Bodies in exactly the same way as they do to all practising solicitors and their firms. It is not in the public interest for the reverse to be the case.

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?

This question is not understood.

Question 31

Do you have any alternative proposals to regulating entities of this type?

The regulations to be applied should be the same irrespective of whether firms are regulated or unregulated entities. It is not in the public interest for there to be a differentiation.

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?

The SLSGC's answer to this question is the same as that for question 31.

Question 33

Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

Yes.

Thank you for completing the **Consultation questionnaire form**.

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Alternatively, print the completed form and submit it by post, along with a printed copy of your **About you form**, to

Solicitors Regulation Authority
Regulation and Education - Policy - Handbook 2017
The Cube
199 Wharfside Street
Birmingham
B1 1RN

Dated 5th September 2016

Completed for and on behalf of the members of the Sussex Law Society's General Committee.

Consultation questionnaire form

Question 1: Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

The content of the test itself is fair and discharging the burden of the suitability test is straightforward in administrative terms but it is unclear what level of scrutiny is given to these returns to ensure that only those who are suitable are admitted to the profession. Further information regarding this process would be welcome as a way of showing greater transparency of the regulatory process.

The Law Society is aware of concerns regarding the timing of the suitability test. The Society was supportive of the removal of student enrolment prior to the start of the Legal Practice Course as it was unnecessarily costly and bureaucratic. However, the Society noted at the time that there may be issues which arose as a result of this and that it was essential that students have proper information to alert them to any likely problem at an early stage. There were also notable benefits to the previous arrangement. First, they enabled any concerns about a student's character to be addressed before the student embarked on the period of recognised training, at which point there has already been a significant outlay in time and money. Secondly, the requirement to undergo the process placed students on notice that their conduct may seriously affect their ability to pursue a legal career. It offered them an opportunity to engage at an early stage with the implications of being a professional. While it is accepted that each individual must take responsibility for their behaviour and should take advantage of the information available on the SRA website about character eligibility, it is not realistic to expect a student to understand the complex technicalities for reaching the SRA's suitability standards.

Unfortunately, although students can request an early appraisal of any issues that may cause problems regarding their suitability, the Society understands that it is not widely understood what this process is and when it should be applied for. The Society is aware, anecdotally, of situations arising whereby firms are routinely having to query trainees when they begin their placements and deal with issues, which the person concerned had not recognised must be declared, at this late point. There may also be situations where firms do not check, which raises issues about client protection. This represents a waste of a significant outlay in time and money on their part.

Clear and appropriate information regarding the suitability test should be made available to students at an early stage in order to make it obvious to students where previous conduct may prevent them from joining the profession and to give them a clear idea of the conduct they will be expected to demonstrate over the ensuing

years if they wish to join the profession.

Question 2: Do you agree with our proposed model for a revised set of Principles?

The Society has concerns with some aspects of the proposals as set out below.

New Principle 1: Uphold the rule of law and the proper administration of justice

This is current principle 1. We welcome its retention. However, we would reiterate that it is important to understand what "the rule of law" truly means. While a solicitor who is acting illegally may damage trust in the profession, it does not follow that the solicitor is also failing to uphold the rule of law. We would refer to The Rule of Law by Lord Bingham[17] which advances eight principles by way of expansion of the basic concept, the latter being: "that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts." These are primarily obligations of the state, not of individuals.

New Principle 2: Ensure that your conduct upholds public confidence in the profession and those delivering legal services

This is a reworking of current principle 6 ("behave in a way that maintains the trust the public places in you and in the provision of legal services") but brings in a new obligation with respect to providers generally.

There are two substantive changes.

First, the absence of any reference in the new wording to the importance of regulated individuals behaving in a way that retains public trust in them personally.

Secondly, it is illogical for regulated individuals and firms to be placed under any regulatory obligation with respect to non-regulated individuals and providers, and the proposed loosely worded reference could deter regulated individuals and firms from pointing out why the public should have greater confidence in the regulated sector, for example because of their professional training and the higher levels of client protections.

We propose that the new Principle be redrafted as follows:

*Proposed alternative wording for New Principle 2: Ensure that your conduct upholds public confidence **in you and** in other regulated individuals and firms"*

New Principle 3: Act with independence

[17] The Rule of Law by Tom Bingham, Penguin Books, 2011.

This is a reworking of current principle 3 ("not allow your independence to be compromised"). The Society does not have any concerns with the revised wording.

New Principle 4: Act with honesty and integrity

This is a reworking of current principle 2 ("act with integrity").

The Society has concerns with this proposed new principle not least because a requirement to be honest, including with respect to client money, is significantly weaker than a requirement to protect it, as required by current principle 10 ("protect client money and assets"), which it is proposed to remove. This proposal is presumably to facilitate the other proposal that solicitors working in unregulated entities should not be able to hold client money in their own name.

The absence in the new principles of any reference to the importance of protecting client money and assets raises concerns from the perspective of professional standards and consumer protection. Arguably, such protection would become even more important in an unregulated entity which do not and would not have to comply with the SRA's accounts rules. We therefore believe the new set of principles should retain an explicit reference to the protection of client's money and assets, ideally in a separate principle.

New Principle 5: act in a way that encourages equality, diversity and inclusion

This is a reworking of current principle 9 ("run your business or carry out your role in the business in a way that encourages equality of opportunity and respect for diversity"). The substantive change is the addition of a reference to inclusion. However, the word "act" seems a significant watering down of the current wording and the Society would prefer to retain "run your business or carry out your role" in place of "act".

We are also concerned that, while equalities legislation will apply to unregulated entities, this Principle will not. The SRA should address this issue in its equality impact assessment.

New Principle 6: Act in the best interest of each client.

This is a minor change to the wording of existing principle 4 ("act in the best interests of each client"). The Society does not have any concerns with this wording.

Question 3: Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

As noted above, we are concerned that the wording of the new Principle 2 does not refer to the importance of regulated individuals' behaviour in a way that retains public trust in them personally.

We would prefer absolute clarity and therefore propose that the new Principle be redrafted as follows:

*Proposed alternative wording for New Principle 2: Ensure that your conduct upholds public confidence **in you and** in other regulated individuals and firms"*

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?

Current Principles

The SRA is proposing the removal of four current principles:

a. Current principle 5 ("provide a proper standard of service to your clients")

The Society believes that this Principle should be retained as this is central to the profession and reflects the high level of quality that consumers can expect from a regulated individual. Its removal gives rise to concerns from the perspective of professional standards and consumer protection.

b. Current principle 7 ("comply with your legal and regulatory obligations and deal with your regulators and ombudsmen in an open, timely and co-operative manner")

The Society does not object to the removal of this principle.

c. Current principle 8 ("run your business or carry out your role in the business effectively and in accordance with proper governance and sound financial and risk management principles")

The Society does not object to the removal of this principle, provided that current principle 10 is retained.

d. Current principle 10 (“protect client money and assets")

As noted above, the removal of this principle raises concerns from the perspective of professional standards and consumer protection. Arguably, such protection would become even more important in an unregulated entity which does not have to comply with the SRA's accounts rules. We therefore believe that the new set of principles should retain an explicit reference to the protection of client money and assets, ideally in a separate principle.

The loss of principles 5 and 10 cause particular concern. In addition to the reasons cited above, these principles are so closely associated with what consumers have come to expect of a solicitor that they might be said to epitomize the brand on which consumer confidence is in large part founded. We can see only risks and no benefits in removing what are often seen as two hallmarks of the profession from the core principles.

At Appendix 3, we provide a scenario showing what could happen in a worst case scenario.

Other Principles arising from the newly revised ones

While confidentiality is arguably implicit in the principle that regulated individuals should "act in the best interest of each client", the Society believes it would be helpful to include a specific reference given its importance to consumers and to compliance with professional standards.

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?

We take the view that it would be helpful to the profession to provide a thorough and developed suite of scenarios, particularly as it is proposed that the indicative behaviours be removed from the Codes. As examples of the types of scenarios which we would consider to be useful, we suggest the following:

- A scenario that deals with a sole practitioner who establishes an unregulated entity in order to provide unreserved legal services. The scenario would cover how this practitioner might manage the operation of a regulated and separately unregulated business in practice. It would be particularly interesting to understand how the sole practitioner can guard against client confusion when practising in the circumstances set out above.

- A scenario that explores a practising solicitor working in an unregulated entity who is asked to represent a client who has clear conflicts with existing clients of that entity. We understand that in such a situation the solicitor would be able to represent the client. It would therefore be valuable to understand the parameters around management of such conflicts.

- A scenario that outlines whether, under the new proposed Codes of Conduct, a solicitor firm of conveyancers can act for a buyer and a seller, or for a borrower and a lender, in a conveyancing transaction and be compliant with 6.1-6.5 of the proposed Code of Conduct for Solicitors.

- A scenario that explores the impact of the proposals on the giving and receiving of undertakings ie between a solicitor in an unregulated entity and a solicitor in a regulated entity. Undertakings are the oil in the engine of legal transactions and help ensure they can take place. If in such circumstances, a solicitor in an unregulated entity were to breach an undertaking, what would be the consequences in terms of reparations to the affected consumer? Under what, if any, circumstances would undertakings from an unregulated firm be acceptable to regulated firms and others?

- A scenario that explores a solicitor who owns and practises through an unregulated entity who wishes to place advertisements online and in a newspaper. It would be useful to understand in more detail what the advertisement can say about the unregulated firm employing solicitors with and without practising certificates.

- A scenario that explores how an in-house lawyer (perhaps working for a local

authority) might provide legal services to the public. How this service would be managed, charged out, and how conflicts and risks would be managed.

- A scenario that explores how a solicitor working in an unregulated firm would manage conflicts, bearing in mind that they would be bound by the conflict rules from the solicitors code but may be working with colleagues who are totally unfamiliar with the concepts of conflict, confidentiality and disclosure.

- As set out in our answer to Question 20, we believe it would be helpful for the SRA to provide a case study on the information that should be displayed about consumer protections, including the level of detail required and expectations as to the prominence of the information presented.

Our consultation with some firms indicates that they are concerned about the removal of indicative behaviours from the handbook because of their usefulness in indicating how the regulated community can best comply with their regulatory requirements.

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?

As the Code's purpose would be to forestall misconduct, there is a balance to be struck between excessive detail and brevity. Clarity is important but so is predictability.

We know that our members, particularly those from smaller firms, like certainty. Many members would rather have a definitive 'do this' or 'don't do that' approach, so that compliance is more straightforward and there is less scope for genuine misunderstandings or disputes with the regulator. Without such certainty, disputes with the regulator about whether or not a particular behaviour is acceptable are more likely, as is uncertainty about the circumstances in which enforcement action will be triggered.

In addition, we are concerned that the language used in the Code is often vague or loosely constructed. This creates a risk that behaviour that is clearly within the current Code may be regarded as incompatible with the new Code and that a member carrying on practice in a fully compliant way now might be in breach under the new Code. There is real concern that both of the new Codes would give the SRA too much discretion. There is clearly a need for the SRA to provide more information and ensure that it acts in a consistent way and to make an explicit commitment to those subject to regulation that it will be consistent, fair, open, transparent and predictable about the circumstances in which it will decide to take or not to take action.

We understand that guidelines are planned and should mention the concerns of many that they are not yet available.

Specific examples of where the Code is lacking in clarity are set out in our answer to Question 13.

Question 7: In your view is there anything specific in the Code for all solicitors that does not need to be there?

No. On the basis of the partial information provided about the new regulatory framework and the SRA's approach, the Society has not so far identified anything specific in the proposed new Code that should be removed.

On the contrary, as noted in our response to Q6, we believe the Code needs more detail and guidance in order for it to be effective and provide clarity to the regulated community.

We would also reiterate that, without the full picture in relation to the new framework and the SRA's approach, it is difficult to reach a definitive judgment on the proposals.

Question 8: Do you think that there anything specific missing from the Code for all solicitors that we should consider adding?

It is not possible to respond to this question with any real certainty as we have not seen the guidelines or other parts of the proposed regulatory reforms.

However, on the basis of what has been set out so far, we have identified three issues on which the Code should be revised:

Unsolicited approaches to clients

The Society is extremely concerned by the proposed removal of Outcome 8.3 in the current Code, which states: "you do not make unsolicited approaches in person or by telephone to members of the public in order to publicise your firm or in-house practice or another business;".

Solicitors who make such unsolicited approaches to clients are not acting in the client's best interests, but rather their own. This explicit prohibition provides an essential protection for clients who are at their most vulnerable when such approaches are made – at the police station, court or prison. Its removal would undermine the protection currently provided to clients in this situation, which prohibits the solicitor from carrying out this behaviour.

The prohibition that the consultation proposes to remove also supports the Government's Duty Solicitor scheme by helping to ensure that anyone arrested can exercise their right to free legal advice from the duty solicitor. Removal of the prohibition would undermine the efficient running of the scheme.

The justification for proposing the removal of the prohibition is that it is "*covered by new 1.2 in the Code for Solicitors and new 1.1 in the Code for Firms to a certain extent.*"

The relevant clauses are as follows:

- new 1.2 in the Code for Solicitors: "*You do not abuse your position by taking unfair advantage of clients or others.*"
- new 1.1 in the Code for Firms: "*You do not abuse your position by taking unfair advantage of clients or others.*"

Clearly, the new clauses carry significantly less weight than the current explicit prohibition. We believe their wording is too weak and unclear to provide certainty to the public, members of the profession and the Legal Aid Agency that unethical behaviour is prohibited and will not be tolerated.

We therefore recommend that the Code of Conduct for Solicitors, RELs and RFLs, and the Code of Conduct for Firms should maintain the current wording of Outcome 8.3, which explicitly prohibits such unethical behavior.

Firms being reasonable or forming reasonable views

A number of references to firms being reasonable or forming reasonable views have been dropped. We would argue that if a solicitor acts reasonably but makes a mistake, it is right in such circumstances that being reasonable should not provide a defence to a request for an injunction or other mandatory order or costs. However, it would also seem unfair to make the actions of the solicitor in such a situation a potential offence that is subject to disciplinary consequences.

Systems to identify and deal with potential conflicts

We note that references to systems to deal with potential conflicts and confidentiality have been lost within the new drafting of the Codes of Conduct. We believe that this causes a problem. We assume that the omission has taken place because there would be general rules about systems. In our experience, and the case law supports this, the biggest single problem for firms in these areas is poor systems, particularly systems for picking up conflicts, or systems for establishing where special protections will be needed to protect confidential information. The SRA approach therefore, while being logical, would quite possibly be unhelpful to firms.

Undertakings

We have particular concerns about the position where a solicitor in an unregulated provider gives an undertaking to a solicitor in a regulated firm or to others who would need to place reliance on it. Undertakings have become a crucial element of the practice of law in the UK and are used to expedite matters that, in the absence of an undertaking, would cause considerable delay and inconvenience to the practitioner and the client.

Even though an undertaking relates to an individual solicitor, the Society has significant concerns regarding an undertaking provided by a solicitor employed by an unregulated provider. We believe that solicitors in a regulated firm would be highly unlikely to accept an undertaking from an unregulated provider due to a lack of protections if things go wrong.

We take the view that undertakings are sufficiently important to warrant protection in both of the codes, making clear that they are not just an enforceable agreement, but that breach can give rise to disciplinary proceedings.

Please also refer to our response to Question 5 which includes a suggested scenario

in relation to undertakings.

Question 9: What are your views on the two options for handling conflicts of interests and how they will work in practice?

The need for clarity around handling of conflicts is paramount. One particularly difficult area is conflicts relating to buyers and sellers in conveyancing transactions. We refer to our suggestion for a specific scenario to be created on this topic in our response to Question 5.

We read the two options set out in the consultation as follows:

- Option 1 largely replicates the 2011 Code, in prohibiting a solicitor from acting where there is a conflict or significant risk of conflict, for example as would exist if an individual solicitor were to act for a buyer and a seller, unless specified circumstances are met and protections are provided;

- Option 2 would narrow the ability to act given that it provides for a complete bar on acting where there is an actual conflict, and requires protections to be put in place if there is a significant risk of a conflict.

We would take the view that Option 2 would quite possibly be unworkable as it is not always possible to identify where a conflict exists. It is too restrictive and unnecessary. Because of the difficulty in identifying where conflicts exist, this option would present risks from a consumer protection perspective.

It may be helpful to set out our thinking to both options in more detail, at the same time commenting on some of the more subtle changes in emphasis:

<u>Option 1</u>

The proposed new rule 6.1 reproduces the old outcome 3.4 dealing with a conflict between the solicitor's own interests and those of the client. It is proposed that there should be an absolute bar to acting (as in the current Code). Under general law such a conflict could be waived. We are not aware of any pressure to change this.

The proposed new rule 6.2 effectively reproduces old outcomes 3.5 to 3.7, and deals with conflicts between clients. In addition to dropping indicative behaviour, it makes a number of changes to the existing rules. First (in 6.2 (a)), the old rule that if someone was to act for more than one client, the clients had to have 'a substantial common interest'. This is to be replaced by saying that the clients need both 'an agreed common purpose and a strong consensus how that purpose is to be obtained'. We take the view that this is weaker, because it allows one firm to act for more than one client on a matter even if the clients have little or no common interest in the matter. There is no explanation for the change.

A further protection has been changed (6.2(iii)). Under the old rules the solicitor had to be satisfied that it was reasonable to act for all clients. This has been dropped. We find this somewhat unsatisfactory, particularly as it would affect less sophisticated clients, who might not understand the implications of giving consent. There is a restatement of the need for the benefits to the clients having to outweigh the risks, but the old requirement was that this was something the solicitor had to have been satisfied about whereas the new requirement is a pure objective test.

Three old protections have been dropped. The first (outcome 3.7 (a)) was that the solicitor had to explain the risks of acting for more than one party and be satisfied that all clients understood this; this was similar to what happens when, for example, one spouse agrees that a house should be mortgaged to support a loan to the business of the other spouse. We would argue again that dropping this is wrong although it may be argued that no consent can be 'informed' without an explanation process (but this should be made clearer). The second (outcome 3.7 (c)) was that other than the matters for which client consent had been given there was no other client conflict. We can see that this protection added little. The third is that without specific client consent, no individual could act for more than one client on the matter. We assume that this was dropped because the issue has been picked up in the code for individuals.

Finally, these conflict rules are to apply to both firms and individuals, in more or less identical terms. But, recognising that some parts of the rule need to apply to individuals, the question remains as to how the application of the whole of the rule works? Is it to be the responsibility of each solicitor on engagement to see that informed client consent has been given? We do not foresee that this would be straightforward. It would be wrong for the senior lawyers acting to be able to just pass responsibility onto the firm, irrespective of what they know or do. We feel that more precise drafting would be beneficial.

<u>Option 2</u>

This would be a complete bar on acting where there is an actual conflict, and protections where there is a significant risk of a conflict. The protections would be (a) informed client consent in writing, (b) where appropriate, putting in place effective safeguards to protect confidential client information, and (c) ceasing to act for one or more of the clients if an actual conflict arises.

This is justified, in paragraph 64, as taking an 'approach which recognises the safeguards around the current exceptions are really about preventing potential conflicts from becoming real ones'. This is incorrect. The existing safeguards were drafted recognising that the parties may have an essentially common interest but still have opposite interests in some respects. These are just examples of a situation that arises not infrequently in a commercial law practice. We understand that when the original rule was drafted, one example which was being held in mind was a solicitor acting for all the partners on forming a partnership, or all owners, when

drafting articles of association. The clear common interest is obvious, but behind it individuals will often have different views on their personal rights in many respects. What a solicitor might typically do is say that he or she will raise the issues where interests may differ and ask the clients to agree how to deal with them and then, in effect, just be the scribe. However, narrowing the scope of the mandate in this way will not always work. Similar issues can be found in drafting a trust deed. We fear that Option 2 would create very real difficulties in these types of situations and could be a recipe for uncertainty.

Also Option 2 seems to abolish the ability in Option 1 and the current rules for a firm to act for more than one client in pursuit of the same object (often where an intermediary is doing some sort of controlled auction for shares in a company or some sort of property). We can see no reason to open this up to uncertainty.

Question 10: Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

We refer to our answer to Question 6.

Specific examples of where the clarity of the proposed new Code could be improved are set out in our answer to Question 13.

Question 11: In your view is there anything specific in the Code for SRA regulated firms that does not need to be there?

No. On the basis of the information provided so far about the new regulatory framework and the SRA's approach, the Society has not identified anything specific in the proposed new Code for SRA regulated firms that should be removed.

On the contrary, as noted in our response to Q10, we believe the Code needs more detail and guidance in order for it to be effective and provide clarity to the regulated community.

We would also reiterate that, without the full picture in relation to the new framework and the SRA's approach, it is difficult to reach a definitive judgement.

Question 12: Do you think that there is anything specific missing from the Code for SRA regulated firms that we should consider adding?

We would repeat our point that without seeing all of the guidance which the SRA intends to publish, it is difficult to respond to this question with any real certainty. On the basis of what is available, we would suggest the following:

We note the absence of 1.3 from the Code – the provision about undertakings. It is unclear whether entities should not be giving undertakings, or that an undertaking has to be attached to an individual solicitor to be enforceable.

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?

Remarks in relation to drafting on Confidentiality and disclosure

Proposed rule 6.3 in the Code of Conduct for Solicitors (and proposed rule 6.1 in the Code of Conduct for Firms) tracks existing outcome 4.1 (and its equivalent) provided the definition of client continues to cover former clients (ie by replacing "clients" by "clients or former clients". We would expect that to be the case but note that proposed rule 6.5 expressly refers to former clients so an explicit reference to former clients is also needed in proposed rules 6.3 and 6.1 in the Code of Conduct for Solicitors and the Code of Conduct for Firms respectively.

Proposed rule 6.4 (about the duty to disclose) incorporates existing outcomes 4.2 and 4.3. There is an oddity in the new rule in the version of the draft code which applies to firms, as the draft rule expressly says that it only applies to individuals. But if it only applies to individuals why does it need to be in the rule for firms? The underlying point of course is that in cases like Kelly v Cooper (a case about estate agents), the courts have made it clear that there is no general assumption that information known to one person in a firm is to be attributed to another.

We note that proposed rule 6.4 has two additions to outcomes 4.2 and 4.3. The first is that a solicitor does not need to pass on information to the client which the solicitor has reason to believe will cause the client serious physical or mental injury. This seems to apply only where the client is an individual, and not (for example) where the client is a company of which the vulnerable person is a controller or director. The second is to reflect general law about the mistaken disclosure of information in a privileged document which need not be disclosed to a client. This reflects case law. In the case of these new exceptions, saying that they are exceptions to the duty to disclose is not at all the same as saying that disclosure cannot be made, which is surely what is intended (certainly in relation to the second of them).

Proposed new rule 6.5 (not acting if to do so puts client confidential information at risk) largely tracks existing required outcome 4.4. This area is the one which has led to most of the recent reported cases on conflicts and confidentiality, although the cases do not refer to the SRA Code of Conduct. It is worth noting that the existing rule was altered some time ago to refer to having ‘information barriers which comply with the common law’. The proposed new rule just refers to measures which result in ‘there being no real risk of disclosure’. This reflects the common law and is consistent with the way in which the new Code of Conduct is drafted.

We would make a couple of points on proposed rule 6.5. The first is that having introduced a reference to former clients (which proposed rule 6.3 does not do) it

then uses the term inconsistently so that, on the face of it, a former client consent is not enough to escape the prohibition on acting, although a current client consent does. Secondly, we are puzzled why this rule, with its references to effective measures, applies to individuals?

Further points in relation to drafting: Code of Conduct for Solicitors

- The paragraph below the Principles on page 45 of the consultation, implies (when it says 'They apply to conduct and behaviour relating to your practice') that the Code does not apply to a solicitor's private life. This should be clarified.

- As worded, by comparison with the provisions in the current Code that this would replace[18], rule 1.4 could be read as meaning that the solicitor is responsible if their client misleads the court or others, or is responsible for other acts or omissions, even if the solicitor was not aware that any mischief was taking place. In light of this, we suggest that rule 1.4 should be reworded as follows:

  1.4 You do not mislead or attempt to mislead your clients, the court or others, either by your own acts or omissions or ***by knowingly*** *allowing or being complicit in another person misleading the court or others* ~~*the acts or omissions of others (including your client)*~~*.*

  We would also note that rule 1.4 must be read in the context of the wider requirement that solicitors must always act in good faith and that misleading anyone whilst acting as a solicitor would potentially breach that requirement in addition to rule 1.4.

- rule 2.4 appears to originate from the Bar Standards Board Code of Conduct. Read in isolation, 'properly arguable' could be confusing for solicitors. It might be interpreted as not being able to put forward instructions which may lack credibility, as opposed to arguments with no legal basis. We assume that guidance will clarify this point.

- rule 3.1 is poorly worded.

- rule 3.4 The term 'Client's attributes' is vague and lacking any legal meaning. It is therefore inappropriate for a Code of Conduct. Moreover, it is unclear what that word encompasses that would not be covered by "needs and circumstances".

- rule 4.2 'Others' might more helpfully read "Others, for example lenders, trustees etc."

[18] O(5.1) "You do not attempt to deceive or knowingly or recklessly mislead the court"; and O(5.2) "You are not complicit in another person deceiving or misleading the court."

Further points in relation to drafting: Code of Conduct for Firms

- In the Code of Conduct for Firms, Cooperation and information requirements section, the text needs to clarify what is meant by 'you'.

- rule 4.2 of the Code of Conduct for Firms, greater clarity is needed on what is meant by 'competent'.

- It is disappointing that rule 7.1 provides very little detail to shed light on applicable outcomes in the SRA Code of Conduct for solicitors and RELS 2017.

Finally, rule 7.8 in the Code of Conduct for Solicitors requires guidance to accompany it. The current code says that a solicitor has to act reasonably to take action. It now depends what 'remedial action' means. We also wonder if the SRA can require a solicitor to take action in these circumstances or if this falls outside its jurisdiction.

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.

There are arguments on both sides and this is an issue requiring debate and careful consideration.

Recognised bodies and recognised sole practices need to ensure compliance and, in particular, that an understanding and appreciation of professional standards and ethics are properly embedded. Arguably, by specifying COLP and COFA roles, the regulator relieves those regulated of the need to decide how best to achieve this. It has also been suggested by practitioners that the COLP and COFA roles have served to reduce the ethical knowledge and awareness of individual practitioners. This potential is mentioned in the findings section of the SRA commissioned Independence, representation and risk report, where it is suggested that the perception of COLPs and COFAs as the 'holder' of professional values raises 'the question of whether such has the potential for individual lawyers to become less aware of, and less interested in, their own professionalism, professional identity and professional obligations.[19]

However, it could be argued that those regulated should determine for themselves how they comply with regulatory requirements and the SRA should find ways of promoting and regulating individual professionalism. Alongside this, any individuals tasked with responsibility for ensuring compliance must demonstrate and maintain the necessary skills and experience, and be subject to appropriate accountability and responsibility controls.

We recommend that the SRA conducts and acts on a survey of individual COLPS and COFAs aimed at identifying specific ways of reducing the burden of reporting, while ensuring that the regulatory framework helps to promote individual professionalism, professional identity and professional obligations.

[19] Independence, Representation and Risk: An Empirical Exploration of the Management of Client Relationships by Large Law Firms: Claire Coe and Dr Steven Vaughan, commissioned by the SRA, 2015.

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?

The Society will shortly publish its 2015 Regulation Survey. Of those who responded to this survey, 91% were the Compliance Officer for Legal Practice (COLP) at their firm. The findings from the survey could inform the nature of further support for this post. Responses indicate the need for clear, unambiguous and effective regulation. In this context it is worthwhile noting the following:

- there was a decline since the 2012 survey in the proportion of firms that thought that the SRA's enforcement procedure is understood by the industry as a credible deterrent and being used in a way that serves to better protect consumers;

- compared with 2012, a smaller proportion of firms agreed that guidance supplementing Handbook regulatory rules is useful, and that principles, outcomes and indicative behaviours provide sufficient guidance on compliance obligations;

- keeping up to date with changes to outcomes and indicative behaviours was the most commonly reported problem with OFR reported by firms; and

- changes to the regulatory regime which would introduce a principles based code only with outcomes and indicative behaviours removed were predicted to negatively affect professional and ethical standards on balance (and particularly so amongst large firms).

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?

We refer to our comments in our introduction and in the sections that follow.

It is possible that some commercial firms, wishing or feeling compelled to take advantage of the liberalisations offered by the new rules may decide to split the provision of their legal operations into two entities: a traditional firm, which would continue to carry out all reserved[20] work, perhaps retaining only a small percentage of the firm's current partners, solicitors and other staff; and a new unregulated entity, which would carry out all unreserved work and employ solicitors with practising certificates as well perhaps as some solicitors without a practising certificate.

In principle, while clients of the new unregulated entity would be less protected than clients of a traditional firm there would be some cost benefits for such firms in taking such steps. The new unregulated entity would not be required to pay entity regulatory and compliance costs, practising certificate costs for non-practising solicitors, contribute to the Solicitors Compensation Fund, take out professional indemnity insurance, employ COLPs, COFAs and other compliance staff, or comply with client account rules.

Furthermore, foreseeable unintended consequences would be that the regulatory burden and cost moves across to smaller firms and sole practitioners who are less able to divide their businesses between regulated and unregulated work; as BAME solicitors are over-represented among smaller firms, this will have diversity implications. This will result in a further restriction on access to justice and increase unmet legal needs as the smaller firms service the less well off demographic.

If many firms elected to go down this route, the Regulator would have to take steps to avoid a significant reduction in income. This would seem likely to lead to higher PC and firm fees, which would have significant negative financial consequences for sole practitioners and firms that chose not to change their business model. In particular, this would be likely to have a disproportionately negative impact on smaller firms for which the cost of changing their business model was not justified by the size of their client base or the high proportion of reserved work they undertake; such firms would have to operate at a competitive disadvantage because their entire business (including reserved and unreserved work) would be subject to the regulatory regime.

In addition, this would also have the effect of making reserved activities such as conveyancing and litigation potentially significantly more expensive for consumers as

[20] http://www.legalservicesboard.org.uk/can_we_help/faqs/Reserved_Legal_Activities.htm

the payment base for regulatory costs to be captured would be very much smaller than now. In addition, regulatory costs would be disproportionate for small and medium-sized firms, which generally carry out a mix of reserved and unreserved activities and may not have a big enough client base/business to justify splitting their business into two separate entities, one regulated and one not. Small and medium sized firms would therefore be likely to have to operate at a competitive disadvantage because their entire business (ie reserved and unreserved work) would be subject to the regulatory regime and its costs, whereas unregulated entities would fall outside this and have lower costs as a result. Ironically, the largest law practices, servicing the largest corporates, would be likely to pay proportionally less than the smallest firms servicing individual consumers; the proposals therefore threaten the viability of established small firms, which may result in forced close down and insolvencies with negative consequences for the communities they serve, especially where the firms concerned conduct legal aid work - exacerbating the ability of vulnerable communities to access justice. There would also be negative implications for competition and for the reputation of the profession.

Another unintended consequence is that solicitors may circumvent the restriction on unregulated entities offering reserved work by making applications to judges to act as paid McKenzie Friends on behalf of their clients. The right to appear before and address a court, including the right to call and examine witnesses, and the right to carry out the conduct of litigation are reserved legal services, and as such it can only be exercised lawfully by a lawyer who is regulated by an approved regulator.

A McKenzie Friend can ask the court to be allowed to conduct litigation if the litigant in person is unable to do so. This means that under the current proposals a solicitor who works in an unregulated firm (who under the new rules would not be able to exercise rights of audience by virtue of being employed in an unregulated entity) can ask a judge to allow them to conduct litigation as an unregulated McKenzie Friend. Faced with qualified solicitors making requests to act as paid McKenzie Friends, Judges may be inclined to treat such applications favourably to avoid dealing with the scenario that the case is run by a litigant in person with the consequential impact that has on the length of the case and the quality of the legal arguments and process. However, this potential workaround would inevitably sow further confusion for both consumers and those working within the legal profession, and inevitably degrade the position of the solicitor as an officer of the court, as well as erode legal professional privilege.

It also raises the question as to whether a solicitor who is permitted by the Judge to work in this capacity should be regulated for that work. The Judicial Executive Board are currently considering prohibiting those McKenzie Friends who are allowed to litigate from being able to claim costs from the other side. If this were to happen it would further confuse the status of solicitors who apply to have the same status as a McKenzie Friend who gains permission to litigate.

There appears to have been no analysis of the list of the consequential risks that

would result from allowing solicitors to deliver non-reserved legal services to the public through unregulated providers comprehensively identified in Table 1 of the Economist's report. It would be useful to have an analysis of how these risks would be mitigated.

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?

Not applicable.

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?

We agree with the 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 authorised entity. We would be concerned about relaxing this provision and thereby allowing the creation of structures that would avoid the requirement for entity regulation altogether and allow solicitors to provide reserved legal services on a consultancy/freelance basis. Any such relaxation would put clients of sole practitioners outwith current protections for clients and consumers and create consumer confusion.

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?

Current Rule 12 effectively requires that a solicitor needs to have three years Post-Qualified Experience (PQE) and to have undertaken a management course before they are able to set up a business as a sole practitioner. This requirement overlaps to a certain extent with the authorisation rules, which allow the SRA to assess the skills and knowledge of an individual of an applicant. However, Rule 12 sets out a clear requirement about the experience an applicant should have before setting up a new firm.

We are surprised that the consultation states that data analysis indicates newly qualified solicitors do not pose a significant risk to the delivery of a proper standard of service and would be interested to see this data. Current rules prevent newly qualified solicitors setting up in business on their own and therefore we are not clear what evidence would be available about their ability to deliver proper services in this type of situation. Furthermore, research has indicated that those who have been practising for less time are more likely to have complaints raised against them, indicating experience is a factor in complaints being raised against solicitors (Pearn Kandola 2010, p30).

We agree that the current requirement to undertake a 12 hour unspecified course on management skills may not be effective. However, lack of understanding of regulatory requirements and particularly the accounts rules is often the cause of solicitors appearing before the SDT following serious regulatory failings and in many cases loss of client money. Making sure that those setting up a new firm have a good understanding of the regulatory requirements, whether it is through a prescribed course or some other method, would seem to us to be essential.

We believe that some form of the 'qualified to supervise' rule should remain, although we agree it would be sensible to move any requirements to the authorisation rules. We believe that there should be a clear rule that prevents newly qualified solicitors from setting up a firm until they have sufficient experience and that those wishing to set up a firm should be required to demonstrate an adequate knowledge of the regulatory requirements.

In considering this question, the Society has been mindful of the conclusions of the independent, comprehensive case file review commissioned by the SRA 'to identify whether there is disparity in the way the SRA applies its policies and procedures in dealing with BME practitioners as compared to others with a view to identifying

potential improvements to such practices, policies and procedures to maximise fairness and consistency…'[21] The current proposals would seem to contradict the findings of that report.

[21] http://www.sra.org.uk/sra/equality-diversity/reports/independent-comparative-case-review.page

Question 20: Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

We believe that it is crucial that consumers understand the protections that they have with regulated provider versus non regulated providers. The proposed new Code of Conduct for Firms does not include any requirements in relation to this matter, and we recommend that the requirement set out at paragraph 8.9 of the Code of Conduct for Solicitors is mirrored in the Code for Firms.

Prospective clients should be clear about the protections in place when they decide to engage a solicitor. Outcome 8.9 of the SRA 's proposed Code of Conduct for Solicitors requires the solicitor to 'make sure that clients understand whether and how the services you provide are regulated and about the protections available to them'. This requirement does not differ substantively from Outcome 1.7 in the current Code of Conduct, which applies to firms and solicitors: 'you inform clients whether and how the services you provide are regulated and how this affects the protections available to the client.'

The SRA asks whether it should require firms to display 'detailed' information about consumer protections. The meaning of 'detailed' is not explained. It is therefore not clear under what circumstances firms could be confident that they have met the requirement. We would urge the SRA to issue guidance for firms on the information that should be displayed, including the level of detail required and expectations as to the prominence of the information presented. This could be in the form of case study examples, to aid solicitors in considering how to present information on consumer protection to the public.

We note the fact that the SRA is only able to impose any requirement of this kind on regulated firms highlights an imbalance between the information that might be available to consumers who use unregulated legal service providers and which would be available to clients of regulated firms.

While the SRA does not have any power to require unregulated entities to display information and the protections available to consumers, it does have a duty to ensure that its actions do not increase consumer confusion.

Question 21: Do you agree with the analysis in our initial Impact Assessment?

Question 22: Do you have any additional information to support our initial Impact Assessment?

The initial impact assessment provides an overview of the thinking behind the changes proposed in the consultation but there is limited empirical evidence to back up some of the assumptions made in the assessment. A comprehensive equality assessment has not yet been made and is essential before any of the proposals are adopted.

Please see Appendix 1 for our detailed analysis of the initial impact assessment.

Code of Conduct for Firms

The new Code is designed to make it easier to comply and reduce the burden of regulation for firms. However for smaller firms, in particular, good guidance will be essential to help make it easier to comply. Alongside this is the need to have in place, and well understood, a credible enforcement approach. Without these, there is a risk that the new code will not reduce the burden on small firms but, on the contrary, will increase the burden.

The current approach to guidance is patchy and while there are good examples such as the recent toolkit for continuing competence which has been widely welcomed, the guidance on consumer credit left many questions unanswered. It would be helpful to see the guidance that will be made available in order to assess whether it will plug the gap for small firms left by the removal of more detailed rules and indicative behaviours, as soon as possible.

Where a regulator provides guidance and toolkits, there is a risk that they quickly become understood as regulation and treated as such, stifling innovation and adding to costs. However, that risk has not been identified in the assessment. There is no information on how the proposals would be enforced, which would help to assure the profession and the public that the regulations would be enforced in an effective and proportionate manner.

The current enforcement function was previously identified as a problem area in 2012/2013 by the LSB and is still not rated as satisfactory. Given the ongoing issues and the importance of the enforcement function to the success of these changes, it would be helpful to have assurance as to how performance in this function will be improved.

It is noted in the consultation that regulatory changes may create some costs. However, there is little indication of the likely scale of these impacts. This is an area whether further work is needed, to ensure the costs do not outweigh any benefits.

One of the benefits highlighted is that the new Code will be online, freely accessible and searchable. As this is the case with the current Code, we do not believe this can be seen as a particular benefit of a new Code.

Changes in Practice Framework Rules

One of the main drivers behind the changes in the PFR is the concept of unmet legal need. This has been exemplified in the impact assessment by the small proportion of people and firms seeking advice about a 'legal' matter and the number of people without wills. Research indicates there are number of reasons why people do not seek legal advice, cost being only one of them. Many people are happy to resolve their own 'legal' problems, indeed there has been a Government drive for them to do so, e.g. raising of small claims limit, creation of Ombudsman etc. Others do not perceive a problem as being a 'legal' problem. Similarly, the reasons for people not having a will are varied, with the reason cited most often, is that 'an individual has nothing to leave'. There is no doubt that for some the cost of legal advice is a factor in not seeking advice but the SRA provide no empirical evidence that:

- alternative legal providers will enter into markets where there is significant unmet legal need;
- services will be provided at a significantly lower cost by unregulated providers.

The scenarios provided on the possible impacts in the market are limited at best and do not appear to take account of information available on the unregulated market. For instance, the SRA considers it likely that will writers will employ solicitors to provide legal advice through their firms. However, the vast majority of specialist will writers are small providers or sole practitioners[22]. Similar assumptions are made about unregulated providers carrying indemnity insurance, while this is common in certain areas of the unregulated market, this is not the case in other areas (Ibid).

There is an assumption that if the regulatory requirements are removed, alternative legal service providers will enter the market and innovate which will in turn drive down costs and reach new consumers. In reality, the CMA's initial assessment is the regulatory framework is not inhibiting innovation.

The assessment does not recognise the serious risk to consumers of these new arrangements. There is a limited recognition that some consumers may suffer as a result of a lack of client protections within alternative legal providers. No evidence is offered as to how this conclusion has been reached. Nor, as noted above is there any clear quantification of the benefits.

[22] Unregulated Legal Service Providers: Understanding supply-side characteristics, p 17 https://research.legalservicesboard.org.uk/wp-content/media/Economic-insight-in-depth-unregulated-research.pdf)

The SRA recognises that there may be some impact on smaller firms, who may not be able to take advantage of the reforms either for logistical reasons e.g. size; monetary reasons e.g. unable to invest in setting up a new business and lack of expertise. The suggestion that the rational response is for firms to close or sell their businesses is unhelpful and in itself may create an unmet need. There must be a risk that reserved legal services deserts are likely if these proposal are implemented.

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?

The Law Society does not support the proposal for solicitors to provide certain legal services through alternative legal service providers for the reasons set out in this response. Clearly, client money and assets need to be protected at all times and in all circumstances.

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?

The consultation proposes that, in line with the arrangements for solicitors working in alternative legal services providers (ALSPs ie unregulated providers), in-house solicitors and solicitors in special bodies should not be permitted to hold client money in their own name. This means that there would be no rules/protections with respect to the handling of client money in these entities[23]. There is, however, a distinction between solicitors working in special bodies and in-house solicitors[24]/solicitors working in ALSPs. In the former, in contrast to the proposed position with in-house solicitors/ALSPs, solicitors are able to deliver reserved legal services direct to the public. This brings the authorised person within the scope of legal services specific regulation. Reserved activities generate a significant proportion of the claims against solicitors and, as such, carries a higher risk profile requiring the application of proportionate protections. It should be noted that special bodies can deliver identical services to traditional firms.

It is also noteworthy that special bodies play a distinct role in the legal services market, in that they particularly provide legal services to vulnerable people. Any disparity in safeguards offered by special bodies will create an inconsistency in the level of consumer protection offered to vulnerable clients. We accept that protection should be proportionate to risk (including tailoring regulatory measures to reflect client base) and should not impose unnecessary burdens but consider that solicitors working for special bodies should be permitted to hold client money personally and be subject to the requirements of the Accounts Rules.

In line with the fact that in-house solicitors and ALSPs will be permitted to only offer non reserved legal services to the public and in recognition of the fact that the regulatory net is based on reserved activities, we agree that solicitors working therein should not be permitted to hold client money in their own name.

[23] The SRA's impact assessment details that it has granted waivers to its current rules to permit businesses employing solicitors in-house to hold client money – so this is a live issue.
[24] In-house solicitors offer, and will continue to offer, reserved legal services activities but only do so in relation to their employer – the SRA proposal for change is that they could in future provide non reserved legal services to the public.

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? If not, what are your reasons?

We have discussed elsewhere in this response our concerns relating to the SRA's proposal to allow solicitors to practise from unregulated entities. In the event that the proposed framework is established however, we agree that if solicitors operating from unregulated entities are not required to hold professional indemnity insurance (PII), their clients should not have access to the Compensation Fund. It would not be prudent to open the Fund to claims arising from work done by solicitors in unregulated entities, which are not subject to the Accounts Rules, Code of Conduct for Firms, and do not have mandatory PII protection which is itself a driver of effective risk management. Where work is not carried out through a regulated firm, clients are arguably exposed to much greater risk due to the lack of these controls and regulatory oversight. Denying access to the Fund for these clients guarantees that the Fund cannot be depleted by a potentially significant pool of claims. The Fund is owned by solicitors and its reserves are a result of contributions they have made subject to the existing rules confining payouts to claims arising from work carried out within a regulated firm.

Despite this, we do recognise the significant decrease in consumer protection and other practical issues that will arise if clients of solicitors working in unregulated entities do not have access to the Compensation Fund. We have explored these issues in more detail below, as we are concerned that the SRA has not fully considered all the repercussions of allowing solicitors to practice from unregulated entities, including the impact on the Compensation Fund.

The consultation proposes that clients of solicitors working in unregulated entities should not have access to the Compensation Fund on the basis that their solicitor would not be able to hold client money or carry out reserved work. However, it is not the case that claims to the Fund are solely linked to misuse of client money, breaches of the Accounts Rules (which apply only to firms not regulated by the SRA) or reserved work. A gap in consumer protection will be created where solicitors commit fraud when carrying out unreserved work (to take as examples: deliberately selling ineffective family trust deeds, forging documents, or convincing a client to alter a will in order for the solicitor to inherit money) as the client would not be eligible to claim from the Compensation Fund in relation to this loss. The SRA's most recent published analysis of claims paid by the Compensation Fund[25] does not include a full breakdown of the areas of work from which the claims arose, and it may be that the SRA does not collect data at this level of detail. Without this information, there cannot be any proper consideration of the potential detriment to consumers of removing access to the Compensation Fund in relation to claims arising from unreserved work.

[25] Economic Insight - SRA Compensation Fund review (2014)

The consultation states that there is no objection in principle to allowing consumers to trade off the protections they receive (including access to the Compensation Fund) where they perceive they receive benefits in relation to this trade off, such as reduced prices or greater accessibility to a service.[26] However, a crucial related issue in allowing consumers to exercise such preferences is whether consumers are able to appreciate or understand the differences in consumer protection between different providers. Research suggests that consumers often do not recognise these distinctions.[27] One could therefore question the wisdom of removing access to the Compensation Fund for consumers who may not realise the importance of this protection until the time they come to make a claim. As discussed in detail in response to Question 27 below, requiring solicitors to provide information to clients on the protections available may not overcome the confusion created by the SRA's proposals and the potential for significant consumer detriment of removing access to the Compensation Fund. In addition, we are unaware of any economic analysis which confirms the changes in the regulatory regime will result in reduced prices and/or greater accessibility of service.

The SRA will also have to address the practical implications of removing access to the Compensation Fund for clients of solicitors working in unregulated entities.

First, the SRA's approach to calculating contributions to the Compensation Fund (currently £548 for firms, and £32 for individuals) will have to be reviewed if solicitors operating from unregulated firms would no longer have to contribute. Currently, 50% of annual Compensation Fund contributions are paid by firms, and 50% by individual solicitors. Contributions to the Compensation Fund would be significantly reduced if substantial numbers of solicitors chose to operate from unregulated firms (and hence did not pay the individual solicitor levy), and/or even a relatively small number of large firms, due to the higher percentage of non-reserved work they carry out, moved non-reserved work to an unregulated provider (and hence did not pay the firm contribution).

However, it is vital that the remaining contributions to the Fund are sufficient to meet the demands on it. It is the long standing approach of the Fund to maintain a minimum reserve fund as a contingency against unexpected numbers of claims or unexpectedly large claims, which includes forecasting contribution requirements to avoid the position of the contribution spiking and then dropping significantly in consecutive years. Given that the impact assessment notes how little can be known about the extent to which solicitors may choose to operate from unregulated entities/firms may decide to hive off non-reserved work, it is difficult to assess to what extent Fund contributions will be impacted, and how the contributions structure should be altered. It would clearly be undesirable to change contribution structures on a continual basis to take account of changing numbers of firms and

[26] Looking to the Future - flexibility and public protection, Annex 6, p.97
[27] Looking to the Future - flexibility and public protection, Annex 5, pparagraph 28

individuals contributing to the Fund. Indeed, it is difficult to envisage how funding arrangements can be amended to enable fair contributions. Smaller firms, who due to the nature of the work they undertake are unable to hive off unreserved work to another entity, would most likely end up paying increased contributions to make up the shortfall to the Fund caused by larger firms and their solicitor employees moving out of SRA regulation. It is problematic that the review of Compensation Fund contributions will not occur until a later date. This makes it very difficult to obtain a full picture of the impact of the proposals and to able to comment fully.

Second, it is unclear how contributions would be collected when a solicitor moves between regulated and unregulated firms. The administration involved tracking solicitors and collecting levies on a tranched basis would clearly not meet the objective of reducing regulatory burdens on solicitors, or administrative costs of the regulatory regime which are ultimately borne by consumers.

Third, the proposed framework would beg the question as to why a solicitor in a regulated firm who carries out only unreserved work and does not hold client money, should have to contribute to the Fund. While it would be impractical to police the collection of contributions in this way, this in addition to the issues raised above demonstrates inconsistencies in the proposed approach and raises questions about the fairness of the proposals in the way that regulation will apply to individuals solicitors and different profiles of firms.

Question 26: Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

We do not agree that individual solicitors should be able to operate from unregulated entities without mandatory PII cover. We are strongly opposed to the proposal in principle.

All work done by a solicitor in private practice is currently covered by the firm's PII. The current arrangement provides unrivalled protection for the consumer, providing assurance that if anything goes wrong they will receive fair settlement, regardless of the type of work undertaken or the circumstances in which the work is carried out. It is unacceptable for individuals to be left destitute or without some level of redress arising from a solicitor's negligence. Mandatory PII cover is fundamental to both consumer protection and the maintenance of public trust in the profession.

There is also a potential risk that a firm with a poor claims record that would affect its ability to obtain PII could be attracted by the proposal as it would allow them to carry out unreserved work from a new unregulated entity without PII in place. Arguably these are the firms whose clients would need the protection the most. We also struggle to understand how solicitors would be able to comply with Principle 6 to act in the best interests of their client, without PII cover in place. It is clearly not in the best interests of the client for their solicitor to be uninsured, as this impacts the client's ability to recover any losses. If the SRA agrees that in order to comply with principle 6, solicitors would in reality be compelled to purchase PII, one must question why the SRA's proposals do not attach PII requirements to individual solicitors. We request clarity from the SRA on this point.

Part of the SRA's reasoning for this proposal is that it would be unclear how a solicitor in an unregulated provider, who may be working as part of a team, is supposed to separate out their own insurance requirements from those of their team. We would argue that it is precisely the fact that the SRA is seeking to differentiate and separate out the role of a solicitor, their high professional standards and regulation of the solicitor from the unregulated entity itself, that has necessitated addressing the issue of individual insurance.

As demonstrated in response to Question 27, the proposal creates unnecessary complexity and uncertainty, and any possible benefits would be outweighed by the significant reduction in client protection.

Question 27: Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

Under the SRA's proposals, solicitors carrying out unreserved work from unregulated entities would have two options:

1. Choose to have no PII cover

Given that there is no requirement to do so, solicitors working in an unregulated entity could choose not to obtain PII. As PII is one of the most costly elements of regulation, there is a real possibility that some solicitors may choose to operate uninsured. This would be particularly alarming in the case of a sole practitioner. Solicitors who choose to operate uninsured without due regard to the personal liability they could incur in the absence of PII cover, would be placing themselves in a potentially ruinous situation. PII protection does not exist purely for the benefit of the public, but also for the benefit of solicitors, as confirmed by the House of Lords in *Swain v The Law Society*.[28]

There would also be nothing to prevent a solicitor's terms of engagement specifying that they cannot be sued for an amount greater than the value of the retainer. This dilution of clients' existing financial protections is not acceptable. Consumers could be left facing hardship as a result of the actions of solicitors regulated by the SRA. The reputation and strength of the solicitors' profession as well as the credibility of the SRA would suffer if clients go uncompensated as a result of a solicitor having no PII cover. This damage would not be possible to repair.

The SRA's proposal is made all the more alarming when one considers the amount of claims by solicitors' firms on their PII that could relate to unreserved work. It is clearly not in solicitors' or clients' interests for there to be no insurance cover in relation to work which, although unreserved, still carries significant exposure to claims.

As stated in response to Question 26, we also struggle to understand how solicitors would be able to comply with Principle 6 to act in the best interests of their client, without PII cover in place.

The Law Society considers that all solicitors in all circumstances should be subject to mandatory PII cover, and would urge the SRA to reconsider the proposal.

2. Choose to obtain PII cover

Solicitors working in an unregulated entity and such entities themselves may wish to

[28] [1983] 1 AC 598

purchase insurance against negligence claims in any event.

A solicitor in an unregulated entity could try to obtain cover on their own behalf, or the entity might take out insurance to cover all the solicitors it employs. In both of these scenarios, there is uncertainty as to the availability, suitability, and affordability of PII that could be purchased on the open market.

First, the wide SRA minimum terms and conditions (MTC) protection would not be replicated in standard commercial PII arrangements. While solicitors' clients are currently protected by comprehensive PII cover (which also includes run off cover), the gaps in coverage between the SRA MTCs and a standard PII policy negotiated by the solicitor or entity would leave solicitors' clients with less protection than the current entitlement, or than when instructing a solicitor from a regulated entity. The SRA has not provided sufficient justification for reducing consumer protection in this way and the resulting asymmetry is confusing.

Second, the potential cost to solicitors or the unregulated entity of purchasing PII is difficult to estimate. Underwriters write risk on the basis of claims exposure. The market currently prices in risk to premiums, so firms with low exposure by reference to the work they undertake (e.g. crime, legally-aided work and employment law) already pay lower premiums than firms undertaking high risk work (e.g. conveyancing). If a firm carrying out predominately unregulated work chose to move out of SRA regulation, there may be limited scope for premium reduction because the risk remains unchanged. Moreover, participating insurers take comfort in the fact that those they insure are SRA-regulated and that the SRA has the power to intervene if necessary. The PII regime plays a role in regulating solicitors as firms with poor claims records will face higher premiums and could face difficulty obtaining insurance at all. Insurers may consider that the claims exposure is increased in an unregulated entity where there is no regulatory oversight of business processes. In the case of solicitors purchasing PII on an individual basis, they would also lose the benefit of lower premiums as a result of the ability to bulk purchase PII to cover the work of the entire firm.

It is therefore by no means certain that unregulated entities or individual solicitors would be able to purchase PII at an affordable cost. Indeed, the SRA's impact assessment makes no attempt to forecast the availability and price of PII for those who would wish to purchase it. There is no analysis or evidence to show that premiums would be reduced; or that reduced premiums would in any event provide greater access to justice as a result. The proposal risks creating considerable consumer detriment for an uncertain and unquantifiable benefit arising from an aspiration for increased access to legal services.

Third, the proposal appears to be based on the assumption that clients will understand the fact that their solicitor does not have insurance, or is insured to a lesser degree than that required by SRA-mandated insurance. Clients differ significantly in their experience of acquiring legal services and their ability to

understand and specify their preferences and requirements. Business consumers who are regular users of legal services may understand their protections and even actively seek to determine whether the level of protection is appropriate for their matter, but the same cannot be said for infrequent, unfamiliar users of legal services. Indeed, there is evidence to suggest that the consumer protection landscape in the legal services market is poorly understood.[29] There is considerable scope for consumer confusion through a mistaken belief that in gaining advice from a solicitor through an alternative legal services provider they are subject to the same protections as if that solicitor worked in a regulated provider. The proposals will only serve to increase the confusions around the different protections attached to services, and lead to decreased confidence in the legal profession and irreparable damage to its standing.

This confusion will not be overcome by requiring solicitors in these circumstances to make sure that their clients understand whether and how the services they provide are regulated and the protections available to them (proposed Outcome 8.9). It is alarming that the case study provided by the SRA[30] suggests that Outcome 8.9 would be met if the solicitor explained the business does have compulsory insurance, but does not state the level of such cover. There would be nothing to prevent a solicitor or unregulated entity from obtaining cheap and ineffectual 'nominal' cover simply to be able to inform clients that they hold PII.

The consultation states that there is no objection in principle to allowing consumers to trade off the protections they receive under different service/provider models where they perceive they receive benefits in relation to this trade off, such as reduced prices or greater accessibility to a service.[31] Again, this incorrectly assumes that consumers understand the difference between regulated and unregulated entities, and appreciate differences in consumer protection in each case, while evidence suggests they may not. [32]

[29] Looking to the Future - flexibility and public protection, Annex 5, pparagraph 28
[30] Looking to the Future - flexibility and public protection, Annex 9, page 204
[31] Looking to the Future - flexibility and public protection, Annex 6, page 97
[32] Looking to the Future - flexibility and public protection, Annex 5, pparagraph 28

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?

Yes. The Society believes that regulation should apply consistently and fairly to the provision of legal services in order to protect consumers. It would not be in the consumer and the wider public interest for solicitors to offer the same service but with different standards of consumer protections according to whether they were employed by a regulated firm or by a Special Body.

Special bodies play an important role in providing legal services to vulnerable people and it is especially important that clients entrusting matters of significant importance to their solicitors have access to appropriate redress. If reserved activities undertaken by Special Bodies fall within SRA regulation, these bodies should be required to maintain PII.

Question 29: Do you have any views on what PII requirements should apply to Special Bodies?

Under the current Practice Framework Rules, solicitors employed by Special Bodies must have a 'reasonably equivalent' level of cover to that required by the SRA Indemnity Insurance Rules. This provides clients of Special Bodies with equivalent protection to that provided to clients of SRA-regulated entities.

The Law Society believes that clients of Special Bodies should be entitled to PII protection in the same way as clients of traditional law firms. Requiring Special Bodies to obtain MTC level PII has the advantage of ensuring that there is consistency in the level of consumer protection offered to clients.

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?

Question 31: Do you have any alternative proposals to regulating entities of this type?

The Society's concerns about the proposal that solicitors should be permitted to deliver non-reserved legal services to the public through alternative legal services providers would not be overcome by the imposition of a threshold on non-SRA regulated firms. Indeed the introduction of an arbitrary threshold could make matters even more confusing for clients. Our concerns around the proposal to allow solicitors to work in unregulated providers and its impact on client protection and the reputation and standing of solicitors would remain for these firms. In conclusion, the Society believes that regulation should apply consistently and fairly to all legal services (individuals and entities) in order to protect buyers of legal services and it is not in consumer and the wider public interest for there to be regulated and unregulated providers offering the same service but with different standards of consumer assurance and protections.

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?

It is not clear what the proposed position is on intervention into a solicitor's individual practice within an unregulated entity. The SRA has the power to do this. However, as has been highlighted, it could prove to be difficult to untangle the practice of the solicitor and the unregulated entity thus making this difficult. It would therefore seem unlikely that the SRA would use this power often. However, the SRA does not appear to be ruling out the possibility.

We are unclear how the SRA's additional powers to request information could help it in investigations where intervention was not an option, for the reasons described above. We consider that the same issues would arise as to the information owned by the unregulated entity (and as such presumably outside the jurisdiction of the SRA) and that owned by the solicitor.

Question 33: Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

We agree that all work within a recognised body or an RSP should remain regulated by the SRA.

Bar Council response to the Looking to the future- flexibility and public protection consultation paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Solicitors' Regulation Authority consultation paper entitled "Looking to the future- flexibility and public protection".[1]

2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Overview

4. The Bar Council does not propose to make substantive comments on the proposed new Principles or the two Codes of Conduct, with the exception of an observation on the Principles and some general concern about the approach being adopted.

5. The Bar Council has significant concerns about the proposal to allow solicitors to practise as such through bodies which are not regulated by the Solicitors' Regulation Authority (SRA), on a basis which is different from that on which other solicitors operate, because of the likely consequences for consumers and for the reputation and of the legal profession, both of which are matters of public interest. We consider that the possible benefits of the proposal are outweighed by the likely disadvantages.

Questions 1- 15:

[1] Solicitors' Regulation Authority (2016), Looking to the future- flexibility and public protection, accessible here.

6. The Bar Council does not propose to comment on any of these questions, except in two respects. Although we have significant doubts as to whether the promulgation of a Code in the form proposed is the most economically efficient, effective and useful way in which to proceed with the regulation of solicitors, we leave it to those who will be subject to it to comment.

7. Our first comment is to note with concern that not all of the professional principles identified in the Legal Services Act 2007 ("LSA") have been included in the proposed Principles, in view of the description of what the Principles represent in the draft Code. The explanation for this omission cannot readily be identified from the consultation paper.

8. Our second comment is that while simplicity and brevity have their value, so too does a Code of Conduct which records both those things which are required, and those which are unacceptable, as part of professional practice as a solicitor. The proposal appears to involve limiting the approach only to high-level principles. To leave such judgments below high level principles to be identified and made anew by individual solicitors every time an issue arises is likely to be unhelpful and economically inefficient, and may allow or encourage a few to justify unethical behaviour to themselves. This is not just a question of simplifying enforcement: it is a question of what is ethical. Enforcement deals with what is to happen only once something unethical has occurred. The two should not be confused by the SRA, or be allowed to become confused in the minds of others.

Question 16: What is your view of the opportunities and threats presented by the proposal to allow solicitors to deliver non-reserved legal services to the public through alternative legal services providers?

9. The Bar Council has grave reservations about this proposal as it stands in a number of respects; specifically, the loss of important protections for clients/consumers, the risk that this will create a two-tier market among regulated lawyers, and the overall threat to the reputation of the legal professions. In summary, we consider that advice or other legal services provided by a regulated lawyer, practising as such, ought always to involve (1) personal responsibility being taken by an individual lawyer for those services and for the lawyer's own actions and decisions in the course of providing them (as the SRA proposes), but also (2) the same client/consumer protections – provided either by that individual lawyer or by the organisation through whom that lawyer is providing those services – whatever the circumstances. Those protections should include legal professional privilege ("LPP"), insurance, the availability of the compensation fund (in those situations not covered by insurance), and the avoidance of conflicts of interest.

10. The SRA's proposals, as the consultation clearly acknowledges, would deny several key protections to clients of solicitors practising in unregulated firms. As well as expressly being ruled out of the compensation fund, they would no longer be able to rely on the minimum (or, indeed, any) insurance requirements that have been laid

down for solicitors. In addition, those clients who contract directly with the firm are likely to lose the right to LPP, despite receiving advice from a qualified solicitor. , and may be exposed to risks of prejudice due to conflicts of interest with other clients of the solicitor's employer (including breaches of confidence). We believe the weakening of these vital client/consumer protections will work against the best interests of clients and consumers, will blur the lines between the regulated and unregulated sectors, is unlikely to be understood, and is likely to do real harm to reputation of the legal professions as a whole.

11. The SRA takes the view that, by allowing solicitors to practise in the unregulated sector, it is "adding to the protections available to consumers" in that sector because of the regulatory requirements and sanctions that attach to them as individuals (Paragraph 112). The consultation asserts that consumers "may draw confidence" from knowing that these firms employ qualified solicitors (Paragraph 15). The Bar Council agrees, but suggests that this confidence would in significant respects be based on the mistaken assumption that all the same protections will apply to clients of these solicitors as apply to clients of those who practise in regulated firms, which would not be the case under these proposals.

12. The Bar Council considers that compulsory insurance is an essential requirement of for a regulated professional who provides legal services. This is necessary both for the protection of the public and the upholding of the professions' reputation. We do not agree with the argument made in the consultation that, because solicitors may find it difficult to separate out their own practice from the wider firm, it is therefore acceptable to leave it to their discretion whether to have insurance at all. Rather than remove the requirement for compulsory insurance, solicitors working in such an environment (if that were to be permitted) should be required to ensure that they operate in such a way that clients are clear about when they are being provided with services by a solicitor and when they are not. If a satisfactory distinction cannot be made, then the right response (proportionate to the risks involved) is for the solicitor not to provide services as a solicitor in those circumstances.

13. The requirement on barristers, whether self-employed or employed, is that they "must ensure that [they] have adequate insurance…. which covers all the legal services [they] supply to the public" (at rC76 of the BSB Handbook). The Bar Council respectfully suggests that the same rule should apply to all solicitors practising as such. This would ensure a consistency in approach to public protection that would help promote public understanding.

14. The SRA seeks to mitigate the risk of false assumptions and consumer confusion by requiring individual solicitors, as well as regulated firms, to take responsibility for making information about consumer protections available. We suggest that this is unrealistic, especially in relation to the most vulnerable or inexperienced consumers of legal services. People tend not to realise that they need consumer protection until something has gone wrong, which is unpredictable. The availability of proper protections must be flagged up at the start. There will inevitably by a very real risk

of many clients believing that they do not need the additional protections because nothing will go wrong; but experience shows that it is inevitable that, in some instances, things *will* go wrong. Similarly, doing one's best to ensure that clients understand is not a guarantee of understanding, and is not a proper substitute for providing a protective mechanism in the event of a later breach of duty.

15. Inexperienced consumers are particularly likely to be looking for the cheapest option, if they are ineligible for legal aid, which the unregulated sector would offer. It would be especially unfair and divisive if such consumers received less protection than those able to afford a more expensive, regulated firm. Those likely to suffer disadvantage are especially likely to be from disadvantaged groups such as BAME communities. The proposals would entrench a two-tier legal service and would be iniquitous.

16. Evidence to support this includes the interim legal services market study by the Competition and Markets Authority, who found in their qualitative survey of individuals that "most… assumed that their legal services provider was regulated and had not checked their regulatory status before engaging them; others did not know what it might mean for a legal services provider to be regulated."[2]

17. We also question that part of the SRA's justification for removing these protections which suggests that it will reduce costs. We doubt there will be a significant saving and are concerned that any saving will be out of proportion to the risks. We would make four observations, in particular:

    a. Solicitors in unregulated organisations will face an additional, upfront cost in advising prospective clients about the protections available to them if they instruct that solicitor compared with the greater protections of instructing another solicitor, and in ensuring that the potential clients have understood this. The organisation may or may not choose to pass that cost on to clients; either way, it will be a cost to the provider which will have an effect on the cost or viability of the service. It may not be significant in those cases in which substantial services will be supplied at a cost which justifies it, but it is likely to be significant as a proportion of the overall cost of providing the service where the service is relatively modest. In the latter type of situation, there is a risk of consumer detriment as a result of commercial pressure on the solicitor to keep the level of explanation to a bare minimum.

    b. More significantly insurance costs would be expected to reflect risk. If the SRA is right that the risk of claims against solicitors providing only non-reserved services is significantly lower than in the case of reserved services, then the cost of insurance for non-reserved activities alone would be expected to be significantly lower, which would in itself reduce the cost of compulsory insurance. This assumes that insurance providers would be willing to

[2] Competition & Markets Authority (2016), Legal Services Market Study: Interim Report, page 59. Available here.

provide insurance in this market and were able to do so profitably: if not, then that would undermine several of the SRA's own assumptions. If the SRA is wrong about the risks presented by non-reserved services, then there would be a clear need for an obligation to insure. Either way, we do not agree that any cost benefits that might flow from the removal of an obligation to insure outweigh the disadvantages in terms of consumer protection. We are also concerned at the risk to the reputation of both the profession and the effectiveness of its regulation – with a consequent risk to consumer/client confidence in both, and in our system of justice – from clients being faced with uninsured claims against a solicitor practising as such.

a. The proposal takes no account of the fact that advice given in a situation which may relate to reserved activities, or which may in due course lead to the need for reserved activities, may itself be negligent, leading to harm to a client. We question the wisdom of drawing a distinction between the protections available for these different activities of a practising solicitor. This too presents a risk to clients and consumers, as well as to the profession and its regulation. It is also likely to lead to added confusion on the part of both clients/consumers and solicitors.

b. One important advantage of insurance is that it can provide a remedy for a client in the event of the insolvency of the insured solicitor or organisation, including (with some exceptions) in the event of fraud. In an excepted fraud situation, the compensation fund may step in. It is not easy to see how clients will be protected in these events if there is no compulsory insurance requirement, and no possibility of a claim on the compensation fund.

18. Furthermore, those clients in the greatest need of transparency will be those who contract with the unregulated firms, since they stand to lose the protections of LPP and the SRA's conflicts regime, in addition to the mandatory insurance requirements and access to the compensation fund. If, owing to commercial incentives, solicitors working in these entities were to come under pressure to do the bare minimum, or to present this information in a vague or misleading way, then it is not clear what the SRA sees as the remedy for this, or as the remedy for any adverse consequences suffered by clients. In this way, the SRA proposals risk creating a legal services landscape in which the most vulnerable clients receive the least protection, and in which there are not enough safeguards in place to prevent a race to the bottom between the least scrupulous unregulated providers.

19. The Bar Council is not convinced that simply restricting the use of the term "solicitor firms" is sufficient to ward off potential consumer confusion and the risks to the reputation of the profession and its regulation. The unregulated entities will presumably still be able to call themselves law firms, lawyer firms, or legal firms, and to describe themselves as employing solicitors. We think it is unrealistic to expect consumers to appreciate the distinction.

20. The Bar Council agrees that "the solicitor brand…will be strengthened if the reputation for excellence is matched by actual consumer experience" (Paragraph 84). However, the consultation offers no assessment of the likely impact on that experience when consumers receive less protection as a result of the new approach. The Bar Council does not accept that evidence of unmet legal need is evidence of a demand for less regulated, hence less protected, services.

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?

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?

21. That Bar Council does not propose to comment on either of those questions.

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?

22. The Bar Council has concerns about the appropriateness of newly qualified solicitors being able to set up as sole practitioners. It is not clear how the SRA would assess their skills and knowledge in the absence of any post-qualification experience. Retention of prescriptive requirements, even in a revised form, in relation to this specific category would therefore seem to be a sensible approach.

Question 20: Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

23. Yes. The Bar Council believes greater transparency is in the interests of consumers. However, this merely enhances the risk of a two-tier market, given that there can be no equivalent requirement in the case of unregulated alternative providers to explain which protections they do not offer.

Question 21: Do you agree with the analysis in our initial Impact Assessment?

Question 22: Do you have any additional information to support our initial Impact Assessment?

24. The Bar Council does not propose to comment on these questions beyond what it has already said above.

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?

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?

25. The Bar Council does not propose to make substantive comments on these questions, but does have concerns about the proposed changes to the definition of "client money" in the separate consultation on the Accounts Rules running at the same time as this one. This would now exclude counsel's fees from that definition, meaning they would instead be treated as the firm's money. The Bar Council does not agree with this dilution of counsel's ability to secure payment in cases of work already done, and we have responded to Question 2 of the Accounts Rules consultation accordingly.

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? If not, what are your reasons?

26. The Bar Council does not propose to comment on this question beyond what it has said above.

Question 26: Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

Question 27: Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

27. Yes. For the reasons given in its response to Question 16 above, the Bar Council strongly disagrees with this proposal.

Questions 28 – 33: 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?

28. The Bar Council does not propose to comment on these questions beyond what it has said above.

Bar Council
21st September 2016

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Consultation Response

Solicitors Regulation Authority (SRA) consultation: Looking to the future – flexibility and public protection

The Law Society of Scotland's response
September 2016

Introduction

1. The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. As a statutory professional membership body pursuing legal excellence, the Law Society of Scotland supports the needs and requirements of the Scottish solicitor profession in delivering legal services to Scottish, UK and global businesses and consumers.

2. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

3. We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law.

4. In preparing this response, we have consulted with Multi-National Practices. We have also suggested to Multi-National Practices that they may wish to consider responding directly to consultation.

General comments

5. Having considered the consultation proposals, we have general views and comments which we express in this response. We also use this opportunity to raise concerns regarding the extent to which some Multi-National Practices and individual solicitors, both Scottish and English qualified, may be subject to overlapping and potentially conflicting regulation.

6. As the professional body representing and regulating Scottish solicitors, we concur with the view of the SRA that the legal sector is evolving at a dramatic pace, not just in England and Wales, but throughout the United Kingdom and beyond. The changes in how legal services are delivered, the emergence of cross border firms,

the growth of new areas of business, the increasing internationalisation of legal services, the changing demands of clients and advances in technology have all impacted on the UK legal services market. The advancements in the legal services market are unlikely to crystallise and, in our view, will continue to evolve at pace. The current UK legal market requires a modern, transparent, responsive and agile approach which can evolve as the market does.

7. We have recently published a paper which sets out the challenges faced by the legal profession in the current market place. Although our paper is focused on the Scottish perspective, many of the themes and issues which we touch upon are shared by the UK legal services market as a whole.[1]

8. We note part of the SRA policy intent is that the proposals will help to develop competition and improve access to justice, through increased availability of services and the possible reduction of the costs associated with those legal services, which will benefit the consumer. In principle, we are supportive of developing the legal services market throughout the UK and agree that proposals to strengthen competition and improve access to justice through affordability, availability and accessibility, on the strict understanding that consumers are afforded adequate and consistent protections, are to be welcomed.

Overlapping and potentially conflicting regulation

9. By way of background there are currently 586 Scottish solicitors practising in England and Wales and 28 cross border firms.[2] Many of these solicitors and firms are also subject to some degree of regulation by the SRA, or work in firms or businesses which are SRA regulated (to a greater or lesser extent). There are also a number of English qualified solicitors working for firms in Scotland.

10. In general, the current requirements (both in relation to the establishment, structuring and management of a "cross-border" practice and in relation to its provision of legal

[1] The Solicitors (Scotland) Act 1980 -The Case for Change
http://www.lawscot.org.uk/media/732471/The-Solicitors-Scotland-Act-1980-The-case-for-change-Regulation-Pa.pdf
[2] Figures correct as at 19 August 2016

services in each jurisdiction) are regarded by many solicitors practising in both jurisdictions as unduly complex and difficult to identify and apply in practice. How the requirements of the different regulatory regimes will inter-act in a particular set of circumstances are found by many solicitors practising in both jurisdictions to be uncertain and unpredictable.

11. This creates, at best, an unnecessarily onerous and disproportionate regulatory burden and, at worst, increases the risk of regulatory failure. Significant issues arise where firms and individual solicitors are conflicted in the application of the current regimes, walking a potential regulatory tightrope to balance the application of both sets of rules which can prove problematic and may raise potential risk. The current restrictions and requirements, in our view, inhibit and discourage competition in the legal services market to the detriment of the consumer.

12. Where there is a necessity and unavoidable requirement for dual regulation, for example where cross border firms employ suitably qualified solicitors to carry out reserved areas of work, then we would suggest that this should be proportionate and applied through cooperation between the SRA and the Law Society of Scotland. We believe that the two organisations should work together to ensure the firms have proportionate regulation which helps them flourish to the benefit of the consumer, and promotes the growth of the regulated legal services sector.

13. Whilst the same considerations can obviously apply outwith the UK jurisdictions, our view remains that improving the position “intra-UK” (or at least between Scotland and England and Wales) is an area which requires further consideration.

<u>The creation of two separate codes</u>

14. We note the policy intent of the SRA proposals is to provide flexibility and enhanced public protection, adaptable to the changing legal sector, by setting out two separate Codes of Conduct; a Code of Conduct for solicitors and a Code of Conduct for firms, which is intended to simplify and replace the current detailed and prescriptive requirements. We are supportive of the proposal to modernise the Codes, focusing on a streamlined approach centred on flexibility.

15. We believe that the separation and modernisation of the Codes will achieve the policy intent, ensuring solicitors are clear about their personal obligations and at the same time, firms will be clear on the systems, processes and controls they need to provide a professional legal service for consumers.

The unregulated legal sector

16. As in England and Wales, Scottish solicitors are not permitted to provide "reserved" legal services to the public through an unregulated legal service provider.[3] However, we recognise that there are a number of alternative legal service providers operating outside of regulation and who do provide legal services to the public. This is something which affects the whole UK legal services market and something we have recently raised with the Scottish Government.[4] We do not believe that this is in the solicitor profession or consumers' interest.

17. In our view, there is also a very strong case, from a consumer protection perspective, for the regulation of the legal services market to be harmonised so that all those offering and providing any legal advice or services are regulated. This would ensure that consumers enjoy and have the benefit of consistent and assured protection, as is currently afforded to all those seeking advice and representation from a regulated firm of solicitors.

18. We also agree that it is paramount to ensure that the public is not only afforded protection if something goes wrong, but is also made aware of the level of protection which they have and is in a position to make an informed choice when choosing the provider of the legal service.

Conflicts of interests

19. We note option 2 does not focus on outcomes but is focused on preventing potential conflicts developing into actual conflicts. We prefer Option 2. This, in our view, is

[3] Solicitors (Scotland) Act 1980 section 26
[4] The Solicitors (Scotland) Act 1980 -The case for change paragraphs 45 – 51
http://www.lawscot.org.uk/media/732471/The-Solicitors-Scotland-Act-1980-The-case-for-change-Regulation-Pa.pdf

more easily understood, making it clear that you should never act if there is an actual conflict. For those Scottish solicitors and firms who have to navigate the issue of dual regulation, the current rules on conflicts of interest can often be problematic, with the rules in England / Wales broader than those of Scotland. We prefer Option 2 as this is much closer to the Scottish position.

Legal Professional Privilege

20. We note that the consultation rightly considers LPP (para 149-155) in the context of alternative legal service providers. LPP, referred to in Scotland as the 'obligation of confidentiality' is key to the rule of law and is essential to the administration of justice as it permits information to be communicated between a lawyer and client without fear of it becoming known to a third party without the clear permission of the client. Confidentiality between solicitor and client is one of the most important principles in this professional relationship.

21. Many UK statutes provide express protection to LPP and it is vigorously protected by the courts. Any proposals which may or will dilute this fundamental principle will be strongly resisted and must be considered very carefully. We fully concur with the comments and concerns of the Law Society of England and Wales[5] that there should be no attempt to erode the principle of LLP and this should not be used as a distinguishing factor between regulated and unregulated providers.

Practice Framework Rules 2011

22. We note that, unfortunately, the SRA has chosen not to include the revised Practice Framework Rules for views and comment. We would welcome confirmation on when the SRA intends to publish the revised Rules, particularly as the detailed rules on where a qualified English solicitor may practice are relevant to how a provider of legal services chooses to structure itself.

[5] The Law Society: SRA handbook consultation - looking to the future flexibility and public protection briefing for solicitors August 2016

SRA Overseas Rules 2013

23. We note further that the consultation document makes no mention of the SRA Overseas Rules and Principles, nor is it clear if the rules and principles have been considered and the interaction between these rules and the proposed changes. We would welcome clarification of this and also if the SRA intends to propose similar changes to the Overseas Rules.

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The Law Society

Response to SRA Consultation: Looking to the future – flexibility and public protection

September 2016

Response to SRA Consultation:
Looking to the future – flexibility and public protection
September 2016

Introduction

1. The Law Society of England and Wales ('the Society') is the professional body for the solicitors' profession in England and Wales, representing over 165,000 solicitors. The Society represents the profession to Parliament, Government and regulatory bodies and has a public interest in the reform of the law.

2. The response to this consultation, "Looking to the Future - flexibility and public protection", should be considered together with the Society's response to the SRA's consultation, "Looking to the Future: Accounts Rules Review", which reviews the accounts rules.

3. On 1 June 2016, the SRA released a consultation "Looking to the Future-flexibility and public protection" which proposes that the Solicitors Code of Conduct be replaced with two separate, shorter and simplified codes, a code for solicitors and a code for firms. This is one of a number of consultations that have been or will be released by the SRA reviewing the regulatory framework for solicitors and firms. Other consultations which may be released over the next year or so include the SRA's review of the solicitors qualifying exam and further consultations on the SRA's handbook, and possible changes by government to the framework for regulation of legal services.

4. There are other contemporaneous consultations and reviews of the legal services market including a consultation on the review of the SRA Accounts Rules; and a Ministry of Justice consultation into changes to the regime governing alternative business structures, which closed on 3 August 2016.

5. There is also a market study of the supply of legal services in England and Wales by the Competition and Markets Authority (CMA) for consumers and small businesses, which is due to report by January 2017.

6. The current regulatory framework was put in place following the Clementi Review which included an in-depth review and analysis of the legal services market. The regime which was implemented is less than 10 years old, and in some aspects less than five years old but is nevertheless undergoing radical and extensive, multi stakeholder reviews which potentially overlap. These piecemeal changes create uncertainty, threaten viability and increase risk of irreversible harm.

7. Stability and certainty of the legal system is vital to the economy and the legal services market. The legal services market directly contributes £25.7 billion[1] to the UK economy, and when the UK legal services market grows by 1%, 8,000 jobs are created and £379 million is added to the whole of the economy[2].

8. The impact of regulation on costs is recognised and the Government's Principles of Regulation[3] emphasise that regulation is only justified where, among other criteria, analysis of the costs and benefits demonstrates that the regulatory approach is superior by a clear margin to alternative self-regulatory or non-regulatory approaches. Further there is a general presumption that regulation should not impose costs and obligations on business, social enterprises, individuals and community groups unless a robust and compelling case has been made.

9. In the interim report on its legal services market study, the CMA sets out high level criteria for assessing the impact of regulatory change and the direct costs of regulation are identified as a factor. The CMA also stated that there were "risks with a wholesale change to a regulatory framework. There is a risk of harming competition, for example, if such a change results in extending, rather than reducing, the scope of regulation beyond the currently reserved activities without justification. It is likely that wholesale reform would result in significant design and transition costs and a period of regulatory uncertainty".

10. This is of particular concern at the present time when the country as a whole and the legal framework is going through a period of unprecedented uncertainty and instability following the referendum decision for the UK to leave the European Union. Unless there is a clear and significant harm that requires addressing urgently, it would be more reasonable to put any such regulatory framework changes on hold at least until the immediate issues around Brexit are addressed.

11. Where other services or markets have been subject to such wide ranging reviews, there has often been a trigger event (such as the 2008/9 financial crisis) or significant, clamorous public complaints (utilities market). This is not

[1] 'Economic value of the legal services sector', Law Society Research Unit, March 2016 (http://www.lawsociety.org.uk/support-services/research-trends/a-25-billion-legal-sector-supports-a-healthy-economy/)

[2] £25.7bn is the real (constant 2012 prices) gross value added (GVA) by the sector in 2015 and the correct basis for considering the sector's contribution to overall gross domestic product. The turnover of the sector in 2015 (as used by the Legal Services Board, was £30.2bn is the Office for National Statistics nominal turnover figure for the sector. Turnover is higher than GVA because it includes goods and services used by the legal services sector but produced by other sectors and because it has not been converted to 'real' terms.

[3] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/468831/bis-13-1038-Better-regulation-framework-manual.pdf

the case with the legal services sector. **The Society is of the view that there is insufficient evidence of significant clear and present "harm" generated by the current system which would require systemic and radical reform such as is proposed.** The Society believes that the proposals are poorly evidenced and misconceived in that they will demonstrably beyond reasonable doubt create consumer confusion and harm, will not address the actual unmet legal needs, nor assist with access to justice. We are not aware of any in-depth analysis, study or investigation of the impact of the proposals or likely achievement of the articulated objectives.

12. The primary purpose of the regulatory framework is to protect the consumer and the public interest. The current proposals will on the contrary erode consumer protections and have serious implications in a number of areas which we consider later in this submission. Furthermore, the proposals are substantially incomplete and lacking in clarity and guidance. This is likely to give rise to additional costs and add to the regulatory burden on regulated solicitors and firms, in particular smaller firms that are most likely to provide legal services to smaller businesses and individual consumers.

Summary of concerns with the specific proposals

13. The Society considers the SRA's proposals to be misconceived. We have significant concerns with:
    - the definition and evidence for "unmet legal need" which is the basis of the case for the proposals, as described in **the Initial Regulatory Impact Assessment**;
    - **the substance and content of some of the proposals**; and
    - **the consultation process** by which the SRA is seeking views on its programme of change.

14. Notwithstanding our overriding concern that the proposals are misconceived, we have in good faith reviewed the specific proposals with our members to ensure that there is a complete response representing the breadth of views of the profession.

The Initial Regulatory Impact Assessment

15. The principal reason articulated in the consultation for the proposals appears to be that the reforms would address the challenge of unmet legal need, which it is posited has arisen primarily because of a lack of flexibility and innovation leading ultimately to unaffordable costs. We have examined the evidence for unmet legal needs which is relied on and found that the evidence is neither robust nor sufficient. This is corroborated by the fact that, in their Interim Report, the CMA did not find it necessary to make a market investigation reference under section 131 of the Enterprise Act 2002. We

have set out in Appendix 1 a full analysis of the evidence on which the SRA's proposals are based and why it is flawed and even dangerous to use it for these purposes.

The substance and content of the proposals

16. We have significant concerns with the substance and content of the proposals, not least for consumer protection. The proposals will enable solicitors to work for unregulated entities providing unreserved services to the public. Such solicitors will be subject to a new code of conduct for solicitors but the organisations they work for will not be subject to the SRA's proposed new code of conduct for firms which will continue to uphold a range of current protections for clients and consumers. Such organisations will not be subject to any SRA Code or enforcement powers. This has potentially serious implications in a number of areas including client protection (and confusion), legal professional privilege and professional supervision. It will in our view lead to the creation of a two tier profession with a significant risk that the SRA's proposals will undermine the positive reputation held in relation to England and Wales solicitors and in the long-term, undermine the global competitiveness of UK law. We provide further details below.

The consultation process

17. The Society is concerned that consultees have been asked to respond to a consultation paper with inadequate detail of what is actually being proposed and what the consequences of the proposed changes are likely to be.

18. In particular, there is no clearly defined vision for the future of the regulatory framework, nor will it be possible to have this until the CMA has completed its market study and the Government has clarified if and when it will bring forward a further consultation on regulatory independence, which it is considering in the context of the CMA's preliminary findings[4]. The Code of Conduct and Principles are the most simple and workable aspects of the current regulatory regime and in least need of change. There are more significant related aspects still to be presented including the practice framework itself, the authorisation rules and enforcement. However, all are intrinsically linked and without an understanding of the related changes in all these areas, we question the efficacy of this partial consultation. In particular, as is made clear in the economist's report published by the SRA as part of the consultation[5], the planned guidance to support the profession in its efforts to understand what is clearly intended to be a very different regulatory regime has importance that cannot be underestimated,

[4] https://www.gov.uk/government/speeches/legal-services-regulation
[5] Looking to the Future - flexibility and public protection, Annex 6: Economist's Report

particularly in the light of the removal of the indicative behaviours. The profession is simply not in a position to make fully informed comments on the proposals and reach a judgment on the impact of the new practice framework and how effective the new Codes of Conduct would be without being provided with the intended additional guidance, which will replace the provisions in the Code that have been removed, and with all necessary information as to how the new form of regulation will be supervised and enforced.

19. Under the Gunning Principles:

    - consultation must take place when the proposal is still at a formative stage;
    - sufficient reasons must be put forward for the proposal to allow for intelligent consideration and response;
    - adequate time must be given for consideration and response; and
    - the product of consultation must be conscientiously taken into account.

20. We have serious concerns that the Gunning Principles are not being followed in this case.

21. In addition, the consultation has not provided any information or modelling on how the changes would be likely to change the balance of firms that would remain fully regulated by the SRA and what the consequent impact on the practising certificate (PC) and/or firm fees might be, and thus the balance of regulatory burden. This has the potential to impact the number of firms offering reserved services and ultimately impacts competition in the market and the cost of services especially at the small firm end of the market. This also raises diversity implications because solicitors from a black, Asian or other ethnic minority background are over-represented as sole practitioners and in firms with fewer than five partners[6].

22. The codes are shorter and simpler and the overarching Principles have been reduced from 10 to 6, losing the principle "provide a proper standard of service" amongst others. This is both a standards and client protection issue. Furthermore the language in the codes is so lacking in specificity that firms will spend more time trying to establish what will comprise compliance; there will also clearly be a wide margin of discretion for the regulator to decide what constitutes compliance.

23. The lack of detail in the consultation on the prior points makes it difficult to form a comprehensive view of the costs and benefits of the proposals.

[6] http://www.lawsociety.org.uk/support-services/research-trends/annual-statistics-report-2015/

24. Most seriously, there does not appear to have been any consideration of the international implications of the proposals for the reputation of the profession or, in practical terms, how the proposals would impact international firms.

25. The consultation paper is noticeably lacking in detail on how the SRA would deal with issues of enforcement, particularly with respect to ensuring that solicitors employed by an unregulated entity do not undertake reserved work, not least because (i) issues commonly cross between areas of legal activity and (ii) the boundary between reserved and unreserved services is sometime less clear cut than the terms would suggest. As observed by Mayson and Marley, "reserved instrument activities" is not a familiar concept even for some solicitors. The intention of relying on the distinction as a basis for distinguishing between entities that need or do not need to comply with the Code of Conduct is likely to lead to confusion and uncertainty.

26. In conclusion, the piecemeal approach to the regulatory review as a whole and the fact that this current consultation is just one of a number of linked consultations, means that it is particularly problematic to have any real understanding of how the new regime will work. The Society believes that it is difficult to properly review the issues when very significant elements of the new framework remain unclear including the future structure of the PC and firm fees, the practice framework rules and the section of the handbook that deals with enforcement.

Our concerns

<u>The Initial Regulatory Impact Assessment</u>

27. All consumers should have access to justice, regardless of social background or wealth. There are clearly unmet legal needs in certain sections of the population but the most significant unmet legal need relates to the removal of legal aid provision. Many consumers, in particular among the most vulnerable communities, do not have the means to pay for legal services at any price point and for them there is no realistic prospect of addressing their legal need without some restoration of publicly funded legal services.

28. Not all issues which have a legal element rationally require legal advice and not all consumers who have a legal issue wish to seek legal advice. There are many issues which may have a legal perspective but which consumers are often content to self-manage. This is a positive and healthy societal approach. It is not in the interests of consumers, the markets or society to encourage excessive and unnecessary use of legal processes to deal with simple matters – e.g. technically receiving a parking fine potentially results in

a "legal need". However it would not be rational or justified to take legal advice each time a parking fine is administered.

29. We are concerned that the evidence for unmet legal need which is the driver of the proposals is not robust and was not designed from a qualitative perspective to be used for justifying substantial regulatory reform. Our detailed analysis of the evidence for unmet legal need as articulated and relied upon for the proposals under discussion is contained in Appendix 1 to this response.

The substance and content of the proposals

Implications of the proposals for consumer protection, perceptions of the profession and the global competitiveness of UK law

30. While it is asserted that the proposals would be likely to deliver improved access to quality services at affordable prices, enhanced standards, increased employment opportunities and a strengthened solicitor brand, we believe the opposite is more likely.

31. In particular, we believe the SRA's proposals would lead to
    - weaker consumer protection because of the implications for:
        - legal professional privilege;
        - professional indemnity insurance and the Compensation Fund;
        - prevention of conflicts of interest;
    - creation of a two tier profession and greater client confusion;
    - lower professional standards;
    - other significant issues including:
        - contract protection;
        - disproportionate impact of regulation on smaller firms and sole practitioners;
        - impact on in-house practitioners;
        - impact on special bodies;
        - overlap between the two Codes of Conduct.

32. In this way, the proposals create a risk of significant damage to the standing of the solicitor profession at home and internationally.

Weaker consumer protection

33. As discussed above, the proposals would enable solicitors to work for unregulated entities providing unreserved legal services to the public. Such solicitors would be subject to the proposed new Code of Conduct for Solicitors but the entities they work for would not be regulated.

34. Despite receiving advice from a solicitor, clients of unregulated firms provided by a solicitor working in an unregulated entity would have none of the protections that clients in regulated firms have and will continue to have.

35. This has potentially serious implications with respect to legal professional privilege, professional indemnity insurance (PII) and the Compensation Fund, prevention of conflicts of interest, contractual protections, professional supervision and standards and the standing of the solicitor profession. We summarise the differences in protection at Appendix 2 and will discuss some of these points below and in the scenarios at Appendix 3 and Appendix 4.

Legal Professional Privilege

36. Legal professional privilege (LPP) is one of the most important rights recognised by English law. Having existed for over 400 years, LPP is treated under English law as a fundamental common law right and as a human right. It is a necessary corollary of the right of every person to seek legal advice and it plays a crucial role in ensuring the proper administration of our justice system. Accordingly, it is a precious right, vigorously protected by our judiciary and usually treated with the utmost respect by Parliament when it legislates. Despite the central position that LPP occupies in our justice system, it can easily be overlooked that this is a right, not of lawyers or the legal profession, but of clients. As noted in Passmore, "all privileged communications are necessarily confidential ones; but it by no means follows that all confidential communications are privileged, since it is only the confidential relationship between lawyer and client that can give rise to such a claim."[7]

37. A serious concern stems from the proposals regarding LPP. Clients of unregulated firms, despite receiving their advice from a solicitor with a practising certificate, will not have the benefit of LPP. In general, in order that communications may be protected by LPP, the advice given must be from a solicitor with a current practising certificate. The problem in this context however would arise as the contract / retainer would be between the consumer and the unregulated entity, not the individual solicitor. In order for the advice from a solicitor in an unregulated entity to attract privilege, the contract / retainer would have to be between the individual solicitor and the client, not the firm. Although it would be theoretically possible to make arrangements to circumvent the issue, the client would then only have redress against the individual solicitor and not the firm if the advice was negligent or wrong. We take the view that such arrangements would be inherently problematic and risky, for solicitors and clients, and furthermore not in keeping with the solicitor's role as an officer of the court. These proposals therefore present a substantial risk that by using an unregulated

[7] Privilege. Sweet & Maxwell [London; 2013]

provider, consumers would find that they do not benefit from protections which they had assumed they would, or only become aware of the lack of protection when they have a significant legal issue for which they want to be able to claim LPP but find they cannot. In such situations, it will be too late for the consumer to do anything about it. There are many completely foreseeable issues around lack of privilege, including confidentiality and insurance. We have prepared a scenario exploring the issues, which is contained in Appendix 3.

38. LPP is under attack in a number of ways and the Society is very involved in the fight to protect LPP. Under the principles of the rule of law and access to justice, LPP should be capable of attaching to advice to clients from a solicitor holding a current practising certificate wherever he or she practises and we are extremely concerned by any attempts to dilute LPP or make it more difficult to obtain or enforce. A situation where clients are unclear or misinformed about their entitlement to a right to LPP is also clearly unacceptable.

39. Finally, we do not believe that it is right in principle for LPP to be a distinguishing feature of the regulatory framework or a distinguishing factor between regulated and unregulated service providers. If one part of the solicitor profession is unable to give legally privileged advice, this is a slippery slope that could erode the concept of LPP; a cornerstone of the justice system, a key right of clients and a major factor in the high standing of the solicitor profession at home and abroad.

Professional Indemnity Insurance (PII) and the Compensation Fund

40. The proposals allow solicitors to operate from unregulated entities without mandatory PII in place. This risks eroding a key element of current client protection, and would also leave the individual solicitors concerned exposed to significant personal liability if they chose to operate without PII. The PII regime also plays an important quasi-regulatory role in encouraging good risk management and behaviours.

41. Additionally, clients of unregulated entities will not have access to the Solicitor's Compensation Fund. Arguably, clients of an unregulated entity would be exposed to much greater risk due to the lack of regulatory controls and oversight. We note that in view of higher risks with unregulated firms it would not be prudent to expose the Fund to the risk of a potentially significant pool of claims that could deplete the Fund's reserves. However the result is a significantly eroded client protection regime.

42. The proposal to counter this is that solicitors working in an unregulated entity would be required to make sure that their clients understood whether and

how the services they provide are regulated and the protections available to them. We would point out that even for those working within the legal sector, insurance and client protections are complicated topics and not easily digested and understood. It is highly likely that even with such a requirement in place, the overwhelming majority of clients will not fully comprehend the implications of purchasing their legal services through an unregulated provider.

Prevention of conflicts of interest

43. Under the proposals, solicitors providing services through an unregulated provider would be regulated as individuals and would be subject to the requirements set out in the Code of Conduct for Solicitors around conflict and confidentiality. However, this would not be true for the unregulated entities themselves or for non-regulated individuals employed by them. Unregulated entities would therefore be able to act in situations where regulated firms would not, creating an uneven playing field, and creating a risk of conflicts in the unregulated entities that would not be present had the client engaged a solicitor in a regulated firm. In such situations, the client might not be aware of a potential or real conflict of interest or appreciate that the unregulated entity was itself not subject to the rules on conflict.

44. The protection of confidential information is a fundamental feature of the solicitor's relationship with clients. As the SRA says in its guidance, "It exists as an obligation both as a matter of the common law and as a matter of conduct." Equally, a solicitor who acts in the face of a conflict of interest involves not only breaching their fiduciary duty to their client, but is putting at risk the important principle that justice must not only be done but be seen to be done. There is a real risk to the perception of justice if a solicitor is seen to act whilst having a conflict of interest.

45. It seems invidious that unregulated entities employing solicitors should not have to comply with a regulatory conflict of interest policy given the concept of conflicts of interest is recognised globally as a serious ethical issue that corporations and government bodies strive to address in many ways, from legislation to internal rules and codes. There is clearly a danger of downgrading professional standards with this proposal and consequentially a seriously negative impact on the standing of the profession internationally where conflict of interest is taken very seriously by Bar Associations. There is agreement internationally on the principle that lawyers should not act when the interests of their clients may conflict. The Council of Europe Recommendation on the freedom of exercise of the profession of lawyer lists the avoidance of conflicts of interest as one of the principle duties of lawyers

towards their clients[8]. A European Parliament resolution recognises that certain rules which are necessary in the specific context of a profession – including the avoidance of conflicts of interest – are not to be considered restrictions of competition within the meaning of Article 81(1) EC Treaty.[9]

46. Furthermore, clients would certainly be at risk. The Society would point to the 2016 Online Survey of Legal Needs, which found that:

- for 48% of issues, respondents checked if their main advisor was regulated (more likely for those aged >55);

- for 38% of issues, respondents did not. Of the 38% of issues where regulatory status was not checked, in over half of cases (52%) the respondent assumed the advisor would be regulated and therefore did not check; in 17% of cases they did not think regulation was important; in 8% of issues they did not know what regulation meant and in a further 8% they did not know how to find information about regulation.

47. There are also inherent risks to solicitors themselves in that a solicitor working in an unregulated entity might unwittingly act in a conflict situation.

48. The proposals will also act as a push to firms to become unregulated for fear of losing clients to unregulated competitors. This has been identified as an issue by some firms we have consulted. It has been suggested that a US style system for conflicts might be adopted generally, however although this might alleviate the position, the US system requires an extraordinary number of waivers and additional paperwork.

Creation of a two tier profession and greater client confusion

49. The SRA's proposal would effectively divide the profession in two by creating a second class of solicitors, delivering unreserved work through unregulated entities and without protections that have been traditionally available to those who consult solicitors.

50. Clearly this scenario will create confusion to consumers. Apart from confusion regarding the client protections available, we believe it will be difficult for consumers to differentiate the type of firm they are instructing. While an unregulated entity will not be able to use the term ‘solicitor's firm’ or ‘solicitors’, it would be able to use titles that included the words "law", "legal services" or "lawyers" and as they are unregulated, there will be no

[8] Recommendation No. R 2000-21 of the Committee of Ministers to member states on the freedom of exercise of the profession of lawyer

[9] European Parliament resolution on scale fees and compulsory tariffs for certain liberal professions, in particular lawyers, and on the particular role and position of the liberal professions in modern society (2001)

means to require them to publicise the fact that the entity is not regulated. There is no prohibition against unregulated firms advertising that they employ solicitors, which would be even more confusing. The situation would be further muddied by the fact that "lawyer" is not a protected title and, as things stand, can be used by any person when supplying unreserved legal services.

51. The potential for consumer confusion is clear. Many consumers are unlikely to appreciate the distinction between a regulated 'solicitor's firm' and an unregulated 'law firm' or 'legal services firm' and the differences in the protections available when supplied with the same service by unregulated and regulated providers.

Lower professional standards

52. We have mentioned above a number of proposals which we believe will have a lowering effect on professional standards, such as the erosion of LPP, and the elimination of the regulatory conflicts regime and PII. However, there is a further proposal which would mean that newly qualified solicitors with no experience would be able to set up their own unregulated firms. It is very common for regulators to prevent newly qualified professionals, such as in medicine, from setting up on their own immediately after qualification because of their lack of experience and the risk of consumer detriment. Our understanding is that the SRA has conducted research that shows that the most problematic solicitors are those at the very beginning and very end of their careers. For example, research conducted by Nottingham Law School for the SRA suggests that it is not until they have gained four years of post qualified experience that new entrants are more confident of their legal expertise and turn their attention to developing a wider skill set, as part of their aspirational career trajectory[10].

53. If that support and supervision were not available it could place clients at risk, as well as risking the standing of the solicitor profession itself, at home and internationally. We provide more detail on this important subject in our response to Question 19.

54. In 'Mapping the Moral Compass', Richard Moorhead and others[11] have examined how individuals, systems and cultures combined to increase or reduce ethical risk in the context of lawyers working in-house in business and government. They estimated that 30-40% of in-house lawyers sometimes experienced ethical pressure to advise on unlawful and/or unethical

[10] http://www.sra.org.uk/documents/SRA/research/sra-cpd-final-report-september.pdf
[11] C Godinho, S Vaughan, P Gilbert and S Mayson - http://www.ucl.ac.uk/laws/law-ethics/cel-events/ELIHL-survey-report

practices; in 10-15% of the sample, such pressure was described as 'elevated'. The research establishes links between a stronger commercial orientation and weaker ethical inclination, with other conceptions of the in-house role, such as 'neutral adviser' and 'exploitation of uncertainty' can also be problematic. The research indicates that behaviour is not always consistent with the approach required under professional codes. Stronger ethical infrastructures, as well as individual, team and professional orientations are all associated with more ethical and more professional in-house lawyers.

55. In addition to the above, the prospect of intervention is a powerful incentive for compliance. The SRA would not be able to intervene in an unregulated entity. The effect of this lack of enforcement power could have serious implications on the behaviours of the entity and, by extension, the solicitors within it.

Other significant issues arising from the consultation

56. There are a number of areas of ambiguity in the proposals that require further clarification from the SRA. These include:

Contract protection

57. It is important to note that the terms of business of a regulated entity can be restricted in a way that an unregulated entity's terms may not. There is case law to the effect that retainers with a regulated solicitors' firm cannot be terminated without cause[12], the solicitor has a duty to warn clients of matters which fall outside the normal scope of the retainer and to inform the client of problems identified or new information learned during the course of a retainer.[13] These obligations on solicitors' firms as determined by the courts underpin the values of an independent legal profession, imposing restrictions that curtail commercial incentives for contractual terms that are not beneficial to the client.

58. Conversely, there are no such restrictions on an unregulated entity's terms of business. The protection currently afforded to clients is open to erosion if the courts were to take the view that unregulated entities are not subject to the same contractual restrictions even if a solicitor employed by the entity carries out the work.

59. On a separate point, although solicitors would be subject to the principles contained in the Code of Conduct for Solicitors, there would be no obligation on the unregulated entity to have systems in place for dealing with client

[12] Buxton v Mills-Owens [2010] EWCA Civ 122
[13] Credit Lyonnais [2002]EWHC 1510; Mortgage Express v Bowerman [1996] 2 All ER 836

files, including retention of files when the matter is complete or the entity closes down. This could undermine a solicitor's ability to comply with their obligations to their client under the Code.

Disproportionate impact of regulation on smaller firms and sole practitioners

60. Under the current fees structure, 60% of the net funding requirement for the Law Society and SRA is received from practising fees paid by solicitor firms. The remaining 40% is collected from individuals' PC fees.[14]

61. Practising fees are charged to solicitor firms according to each firm's annual turnover in the accounting period prior to October (when fees are collected). A payment structure with turnover bandings is published annually by the SRA.[15] The proportion of turnover charged declines as turnover increases. However, the 200 firms with the highest revenue contribute over 40% of total fees paid by all firms (estimate for the year 2014-15) due to the scale of their turnover.

62. Unreserved work accounts for the majority of solicitor firms' turnover. Hence if solicitor firms' unreserved work were switched to unregulated providers, the turnover base that underpins practising fees paid by firms would be reduced (perhaps markedly). As a result, total fees received from firms, under the current bandings, would fall.

63. There is no information about any prior analysis of the projected impact of its proposals on fees, in particular the turnover based firm fee. Without this information, and an assessment of the impact on the SRA's costs, it is impossible to derive a full picture of what the consequences of the proposals might be.

64. We understand that some firms feel they will have no choice but to establish unregulated entities through which to provide unreserved services, in order to remain competitive. As stated above, we have real concerns about how these changes might ultimately affect the fees for smaller firms who may, collectively, find themselves making up the shortfall in fees.

65. Unintended consequences could be a proportionately higher burden of practising fees on smaller firms and sole practitioners, who do not find it cost effective (or possible) to split their business between regulated and unregulated services. This is likely to result in higher costs for consumers at

[14] Details of the funding arrangements are contained in the document: http://www.legalservicesboard.org.uk/projects/independent_regulation/PDF/2015/20150723_SRA_TLS_To_LSB_Section_51_Application.pdf. Practising fees also go to fund the levies that the Law Society Group pays under the Legal Services Act to fund the Solicitors Disciplinary Tribunal, Legal Services Board, and Legal Ombudsman.

[15] For example the 2014-15 fee structure: http://www.sra.org.uk/mysra/fees/fee-policy-2014-2015.page

the less economically well off end of the market for regulated (and possibly unregulated) services as a result.

Impact on In-house practitioners

66. By ceasing to separate out core regulatory provisions for in-house solicitors, the SRA will put in-house solicitors on an equal footing with other solicitors. The Society welcomes this acknowledgment that in-house solicitors are (as they always have in fact been) an equal part of the profession. However, we suggest that there needs to be a review of the Code to ensure that in-house solicitors are not caught by any provisions which should only apply to solicitors in private practice or vice versa. There are currently no in-house specific provisions in the code and this seems to be likely to raise issues in the future because in-house roles are very different from private practice.

67. It is proposed that in-house solicitors should no longer be prevented from only acting for their employer. This is intended to enhance access to justice for consumers. In practice, this change will mean that any in-house solicitor can provide advice and assistance to the public, provided they are not carrying out one of the reserved legal activities. In the case of local authority in-house solicitors, this may be attractive as it could permit them to provide advice to other bodies and authorities without having to obtain a waiver. However, this will result in increasing conflicts of interest situations, with the need to comply with the Code of Conduct for Solicitors. They will also face potential liability exposure, which will realistically have to be covered by their employer's indemnity. In addition, they too will not be able to provide advice which is covered by LPP.

68. With respect to in-house solicitors, it is difficult to envisage in what circumstances they would wish to act for third parties, or in what circumstances they would be permitted to do so. Many employers prohibit employees taking on other work as it is not in their interests for them to do so.

69. We have received specific feedback to the proposals from in-house lawyers working in Local Government, who are not in favour of the new proposals for a number of reasons. They remain concerned about the lack of clarity as to whether they can provide service to more than one local authority or body. These proposals do not address the issue. In addition the unregulated entity proposals are unattractive for the following reasons: they wish to remain regulated and intend to carry out unreserved work, the lack of LPP; the lack of regulation of conflicts rules; the fact that public procurement rules prevent local authorities from engaging unregulated firms; and because they are concerned that legal work that is partially funded by the tax payer through Council Tax could be delivered via an unregulated firm. Those

clients/consumers should receive the same quality of work and protections as consumers of regulated firms.

Impact on Special Bodies

70. The consultation is being used as an opportunity to address the position of 'special bodies' – not for profit organisations such as trade unions, law centres and Citizens Advice. These bodies have been subject to transitional arrangement provisions in the Legal Services Act 2007, meaning that while the solicitors they employ are regulated by the SRA, the body remains unregulated. The SRA's suggested new approach is to treat special bodies in the same way that it currently treats multi-disciplinary practices[16]. Special bodies play an important role in providing access to justice for vulnerable people who may not be able to afford access to legal services. We believe that, as well as considering the impact of the proposals on bodies such as Law Centres, there needs to be a detailed analysis of the impact on the market, and other providers in the market, of bringing these providers into the regulated sphere.

Overlap between the two Codes of Conduct

71. There is overlap between the two Codes, most noticeably in areas such as conflict, complaints and client information/identification. It is not clear which would take precedence in the event of there being a conflict between the two Codes.

[16] MDPs - alternative business structures providing a mixture of legal and non-legal services - where reserved activity is SRA regulated and non reserved activity is not subject to the provisions of the Handbook.

Consultation questionnaire form

Question 1: Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

The content of the test itself is fair and discharging the burden of the suitability test is straightforward in administrative terms but it is unclear what level of scrutiny is given to these returns to ensure that only those who are suitable are admitted to the profession. Further information regarding this process would be welcome as a way of showing greater transparency of the regulatory process.

The Law Society is aware of concerns regarding the timing of the suitability test. The Society was supportive of the removal of student enrolment prior to the start of the Legal Practice Course as it was unnecessarily costly and bureaucratic. However, the Society noted at the time that there may be issues which arose as a result of this and that it was essential that students have proper information to alert them to any likely problem at an early stage. There were also notable benefits to the previous arrangement. First, they enabled any concerns about a student's character to be addressed before the student embarked on the period of recognised training, at which point there has already been a significant outlay in time and money. Secondly, the requirement to undergo the process placed students on notice that their conduct may seriously affect their ability to pursue a legal career. It offered them an opportunity to engage at an early stage with the implications of being a professional. While it is accepted that each individual must take responsibility for their behaviour and should take advantage of the information available on the SRA website about character eligibility, it is not realistic to expect a student to understand the complex technicalities for reaching the SRA's suitability standards.

Unfortunately, although students can request an early appraisal of any issues that may cause problems regarding their suitability, the Society understands that it is not widely understood what this process is and when it should be applied for. The Society is aware, anecdotally, of situations arising whereby firms are routinely having to query trainees when they begin their placements and deal with issues, which the person concerned had not recognised must be declared, at this late point. There may also be situations where firms do not check, which raises issues about client protection. This represents a waste of a significant outlay in time and money on their part.

Clear and appropriate information regarding the suitability test should be made available to students at an early stage in order to make it obvious to students where previous conduct may prevent them from joining the profession and to give them a clear idea of the conduct they will be expected to demonstrate over the ensuing

years if they wish to join the profession.

Question 2: Do you agree with our proposed model for a revised set of Principles?

The Society has concerns with some aspects of the proposals as set out below.

New Principle 1: Uphold the rule of law and the proper administration of justice

This is current principle 1. We welcome its retention. However, we would reiterate that it is important to understand what "the rule of law" truly means. While a solicitor who is acting illegally may damage trust in the profession, it does not follow that the solicitor is also failing to uphold the rule of law. We would refer to The Rule of Law by Lord Bingham[17] which advances eight principles by way of expansion of the basic concept, the latter being: "that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts." These are primarily obligations of the state, not of individuals.

New Principle 2: Ensure that your conduct upholds public confidence in the profession and those delivering legal services

This is a reworking of current principle 6 ("behave in a way that maintains the trust the public places in you and in the provision of legal services") but brings in a new obligation with respect to providers generally.

There are two substantive changes.

First, the absence of any reference in the new wording to the importance of regulated individuals behaving in a way that retains public trust in them personally.

Secondly, it is illogical for regulated individuals and firms to be placed under any regulatory obligation with respect to non-regulated individuals and providers, and the proposed loosely worded reference could deter regulated individuals and firms from pointing out why the public should have greater confidence in the regulated sector, for example because of their professional training and the higher levels of client protections.

We propose that the new Principle be redrafted as follows:

*Proposed alternative wording for New Principle 2: Ensure that your conduct upholds public confidence **in you and** in other regulated individuals and firms"*

New Principle 3: Act with independence

[17] The Rule of Law by Tom Bingham, Penguin Books, 2011.

This is a reworking of current principle 3 ("not allow your independence to be compromised"). The Society does not have any concerns with the revised wording.

New Principle 4: Act with honesty and integrity

This is a reworking of current principle 2 ("act with integrity").

The Society has concerns with this proposed new principle not least because a requirement to be honest, including with respect to client money, is significantly weaker than a requirement to protect it, as required by current principle 10 ("protect client money and assets"), which it is proposed to remove. This proposal is presumably to facilitate the other proposal that solicitors working in unregulated entities should not be able to hold client money in their own name.

The absence in the new principles of any reference to the importance of protecting client money and assets raises concerns from the perspective of professional standards and consumer protection. Arguably, such protection would become even more important in an unregulated entity which do not and would not have to comply with the SRA's accounts rules. We therefore believe the new set of principles should retain an explicit reference to the protection of client's money and assets, ideally in a separate principle.

New Principle 5: act in a way that encourages equality, diversity and inclusion

This is a reworking of current principle 9 ("run your business or carry out your role in the business in a way that encourages equality of opportunity and respect for diversity"). The substantive change is the addition of a reference to inclusion. However, the word "act" seems a significant watering down of the current wording and the Society would prefer to retain "run your business or carry out your role" in place of "act".

We are also concerned that, while equalities legislation will apply to unregulated entities, this Principle will not. The SRA should address this issue in its equality impact assessment.

New Principle 6: Act in the best interest of each client.

This is a minor change to the wording of existing principle 4 ("act in the best interests of each client"). The Society does not have any concerns with this wording.

Question 3: Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

As noted above, we are concerned that the wording of the new Principle 2 does not refer to the importance of regulated individuals' behaviour in a way that retains public trust in them personally.

We would prefer absolute clarity and therefore propose that the new Principle be redrafted as follows:

*Proposed alternative wording for New Principle 2: Ensure that your conduct upholds public confidence **in you and** in other regulated individuals and firms"*

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?

Current Principles

The SRA is proposing the removal of four current principles:

a. Current principle 5 ("provide a proper standard of service to your clients")

The Society believes that this Principle should be retained as this is central to the profession and reflects the high level of quality that consumers can expect from a regulated individual. Its removal gives rise to concerns from the perspective of professional standards and consumer protection.

b. Current principle 7 ("comply with your legal and regulatory obligations and deal with your regulators and ombudsmen in an open, timely and co-operative manner")

The Society does not object to the removal of this principle.

c. Current principle 8 ("run your business or carry out your role in the business effectively and in accordance with proper governance and sound financial and risk management principles")

The Society does not object to the removal of this principle, provided that current principle 10 is retained.

d. Current principle 10 (“protect client money and assets")

As noted above, the removal of this principle raises concerns from the perspective of professional standards and consumer protection. Arguably, such protection would become even more important in an unregulated entity which does not have to comply with the SRA's accounts rules. We therefore believe that the new set of principles should retain an explicit reference to the protection of client money and assets, ideally in a separate principle.

The loss of principles 5 and 10 cause particular concern. In addition to the reasons cited above, these principles are so closely associated with what consumers have come to expect of a solicitor that they might be said to epitomize the brand on which consumer confidence is in large part founded. We can see only risks and no benefits in removing what are often seen as two hallmarks of the profession from the core principles.

At Appendix 3, we provide a scenario showing what could happen in a worst case scenario.

Other Principles arising from the newly revised ones

While confidentiality is arguably implicit in the principle that regulated individuals should "act in the best interest of each client", the Society believes it would be helpful to include a specific reference given its importance to consumers and to compliance with professional standards.

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?

We take the view that it would be helpful to the profession to provide a thorough and developed suite of scenarios, particularly as it is proposed that the indicative behaviours be removed from the Codes. As examples of the types of scenarios which we would consider to be useful, we suggest the following:

- A scenario that deals with a sole practitioner who establishes an unregulated entity in order to provide unreserved legal services. The scenario would cover how this practitioner might manage the operation of a regulated and separately unregulated business in practice. It would be particularly interesting to understand how the sole practitioner can guard against client confusion when practising in the circumstances set out above.

- A scenario that explores a practising solicitor working in an unregulated entity who is asked to represent a client who has clear conflicts with existing clients of that entity. We understand that in such a situation the solicitor would be able to represent the client. It would therefore be valuable to understand the parameters around management of such conflicts.

- A scenario that outlines whether, under the new proposed Codes of Conduct, a solicitor firm of conveyancers can act for a buyer and a seller, or for a borrower and a lender, in a conveyancing transaction and be compliant with 6.1-6.5 of the proposed Code of Conduct for Solicitors.

- A scenario that explores the impact of the proposals on the giving and receiving of undertakings ie between a solicitor in an unregulated entity and a solicitor in a regulated entity. Undertakings are the oil in the engine of legal transactions and help ensure they can take place. If in such circumstances, a solicitor in an unregulated entity were to breach an undertaking, what would be the consequences in terms of reparations to the affected consumer? Under what, if any, circumstances would undertakings from an unregulated firm be acceptable to regulated firms and others?

- A scenario that explores a solicitor who owns and practises through an unregulated entity who wishes to place advertisements online and in a newspaper. It would be useful to understand in more detail what the advertisement can say about the unregulated firm employing solicitors with and without practising certificates.

- A scenario that explores how an in-house lawyer (perhaps working for a local

authority) might provide legal services to the public. How this service would be managed, charged out, and how conflicts and risks would be managed.

- A scenario that explores how a solicitor working in an unregulated firm would manage conflicts, bearing in mind that they would be bound by the conflict rules from the solicitors code but may be working with colleagues who are totally unfamiliar with the concepts of conflict, confidentiality and disclosure.

- As set out in our answer to Question 20, we believe it would be helpful for the SRA to provide a case study on the information that should be displayed about consumer protections, including the level of detail required and expectations as to the prominence of the information presented.

Our consultation with some firms indicates that they are concerned about the removal of indicative behaviours from the handbook because of their usefulness in indicating how the regulated community can best comply with their regulatory requirements.

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?

As the Code's purpose would be to forestall misconduct, there is a balance to be struck between excessive detail and brevity. Clarity is important but so is predictability.

We know that our members, particularly those from smaller firms, like certainty. Many members would rather have a definitive 'do this' or 'don't do that' approach, so that compliance is more straightforward and there is less scope for genuine misunderstandings or disputes with the regulator. Without such certainty, disputes with the regulator about whether or not a particular behaviour is acceptable are more likely, as is uncertainty about the circumstances in which enforcement action will be triggered.

In addition, we are concerned that the language used in the Code is often vague or loosely constructed. This creates a risk that behaviour that is clearly within the current Code may be regarded as incompatible with the new Code and that a member carrying on practice in a fully compliant way now might be in breach under the new Code. There is real concern that both of the new Codes would give the SRA too much discretion. There is clearly a need for the SRA to provide more information and ensure that it acts in a consistent way and to make an explicit commitment to those subject to regulation that it will be consistent, fair, open, transparent and predictable about the circumstances in which it will decide to take or not to take action.

We understand that guidelines are planned and should mention the concerns of many that they are not yet available.

Specific examples of where the Code is lacking in clarity are set out in our answer to Question 13.

Question 7: In your view is there anything specific in the Code for all solicitors that does not need to be there?

No. On the basis of the partial information provided about the new regulatory framework and the SRA's approach, the Society has not so far identified anything specific in the proposed new Code that should be removed.

On the contrary, as noted in our response to Q6, we believe the Code needs more detail and guidance in order for it to be effective and provide clarity to the regulated community.

We would also reiterate that, without the full picture in relation to the new framework and the SRA's approach, it is difficult to reach a definitive judgment on the proposals.

Question 8: Do you think that there anything specific missing from the Code for all solicitors that we should consider adding?

It is not possible to respond to this question with any real certainty as we have not seen the guidelines or other parts of the proposed regulatory reforms.

However, on the basis of what has been set out so far, we have identified three issues on which the Code should be revised:

Unsolicited approaches to clients

The Society is extremely concerned by the proposed removal of Outcome 8.3 in the current Code, which states: "you do not make unsolicited approaches in person or by telephone to members of the public in order to publicise your firm or in-house practice or another business;".

Solicitors who make such unsolicited approaches to clients are not acting in the client's best interests, but rather their own. This explicit prohibition provides an essential protection for clients who are at their most vulnerable when such approaches are made – at the police station, court or prison. Its removal would undermine the protection currently provided to clients in this situation, which prohibits the solicitor from carrying out this behaviour.

The prohibition that the consultation proposes to remove also supports the Government's Duty Solicitor scheme by helping to ensure that anyone arrested can exercise their right to free legal advice from the duty solicitor. Removal of the prohibition would undermine the efficient running of the scheme.

The justification for proposing the removal of the prohibition is that it is "*covered by new 1.2 in the Code for Solicitors and new 1.1 in the Code for Firms to a certain extent.*"

The relevant clauses are as follows:

- new 1.2 in the Code for Solicitors: "*You do not abuse your position by taking unfair advantage of clients or others.*"
- new 1.1 in the Code for Firms: "*You do not abuse your position by taking unfair advantage of clients or others.*"

Clearly, the new clauses carry significantly less weight than the current explicit prohibition. We believe their wording is too weak and unclear to provide certainty to the public, members of the profession and the Legal Aid Agency that unethical behaviour is prohibited and will not be tolerated.

We therefore recommend that the Code of Conduct for Solicitors, RELs and RFLs, and the Code of Conduct for Firms should maintain the current wording of Outcome 8.3, which explicitly prohibits such unethical behavior.

Firms being reasonable or forming reasonable views

A number of references to firms being reasonable or forming reasonable views have been dropped. We would argue that if a solicitor acts reasonably but makes a mistake, it is right in such circumstances that being reasonable should not provide a defence to a request for an injunction or other mandatory order or costs. However, it would also seem unfair to make the actions of the solicitor in such a situation a potential offence that is subject to disciplinary consequences.

Systems to identify and deal with potential conflicts

We note that references to systems to deal with potential conflicts and confidentiality have been lost within the new drafting of the Codes of Conduct. We believe that this causes a problem. We assume that the omission has taken place because there would be general rules about systems. In our experience, and the case law supports this, the biggest single problem for firms in these areas is poor systems, particularly systems for picking up conflicts, or systems for establishing where special protections will be needed to protect confidential information. The SRA approach therefore, while being logical, would quite possibly be unhelpful to firms.

Undertakings

We have particular concerns about the position where a solicitor in an unregulated provider gives an undertaking to a solicitor in a regulated firm or to others who would need to place reliance on it. Undertakings have become a crucial element of the practice of law in the UK and are used to expedite matters that, in the absence of an undertaking, would cause considerable delay and inconvenience to the practitioner and the client.

Even though an undertaking relates to an individual solicitor, the Society has significant concerns regarding an undertaking provided by a solicitor employed by an unregulated provider. We believe that solicitors in a regulated firm would be highly unlikely to accept an undertaking from an unregulated provider due to a lack of protections if things go wrong.

We take the view that undertakings are sufficiently important to warrant protection in both of the codes, making clear that they are not just an enforceable agreement, but that breach can give rise to disciplinary proceedings.

Please also refer to our response to Question 5 which includes a suggested scenario

in relation to undertakings.

Question 9: What are your views on the two options for handling conflicts of interests and how they will work in practice?

The need for clarity around handling of conflicts is paramount. One particularly difficult area is conflicts relating to buyers and sellers in conveyancing transactions. We refer to our suggestion for a specific scenario to be created on this topic in our response to Question 5.

We read the two options set out in the consultation as follows:

- Option 1 largely replicates the 2011 Code, in prohibiting a solicitor from acting where there is a conflict or significant risk of conflict, for example as would exist if an individual solicitor were to act for a buyer and a seller, unless specified circumstances are met and protections are provided;

- Option 2 would narrow the ability to act given that it provides for a complete bar on acting where there is an actual conflict, and requires protections to be put in place if there is a significant risk of a conflict.

We would take the view that Option 2 would quite possibly be unworkable as it is not always possible to identify where a conflict exists. It is too restrictive and unnecessary. Because of the difficulty in identifying where conflicts exist, this option would present risks from a consumer protection perspective.

It may be helpful to set out our thinking to both options in more detail, at the same time commenting on some of the more subtle changes in emphasis:

<u>Option 1</u>

The proposed new rule 6.1 reproduces the old outcome 3.4 dealing with a conflict between the solicitor's own interests and those of the client. It is proposed that there should be an absolute bar to acting (as in the current Code). Under general law such a conflict could be waived. We are not aware of any pressure to change this.

The proposed new rule 6.2 effectively reproduces old outcomes 3.5 to 3.7, and deals with conflicts between clients. In addition to dropping indicative behaviour, it makes a number of changes to the existing rules. First (in 6.2 (a)), the old rule that if someone was to act for more than one client, the clients had to have 'a substantial common interest'. This is to be replaced by saying that the clients need both 'an agreed common purpose and a strong consensus how that purpose is to be obtained'. We take the view that this is weaker, because it allows one firm to act for more than one client on a matter even if the clients have little or no common interest in the matter. There is no explanation for the change.

A further protection has been changed (6.2(iii)). Under the old rules the solicitor had to be satisfied that it was reasonable to act for all clients. This has been dropped. We find this somewhat unsatisfactory, particularly as it would affect less sophisticated clients, who might not understand the implications of giving consent. There is a restatement of the need for the benefits to the clients having to outweigh the risks, but the old requirement was that this was something the solicitor had to have been satisfied about whereas the new requirement is a pure objective test.

Three old protections have been dropped. The first (outcome 3.7 (a)) was that the solicitor had to explain the risks of acting for more than one party and be satisfied that all clients understood this; this was similar to what happens when, for example, one spouse agrees that a house should be mortgaged to support a loan to the business of the other spouse. We would argue again that dropping this is wrong although it may be argued that no consent can be 'informed' without an explanation process (but this should be made clearer). The second (outcome 3.7 (c)) was that other than the matters for which client consent had been given there was no other client conflict. We can see that this protection added little. The third is that without specific client consent, no individual could act for more than one client on the matter. We assume that this was dropped because the issue has been picked up in the code for individuals.

Finally, these conflict rules are to apply to both firms and individuals, in more or less identical terms. But, recognising that some parts of the rule need to apply to individuals, the question remains as to how the application of the whole of the rule works? Is it to be the responsibility of each solicitor on engagement to see that informed client consent has been given? We do not foresee that this would be straightforward. It would be wrong for the senior lawyers acting to be able to just pass responsibility onto the firm, irrespective of what they know or do. We feel that more precise drafting would be beneficial.

<u>Option 2</u>

This would be a complete bar on acting where there is an actual conflict, and protections where there is a significant risk of a conflict. The protections would be (a) informed client consent in writing, (b) where appropriate, putting in place effective safeguards to protect confidential client information, and (c) ceasing to act for one or more of the clients if an actual conflict arises.

This is justified, in paragraph 64, as taking an 'approach which recognises the safeguards around the current exceptions are really about preventing potential conflicts from becoming real ones'. This is incorrect. The existing safeguards were drafted recognising that the parties may have an essentially common interest but still have opposite interests in some respects. These are just examples of a situation that arises not infrequently in a commercial law practice. We understand that when the original rule was drafted, one example which was being held in mind was a solicitor acting for all the partners on forming a partnership, or all owners, when

drafting articles of association. The clear common interest is obvious, but behind it individuals will often have different views on their personal rights in many respects. What a solicitor might typically do is say that he or she will raise the issues where interests may differ and ask the clients to agree how to deal with them and then, in effect, just be the scribe. However, narrowing the scope of the mandate in this way will not always work. Similar issues can be found in drafting a trust deed. We fear that Option 2 would create very real difficulties in these types of situations and could be a recipe for uncertainty.

Also Option 2 seems to abolish the ability in Option 1 and the current rules for a firm to act for more than one client in pursuit of the same object (often where an intermediary is doing some sort of controlled auction for shares in a company or some sort of property). We can see no reason to open this up to uncertainty.

Question 10: Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

We refer to our answer to Question 6.

Specific examples of where the clarity of the proposed new Code could be improved are set out in our answer to Question 13.

Question 11: In your view is there anything specific in the Code for SRA regulated firms that does not need to be there?

No. On the basis of the information provided so far about the new regulatory framework and the SRA's approach, the Society has not identified anything specific in the proposed new Code for SRA regulated firms that should be removed.

On the contrary, as noted in our response to Q10, we believe the Code needs more detail and guidance in order for it to be effective and provide clarity to the regulated community.

We would also reiterate that, without the full picture in relation to the new framework and the SRA's approach, it is difficult to reach a definitive judgement.

Question 12: Do you think that there is anything specific missing from the Code for SRA regulated firms that we should consider adding?

We would repeat our point that without seeing all of the guidance which the SRA intends to publish, it is difficult to respond to this question with any real certainty. On the basis of what is available, we would suggest the following:

We note the absence of 1.3 from the Code – the provision about undertakings. It is unclear whether entities should not be giving undertakings, or that an undertaking has to be attached to an individual solicitor to be enforceable.

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?

Remarks in relation to drafting on Confidentiality and disclosure

Proposed rule 6.3 in the Code of Conduct for Solicitors (and proposed rule 6.1 in the Code of Conduct for Firms) tracks existing outcome 4.1 (and its equivalent) provided the definition of client continues to cover former clients (ie by replacing "clients" by "clients or former clients". We would expect that to be the case but note that proposed rule 6.5 expressly refers to former clients so an explicit reference to former clients is also needed in proposed rules 6.3 and 6.1 in the Code of Conduct for Solicitors and the Code of Conduct for Firms respectively.

Proposed rule 6.4 (about the duty to disclose) incorporates existing outcomes 4.2 and 4.3. There is an oddity in the new rule in the version of the draft code which applies to firms, as the draft rule expressly says that it only applies to individuals. But if it only applies to individuals why does it need to be in the rule for firms? The underlying point of course is that in cases like Kelly v Cooper (a case about estate agents), the courts have made it clear that there is no general assumption that information known to one person in a firm is to be attributed to another.

We note that proposed rule 6.4 has two additions to outcomes 4.2 and 4.3. The first is that a solicitor does not need to pass on information to the client which the solicitor has reason to believe will cause the client serious physical or mental injury. This seems to apply only where the client is an individual, and not (for example) where the client is a company of which the vulnerable person is a controller or director. The second is to reflect general law about the mistaken disclosure of information in a privileged document which need not be disclosed to a client. This reflects case law. In the case of these new exceptions, saying that they are exceptions to the duty to disclose is not at all the same as saying that disclosure cannot be made, which is surely what is intended (certainly in relation to the second of them).

Proposed new rule 6.5 (not acting if to do so puts client confidential information at risk) largely tracks existing required outcome 4.4. This area is the one which has led to most of the recent reported cases on conflicts and confidentiality, although the cases do not refer to the SRA Code of Conduct. It is worth noting that the existing rule was altered some time ago to refer to having ‘information barriers which comply with the common law’. The proposed new rule just refers to measures which result in ‘there being no real risk of disclosure’. This reflects the common law and is consistent with the way in which the new Code of Conduct is drafted.

We would make a couple of points on proposed rule 6.5. The first is that having introduced a reference to former clients (which proposed rule 6.3 does not do) it

then uses the term inconsistently so that, on the face of it, a former client consent is not enough to escape the prohibition on acting, although a current client consent does. Secondly, we are puzzled why this rule, with its references to effective measures, applies to individuals?

Further points in relation to drafting: Code of Conduct for Solicitors

- The paragraph below the Principles on page 45 of the consultation, implies (when it says 'They apply to conduct and behaviour relating to your practice') that the Code does not apply to a solicitor's private life. This should be clarified.

- As worded, by comparison with the provisions in the current Code that this would replace[18], rule 1.4 could be read as meaning that the solicitor is responsible if their client misleads the court or others, or is responsible for other acts or omissions, even if the solicitor was not aware that any mischief was taking place. In light of this, we suggest that rule 1.4 should be reworded as follows:

  1.4 You do not mislead or attempt to mislead your clients, the court or others, either by your own acts or omissions or ***by knowingly*** *allowing or being complicit in another person misleading the court or others* ~~*the acts or omissions of others (including your client)*~~*.*

  We would also note that rule 1.4 must be read in the context of the wider requirement that solicitors must always act in good faith and that misleading anyone whilst acting as a solicitor would potentially breach that requirement in addition to rule 1.4.

- rule 2.4 appears to originate from the Bar Standards Board Code of Conduct. Read in isolation, 'properly arguable' could be confusing for solicitors. It might be interpreted as not being able to put forward instructions which may lack credibility, as opposed to arguments with no legal basis. We assume that guidance will clarify this point.

- rule 3.1 is poorly worded.

- rule 3.4 The term 'Client's attributes' is vague and lacking any legal meaning. It is therefore inappropriate for a Code of Conduct. Moreover, it is unclear what that word encompasses that would not be covered by "needs and circumstances".

- rule 4.2 'Others' might more helpfully read "Others, for example lenders, trustees etc."

[18] O(5.1) "You do not attempt to deceive or knowingly or recklessly mislead the court"; and O(5.2) "You are not complicit in another person deceiving or misleading the court."

Further points in relation to drafting: Code of Conduct for Firms

- In the Code of Conduct for Firms, Cooperation and information requirements section, the text needs to clarify what is meant by 'you'.

- rule 4.2 of the Code of Conduct for Firms, greater clarity is needed on what is meant by 'competent'.

- It is disappointing that rule 7.1 provides very little detail to shed light on applicable outcomes in the SRA Code of Conduct for solicitors and RELS 2017.

Finally, rule 7.8 in the Code of Conduct for Solicitors requires guidance to accompany it. The current code says that a solicitor has to act reasonably to take action. It now depends what 'remedial action' means. We also wonder if the SRA can require a solicitor to take action in these circumstances or if this falls outside its jurisdiction.

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.

There are arguments on both sides and this is an issue requiring debate and careful consideration.

Recognised bodies and recognised sole practices need to ensure compliance and, in particular, that an understanding and appreciation of professional standards and ethics are properly embedded. Arguably, by specifying COLP and COFA roles, the regulator relieves those regulated of the need to decide how best to achieve this. It has also been suggested by practitioners that the COLP and COFA roles have served to reduce the ethical knowledge and awareness of individual practitioners. This potential is mentioned in the findings section of the SRA commissioned Independence, representation and risk report, where it is suggested that the perception of COLPs and COFAs as the 'holder' of professional values raises 'the question of whether such has the potential for individual lawyers to become less aware of, and less interested in, their own professionalism, professional identity and professional obligations.[19]

However, it could be argued that those regulated should determine for themselves how they comply with regulatory requirements and the SRA should find ways of promoting and regulating individual professionalism. Alongside this, any individuals tasked with responsibility for ensuring compliance must demonstrate and maintain the necessary skills and experience, and be subject to appropriate accountability and responsibility controls.

We recommend that the SRA conducts and acts on a survey of individual COLPS and COFAs aimed at identifying specific ways of reducing the burden of reporting, while ensuring that the regulatory framework helps to promote individual professionalism, professional identity and professional obligations.

[19] Independence, Representation and Risk: An Empirical Exploration of the Management of Client Relationships by Large Law Firms: Claire Coe and Dr Steven Vaughan, commissioned by the SRA, 2015.

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?

The Society will shortly publish its 2015 Regulation Survey. Of those who responded to this survey, 91% were the Compliance Officer for Legal Practice (COLP) at their firm. The findings from the survey could inform the nature of further support for this post. Responses indicate the need for clear, unambiguous and effective regulation. In this context it is worthwhile noting the following:

- there was a decline since the 2012 survey in the proportion of firms that thought that the SRA's enforcement procedure is understood by the industry as a credible deterrent and being used in a way that serves to better protect consumers;

- compared with 2012, a smaller proportion of firms agreed that guidance supplementing Handbook regulatory rules is useful, and that principles, outcomes and indicative behaviours provide sufficient guidance on compliance obligations;

- keeping up to date with changes to outcomes and indicative behaviours was the most commonly reported problem with OFR reported by firms; and

- changes to the regulatory regime which would introduce a principles based code only with outcomes and indicative behaviours removed were predicted to negatively affect professional and ethical standards on balance (and particularly so amongst large firms).

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?

We refer to our comments in our introduction and in the sections that follow.

It is possible that some commercial firms, wishing or feeling compelled to take advantage of the liberalisations offered by the new rules may decide to split the provision of their legal operations into two entities: a traditional firm, which would continue to carry out all reserved[20] work, perhaps retaining only a small percentage of the firm's current partners, solicitors and other staff; and a new unregulated entity, which would carry out all unreserved work and employ solicitors with practising certificates as well perhaps as some solicitors without a practising certificate.

In principle, while clients of the new unregulated entity would be less protected than clients of a traditional firm there would be some cost benefits for such firms in taking such steps. The new unregulated entity would not be required to pay entity regulatory and compliance costs, practising certificate costs for non-practising solicitors, contribute to the Solicitors Compensation Fund, take out professional indemnity insurance, employ COLPs, COFAs and other compliance staff, or comply with client account rules.

Furthermore, foreseeable unintended consequences would be that the regulatory burden and cost moves across to smaller firms and sole practitioners who are less able to divide their businesses between regulated and unregulated work; as BAME solicitors are over-represented among smaller firms, this will have diversity implications. This will result in a further restriction on access to justice and increase unmet legal needs as the smaller firms service the less well off demographic.

If many firms elected to go down this route, the Regulator would have to take steps to avoid a significant reduction in income. This would seem likely to lead to higher PC and firm fees, which would have significant negative financial consequences for sole practitioners and firms that chose not to change their business model. In particular, this would be likely to have a disproportionately negative impact on smaller firms for which the cost of changing their business model was not justified by the size of their client base or the high proportion of reserved work they undertake; such firms would have to operate at a competitive disadvantage because their entire business (including reserved and unreserved work) would be subject to the regulatory regime.

In addition, this would also have the effect of making reserved activities such as conveyancing and litigation potentially significantly more expensive for consumers as

[20] http://www.legalservicesboard.org.uk/can_we_help/faqs/Reserved_Legal_Activities.htm

the payment base for regulatory costs to be captured would be very much smaller than now. In addition, regulatory costs would be disproportionate for small and medium-sized firms, which generally carry out a mix of reserved and unreserved activities and may not have a big enough client base/business to justify splitting their business into two separate entities, one regulated and one not. Small and medium sized firms would therefore be likely to have to operate at a competitive disadvantage because their entire business (ie reserved and unreserved work) would be subject to the regulatory regime and its costs, whereas unregulated entities would fall outside this and have lower costs as a result. Ironically, the largest law practices, servicing the largest corporates, would be likely to pay proportionally less than the smallest firms servicing individual consumers; the proposals therefore threaten the viability of established small firms, which may result in forced close down and insolvencies with negative consequences for the communities they serve, especially where the firms concerned conduct legal aid work - exacerbating the ability of vulnerable communities to access justice. There would also be negative implications for competition and for the reputation of the profession.

Another unintended consequence is that solicitors may circumvent the restriction on unregulated entities offering reserved work by making applications to judges to act as paid McKenzie Friends on behalf of their clients. The right to appear before and address a court, including the right to call and examine witnesses, and the right to carry out the conduct of litigation are reserved legal services, and as such it can only be exercised lawfully by a lawyer who is regulated by an approved regulator.

A McKenzie Friend can ask the court to be allowed to conduct litigation if the litigant in person is unable to do so. This means that under the current proposals a solicitor who works in an unregulated firm (who under the new rules would not be able to exercise rights of audience by virtue of being employed in an unregulated entity) can ask a judge to allow them to conduct litigation as an unregulated McKenzie Friend. Faced with qualified solicitors making requests to act as paid McKenzie Friends, Judges may be inclined to treat such applications favourably to avoid dealing with the scenario that the case is run by a litigant in person with the consequential impact that has on the length of the case and the quality of the legal arguments and process. However, this potential workaround would inevitably sow further confusion for both consumers and those working within the legal profession, and inevitably degrade the position of the solicitor as an officer of the court, as well as erode legal professional privilege.

It also raises the question as to whether a solicitor who is permitted by the Judge to work in this capacity should be regulated for that work. The Judicial Executive Board are currently considering prohibiting those McKenzie Friends who are allowed to litigate from being able to claim costs from the other side. If this were to happen it would further confuse the status of solicitors who apply to have the same status as a McKenzie Friend who gains permission to litigate.

There appears to have been no analysis of the list of the consequential risks that

would result from allowing solicitors to deliver non-reserved legal services to the public through unregulated providers comprehensively identified in Table 1 of the Economist's report. It would be useful to have an analysis of how these risks would be mitigated.

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?

Not applicable.

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?

We agree with the 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 authorised entity. We would be concerned about relaxing this provision and thereby allowing the creation of structures that would avoid the requirement for entity regulation altogether and allow solicitors to provide reserved legal services on a consultancy/freelance basis. Any such relaxation would put clients of sole practitioners outwith current protections for clients and consumers and create consumer confusion.

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?

Current Rule 12 effectively requires that a solicitor needs to have three years Post-Qualified Experience (PQE) and to have undertaken a management course before they are able to set up a business as a sole practitioner. This requirement overlaps to a certain extent with the authorisation rules, which allow the SRA to assess the skills and knowledge of an individual of an applicant. However, Rule 12 sets out a clear requirement about the experience an applicant should have before setting up a new firm.

We are surprised that the consultation states that data analysis indicates newly qualified solicitors do not pose a significant risk to the delivery of a proper standard of service and would be interested to see this data. Current rules prevent newly qualified solicitors setting up in business on their own and therefore we are not clear what evidence would be available about their ability to deliver proper services in this type of situation. Furthermore, research has indicated that those who have been practising for less time are more likely to have complaints raised against them, indicating experience is a factor in complaints being raised against solicitors (Pearn Kandola 2010, p30).

We agree that the current requirement to undertake a 12 hour unspecified course on management skills may not be effective. However, lack of understanding of regulatory requirements and particularly the accounts rules is often the cause of solicitors appearing before the SDT following serious regulatory failings and in many cases loss of client money. Making sure that those setting up a new firm have a good understanding of the regulatory requirements, whether it is through a prescribed course or some other method, would seem to us to be essential.

We believe that some form of the 'qualified to supervise' rule should remain, although we agree it would be sensible to move any requirements to the authorisation rules. We believe that there should be a clear rule that prevents newly qualified solicitors from setting up a firm until they have sufficient experience and that those wishing to set up a firm should be required to demonstrate an adequate knowledge of the regulatory requirements.

In considering this question, the Society has been mindful of the conclusions of the independent, comprehensive case file review commissioned by the SRA 'to identify whether there is disparity in the way the SRA applies its policies and procedures in dealing with BME practitioners as compared to others with a view to identifying

potential improvements to such practices, policies and procedures to maximise fairness and consistency…'[21] The current proposals would seem to contradict the findings of that report.

[21] http://www.sra.org.uk/sra/equality-diversity/reports/independent-comparative-case-review.page

Question 20: Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

We believe that it is crucial that consumers understand the protections that they have with regulated provider versus non regulated providers. The proposed new Code of Conduct for Firms does not include any requirements in relation to this matter, and we recommend that the requirement set out at paragraph 8.9 of the Code of Conduct for Solicitors is mirrored in the Code for Firms.

Prospective clients should be clear about the protections in place when they decide to engage a solicitor. Outcome 8.9 of the SRA 's proposed Code of Conduct for Solicitors requires the solicitor to 'make sure that clients understand whether and how the services you provide are regulated and about the protections available to them'. This requirement does not differ substantively from Outcome 1.7 in the current Code of Conduct, which applies to firms and solicitors: 'you inform clients whether and how the services you provide are regulated and how this affects the protections available to the client.'

The SRA asks whether it should require firms to display 'detailed' information about consumer protections. The meaning of 'detailed' is not explained. It is therefore not clear under what circumstances firms could be confident that they have met the requirement. We would urge the SRA to issue guidance for firms on the information that should be displayed, including the level of detail required and expectations as to the prominence of the information presented. This could be in the form of case study examples, to aid solicitors in considering how to present information on consumer protection to the public.

We note the fact that the SRA is only able to impose any requirement of this kind on regulated firms highlights an imbalance between the information that might be available to consumers who use unregulated legal service providers and which would be available to clients of regulated firms.

While the SRA does not have any power to require unregulated entities to display information and the protections available to consumers, it does have a duty to ensure that its actions do not increase consumer confusion.

Question 21: Do you agree with the analysis in our initial Impact Assessment?

Question 22: Do you have any additional information to support our initial Impact Assessment?

The initial impact assessment provides an overview of the thinking behind the changes proposed in the consultation but there is limited empirical evidence to back up some of the assumptions made in the assessment. A comprehensive equality assessment has not yet been made and is essential before any of the proposals are adopted.

Please see Appendix 1 for our detailed analysis of the initial impact assessment.

Code of Conduct for Firms

The new Code is designed to make it easier to comply and reduce the burden of regulation for firms. However for smaller firms, in particular, good guidance will be essential to help make it easier to comply. Alongside this is the need to have in place, and well understood, a credible enforcement approach. Without these, there is a risk that the new code will not reduce the burden on small firms but, on the contrary, will increase the burden.

The current approach to guidance is patchy and while there are good examples such as the recent toolkit for continuing competence which has been widely welcomed, the guidance on consumer credit left many questions unanswered. It would be helpful to see the guidance that will be made available in order to assess whether it will plug the gap for small firms left by the removal of more detailed rules and indicative behaviours, as soon as possible.

Where a regulator provides guidance and toolkits, there is a risk that they quickly become understood as regulation and treated as such, stifling innovation and adding to costs. However, that risk has not been identified in the assessment. There is no information on how the proposals would be enforced, which would help to assure the profession and the public that the regulations would be enforced in an effective and proportionate manner.

The current enforcement function was previously identified as a problem area in 2012/2013 by the LSB and is still not rated as satisfactory. Given the ongoing issues and the importance of the enforcement function to the success of these changes, it would be helpful to have assurance as to how performance in this function will be improved.

It is noted in the consultation that regulatory changes may create some costs. However, there is little indication of the likely scale of these impacts. This is an area whether further work is needed, to ensure the costs do not outweigh any benefits.

One of the benefits highlighted is that the new Code will be online, freely accessible and searchable. As this is the case with the current Code, we do not believe this can be seen as a particular benefit of a new Code.

Changes in Practice Framework Rules

One of the main drivers behind the changes in the PFR is the concept of unmet legal need. This has been exemplified in the impact assessment by the small proportion of people and firms seeking advice about a 'legal' matter and the number of people without wills. Research indicates there are number of reasons why people do not seek legal advice, cost being only one of them. Many people are happy to resolve their own 'legal' problems, indeed there has been a Government drive for them to do so, e.g. raising of small claims limit, creation of Ombudsman etc. Others do not perceive a problem as being a 'legal' problem. Similarly, the reasons for people not having a will are varied, with the reason cited most often, is that 'an individual has nothing to leave'. There is no doubt that for some the cost of legal advice is a factor in not seeking advice but the SRA provide no empirical evidence that:

- alternative legal providers will enter into markets where there is significant unmet legal need;
- services will be provided at a significantly lower cost by unregulated providers.

The scenarios provided on the possible impacts in the market are limited at best and do not appear to take account of information available on the unregulated market. For instance, the SRA considers it likely that will writers will employ solicitors to provide legal advice through their firms. However, the vast majority of specialist will writers are small providers or sole practitioners[22]. Similar assumptions are made about unregulated providers carrying indemnity insurance, while this is common in certain areas of the unregulated market, this is not the case in other areas (Ibid).

There is an assumption that if the regulatory requirements are removed, alternative legal service providers will enter the market and innovate which will in turn drive down costs and reach new consumers. In reality, the CMA's initial assessment is the regulatory framework is not inhibiting innovation.

The assessment does not recognise the serious risk to consumers of these new arrangements. There is a limited recognition that some consumers may suffer as a result of a lack of client protections within alternative legal providers. No evidence is offered as to how this conclusion has been reached. Nor, as noted above is there any clear quantification of the benefits.

[22] Unregulated Legal Service Providers: Understanding supply-side characteristics, p 17 https://research.legalservicesboard.org.uk/wp-content/media/Economic-insight-in-depth-unregulated-research.pdf)

The SRA recognises that there may be some impact on smaller firms, who may not be able to take advantage of the reforms either for logistical reasons e.g. size; monetary reasons e.g. unable to invest in setting up a new business and lack of expertise. The suggestion that the rational response is for firms to close or sell their businesses is unhelpful and in itself may create an unmet need. There must be a risk that reserved legal services deserts are likely if these proposal are implemented.

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?

The Law Society does not support the proposal for solicitors to provide certain legal services through alternative legal service providers for the reasons set out in this response. Clearly, client money and assets need to be protected at all times and in all circumstances.

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?

The consultation proposes that, in line with the arrangements for solicitors working in alternative legal services providers (ALSPs ie unregulated providers), in-house solicitors and solicitors in special bodies should not be permitted to hold client money in their own name. This means that there would be no rules/protections with respect to the handling of client money in these entities[23]. There is, however, a distinction between solicitors working in special bodies and in-house solicitors[24]/solicitors working in ALSPs. In the former, in contrast to the proposed position with in-house solicitors/ALSPs, solicitors are able to deliver reserved legal services direct to the public. This brings the authorised person within the scope of legal services specific regulation. Reserved activities generate a significant proportion of the claims against solicitors and, as such, carries a higher risk profile requiring the application of proportionate protections. It should be noted that special bodies can deliver identical services to traditional firms.

It is also noteworthy that special bodies play a distinct role in the legal services market, in that they particularly provide legal services to vulnerable people. Any disparity in safeguards offered by special bodies will create an inconsistency in the level of consumer protection offered to vulnerable clients. We accept that protection should be proportionate to risk (including tailoring regulatory measures to reflect client base) and should not impose unnecessary burdens but consider that solicitors working for special bodies should be permitted to hold client money personally and be subject to the requirements of the Accounts Rules.

In line with the fact that in-house solicitors and ALSPs will be permitted to only offer non reserved legal services to the public and in recognition of the fact that the regulatory net is based on reserved activities, we agree that solicitors working therein should not be permitted to hold client money in their own name.

[23] The SRA's impact assessment details that it has granted waivers to its current rules to permit businesses employing solicitors in-house to hold client money – so this is a live issue.
[24] In-house solicitors offer, and will continue to offer, reserved legal services activities but only do so in relation to their employer – the SRA proposal for change is that they could in future provide non reserved legal services to the public.

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? If not, what are your reasons?

We have discussed elsewhere in this response our concerns relating to the SRA's proposal to allow solicitors to practise from unregulated entities. In the event that the proposed framework is established however, we agree that if solicitors operating from unregulated entities are not required to hold professional indemnity insurance (PII), their clients should not have access to the Compensation Fund. It would not be prudent to open the Fund to claims arising from work done by solicitors in unregulated entities, which are not subject to the Accounts Rules, Code of Conduct for Firms, and do not have mandatory PII protection which is itself a driver of effective risk management. Where work is not carried out through a regulated firm, clients are arguably exposed to much greater risk due to the lack of these controls and regulatory oversight. Denying access to the Fund for these clients guarantees that the Fund cannot be depleted by a potentially significant pool of claims. The Fund is owned by solicitors and its reserves are a result of contributions they have made subject to the existing rules confining payouts to claims arising from work carried out within a regulated firm.

Despite this, we do recognise the significant decrease in consumer protection and other practical issues that will arise if clients of solicitors working in unregulated entities do not have access to the Compensation Fund. We have explored these issues in more detail below, as we are concerned that the SRA has not fully considered all the repercussions of allowing solicitors to practice from unregulated entities, including the impact on the Compensation Fund.

The consultation proposes that clients of solicitors working in unregulated entities should not have access to the Compensation Fund on the basis that their solicitor would not be able to hold client money or carry out reserved work. However, it is not the case that claims to the Fund are solely linked to misuse of client money, breaches of the Accounts Rules (which apply only to firms not regulated by the SRA) or reserved work. A gap in consumer protection will be created where solicitors commit fraud when carrying out unreserved work (to take as examples: deliberately selling ineffective family trust deeds, forging documents, or convincing a client to alter a will in order for the solicitor to inherit money) as the client would not be eligible to claim from the Compensation Fund in relation to this loss. The SRA's most recent published analysis of claims paid by the Compensation Fund[25] does not include a full breakdown of the areas of work from which the claims arose, and it may be that the SRA does not collect data at this level of detail. Without this information, there cannot be any proper consideration of the potential detriment to consumers of removing access to the Compensation Fund in relation to claims arising from unreserved work.

[25] Economic Insight - SRA Compensation Fund review (2014)

The consultation states that there is no objection in principle to allowing consumers to trade off the protections they receive (including access to the Compensation Fund) where they perceive they receive benefits in relation to this trade off, such as reduced prices or greater accessibility to a service.[26] However, a crucial related issue in allowing consumers to exercise such preferences is whether consumers are able to appreciate or understand the differences in consumer protection between different providers. Research suggests that consumers often do not recognise these distinctions.[27] One could therefore question the wisdom of removing access to the Compensation Fund for consumers who may not realise the importance of this protection until the time they come to make a claim. As discussed in detail in response to Question 27 below, requiring solicitors to provide information to clients on the protections available may not overcome the confusion created by the SRA's proposals and the potential for significant consumer detriment of removing access to the Compensation Fund. In addition, we are unaware of any economic analysis which confirms the changes in the regulatory regime will result in reduced prices and/or greater accessibility of service.

The SRA will also have to address the practical implications of removing access to the Compensation Fund for clients of solicitors working in unregulated entities.

First, the SRA's approach to calculating contributions to the Compensation Fund (currently £548 for firms, and £32 for individuals) will have to be reviewed if solicitors operating from unregulated firms would no longer have to contribute. Currently, 50% of annual Compensation Fund contributions are paid by firms, and 50% by individual solicitors. Contributions to the Compensation Fund would be significantly reduced if substantial numbers of solicitors chose to operate from unregulated firms (and hence did not pay the individual solicitor levy), and/or even a relatively small number of large firms, due to the higher percentage of non-reserved work they carry out, moved non-reserved work to an unregulated provider (and hence did not pay the firm contribution).

However, it is vital that the remaining contributions to the Fund are sufficient to meet the demands on it. It is the long standing approach of the Fund to maintain a minimum reserve fund as a contingency against unexpected numbers of claims or unexpectedly large claims, which includes forecasting contribution requirements to avoid the position of the contribution spiking and then dropping significantly in consecutive years. Given that the impact assessment notes how little can be known about the extent to which solicitors may choose to operate from unregulated entities/firms may decide to hive off non-reserved work, it is difficult to assess to what extent Fund contributions will be impacted, and how the contributions structure should be altered. It would clearly be undesirable to change contribution structures on a continual basis to take account of changing numbers of firms and

[26] Looking to the Future - flexibility and public protection, Annex 6, p.97
[27] Looking to the Future - flexibility and public protection, Annex 5, pparagraph 28

individuals contributing to the Fund. Indeed, it is difficult to envisage how funding arrangements can be amended to enable fair contributions. Smaller firms, who due to the nature of the work they undertake are unable to hive off unreserved work to another entity, would most likely end up paying increased contributions to make up the shortfall to the Fund caused by larger firms and their solicitor employees moving out of SRA regulation. It is problematic that the review of Compensation Fund contributions will not occur until a later date. This makes it very difficult to obtain a full picture of the impact of the proposals and to able to comment fully.

Second, it is unclear how contributions would be collected when a solicitor moves between regulated and unregulated firms. The administration involved tracking solicitors and collecting levies on a tranched basis would clearly not meet the objective of reducing regulatory burdens on solicitors, or administrative costs of the regulatory regime which are ultimately borne by consumers.

Third, the proposed framework would beg the question as to why a solicitor in a regulated firm who carries out only unreserved work and does not hold client money, should have to contribute to the Fund. While it would be impractical to police the collection of contributions in this way, this in addition to the issues raised above demonstrates inconsistencies in the proposed approach and raises questions about the fairness of the proposals in the way that regulation will apply to individuals solicitors and different profiles of firms.

Question 26: Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

We do not agree that individual solicitors should be able to operate from unregulated entities without mandatory PII cover. We are strongly opposed to the proposal in principle.

All work done by a solicitor in private practice is currently covered by the firm's PII. The current arrangement provides unrivalled protection for the consumer, providing assurance that if anything goes wrong they will receive fair settlement, regardless of the type of work undertaken or the circumstances in which the work is carried out. It is unacceptable for individuals to be left destitute or without some level of redress arising from a solicitor's negligence. Mandatory PII cover is fundamental to both consumer protection and the maintenance of public trust in the profession.

There is also a potential risk that a firm with a poor claims record that would affect its ability to obtain PII could be attracted by the proposal as it would allow them to carry out unreserved work from a new unregulated entity without PII in place. Arguably these are the firms whose clients would need the protection the most. We also struggle to understand how solicitors would be able to comply with Principle 6 to act in the best interests of their client, without PII cover in place. It is clearly not in the best interests of the client for their solicitor to be uninsured, as this impacts the client's ability to recover any losses. If the SRA agrees that in order to comply with principle 6, solicitors would in reality be compelled to purchase PII, one must question why the SRA's proposals do not attach PII requirements to individual solicitors. We request clarity from the SRA on this point.

Part of the SRA's reasoning for this proposal is that it would be unclear how a solicitor in an unregulated provider, who may be working as part of a team, is supposed to separate out their own insurance requirements from those of their team. We would argue that it is precisely the fact that the SRA is seeking to differentiate and separate out the role of a solicitor, their high professional standards and regulation of the solicitor from the unregulated entity itself, that has necessitated addressing the issue of individual insurance.

As demonstrated in response to Question 27, the proposal creates unnecessary complexity and uncertainty, and any possible benefits would be outweighed by the significant reduction in client protection.

Question 27: Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

Under the SRA's proposals, solicitors carrying out unreserved work from unregulated entities would have two options:

1. Choose to have no PII cover

Given that there is no requirement to do so, solicitors working in an unregulated entity could choose not to obtain PII. As PII is one of the most costly elements of regulation, there is a real possibility that some solicitors may choose to operate uninsured. This would be particularly alarming in the case of a sole practitioner. Solicitors who choose to operate uninsured without due regard to the personal liability they could incur in the absence of PII cover, would be placing themselves in a potentially ruinous situation. PII protection does not exist purely for the benefit of the public, but also for the benefit of solicitors, as confirmed by the House of Lords in *Swain v The Law Society*.[28]

There would also be nothing to prevent a solicitor's terms of engagement specifying that they cannot be sued for an amount greater than the value of the retainer. This dilution of clients' existing financial protections is not acceptable. Consumers could be left facing hardship as a result of the actions of solicitors regulated by the SRA. The reputation and strength of the solicitors' profession as well as the credibility of the SRA would suffer if clients go uncompensated as a result of a solicitor having no PII cover. This damage would not be possible to repair.

The SRA's proposal is made all the more alarming when one considers the amount of claims by solicitors' firms on their PII that could relate to unreserved work. It is clearly not in solicitors' or clients' interests for there to be no insurance cover in relation to work which, although unreserved, still carries significant exposure to claims.

As stated in response to Question 26, we also struggle to understand how solicitors would be able to comply with Principle 6 to act in the best interests of their client, without PII cover in place.

The Law Society considers that all solicitors in all circumstances should be subject to mandatory PII cover, and would urge the SRA to reconsider the proposal.

2. Choose to obtain PII cover

Solicitors working in an unregulated entity and such entities themselves may wish to

[28] [1983] 1 AC 598

purchase insurance against negligence claims in any event.

A solicitor in an unregulated entity could try to obtain cover on their own behalf, or the entity might take out insurance to cover all the solicitors it employs. In both of these scenarios, there is uncertainty as to the availability, suitability, and affordability of PII that could be purchased on the open market.

First, the wide SRA minimum terms and conditions (MTC) protection would not be replicated in standard commercial PII arrangements. While solicitors' clients are currently protected by comprehensive PII cover (which also includes run off cover), the gaps in coverage between the SRA MTCs and a standard PII policy negotiated by the solicitor or entity would leave solicitors' clients with less protection than the current entitlement, or than when instructing a solicitor from a regulated entity. The SRA has not provided sufficient justification for reducing consumer protection in this way and the resulting asymmetry is confusing.

Second, the potential cost to solicitors or the unregulated entity of purchasing PII is difficult to estimate. Underwriters write risk on the basis of claims exposure. The market currently prices in risk to premiums, so firms with low exposure by reference to the work they undertake (e.g. crime, legally-aided work and employment law) already pay lower premiums than firms undertaking high risk work (e.g. conveyancing). If a firm carrying out predominately unregulated work chose to move out of SRA regulation, there may be limited scope for premium reduction because the risk remains unchanged. Moreover, participating insurers take comfort in the fact that those they insure are SRA-regulated and that the SRA has the power to intervene if necessary. The PII regime plays a role in regulating solicitors as firms with poor claims records will face higher premiums and could face difficulty obtaining insurance at all. Insurers may consider that the claims exposure is increased in an unregulated entity where there is no regulatory oversight of business processes. In the case of solicitors purchasing PII on an individual basis, they would also lose the benefit of lower premiums as a result of the ability to bulk purchase PII to cover the work of the entire firm.

It is therefore by no means certain that unregulated entities or individual solicitors would be able to purchase PII at an affordable cost. Indeed, the SRA's impact assessment makes no attempt to forecast the availability and price of PII for those who would wish to purchase it. There is no analysis or evidence to show that premiums would be reduced; or that reduced premiums would in any event provide greater access to justice as a result. The proposal risks creating considerable consumer detriment for an uncertain and unquantifiable benefit arising from an aspiration for increased access to legal services.

Third, the proposal appears to be based on the assumption that clients will understand the fact that their solicitor does not have insurance, or is insured to a lesser degree than that required by SRA-mandated insurance. Clients differ significantly in their experience of acquiring legal services and their ability to

understand and specify their preferences and requirements. Business consumers who are regular users of legal services may understand their protections and even actively seek to determine whether the level of protection is appropriate for their matter, but the same cannot be said for infrequent, unfamiliar users of legal services. Indeed, there is evidence to suggest that the consumer protection landscape in the legal services market is poorly understood.[29] There is considerable scope for consumer confusion through a mistaken belief that in gaining advice from a solicitor through an alternative legal services provider they are subject to the same protections as if that solicitor worked in a regulated provider. The proposals will only serve to increase the confusions around the different protections attached to services, and lead to decreased confidence in the legal profession and irreparable damage to its standing.

This confusion will not be overcome by requiring solicitors in these circumstances to make sure that their clients understand whether and how the services they provide are regulated and the protections available to them (proposed Outcome 8.9). It is alarming that the case study provided by the SRA[30] suggests that Outcome 8.9 would be met if the solicitor explained the business does have compulsory insurance, but does not state the level of such cover. There would be nothing to prevent a solicitor or unregulated entity from obtaining cheap and ineffectual 'nominal' cover simply to be able to inform clients that they hold PII.

The consultation states that there is no objection in principle to allowing consumers to trade off the protections they receive under different service/provider models where they perceive they receive benefits in relation to this trade off, such as reduced prices or greater accessibility to a service.[31] Again, this incorrectly assumes that consumers understand the difference between regulated and unregulated entities, and appreciate differences in consumer protection in each case, while evidence suggests they may not. [32]

[29] Looking to the Future - flexibility and public protection, Annex 5, pparagraph 28
[30] Looking to the Future - flexibility and public protection, Annex 9, page 204
[31] Looking to the Future - flexibility and public protection, Annex 6, page 97
[32] Looking to the Future - flexibility and public protection, Annex 5, pparagraph 28

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?

Yes. The Society believes that regulation should apply consistently and fairly to the provision of legal services in order to protect consumers. It would not be in the consumer and the wider public interest for solicitors to offer the same service but with different standards of consumer protections according to whether they were employed by a regulated firm or by a Special Body.

Special bodies play an important role in providing legal services to vulnerable people and it is especially important that clients entrusting matters of significant importance to their solicitors have access to appropriate redress. If reserved activities undertaken by Special Bodies fall within SRA regulation, these bodies should be required to maintain PII.

Question 29: Do you have any views on what PII requirements should apply to Special Bodies?

Under the current Practice Framework Rules, solicitors employed by Special Bodies must have a 'reasonably equivalent' level of cover to that required by the SRA Indemnity Insurance Rules. This provides clients of Special Bodies with equivalent protection to that provided to clients of SRA-regulated entities.

The Law Society believes that clients of Special Bodies should be entitled to PII protection in the same way as clients of traditional law firms. Requiring Special Bodies to obtain MTC level PII has the advantage of ensuring that there is consistency in the level of consumer protection offered to clients.

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?

Question 31: Do you have any alternative proposals to regulating entities of this type?

The Society's concerns about the proposal that solicitors should be permitted to deliver non-reserved legal services to the public through alternative legal services providers would not be overcome by the imposition of a threshold on non-SRA regulated firms. Indeed the introduction of an arbitrary threshold could make matters even more confusing for clients. Our concerns around the proposal to allow solicitors to work in unregulated providers and its impact on client protection and the reputation and standing of solicitors would remain for these firms. In conclusion, the Society believes that regulation should apply consistently and fairly to all legal services (individuals and entities) in order to protect buyers of legal services and it is not in consumer and the wider public interest for there to be regulated and unregulated providers offering the same service but with different standards of consumer assurance and protections.

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?

It is not clear what the proposed position is on intervention into a solicitor's individual practice within an unregulated entity. The SRA has the power to do this. However, as has been highlighted, it could prove to be difficult to untangle the practice of the solicitor and the unregulated entity thus making this difficult. It would therefore seem unlikely that the SRA would use this power often. However, the SRA does not appear to be ruling out the possibility.

We are unclear how the SRA's additional powers to request information could help it in investigations where intervention was not an option, for the reasons described above. We consider that the same issues would arise as to the information owned by the unregulated entity (and as such presumably outside the jurisdiction of the SRA) and that owned by the solicitor.

Question 33: Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

We agree that all work within a recognised body or an RSP should remain regulated by the SRA.

Appendix 1: The Initial Regulatory Impact Assessment: Unmet legal Need

1 Pleasance and Balmer wrote:

> "*Legal need is a contested concept. It has been used to refer to occasions when people experience legal problems but fail to obtain the services of lawyers to assist with resolution. However it is generally recognized that legal mechanisms do not always provide the most appropriate route to solving problems that raise legal issues. Attempts to define legal needs have therefore come to place emphasis on understanding of options and preferences."*[33]

2 All consumers should have access to justice, regardless of social background or wealth. There are clearly unmet legal needs in certain sections of the population but the most significant unmet legal need relates to legal aid removal. For those consumers it is questionable that they would be able to afford to obtain legal advice at any cost point. The evidence relating to other unmet legal need is not so robust as to provide definitive evidence to justify changing the regulatory framework.

3 Not all issues that have a legal element require legal advice and not all consumers who have a legal issue wish to seek legal advice. There are many issues which may have a legal perspective but which consumers are often content to self-manage. There are many sources of self-help advice, including online and from official; bodies such as Citizen's Advice Bureaux, which help citizens decide if they have a problem that they may need legal advice to resolve, whether from a legal adviser who specialises in the problem such as a solicitor or one of the many other organisations who may be able to help (for example https://www.citizensadvice.org.uk/law-and-rights/legal-system/). This is a positive and healthy societal approach. It is not in the interests of consumers, the markets or society to encourage excessive and unnecessary use of legal processes to deal with simple matters – e.g. technically receiving a parking fine potentially results in a "legal need", although it would not be rational or justified to take legal advice each time a parking fine is administered.

4 However, there are pockets of the legal services sector where there are access to justice concerns and these should be addressed as they affect the most at risk and vulnerable consumers.

[33] https://research.legalservicesboard.org.uk/wp-content/media/How-People-Resolve-Legal-Problems.pdf

5 In summary, there are different levels of legal need across society, with the serious unmet legal need residing at the least affluent levels of society where the removal of legal aid across many areas has created serious unmet legal need.

6 With the implementation of the Legal Aid, Sentencing & Punishment of Offenders Act, ordinary people are finding it increasingly difficult to access justice because of issues including the steady erosion of legal aid, the ongoing programme of court closures and increases in court fees, as well as changes to the rules regarding the ability of clients to recover legal costs.

7 The impact on the most vulnerable is a major concern for the Society, which continues to campaign for an improvement in the current state of access to justice so that this unmet legal need can be met. The Society recently launched a campaign to raise awareness of the fact that legal aid advice for housing is disappearing in large areas of England and Wales, creating legal aid deserts. We are also working with the Bar Council and others to examine the potential for some of the gap to be addressed through a Contingent Legal Aid Fund .

8 While the consultation asserts that the proposals would have this effect, we do not believe that the analysis of the available evidence in the Initial Regulatory Impact Assessment (IRIA) bears this out.

9 When legal need is defined by presenting respondents with a list of issues ranging from very minor (and which individuals judge to be so and are content to deal with themselves) to very serious issues, and include issues that have traditionally been catered for by the not-for-profit sector (until the impacts of the Legal Aid, Sentencing & Punishment of Offenders Act started taking effect), a finding that solicitors are not used for every legal need identified does not constitute evidence that there are substantial amounts of actual unmet need generally. Ours is not an increasingly litigious society and we should not be taking action that would encourage the seeking of legal advice where rationally no legal action should be taken.

- **IRIA paragraph 21 states that "Many individual people and small businesses are unable to access legal services from a solicitor at a cost they can afford."**

10 This is an over simplification. Research demonstrates that cost is not the primary reason why consumers decide against seeking help from a professional adviser. According to the Legal Services Board's 2012 Legal Needs Survey, people do nothing about legal issues mainly because they lack awareness about what can be done or where to go for help. Reasons are primarily related to the type of legal need, complexity of the need and previous experience. Incidence of taking action increases as the seriousness of the problem increases. For those who deal with matters themselves, cost was found to be an issue but not the overriding issue. The main reasons were that they didn't think the problem would be difficult to resolve (24%), confidence in their ability to handle the matter alone (17%), the fact that they had

enough time to handle the matter alone (11%), whereas only 9% thought it would cost too much to seek advice from a professional.

11 These findings are corroborated and, added to, by the 2016 Online Survey of Legal Needs commissioned by the Legal Services Board (LSB) and the Society. While the survey does not purport to be nationally representative of people with legal needs, its large sample size of legal issues (16,000) means that it provides a robust basis for exploring problem resolution strategies. The fact that its findings are corroborated by other research also lends weight to the survey.

12 According to the 2016 Online Survey, almost half of issues considered were handled by respondents themselves or with help from family and friends and fear of cost was a reason for just one in ten of this group. Of those one in ten, 43% did nothing to find out about the actual costs of advice or assistance. This indicates that a substantial issue relating to cost is perception.

13 Multivariate modelling of the 2016 survey data demonstrated that the factors with the greatest influence on issue handling strategy were not cost but rather:

- type of issue;
- whether or not the respondent characterised the issue as legal; and
- the respondent's perception of the severity of the issue.

- **IRIA paragraph 21 states that "Fewer than one in ten people experiencing legal problems instruct a solicitor or barrister."**

14 This is highly selective use of available evidence and significantly understates the use of solicitors. The evidence is an analysis by Pleasence and Balmer of 2012 Civil and Social Justice panel data, which focuses on 15 civil justice issues.

15 However, this research did not examine more common transactional issues. According to the LSB's 2012 Legal Services Benchmarking survey, which did examine transactional issues as well as civil justice issues (28 issues in total), 42% of respondents with a legal problem had taken some form of advice from a solicitor.

16 The Legal Services Consumer Panel's 2015 tracker survey estimated that 34% of a nationally representative sample of the public had used a legal service in the previous two years; of these, 62% had used a solicitor in the previous two years.

17 In the Pleasence and Balmer study, cited in the consultation, the top three reasons for not instructing a lawyer identified by respondents for civil justice issues were:

- no need (48%);
- cost (23%); and
- the issue was not considered to be sufficiently important (6%).

18 The authors of the report concluded that 'The findings confirm the complexity of behaviour, and the importance of problem severity, problem type and perceptions/understandings. Our findings do not suggest any broad crisis of access to justice, with market rationing operating to channel more severe problems towards advice and formal process and some inaction appearing entirely rational. However, the legal services market and civil justice system do not ensure fair and equal access to justice, with deficiencies attributable largely to the difficulty of enabling vulnerable populations with limited capability and resources (e.g. those with health problems, low levels of education and/or lower income) to access appropriate help in a complex legal services market in which innovations to broaden service reach have often emanated from outside of the traditional legal professional sphere.'

19 As the proposals have the potential to increase complexity, it is unclear how they would stimulate the type of innovation that could reasonably be expected to address access issues for those with limited capability and resources.

20 As regards capability, the economic rationale supporting the proposals refers to some proposed 'consumer-facing guides' (public and business guides) which the regulator intends to produce: to reduce the information asymmetry between consumers and providers of legal services; reduce search costs for consumers; allow consumers to influence quality improvements and place pricing pressure on providers; and boost demand for legal services. Without further information on the form of these guides, and on how they will be tested against users' actual needs, it is impossible to assess their likely success.

21 Given the importance of public legal education in helping to address access issues identified by experts, much more clarity and specificity about the proposed guides should have been included with the consultation. Without that detail, it is impossible to judge how the guides will mitigate against increased complexity. We know from research commissioned by the LSB that an independent legal advice and guidance site was thought to be more useful than published guides; that 'just in time' aids are more useful to consumers than 'just in case' aids; and that better understanding of legal services consumers decision making is required in order to identify the types of tools and aids that would in practice be most useful to consumers. It is unlikely that a set of guides published by the regulator would fully meet potential consumers' information needs in a more, not less, complicated market.

- **IRIA paragraph 21 states that "The picture is very much the same for small businesses, the majority of whom have little contact with solicitors or law firms. Over half of small businesses that experience a problem try to resolve it on their own. Accountants are consulted more often than lawyers when small businesses need advice."**

22 This statement is based on the Legal Services Board's 2015 survey of small businesses (<50 employees) 'Understanding the legal needs of small businesses'. While the report's findings have been summarised, some of the complexities detailed therein are worth highlighting.

23 Business demand for specific types of legal services varies by size of firm and, again, reasons other than cost play a part. For the smallest of small firms, other deterrents include:

- the problem/s not necessarily requiring legal advice;
- the owner/s of the problem not knowing who to approach;
- fear of loss of reputation within the industry and the loss of future work; and
- having 'coping' strategies.

- **IRIA Paragraph 21 states that "This demonstrates substantial legal need not currently being met by regulated lawyers, including solicitors."; and paragraph 82 states that "This indicates there is substantial legal need not currently being addressed from existing suppliers"**

24 The consultation does not include any quantification of the volume or value of need that is not being met. The term 'substantial' appears not to have accounted for the range of different reasons that deter people from seeking legal advice (from solicitors or otherwise). Those who identify cost as a deterrent to seeking advice are a minority and other factors are more important in decision making.

25 Even if it were the case that more people and small businesses would seek the advice of a solicitor if solicitor prices were lower, the consultation does not provide an analysis that demonstrates how savings made by the fact that unregulated entities employing solicitors would not have to meet the costs of regulation will reduce the price paid by consumers substantially. There is no answer to the question 'how much cheaper will these proposals make services'? This is a fundamental point which has not been addressed.

- **Paragraph 82 of the Initial Regulatory Impact Assessment states that: "Our proposals are intended to allow greater competition and choice in areas of law with growth potential because there is unmet legal need. We know for example that a significant proportion of the population do not have a will. In the case of small firms, the most common problems relate to trading, employment and taxation ... The vast majority of firms in this sector currently have little contact with a legal adviser. Less than one in ten small firms either employed in-house lawyers or had a retainer with an external provider. Over half of firms experiencing a problem tried to resolve it themselves, more often seeking advice from an accountant than a lawyer. This indicates there s substantial legal need not currently being addressed from existing suppliers of legal services."**

26 The consultation does not appear to have identified the specific areas with growth potential. An assumption that where there is an unmet need, there is

potential for growth, cannot be correct when ‘need’ has been so broadly defined. To identify areas with potential for growth, there would be a need to develop a much better understanding of the extent to which the different reasons for not seeking professional help to date apply to different types of need. The idea also seems to assume that it is possible to provide professional services at the lowest levels of affordability. Without an understanding of which areas are likely to be attractive to alternative legal businesses, it is very unlikely that impacts can have been properly assessed.

27 The consultation asserts that stronger entry, expansion and competition will lead to increased choice in the market for unreserved services in areas with growth potential, which have not been identified. However, the economist’s report supporting the proposal indicates that this will not happen if: (i) consumers’ do not see solicitors’ and others’ services as substitutes, or (ii) solicitors’ activity is not switched to alternative legal services suppliers. The conclusion that ‘unmet need’ will be addressed assumes that the ‘unmet need’ is in sectors of the unreserved market where the above two conditions do not pertain.

28 The approach taken in the consultation to tackling ‘unmet need’ rests on reducing cost, but as noted already the body of research points to other factors being more influential on people’s choices about problem resolution. The consultation does not appear to consider these complexities. For example, on the consumer side, the 2016 Online Survey of Legal Needs commissioned by the LSB and the Society, showed that doing nothing was most strongly associated with the following types of issue: personal injury; clinical negligence; work injury; unfair treatment by the police; and discrimination. Many of these areas are subject to government initiatives to deter people from using a lawyer.

29 Furthermore, handling an issue alone or with informal help was most closely associated with consumer and probate issues. Probate is a reserved area and the main motivations for people handling consumer issues alone were that (i) respondents thought they would be easy to resolve and (ii) they had time available. Taking these examples, it is also unlikely that the proposals would help to improve take-up of advice. On the other hand, a perverse incentive might arise for solicitor firms to reduce the supply of reserved services, including some firms stopping reserved activity altogether, thereby reducing the supply of reserved services.

30 The 2016 Online Survey indicates that over two-thirds of the issues presented to respondents were not thought of as a ‘legal issue 'at first. An element of this percentage is likely to result from the very broad definition of ‘legal issue’, which includes matters such as consumer issues that people are generally content to deal with themselves. However, clearly there is also an actual lack of understanding of legal rights, processes and forms of redress. Consumer facing guides, as proposed by SRA, would be unlikely to address the capability need identified by Pleasence and Balmer.

31 In terms of severity of problems, the highest mean average scores achieved in the 2016 Online Survey concerned homelessness issues, problems with rented property, clinical negligence, domestic violence, immigration and divorce/dissolution.

32 The lowest average scores related to consumer issues and making wills. The SRA's sweeping approach to describing 'substantial unmet need' includes issues that people would still do nothing about even if costs were lowered.

- **IARA paragraph 82 states that: a "significant proportion of people don't have a will"**

33 Will making is already open to competition between reserved and unreserved providers, and many unreserved providers opt into self-regulation. In its interim report on a market study on the supply of legal services in England and Wales, the CMA noted that "There are a large number of suppliers of wills and probate services. There is also some variation in the types of providers consumers can choose. Despite this there is some evidence that competition may not be working as well as it could be. There are clear asymmetries of information between the consumers of wills and probate services and the providers. It does not appear to be easy for a consumer to assess their level of legal need or the likely price and quality of available suppliers." As noted, the Society will be working with the CMA to support more information being supplied to clients, while ensuring that critical client protections remain in place.

34 It is not at all clear how the issues identified by the CMA would be addressed by the proposal to allow solicitors to set up or work in an unregulated entity).

35 Will-making is known to be associated with age[34] and cost is not the main reason for people not making wills. According to Moneywise, the main reason people do not make wills is apathy:

- 25% of people without one say they plan to have one written when they get older; and

- 11% say it has never occurred to them to write one.

36 Although the Moneywise research indicates that 'many people are also worried about the costs involved', the organisation points out that wills 'can be relatively inexpensive at around £120 for a single person and £200 for a couple'

[34] 90% of people aged 75-84 had a will in 2015 up from 82% in 2013 (http:www.willaid.org.uk/press/research) compared with 11% of those aged 18-24 in 2013 (http://www.wills-advice.co.uk/top-five-reasons-young-people-make-will/). 2010 research by ICM for TLS found that 7% of 18-25 year olds had a will compared to 20% of 25-34 year olds, 41% of 35-44 year olds, 55% of 45-54 year olds, 64% of 55-64 year olds and 81% of 65 years olds.

(without mentioning the DIY options available). This aligns with the finding highlighted earlier that will issues are, on average, perceived as low severity and that perceived severity is a major determinant of problem resolution strategy (from the 2016 Legal Services Board / Law Society Legal Needs survey).

- **IARA paragraph 82 states that "Over half of firms experiencing a problem tried to resolve it themselves, more often seeking advice from an accountant than a lawyer."**

37 The proposals might help solicitors retain work from small businesses that might otherwise go to an accountant and may possibly improve the take-up of legal advice by small businesses because they would enable solicitors to work in accountancy practices and other organisations with closer links to the small business community. The potential for increased choice is again underpinned by the idea (in the SRA economist's paper) that stronger entry, expansion and competition in the market for unreserved services would arise. However, the economic rationale accepts that this will not happen if (i) purchasers do not see alternative legal providers and traditional providers as substitutes and (ii) solicitors' activity is not switched to alternative legal services suppliers.

38 The authors (Blackburn et al) of the LSB's 2015 survey of small businesses, cited in the consultation, deduce that, in general, the demand for specific types of legal services will vary by size of firm and certain services will be required earlier on as the business grows. They go on to say: "What we cannot establish at this stage, however, is whether the demand for legal services is being fully met or constrained by other factors".

39 The survey's findings indicate that small firms are thought to use their accountants more frequently than any other provider because it is a necessary relationship for taxation and compliance purposes and it is set within an 'institutional' trust framework. Small business owners do not regard lawyers as part of their natural business problem resolution strategies and are not accessing legal services because of perceived and real barriers. In contrast, accountants benefit from both institutional and relational trust because of the frequency of contact and a greater understanding amongst firms of what accountants provide.

Appendix 2: Consumer protections for clients of solicitors working in regulated firms and unregulated providers if the proposals were implemented

	Client instructs solicitor in a regulated firm [reserved and/or non-reserved activities]	**Client instructs solicitor in an unregulated firm** [non- reserved activities only]
Conflicts	The solicitor is bound by the conflict rules in the Code of Conduct for Solicitors which stipulate that the solicitor cannot act in a conflict situation. The firm is subject to the conflict rules in the Code of Conduct for Firms.	The solicitor is bound by the conflict rules in the Code of Conduct for Solicitors, but the firm is not subject to the Code of Conduct for Firms. *Risks to consumers:* • *A solicitor will be able to represent a client who has clear conflict with existing clients of that entity. No conflict rules apply to entity/other employees risks solicitor acting in a conflict situation (e.g. no firm conflict management systems);* • *A solicitor with 2 clients in conflict can pass one client to another solicitor or person in the firm and avoid the conflict rules which apply under the Code of Conduct for Solicitors.*
Confidentiality	Code of Conduct for Solicitors and Code of Conduct for Firms both contain confidentiality requirements. The following rules apply to regulated entities: • where appropriate, you put in place effective safeguards to protect your clients' confidential information; • you do not act for a client in a matter where	Code of Conduct for Solicitors contains confidentiality requirements, but the entity is not subject to the Code of Conduct for Firms. The rules opposite do not apply. Common law rules of confidentiality would apply. It would be for the individual solicitor to ensure they are complying. *Risks to consumers:* • *Risk of disclosure of confidential information from lack of controls at firm level, particularly where the*

	that client has an interest adverse to the interest of another current client or a former client for whom you hold confidential information which is material to that matter unless all effective measures have been taken which result in there being no real risk of disclosure of the confidential information.	*firm acts for 2 clients who would be regarded as a conflict under the SRA rules.*
Legal Professional Privilege (LPP)	Applies fully.	LPP does not attach to the entity. *Risks to consumers:* • *Clients are unable to prevent sensitive legal advice being disclosed and used against them in court;* • *A situation where clients are unclear or misinformed about their entitlement to a right to LPP is undesirable.*
Standard consumer protections are available but there are special issues which impact provision of legal advice: • *Issue of enforcement and therefore access to redress - query whether public enforcers such as Trading Standards would interfere in the provision of legal advice (more concerned with higher profile issues such as sale of unsafe products);* *Risk to consumers:* • *If the entity/solicitor does not have the ability to pay any compensation owed, the client is left without redress in the absence of PII cover;* • *Potentially greater freedom for unregulated entities' terms of business to include terms that are in their commercial interest and are not beneficial to the client.*		
Regulatory protections (before event/ongoing)		
Education and training requirements	For the first three years of practice, supervision is required and a solicitor may not set up on	Newly qualified solicitors with little experience could set up an unregulated firm.

	their own.	*Risk to consumers:* • *Risks to delivery of a proper standard of service. Evidence that experience is a factor in complaints being raised against solicitors (Pearn Kandola 2010, p30).*
Firm business and managerial standards	Yes.	No - firm not subject to Code of Conduct for firms.
Provide information about protections	Yes.	Yes - must state whether PII is in place, and make clear that there is no access to the Compensation Fund. *Risk to consumers:* • *Evidence of poor understanding of protections, so question whether consumers will take note of and understand the reduced protections and how these may affect them.*
Regulatory protections (redress)		
Access to Legal Ombudsman	Yes. Must inform client of right to complain about the solicitor or the firm to the Legal Ombudsman.	Yes. Must inform client of right to complain about the solicitor, but not about the unregulated provider, to the Legal Ombudsman.
Holding client money	Yes, and must comply with SRA Accounts Rules. PII or the Compensation Fund would in principle be available in the event of a LeO judgment against an insolvent firm.	Solicitor cannot hold client money, but no restriction on the employing entity holding client money. However, in practice, while anti-moneylaundering legislation does not prevent unregulated entities setting up client accounts, banks may be reluctant to do so because of the compliance costs associated with these accounts. *Risk to consumer:* • *No access to Compensation Fund in event of dishonesty resulting in loss of client money;*

		• *No guarantee of proper procedures and safeguards in unregulated entities for holding any client money?* • *If the entity loses this money/goes insolvent, client may not be able to recoup the money;* • *A LeO judgment against the solicitor would be enforceable but in practice only if the solicitor had the means to pay.*
PII protection	Yes - the regulated firm must hold PII on SRA-mandated minimum terms and conditions.	Solicitor/ unregulated entity not required to hold PII. If solicitor/entity does not purchase PII, client must fall back on standard consumer protections. *Risk to consumers:* • *If the entity/solicitor does not have the ability to pay any monies owed in the event of a successful claim and there is no PII in place, the client is left without redress;* • *If the entity/solicitor has obtained PII, this may not be on the SRA minimum terms and conditions of PII, resulting in less comprehensive cover and affecting the client's ability to obtain redress;* • *A standard PII policy held by the firm would not include run-off cover, resulting in no redress for a client who brought a claim after the entity had closed down.*
Access to Compensation Fund	Yes.	No. *Risk to consumers:* • *No redress for loss caused by solicitor dishonesty in relation to unreserved work.*
Sanctions for misconduct	Yes.	Yes.

Appendix 3: Scenario illustrating the risks to a client in engaging a solicitor working in an unregulated provider

This scenario is based upon information made available by the SRA in its Looking to the Future consultation on 1 June 2016. This consultation contains the draft codes of conduct for solicitors and firms but not the supporting guidance. Further relevant detail is also awaited in the Practice Framework Rules consultation.

What happens

- **Client engages an unregulated provider**

Z, a company, engages an unregulated provider, Small Business Law (SBL), to help it buy a small business. At the introductory meeting, SBL takes money on account from Z and advises that a lawyer will need to be involved. Subsequently, SBL allocates the case to a solicitor employed by SBL to work on the acquisition.

- **SBL's solicitor explains to the client the implications of engaging an unregulated provider**

In line with the obligation to act in the client's best interest, SBL's solicitor explains the client protection implications of engaging an unregulated provider rather than a regulated firm. This includes the lack of Legal Professional Privilege (LPP) and the consequences of the fact that Z's client money is already held in an account managed by SBL. Additionally, SBL's solicitor explains the conflict rules applicable to regulated individuals and emphasises that these mean that SBL's solicitor is not allowed to represent any other clients whose interests would conflict with those of Z. Finally, SBL's solicitor informs Z that SBL has a separate division that is acting for the seller of the business but that this will save money for Z and that confidentiality will not be a problem as there are sufficient firewalls in place preventing information "leaking" to the seller. Z is not deterred from retaining SBL by any of the above information.

- **The client transfers a large sum to SBL but then decides not to proceed**

The day before the sale is scheduled to take place, Z transfers a very large sum of money to SBL. However, late that afternoon, Z becomes aware that the target business has undisclosed liabilities and decides to withdraw the proposal to buy the business.

On examining the papers, Z identifies that SBL's solicitor appears to have provided a poor service because the liabilities had been disclosed during the due diligence work previously carried out.

The risks to the client

- **Risk to the client arising from the use of an office account**

Z asks SBL to return its money but is advised that the money was placed in an office account which had a large overdraft. As soon as the large deposit was placed in the account, the bank had contacted SBL to say that its overdraft limit had been reduced by the sum of the deposit. The money therefore cannot be accessed.

- **Risk to the client arising from the lack of professional indemnity insurance[35]**

Z has heard of professional indemnity insurance (PII) and therefore decides to makes a formal claim for professional negligence only to discover that SBL does not hold any form of PII.

- **Risk to the client arising from the lack of legal professional privilege[36]**

In the meantime Z is sued by the seller of the business. As the case progresses, Z is forced to disclose the advice and information that Z had received from SBL. Z's new solicitor explains that, as Z did not engage SBL's solicitor via a direct retainer, communications and documents that passed between SBL and Z do not attract legal professional privilege.

Z loses the case and is required to pay the seller compensation and the seller's costs.

- **Risk to client because SBL does not have to observe conflict rules**

In the course of the case, Z becomes aware that information provided in confidence to SBL has been shared with the seller. While SBL's solicitor had made it clear that he would keep Z's affairs confidential he subsequently left SBL and, after leaving, did not have any control over the files held by SBL.

Z's new solicitor advises that there may have been some legal obligations on SBL to maintain confidentiality with respect to the information provided. However, as there is no evidence that SBL's solicitor, ie the solicitor that advised Z originally, had acted in breach of SRA rules, Z's only remedy will be to claim compensation from SBL through the courts. Z could also report the matter to the Information Commissioner's Office.

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[35] Professional indemnity insurance (PII) is insurance that covers civil liability claims arising from a solicitor's work in private legal practice. These claims most commonly involve professional negligence.

[36] Legal professional privilege (LPP) is a privilege against disclosure, ensuring clients know that certain documents and information provided to lawyers cannot be disclosed at all. It recognises the client's fundamental human right to be candid with his legal adviser, without fear of later disclosure to his prejudice. It is an absolute right and cannot be overridden by any other interest. LPP does not extend to everything lawyers have a duty to keep confidential. LPP protects only those confidential communications falling under either of the two heads of privilege - advice privilege or litigation privilege. For the purposes of LPP, a lawyer only includes regulated solicitors and employees of a regulated firm, barristers and in-house lawyers.

- **Risk to the client because the SRA cannot handle complaints about SBL**

Z decides to complain about SBL to the SRA. However, the SRA advises that, despite its name, SBL is not regulated by the SRA and the SRA cannot take any action against SBL. While Z is able to complain about SBL's solicitor to the SRA and the Legal Ombudsman (LeO), Z is not able to complain about SBL because it is an unregulated provider.

Z decides to make a complaint to LeO about SBL's solicitor

- **Risk to the client because the Legal Ombudsman (LeO) is unable to investigate Z's complaint**

In the meantime, LeO contacts Z in relation to the complaint about SBL's solicitor, ie the solicitor that advised Z originally. The individual no longer works for SBL and has tried without success to get access to the files on the case held by SBL. LeO has taken the pragmatic view that without this information, the individual cannot properly respond and the complaint therefore cannot be properly investigated.

LeO informs Z that it is taking no further action.

Appendix 4: Scenario illustrating the practical consequences for a solicitor working in an unregulated provider

X is a solicitor working in an unregulated organisation that provides non-reserved legal services. The organisation is not regulated by the SRA or any other approved regulator. When taking on a new client, X makes it clear that, whilst she is personally regulated by the SRA as an individual practising solicitor, the organisation she works for is not. In particular, X will need to maintain records showing that, in line with the Code of Conduct for Solicitors, she has provided clients with appropriate information about whether and how the services she provides are regulated and the protections, if any, available to clients. The information provided will need to inform clients about their right to complain about her services and her charges and how such complaints can be made. The information will also need to set out the distinction between reserved and unreserved work so that the client understands from the outset that circumstances may arise in which X will no longer be able to provide services to them.

X is required to maintain an up to date understanding of the Code of Conduct for Solicitors and what she is required to do in order to comply with its requirements. In particular, this requires X to have a good understanding of the distinction between reserved and unreserved work, so that she does not fall foul of the regulatory prohibition on solicitors conducting reserved work in an unregulated entity. X will also need relationships in place with a number of solicitors who, subject to availability, would be able to take over any reserved work that arose.

Senior management of the unregulated organisation decides that it cannot afford to take out professional indemnity insurance (PII). While X is not required by the SRA to have PII for her work as it is being carried out in an unregulated entity, X decides that she would like to put something in place to mitigate the risk and so that she is not at a disadvantage to regulated solicitors offering the same service from a regulated firm. It is unlikely that X will be obtain the high level of PII coverage required by the SRA for qualifying insurance, as insurers are unlikely to offer these terms outside of the regulated market. X will also need to be clear as to her engagement / contract with the unregulated provider and the extent, if any, to which the organisation will provide a guarantee of her work and how such guarantees impact on her own liability.

Legal professional privilege would not attach to communications between a client and the organisation for the purpose of seeking legal advice or providing it to the client. However, some clients are aware of the importance of LPP and, where this is the case, X will need to have a direct retainer from the client in order for the legal advice to attract LPP, although in practice, we envisage this may be difficult to set up. X will need to keep a careful record of what advice she provides that is capable of attracting privilege and what is not. As a regulated individual, X is not allowed to hold client money in her own name. However, the unregulated firm she works for is able to hold and handle money for and on behalf of clients without having to comply

with the SRA's rules. Clients will need to be made aware that the individual solicitor will not hold the money and of the implications in relation to the compensation fund.

In addition to keeping abreast of regulatory changes, X will remain responsible for meeting regulatory continued competence training requirements, particular to ensure that she maintains professional standards and complies at all times with the regulator's requirements and does not act in any way such as to bring the profession into disrepute. This is likely to involve a certain amount of costs that she will have to meet herself.

Finally, X will need to maintain records of all of the work she handles while employed by the organisation to ensure that she can respond effectively should a client complain or pursue litigation against her after she is no longer employed by the organisation.

PLP is an independent national legal charity which aims to improve access to justice and to public law remedies for those whose access is restricted by poverty, discrimination or other similar barriers. To fulfil its objectives PLP undertakes research, legal casework, training and policy work.

PLP is a 'special body' within the meaning of the Legal Services Act, to which the transitional arrangements in the LSA apply. PLP's employed lawyers are individually regulated by the SRA and BSB, but PLP is not currently subject to SRA entity regulation. However, as a provider of immigration advice, PLP is entity regulated by the OISC. PLP also complies with the requirements of its contract with the Legal Aid Agency, including conformity with the Law Society LEXCEL standard. As a charity, PLP is also subject to regulation by the Charities Commission.

Our employed lawyers provide reserved legal activities to the public, for example through our Public Law contract with the Legal Aid Agency ("LAA"), on Conditional Fee Arrangements ("CFA") or on a pro bono basis. We specialise in strategic litigation with the aim of improving access to justice. The majority of our cases are issued as judicial reviews in the High Court or Upper Tribunal, and many of them are finally decided in the appeal courts. We also provide non-reserved legal advice and generalist advice to the public.

In addition to our reserved legal activities, PLP undertakes unreserved legal activities, providing second-tier advice to other agencies and advice and assistance to the public; conducts empirical research into issues affecting access to justice; delivers conferences and training on public law; and engages with relevant policy matters.

The management of PLP is vested in a voluntary board of trustees with no financial stake in the organisation. There are currently thirteen members of the board of trustees, and they include practicing lawyers, voluntary sector advocates, and consultants. The board of trustees is not responsible for the day to day running of the organisation, which is delegated to PLP's employed lawyers and staff.

This is PLP's response to the SRA consultation 'Looking to the Future.' It addresses the proposals for the regulation of Special Bodies, and also addresses those consultation questions that directly refer to the arrangements for special bodies, questions 24, 28 and 29. It does not seek to comment on any other aspect of the consultation and should not be taken as either endorsing or disagreeing with any of the other proposals.

Regulatory Framework for Special Bodies

Under the transitional arrangement provisions in the Legal Services Act 2007, Special Bodies have not been required to be regulated as an entity by the SRA. PLP is not opposed to entity regulation for Special Bodies per se. However, it is important that the regulatory framework developed is proportionate to the risk posed.

As set out above, PLP is currently regulated to varying degrees by several different bodies. Most Special Bodies will similarly already be subject to stringent regulatory requirements. Further, they are not for profit organisations working to further their charitable objectives; the lack of a profit motive is a relevant factor in assessing the risk that entity regulation is required to meet. The consultation paper does not identify any particular risk arising from the current arrangements for Special Bodies which the proposal to regulate seeks to mitigate

and in the absence of clear evidence of risk to the SRA's regulatory objectives, PLP considers that the case for regulation is not made out.

In 'Looking to the Future' the SRA indicates that it intends to develop a regulatory framework that will allow the Legal Services Board to end the transitional arrangements, however, no detail of the proposed regulatory framework is provided in the consultation paper. It is said that the framework will be broadly similar to that used to regulate multidisciplinary practices ("MDPs"), and our understanding of the regulation of MDPs is set out in brief below:

a) an MDP is entity regulated, meaning that the owners, managers and those who work there will need to comply with the SRA Authorisation rules, the SRA Principles and applicable parts of the SRA Handbook;
b) an MDP's reserved activities are always SRA regulated;
c) solicitors employed in the MDP continue to be individually regulated and non-reserved activities undertaken by an SRA regulated professional in an MDP are SRA regulated;
d) activities which are not SRA regulated are not subject to certain provisions in the Handbook, such as those relating to PII, the Compensation Fund, the Accounts Rules and many of the provisions in the SRA Code of Conduct.

As stated above, it is not clear from the consultation how closely aligned to MDP regulation the SRA envisages entity regulation for Special Bodies will be. The imposition of a framework closely aligned to the MDP model set out above could be problematic for Special Bodies, particularly in terms of:

a) The impact of entity regulation on a Special Body's currently unregulated activities; and
b) The impact of imposing additional obligations on the 'managers' of Special Bodies, who are generally voluntary members of boards of trustees.

As is recognised by the Law Society in their response to this consultation, Special Bodies play an important role in providing legal services to vulnerable individuals. It is vital that any regulatory framework enables them to continue to do so. In many Special Bodies the provision of regulated legal services is only a part of the organisation's activities, and unregulated activities, such as general advice and training, are central to their role in facilitating access to justice.

In addition to what for many organisations may be a prohibitive cost associated with entity regulation, it appears that entity regulation under the MDP model would require a Special Body to comply with much of the SRA regulatory framework in all aspects of its work. This will plainly impact on the organisation's currently unregulated activities, potentially impeding them, and the implementation of compliant practices across previously unregulated work could incur a considerable resource cost. In light of the severity of the possible impact, an MDP model should not be imposed without a clear understanding of what that impact could be. This will require further consultation and engagement with Special Bodies.

We are concerned that aligning with the requirements for owners of MDPs could deter potential trustees from joining the voluntary boards of Special Bodies. Such organisations are generally prohibited by their constitutions from remunerating trustees for their time. The SRA Authorisation rules require all 'owners' or 'managers' to apply to the SRA for approval,

and be approved. If the Authorisation rules apply to Special Bodies, potential trustees would need to disclose information to, and be approved by, the SRA before taking up post.

This clearly could deter potential trustees from volunteering to join the board of a Special Body. In addition, it will create a further bureaucratic hurdle to the overcome for organisations which may have limited resources. It is also of concern that it would prevent individuals drawn from, or representative of, a Special Body's service users from being represented on the board of trustees.

Further, under the SRA Authorisation rules, the board of trustees would be responsible for the organisation's compliance with SRA requirements, something for which potential voluntary trustees may well be unwilling to assume responsibility. It is generally regarded as preferable for there to be a range of expertise on a board of trustees, but those with no legal training may be deterred by the prospect of responsibility for SRA compliance. Conversely, legal professionals will be aware of the requirements, and may also be deterred as a result.

In the circumstances, in the absence of clear evidence of risk arising from the current position of Special Bodies, the additional burden which regulation would impose on Special Bodies is not justified or proportionate. PLP does not consider that the case for ending the transitional arrangements is currently made out.

Further, the proposals for Special Bodies in the consultation paper are not set out in any detail. It does not appear that the MDP model would be suitable in its entirety, and we ask that, should the SRA nonetheless decide to proceed with asking the LSB to end the transitional arrangements, it should first work closely with Special Bodies to develop a clear framework for entity regulation that allows these organisations to continue to provide advice and support to some of the most vulnerable in our society.

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?

PLP and other Special Bodies provide reserved legal services to the public. The financial protections afforded to the public in relation to reserved legal activities should be the same in a Special Body, and for any in house solicitor, as in a traditional firm.

Currently PLP holds client money in the name of SRA regulated solicitors, who are subject to the requirements of the Accounts Rules. If PLP did not hold client money in the name of SRA regulated solicitors, it would not be protected by the requirements of the Accounts Rules.

SRA regulated solicitors in Special Bodies providing reserved legal activities to the public should continue to be permitted to hold client money personally, and if the SRA decides to allow in-house solicitors to advise members of the public they should be subject to the same requirements. This position may change if a suitable framework for entity regulation is developed, providing the same level of protection for client money.

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?

Yes.

Question 29: Do you have any views on what PII requirements should apply to Special Bodies?

Solicitors employed by Special Bodies are required to have a 'reasonably equivalent' level of cover to that required by the SRA Indemnity Insurance Rules. Where Special Bodies are undertaking reserved legal activities, PLP believes that this requirement should be maintained, thereby providing clients of Special Bodies with the same level of protection as clients of traditional law firms.

Thomas Hulme

Dear Sir or Madam,

I write regarding the above and particularly to express my concern that the proposal presents.

I cannot but believe but that the proposal poses the following salient risks:

Primarily, the lack of certainty and confusion to consumers of legal services - the proposal appears to allow solicitors to work in unregulated, uninsured organisations. What afeguards are going to be provided to ensure that they know that their conversations are not necessarily protected by privilege or that the advice they receive leaves them exposed in the event of risk. Indeed they might later seek redress after the event of erroneous advice through litigation but that proposition is wholly unattractive for a series of obvious reasons.

My secondary concern is that the proposal will diminish the faith and standing of solicitors. Please understand that I and the vast majority of solicitors take extremely seriously the trust and faith placed in us. We take extremely seriously and expend substantial amounts of time ensuring that all aspects of our work are fully compliant to best protect the public we serve. I do not take any risks when it comes to protecting the public and neither do I believe either our regulator nor any professional body should ever seek to diminish the standards and protections that are necessary for the proper conduct of often extremely serious matters.

I do appreciate that as regulator much of your dealings are with legal professionals, organisations and companies. Your knowledge of the intricacies of the legal profession is therefore immense. Please do be alert to the fact that the vast majority of consumers have very little such understanding, at most they have a vague notion of the (increasingly little) difference between solicitors and barristers. Proposing to add further layers with the concomitant risks of doing does not, in my opinion, serve a beneficial purpose. I should add that I have not heard of any demand from consumers for any such developments but your experience may be otherwise should such fall within the SRA's remit.

I trust that this is of assistance to your analysis but if I can assist further please do not hesitate to contact me.

Yours sincerely,

Thomas Hulme

Thomas Wood

Dear SRA

I recently attended a webinar provided by the Law Society on the SRA Handbook Review Consultation.

I am writing to provide my feedback on the proposed changes set out in the SRA Consultation.

We were advised that one of the proposed changes would be to remove the indicative behaviours set out by Handbook. My view would be that without these guidelines firms would be taking a shot in the dark when trying to deal with potential conflicts.

If anything, I believe, and I know a number of my peers who work in the area of conflict management, believe that the Handbook should be more prescriptive and revert back to a rules based system which would ensure law firms can manage risk more effectively. At present, there is too much confusion over what solicitors can and cannot do. The client is unlikely to understand the conflict guidelines and so is reliant on their legal advisor “to do the right thing”. I am concerned that no-one knows what the right thing is anymore because it is not clear. Furthermore differences in opinions in the legal sector on the conflict guidelines can only confuse the client further.

Kind regards

Thomas Wood | CCU Manager – Conflicts |Global Operations

Consultation: Looking to the future - flexibility and public protection

Response ID:264 Data

2. Your identity

Surname

Earl

Forename(s)

Tim

We may publish a list of respondents and a report on responses. Partial attributed responses may be published. Please advise us if you do not wish us to attribute your response or for your name or the name of your firm or organisation to appear on any published list of respondents.

Attribute my/our response and publish my/our name.

Please identify the capacity in which you are submitting a response. I am submitting a response…

on my own behalf as an employed solicitor

3.

1. Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

No

4.

2. Do you agree with our proposed model for a revised set of Principles?

Yes

5.

3. Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

Yes

6.

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?

No

7.

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?

No

8.

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?

Yes

9.

7. In your view is there anything specific in the Code that does not need to be there?

No

10.

8. Do you think that there anything specific missing from the Code that we should consider adding?

No

11.

9. What are your views on the two options for handling conflicts of interests and how they will work in practice?

12.

10. Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

Yes

13.

11. In your view is there anything specific in the Code that does not need to be there?

No

14.

12. Do you think that there anything specific missing from the Code that we should consider adding?

No

15.

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?

16.

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.

Yes. Personal responsibility is the key to ensuring compliance.

17.

15. How could we improve the way in which the COLP/COFA roles work or to provide further support to compliance officers, in practice?

18.

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?

Choice is good provided adequate protection is in place. I have not seen any evidence to support the suggestions that these proposals carry more risk for the consumer.

19.

17. How likely are you to take advantage in the greater flexibility about where solicitors can practice as an individual or as a business?

Unlikely

20.

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?

Necessary

21.

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?

The problem is that the requirement is too easy to meet. It doesn't serve any useful purpose in its current form.

22.

20. Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

No

23.

21. Do you agree with the analysis in our initial Impact Assessment?

Yes

24.

22. Do you have any additional information to support our initial Impact Assessment?

No

25.

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?

Yes

26.

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?

They shouldn't

27.

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? If not, what are your reasons?

Yes, but ALSPs need to have an alternative

28.

26. Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

Yes

29.

27. Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

30.

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?

Yes

31.

29. Do you have any views on what PII requirements should apply to Special Bodies?

32.

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?

Don't know

33.

31. Do you have any alternative proposals to regulating entities of this type?

No

34.

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?

No

35.

33. Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

Yes

Response on behalf of the Tunbridge Wells, Tonbridge and District Law Society to the SRA Consultation: Looking to the Future – Flexibility and Public Protection

1. **Have you encountered any particular issues in respect of the practical application of the suitability test (either on an individual basis or in terms of business procedures or decisions)?**

   No, but we believe that information about the suitability test should be made available to students at an early stage in order to make it obvious to those students who have been guilty of unacceptable conduct in the past that they cannot join the profession and also to explain to them the level of conduct to which they are expected to adhere.

2. **Do you agree with our proposed model for a revised set of principles?**

   We do not agree that the Code of Conduct needs changing. The Code of Conduct and principles are simple and workable. Furthermore, the two new Codes of Conduct are supplied by the SRA without the SRA's intended additional guidance. The SRA fails to explain how it would deal with enforcement, particularly to ensure that solicitors employed by an unregulated entity do not undertake reserved work, bearing in mind that the boundary between reserved and unreserved work is not as clear cut as the SRA assumes.

   It was only in 2011 that the SRA introduced a new Code of Conduct which it claimed was a substantial improvement on the previous one and which represented a new way forward, based on outcomes focused regulation and indicative behaviours. Only five years on, the SRA now states (paragraph 46 at the consultation) that its own Code of Conduct is "long, confusing and complicated" and that it is (paragraph 48) "detailed and prescriptive". The SRA also states (paragraph 46) that it can make the "line between individual and entity responsibilities blurred and difficult to apply". The SRA goes on to make numerous other criticisms of its own code. It is astonishing that, only five years after a new Code of Conduct was imposed and trumpeted as the way forward, it is now condemned as totally inadequate by those who drafted it. This casts a doubt over the SRA's competence and its suitability to regulate the profession at all.

   Furthermore, the wording is vague and this is likely to make it harder for regulated firms and individual solicitors to determine whether they are in breach of the code or not. It would also give the SRA too much power to determine whether there is a breach when the position is not clear-cut.

   Finally, there is a degree of overlap between the two codes, most noticeably in the areas of conflict, confidentiality and client information/identification. It is not clear which would take precedence in the event of a conflict between the two codes.

3. **Do you consider that the new principle two sets the right expectations around maintaining public trust and confidence?**

   No. It makes no sense for regulated individuals and firms to be placed under a regulatory obligation in respect of non-regulated individuals and providers: the loose wording of principle 2 means that regulated individuals and providers would have to support unregulated entities, despite the much higher levels of client protections afforded by regulated entities.

4. **Are there any other principles you think we should include, either from the current principles or which arise from the newly revised ones?**

   We are concerned that two of the principles which the SRA proposes to jettison are the requirements to "provide a proper standard of service to your clients" and to "protect client money and assets". These are extremely important principles and we do not know why the SRA sees fit to abandon them. There should also be a specific reference to the importance of confidentiality.

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?**

   See answers to 2 and 4. In addition, the SRA should provide guidance for the scenario of a practising solicitor working in an unregulated entity and told to represent a client who has clear conflicts with existing clients of that entity. It appears that, in such a situation, the solicitor would be able to represent the client, which is unacceptable.

6. **Have we achieved our aim of developing a short, focused Code for all solicitors, wherever they work that is clear and easy to understand?**

   No.

7. **In your view is there anything specific in the Code that does not need to be there?**

   No.

8. **Do you think that there is anything specific missing from the Code that we should consider adding?**

   See answer 4 above. Also, the SRA wrongfully proposes to remove outcome 8.3 of the current Code which bans unsolicited approaches in person or by telephone to members of the public. This ban provides essential protection to vulnerable clients – e.g. at a police station. The SRA claims that it is justified in removing the prohibition because protection is provided by 1.2 in the proposed new Code for solicitors and 1.1 in the Code for firms – but these only ban the solicitor/firm for abusing their position by taking "unfair advantage of the clients or others", which is a weaker form of protection.

   We are also concerned that solicitors in a regulated firm might well not accept an undertaking from a solicitor in an unregulated entity, due to the lack of protection if things went wrong. Undertakings are an essential part of the practice of law and anything which casts doubt over their worth (as the SRA's proposals would) would cause obstruction and delay to the legal process.

9. **What are your views on the two options set out for handling actual conflict or significant risk of conflict between two or more clients and how do you think they will work in practice?**

   We prefer option 1 because there will be circumstances where there is an actual conflict and yet the solicitor should still be able to act – e.g. in conveyancing transactions. While we accept that option 2 is simpler in that it simply bans a solicitor acting where there is a client conflict, option 1 probably deals with the realities of

work situations in a practical way. We should add however that even option 1 needs redrafting in our view because it appears weaker than the current rule and affords less public protection.

10. Have we achieved our aim of developing a short focused code for SRA regulated firms that is clear and easy to understand?

No – see answers to 2 to 9.

11. In your view is there anything specific in the Code that does not need to be there?

No. On the contrary, the Code needs more detail.

12. Do you think that there is anything specific missing from the Code that we should consider adding?

See answers to 2 to 9.

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?

Yes. See answers to 2 to 9.

14. Do you agree with our intention to retain the COLP and COFA roles for recognised bodies and recognised sole practices?

Yes.

(a) In responding to this question, please set out the ways in which the roles COLP/COFA either assist or do not assist with compliance?

Subject to answer 15, we accept that these roles do work best in smaller and medium sized firms and that, in larger firms, the roles can be too wide. Nonetheless, we think that it is important that one person is responsible for each of these roles at a firm and it is of course always up to the firm to create a structure to spread the work out if necessary.

15. How could we improve the way in which the COLP/COFA roles work or provide further support to compliance officers, in practice?

In larger firms, there are more resources by way of compliance software and support for the COLP and COFA, whereas our members report that, in small and medium sized firms, the roles are usually allocated to partners and not non-fee earners, as most firms usually cannot support a non-fee earner at high management level. More support for COLPs and COFAs is therefore required. The SRA helpline that is offered should be more practical, and the advisers able to give more comprehensive advice.

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?

We are strongly opposed to the SRA's proposal to allow solicitors to deliver non-reserved legal services to the public through unregulated entities and to describe

themselves as “practising solicitors”. This proposal, if implemented, would cause high levels of confusion among consumers, create two tiers of solicitor and very substantially damage public protection. Clients of an unregulated entity would be exposed to a much greater risk because of the lack of regulatory controls and oversight. It is astonishing that the SRA can describe this proposal as being about “public protection”.

The current position is that a non-regulated entity can of course employ a solicitor to do legal work, but that solicitor cannot be described as a practising solicitor and cannot provide legal services to the public as a solicitor: she is there to provide legal services for her employer. This arrangement works wells.

There is no doubt whatever that, if the SRA’s proposal were allowed, consumers would think that they would have the same protections that would apply if they instructed a regulated firm of solicitors. In fact, of course, they would have no such protection for the following reasons:

- Legal professional privilege would apply to the solicitor but not to the unregulated entity.
- Rules on conflict and confidentiality would apply to the individual solicitor but not the unregulated entity.
- The unregulated entity would have no professional indemnity insurance.
- The unregulated entity would have no access to the Compensation Fund.
- The unregulated entity would not be subject to LeO.

Dealing with each of these in turn, the question of legal professional privilege is extremely important. In the Prudential case in 2013, the Supreme Court decided that legal professional privilege applied only to qualified solicitors and barristers. Our members report that some of their clients, who had previously instructed unregulated entities, were shocked to discover that confidential advice which they had received from that unregulated entity was not covered by legal professional privilege and therefore had to be disclosed in court or employment tribunal cases. The SRA’s proposal would make this situation much worse because consumers would no doubt believe that legal professional privilege applied when instructing the solicitor and, while it would indeed apply to the individual solicitor, it would not apply to the unregulated firm. In practice, this would cause serious confusion and uncertainty as to the extent to which legal professional privilege applied. The SRA appears to overlook the fact that the right of legal professional privilege is a right of clients, not lawyers.

The same point applies in relation to the rules on conflict and confidentiality: the individual solicitor would be bound by these important rules but the unregulated entity that employed her would not. How this would be resolved? How would the consumer know whether information he supplied to the unregulated entity would remain confidential or not and how would conflicts be dealt with?

Again, the consumer would assume that the solicitor employed by an unregulated entity would have insurance for negligence claims, but this would not be the case and the unregulated entity could be uninsured and unable to pay out on claims. The same point applies in relation to the Compensation Fund. No doubt solicitors and unregulated firms would not have to make payments into the Compensation Fund, with the result that firms authorised by the SRA would have to make increased contributions to the fund.

In addition, unregulated entities would not have to employ COLPs and COFAs which would of course save them money but reduce client protection. The consequence of the SRA's changes would be that the burden of regulation would be shifted disproportionately on to regulated smaller firms and sole practitioners, making reserved activities such as litigation potentially more expensive still for consumers.

Finally, the individual solicitor would be subject to LeO but the unregulated firm would not – how would this be resolved in practice?

The SRA says that it would be up to the unregulated entity to decide if it wanted to tell consumers that it employed a (regulated) solicitor. This is an obvious recipe for confusion among consumers, most of whom would be unable to grasp the significance of the distinction. The SRA claims (paragraph 17) that this would increase consumer choice because the consumer could instruct a solicitor in an unregulated firm but an uninformed choice is no choice at all and the SRA's proposals would simply cause confusion among consumers. For most consumers, an assessment of regulatory status (and the protections therefore available) does not play an important part in their choice of provider of legal services. Few consumers are likely to distinguish between a regulated firm of solicitors and an unregulated law firm and understand the difference in protections they provide.

Client protections are complicated and not easily understood. In practice, the overwhelming majority of clients would not be able to properly comprehend the implications of buying their legal services from an unregulated provider.

There is to be no prohibition against unregulated firms advertising that they employ solicitors. Furthermore, the term "lawyer" is not a protected title and can be used by anyone when supplying unreserved legal services.

There is to be apparently no obligation on unregulated entities to have systems in place for dealing with client files, including retention of files when the matter is complete or the entity closes down, undermining the abilities of the solicitor employed by an unregulated entity to comply with their own obligations.

The SRA states that these changes would promote innovation, reduce costs for consumers and allow "unmet" legal need to be met. The SRA fails to identify what "unmet" legal need is supposed to mean. In reality, of course, there certainly is "unmet" legal need – as a result of the virtual abolition of legal aid over the last 20 years.

In addition, an unintended consequence is that a solicitor employed by an unregulated entity may be able to circumvent the ban on unregulated entities offering reserved work. She could do this by making an application to the judge to act as a paid McKenzie Friend on behalf of her client. At present, such work is reserved and can only be exercised by a solicitor or other regulated lawyer. Bearing in mind the extent to which litigants in person are clogging up the courts, judges would probably treat such applications favourably, entirely undermining the SRA's intention of leaving in place the restrictions on who can conduct reserved work.

The SRA's real purpose here is of course to cut the cost of legal services (paragraph 16 of the consultation). It is probably true that these changes would result in some services being provided more cheaply because no doubt unregulated entities would employ solicitors who would describe themselves as regulated solicitors. Unregulated entities would not of course have to bear the expense associated with regulation and no doubt could provide services at lower cost – and with far less client

protections being afforded to the public. Succeeding in its aim of cutting the cost of public services does not, however, justify severe damage to the reputation of the legal profession and severe erosion of public trust in it, let alone the serious damage to public protection which these changes would undoubtedly cause. The solicitors profession in England and Wales has already suffered reputational damage abroad as a result of the SRA's "reforms" over the last few years, particularly in the USA and in Europe and there is no doubt that these reforms, if implemented, would result in foreign jurisdictions regarding the profession as lacking in integrity (particularly in relation to issues over conflicts of interest) and no longer upholding the high standards which it used to.

17. How likely are you to take advantage of the greater flexibility around where solicitors can practise as an individual or as a business?

Not at all – we have no desire to be complicit in the damage to public protection which these proposals would entail.

18. What are you 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?

We agree with this proposal.

19. What is your view on whether the current "qualified to supervise" requirement is necessary to address and identify the risk and/or is fit for that purpose?

We strongly oppose this proposal. The current rule 12 requires a solicitor to have three years' post-qualification experience and to have undertaken a management course before setting up as a sole practitioner. The SRA proposes that newly qualified solicitors should be allowed to set up their own unregulated firms. This would undoubtedly severely undermine the reputation of the profession and severely damage public confidence and public protection. The only solicitors who would want to set up their own firms as newly qualifieds would be those who had failed to perform adequately at their own firms and who therefore felt they had no choice but to set up their own firms as no-one else would employ them. There is simply no merit in any of the SRA's arguments. The SRA claims that newly qualifieds do not present a significant risk to delivery of a proper standard of service and that it has no evidence that newly qualifieds pose a danger. That is entirely untrue: the SRA's own research shows that the solicitors which cause most problems for the public are those at the beginning and at the end of their careers. Research conducted by Nottingham Law School for the SRA indicates that solicitors require four years post-qualification experience to be confident of their legal expertise. In practice, newly qualifieds generally do not cause problems because they are carefully supervised by more senior solicitors in the firm and their work carefully checked to ensure that any errors are corrected before the work is finalised for the client. In the absence of such checks, there is no doubt that newly qualifieds would make numerous mistakes, thus causing serious damage to public protection.

20. Do you think that we should require SRA regulated firms to display detailed information about the protections available to consumers?

In principle, this sounds sensible because it would enable regulated firms to be able to advertise the fact that they provide protection that non-regulated entities do not have. In practice, however, it is hard to see how this could be done in a way which

would be succinct and easy to display to consumers eg on headed notepaper. The information could of course be included in the regulated firms' Terms of Business, but most consumers would regard this as "small print" and would be unlikely to pay much attention. The SRA should issue guidance as to what information should be displayed and how extensive it should be. A further difficulty is that, even if the SRA did this, the SRA has no power to require unregulated entities to display information informing the public that they offer no public protection and so it is hard to see how this proposal would enable consumers to make informed choices.

21. Do you agree with the analysis in our initial impact assessment

Although the new Code of Conduct is apparently intended to make it easier for firms to comply with regulation, we have highlighted in our answers above how this is unlikely to be the case, given how loosely worded the new Code is and the uncertainties left by some of the redrafting of the current Code. The SRA, in putting forward these reforms, refers to the existence of "unmet" legal need, but fails to define that. There is no evidence that the SRA's changes would result in unregulated entities satisfying these alleged "unmet" legal needs or that they would do so at lower cost. The real unmet legal need at present has resulted from the near abolition of legal aid.

The impact assessment also fails to recognise the serious risk to consumers by way of loss of client protection.

22. Do you have any additional information to support our initial impact assessment?

See answer 21 above.

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?

Yes. Clearly, if a regulated solicitor was employed in an unregulated entity, consumers would no doubt believe that any money handed over to that solicitor was protected in the way that client money is in regulated firms. In fact, any money handed over by the consumer to unregulated entity would not be protected at all and, for example, if that entity went into liquidation, then its bank and other creditors would be able to seize that money. For the purposes of public protection, therefore, solicitors working in unregulated entities should not be allowed to hold client money.

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?

They should not be allowed to hold client money personally, for the reason set out in answer to question 23. Special bodies include trade unions, law centres and Citizens Advice Bureaux. These bodies have been subject to transitional arrangements in the Legal Services Act 2007, meaning that while the solicitors they employ are regulated by the SRA, the body remains unregulated. The SRA's suggested new approach is to treat special bodies in the same way that it currently treats multidisciplinary practices (where reserved activity is SRA regulated and non-reserved activity is not subject to the SRA handbook). These bodies play an important role in providing access to justice for vulnerable people who may not be able to afford access to legal services. As well as considering the impact of the proposals on bodies such as law centres, the SRA needs to carry out a detailed analysis of the impact on the market

and other providers in the market by extending proper regulation to these providers.

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?

Yes. Such solicitors would not be required to contribute towards the Compensation Fund and so should not be allowed to benefit from it.

(a) If not, what are your reasons?

See above. In addition, work carried out by unregulated entities would clearly result in clients being exposed to much greater risks due to lack of controls. If unregulated entities were able to rely on the Compensation Fund, the fund could be depleted by substantial claims. Allowing unregulated entities to rely on the Compensation Fund would of course mean that regulated solicitors would have to contribute more to the Compensation Fund, which would be unfair. Of course, we should add that points like this expose the huge problem with the SRA's proposals which the SRA seems unable to grasp: that the existence of unregulated entities employing practising solicitors would expose the public to serious risks and loss of protections. The SRA claims that they have no objection to allowing consumers to "lose" their protection in exchange for reduced price. This fails to recognise that consumers usually do not recognise and understand the distinctions between regulated firms and unregulated entities and the benefits of the relevant protection.

26. Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

We do not agree with this. If the solicitor is to be described as a practising solicitor and held out as such by the unregulated entity which employs her, then clearly that solicitor should have individual professional indemnity cover. Not to require this would cause confusion to consumers and serious damage to public protection. Consumers would no doubt assume that any solicitor was fully insured for any errors and losses and consequently should be insured. Clearly, a solicitor would not be able to comply with principle 6 to act in the best interest of the client, without PII cover in place.

27. Do you think that there are any difficulties with the approach we propose and, if so, what are these difficulties?

See answer 26 above. There is a serious risk of a solicitor working in an unregulated firm not taking out PII cover. As this is expensive, not having it would enable the unregulated entity to charge clients less – but the consequence would be that, in the event of a claim, consumers might have no redress as the unregulated entity could go out of business. Furthermore, the unregulated entity could include in its contractual arrangements with the consumers a term that the unregulated entity cannot be sued for an amount greater than the value of the retainer. This would of course significantly reduce public protection. Again, the SRA assumes that consumers would understand the level of protections or lack of protection offered – in reality most consumers are unlikely to understand this and will be driven entirely by price.

28. Do you think 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?

Yes. It is particularly important that, when providing reserved legal activities, PII should be in place. Not to require it would be to cause confusion among consumers and cause serious damage to public protection.

29. Do you have any views on what PII requirements should apply to special bodies?

PII requirement should be the same as for regulated firms.

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?

The imposition of arbitrary thresholds is likely to make decision making even more confusing for consumers. Regulation should be applied consistently to all providers of legal services in order to protect consumers. As we have already pointed out, it is against the public interest for there to be regulated and unregulated providers offering the same service with differing levels of protection.

31. Do you have any alternative proposals for regulating entities of this type?

See answer to 30 above.

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?

This only goes to highlight how ludicrous the SRA's proposals are. It would indeed be from a practical point of view very difficult for the SRA to intervene into the practice of an individual solicitor working at an unregulated entity and the SRA identifies at paragraph 161 some of the problems. There is really no way round this and it only helps to highlight how deeply flawed and impractical the SRA's entire proposals are.

33. Do you agree with our proposal that all work within a regulated body or an RSP should remain regulated by the SRA?

Yes. The SRA correctly identifies at paragraph 169 the problems with departing from this position.

20 September 2016

Consultation: Looking to the future - flexibility and public protection

Consultation questionnaire form

This response is submitted on behalf of the Bristol Risk Managers' Group.

We are happy for you to list our firm's names as having responded to the consultation but do not want any of the comments in this response to be attributed to our firms or to the Bristol Risk Managers' Group.

The Bristol Risk Managers' Group is an informal association of individuals with risk and compliance responsibilities in a number of national firms (all within the top 100) with offices in Bristol. The group meets bi-monthly on Chatham House terms to discuss non-competitive matters of interest and runs an annual training event. For convenience we refer to ourselves in this response as the Bristol Risk Managers' Group but the members who have participated in this response are, by alphabetical order of firm:

Bevan Brittan LLP – Peter Rogers, Director of Risk

Bond Dickinson LLP - Nicki Shepherd, Partner and Head of Risk and Best Practice

Burges Salmon LLP – Phil Steel, Head of Risk and Best Practice

Clarke Willmott LLP – Jon Green, Head of Risk and Compliance

DAC Beachcroft LLP – Tony Cherry, Partner and Chair of Business Services

Foot Anstey LLP – James Treloar, Head of Business Excellence

Thrings LLP – Anna Hudson, Director of Quality and Risk

Veale Wasbrough Vizards LLP – Claire Ainley, Partner and Head of Risk & Compliance

This response is submitted by the named individuals in their own right and it does not necessarily reflect the views of the partners or members of the firms mentioned for the simple reason that it is not feasible to canvass each one in the time available. The group feels that it is very well placed to respond to the consultation paper because of the positions that the members hold within their respective firms.

Although we have submitted a joint response we would like it to be treated as eight individual responses.

Question 1

Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

We have no concerns with the content of the test. However when we recruit we assess the candidate against the suitability test requirements and there are challenges around accessing information to help in this assessment.

Most firms in the Bristol Risk Managers' Group use outside referencing agencies to carry out checks such as DBS, financial probity and validity of academic qualifications but there is a cost to this which smaller firms may find prohibitive. Additionally the results of these checks are purely objective (eg it will highlight if someone has a CCJ) and given that references from previous employers are usually bland, we have to rely on thorough interviewing to make any form of subjective assessment.

Question 2

Do you agree with our proposed model for a revised set of Principles?

The new Principles represent the fourth iteration of a set of high level principles governing the conduct of solicitors and other regulated individuals & firms in the 27 years since the Solicitors' Practice Rules 1990 ("SPR 1990") came into force, and more significantly the third in a space of the last ten years (2007-2011).

Given that solicitors' fiduciary duties have remained broadly unchanged during this period, this risks giving an impression of change for changes' sake rather than in response to a significantly different and fast evolving ethical landscape.

The 2011 Principles, whilst being the longest set of Principles to date, did resonate with our members, and the enshrining of good governance and sound financial and risk management as a new Principle in 2011 provided important leverage for COFAs and COLPs to ensure that they were given adequate resources to back up their new responsibilities. Whilst we are confident that our member firms will continue to invest in these functions notwithstanding the removal of this Principle, the same may not be true of all firms, and the risk is that these aspects will no longer be given appropriate priority when it comes to a firm's investment decisions.

The removal of the Principle around standards of work is also a concern, and although one could argue that the requirement to act in the best interest of each client can only be achieved by delivering a high standard of work, it is notable that each of the previous 3 iterations (The SPR 1990, SRA Code 2007, and the SRA Principles 2011) saw fit to include both "best interests" and "standard of work" as separate and distinct Principles.

Again, we are concerned that this may send out the wrong message to firms which might choose not to prioritise investment in training (perhaps encouraged by the other recent changes to the competence regime into thinking that their regulator no longer wishes to concern itself with this aspect of their activities). Likewise, it may also send an unfortunate message to partners and non-partners alike that shoddy work or poor standards of client service are viewed as less important than the remaining Principles which are being retained (for example equality & diversity) .

The removal of the reference in the Principles to the requirement to *"Protect client money and assets"* is also, in our view, an unfortunate downgrading of this obligation especially against the background of some high profile instances of solicitors and other legal professionals stealing client money, and is not in our view adequately compensated for by the addition of the requirement of honesty in new Principle 4, alongside new Principles 2 and 6.

Finally, in relation to the removal of the specific requirement to *"Comply with your legal and regulatory obligations and deal with your regulators and ombudsmen in an open, timely and co-operative manner"*, whilst to some extent one could read into the other Principles a requirement to the like effect (new Principles 1, 2 and 4), having this obligation spelt out in the Principles does, in our view, afford it additional weight and assist COLPs/COFAs and others tasked with engaging with the SRA etc. in gaining the cooperation of individual partners and other fee earners. This requirement could, however be addressed elsewhere in the new Code.

Question 3

Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

This new Principle is "ensure that your conduct upholds public confidence in the profession and those delivering legal services".

The equivalent in the 2011 Principles was to "Behave in a way that maintains the trust the public places in you and in the provision of legal services"

Likewise in the SRA Code 2007 "You must not behave in a way that is likely to diminish the trust the public places in you or the legal profession"

Finally in the SPR 1990 one finds "A solicitor shall not do anything in the course of practising as a solicitor, or permit another person to do anything on his or her behalf, which compromises or impairs or is likely to compromise or impair…. The good repute of the solicitor or of the solicitors' profession"

All of the previous iterations of this Principle (SPR 1990, 2007 Code, & the 2011 Principles) made reference to the need to behave in a way which upholds public trust in the solicitor personally. The proposed Principle 2 doesn't do so. One could argue that it follows naturally that a client who experiences poor behaviour from their solicitor is likely to have their confidence shaken in the profession as a whole, but other than a saving of words, we cannot see the advantage of removing the reference to "you". We wonder whether it was done so as to avoid having to refer to three elements (you, the profession, and those delivering legal services).

We would also note that, having removed reference to the "profession" in the 2011 Principles, this has now been restored. In doing so this does seem to emphasise a distinction between "members of the profession" on the one hand, and "those delivering legal services" on the other, which may not have been intended.

We would endorse the Law Society's alternative wording, namely "Ensure that your conduct upholds public confidence in you and in other regulated individuals and firms" although for consistency with the existing Principle we would prefer "Behave in a way which maintains public confidence in you and in other regulated individuals and firms".

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?

As mentioned above, we consider that the revised Principles should include a Principle relating to standards of service.

If equality, diversity and inclusion are to be retained as Principles (which we fully support), then the Principle relating to governance and financial/risk management (also introduced in the 2011 Principles) should likewise be retained as a Principle for reasons mentioned in the answer to Question 2 above. Arguably the requirement for equality etc. flows from the requirement for good governance, and a firm which is poorly governed is unlikely to promote an equality and inclusiveness agenda.

The 2011 Principles regarding cooperation with the Regulator and protection of client money both served a useful purpose, and we would advocate that they be retained for the reasons mentioned in the answer to Question 2 above; that said, we would be content for the requirement for cooperation with the Regulator to be included in the Code as opposed to the Principles provided it is given adequate emphasis.

Whilst we note the Law Society's suggestion that the duty of confidentiality might be upgraded into a Principle, we feel this obligation would be adequately covered in the body of the Code (as currently in the 2011 Code) subject to the inclusion of a Principle to "Protect client money and assets" and the addition to the SRA Glossary definition of "assets" to include "proprietary and/or confidential information" (the current definition is "includes money, documents, wills, deeds, investments and other property" which place the emphasis on tangible assets whereas the "crown jewels" for many clients is in the form of electronic data).

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?

As the new Code has removed the indicative behaviours (which provided a level of guidance, albeit significantly reduced from that previously provided) and has deliberately adopted subjective (and vague) terms, comprehensive guidance and case studies will be vital. The quality of this guidance is also critical. There is little point in concentrating on simple, straightforward scenarios, as most solicitors will be able to work these out for themselves. The example scenarios provided as part of the consultation are too simplistic and could arguably best be dealt with by a FAQ section. The guidance and scenarios need to focus on the more complex /grey areas.

There is a particular need for detailed and comprehensive guidance in the area of conflicts, where it is disappointing that no examples of scenarios were supplied. So for example we need scenarios to set out when a firm can act for more than one party with particular emphasis on real estate matters. Scenarios should also cover the interaction between the conflict and confidentiality rules and the acceptable use of information barriers.

We need guidance on the use of undertakings given between solicitors working in regulated and unregulated entities.

Clear and unequivocal statements as to what information should be displayed about consumer protection and the level of detail that should be given and how it should be provided should also be provided.

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?

This question is difficult to answer without sight of the proposed guidance on the revised regulatory regime, which we understand will follow the conclusion of this consultation. Although a succinct approach to the Code is welcomed, it is essential that solicitors are guided as to what is expected from them, both in terms of compliance with the new provisions on a practical level and with regard to the SRA's proposed approach to enforcement.

Question 7

In your view is there anything specific in the Code that does not need to be there?

No, we do not consider that there are any specific provisions of the Code which ought to be removed.

Question 8

Do you think that there anything specific missing from the Code that we should consider adding?

We refer to our response to question 4.

Amongst others, current Principle 5 (providing a proper standard of service to your client) is omitted from the new Code. Our view is that this Principle should be maintained because it is distinct from the obligation to act in the best interest of each client (new Principle 6) and emphasises the importance of solicitors providing a good and timely service to the public. We do not believe that there is a good reason for excluding this Principle from the new Code for solicitors.

Question 9

What are your views on the two options for handling conflicts of interests and how they will work in practice?

As this is often the most complex area to get right and goes to the heart of what it means to be a solicitor (in that it is the basis on which client trust and confidence is often built) we must ensure that there is true clarity in this area. The lack of example scenarios and guidance makes it difficult to assess how the SRA sees the two proposed options working in practice and therefore makes it difficult for us to make any substantive comments. For example, if a firm is instructed to act for a group of shareholders who will have an agreed desire to conclude the shareholders' agreement but may have slightly different interests in the detail, the lack of guidance makes it difficult to assess whether it would be permissible to act for all shareholders under Option 2. One could argue that as there are bound to be slightly different views amongst the shareholders, Option 2 would not allow you to act for all shareholders because the common interest exception is no longer available. However it could also be argued that as you will not necessarily know at the outset of a matter how different those views will be, potentially you are only recording the shareholders' requirements with just the possibility of a conflict on the horizon so you could proceed but then cease acting should things escalate to an actual conflict. Such uncertainty is not good for the profession or for clients.

Clear guidance is needed for conveyancing matters (akin to the current indicative behaviour 3.7 on acting for lender and borrower).

In the absence of any guidance, Option 1 is preferable. On the face of it, Option 2 appears to be too restrictive with the result being that solicitors will lose the ability to act in certain defined circumstances (ie common purpose/ substantial common interest) when in fact acting in such circumstances (with safeguards) may sometimes be of benefit to the client through cost and time savings because they do not have to instruct other solicitors. Such a change would be a retrograde step.

Whichever option is adopted, clarification is needed as to how the conflict rules between the two different codes will work.

Question 10

Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

No – this answer is predicated by the cultural issues surrounding the Code. The Code is not an accessible document. It is not covered off in detail in training for new solicitors. There is a widespread education piece here which needs to be addressed across the profession.

In practice it tends to be referred to as a point of reference once the need to consult it has been identified. Therefore whilst the attempt to shorten the Code is laudable this does result in a general non-specific form of words being used which absent any specifics or examples by way of indicative behaviours is unlikely to provide clear guidance to those consulting it.

A good example of this is the vagueness surrounding identifying a client's identity and lack of examples demonstrating indicative behaviours around acting in the best interests of the client.

A particular concern is also the removal of references and requirements to comply with the law and specific legislation. In the absence of any provision of indicative behaviours, the identification of specific legislation as the source of the requirement elaborated in the Code would at least steer the writer to the primary legislation as a source of advice.

The SRA's attention is drawn to the example of the Financial Conduct Authority's Handbook particularly the format of the online edition where it is easy to drill down into the requirements, examples are given by way of definitions in the glossary which are cross referenced to further sources of information and significant guidance as to the interpretation of specific rules is given in the Perimeter Guidance PERG section.

Question 11

In your view is there anything specific in the Code that does not need to be there?

No

Question 12

Do you think that there anything specific missing from the Code that we should consider adding?

As set out in Question 10 above, the lack of particularity in the wording does suggest the need for guidance in the form of specific examples or indicative behaviours to be included which are presently missing. This should be reconsidered.

Clear guidance on conflicts is needed.

This question cannot be answered properly until the proposed associated guidance has been published by the SRA. Without guidance the revised Code will create more uncertainty than exists at present. Without seeing the proposed guidance, Solicitors cannot know whether it will properly address such uncertainty.

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?

As indicated above, it requires guidance to help provide clarity. We have also indicated above where we support the Law Society's proposed alternative drafting.

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.

We are supportive of retaining both roles for recognised bodies. We consider that they represent an effective transmission mechanism for bringing regulatory compliance into the mainstream management of larger entities in a form that is consistent with the varying regulatory risks and requirements found across the different types of legal practice carried on within those entities. No members of the group making this response are involved in recognised sole practices, but as a matter of principle we have always considered the concept of a COLP or COFA in a sole practice a somewhat artificial construct and arguably it would be better if additional duties were put directly on solicitors who choose to operate as sole practitioners in their role as Principal.

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?

The COLP and COFA are exposed to considerable personal risk, through the need to make judgements in real time that may with the benefit of hindsight appear wrong. In our view the removal of Indicative Behaviours will tend to increase that risk. Originally, for larger entities, this risk was mitigated by access to a Regulatory (originally Relationship) Manager who, whilst not offering "safe harbour" was nevertheless a valuable sounding board in areas of uncertainty. The reduction in scope of Regulatory Management means that very few firms now have that option. The Ethics guidance available from the SRA is not at a sufficiently high level to meet this need and is sometimes questionable. In our view for entities paying over a threshold for annual entity based fees and Practising Certificates combined (the level to be determined) access should be available to a small group of senior regulators able to offer meaningful guidance on sensitive and/or complex issues.

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?

We regard this proposal as sound in its original conception, but flawed as to the detail. As a logical extension of the abolition of the Separate Business Rule, freeing solicitors to provide non-reserved legal services and services other than legal services through alternative structures would make a valuable contribution to competition and public choice. Unfortunately those advantages are in our view outweighed by the proposed lack of regulatory equality between solicitors in regulated and non-regulated entities. In particular, the proposals in relation to both conflicts and requirements for professional indemnity insurance appear to offer an unacceptable competitive advantage to the non-regulated body. Moreover we consider that the relaxation in each of these areas represents a significant threat to the protection enjoyed by the public. There is a substantial threat to the Solicitor brand since the public are unlikely to be able or willing to distinguish between a loss suffered, through conflict or the lack of insurance, caused by a Solicitor in an unregulated entity as opposed to one in a regulated entity.

We do not support this proposal in its current form.

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?

Whilst individuals within the firms represented in this response may wish to work outside a regulated entity, it is not possible for Bristol Risk Managers' Group to speak for the intentions of either them, or the individual firms represented. In general terms, though, we can say that since each firm carries out a mix of reserved and unreserved work, it would be necessary to set up a separate entity to take advantage of the looser regulatory environment and clearly one issue would be the difficulty of establishing governance between the parent firm and the new entity, together with the risks of brand contamination. It is beyond the scope of this response to consider how such issues and risks might be weighed against the opportunities by each firm.

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?

This seems to be a sensible approach. The risk with allowing a sole solicitor to provide reserved legal activities via a non-authorised body dilutes the profession's standards and potentially puts clients as risk (in terms of standards of service, regulation of that provider and professional indemnity insurance requirements.)

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?

Allowing newly qualified solicitors set up their own practice seems to present a significant risk to the profession. Surely this presents a risk that whilst "qualified" the individual would lack the relevant experience to enable them to consider and understand all the risks that operating your own practice presents. The requirement to be supervised for 36 months before being deemed qualified to supervise seems appropriate. Whether this is too long or not long enough is up for debate but it seems appropriate that there would be some period of time where a newly qualified person should be supervised by an experienced individual. The risk to the profession here is that a proper standard of service is not provided which impacts the reputation of the solicitor brand.

Question 20

Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

Yes. We think it is important that clients know the protections that SRA regulated firms require and provide its consumers and also what protection an unregulated firm does not offer. This should allow consumers to make an informed choice in relation to protection and support when choosing a legal service provider and the risks associated with choosing a non SRA regulated provider.

Question 21

Do you agree with the analysis in our initial Impact Assessment?

We endorse the comments made in the Law Society's response to this question. We do not agree that the changes proposed will make legal services more accessible. There appears to be no evidence to support the assertion that the changes "should boost growth". Regardless of the content of the consumer support strategy, we believe that the proposed changes will confuse consumers, expose them to unnecessary risks through their lack of understanding of whether their solicitor can conduct reserved or unreserved activities for them and thereby damage trust and confidence in the profession.

Question 22

Do you have any additional information to support our initial Impact Assessment?

No

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?

While the justification put forward for this proposal in the consultation paper appears logical, it does expose the ongoing risks of allowing regulatory inequality, the creation of uneven playing field for those within the legal market and the potential for confusion amongst consumers. Surely passing the responsibility to individual solicitors to safeguard client assets within an unregulated business, within which they may have little control, confidence in or knowledge of the management systems, will make it far less attractive for solicitors to want to work for alternative legal service providers and therefore will encourage solicitors to remain working within regulated practices?

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?

The priority must be to protect client money, especially given that many Special Bodies will be working with particularly vulnerable people. On that basis we agree with the proposal for those working in Special Bodies.

We cannot comment on the application of this rule to in house solicitors.

It is well established that criminals are targeting solicitors and their clients with a view to diverting client funds into fraudulent accounts. It might help the profession to be able to access a (controlled) list of firms with client accounts to be able to verify the details against any fraudulent details which may have been provided.

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?

If not, what are your reasons?

No we do not agree that the SRA Compensation Fund should not be available to clients of solicitors working in alternative legal service providers. We are concerned that:

1) It will reduce consumer protection

Consumers who suffer loss as a result of fraud, negligence or the inadequate insurance of a solicitor in an alternative legal services provider will not have access to the SRA Compensation Fund in relation to this loss and so may well be without financial recourse. We are extremely concerned that these proposals will have a fundamental reduction in consumer protections.

2) There will be lack of clarity to the consumer

We are not confident that the consumer will fully understand the relevant distinctions of levels of protection offered and that by seeking advice from a solicitor working in an alternative legal service provider they will not be eligible to make a claim on the Compensation Fund.

We understand that under the proposed changes it will be the responsibility of the solicitor to advise clients of the regulatory protections they are entitled to and to explain to them, if necessary, that they are not eligible to make a claim on the Compensation Fund. We are concerned about how and when this information will be communicated to the consumers and the lack of clarity around this.

3) The "non savvy" consumer will be most adversely impacted by the changes

We understand that the proposed changes are driven by a perceived cost benefit to the consumer. We understand that the suggestion is that solicitors working in alternative legal service providers will be able to offer consumers a more competitive price as they do not have to make payments into the Compensation Fund. However, whilst we accept there will be some sophisticated consumers who are willing to be exposed to some risk to trade off certain protections (such as access to the Compensation Fund) in exchange for lower prices, we think those looking for cheaper alternatives are more likely to be the less commercially driven consumers who may well not even be aware they are running the risk.

4) It will damage the existing Compensation Fund

The proposals also risk undermining or depleting the existing Compensation Fund as solicitors working in unregulated entities would not have to contribute to the Fund. This would seem likely to mean that solicitors working in regulated entities would have to make additional contributions to secure the Fund’s viability, increasing the regulatory burden on them and exacerbating the two tier profession that could result

from the proposals.

Question 26

Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

No we do not agree with the proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor. We think that there should be a mandatory obligation for the solicitor to have sufficient individual professional indemnity insurance in place (whether that is arranged and provided by them or their employer).

Question 27

Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

Yes. The difficulties we envisage with the proposed approach are:

1) Consumer confusion

We are concerned about the risk of consumer confusion. We think the different protections attached to the services provided by solicitors dependent on whether it is through regulated providers or alternative legal providers creates scope for confusion. We think there is a potential risk that consumers will believe that in gaining advice from a solicitor through an alternative legal services provider they are still subject to the same protections as if that solicitor worked in a regulated provider (eg the SRA compensation fund protection and professional indemnity insurance cover).

2) Lack of clarity

We think that some consumers may not understand that, in seeking the services of a solicitor through an alternative legal service provider, they are potentially foregoing some of the protections that currently exist (including access to the Compensation Fund and regulated indemnity insurance requirements).

Even for those people working within the legal sector, professional indemnity insurance and client protections are complicated topics which are not easily understood and so clients cannot be expected to fully comprehend the nuances and implications of purchasing their legal services through an unregulated legal provider.

3) It will create a favourable competitive advantage to unregulated entities

We are concerned that those smaller firms which are currently struggling to get PII might see becoming an alternative service provider a more attractive option. However this decision would be driven by commercial pragmatism rather than the clients' best interests. Similarly the proposals will make regulated entities less attractive to consumers because they will be competitively disadvantaged versus unregulated entities.

4) Detriment to the profession

We are also extremely concerned that the proposed changes will tarnish the legal profession as a whole and will damage the title of solicitor.

We think there is an expectation from the consumer that the legal advice they receive is covered by some form of professional indemnity insurance. If solicitors are allowed to work without mandatory insurance cover we think it will lead to a decrease in confidence in the legal profession and a "slippery slope" towards a deregulated legal market.

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?

Yes. Professional indemnity insurance is in place to ensure that consumers can access a financial remedy so this protection should be available to all consumers regardless of how they access reserved legal activities.

Question 29

Do you have any views on what PII requirements should apply to Special Bodies?

The level of consumer protection should be consistent with that provided by regulated firms. We suggest that it replicate the current "reasonably equivalent level of cover" contained in the Practice Framework Rules for solicitors employed by Special Bodies.

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?

We agree it is not desirable to impose thresholds on non-SRA regulated firms, which are mainly or wholly owned by SRA authorised solicitors. We should state, however, that the imposition of thresholds does not get around the fundamental concerns we have about the SRA's proposal to permit solicitors to deliver non-reserved legal services to the public via unregulated firms. These concerns are primarily about the likely reduction in consumer protection and reputation of solicitors operating within such entities. If this were permitted, the imposition of a threshold is likely to cause confusion among consumers and may lead to uninformed decision-making on their part about the most appropriate firm to provide the service they are seeking.

Question 31

Do you have any alternative proposals to regulating entities of this type?

No. We believe only one system of regulation should apply equally to all providers of legal services, whether individual or entities, to ensure fair, consistent consumer protection in a framework which is clear and easily comprehensible to the consumer. To have a two-tier system will not achieve that and runs the high risk of duality of standards between regulated and unregulated firms, as well as confusion to the consumer. We are concerned that such a system may ultimately reduce public confidence in the legal profession, a principle the SRA must not allow to be compromised.

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?

The SRA's proposals do not clearly state what its position is on intervention in a solicitor's individual practice within an unregulated entity. The SRA has the power to do this. However, it is likely to prove to be a more complex and difficult process to untangle the practice of the solicitor and the unregulated entity, without the right to intervene in the unregulated practice. We are unclear how the SRA's additional powers to request information could help it in investigations where intervention was not an option, for the reasons described above. We consider that the same issues would arise as to the information owned by the unregulated entity (and as such presumably outside the jurisdiction of the SRA) and that owned by the solicitor.

We see this potential difficulty as another very important reason for retaining a regulatory framework applicable to all legal services providers. If the SRA is limited as to the action it is empowered to take against an unregulated entity, this may result in an outcome whereby standards are compromised and consumer protection is reduced, notwithstanding the regulatory obligations on the solicitor operating within that entity. The regulatory disconnect between the solicitor and the unregulated entity employer may lead to this outcome as a result of the entity's ability to shift total regulatory responsibility to the solicitor. We believe this will create a significant tension between the commercial objectives of the entity and the regulatory obligations of the solicitor. Where this exists, the solicitor's economic dependence on the employer makes this undesirable outcome more likely.

Question 33

Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

Yes. We agree.

Thank you for completing the **Consultation questionnaire form**.

Please save a copy of the completed form.

Please return it, along with your completed **About you form**, as an email attachment to consultation@sra.org.uk, by **21 September 2016**.

Alternatively, print the completed form and submit it by post, along with a printed copy of your **About you form**, to

Solicitors Regulation Authority
Regulation and Education - Policy - Handbook 2017
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20 September 2016

This is our response to the SRA Consultation

Looking to the future - flexibility and public protection

We are responding to the SRA consultation

We have seen the comprehensive response submitted by The Law Society on 8 September 2016 and we adopt that response as our own . The Law Society's response can be found at this link:

http://www.lawsociety.org.uk/policy-campaigns/consultation-responses/looking-to-the-future-consultations-law-society-response/

Consultation Questions
Our replies to the SRA Consultation Paper have been completed below - the relevant 33 questions set out in the Consultation Questionnaire form provided in electronic format by the SRA, and these are contained below on the accompanying pages. We have also been guided by the response from the West London Local Law Society.

Andrew Wainwright

Wainwright & Cummins LLP

Consultation questionnaire form

This form is designed to be completed electronically—in MS Word. Please save it locally before and after completing it.

Question 1

Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

We have not encountered any issues in respect of the suitability test

Question 2

Do you agree with our proposed model for a revised set of Principles?

No it seems misguided We see no reason to change the principles on which young solicitors have been trained and which embody the ethical considerations central to all practising solicitors.

Question 3

Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

No, the removal of the principles that a solicitor should provide a proper standard of care to client, act in the best interest of each client and protect client money and assets seems to be a betrayal of the aims a professional should strive for.

The existing principles make clear a solicitor's professional responsibilities

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?

See comments above. We endorse the Law Society's concerns about the abolition of existing Principle 5, 8 and 10.

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?

The proposals are wrong and misconceived

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?

No you have not produced a rule book for professionals but arguably an amoral charter without any guidance or indication as to where the line is drawn. Regulation should embody some degree of certainty. These proposals as written do not do that.

Question 7

In your view is there anything specific in the Code that does not need to be there?

No the existing code is fine

Question 8

Do you think that there anything specific missing from the Code that we should consider adding?

We endorse The Law Society's response to this question

Question 9

What are your views on the two options for handling conflicts of interests and how they will work in practice?

No. The options are untenable, and weaken public protection and will leave consumers confused. If it is accepted that to act for one or more clients where there is actual conflict or a significant risk of conflict is wrong then that needs to be said. We do not believe that is a proper way to train young lawyers or for the profession as a whole to behave.

Question 10

Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

No you are potentially undermining the solicitors profession without adequate protection for clients or to prevent damage to the reputation of the legal profession

Question 11

In your view is there anything specific in the Code that does not need to be there?

There is no need to introduce change.

Question 12

Do you think that there anything specific missing from the Code that we should consider adding?

Yes We urge you not to make your proposed changes. This apart, there are no proper provisions covering how undertakings are to be dealt with within unregulated undertakings. This needs to be clarified

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?

Yes your code is wrong, and we endorse the comments of the Law Society. Your approach creates two tiers of solicitors, those working in a regulated entity and those working in an unregulated entity, with consequential risks to consumer protections and professional standards which will damage the standing of solicitors and create confusions for solicitors and their clients

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.

We also endorse The Law Society's call for careful consideration of the roles of the COLP and COFA. There is a thin dividing line between over regulation and sufficient regulation to inspire public confidence. The prospect of solicitors practising in unregulated entities without any form of internal supervision causes us concern.

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?

Yes. Please provide clear and detailed guidance

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?

We have seen The law Society's response and endorse those comments.

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?

We consider that this is to be avoided because of the lack of protection for the public.

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?

We believe there is substance to this suggestion

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?

We endorse the Law Society's response

Question 20

Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

The better model would be to require all unregulated entities to highlight the lack of protection to its consumers. That is where the danger lies to consumers

Question 21

Do you agree with the analysis in our initial Impact Assessment?

No. It ignores reality. The better model would be to require all unregulated entities to highlight the lack of protection to its consumers. That is where the danger lies to consumers. See the Law Society's detailed response

Question 22

Do you have any additional information to support our initial Impact Assessment?

No it is wrong. We have noted The Law Society's analysis of the Impact Statement and we commend that analysis.

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?

Yes It would clearly not be appropriate for a solicitor in an unregulated entity to hold client money in their own name; not least because the SRA is proposing the abolition of Principle 10: You must protect client money and assets.

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?

We support the Law Society's response

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?

If not, what are your reasons?

Yes but they should not be allowed to hold themselves out as solicitors. We endorse the comments of the Law Society. Two tier in this context means two tier.

Question 26

Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

No all solicitors should have PII cover or they should not be allowed to use the title solicitor.

Question 27

Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

Many see comments above. We endorse the Law Society's comprehensive response on this topic.

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?

Yes

Question 29

Do you have any views on what PII requirements should apply to Special Bodies?

The same as apply to all solicitors

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?

If you are regulating them they should be held to the same standards as solicitors. We endorse the Law Society's comprehensive response on this topic.

Question 31

Do you have any alternative proposals to regulating entities of this type?

No. We endorse the Law Society's comprehensive response on this topic.

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?

They seem dangerous and weaken consumer protection. We endorse the Law Society's comprehensive response on this topic.

Question 33

Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

Yes, unless regulation is returned to the Law Society.

Thank you for completing the **Consultation questionnaire form**.

Please save a copy of the completed form.

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Alternatively, print the completed form and submit it by post, along with a printed copy of your **About you form**, to

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199 Wharfside Street
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Response to SRA consultation: Looking to the future - flexibility and public protection

On 1st June 2016, the SRA released a consultation “Looking to the Future - Flexibility and public protection” in which it proposes that the current Solicitors Code of Conduct should be replied with two separate codes, namely a Code of Conduct for Solicitors and a Code of Conduct for Firms. The SRA’s aim in proposing two separate codes is to ensure that every solicitor is absolutely clear about their personal obligations and responsibility to maintain professional standards and that firms have clarity about the systems and controls they need to provide good legal services for the consumers.

In addition to such changes, the SRA further proposes to afford solicitors greater flexibility in providing an opportunity for them to freely deliver services outside of regulated firms. These proposals seek to address the growing concerns in respect of access to justice for both the public and small businesses, who currently find themselves unable to access legal advice at an affordable price.

With regards to the creation of two separate codes of conduct, Wakefield Council Legal Team would welcome such changes, however currently there are no in-house specific provisions contained within the code. As such the proposed code may include provisions, which should only apply to solicitors in private practice and the Local Authority would ask the SRA to give consideration as to whether such provisions should be nuanced to avoid any unintended consequences.

The current proposals would be likely to lead to a two tier profession through the creation of a second class of solicitors, who deliver unreserved work through unregulated entities but without the necessary consumer protection. Solicitors that provide non-reserved legal services to the public through an unregulated alternative legal services provider would not be required to meet the minimum terms and conditions for Professional Indemnity Insurance set by the SRA or to contribute to the Solicitors Compensation Fund as their clients would not have access such redress. It is proposed that such solicitors would be required to ensure that their clients understood the protections available to them, however this does not mitigate the fact that consumer protection is significantly diminished. It cannot be ignored that ordinary people, such as the residents of Wakefield, are likely to be adversely affected without a clear mechanism for redress.

Furthermore, whilst the proposals suggest that an unregulated entity would be unable to use the terms ‘solicitors firm’ or ‘solicitors’ this does not mitigate the potential for confusion. It is anticipated that very few individuals would be able to distinguish between a regulated firm of solicitors and an unregulated law firm and therefore be unable to appreciate the differing protection afforded to them should things go wrong.

In practice, as I understand it, the proposals would mean that any in-house solicitor could provide advice and assistance to the public provided they are not carrying out one of the reserved legal activities. Whilst on the face of it, this could be regarded as an attractive option to enable in-house solicitors to provide advice to other bodies and authorities without the need to obtain a waiver, it is likely to result in increasing conflict of interest situations.

Furthermore, the potential for liability exposure cannot be underestimated and there is a risk that such liability would have to be covered by the Council’s insurance. Additionally, any advice given in these circumstances would not be covered by legal professional privilege which is a great disadvantage to the proposals. What is more, it is unclear from the proposals as to whether an in-house solicitor would be able provide services to more than one local authority or body, therefore clarification is required so that any impact can be determined. More generally, it is concerning that legal work undertaken by the Local Authority and therefore partially funded by the tax payer could be delivered via an unregulated firm in the future, which is unlikely to instill public confidence.

Wakefield Council Legal Team echoes the concerns raised by The Law Society in suggesting that the proposals are misconceived and have the potential to be damaging upon the profession rather than enhancing standards and improving access to quality services as the SRA would hope.

Bernadette Livesey

City Solicitor

Wakefield Council

20th September 2016

Waller and Hart Solicitors LtD

Consultation: Looking to the future - flexibility and public protection

Consultation questionnaire form

This form is designed to be completed electronically—in MS Word. Please save it locally before and after completing it.

Question 1

Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

Question 2

Do you agree with our proposed model for a revised set of Principles?

Question 3

Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

The removal of the principles that solicitors should 'provide a proper standard of service to your clients', 'act in the best interests of each client' and 'protect client money and assets' has negative implications for consumer protection and the maintenance of professional standards.

The Principles should continue to refer to the solicitor’s duty to keep the affairs of the client confidential.

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?

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?

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?

The creation of separate codes of conduct distinguishes the responsibilities of an individual solicitor, wherever he or she is working, and those of a regulated entity. The creation of two codes is not an issue.

However, the approach creates two tiers of solicitors: those working in a regulated entity and those working in an unregulated entity, with consequential risks to consumer protections and professional standards which risk damaging the standing of solicitors and creating confusion for consumers;

Although both of the draft Codes focus on brevity and simplicity, they provide less certainty about what is and is not permitted. Some solicitors might prefer a more definitive approach so that compliance is clearer and there is less discretion for the SRA to determine when there is a breach, which could result in enforcement action that might have been avoidable if the Codes were clearer. It is difficult to take an informed view on how the new Codes would work in practice be without seeing the associated guidance which the SRA has not published alongside the draft Codes.

The language of the draft Codes is imprecise and could mean that members currently practising in a fully compliant way could find themselves accused of a breach after the proposed new codes come into force.

There is some overlap between the two draft Codes, most noticeably in areas such conflict, complaints and client information/identification. If this is not addressed, it is not clear which would take precedence where such inconsistencies exist.

Question 7

In your view is there anything specific in the Code that does not need to be there?

Question 8

Do you think that there anything specific missing from the Code that we should consider adding?

Question 9

What are your views on the two options for handling conflicts of interests and how they will work in practice?

The consultation makes clear that solicitors employed by an unregulated entity would continue to be regulated as individuals and would be subject to conflict rules. However, as the conflicts rules will not apply to unregulated entities, in practice they will not have much effect if any on the unregulated entities whilst the regulated entities will be subject to the same level of restriction as they are now or, potentially, a greater level depending on which of the two options on conflicts is adopted by the SRA.

The SRA offers two options for dealing with conflicts:

- Option 1 largely replicates the 2011 Code, in prohibiting a solicitor from acting where there is a conflict or significant risk of such a conflict, unless specified circumstances are met and protections are provided.

- Option 2 would narrow the ability to act given that it provides for a complete bar on acting where there is an actual conflict, and protections to be put in place if there is a significant risk of a conflict.

Option 2 may be unworkable because it is not always possible to identify that an actual conflict exists and a solicitor may unwittingly act in a conflict situation. Because the non-regulated colleagues of regulated solicitors would not be subject to conflict rules, there is a risk of confusion to consumers, a very favourable competitive advantage to unregulated entities and lack of a fundamental consumer protection for clients of unregulated entities.

Question 10

Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

Question 11

In your view is there anything specific in the Code that does not need to be there?

Question 12

Do you think that there anything specific missing from the Code that we should consider adding?

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?

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.

Consideration of these questions will benefit from the input of current COLPs and COFAs who are best placed to identify unnecessary requirements while firms and sole practitioners will also wish to consider how valuable the roles themselves are.

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?

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?

There is insufficient evidence to support these proposals or the expected benefits from their implementation, which are stated to include improved access to quality services at affordable prices, enhanced professional standards, and increased employment opportunities.
In particular, the proposals could have undesirable and/or unintended consequences as follows:

Reputation and standing of solicitors
The proposals may result in two tiers of solicitors. Those working in unregulated businesses are unlikely to be able to give advice which is legally privileged, will not be required to have PII, clients will not have the benefit of compensation fund and the protection of the principles governing conflicts of interest. Not only is this likely to create consumer detriment and confusion but it is likely to damage the reputation of the title of solicitor.

Legal Professional Privilege (LPP)
LPP should attach to clients seeking advice from a solicitor holding a current practising certificate wherever he or she practises and any attempts to dilute or make LPP more difficult to obtain or enforce could erode the concept of LPP, which is a cornerstone of the justice system and a key right of clients. This could also undermine the standing of the solicitor profession both at home and abroad. It is not right in principle for LPP to be a distinguishing factor between regulated and unregulated service providers.
It is likely that in-house solicitors working in an unregulated entity, for example a local authority, providing advice to individuals or organisations other than the unregulated entity would not have the protection of LPP.

Conflicts and confidentiality
The proposals will result in confidentiality only applying to individual solicitors working in an unregulated entity, including in an in-house team, but not to the entity or to other employees. There is a risk that a solicitor may unwittingly act in a conflict situation and that clients may not be aware of a potential or real conflict of interest or of the fact that the entity is not subject to the rules on conflict. It also results in making regulated entities less attractive because they will be competitively disadvantaged versus unregulated entities.

Consumer protections - Professional Indemnity Insurance (PII) and the Compensation Fund
Under the SRA's proposals, solicitors working in unregulated entities would not be required to have PII and their clients would not have access to the Compensation Fund if things go wrong. This risks eroding a key element of

current client protection. The proposals risk creating two tiers of client protections - with different rules and protections applying to solicitors' clients depending on the kind of entity in which the solicitor is working.
The SRA proposes that solicitors working from unregulated entities would be required to make sure that their clients understand whether and how the services they provide are regulated and the protections available to them. Even for those working within the legal sector, insurance and client protections are complicated topics which are not easily digested and understood and clients cannot be expected to fully comprehend the implications of purchasing their legal services through an unregulated provider. The proposals also risk undermining or depleting the existing Compensation Fund as solicitors working from unregulated entities would not have to contribute to the Fund; this would seem likely to mean that solicitors working in regulated entities would have to make additional contributions to secure the Fund's viability, increasing the regulatory burden on them and exacerbating the two tier profession that could result from the proposals.

Consumer confusion about status
Under the proposals, solicitors holding a current practising certificate would be able to use their title whether providing legal services to the public through a regulated or unregulated entity. While a provider would not be able to use the term ‘solicitors firm’ or ‘solicitors’ unless the entity was regulated by the SRA,this would seem unlikely to mitigate the risk of consumer confusion especially where the unregulated entity described itself as a ‘law firm’ or 'legal services firm' or advertised that they employ solicitors. Consumers will lose the assurance they currently have as to quality and protections when they engage a solicitor. It is inappropriate that consumers will have to undertake fairly substantial due diligence. This will additionally undermine the standing of the profession internationally.

Annual practising certificate (PC) fees
There is no information on this point and the SRA needs to undertake and publish an analysis of the projected impact of its proposals on the PC fee, and in particular the turnover based firm fee. The SRA should not close this consultation until this information is available.

Supervision
Newly qualified solicitors without any experience would be able to set up their own unregulated firms. Newly qualified solicitors working in an unregulated entity would no longer have the requirement of support and guidance from more experienced solicitors. This will increase the risks to clients as well as putting newly qualified solicitors themselves at risk, and negatively impact on the standing of the solicitor profession Damage to standards will increase incrementally as this applies year on year and fewer solicitors in unregulated entities have ever received supervision.

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?

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?

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?

Question 20

Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

Question 21

Do you agree with the analysis in our initial Impact Assessment?

Question 22

Do you have any additional information to support our initial Impact Assessment?

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?

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?

Consideration of this question will benefit from the input of current in-house teams and relevant local employers.

Consideration of this question will benefit from the input of special bodies, such as law centres, which play an important role in providing access to justice for vulnerable people who may not be able to afford access to legal services.

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?

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?

Question 27

Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

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?

Question 29

Do you have any views on what PII requirements should apply to Special Bodies?

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?

Question 31

Do you have any alternative proposals to regulating entities of this type?

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?

Question 33

Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

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Wards Solicitors

Consultation: Looking to the future - flexibility and public protection

Consultation questionnaire form

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Question 1

Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

No.

Question 2

Do you agree with our proposed model for a revised set of Principles?

In theory yes.

Question 3

Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

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?

No

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?

Guidance is always useful as otherwise the entire system relies upon “after the event” decisions – too late as by then any harm has been done.

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?

It is short but guidance will still be required to eliminate risk to clients and reduce uncertainty.

Question 7

In your view is there anything specific in the Code that does not need to be there?

No

Question 8

Do you think that there anything specific missing from the Code that we should consider adding?

Guidance especially on conflicts of interest. Even if a firm is clear on its own interpretation, it is useful to be able to quote guidance to clients or others who are complaining.

Question 9

What are your views on the two options for handling conflicts of interests and how they will work in practice?

IT is hard to say without operating the rules in practice. However the present rules work and the new Option 2 doesn't seem too prescriptive.

Question 10

Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

It is short and easy to understand. The issue will always be what is not stated however……

Question 11

In your view is there anything specific in the Code that does not need to be there?

No.

Question 12

Do you think that there anything specific missing from the Code that we should consider adding?

No

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?

No

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.

The roles are sensible enough as they are. The issue would be if solicitors as individuals are allowed to work for non-regulated bodies and to call themselves solicitors. What happens there? I really think the idea that solicitors could be regulated as individuals within an unregulated body is dangerous and unworkable in practice. It puts a lot of pressure on the individual – maybe very inexperienced and junior lawyer – to confront an employer and successfully maintain personal compliance against the odds that it would happen.

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?

Nothing specific -.

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?

There are various options that this implies – from a regulated firm setting up a separate unregulated firm for non-reserved activities to non-lawyers employing solicitors despite the entity not itself being regulated.

The Opportunities to run a separate business that is not regulated seem minimal unless you are a non-regulated business in which case you would have a more qualified workforce available.

The Threats however are many making this proposal dangerous and against the consumer interest:

1 The public is not going to be aware of the ins and outs of regulation. The risk is therefore that consumers will not understand the difference between a regulated body with all the protections that has as against a non-regulated entity that may have no PII, no client account etc.. It is not enough to say that information should be supplied to consumers. This information will - if any is included (and who would regulate that?) –be reduced to the absolute minimum required to comply. In other words it will be hidden in small print along with all manner of other things and rarely read by consumers. Some consumers will not appreciate the risks even if they read information about non-regulation. Some will just take risks with impacts on them and perhaps others who are not technically “the client”. For example, a probate instruction from an executor to a non-regulated firm would not provide insurance or cover for mistakes or funds going missing. You will say that this is the current position and not relevant to the issues here. However, at present non-regulated entities do not (openly) employ solicitors. If the rule is brought in as you propose then non-regulated entities will use the individual solicitors to promote their businesses as though they were regulated. That will just confuse the consumer.

2 There will be intolerable pressures on individual often inexperienced solicitors who will be required to comply with the Code by the SRA but have little or no influence over their employers who will not be at risk as they will not be regulated. The outcome will be that individual solicitors will be placed in an invidious position of potential conflict with their employers and risk of sanction by SRA for following their employer’s instructions.

3 If solicitors are to work for non-regulated bodies then they should be banned from using the word “solicitor” in any correspondence or advertising or literature of any kind. The experience and skills would be available but not the title of solicitor. To do otherwise would risk confusion and lead to loss of public confidence in both the profession and the SRA. The recent case of Lyons v. Kerr-Robinson [2016] EWHC 2137 (Ch) is an example of what can happen even with the current rules (which seem to have been broken) let alone the free for all that you seem to be proposing.

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?

Unlikely to do it as we would not wish to work without insurance and so what would be the benefit? The only real potential saving would be for a firm such as ours to split to create a non-regulated company that did non-reserved work only avoiding Practising Certificate fees…….. loser – SRA!

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?

Very wise.

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?

Experience can only be gained by working in the field. Ignoring the practical difficulties of a newly qualified solicitor getting regulated and insured without a track record, this seems very short sighted from a public protection aspect. Most newly qualified solicitors need and welcome supervision by their more senior colleagues in their early years. If they don’t then it is a sign of a cavalier attitude.

Question 20

Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

Not necessarily. The problem you could create would relate to non-regulated firms not providing information about the risks they pose and their lack on insurance, regulation etc..

Question 21

Do you agree with the analysis in our initial Impact Assessment?

For reasons stated – No.

Question 22

Do you have any additional information to support our initial Impact Assessment?

Whilst there is clearly an agenda to open up the profession and the work it does, this should not be done at the expense of public protection and clarity. The word "Solicitor" implies a brand to the consumer that includes all the protections of client accounts, PII, disciplinary action and so on. It is also not enough to say the LeO might (or might not?) in effect police non-regulated firms.

There is an existing a serious problem already with non-regulated non-qualified firms offering legal services without consumer protection. My own experience has been mostly with the issues created by non-qualified Will Writers. I see no reason to assume that allowing individual solicitors to work for such entities will enhance consumer protection or reduce fees. It will simply endorse and justify the use of non-regulated firms and companies.

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?

They shouldn’t be allowed to work as solicitors in an unregulated environment at all let alone hold client money. What will stop the unregulated entity from holding the money?

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?

I don’t think any employed solicitor should be expected or allowed to hold client money.

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?

If not, what are your reasons?

I agree – why should it be? But the case referred to above (Lyons v Kerr-Robinson) shows that the expectation of a client might be that it would…….

Question 26

Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

If you mean those working for unregulated bodies then it would not be practical as insurers would not be keen. Imagine the arguments over whether a mistake on a file was the responsibility of the individual solicitor or the non-regulated entity or another person within it…….

Question 27

Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

For reasons stated, I think your approach on allowing solicitors to work for unregulated bodies and to be called/use the solicitor moniker are frankly bonkers and against the public interest.

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?

Yes.

Question 29

Do you have any views on what PII requirements should apply to Special Bodies?

Everything that applies to regulated frims as now.

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?

Can’t actually see you could do this as you wouldn’t be regulating them.

Question 31

Do you have any alternative proposals to regulating entities of this type?

More work should be reserved – eg Wills and Probate – for public protection. Existing regulation should not be reduced for legal work. The risks are too great.

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?

No as the situation should nt be allowed to arise.

Question 33

Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

Yes or there will be chaos.

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Consultation: Looking to the future - flexibility and public protection

Response ID:610 Data

2. Your identity

Surname

Kay

Forename(s)

Peter

Name of the firm or organisation where you work

Ware & Kay Solicitors Ltd

We may publish a list of respondents and a report on responses. Partial attributed responses may be published. Please advise us if you do not wish us to attribute your response or for your name or the name of your firm or organisation to appear on any published list of respondents.

Attribute my/our response and publish my/our name.

Please identify the capacity in which you are submitting a response. I am submitting a response...

on behalf of my firm.

Please enter your firm's name:: Ware & Kay Solicitors Ltd

3.

1. Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

No

4.

2. Do you agree with our proposed model for a revised set of Principles?

No for the reasons stated in this response.

5.

3. Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

No for the reasons stated in answer 4.

6.

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?

Are there any other Principles that you think we should include, either from the current Principles or which arise from the newly revised ones?

We consider that following principles should not be removed.

That solicitors should

1. 'provide a proper standard of service to your clients',
2. 'act in the best interests of each client' and
3. 'protect client money and assets'.

Their removal will:

a. adversely impact consumer protection;

b. reduce essential professional standards; and

c. erode the trust and the unquestioning ability to rely on a solicitor that both clients and other professions currently have in solicitors.

It is a fundamental principle upon which clients rely that their solicitor keeps their affairs confidential. The Principles should therefore continue to refer to the solicitor's duty to keep the affairs clients confidential in order to reassure rather than raise doubt.

7.

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?

As a general comment it is always helpful to provide guidance and scenarios to illuminate dry text.

8.

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?

No.

The creation of separate codes of conduct for an individual solicitor and one for regulated entities creates two types of solicitors: those working in a regulated entity and those working in an unregulated entity. This will undoubtedly lead to confusion amongst consumers, damage the standing of solicitors overall and particularly diminish the standing of solicitors who practise in unregulated entities. They will be seen as second class. De-regulating entities in this way will bring risks to consumer protection.

9.

7. In your view is there anything specific in the Code that does not need to be there?

None noted other than resolution of conflicts created by having 2 codes. Which prevails?

There is some overlap between the two draft Codes, most noticeably in areas such conflict, complaints and client information/identification which will need to be resolved for the sake of clarity.

10.

8. Do you think that there anything specific missing from the Code that we should consider adding?

Enforcement officers and solicitors will benefit from clear guidance on interpretation and scenario case studies linked to the principles.

11.

9. What are your views on the two options for handling conflicts of interests and how they will work in practice?

The 2 options suggested are unworkable for a solicitor working within an unregulated entity. If a colleague in an unregulated entity is not a solicitor then that colleague will be able to ignore the conflict rules leaving the solicitor in an impossible position of working alongside a colleague for a firm that breaches a code that applies to him/her as an individual.

Conflicts of interest are detrimental to consumer interest and protection. Encouraging unregulated firms to ignore conflict rules on the basis of reducing cost to and access to legal advice for a consumer is contrary to what the SRA and solicitors should stand for.

Option 2 is unworkable in practice as it will lead to conflicts being ignored when transactions are part way through. There will be no need to consider conflicts of interest at the outset unless it actually exists and once the transaction is underway the rules will not be scrupulousy adhered to in unregulated entities.

Option 1 therefore is preferred.

12.

10. Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

No

Brevity and simplicity is a laudable ambition but not at the expense of certainty. It is essential that solicitors and consumers know what is and is not permitted. Essential principles are being ignored and trust in the profession will be eroded.

13.

11. In your view is there anything specific in the Code that does not need to be there?

This is a repeat of question 7.

Repeat of answer to question 7:

None noted other than resolution of conflicts created by having 2 codes. Which prevails?

There is some overlap between the two draft Codes, most noticeably in areas such conflict, complaints and client information/identification which will need to be resolved for the sake of clarity.

14.

12. Do you think that there anything specific missing from the Code that we should consider adding?

This is a repeat of question 8.

Repeat of answer to question 8:

Enforcement officers and solicitors will benefit from clear guidance on interpretation and scenario case studies.

15.

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?

Other than as noted in answers to previous question, no.

16.

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.

Yes.

The placing of responsibility on 2 designated persons to ensure compliance within a regulated entity does lead to independent assessment free from the constraints of partnership or collegiate working which may previously have lead to some "toeing the line" under pressure from a more senior colleague.

It therefore is more likely to lead to greater consumer protection.

The absence of this leadership within unregulated entities will be detrimental to the development of any solicitor employed in such entity and their knowledge of compliance with the principles.

17.

15. How could we improve the way in which the COLP/COFA roles work or to provide further support to compliance officers, in practice?

Further regulation would be unwelcome and costly and detrimental to consumer cost reduction and access to legal advice.

Lack of clarity, guidance and examples in the Handbook will be a disservice to the COLP/COFA roles.

18.

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?

The evidence does not support the premise that the proposals will improve access to quality services at affordable prices, enhanced professional standards, and increased employment opportunities.

The evidence is that the overwhelming majority of those who choose not to engage a professional to provide legal advice do so because they are able to resolve their issue themselves without the cost of using a lawyer and have not been disadvantaged in so doing.

The proposals will result in two tiers of solicitors. Those working in unregulated businesses are unlikely to be able to give advice which is legally privileged, will not be required to have PII, clients will not have the benefit of a compensation fund and the protection of the principles governing conflicts of interest. This will harm consumer interests and lead to a loss of trust in solicitors as individuals and as a profession.

Legal professional privilege is essential for the protection of clients and for their solicitors. If you create a two tier profession you erode this fundamental right and protection.

Consumers will be disadvantaged by solicitors working in unregulated entities not being required to have PII and not having access to the Compensation Fund if things go wrong.

Lack of supervision and experience will be a hallmark of new unregulated entities and if they are set up by newly qualified or inexperienced solicitors their consumer will inevitably be disadvantaged, claims will be unsatisfied and monies lost. The fact that solicitors were involved will have a very negative impact upon the reputation and standing of solicitors generally.

19.

17. How likely are you to take advantage in the greater flexibility about where solicitors can practice as an individual or as a business?

It is unlikely that Ware & Kay Solicitors Ltd will alter the way they conduct their business as a result of the greater flexibility as it is likely to lead to a loss of reputation, trust and therefore financial stability.

20.

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?

It is an essential protection for the consumers of legal services that all providers of reserved legal services are regulated and that this is not restricted just to sole practitioners.

21.

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?

No view.

22.

20. Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

No. The information is already available through terms of business, the complaints process, through SRA and Law Society published information, the internet and through consultation with other solicitors.

The SRA wants to have a light touch and this would be unnecessary regulation.

23.

21. Do you agree with the analysis in our initial Impact Assessment?

No view

24.

22. Do you have any additional information to support our initial Impact Assessment?

No

25.

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?

Yes

26.

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?

It is not considered that it would ever be in the interests of consumers to allow this.

27.

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? If not, what are your reasons?

Yes

28.

26. Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

No because it must detract from the protection that consumers should expect if they use a solicitor even if they are in an unregulated firm. Otherwise you devalue the title of "solicitor" to the detriment of all.

29.

27. Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

The difficulties have been outlined in the answers already provided.

In summary, if you create 2 tiers of solicitors you create uncertainty, lack of trust, diminution of professional standing; dilution of consumer protection, and unequal business environments, in pursuit of a goal that affect very few who have other routes to accessing legal advice through free legal advice sessions provided by most firms of solicitors.

30.

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?

Yes otherwise you diminish consumer protection.

31.

29. Do you have any views on what PII requirements should apply to Special Bodies?

It should be the same as required of solicitors.

32.

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?

By failing to apply a threshold the proliferation of unregulated entities is being encouraged. The encouragement of unregulated entities is undesirable as it erodes consumer protection in pursuit of an objective which is not supported by evidence of need. Application of a low threshold (if such relaxation is allowed) is therefore vital.

33.

31. Do you have any alternative proposals to regulating entities of this type?

No

34.

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?

It must be necessary if regulation of the individual is continued even though working in an unregulated entity. If not then an important tool in consumer protection is lost.

35.

33. Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

Yes

Warwickshire County Council

Consultation: Looking to the future - flexibility and public protection

Consultation questionnaire form

This form is designed to be completed electronically—in MS Word. Please save it locally before and after completing it.

Question 1

Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

No

Question 2

Do you agree with our proposed model for a revised set of Principles?

Yes

Question 3

Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

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?

No

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?

Not unless anything fundamental is proposed to change in relation to the regulation of public sector in-house legal teams, which we did not detect from the consultation. Warwickshire Legal Services has been providing legal services to a number of public sector bodies for over 20 years based on the existing regulatory framework, and we do not wish to see any changes which would undermine the enormous contribution that public sector in-house legal teams, working together through various shared service models, make to public life and upholding the rule of law in the UK.

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?

We think it is difficult to develop a one size fits all approach to such a diverse profession. Because of its brevity yet potential reach, it is difficult at this stage to predict how the Code will be applied and enforced.

Question 7

In your view is there anything specific in the Code that does not need to be there?

No

Question 8

Do you think that there anything specific missing from the Code that we should consider adding?

No

Question 9

What are your views on the two options for handling conflicts of interests and how they will work in practice?

We strongly prefer Option 1, which is very similar to the existing Handbook Outcome 3.6. As an in-house legal practice acting for a number of public sector organisations we do have occasion to rely on Outcome 3.6 as currently drafted. We regard this as a proportionate and appropriate level of regulation which recognises that our clients are sophisticated businesses and capable of giving informed consent in cases such as that contemplated by Outcome 3.6/ Option 1.

We do not agree with Option 2 and consider it is unnecessarily restrictive.

Question 10

Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

See response to Q6.

Question 11

In your view is there anything specific in the Code that does not need to be there?

No

Question 12

Do you think that there anything specific missing from the Code that we should consider adding?

No

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?

No comments at this stage

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.

No comments at this stage

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?

No comments at this stage

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?

See Q5 response: it is imperative that any change in the SRA regulatory framework does not destabilise the well-established model of public sector in-house legal teams (like Warwickshire Legal Services) providing services to multiple public sector bodies.

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?

Unlikely

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?

No comments

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?

No comments

Question 20

Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

Yes, but applying usual principles as to what is proportionate

Question 21

Do you agree with the analysis in our initial Impact Assessment?

No comments

Question 22

Do you have any additional information to support our initial Impact Assessment?

No comments, except see response to Q5

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?

No comments

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?

No comments

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?

If not, what are your reasons?

No comments

Question 26

Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

No comments

Question 27

Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

No comments

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?

No comments

Question 29

Do you have any views on what PII requirements should apply to Special Bodies?

No comments

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?

No comments

Question 31

Do you have any alternative proposals to regulating entities of this type?

No comments

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?

No comments

Question 33

Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

Yes

Thank you for completing the **Consultation questionnaire form**.

Please save a copy of the completed form.

Please return it, along with your completed **About you form**, as an email attachment to consultation@sra.org.uk, by **21 September 2016**.

Alternatively, print the completed form and submit it by post, along with a printed copy of your **About you form**, to

Solicitors Regulation Authority
Regulation and Education - Policy - Handbook 2017
The Cube
199 Wharfside Street
Birmingham
B1 1RN

Weil, Gotshal & Manges

110 Fetter Lane
London EC4A 1AY
+44 20 7903 1000 tel
+44 20 7903 0990 fax

Our Ref: Luceysar
Your Ref:

21 September 2016

Solicitors Regulation Authority
Regulation and Education – Policy – Handbook 2017
The Cube
199 Wharfside Street
Birmingham
B1 1RN

Dear Sirs,

Re: SRA Consultation: Looking to the future - flexibility and public protection (June 2016)

Weil, Gotshal & Manages is a member firm of the City of London Law Society ("**CLLS**") and the CLLS response to this consultation dated 14 September 2016 largely reflects our views and concerns about the SRA's proposed reforms. Accordingly we have limited the firm's own response to points not addressed by the CLLS response, which we would like the SRA to consider, and to general comments already raised by the CLLS, but which we feel are of such importance to that it is incumbent upon us to reiterate them again in our own response.

General Comments

1. Timescale and structure of consultation and reform

As previously raised with our Regulatory Manager, we are concerned about the timing of the SRA's review of regulatory changes and the manner in which the consultation for reform is being conducted. As the SRA is aware the Competition & Markets Authority ("**CMA**") is yet to publish its final report on its legal markets study and the Legal Services Board ("**LSB**") has just published its "vision for legislative reform of the regulatory framework for legal services in England and Wales". We would respectively submit that any proposed changes to the regulatory regime by the SRA should take into account the final findings of the CMA study and the LSB's proposals. By failing to take account of wider issues and reforms being contemplated the SRA risks implementing a new regulatory regime, which may not be fit for purpose in the longer-term.

We would urge the SRA to ensure that if it does proceed with the proposed new Codes of Conduct and other reforms these are sufficiently future-proofed. The scale of regulatory changes which the profession has had to endure over the last decade is unsustainable and to the best of our knowledge, unparalleled in the legal profession in any other jurisdiction. The current SRA Handbook, first published in 2011, is now on version 17 following regular amendments over the last five years. We think it is extremely important that the new Codes and other rules in the Handbook are sufficiently consulted upon and settled in final form before being implemented to guard against the need for frequent amendments post-publication.

We are also concerned that SRA's consultation, which includes fundamental reforms, comes at a time of great uncertainty for the sector and country as a whole following the Brexit vote on 23 June. Many international firms may have to make changes to their European operations and many US-headquartered firms such as ours which

use the UK and/or SRA authorisation to passport into other European jurisdictions may have to reconsider the legal and regulatory structure of their offices in the UK and Europe.

The piecemeal nature in which the SRA is consulting on the various elements of the proposed regulatory changes is further frustrating firms understanding of, and ability to fully respond to, the proposed reforms. Many aspects of SRA regulation are interlinked and the full extent and meaning of the changes can only be understood if all the proposed changes can be considered together. In particular, as "the Principles and Codes are underpinned by [the] SRA's Enforcement Strategy" we feel unable to fully understand and comment on the proposed changes in the absence of any details of the SRA's proposed changes to enforcement.

2. Privilege

Further to the CLLS response, as the SRA is aware privilege belongs to the client, not the lawyer and in moving forward with its proposals we are concerned that the SRA has not given sufficient consideration to the prospect that such reforms will erode this fundamental right of clients to privilege in the legal advice they receive from their lawyer. The LSB states that "legal professional privilege is not a regulatory responsibility" and that "there should be a level playing field in relation to privilege". The proposed reforms will achieve the opposite: clients of regulated firms will enjoy the protection of privilege whereas clients of unregulated firms will not. We note the SRA's suggested workaround - clients could contract directly with individual solicitors, but this is not without its difficulties, some of which are referred to in the CLLS response. We respectively suggest that the SRA give the consequences of this change further consideration and that SRA's reforms should be delayed until reform to the legislative framework is properly underway and it is clear what, if any, changes will be made to the extent of privilege.

3. Compliance with anti-money laundering legislation

We believe there may also be implications for compliance with anti-money laundering ("**AML**") and counter-terrorist financing ("**CTF**") legislation for solicitors operating in businesses in the unregulated sector. Currently, SRA regulated firms are subject to AML and CTF legislation at law and the SRA Code of Conduct additionally imposes a regulatory obligation on firms to comply with AML requirements. While individual solicitors working, for example in-house, are also subject to this legislation, in-house solicitors (subject to limited exceptions in Rule 4 of the Practice Framework Rules) only provide advice to their employer. Therefore compliance with the legislation is arguably relatively straightforward as they only have one client. We are concerned that compliance with the AML and CTF legislation may become more difficult for solicitors in business which may not themselves be required to comply with such legislation and will not have the systems and processes to support solicitors in this area. It may also be difficult for junior solicitors or those operating in a minority within such a business to implement proper controls to comply with their client due diligence, reporting and monitoring obligations. As the SRA's own Anti-Money Laundering Report 2016 states "Solicitors' firms are an attractive target for those wishing to launder the proceeds of crime". This could have a negative impact on the brand and reputation of solicitors as well as wider implications for the detection of money laundering and terrorist financing generally.

Answers to specific questions in addition to the CLLS answers, with which we agree.

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?

We agree with the CLLS's view on the issuance of guidance and the risk of creating additional regulation through guidance. However, if the SRA is minded to issue guidance and / or provide scenarios, we think it should ensure that such guidance and scenarios are reflective of the profession as a whole – a profession which engages in a range of practices and has a diverse client base. In the past examples and scenarios

provided by the SRA were not relevant to firms such as ours advising sophisticated clients on complex transactions and therefore of little assistance in interpreting and applying the rules in practical terms.

6. Have we achieved our aim of developing a short, focused Code for all solicitors, wherever they work that is clear and easy to understand?

We agree with the majority view of CLLS members that a split Code will be unhelpful for regulated firms and solicitors in regulated firms. We also believe there is significant overlap between the two Codes and therefore a combined Code would arguably be shorter, which we understand is the SRA's objective. We also believe that in practice regulated firms will have to require compliance with the Firm Code by all their solicitors and non-qualified staff to ensure that the firm itself complies with its obligations and therefore think it unnecessary and unhelpful to have two Codes. It may be difficult for individuals to draw a distinction between their obligations under one or other Code.

8. Do you think that there is anything specific missing from the Code that we should consider adding?

See response to question 9 below.

9. What are your views on the two options set out for handling actual conflict or significant risk of conflict between two or more clients and how do you think they will work in practice?

We favour Option 1 subject to the drafting amendments put forward by the CLLS. However, if the SRA is mindful to introduce a "sophisticated client exception", we think the language and any supporting guidance should be the subject of proper consultation. "Sophisticated clients" are generally understood to be those who regularly instruct solicitors and / or have in-house legal teams, but we think that the SRA should specifically define "sophisticated clients" in the context of such an exception. We believe the SRA should also carefully consider the parameters of such a rule, for example would it result in solicitors of the same firm "sitting across the table" from each other negotiating terms? Such situations have implications for solicitors' independence and own interest conflicts for firms. A sophisticated client exception would require clear, unambiguous language to avoid it being open to abuse.

Has the SRA intentionally removed the overarching requirement of reasonableness in the conflict rules as this is not explained in the consultation? Reasonableness currently provides an extra layer of protection for clients and is addressed in the current indicative behaviours (3.4) and (3.5). Not only must solicitors be comfortable that the clients understand the issues and have provided informed consent for the firm or solicitor to act for more than one client in respect of the same or a related matter, but the firm / solicitor must also be satisfied that it is reasonable to do so. Reasonableness was also given significant weight in the 2007 Code and the guidance at paragraph 7 and 8 in that Code suggests that reasonableness was to ensure solicitors considered the bargaining power of each client, that the solicitor or firm could act even-handedly for each client (presumably in recognition of the common law "no inhibition" principle). This goes to the heart of a conflict of interest, in that the solicitor must be satisfied that the joint or multiple representation will not prejudice any client or cause the solicitor to fail in his/her obligations to one of his clients as a result of acting in the best interests of another client. We would welcome clarification from the SRA.

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 service providers?

We would add to the CLLS response at B to question 16 that the application of different conflicts rules to solicitors in regulated and unregulated businesses could not only leave regulated firms at a competitive disadvantage, but could also result in a significant relaxation of the conflicts rules across the profession as a whole, particularly if firms which are currently regulated choose to hive off their unreserved work to

unregulated businesses. This could have negative implications to the solicitor brand as well as leading to an increase in regulatory and / or legal action against solicitors if clients are unhappy about the progress or outcome of their matter and believe it may be as a result of their solicitor acting in circumstances where a conflict of interest exists.

17. How likely are you to take advantage in the greater flexibility around where solicitors can practice as an individual or as a business?

We do not think we will be able to take advantage of the perceived greater flexibility. Our clients instruct us on the basis that we can provide a full seamless service across practice areas and assist them in achieving their objectives or resolving problems which often touch on various legal issues, including reserved legal activities. If we were to avail of the proposal to allow solicitors provide general legal advice to the public through unregulated entities and reduce our overall regulatory burden and costs by creating an unregulated entity to provide general legal advice and a separate regulated entity to incorporate our litigation and real estate practices, we would we be erecting barriers to the provision of such expertise for our clients. Our clients instruct us because we are a full-service firm and can provide seamless advice across our reserved and unreserved practice areas. We would also have to consider whether there would be any regulatory bar in the other jurisdictions in which we practice, particularly the United States, to the firm practicing through an unregulated business in the England and Wales.

We confirm we are happy for our name to be published, but not our response to this consultation.

Yours faithfully,

Weil, Gotshal & Manges

WEST LONDON LAW SOCIETY

HON SECRETARY JAMES CHAPLIN
c/o Lansbury Worthington
11 Galena Road
LONDON W6 0LT

20 September 2016

This is the response to the SRA Consultation of West London Law Society (WLLS)

Looking to the future - flexibility and public protection

WLLS is responding to the consultation on behalf of its committee

We have seen the comprehensive response submitted by The Law Society on 8 September 2016 and we adopt that response as our own, except where it is clear in this response that the views of WLLS differ. The Law Society's response can be found at this link::

http://www.lawsociety.org.uk/policy-campaigns/consultation-responses/looking-to-the-future-consultations-law-society-response/

Consultation Questions
Our replies to the SRA Consultation Paper have been completed below the relevant 33 questions set out in the Consultation Questionnaire form provided in electronic format by the SRA, and these are contained below on the accompanying pages.

For and on behalf of the Committee of West London Law Society

Consultation questionnaire form

This form is designed to be completed electronically—in MS Word. Please save it locally before and after completing it.

Question 1

Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

We have not encountered any issues in respect of the suitability test

Question 2

Do you agree with our proposed model for a revised set of Principles?

No it seems misguided We see no reason to change the principles on which young solicitors have been trained and which embody the ethical considerations central to all practising solicitors.

Question 3

Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

No, the removal of the principles that a solicitor should provide a proper standard of care to client, act in the best interest of each client and protect client money and assets seems to be a betrayal of the aims a professional should strive for.

The existing principles make clear a solicitor's professional responsibilities

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?

See comments above. We endorse the Law Society's concerns about the abolition of existing Principle 5, 8 and 10.

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?

The proposals are wrong and misconceived

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?

No you have NOT produce a rule book for professionals but an amoral charter without any guidance or indication as to where the line is drawn. Regulation should embody some degree of certainty. These proposals as written do not do that.

Question 7

In your view is there anything specific in the Code that does not need to be there?

No the existing code is fine

Question 8

Do you think that there anything specific missing from the Code that we should consider adding?

Leave it alone. Your proposals are wrong. We endorse The Law Society's response to this question

Question 9

What are your views on the two options for handling conflicts of interests and how they will work in practice?

No. The options are untenable, and weaken public protection and will leave consumers confused. If it is accepted that to act for one or more clients where there is actual conflict or a significant risk of conflict is wrong then that needs to be said. We do not believe that is a proper way to train young lawyers or for the profession as a whole to behave.

Question 10

Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

No you are destroying the solicitors profession without adequate protection for clients or to prevent damage to the reputation of the legal profession

Question 11

In your view is there anything specific in the Code that does not need to be there?

Do not introduce your changes. They are all unnecessary.

Question 12

Do you think that there anything specific missing from the Code that we should consider adding?

Yes Do not make your proposed changes. This apart, there are no proper provisions covering how undertakings are to be dealt with within unregulated undertakings. This needs to be clarified

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?

Yes your code is wrong, and we endorse the comments of the Law Society. Your approach creates two tiers of solicitors, those working in a regulated entity and those working in an unregulated entity, with consequential risks to consumer protections and professional standards which will damage the standing of solicitors and create confusions for solicitors and their clients

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.

We also endorse The Law Society's call for careful consideration of the roles of the COLP and COFA. There is thin dividing line between over regulation and sufficient regulation to inspire public confidence. The prospect of solicitors practising in unregulated entities without any form of internal supervision causes us concern.

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?

Yes provide clear and detailed guidance

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?

Not a good idea. We have also seen The law Society's response and endorse those comments.

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?

We consider that this is to be avoided because of the lack of protection for the public.

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?

About your only good idea

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?

We endorse the Law Society's response

Question 20

Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

The better model would be to require all unregulated entities to highlight the lack of protection to its consumers. That is where the danger lies to consumers

Question 21

Do you agree with the analysis in our initial Impact Assessment?

No it ignores reality. The better model would be to require all unregulated entities to highlight the lack of protection to its consumers. That is where the danger lies to consumers. See the Law Society's detailed response

Question 22

Do you have any additional information to support our initial Impact Assessment?

No it is wrong.. We have noted The Law Society's analysis of the Impact Statement and we commend that analysis.

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?

Yes It would clearly not be appropriate for a solicitor in an unregulated entity to hold client money in their own name; not least because the SRA is proposing the abolition of Principle 10: You must protect client money and assets.

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?

Should not be allowed. We support the Law Society's response

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?

If not, what are your reasons?

Yes but they should not be allowed to hold themselves out as solicitors. We endorse the comments of the Law Society. Two tier in this context means two tier.

Question 26

Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

No all solicitors should have PII cover or they should not be allowed to use the title solicitor.

Question 27

Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

Many see comments above We endorse the Law Society's comprehensive response on this topic.

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?

Yes

Question 29

Do you have any views on what PII requirements should apply to Special Bodies?

The same as apply to all solicitors

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?

If you are regulating them they should be held to the same standards as solicitors. We endorse the Law Society's comprehensive response on this topic.

Question 31

Do you have any alternative proposals to regulating entities of this type?

No. We endorse the Law Society's comprehensive response on this topic.

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?

They seem dangerous and weaken consumer protection. We endorse the Law Society's comprehensive response on this topic.

Question 33

Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

Yes, unless regulation is returned to the Law Society.

Thank you for completing the **Consultation questionnaire form**.

Please save a copy of the completed form.

Please return it, along with your completed **About you form**, as an email attachment to consultation@sra.org.uk, by **21 September 2016**.

Alternatively, print the completed form and submit it by post, along with a printed copy of your **About you form**, to

Solicitors Regulation Authority
Regulation and Education - Policy - Handbook 2017
The Cube
199 Wharfside Street
Birmingham
B1 1RN

From
West Sussex County Council
Legal Services

Date: 20th September 2016
Phone: 0330 2222662
e-mail: tony.kershaw@westsussex.gov.uk

Dear Sirs

Please find enclosed our response to your consultation 'Looking to the Future'. This response is submitted on behalf of West Sussex County Council.

As the SRA is aware, many local authorities are engaged in the provision of both reserved and non-reserved legal services to external bodies, pursuant to their powers under the Local Authorities Good and Services Act 1970. We consider this to be a key issue which ought to be addressed as part of this consultation. We have asked in this response for clarity from the SRA to confirm that there are no barriers to this practice and we trust that the SRA is prepared to take the necessary steps to provide such clarity.

Yours faithfully

Tony Kershaw
Director of Law
West Sussex County Council
tony.kershaw@westsussex.gov.uk

Consultation: Looking to the future - flexibility and public protection

Consultation questionnaire form

This form is designed to be completed electronically—in MS Word. Please save it locally before and after completing it.

Question 1

Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

We are supportive of the need to maintain high standards in the profession and secure that all those practising as Solicitors satisfy the criteria in the Suitability Test 2011.

We have not encountered any situations where the practical application of the test has created any issues for individuals or employers.

Question 2

Do you agree with our proposed model for a revised set of Principles?

We welcome the simplification of the principles, but would not support removal of the principle to “protect client money and assets”. This is particularly important to Local Authorities as clients of external Solicitors. Our assets are public assets, which we have a duty to manage appropriately.

We also consider that the Principles should continue to refer to the solicitor’s duty to keep the affairs of the client confidential.

Question 3

Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

The revised principles do not refer to maintaining public trust and we consider that this should be included. The concept of being able to trust your legal advisor is distinct to having confidence in them or the profession. Both the SRA's 'Question of Trust' campaign and the wording of this Question 3 suggests that the SRA believes there is a distinction between trust and confidence. Perhaps revised principle 2 could be amended to read:

"2. ensure that your conduct upholds public confidence in the profession and **trust in** those delivering legal services"

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?

No – the reduced number and simplified approach to the principles will make it easier to apply the Principles across practice areas, including Local Government and other sectors where there may be differing levels of regulation and oversight from other bodies.

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?

It will be of particular use to receive guidance from the SRA as to the application of the new Codes and Practice Framework Rules to the conduct of reserved and non-reserved activities by local authority legal teams, using existing local government powers under the Local Authorities (Goods and Services) Act 1970, the Yorkshire Purchasing Organisation Case and existing Rule 4 of the Practice Framework Rules. Please – please see further below.

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?

The simpler, more focussed code is to be welcomed. In terms of in house practice, as highlighted below in our response to Question 8, it is in the interests of both the SRA and in house Solicitors to have clarity as to what is meant by “public or a section of the public”, specifically in the context of local authority employed Solicitors who wish to provide advice to other public or other bodies within the powers set out by the Local Authorities (Goods and Services) Act 1970. We cannot overstate how important it is to clarify this in order to enable the public sector to meet the expectations of Government, its public sector partners and the public in delivering joined up public services.

Question 7

In your view is there anything specific in the Code that does not need to be there?

Section 8.4 of the Code references referrals of disputes to ADR - we are not aware that this is a current requirement. The proposals do not address circumstances in which the particular ADR scheme is not agreed between the Parties.

Please see response to question 9 in relation to conflicts of interest.

Question 8

Do you think that there anything specific missing from the Code that we should consider adding?

It is in the interests of both the SRA and in house Solicitors to have clarity as to what is meant by “public or a section of the public”, specifically in the context of local authority employed Solicitors who wish to provide advice to other bodies within the powers set out by the Local Authorities (Goods and Services) Act 1970.

Section 8.1 would benefit from amendment to include this.

Question 9

What are your views on the two options for handling conflicts of interests and how they will work in practice?

Option 2 is preferable as it simplifies matters and protects both clients and Solicitors, by prohibiting acting in situations of actual conflicts of interest and allowing for exceptions where there is a significant risk of a conflict of interest arising, as is currently provided for.

Both versions appear to be somewhat confused as they rely on in the current definition of “Client Conflict” which refers to actual conflicts and significant risks of conflicts.

Question 10

Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

As set out above, the Code does not address the key issues which are impacting on local government legal practice both currently and in the future. To miss this opportunity would be regrettable.

Question 11

In your view is there anything specific in the Code that does not need to be there?

No

Question 12

Do you think that there anything specific missing from the Code that we should consider adding?

See response to Question 8 above.

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?

We do not have any further specific issues to highlight.

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.

We do not have any comments to make in relation to this question as it is not specifically relevant to local authority practise.

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?

We do not have any comments to make in relation to this question as it is not specifically relevant to local authority practise.

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?

Annex 5 to the Consultation at page 26 includes a scenario where the new approach to regulation would allow individual in house Solicitors the ability to provide non reserved legal advice to the public. This does not recognise the additional step that is legally required of local authorities (including their legal services departments) before they can provide services to the public for profit of establishing a trading company.

Further, a large part of the work undertaken by local authority legal teams is reserved activity – including advocacy and property transactions - and so setting up an alternative legal service provider would be unlikely to be considered to provide a useful opportunity.

Therefore the opportunities presented by the proposal do not assist local authorities in providing non reserved legal activities with less regulation, as a trading company would still be required. Neither do the proposals address the key issue of ensuring that there is clarity that local authorities can provide reserved and non-reserved legal advice to other public bodies pursuant to their existing powers. The threat from these proposals is that the need for certainty is not met.

The question raised at paragraph 89 is important in relation to whether privilege would still apply to advice provided by an alternative legal service provider, employing Solicitors in some roles and we believe this issue requires more consideration. If such advice would not be privileged we would be extremely concerned as to the implications of that for recipients of such advice. Legal professional privilege is an essential element of a functioning legal system.

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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?

Please see our response to question 16.

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)?

Local authority employed Solicitors operate to provide non-reserved and reserved activities, primarily to their employer. The local authority itself is not an entity authorised by the SRA.

As stated previously in our response, the point which is vital for us to understand is the extent to which other local authorities, the public and third sector bodies fall within the definition of the “public or section of the public”. The SRA has received a copy of the opinion of James Goudie QC in response to a request from Lawyers in Local Government and the Local Government Association, as to whether such bodies would fall within the definition of the “public or section of the public”. This was unequivocal in its conclusion that the above wording did not prohibit local authority employed Solicitors from providing reserved legal activities to the types of body indicated above. In discussion, the SRA has highlighted that the Legal Services Board is able to request guidance on this wording (which originates from the Legal Services Act 2007) from the Government.

We feel that this is of such importance, that the SRA should approach the LSB to make such a request of the Government as soon as possible, so that this can be clarified and the outcome of the SRA’s regulatory review can reflect this new information.

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?

While recognising that the requirement does not apply to local government legal teams, the existing requirements seem overly prescriptive and ultimately not fit for purpose. As the SRA recognises in paragraph 101, the requirement to have practised for at least 36 months within the last 10 years is no guarantee of current knowledge of the law, nor of the ability to effectively supervise another.

Question 20

Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

For individuals and organisations which do not habitually instruct Solicitors it is important that they have an easy way of accessing information in relation to the protections afforded to them, particularly in the context of a fast paced and changing market.

Question 21

Do you agree with the analysis in our initial Impact Assessment?

As highlighted above, the assumptions made in relation to how local authority legal teams may react to the changes are flawed and do not recognise the specific legislative environment in which local authorities work, nor the nature of the work we undertake.

Question 22

Do you have any additional information to support our initial Impact Assessment?

Please see response to question 21.

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?

Yes

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?

In house Solicitors would not normally be responsible for holding client money, as they are an arm of the client organisation and will work closely with the finance department. Where providing services to external bodies, they should be holding money in accordance with the SAR or not at all (i.e. arranging for direct payments between the purchaser and seller on a land transaction). However, this is not what many external bodies are used to (if they have dealt with traditional firms) and in the interests of opening up the market place to alternative service delivery models, it seems sensible to provide for this option.

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?

No

If not, what are your reasons?

We think the proposed proposals create a confusing two tier market that the public will not understand.

Question 26

Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

We agree with the proposed approach, but would welcome the inclusion of an obligation that applies now under the Practice Framework Rule 4.2(b) whereby a Solicitor is required to ensure that their employer carries sufficient indemnities for the nature of the work being undertaken.

Question 27

Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

This does potentially create a situation where a consumer receives negligent advice, suffers a loss and is unable to recover their losses from the alternative legal services provider. This is clearly not a desirable outcome.

Please see response to question 26.

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?

Yes, these are treated differently to non-reserved legal activities for a valid reason, that they are potentially high risk and high value. It would be counter intuitive to allow them to provide services to the public, in a similar way to other Solicitors, without some form of insurance or indemnity behind them.

Question 29

Do you have any views on what PII requirements should apply to Special Bodies?

See question 28

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?

We agree with the SRA's view that it is not desirable. It is inconsistent with the legislative requirements and would be inconsistent with the approach being adopted in terms of opening up the market.

Question 31

Do you have any alternative proposals to regulating entities of this type?

We do not have any alternative proposals.

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?

No.

Question 33

Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

We agree with the SRA's proposal.

Thank you for completing the **Consultation questionnaire form**.

Please save a copy of the completed form.

Please return it, along with your completed **About you form**, as an email attachment to consultation@sra.org.uk, by **21 September 2016**.

Alternatively, print the completed form and submit it by post, along with a printed copy of your **About you form**, to

Solicitors Regulation Authority
Regulation and Education - Policy - Handbook 2017
The Cube
199 Wharfside Street
Birmingham
B1 1RN

Consultation: Looking to the future - flexibility and public protection

Response ID:78 Data

2. Your identity

Surname

Lawlor

Forename(s)

Frances

We may publish a list of respondents and a report on responses. Partial attributed responses may be published. Please advise us if you do not wish us to attribute your response or for your name or the name of your firm or organisation to appear on any published list of respondents.

Attribute my/our response and publish my/our name.

Please identify the capacity in which you are submitting a response. I am submitting a response…

on behalf of a local law society

Please enter the name of the society.: Wigan

3.

1. Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

Yes it is very confusing.

4.

2. Do you agree with our proposed model for a revised set of Principles?

No they are too simplistic and open to several different interpretations.

5.

3. Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

No I feel that it is confusing and misleading

6.

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?

The removal of the principles that solicitors should 'provide a proper standard of service to your clients', 'act in the best interests of each client' and 'protect client money and assets' standards. has negative implications for consumer protection and the maintenance of professional.

In my view the duty of client confidentiality must continue to be included. It is of the utmost importance for public trust in the profession.

7.

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?

No I do not support the use of case studies and guidance in this way.

8.

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?

As I see it the problem is not the two codes but the two-tier system of Solicitors they will create causing

confusion for the profession and the general public. This will result in a loss of standing for the profession and risks consumer protection.

9.

7. In your view is there anything specific in the Code that does not need to be there?

No far from it they are too brief in my opinion and therefore leave too many matters open to interpretation

10.

8. Do you think that there anything specific missing from the Code that we should consider adding?

They are too brief and therefore open to several forms of interpretation. The language is imprecise so it will be difficult to know whether we are doing something right or wrong. If the Codes were clearer we would know where we stand.
It is difficult to take an informed view on how the new Codes would work in practice without seeing the associated guidance which the SRA has not chosen to publish as yet.

11.

9. What are your views on the two options for handling conflicts of interests and how they will work in practice?

The consultation makes clear that solicitors employed by an unregulated entity would continue to be regulated as individuals and would be subject to conflict rules. However, as the conflicts rules will not apply to unregulated entities, in practice they will not have much effect if any on the unregulated entities whilst the regulated entities will be subject to the same level of restriction as they are now or, potentially, a greater level depending on which of the two options on conflicts is adopted by the SRA. Very confusing!

12.

10. Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

It is short but not focused in my view. It leaves too much open to interpretation

13.

11. In your view is there anything specific in the Code that does not need to be there?

No

14.

12. Do you think that there anything specific missing from the Code that we should consider adding?

Yes but too numerous to mention

15.

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?

too broadly drafted

16.

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.

I have no strong view but I am neither a COLP nor a COFA. Those currently occupying those roles would be better placed to answer.

17.

15. How could we improve the way in which the COLP/COFA roles work or to provide further support to compliance officers, in practice?

No view

18.

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?

I do not like these proposals which I believe will result in confusion for the public and a loss of standing for the profession

19.

17. How likely are you to take advantage in the greater flexibility about where solicitors can practice as an individual or as a business?

Very unlikely

20.

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?

I agree

21.

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?

It should remain as it is now

22.

20. Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

Yes but consumers take no notice of these things until something goes wrong

23.

21. Do you agree with the analysis in our initial Impact Assessment?

No

24.

22. Do you have any additional information to support our initial Impact Assessment?

No

25.

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?

Yes

26.

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?

They should not be allowed to do so

27.

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? If not, what are your reasons?

I do agree but I do not like the idea of alternative legal services providers anyway

28.

26. Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

Yes but again I do not like this two tier system. It is confusing and dangerous

29.

27. Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

There are so many potential difficulties. The main ones are :-
> Two tier system
> Confusion for the public as to if and how they are protected
> Different rules about conflicts
> Legal Professional Privilege

30.

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?

Yes

31.

29. Do you have any views on what PII requirements should apply to Special Bodies?

There should be level playing field

32.

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?

I am not sure

33.

31. Do you have any alternative proposals to regulating entities of this type?

No

34.

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?

No

35.

33. Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

Yes

JTG/GT/17682/614

9 September 2016

wilkin chapman llp
solicitors

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DX 13511 Grimsby 1
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The Chairman
Solicitors Regulation Authority
The Cube
199 Wharfside Street
BIRMINGHAM
B1 1RN

By email: consultation@sra.org.uk

Dear Sir

CONSULTATION – "LOOKING TO THE FUTURE – FLEXIBILITY AND PUBLIC PROTECTION"

I am writing as senior partner of my firm to express my dismay and grave concern as to the effect of the current SRA proposals to allow Solicitors to practice in unregulated firms. I am also writing on behalf of my 47 fellow partners who share my views and have urged me to write in these terms.

Wilkin Chapman LLP is a SRA regulated solicitors firm with nearly 400 staff providing a full range of legal services to a local, regional and national client base from 8 offices in Lincolnshire and East and South Yorkshire. Described in the Legal 500 as a "regional heavyweight", the firm is just outside the top 100 UK firms by turnover. We take pride in our values of integrity, professionalism and "doing the right thing".

I am therefore hugely concerned to see in your consultation paper that you propose to allow solicitors to provide unreserved legal services from unregulated firms in future.

This will:-

- create a two tier profession;
- damage the reputation and brand of solicitors everywhere, to their detriment and that of all those who rely on them.

Solicitors working in unregulated firms are unlikely to be able to give advice which will be covered by legal professional privilege, will not be required to have professional indemnity insurance and will not be covered by the Compensation Fund, or be subject to the same rules or conflicts of interest as those in regulated firms.

Members of the public seeking legal services will find it difficult to distinguish between solicitors working in regulated and unregulated firms. It is simply reckless and irresponsible of the SRA as a regulator to expose clients to the lack of safeguards in an unregulated firm. Advice given to such clients will be unprotected from disclosure and not backed by insurance.

Unregulated firms will have an unfair advantage in the market by appearing to offer the same legal services through identically qualified professionals but without paying the same regulatory and insurance costs as regulated firms.

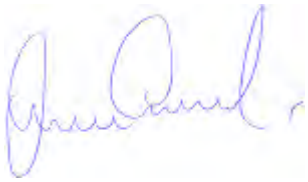
Solicitors in regulated firms will not be able to rely on undertaking given by solicitors in unregulated firms because the unregulated firm will have no liability to comply with the undertaking.

Solicitors in unregulated firms will have to conduct due diligence checks on firms on the other side to establish whether they are regulated or unregulated. Our own professional indemnity insurers may be reluctant to cover us for the risks of dealing with solicitors in unregulated firms.

There will be no requirement for solicitors in unregulated firms to be properly trained or supervised. Newly qualified solicitors working in such firms may find they are unable to move to the regulated sector and are subject to pressures to work in a less than ethical manner by their employer.

In short, the proposals are dangerous and damaging to the public and the profession. They should be swiftly abandoned.

Yours faithfully



WILKIN CHAPMAN LLP
Mark Carlton
Senior Partner

Advanced Member of The Law Society's Family Accreditation

Email: mcarlton@wilkinchapman.co.uk
Direct Tel: 01472 262627

Consultation: Looking to the future - flexibility and public protection

Response ID:560 Data

2. Your identity

Surname

Kay

Forename(s)

Peter

We may publish a list of respondents and a report on responses. Partial attributed responses may be published. Please advise us if you do not wish us to attribute your response or for your name or the name of your firm or organisation to appear on any published list of respondents.

Attribute my/our response and publish my/our name.

Please identify the capacity in which you are submitting a response. I am submitting a response…

on behalf of a local law society

Please enter the name of the society.: Yorkshire Law Society

3.

1. Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

No

4.

2. Do you agree with our proposed model for a revised set of Principles?

No for the reasons stated in this response.

5.

3. Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

No for the reasons stated in answer 4.

6.

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?

We consider that following principles should not be removed.
That solicitors should
1. 'provide a proper standard of service to your clients',
2. 'act in the best interests of each client' and
3. 'protect client money and assets'.
Their removal will:
a. adversely impact consumer protection;
b. reduce essential professional standards; and
c. erode the trust and the unquestioning ability to rely on a solicitor that both clients and other professions currently have in solicitors.

It is a fundamental principle upon which clients rely that their solicitor keeps their affairs confidential. The Principles should therefore continue to refer to the solicitor's duty to keep the affairs clients confidential in order to reassure rather than raise doubt.

7.

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?

As a general comment it is always helpful to provide guidance and scenarios to illuminate dry text.

8.

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?

No.

The creation of separate codes of conduct for an individual solicitor and one for regulated entities creates two types of solicitors: those working in a regulated entity and those working in an unregulated entity. This will undoubtedly lead to confusion amongst consumers, damage the standing of solicitors overall and particularly diminish the standing of solicitors who practise in unregulated entities. They will be seen as second class.
De-regulating entities in this way will bring risks to consumer protection.

9.

7. In your view is there anything specific in the Code that does not need to be there?

None noted other than resolution of conflicts created by having 2 codes. Which prevails?
There is some overlap between the two draft Codes, most noticeably in areas such conflict, complaints and client information/identification which will need to be resolved for the sake of clarity.

10.

8. Do you think that there anything specific missing from the Code that we should consider adding?

Enforcement officers and solicitors will benefit from clear guidance on interpretation and scenario case studies.

11.

9. What are your views on the two options for handling conflicts of interests and how they will work in practice?

The 2 options suggested are unworkable for a solicitor working within an unregulated entity. If a colleague in an unregulated entity is not a solicitor then that colleague will be able to ignore the conflict rules leaving the solicitor in an impossible position of working alongside a colleague for a firm that breaches a code that applies to him/her as an individual.

Conflicts of interest are detrimental to consumer interest and protection. Encouraging unregulated firms to ignore conflict rules on the basis of reducing cost to and access to legal advice for a consumer is contrary to what the SRA and solicitors should stand for.

Option 2 is unworkable in practice as it will lead to conflicts being ignored when transactions are part way through. There will be no need to consider conflicts of interest at the outset unless it actually exists and once the transaction is underway the rules will not be scrupulousy adhered to in unregulated entities.

Option 1 therefore is preferred.

12.

10. Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

No

Brevity and simplicity is a laudable ambition but not at the expense of certainty. It is essential that solicitors and consumers know what is and is not permitted. Essential principles are being ignored and trust in the profession will be eroded.

13.

11. In your view is there anything specific in the Code that does not need to be there?

This is a repeat of question 7.

Repeat of answer to question 7:
None noted other than resolution of conflicts created by having 2 codes. Which prevails?
There is some overlap between the two draft Codes, most noticeably in areas such conflict, complaints and client information/identification which will need to be resolved for the sake of clarity.

14.

12. Do you think that there anything specific missing from the Code that we should consider adding?

This is a repeat of question 8.

Repeat of answer to question 8:
Enforcement officers and solicitors will benefit from clear guidance on interpretation and scenario case studies.

15.

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?

Other than as noted in answers to previous question, no.

16.

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.

Yes.

The placing of responsibility on 2 designated persons to ensure compliance within a regulated entity does lead to independent assessment free from the constraints of partnership or collegiate working which may previously have lead to some "toeing the line" under pressure from a more senior colleague.

It therefore is more likely to lead to greater consumer protection.

The absence of this leadership within unregulated entities will be detrimental to the development of any solicitor employed in such entity and their knowledge of compliance with the principles.

17.

15. How could we improve the way in which the COLP/COFA roles work or to provide further support to compliance officers, in practice?

Further regulation would be unwelcome and costly and detrimental to consumer cost reduction and access to legal advice.

Lack of clarity, guidance and examples in the Handbook will be a disservice to the COLP/COFA roles.

18.

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?

The evidence does not support the premise that the proposals will improve access to quality services at affordable prices, enhanced professional standards, and increased employment opportunities.

The evidence is that the overwhelming majority of those who choose not to engage a professional to provide legal advice do so because they are able to resolve their issue themselves without the cost of using a lawyer and have not been disadvantaged in so doing.

The proposals will result in two tiers of solicitors. Those working in unregulated businesses are unlikely to be able to give advice which is legally privileged, will not be required to have PII, clients will not have the benefit of a compensation fund and the protection of the principles governing conflicts of interest. This will harm consumer interests and lead to a loss of trust in solicitors as individuals and as a profession.

Legal professional privilege is essential for the protection of clients and for their solicitors. If you create a two tier profession you erode this fundamental right and protection.

Consumers will be disadvantaged by solicitors working in unregulated entities not being required to have PII and not having access to the Compensation Fund if things go wrong.

Lack of supervision and experience will be a hallmark of new unregulated entities and if they are set up by newly qualified or inexperienced solicitors their consumer will inevitably be disadvantaged, claims will be unsatisfied and monies lost. The fact that solicitors were involved will have a very negative impact upon the reputation and standing of solicitors generally.

19.

17. How likely are you to take advantage in the greater flexibility about where solicitors can practice as an individual or as a business?

It is unlikely that the members of the Yorkshire Law Society will alter the way they conduct their business as a result of the greater flexibility as it is likely to lead to a loss of reputation, trust and therefore financial stability.

20.

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?

It is an essential protection for the consumers of legal services that all providers of reserved legal services are regulated and that this is not restricted just to sole practitioners.

21.

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?

No view

22.

20. Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

No. The information is already available through terms of business, the complaints process, through SRA and Law Society published information, the internet and through consultation with other solicitors.

The SRA wants to have a light touch and this would be unnecessary regulation.

23.

21. Do you agree with the analysis in our initial Impact Assessment?

No view

24.

22. Do you have any additional information to support our initial Impact Assessment?

No

25.

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?

Yes

26.

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?

It is not considered that it would ever be in the interests of consumers to allow this.

27.

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? If not, what are your reasons?

Yes

28.

26. Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

No because it must detract from the protection that consumers should expect if they use a solicitor even if they are in an unregulated firm. Otherwise you devalue the title of "solicitor" to the detriment of all.

29.

27. Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

The difficulties have been outlines in the answers already provided.

In summary, if you create 2 tiers of solicitors you create uncertainty, lack of trust, diminution of professional standing; dilution of consumer protection, and unequal business environments, in pursuit of a goal that affect very few who have other routes to accessing legal advice through free legal advice sessions provided by most firms of solicitors.

30.

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?

Yes otherwise you diminish consumer protection.

31.

29. Do you have any views on what PII requirements should apply to Special Bodies?

It should be the same as required of solicitors.

32.

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?

By failing to apply a threshold the proliferation of unregulated entities is being encouraged. The encouragement of unregulated entities is undesirable as it erodes consumer protection in pursuit of an objective which is not supported by evidence of need. Application of a low threshold (if such relaxation is

allowed) is therefore vital.

33.

31. Do you have any alternative proposals to regulating entities of this type?

No.

34.

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?

It must be necessary if regulation of the individual is continued even though working in an unregulated entity. If not then an important tool in consumer protection is lost.

35.

33. Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

Yes

ID - 1

I am a qualified solicitor looking to mainly respond to areas of the Consultation affecting me and am encouraged by the changes which will benefit solicitors who are women and those exploring new ways of work in stiff competition.

I would also like to Highlight the HireMeMyWay Campaign and request support for it which will also encourage more talented women solicitors to reach the top, boards and be successful and help with promoting diversity in our sector.

1. I feel that Solicitors should be allowed to call themselves Solicitors under a separate non regulated business. They should have the option of choosing to have insurance (for which the Insurance sector needs to be pressured to become more flexible and offer such alternate cover provisions a lower premiums if client money is not held or in less high risk legal fields as may be h=judged on past claims data). This would ensure healthy competition and more flexible models of working which will benefit entrepreneurs and the public.

2. Referral fees are common in many industries and could be preferred to large marketing spends such that smaller businesses can compete with large firms. However as long as solicitors are governed separately and made to comply with accepting matters in good faith keeping client interests in mind I don't think they should be made to inform clients about such fees as it can become awkward, break trust and thus reduce competition. In any event the you refer to me and I refer back to you culture that takes its place is fairly similar in outcome so why not remove this unnecessary rule.

3. Finally user friendly videos on regulation would be more useful in this digital age rather than long documents that would only be able to be analysed by large firms that have large departments to support their compliance and this would help all solicitors be more compliant and thus help less compensation fund claims.

I thank you for giving serious consideration to my feedback and apologize for the informal method of response.

Please treat this feedback as anonymous for the purpose of publication.

ID - 2

Consultation: Looking to the future - flexibility and public protection

Consultation questionnaire form

This form is designed to be completed electronically—in MS Word. Please save it locally before and after completing it.

Question 1

Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

I have not personally had issues with the suitability test as I am at the other end of my professional life. However, I have had to consider it with a view to establishing a competence framework at a number of commercial law firms and find it very High Street focussed. For example, (but there are many), in a large law firm, client intake is centralised for risk and economic reasons, so AML training for lawyers focusses not on CDD but on suspicion. I think the Test is more of a straitjacket than the previous system.

Question 2

Do you agree with our proposed model for a revised set of Principles?

I find the items omitted are pretty extraordinary as they seem to give the wrong external message to clients, as well as to the more, shall we say, 'ethically challenged' solicitors. It was useful to have the six 'professional' and four 'business' principles and I cannot see any reason for change. I always thought it was a fudge that confidentiality was an Outcome not a Principle in the 2011 Code (it has been said to me that this was because confidentiality underpinned all the Principles but I am not convinced). I know that confidentiality is in the LSA as a professional principle but these were not all carried through, which is curious. This would have been a good opportunity to put that right.

Question 3

Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

I don't have any particular comment other than I see myself providing rather than delivering legal services; this is not just a semantic point.

It has to be clear the extent to which private conduct is relevant. This was the subject of most debate in the Question of Trust session I attended and it has been the same when running internal 'question of ethics' workshops.

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?

See answer to question 2 about duty of confidentiality. I don't believe the case has been made to cut down the existing Principles.

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?

I feel very strongly about this. I have been a director of risk for 16 years and answered a very large number of ethical/conduct dilemmas in that time. Every situation is so fact specific that what is needed is clarity in the Code and not a changing set of case studies. If they are anything like the cases studies for training they are not particularly helpful and/or too simplistic and/or not covering the real issues I face. Conflict is a particular issue of course but there are many others e.g. undertakings and conflict races where case studies cannot be a substitute for clearly stated obligations.

Our training as lawyers is to look at the black letter law, then at case law to help interpret the effect of the known facts. We expect to do the same for our own conduct. If the black letter isn't specific (and these Codes are deliberately high level, in my view, wrongly) then the case studies will make the position opaquer and not clearer.

How will the SRA convict anyone of misconduct if the answer was in a case study that flashed in and out of the website?

I also seriously question how much shorter the Code will be if one has to add back in guidance and FAQs (which are also far more ephemeral by nature) to the text of the Code. This is not simplifying as I understand it.

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?

There wasn't much that was wrong with the old one, apart from the IBs (and even then a few were useful). The Outcomes could be printed on 8 pages of A4 (I dished them out frequently) and that is within any literate person's grasp. The requirement for even more brevity seems to come from within the SRA. It is not something I have ever heard in the profession. The Handbook is one thing but the Code didn't need as much tinkering as this.

Brevity is of less importance than certainty in professional dealings (get it wrong and you lose your ability to work) and this proposed Code does not assist with the latter and by taking such a high level approach, internal conflicts between both Codes have arisen and in areas where we really don't need it particularly conflicts and client identification.

We have all come across solicitors doing something in clear breach of the current Code and this can be pointed out and if necessary acted upon. However, if the new Code has too much room for interpretation, this will set up frictions which should not arise if the wording was more careful and precise.

More generally, and this applies to most of the rest of the Questions, this is a very unwelcome distraction. Risk managers are trying to deal with the GDPR, 4MLD and Brexit let alone the new training regime. This consultation does not result in anything that comes from the profession an I am really concerned that many risk managers want to be involved but don't have the time because of the above, leading to a situation in which we are sleep walking into a situation that will cause real problems for true consumers, for international firms and generally result in complete re-writing of internal training, and policies and procedures which have just been bedded in from the 2011 Code.

Question 7

In your view is there anything specific in the Code that does not need to be there?

There is plenty that should be there but see answer to Q 8.

Question 8

Do you think that there anything specific missing from the Code that we should consider adding?

Until we see the proposed guidance it isn't possible to comment sensibly on this. My concern is that the Code will be set in stone then when the guidance comes we will want more clarity in the Code and it will be too late. They should be published together even if the guidance is, inevitably more of a work in progress.

Question 9

What are your views on the two options for handling conflicts of interests and how they will work in practice?

I am very concerned by the proposals and some of the work coming out of the reference group (own interest for instance not being understood). We have to remember that conflict/confidentiality/disclosure obligations are primarily a creature of the common law and the Code should be codifying what the common law says.

I had hoped that the regulatory managers would have had more influence in explaining the quotidian conflict issues faced by large commercial law firms.

The proposal that solicitors may practice in an unregulated entity is deeply worrying and one of the reasons is conflict (the other reasons that particularly concern me are insurance and privilege for reasons well-rehearsed elsewhere).

I completely agree with the concerns about unmet legal need but we shouldn't have the most vulnerable members of our society having what is effectively a second hand service. I have come across an ABS acting for all parties in a residential conveyancing transaction for example (on the grounds that it would save money, but didn't). The current proposals would entrench that sort of behaviour and provide a favourable competitive advantage to unregulated entities which cannot be what is desired but is I assume the unintended consequence of the proposed change. This is a real possibility if accountancy firms employ single solicitors i.e. not as an ABS and those solicitors act for different sides in the same transaction. This is not a level playing field and the test should be the interests of the client(s) and not the regulatory status of the lawyer they instruct.

I don't believe that the second option is common law compliant and it would narrow the ability to act in circumstances where it is perfectly proper now. I am not aware of any demand for change. However, if there is to be a change the whole question of what can and should be permitted should be looked at. Is the time right, given the growing internationalisation of commercial practice, to look again at informed waiver by sophisticated clients? If the rules are to change, then they should be looked at in the round and not just an attempt to simplify existing rules.

I am concerned that changes of wording e.g. 'substantial common interest' replaced by 'agreed common purpose' will introduce uncertainty. To me the latter is narrower than the former and am concerned that the common purpose must be agreed – what is the level of agreement required? It doesn't fit most SCI issues I grapple with, particularly when considering them at the outset.

Question 10

Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

I do understand the logic but imagine in practice that there will be a lot of unnecessary cross referring between the two.

I still struggle to understand why, if these issues are considered important for SRA regulated firms, they are not considered important for the individual solicitors in non regulated firms.

Question 11

In your view is there anything specific in the Code that does not need to be there?

I assume this means the Code for firms. I don't feel the need for two so it follows that I don't have specific comments.

One issue close to my heart is that the rules about complaints are now in a complete mess (not the SRA's fault). Every client has a right to complain but few clients in firms in which I work have a right to complain to LeO. I wish that this is acknowledged by the LSB among others and then reflected in the Code. It goes against the grain to tell clients they have a right when they don't.

Question 12

Do you think that there anything specific missing from the Code that we should consider adding?

See above

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?

See above

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.

In every firm I am involved with, that is, large commercial law firms, the 'heavy lifting' part of a COLP role is done by someone other than the COLP - who is reserved for policy/strategy/'bet the farm' issues. This plurality is not reflected in the old or new Handbook. Equally I have never seen the point of a sole practitioner having to be a COLP/COFA either.

Firms should be allowed to manage their risks, including regulatory risk, in line with the people available and the firm's culture and not via a straitjacket. I don't believe the COLP system has been a success very much for the reasons rehearsed when they were proposed. One important one is the effect of deterring confidences and queries which then go elsewhere or may be unanswered.

In practical terms, the appointment/changing of a COLP is a bureaucratic nightmare, for example the form is circuitous and asks many questions the SRA already knows.

I have not been involved in the appointment of a COFA but am aware that there is an unhelpful overlap in duties and obligations which again could have been addressed. The need for HOFA/HOLP is different and it was a mistake to map the COFA/COLP directly. Given the proposed relaxation of the SAR, is now the time to look at where responsibility for say financial stability really sits and indeed what 'Administration' means in the COFA title?

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?

By turning out something more comprehensible than the Authorisation Rules, in short. But I believe the best thing is to say that these roles are desirable but if firms achieve the outcomes without making a specific appointment, they should be free to do so, reinforcing the point that all partners/managers are responsible instead. There are good (internal) disciplinary reasons why this should be and firms should be allowed to choose.

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?

I am very concerned by this proposal which I believe is irresponsible, whilst I understand the logic that underpins it. There are four points I would like to make from my direct experience. Again in my direct experience these are not always understood by solicitors so I struggle to see whether clients will understand (until too late) the full significance of any explanation.

1. Conflicts. See my answer to Q 9

2. Insurance. It seems to me that without mandatory insurance with publicly available terms, we are abandoning those who are least likely to be able to understand what is said to them about insurance. Legal services are expensive and a significant factor is the cost of the minimum terms insurance. However, the answer is not to permit, indeed encourage, people to give legal advice without it. I have seen too many will writers (for example) duck their responsibilities so that testators and their beneficiaries are in effect left without a remedy (because PII kicks in when the claim is made and not when the breach occurs).

3. Public policy. Following on from the above, I am often asked internally whether we are safe to accept e.g. an undertaking from a firm we don't know about whom we have some concerns (usually inchoate) and my answer always is that they are regulated and therefore insured and we can proceed, and our clients can be comforted, with confidence. If we have to start asking for insurance information (and be sure that it will be available when needed) this will have a seriously deleterious effect on the whole chain of transactions. I used to act for the insurers of construction professionals and this kind of policy examination was common, necessary and time consuming. How can we express our concerns and not step into libel territory?

4. Privilege. Again, this is not just a private issue between the client who chooses a solicitor who cannot claim privilege and that solicitor. The effect on the 'chain', problems with disclosure at a later date are all, I would suggest unintended and undesirable consequences. Legal professional privilege is under threat anyway and it is unwise for a regulator to undermine it further.

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?

I will not 'take advantage' of such a retrograde step. I have had too much experience of professionals in other professions) who have insurance problems, through no fault of their own ever to opt for flexibility over certainty.

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?

Couldn't agree more. However, I believe this should apply to all solicitors and it should be part of the 'brand'.

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?

It has been part of my welcome to newly admitted solicitors for many years to warn them that it is quite normal not to feel that the 'L plates' don't come off for 2-3 years, depending on the level of specialisation. This talk hasn't changed much in over 20 years. I am very conscious, having set up my own risk management consultancy for lawyers three years ago, of the pressures of running your own business. Although in theory self-employed for over thirty years, as a partner, in practice, I have only really experienced the 'sharp end' of running a business in the last three years. I feel very strongly that the three years' requirement reflects common sense and feel it would be a disaster to let it go. It reflects accumulated wisdom that should not be trashed.

Question 20

Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

Only if the proposals to go ahead with individuals practising in unregulated firms goes ahead, but a) they should be the ones specifying quite what a risk their clients are taking and b) the SRA must continue to remember the numbers of clients who aren't technically consumers and bitterly resent the compulsory paperwork we are required to send them.

Question 21

Do you agree with the analysis in our initial Impact Assessment?

I have not had time to consider this question.

Question 22

Do you have any additional information to support our initial Impact Assessment?

I have not had time to consider this question.

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?

Yes. Of course

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?

They should sign up to the whole caboodle (minimum terms, SAR, SCF)) or not at all. They can't cherry pick.

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?

If not, what are your reasons?

Of course they shouldn't. This is an expensively won protection. My concern is that this will not be understood by the most vulnerable in society until it is too late.

Question 26

Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

Absolutely not. It would be a disaster. There must be minimum terms cover, a level playing field, available to all clients of a solicitor.

Question 27

Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

See above, passim

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?

Of course. The question shouldn't be necessary. Speaking as a local tax payer, I do not want to subsidise the errors of my local council's legal department's commercial venture. This is already an injustice.

Question 29

Do you have any views on what PII requirements should apply to Special Bodies?

Internal errors subsidised. The remainder on a level playing field.

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?

They should be regulated as a firm and as individuals by the SRA otherwise they can 'game the system' between the two codes. Human nature is human nature.

Question 31

Do you have any alternative proposals to regulating entities of this type?

I think the options are binary so no.

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?

This makes my point for me. Significant damage to people who are least able to defend themselves could (and probably. will) be caused. I speak as a long term volunteer in a legal advice centre and from pro bono work.

Question 33

Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

No further comment

Thank you for completing the **Consultation questionnaire form**.

Please save a copy of the completed form.

Please return it, along with your completed **About you form**, as an email attachment to consultation@sra.org.uk, by **21 September 2016**.

Alternatively, print the completed form and submit it by post, along with a printed copy of your **About you form**, to

Solicitors Regulation Authority
Regulation and Education - Policy - Handbook 2017
The Cube
199 Wharfside Street
Birmingham
B1 1RN

ID - 3

Consultation: Looking to the future - flexibility and public protection

Consultation questionnaire form

This form is designed to be completed electronically—in MS Word. Please save it locally before and after completing it.

Question 1

Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

In the context of our business, the suitability test is usually a factor when making applications for SRA approval for individuals joining the firm. Lawyers are 'deemed approved' and therefore, we may use mySRA to effect any changes – this process is usually straightforward and we are happy with this system.

However, in our experience, issues generally arise in the context of non-lawyers and we would make the following comments:

- the time taken to process the application – as it's all done manually, it isn't a very interactive process, which means questions / issues take longer to resolve;

- the SRA should consider adding an online portal area to its systems to enable the non-lawyer process to be dealt with online, perhaps to the existing mySRA system. For example, we input an individual's data into the system, the CRB (DBS) link auto-generates; the applicant can log in and complete the SRA form, together with the DBS form, which is then submitted to the firm; the firm then submits the form to the SRA; and

- we would suggest the SRA re-considers its requirement to have a Certificate of Good Standing from the individual's regulatory / membership body before granting approval, perhaps making their approval 'subject to the receipt of' the certificate. In our experience, waiting for the certificate can cause unnecessary delays and is only relevant to those individuals regulated by another professional body. Often, the individual's status can be confirmed via online membership records, or the applicant could provide their own membership / admission certificate.

More generally, the actual suitability test is not 'user-friendly' with non-lawyers easily misinterpreting the questions asked; there would be particular benefit in clarifying the disclosure requirements in respect of driving offences.

The SRA may also wish to consider providing a 30 minute webinar, for example, alongside the approval decision, which could cover the individual's obligations in a regulated legal practice.

Question 2

Do you agree with our proposed model for a revised set of Principles?

Our primary concern in respect of the revised set of Principles is the removal of the requirement to protect client money and assets. Consistent with our response to the separate consultation on the SRA Accounts Rules, we fundamentally disagree with the proposed reclassification of payments on account being treated as office money: aside from being extremely difficult to manage operationally, it offers far less protection for clients.

We do not consider the inclusion of this specific Principle in the proposed Code as adding unnecessarily to the length of the Code and its importance outweighs any perceived detriment in its continued inclusion.

Question 3

Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

We agree with the Law Society's response in this regard: the current drafting lacks clarity and could be interpreted as imposing a wider obligation upon solicitors working in alternative legal services providers than is otherwise intended. We would prefer revised wording which retains the approach that professional conduct is both a personal matter for the regulated individual, as well as being a matter for the regulated entity.

In addition, placing reliance on one broad principle is liable to be void for uncertainty and casts doubt on whether regulatory action by the SRA based upon an alleged breach of such a broad principle could ever be fair and / or consistent.

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?

Please see our comments in response to question 2 above.

We would also agree with the comments in the Law Society's own response to the Consultation concerning the reinstatement of the following principles:

- provide a proper standard of service to your clients; and
- protect client money and assets.

Both of the above are fundamental to the practice of solicitors and SRA-regulated entities and, in line with the desire to create a 'solicitor brand', are hallmarks of what sets solicitors apart from unregulated legal service providers.

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?

In the event that the SRA proceeds with its proposals, there will be a need for clear and consistent guidance both in terms of its interpretation of the stripped back rules and in terms of its enforcement strategy.

Meaningful guidance will be needed to help solicitors and regulated individuals apply the rules to their everyday practice in a manner which is both proportionate and risk-based and whilst we appreciate that it is impossible to plan for every eventuality, a comprehensive suite of scenarios / case studies based upon the SRA's own experience of regulating / investigating potential breaches would be hugely beneficial. These can of course be updated and refined as thinking develops and the revised rules become embedded in practice, to take account of the changing legal market and risks arising.

Consideration should also be given to the training provided to those undertaking the legal practice course, or equivalent, in professional conduct matters to ensure consistency between those entering the legal profession and those already practising.

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?

Whilst the new Codes are certainly short and focused, it remains to be seen whether it will be interpreted in a targeted, proportionate and risk based manner by the SRA in its dealings with the regulated community remains to be seen.

Our ability to comment effectively and in a meaningful way is dependent on the SRA sharing its proposed enforcement strategy sooner rather than later. The interpretation of the Code(s) and our advice to fee earners in professional conduct and ethical matters is to a great extent dependent on our central R&C team's understanding and experience of the SRA's own interpretation of the rules. We are not able to advise in a vacuum and so early engagement and sharing of proposed enforcement strategy and resources such as the Risk Outlook is of paramount importance.

Question 7

In your view is there anything specific in the Code that does not need to be there?

No. In our view based upon the limited information available at this stage, the Codes would benefit from more detail and guidance in order to enable its effective interpretation by those the SRA regulates and those responsible for advising them.

Question 8

Do you think that there anything specific missing from the Code that we should consider adding?

In our view, the individual code for solicitors needs to say something about the requirement to provide specific information to their consumers on the difference between using them to provide legal services in an alternative legal services provider and in using the services provided by a regulated firm i.e. the key features such as PII, compensation fund, difference in complaints procedure.

The SRA will have no regulatory remit over the alternative legal services provider itself and therefore, naturally the ability to enforce any breach of this requirement will rest with the individual solicitor. For that reason, absolute clarity is a must.

We would also echo and endorse the comments made by the Law Society in their own response to the Consultation in respect of the proposal to remove the prohibition in respect of 'unsolicited approaches' – this is a fundamental protection currently and in our view sets us apart from other areas of the legal services market. If the SRA is keen to adopt and promote a 'solicitor brand', the removal of this prohibition risks further blurring the lines between SRA regulated practices and alternative legal services providers. The suggestion in the Consultation that the 'mischief' the prohibition is designed to prevent would be covered by clauses 1.2 and 1.1 in the Code for Solicitors and the Code for Firms respectively is our view misplaced. The current, proposed drafting is too broad and allows for a subjective interpretation of the impact of an unsolicited approach on a consumer particularly in the absence of a complaint by that individual. It is also unclear how the removal of this prohibition would sit with the ICO and its own approach to unsolicited approaches.

We would also agree with the Law Society's comments regarding the absence of requirements around (a) systems to identify and deal with potential conflicts; and (b) undertakings.

Question 9

What are your views on the two options for handling conflicts of interests and how they will work in practice?

In our experience in this context, the greatest challenge faced by the profession is the practical interpretation of the provisions in regards to conflict of interest and information conflicts.

Depending upon how the draft Option is 2 is interpreted by the SRA and the profession in practice, we are concerned that the proposed amendments will see firms either becoming less competitive within the market place through the decline of work that other firms or non SRA regulated entities will accept or, whether knowingly or not, take the risk of breaching the rules by applying them too broadly.

Our understanding of the practical interpretation of the current provisions, broadly replicated within the draft Option 1, is that the inclusion of the terms “conflict or a significant risk of such a conflict” is sufficiently broad to focus on the point that instructions should not be accepted in any scenario where there is a conflict of interest or, on the happening of one or two reasonably foreseeable events, a conflict of interest is very likely to arise.

The proposed split of the provision as set out in Option 2, so that instructions should not be accepted where there is a conflict of interest only, deliberately and specifically excludes from the reader’s mind consideration as to whether or not to turn away the instructions in cases where there is a significant risk of a conflict. This presents a higher risk that instructions will be accepted where there is a significant risk of a conflict of interest and the acceptance of them will give rise to a high risk of premature termination of one or more engagements. Equally, the separation of the consideration of the provisions regarding “significant risk of a conflict” may result in the misinterpretation of a situation presenting a significant risk of a conflict being an actual conflict and the proposed engagement being turned away unnecessarily, without consideration of the wider reputational and commercial impact and the consequences for the particular client(s) concerned.

The absence of the provisions regarding the importance of either “an agreed common purpose” or “competing for the same objective” in Option 2 presents a real risk that important considerations as to the appropriate circumstances in which an information barrier may be utilised will be overlooked leading to an increased risk of injunction applications to prevent firms from continuing with particular representations, claims and complaint.

Given the importance of the correct application of the conflict provisions in practice, our view that it is the responsibility of the regulator to implement / have in place provisions that are both transparent and not open to a wide interpretation in practical terms. This helps ensure that there is consistent practical application, maintains public confidence in the profession and fair competition between regulated entities.

For these reasons, we prefer the proposed forms of words set out at Option 1 of the new draft Conflict Rule.

Question 10

Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

Please see our comments in relation to question 6 above.

Question 11

In your view is there anything specific in the Code that does not need to be there?

Please see our comments in relation to question 7 above.

Question 12

Do you think that there anything specific missing from the Code that we should consider adding?

As mentioned above, it is difficult to comment meaningfully on the draft Codes without seeing the associated guidance / toolkits which may subsequently be produced. In our experience of advising the business and individuals within it, the absence of detail and / or specific examples of how an obligation may be interpreted in practice often provokes debate.

The move towards a stripped back Code with little in the way of detail risks prompting further debate where a detail being added back into the draft Code(s) may prevent time and resource being spent unnecessarily on legal debate, rather than the provision of a proper standard of service to clients.

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?

We have considered the Law Society's response to the Consultation and would agree with their detailed analysis of, and comments upon the drafting of the Codes.

In particular, we would echo the comments in respect of rules 1.4 and 2.4: the issue of the extent to which a solicitor must follow a client's instructions where there are credibility issues, or concerns as to the strength of an individual's case, is often complex and requires a balance to be struck between the duty to act in a client's best interests and the overriding duty to the Court.

The striking of this balance is often difficult and involves ethical considerations, as well as a thorough understanding of where and how to draw the line between fearlessly and objectively pursuing a client's interests and not allowing one's independence to be compromised. This area of the Code requires clarity and would benefit from comprehensive guidance.

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.

In our view, retaining the roles is not an issue in principle, as their existence has helped in providing a central point within law firms to account for its compliance and regulation procedures, whereas previously without a central point of contact, risk and compliance matters often became secondary to the primary objectives in firms trying to generate / attract new business. The introduction of the roles has assisted in driving a culture and awareness of risks associated with compliance matters. The appointed individuals are able to influence and embed these principles into business practices to encourage compliance amongst their staff.

However, in our view, there are concerns regarding the relevance of these roles and the operation of them in large law firms. It is difficult for one individual COLP/COFA to be fully aware, understand and be accountable for all the firm's compliance issues. One individual cannot effectively perform this role on their own, yet our own understanding of the SRA's expectations is for the appointed COLP/COFA to perform these roles effectively in large firms regardless.

The roles potentially place disproportionate risk and responsibility on the COLP/COFA to report matters to the SRA. The situation can often leave COFA/COLPs being isolated within the law firm. This is a factor that may affect firms whatever their size. Our view is that the responsibility should rest with a number of senior management that are responsible for the operation of the firm.

The roles, in our view, are better suited to smaller practices where the COLPs and COFAs are most likely a sole practitioner or senior partner in a smaller firm – the same people that run the business take responsibility for compliance which is usually reflective of reality, although we appreciate this comes with its own risk for potential of lack of impartiality. In order to retain the roles for larger firms there needs to be some changes in proving the relevance of the roles as they are. There needs to be consideration given to the natural existence of qualified and professional individuals within the personnel structures in larger firms who provide regulatory / compliance / management advice and services, often feeding into a committee to take forward rather than to the COLP/COFA only.

This actually demonstrates that the larger law firm may be going the extra mile to perform the function of the roles, but the SRA have not formally acknowledged or supported this as yet and continue to place the burden fully on one individual who must be a 'qualified lawyer' within the terms of the Legal Services Act. In retaining this strict requirement, the SRA fails to consider the different skills / knowledge set of a risk and compliance professional and a practising lawyer and does not appear to appreciate that the former can, in most cases, offer a more objective and credible assessment of whether a breach of the rules, for example is 'material' and therefore reportable.

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?

In our view, this area would benefit from the introduction of a tiered system for COLP/COFA compliance whereby, the implementation of the roles is considered in context according to the individual law firm.

For example, the COLP/COFA for a sole practitioner firm needs to be the Principal, whereas for a medium sized firm it would ultimately be the senior partner, or partners, potentially appointing more than one person to take on / share the role / responsibility.

For larger firms, there should be an acknowledgment of comprehensive and robust compliance structures in place, with senior individuals fulfilling various aspects of the role(s). Consideration ought to be given to non-legally qualified individuals being COLP/COFA, particularly when it is those people that are in reality undertaking the day-today risk analysis for the firm, including but not limited to compliance reviews.

The SRA may wish to consider a qualification process for non-lawyers to be appointed in COLP roles such as an interview, or practical exercise and given consideration to positions such as Deputy COLP and / or the COLP / COFA teams made up of relevant individuals.

The SRA needs to consider working collaboratively with larger firms to understand the intricacies of how the compliance teams operate in order to provide a bespoke approach to the COLP/COFA roles whilst complying with the Legal Services Act.

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?

We are concerned that the proposal to allow solicitors to deliver non-reserved legal services to the public through alternative legal services providers may lead to the creation of a 2 tier system of legal services provider, which is not necessarily in the best interests of client, especially where the client is unsophisticated, or the primary driver for their choice is cost. The SRA itself comments on the 'unmet legal need'.

We think countering 'unmet need' with a more flexible approach to the regulation of solicitors and entities is only one part of the solution and does not take into account any socio-economic reasons there may be which contribute to the 'unmet need'. The citation of a bald statistic without further analysis or context as to the reasons, if any, given by those taking part in the research regarding the accessing of legal services is unhelpful and undermines the objectives the SRA is seeking to achieve – namely increasing competition in the legal profession and increasing access to legal services for consumers (whether lay or business).

In referring to alternative legal services providers, we do not include those falling to be regulated by bodies such as ICAEW; ILEX, the CLC and the BSB, or the MoJ as a CMC. Rather, we are concerned about those providers who will not all under any specific regulation, leaving consumers of their services with limited protection beyond specific statutory regimes. Whilst arguably this proposal may serve to increase competition (to the benefit of the consumer), it may also have the detrimental effect of leaving consumers without appropriate redress when required.

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?

Assuming the proposals are implemented by the SRA, they will in due course be reviewed in line with our strategic objectives to determine the extent to which we as a Group will take advantage of the greater flexibility.

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?

We agree that this requirement should remain.

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?

We note the comments made in the Consultation document that other regulations are designed to address the risks associated with newly qualified solicitors having insufficient skills or knowledge in relation to the management and control of a business, but we would question the basis on which this assessment could reasonably made if there are no basic requirements in the first place.

Whilst we would echo the Law Society's response that the current requirement to have completed 12 hours of management training may not be effective, it may give newly qualified solicitors an insight into how a practice is run and whether it is something that they should consider immediately, or wait until they are a few more years PQE. Arguably, a newly qualified solicitor should be focused on developing their individual practice and reputation, rather than taking on the additional burden of owning / running a practice on their own.

We acknowledge that the length of time qualified is not of itself a robust measure of competence: it is however an indicator of practical experience and the ability to identify and manage risk in relation to their professional practice. With this added experience comes financial and professional maturity and the ability to withstand external pressures which may otherwise affect an individual's ability to manage a practice effectively and responsibly.

We endorse the comments made by the Law Society in respect of the SRA's data showing newly qualified solicitors do not present a significant risk to the delivery of a proper standard of service: whilst taking a narrow interpretation of 'proper standard if service' may show this to be true, it fails to recognise the wider obligations which come with running and managing a regulated legal practice. For example, handling client money / assets; operating client and office account effectively; maintaining adequate PII; and in some cases, being responsible for the employment and remuneration of others.

Question 20

Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

It depends on what is considered 'detailed' – it would be helpful to know what the SRA considered 'detailed' as we consider the information we already provide to be 'detailed'. At present our view is that we already provide enough information within client retainer letters and terms of business i.e. contact details for a complaint, indemnity insurance details etc. Even these details are not always read by clients or understood by them. We find that often clients only seek out such details where they have a requirement to intimate a claim, or raise a complaint about our service.

In our view, consideration needs to be given as to what our consumers would gain from more information. Our view is that our clients may find this confusing and question why there may be more pages dealing with compliance matters than their actual matter in hand – the suggestion is not commercially positive and in fact may have a negative impact on clients' confidence in our services if all they see are more details on what to do If they're not happy. Essentially, consumers are already receiving the information they need, coupled with our own fee earner awareness of identifying matters such as consumer protection and where they express dissatisfaction, our colleagues are experienced enough to address them and adopt early engagement which is the principle that should be promoted throughout firms – acting in the client's best interests at all times.

We presume that this question is asked in the context of trying to ensure consumers know the difference between engaging the services of an alternative legal services provider and a regulated law firm and what the process for redress is i.e. that it is different and the stronger protections being those associated with a regulated practice. Our view is that alternative legal service providers should expressly state their position i.e. their clients will not benefit from the compensation fund, they do not have PII as they are unregulated practices and there is no independent body able to consider any complaints they may have regarding the level of service with which they have been provided. The latter suggestion may not work commercially and it may turn consumers away, however, this does address the issue: we have a duty to educate consumers in this area and they have right to know when the service they are purchasing has additional statutory protections associated with it.

Despite our comments, the details for protection are not, in our experience a primary concern for clients, they are usually most concerned with cost of the service first and foremost and protections usually come into play if and when something goes wrong.

Question 21

Do you agree with the analysis in our initial Impact Assessment?

We have considered the Law Society's detailed comments and analysis in respect of the initial Impact Assessment and would endorse those comments.

Question 22

Do you have any additional information to support our initial Impact Assessment?

Please see question 21 above.

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?

We agree. In our view the client's best interest would not be best served by allowing solicitors in alternative legal services providers to hold client monies in their own name. If solicitors were allowed to hold client money in their own name, it would mirror the practice of a Sole Practitioner, yet without the individual solicitor having a regulated practice. Sole Practitioners generally have robust regulatory procedures in place when operating a practice, particularly in relation to the management of their client and office accounts and the suggestion of a solicitor in a non-regulated practice holding client money is considered to be very high risk to clients and the legal industry's reputation as a whole.

However, we are concerned by the SRA's own approach to this issue as proposed at page 32 of the Consultation document, where on the one hand it is stated: *"…the solicitor will be responsible for any personal misconduct relating to those assets whether or not the firm is authorised by us"*, which is followed by the paragraphs relating to the Compensation Fund, where it is stated: *"…our proposal is that clients of solicitors outside of authorised firms will not be able to make a claim on the Compensation Fund in any circumstances."*

Whilst arguably a solicitor who chooses to provide legal services through an alternative legal services provider should not take with them the protections offered by the SRA (and indeed, the SRA would not be authorised to regulate those providers), there is in our view a real risk of a gap in statutory protections opened up. Although this would, put at its most simple, enable consumers to readily identify the differences between an SRA-regulated practice and an alternative legal services provider, it doesn't account for the consumers who for whatever reason may have to opt for the latter, whether due to costs, accessibility of services or simple geography, caused by the natural contraction of the market.

Stating that a solicitor will personally liable for any malfeasance in relation to client money they may hold through an alternative legal services provider fails to appreciate the commercial reality and assumes that in each case, the solicitor will hold a sufficiently senior position within the provider to influence the handling of those funds once received.

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?

This is not applicable to our business and we therefore have no specific comments to make.

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?

If not, what are your reasons?

Yes, agreed in principle for the reasons stated in the Consultation paper.

We do however question the appropriateness of this approach and the invidious position in which it will place those solicitors working in an alternative legal services provider. Please see our comments at question 23 above: there is a risk that solicitors may find themselves personally liable for acts / omissions in respect of client money held by (or through) their employers simply because they have an overriding duty to protect client money / assets. The proposal assumes a level of influence in the management of the alternative legal services provider which in reality the individual solicitor may not have.

Question 26

Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

Whilst we agree with the rationale behind the proposal, we consider it somewhat naïve to assume that alternative legal service providers will take on (often costly) PII cover when there is no specific requirement to do so, either at all, or at an appropriate level commensurate to the risks involved in the work it proposes to undertake.

Solicitors in the unregulated sector and operating without PII present a risk to consumers if and when the worst happens. Consumers may find they are unable to proceed with negligence claims due to the lack of appropriate PII, or even resource on their own part to bring the claim, despite there being a strong case on the face of it. The consumer may have genuinely used the lower cost unregulated practice due to financial difficulties e.g. filing for a divorce and if their matter has not been managed properly or the deadline for filing is missed etc the consumer could be left in further financial difficulty without any options / routes through which to obtain redress.

Our view is that this is again a matter of understanding how sophisticated the consumer may be, whether they have been told they will not receive the benefit of PII and whether this course of action is, in the long terms, in the best interests of our consumers using legal services.

Question 27

Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

The principal difficulty with the approach proposed is consumer awareness and understanding in relation to using a non-regulated firm / alternative legal services provider.

Potentially misleading advertising being used by non-regulated firms is always a risk and examples are readily available in the legal services market: the proposals pre-suppose all consumers are sophisticated enough to appreciate the difference in providers, which are sometimes less obvious.

There is also a risk that consumers will become disgruntled with the lack of clarity which may lead to a loss of confidence in legal profession as a whole if non-regulated firms do not meet consumer expectations.

We are interested to understand how the SRA proposes ensuring there is a clear distinction made between the unregulated and regulated areas, so that the public are aware despite there being regulated solicitors in unregulated practice, which will muddy the waters for a lot of consumers.

In our view, there is a risk that consumer will 'blend' the two areas and promotions, marketing and advertising will often play a large role in the consumer' decision making process, without them realising the potential risks of using unregulated practices.

In addition, it must be appreciated that the marketing budgets for the regulated smaller firms are unlikely to be as large as those of unregulated firms and may pose unfair competition. This risks a contraction of the legal services market in respect of regulated legal practices, which may in turn reduce, rather than increase, consumer choice.

Consumer awareness may not be at a level that differentiates between regulated and non-regulated entities and therefore they would not be making an informed decision in accessing legal services and what their rights of redress may be if something goes wrong, or if they have concerns about the level of service with which they have been provided. In particular, the 'yardstick' as to what is 'reasonable' in a regulated entity and what is 'reasonable' in a non-regulated entity will be different and consumers therefore expected to compare apples with oranges.

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?

This is not applicable to our business and we therefore have no specific comments to make.

Question 29

Do you have any views on what PII requirements should apply to Special Bodies?

This is not applicable to our business and we therefore have no specific comments to make.

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?

We have considered and would endorse the comments made by the Law Society in its own response to the Consultation document.

In particular, we refer to the comment at paragraph 154 of the Consultation document, which states: *"Any legal advice given by the firm to its clients will of course be confidential to the client, but that advice given by that firm will not be protected from inspection on the basis of legal professional privilege"*. Given that the concepts of confidentiality and LPP and their interplay with each other often taxes some of the best legal minds, we are unsure how an unsophisticated (or even sophisticated) client / consumer will appreciate what this means both in general and for them in their individual legal matter.

We also note the proposal that solicitors providing legal services through an alternative provider will not be able to use the terms 'solicitor' or 'solicitors' in the firm title and whilst this restriction is a step towards creating a recognised 'solicitor brand', we questions how, when solicitors working within the non-regulated firm will still be able to refer to themselves as solicitors, this will provide clarity for consumers.

Question 31

Do you have any alternative proposals to regulating entities of this type?

No. This is a matter for wider discussion / consultation and does not sit within the review of the SRA Handbook.

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?

The SRA's powers to intervene into an individual solicitors practice 'within a practice' are well-established and the complexities of effecting an intervention into a solicitor's practice once operating in an alternative legal services provider are recognised. In particular, there may be circumstances where the firm and / or individual may deliberately cloud the issue.

As the SRA would have no statutory powers to require the alternative legal services provider to operate and manage their business in a specific way to make intervention easier, it is difficult to see how this problem could be resolved. Although we note the extended powers under section 44B and section 44BB of the Solicitors Act 1974 (as amended), it is our understanding that the efficacy of these powers may be diluted by the notice requirements in exercising those powers.

It is likely that a wider, more detailed consideration would need to be given to this issue and it may be that a statutory solution is required.

Question 33

Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

We agree.

Thank you for completing the **Consultation questionnaire form**.

Please save a copy of the completed form.

Please return it, along with your completed **About you form**, as an email attachment to consultation@sra.org.uk, by **21 September 2016**.

Alternatively, print the completed form and submit it by post, along with a printed copy of your **About you form**, to

Solicitors Regulation Authority
Regulation and Education - Policy - Handbook 2017
The Cube
199 Wharfside Street
Birmingham
B1 1RN

ID - 4

Consultation questionnaire form

Question 1: Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

The content of the test itself is fair and discharging the burden of the suitability test is straightforward in administrative terms but it is unclear what level of scrutiny is given to these returns to ensure that only those who are suitable are admitted to the profession. Further information regarding this process would be welcome as a way of showing greater transparency of the regulatory process.

The Law Society is aware of concerns regarding the timing of the suitability test. The Society was supportive of the removal of student enrolment prior to the start of the Legal Practice Course as it was unnecessarily costly and bureaucratic. However, the Society noted at the time that there may be issues which arose as a result of this and that it was essential that students have proper information to alert them to any likely problem at an early stage. There were also notable benefits to the previous arrangement. First, they enabled any concerns about a student's character to be addressed before the student embarked on the period of recognised training, at which point there has already been a significant outlay in time and money. Secondly, the requirement to undergo the process placed students on notice that their conduct may seriously affect their ability to pursue a legal career. It offered them an opportunity to engage at an early stage with the implications of being a professional. While it is accepted that each individual must take responsibility for their behaviour and should take advantage of the information available on the SRA website about character eligibility, it is not realistic to expect a student to understand the complex technicalities for reaching the SRA's suitability standards.

Unfortunately, although students can request an early appraisal of any issues that may cause problems regarding their suitability, the Society understands that it is not widely understood what this process is and when it should be applied for. The Society is aware, anecdotally, of situations arising whereby firms are routinely having to query trainees when they begin their placements and deal with issues, which the person concerned had not recognised must be declared, at this late point. There may also be situations where firms do not check, which raises issues about client protection. This represents a waste of a significant outlay in time and money on their part.

Clear and appropriate information regarding the suitability test should be made available to students at an early stage in order to make it obvious to students where previous conduct may prevent them from joining the profession and to give them a clear idea of the conduct they will be expected to demonstrate over the ensuing

years if they wish to join the profession.

Question 2: Do you agree with our proposed model for a revised set of Principles?

The Society has concerns with some aspects of the proposals as set out below.

New Principle 1: Uphold the rule of law and the proper administration of justice

This is current principle 1. We welcome its retention. However, we would reiterate that it is important to understand what "the rule of law" truly means. While a solicitor who is acting illegally may damage trust in the profession, it does not follow that the solicitor is also failing to uphold the rule of law. We would refer to The Rule of Law by Lord Bingham[17] which advances eight principles by way of expansion of the basic concept, the latter being: "that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts." These are primarily obligations of the state, not of individuals.

New Principle 2: Ensure that your conduct upholds public confidence in the profession and those delivering legal services

This is a reworking of current principle 6 ("behave in a way that maintains the trust the public places in you and in the provision of legal services") but brings in a new obligation with respect to providers generally.

There are two substantive changes.

First, the absence of any reference in the new wording to the importance of regulated individuals behaving in a way that retains public trust in them personally.

Secondly, it is illogical for regulated individuals and firms to be placed under any regulatory obligation with respect to non-regulated individuals and providers, and the proposed loosely worded reference could deter regulated individuals and firms from pointing out why the public should have greater confidence in the regulated sector, for example because of their professional training and the higher levels of client protections.

We propose that the new Principle be redrafted as follows:

*Proposed alternative wording for New Principle 2: Ensure that your conduct upholds public confidence **in you and** in other regulated individuals and firms"*

New Principle 3: Act with independence

[17] The Rule of Law by Tom Bingham, Penguin Books, 2011.

This is a reworking of current principle 3 ("not allow your independence to be compromised"). The Society does not have any concerns with the revised wording.

New Principle 4: Act with honesty and integrity

This is a reworking of current principle 2 ("act with integrity").

The Society has concerns with this proposed new principle not least because a requirement to be honest, including with respect to client money, is significantly weaker than a requirement to protect it, as required by current principle 10 ("protect client money and assets"), which it is proposed to remove. This proposal is presumably to facilitate the other proposal that solicitors working in unregulated entities should not be able to hold client money in their own name.

The absence in the new principles of any reference to the importance of protecting client money and assets raises concerns from the perspective of professional standards and consumer protection. Arguably, such protection would become even more important in an unregulated entity which do not and would not have to comply with the SRA's accounts rules. We therefore believe the new set of principles should retain an explicit reference to the protection of client's money and assets, ideally in a separate principle.

New Principle 5: act in a way that encourages equality, diversity and inclusion

This is a reworking of current principle 9 ("run your business or carry out your role in the business in a way that encourages equality of opportunity and respect for diversity"). The substantive change is the addition of a reference to inclusion. However, the word "act" seems a significant watering down of the current wording and the Society would prefer to retain "run your business or carry out your role" in place of "act".

We are also concerned that, while equalities legislation will apply to unregulated entities, this Principle will not. The SRA should address this issue in its equality impact assessment.

New Principle 6: Act in the best interest of each client.

This is a minor change to the wording of existing principle 4 ("act in the best interests of each client"). The Society does not have any concerns with this wording.

Question 3: Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

As noted above, we are concerned that the wording of the new Principle 2 does not refer to the importance of regulated individuals' behaviour in a way that retains public trust in them personally.

We would prefer absolute clarity and therefore propose that the new Principle be redrafted as follows:

*Proposed alternative wording for New Principle 2: Ensure that your conduct upholds public confidence **in you and** in other regulated individuals and firms"*

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?

Current Principles

The SRA is proposing the removal of four current principles:

a. Current principle 5 ("provide a proper standard of service to your clients")

The Society believes that this Principle should be retained as this is central to the profession and reflects the high level of quality that consumers can expect from a regulated individual. Its removal gives rise to concerns from the perspective of professional standards and consumer protection.

b. Current principle 7 ("comply with your legal and regulatory obligations and deal with your regulators and ombudsmen in an open, timely and co-operative manner")

The Society does not object to the removal of this principle.

c. Current principle 8 ("run your business or carry out your role in the business effectively and in accordance with proper governance and sound financial and risk management principles")

The Society does not object to the removal of this principle, provided that current principle 10 is retained.

d. Current principle 10 (“protect client money and assets")

As noted above, the removal of this principle raises concerns from the perspective of professional standards and consumer protection. Arguably, such protection would become even more important in an unregulated entity which does not have to comply with the SRA's accounts rules. We therefore believe that the new set of principles should retain an explicit reference to the protection of client money and assets, ideally in a separate principle.

The loss of principles 5 and 10 cause particular concern. In addition to the reasons cited above, these principles are so closely associated with what consumers have come to expect of a solicitor that they might be said to epitomize the brand on which consumer confidence is in large part founded. We can see only risks and no benefits in removing what are often seen as two hallmarks of the profession from the core principles.

At Appendix 3, we provide a scenario showing what could happen in a worst case scenario.

Other Principles arising from the newly revised ones

While confidentiality is arguably implicit in the principle that regulated individuals should "act in the best interest of each client", the Society believes it would be helpful to include a specific reference given its importance to consumers and to compliance with professional standards.

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?

We take the view that it would be helpful to the profession to provide a thorough and developed suite of scenarios, particularly as it is proposed that the indicative behaviours be removed from the Codes. As examples of the types of scenarios which we would consider to be useful, we suggest the following:

- A scenario that deals with a sole practitioner who establishes an unregulated entity in order to provide unreserved legal services. The scenario would cover how this practitioner might manage the operation of a regulated and separately unregulated business in practice. It would be particularly interesting to understand how the sole practitioner can guard against client confusion when practising in the circumstances set out above.

- A scenario that explores a practising solicitor working in an unregulated entity who is asked to represent a client who has clear conflicts with existing clients of that entity. We understand that in such a situation the solicitor would be able to represent the client. It would therefore be valuable to understand the parameters around management of such conflicts.

- A scenario that outlines whether, under the new proposed Codes of Conduct, a solicitor firm of conveyancers can act for a buyer and a seller, or for a borrower and a lender, in a conveyancing transaction and be compliant with 6.1-6.5 of the proposed Code of Conduct for Solicitors.

- A scenario that explores the impact of the proposals on the giving and receiving of undertakings ie between a solicitor in an unregulated entity and a solicitor in a regulated entity. Undertakings are the oil in the engine of legal transactions and help ensure they can take place. If in such circumstances, a solicitor in an unregulated entity were to breach an undertaking, what would be the consequences in terms of reparations to the affected consumer? Under what, if any, circumstances would undertakings from an unregulated firm be acceptable to regulated firms and others?

- A scenario that explores a solicitor who owns and practises through an unregulated entity who wishes to place advertisements online and in a newspaper. It would be useful to understand in more detail what the advertisement can say about the unregulated firm employing solicitors with and without practising certificates.

- A scenario that explores how an in-house lawyer (perhaps working for a local

authority) might provide legal services to the public. How this service would be managed, charged out, and how conflicts and risks would be managed.

- A scenario that explores how a solicitor working in an unregulated firm would manage conflicts, bearing in mind that they would be bound by the conflict rules from the solicitors code but may be working with colleagues who are totally unfamiliar with the concepts of conflict, confidentiality and disclosure.

- As set out in our answer to Question 20, we believe it would be helpful for the SRA to provide a case study on the information that should be displayed about consumer protections, including the level of detail required and expectations as to the prominence of the information presented.

Our consultation with some firms indicates that they are concerned about the removal of indicative behaviours from the handbook because of their usefulness in indicating how the regulated community can best comply with their regulatory requirements.

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?

As the Code's purpose would be to forestall misconduct, there is a balance to be struck between excessive detail and brevity. Clarity is important but so is predictability.

We know that our members, particularly those from smaller firms, like certainty. Many members would rather have a definitive 'do this' or 'don't do that' approach, so that compliance is more straightforward and there is less scope for genuine misunderstandings or disputes with the regulator. Without such certainty, disputes with the regulator about whether or not a particular behaviour is acceptable are more likely, as is uncertainty about the circumstances in which enforcement action will be triggered.

In addition, we are concerned that the language used in the Code is often vague or loosely constructed. This creates a risk that behaviour that is clearly within the current Code may be regarded as incompatible with the new Code and that a member carrying on practice in a fully compliant way now might be in breach under the new Code. There is real concern that both of the new Codes would give the SRA too much discretion. There is clearly a need for the SRA to provide more information and ensure that it acts in a consistent way and to make an explicit commitment to those subject to regulation that it will be consistent, fair, open, transparent and predictable about the circumstances in which it will decide to take or not to take action.

We understand that guidelines are planned and should mention the concerns of many that they are not yet available.

Specific examples of where the Code is lacking in clarity are set out in our answer to Question 13.

Question 7: In your view is there anything specific in the Code for all solicitors that does not need to be there?

No. On the basis of the partial information provided about the new regulatory framework and the SRA's approach, the Society has not so far identified anything specific in the proposed new Code that should be removed.

On the contrary, as noted in our response to Q6, we believe the Code needs more detail and guidance in order for it to be effective and provide clarity to the regulated community.

We would also reiterate that, without the full picture in relation to the new framework and the SRA's approach, it is difficult to reach a definitive judgment on the proposals.

Question 8: Do you think that there anything specific missing from the Code for all solicitors that we should consider adding?

It is not possible to respond to this question with any real certainty as we have not seen the guidelines or other parts of the proposed regulatory reforms.

However, on the basis of what has been set out so far, we have identified three issues on which the Code should be revised:

Unsolicited approaches to clients

The Society is extremely concerned by the proposed removal of Outcome 8.3 in the current Code, which states: "you do not make unsolicited approaches in person or by telephone to members of the public in order to publicise your firm or in-house practice or another business;".

Solicitors who make such unsolicited approaches to clients are not acting in the client's best interests, but rather their own. This explicit prohibition provides an essential protection for clients who are at their most vulnerable when such approaches are made – at the police station, court or prison. Its removal would undermine the protection currently provided to clients in this situation, which prohibits the solicitor from carrying out this behaviour.

The prohibition that the consultation proposes to remove also supports the Government's Duty Solicitor scheme by helping to ensure that anyone arrested can exercise their right to free legal advice from the duty solicitor. Removal of the prohibition would undermine the efficient running of the scheme.

The justification for proposing the removal of the prohibition is that it is "*covered by new 1.2 in the Code for Solicitors and new 1.1 in the Code for Firms to a certain extent.*"

The relevant clauses are as follows:

- new 1.2 in the Code for Solicitors: "*You do not abuse your position by taking unfair advantage of clients or others.*"
- new 1.1 in the Code for Firms: "*You do not abuse your position by taking unfair advantage of clients or others.*"

Clearly, the new clauses carry significantly less weight than the current explicit prohibition. We believe their wording is too weak and unclear to provide certainty to the public, members of the profession and the Legal Aid Agency that unethical behaviour is prohibited and will not be tolerated.

We therefore recommend that the Code of Conduct for Solicitors, RELs and RFLs, and the Code of Conduct for Firms should maintain the current wording of Outcome 8.3, which explicitly prohibits such unethical behavior.

Firms being reasonable or forming reasonable views

A number of references to firms being reasonable or forming reasonable views have been dropped. We would argue that if a solicitor acts reasonably but makes a mistake, it is right in such circumstances that being reasonable should not provide a defence to a request for an injunction or other mandatory order or costs. However, it would also seem unfair to make the actions of the solicitor in such a situation a potential offence that is subject to disciplinary consequences.

Systems to identify and deal with potential conflicts

We note that references to systems to deal with potential conflicts and confidentiality have been lost within the new drafting of the Codes of Conduct. We believe that this causes a problem. We assume that the omission has taken place because there would be general rules about systems. In our experience, and the case law supports this, the biggest single problem for firms in these areas is poor systems, particularly systems for picking up conflicts, or systems for establishing where special protections will be needed to protect confidential information. The SRA approach therefore, while being logical, would quite possibly be unhelpful to firms.

Undertakings

We have particular concerns about the position where a solicitor in an unregulated provider gives an undertaking to a solicitor in a regulated firm or to others who would need to place reliance on it. Undertakings have become a crucial element of the practice of law in the UK and are used to expedite matters that, in the absence of an undertaking, would cause considerable delay and inconvenience to the practitioner and the client.

Even though an undertaking relates to an individual solicitor, the Society has significant concerns regarding an undertaking provided by a solicitor employed by an unregulated provider. We believe that solicitors in a regulated firm would be highly unlikely to accept an undertaking from an unregulated provider due to a lack of protections if things go wrong.

We take the view that undertakings are sufficiently important to warrant protection in both of the codes, making clear that they are not just an enforceable agreement, but that breach can give rise to disciplinary proceedings.

Please also refer to our response to Question 5 which includes a suggested scenario

in relation to undertakings.

Question 9: What are your views on the two options for handling conflicts of interests and how they will work in practice?

The need for clarity around handling of conflicts is paramount. One particularly difficult area is conflicts relating to buyers and sellers in conveyancing transactions. We refer to our suggestion for a specific scenario to be created on this topic in our response to Question 5.

We read the two options set out in the consultation as follows:

- Option 1 largely replicates the 2011 Code, in prohibiting a solicitor from acting where there is a conflict or significant risk of conflict, for example as would exist if an individual solicitor were to act for a buyer and a seller, unless specified circumstances are met and protections are provided;

- Option 2 would narrow the ability to act given that it provides for a complete bar on acting where there is an actual conflict, and requires protections to be put in place if there is a significant risk of a conflict.

We would take the view that Option 2 would quite possibly be unworkable as it is not always possible to identify where a conflict exists. It is too restrictive and unnecessary. Because of the difficulty in identifying where conflicts exist, this option would present risks from a consumer protection perspective.

It may be helpful to set out our thinking to both options in more detail, at the same time commenting on some of the more subtle changes in emphasis:

<u>Option 1</u>

The proposed new rule 6.1 reproduces the old outcome 3.4 dealing with a conflict between the solicitor's own interests and those of the client. It is proposed that there should be an absolute bar to acting (as in the current Code). Under general law such a conflict could be waived. We are not aware of any pressure to change this.

The proposed new rule 6.2 effectively reproduces old outcomes 3.5 to 3.7, and deals with conflicts between clients. In addition to dropping indicative behaviour, it makes a number of changes to the existing rules. First (in 6.2 (a)), the old rule that if someone was to act for more than one client, the clients had to have 'a substantial common interest'. This is to be replaced by saying that the clients need both 'an agreed common purpose and a strong consensus how that purpose is to be obtained'. We take the view that this is weaker, because it allows one firm to act for more than one client on a matter even if the clients have little or no common interest in the matter. There is no explanation for the change.

A further protection has been changed (6.2(iii)). Under the old rules the solicitor had to be satisfied that it was reasonable to act for all clients. This has been dropped. We find this somewhat unsatisfactory, particularly as it would affect less sophisticated clients, who might not understand the implications of giving consent. There is a restatement of the need for the benefits to the clients having to outweigh the risks, but the old requirement was that this was something the solicitor had to have been satisfied about whereas the new requirement is a pure objective test.

Three old protections have been dropped. The first (outcome 3.7 (a)) was that the solicitor had to explain the risks of acting for more than one party and be satisfied that all clients understood this; this was similar to what happens when, for example, one spouse agrees that a house should be mortgaged to support a loan to the business of the other spouse. We would argue again that dropping this is wrong although it may be argued that no consent can be 'informed' without an explanation process (but this should be made clearer). The second (outcome 3.7 (c)) was that other than the matters for which client consent had been given there was no other client conflict. We can see that this protection added little. The third is that without specific client consent, no individual could act for more than one client on the matter. We assume that this was dropped because the issue has been picked up in the code for individuals.

Finally, these conflict rules are to apply to both firms and individuals, in more or less identical terms. But, recognising that some parts of the rule need to apply to individuals, the question remains as to how the application of the whole of the rule works? Is it to be the responsibility of each solicitor on engagement to see that informed client consent has been given? We do not foresee that this would be straightforward. It would be wrong for the senior lawyers acting to be able to just pass responsibility onto the firm, irrespective of what they know or do. We feel that more precise drafting would be beneficial.

<u>Option 2</u>

This would be a complete bar on acting where there is an actual conflict, and protections where there is a significant risk of a conflict. The protections would be (a) informed client consent in writing, (b) where appropriate, putting in place effective safeguards to protect confidential client information, and (c) ceasing to act for one or more of the clients if an actual conflict arises.

This is justified, in paragraph 64, as taking an 'approach which recognises the safeguards around the current exceptions are really about preventing potential conflicts from becoming real ones'. This is incorrect. The existing safeguards were drafted recognising that the parties may have an essentially common interest but still have opposite interests in some respects. These are just examples of a situation that arises not infrequently in a commercial law practice. We understand that when the original rule was drafted, one example which was being held in mind was a solicitor acting for all the partners on forming a partnership, or all owners, when

drafting articles of association. The clear common interest is obvious, but behind it individuals will often have different views on their personal rights in many respects. What a solicitor might typically do is say that he or she will raise the issues where interests may differ and ask the clients to agree how to deal with them and then, in effect, just be the scribe. However, narrowing the scope of the mandate in this way will not always work. Similar issues can be found in drafting a trust deed. We fear that Option 2 would create very real difficulties in these types of situations and could be a recipe for uncertainty.

Also Option 2 seems to abolish the ability in Option 1 and the current rules for a firm to act for more than one client in pursuit of the same object (often where an intermediary is doing some sort of controlled auction for shares in a company or some sort of property). We can see no reason to open this up to uncertainty.

Question 10: Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

We refer to our answer to Question 6.

Specific examples of where the clarity of the proposed new Code could be improved are set out in our answer to Question 13.

Question 11: In your view is there anything specific in the Code for SRA regulated firms that does not need to be there?

No. On the basis of the information provided so far about the new regulatory framework and the SRA's approach, the Society has not identified anything specific in the proposed new Code for SRA regulated firms that should be removed.

On the contrary, as noted in our response to Q10, we believe the Code needs more detail and guidance in order for it to be effective and provide clarity to the regulated community.

We would also reiterate that, without the full picture in relation to the new framework and the SRA's approach, it is difficult to reach a definitive judgement.

Question 12: Do you think that there is anything specific missing from the Code for SRA regulated firms that we should consider adding?

We would repeat our point that without seeing all of the guidance which the SRA intends to publish, it is difficult to respond to this question with any real certainty. On the basis of what is available, we would suggest the following:

We note the absence of 1.3 from the Code – the provision about undertakings. It is unclear whether entities should not be giving undertakings, or that an undertaking has to be attached to an individual solicitor to be enforceable.

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?

Remarks in relation to drafting on Confidentiality and disclosure

Proposed rule 6.3 in the Code of Conduct for Solicitors (and proposed rule 6.1 in the Code of Conduct for Firms) tracks existing outcome 4.1 (and its equivalent) provided the definition of client continues to cover former clients (ie by replacing "clients" by "clients or former clients". We would expect that to be the case but note that proposed rule 6.5 expressly refers to former clients so an explicit reference to former clients is also needed in proposed rules 6.3 and 6.1 in the Code of Conduct for Solicitors and the Code of Conduct for Firms respectively.

Proposed rule 6.4 (about the duty to disclose) incorporates existing outcomes 4.2 and 4.3. There is an oddity in the new rule in the version of the draft code which applies to firms, as the draft rule expressly says that it only applies to individuals. But if it only applies to individuals why does it need to be in the rule for firms? The underlying point of course is that in cases like Kelly v Cooper (a case about estate agents), the courts have made it clear that there is no general assumption that information known to one person in a firm is to be attributed to another.

We note that proposed rule 6.4 has two additions to outcomes 4.2 and 4.3. The first is that a solicitor does not need to pass on information to the client which the solicitor has reason to believe will cause the client serious physical or mental injury. This seems to apply only where the client is an individual, and not (for example) where the client is a company of which the vulnerable person is a controller or director. The second is to reflect general law about the mistaken disclosure of information in a privileged document which need not be disclosed to a client. This reflects case law. In the case of these new exceptions, saying that they are exceptions to the duty to disclose is not at all the same as saying that disclosure cannot be made, which is surely what is intended (certainly in relation to the second of them).

Proposed new rule 6.5 (not acting if to do so puts client confidential information at risk) largely tracks existing required outcome 4.4. This area is the one which has led to most of the recent reported cases on conflicts and confidentiality, although the cases do not refer to the SRA Code of Conduct. It is worth noting that the existing rule was altered some time ago to refer to having ‘information barriers which comply with the common law’. The proposed new rule just refers to measures which result in ‘there being no real risk of disclosure’. This reflects the common law and is consistent with the way in which the new Code of Conduct is drafted.

We would make a couple of points on proposed rule 6.5. The first is that having introduced a reference to former clients (which proposed rule 6.3 does not do) it

then uses the term inconsistently so that, on the face of it, a former client consent is not enough to escape the prohibition on acting, although a current client consent does. Secondly, we are puzzled why this rule, with its references to effective measures, applies to individuals?

Further points in relation to drafting: Code of Conduct for Solicitors

- The paragraph below the Principles on page 45 of the consultation, implies (when it says 'They apply to conduct and behaviour relating to your practice') that the Code does not apply to a solicitor's private life. This should be clarified.

- As worded, by comparison with the provisions in the current Code that this would replace[18], rule 1.4 could be read as meaning that the solicitor is responsible if their client misleads the court or others, or is responsible for other acts or omissions, even if the solicitor was not aware that any mischief was taking place. In light of this, we suggest that rule 1.4 should be reworded as follows:

  1.4 You do not mislead or attempt to mislead your clients, the court or others, either by your own acts or omissions or ***by knowingly*** *allowing or being complicit in another person misleading the court or others* ~~*the acts or omissions of others (including your client)*~~*.*

  We would also note that rule 1.4 must be read in the context of the wider requirement that solicitors must always act in good faith and that misleading anyone whilst acting as a solicitor would potentially breach that requirement in addition to rule 1.4.

- rule 2.4 appears to originate from the Bar Standards Board Code of Conduct. Read in isolation, 'properly arguable' could be confusing for solicitors. It might be interpreted as not being able to put forward instructions which may lack credibility, as opposed to arguments with no legal basis. We assume that guidance will clarify this point.

- rule 3.1 is poorly worded.

- rule 3.4 The term 'Client's attributes' is vague and lacking any legal meaning. It is therefore inappropriate for a Code of Conduct. Moreover, it is unclear what that word encompasses that would not be covered by "needs and circumstances".

- rule 4.2 'Others' might more helpfully read "Others, for example lenders, trustees etc."

[18] O(5.1) "You do not attempt to deceive or knowingly or recklessly mislead the court"; and O(5.2) "You are not complicit in another person deceiving or misleading the court."

Further points in relation to drafting: Code of Conduct for Firms

- In the Code of Conduct for Firms, Cooperation and information requirements section, the text needs to clarify what is meant by 'you'.

- rule 4.2 of the Code of Conduct for Firms, greater clarity is needed on what is meant by 'competent'.

- It is disappointing that rule 7.1 provides very little detail to shed light on applicable outcomes in the SRA Code of Conduct for solicitors and RELS 2017.

Finally, rule 7.8 in the Code of Conduct for Solicitors requires guidance to accompany it. The current code says that a solicitor has to act reasonably to take action. It now depends what 'remedial action' means. We also wonder if the SRA can require a solicitor to take action in these circumstances or if this falls outside its jurisdiction.

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.

There are arguments on both sides and this is an issue requiring debate and careful consideration.

Recognised bodies and recognised sole practices need to ensure compliance and, in particular, that an understanding and appreciation of professional standards and ethics are properly embedded. Arguably, by specifying COLP and COFA roles, the regulator relieves those regulated of the need to decide how best to achieve this. It has also been suggested by practitioners that the COLP and COFA roles have served to reduce the ethical knowledge and awareness of individual practitioners. This potential is mentioned in the findings section of the SRA commissioned Independence, representation and risk report, where it is suggested that the perception of COLPs and COFAs as the 'holder' of professional values raises 'the question of whether such has the potential for individual lawyers to become less aware of, and less interested in, their own professionalism, professional identity and professional obligations.[19]

However, it could be argued that those regulated should determine for themselves how they comply with regulatory requirements and the SRA should find ways of promoting and regulating individual professionalism. Alongside this, any individuals tasked with responsibility for ensuring compliance must demonstrate and maintain the necessary skills and experience, and be subject to appropriate accountability and responsibility controls.

We recommend that the SRA conducts and acts on a survey of individual COLPS and COFAs aimed at identifying specific ways of reducing the burden of reporting, while ensuring that the regulatory framework helps to promote individual professionalism, professional identity and professional obligations.

[19] Independence, Representation and Risk: An Empirical Exploration of the Management of Client Relationships by Large Law Firms: Claire Coe and Dr Steven Vaughan, commissioned by the SRA, 2015.

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?

The Society will shortly publish its 2015 Regulation Survey. Of those who responded to this survey, 91% were the Compliance Officer for Legal Practice (COLP) at their firm. The findings from the survey could inform the nature of further support for this post. Responses indicate the need for clear, unambiguous and effective regulation. In this context it is worthwhile noting the following:

- there was a decline since the 2012 survey in the proportion of firms that thought that the SRA's enforcement procedure is understood by the industry as a credible deterrent and being used in a way that serves to better protect consumers;

- compared with 2012, a smaller proportion of firms agreed that guidance supplementing Handbook regulatory rules is useful, and that principles, outcomes and indicative behaviours provide sufficient guidance on compliance obligations;

- keeping up to date with changes to outcomes and indicative behaviours was the most commonly reported problem with OFR reported by firms; and

- changes to the regulatory regime which would introduce a principles based code only with outcomes and indicative behaviours removed were predicted to negatively affect professional and ethical standards on balance (and particularly so amongst large firms).

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?

We refer to our comments in our introduction and in the sections that follow.

It is possible that some commercial firms, wishing or feeling compelled to take advantage of the liberalisations offered by the new rules may decide to split the provision of their legal operations into two entities: a traditional firm, which would continue to carry out all reserved[20] work, perhaps retaining only a small percentage of the firm's current partners, solicitors and other staff; and a new unregulated entity, which would carry out all unreserved work and employ solicitors with practising certificates as well perhaps as some solicitors without a practising certificate.

In principle, while clients of the new unregulated entity would be less protected than clients of a traditional firm there would be some cost benefits for such firms in taking such steps. The new unregulated entity would not be required to pay entity regulatory and compliance costs, practising certificate costs for non-practising solicitors, contribute to the Solicitors Compensation Fund, take out professional indemnity insurance, employ COLPs, COFAs and other compliance staff, or comply with client account rules.

Furthermore, foreseeable unintended consequences would be that the regulatory burden and cost moves across to smaller firms and sole practitioners who are less able to divide their businesses between regulated and unregulated work; as BAME solicitors are over-represented among smaller firms, this will have diversity implications. This will result in a further restriction on access to justice and increase unmet legal needs as the smaller firms service the less well off demographic.

If many firms elected to go down this route, the Regulator would have to take steps to avoid a significant reduction in income. This would seem likely to lead to higher PC and firm fees, which would have significant negative financial consequences for sole practitioners and firms that chose not to change their business model. In particular, this would be likely to have a disproportionately negative impact on smaller firms for which the cost of changing their business model was not justified by the size of their client base or the high proportion of reserved work they undertake; such firms would have to operate at a competitive disadvantage because their entire business (including reserved and unreserved work) would be subject to the regulatory regime.

In addition, this would also have the effect of making reserved activities such as conveyancing and litigation potentially significantly more expensive for consumers as

[20] http://www.legalservicesboard.org.uk/can_we_help/faqs/Reserved_Legal_Activities.htm

the payment base for regulatory costs to be captured would be very much smaller than now. In addition, regulatory costs would be disproportionate for small and medium-sized firms, which generally carry out a mix of reserved and unreserved activities and may not have a big enough client base/business to justify splitting their business into two separate entities, one regulated and one not. Small and medium sized firms would therefore be likely to have to operate at a competitive disadvantage because their entire business (ie reserved and unreserved work) would be subject to the regulatory regime and its costs, whereas unregulated entities would fall outside this and have lower costs as a result. Ironically, the largest law practices, servicing the largest corporates, would be likely to pay proportionally less than the smallest firms servicing individual consumers; the proposals therefore threaten the viability of established small firms, which may result in forced close down and insolvencies with negative consequences for the communities they serve, especially where the firms concerned conduct legal aid work - exacerbating the ability of vulnerable communities to access justice. There would also be negative implications for competition and for the reputation of the profession.

Another unintended consequence is that solicitors may circumvent the restriction on unregulated entities offering reserved work by making applications to judges to act as paid McKenzie Friends on behalf of their clients. The right to appear before and address a court, including the right to call and examine witnesses, and the right to carry out the conduct of litigation are reserved legal services, and as such it can only be exercised lawfully by a lawyer who is regulated by an approved regulator.

A McKenzie Friend can ask the court to be allowed to conduct litigation if the litigant in person is unable to do so. This means that under the current proposals a solicitor who works in an unregulated firm (who under the new rules would not be able to exercise rights of audience by virtue of being employed in an unregulated entity) can ask a judge to allow them to conduct litigation as an unregulated McKenzie Friend. Faced with qualified solicitors making requests to act as paid McKenzie Friends, Judges may be inclined to treat such applications favourably to avoid dealing with the scenario that the case is run by a litigant in person with the consequential impact that has on the length of the case and the quality of the legal arguments and process. However, this potential workaround would inevitably sow further confusion for both consumers and those working within the legal profession, and inevitably degrade the position of the solicitor as an officer of the court, as well as erode legal professional privilege.

It also raises the question as to whether a solicitor who is permitted by the Judge to work in this capacity should be regulated for that work. The Judicial Executive Board are currently considering prohibiting those McKenzie Friends who are allowed to litigate from being able to claim costs from the other side. If this were to happen it would further confuse the status of solicitors who apply to have the same status as a McKenzie Friend who gains permission to litigate.

There appears to have been no analysis of the list of the consequential risks that

would result from allowing solicitors to deliver non-reserved legal services to the public through unregulated providers comprehensively identified in Table 1 of the Economist's report. It would be useful to have an analysis of how these risks would be mitigated.

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?

Not applicable.

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?

We agree with the 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 authorised entity. We would be concerned about relaxing this provision and thereby allowing the creation of structures that would avoid the requirement for entity regulation altogether and allow solicitors to provide reserved legal services on a consultancy/freelance basis. Any such relaxation would put clients of sole practitioners outwith current protections for clients and consumers and create consumer confusion.

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?

Current Rule 12 effectively requires that a solicitor needs to have three years Post-Qualified Experience (PQE) and to have undertaken a management course before they are able to set up a business as a sole practitioner. This requirement overlaps to a certain extent with the authorisation rules, which allow the SRA to assess the skills and knowledge of an individual of an applicant. However, Rule 12 sets out a clear requirement about the experience an applicant should have before setting up a new firm.

We are surprised that the consultation states that data analysis indicates newly qualified solicitors do not pose a significant risk to the delivery of a proper standard of service and would be interested to see this data. Current rules prevent newly qualified solicitors setting up in business on their own and therefore we are not clear what evidence would be available about their ability to deliver proper services in this type of situation. Furthermore, research has indicated that those who have been practising for less time are more likely to have complaints raised against them, indicating experience is a factor in complaints being raised against solicitors (Pearn Kandola 2010, p30).

We agree that the current requirement to undertake a 12 hour unspecified course on management skills may not be effective. However, lack of understanding of regulatory requirements and particularly the accounts rules is often the cause of solicitors appearing before the SDT following serious regulatory failings and in many cases loss of client money. Making sure that those setting up a new firm have a good understanding of the regulatory requirements, whether it is through a prescribed course or some other method, would seem to us to be essential.

We believe that some form of the 'qualified to supervise' rule should remain, although we agree it would be sensible to move any requirements to the authorisation rules. We believe that there should be a clear rule that prevents newly qualified solicitors from setting up a firm until they have sufficient experience and that those wishing to set up a firm should be required to demonstrate an adequate knowledge of the regulatory requirements.

In considering this question, the Society has been mindful of the conclusions of the independent, comprehensive case file review commissioned by the SRA 'to identify whether there is disparity in the way the SRA applies its policies and procedures in dealing with BME practitioners as compared to others with a view to identifying

potential improvements to such practices, policies and procedures to maximise fairness and consistency…'[21] The current proposals would seem to contradict the findings of that report.

[21] http://www.sra.org.uk/sra/equality-diversity/reports/independent-comparative-case-review.page

Question 20: Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

We believe that it is crucial that consumers understand the protections that they have with regulated provider versus non regulated providers. The proposed new Code of Conduct for Firms does not include any requirements in relation to this matter, and we recommend that the requirement set out at paragraph 8.9 of the Code of Conduct for Solicitors is mirrored in the Code for Firms.

Prospective clients should be clear about the protections in place when they decide to engage a solicitor. Outcome 8.9 of the SRA 's proposed Code of Conduct for Solicitors requires the solicitor to 'make sure that clients understand whether and how the services you provide are regulated and about the protections available to them'. This requirement does not differ substantively from Outcome 1.7 in the current Code of Conduct, which applies to firms and solicitors: 'you inform clients whether and how the services you provide are regulated and how this affects the protections available to the client.'

The SRA asks whether it should require firms to display 'detailed' information about consumer protections. The meaning of 'detailed' is not explained. It is therefore not clear under what circumstances firms could be confident that they have met the requirement. We would urge the SRA to issue guidance for firms on the information that should be displayed, including the level of detail required and expectations as to the prominence of the information presented. This could be in the form of case study examples, to aid solicitors in considering how to present information on consumer protection to the public.

We note the fact that the SRA is only able to impose any requirement of this kind on regulated firms highlights an imbalance between the information that might be available to consumers who use unregulated legal service providers and which would be available to clients of regulated firms.

While the SRA does not have any power to require unregulated entities to display information and the protections available to consumers, it does have a duty to ensure that its actions do not increase consumer confusion.

Question 21: Do you agree with the analysis in our initial Impact Assessment?

Question 22: Do you have any additional information to support our initial Impact Assessment?

The initial impact assessment provides an overview of the thinking behind the changes proposed in the consultation but there is limited empirical evidence to back up some of the assumptions made in the assessment. A comprehensive equality assessment has not yet been made and is essential before any of the proposals are adopted.

Please see Appendix 1 for our detailed analysis of the initial impact assessment.

Code of Conduct for Firms

The new Code is designed to make it easier to comply and reduce the burden of regulation for firms. However for smaller firms, in particular, good guidance will be essential to help make it easier to comply. Alongside this is the need to have in place, and well understood, a credible enforcement approach. Without these, there is a risk that the new code will not reduce the burden on small firms but, on the contrary, will increase the burden.

The current approach to guidance is patchy and while there are good examples such as the recent toolkit for continuing competence which has been widely welcomed, the guidance on consumer credit left many questions unanswered. It would be helpful to see the guidance that will be made available in order to assess whether it will plug the gap for small firms left by the removal of more detailed rules and indicative behaviours, as soon as possible.

Where a regulator provides guidance and toolkits, there is a risk that they quickly become understood as regulation and treated as such, stifling innovation and adding to costs. However, that risk has not been identified in the assessment. There is no information on how the proposals would be enforced, which would help to assure the profession and the public that the regulations would be enforced in an effective and proportionate manner.

The current enforcement function was previously identified as a problem area in 2012/2013 by the LSB and is still not rated as satisfactory. Given the ongoing issues and the importance of the enforcement function to the success of these changes, it would be helpful to have assurance as to how performance in this function will be improved.

It is noted in the consultation that regulatory changes may create some costs. However, there is little indication of the likely scale of these impacts. This is an area whether further work is needed, to ensure the costs do not outweigh any benefits.

One of the benefits highlighted is that the new Code will be online, freely accessible and searchable. As this is the case with the current Code, we do not believe this can be seen as a particular benefit of a new Code.

Changes in Practice Framework Rules

One of the main drivers behind the changes in the PFR is the concept of unmet legal need. This has been exemplified in the impact assessment by the small proportion of people and firms seeking advice about a 'legal' matter and the number of people without wills. Research indicates there are number of reasons why people do not seek legal advice, cost being only one of them. Many people are happy to resolve their own 'legal' problems, indeed there has been a Government drive for them to do so, e.g. raising of small claims limit, creation of Ombudsman etc. Others do not perceive a problem as being a 'legal' problem. Similarly, the reasons for people not having a will are varied, with the reason cited most often, is that 'an individual has nothing to leave'. There is no doubt that for some the cost of legal advice is a factor in not seeking advice but the SRA provide no empirical evidence that:

- alternative legal providers will enter into markets where there is significant unmet legal need;
- services will be provided at a significantly lower cost by unregulated providers.

The scenarios provided on the possible impacts in the market are limited at best and do not appear to take account of information available on the unregulated market. For instance, the SRA considers it likely that will writers will employ solicitors to provide legal advice through their firms. However, the vast majority of specialist will writers are small providers or sole practitioners[22]. Similar assumptions are made about unregulated providers carrying indemnity insurance, while this is common in certain areas of the unregulated market, this is not the case in other areas (Ibid).

There is an assumption that if the regulatory requirements are removed, alternative legal service providers will enter the market and innovate which will in turn drive down costs and reach new consumers. In reality, the CMA's initial assessment is the regulatory framework is not inhibiting innovation.

The assessment does not recognise the serious risk to consumers of these new arrangements. There is a limited recognition that some consumers may suffer as a result of a lack of client protections within alternative legal providers. No evidence is offered as to how this conclusion has been reached. Nor, as noted above is there any clear quantification of the benefits.

[22] Unregulated Legal Service Providers: Understanding supply-side characteristics, p 17 https://research.legalservicesboard.org.uk/wp-content/media/Economic-insight-in-depth-unregulated-research.pdf)

The SRA recognises that there may be some impact on smaller firms, who may not be able to take advantage of the reforms either for logistical reasons e.g. size; monetary reasons e.g. unable to invest in setting up a new business and lack of expertise. The suggestion that the rational response is for firms to close or sell their businesses is unhelpful and in itself may create an unmet need. There must be a risk that reserved legal services deserts are likely if these proposal are implemented.

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?

The Law Society does not support the proposal for solicitors to provide certain legal services through alternative legal service providers for the reasons set out in this response. Clearly, client money and assets need to be protected at all times and in all circumstances.

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?

The consultation proposes that, in line with the arrangements for solicitors working in alternative legal services providers (ALSPs ie unregulated providers), in-house solicitors and solicitors in special bodies should not be permitted to hold client money in their own name. This means that there would be no rules/protections with respect to the handling of client money in these entities[23]. There is, however, a distinction between solicitors working in special bodies and in-house solicitors[24]/solicitors working in ALSPs. In the former, in contrast to the proposed position with in-house solicitors/ALSPs, solicitors are able to deliver reserved legal services direct to the public. This brings the authorised person within the scope of legal services specific regulation. Reserved activities generate a significant proportion of the claims against solicitors and, as such, carries a higher risk profile requiring the application of proportionate protections. It should be noted that special bodies can deliver identical services to traditional firms.

It is also noteworthy that special bodies play a distinct role in the legal services market, in that they particularly provide legal services to vulnerable people. Any disparity in safeguards offered by special bodies will create an inconsistency in the level of consumer protection offered to vulnerable clients. We accept that protection should be proportionate to risk (including tailoring regulatory measures to reflect client base) and should not impose unnecessary burdens but consider that solicitors working for special bodies should be permitted to hold client money personally and be subject to the requirements of the Accounts Rules.

In line with the fact that in-house solicitors and ALSPs will be permitted to only offer non reserved legal services to the public and in recognition of the fact that the regulatory net is based on reserved activities, we agree that solicitors working therein should not be permitted to hold client money in their own name.

[23] The SRA's impact assessment details that it has granted waivers to its current rules to permit businesses employing solicitors in-house to hold client money – so this is a live issue.
[24] In-house solicitors offer, and will continue to offer, reserved legal services activities but only do so in relation to their employer – the SRA proposal for change is that they could in future provide non reserved legal services to the public.

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? If not, what are your reasons?

We have discussed elsewhere in this response our concerns relating to the SRA's proposal to allow solicitors to practise from unregulated entities. In the event that the proposed framework is established however, we agree that if solicitors operating from unregulated entities are not required to hold professional indemnity insurance (PII), their clients should not have access to the Compensation Fund. It would not be prudent to open the Fund to claims arising from work done by solicitors in unregulated entities, which are not subject to the Accounts Rules, Code of Conduct for Firms, and do not have mandatory PII protection which is itself a driver of effective risk management. Where work is not carried out through a regulated firm, clients are arguably exposed to much greater risk due to the lack of these controls and regulatory oversight. Denying access to the Fund for these clients guarantees that the Fund cannot be depleted by a potentially significant pool of claims. The Fund is owned by solicitors and its reserves are a result of contributions they have made subject to the existing rules confining payouts to claims arising from work carried out within a regulated firm.

Despite this, we do recognise the significant decrease in consumer protection and other practical issues that will arise if clients of solicitors working in unregulated entities do not have access to the Compensation Fund. We have explored these issues in more detail below, as we are concerned that the SRA has not fully considered all the repercussions of allowing solicitors to practice from unregulated entities, including the impact on the Compensation Fund.

The consultation proposes that clients of solicitors working in unregulated entities should not have access to the Compensation Fund on the basis that their solicitor would not be able to hold client money or carry out reserved work. However, it is not the case that claims to the Fund are solely linked to misuse of client money, breaches of the Accounts Rules (which apply only to firms not regulated by the SRA) or reserved work. A gap in consumer protection will be created where solicitors commit fraud when carrying out unreserved work (to take as examples: deliberately selling ineffective family trust deeds, forging documents, or convincing a client to alter a will in order for the solicitor to inherit money) as the client would not be eligible to claim from the Compensation Fund in relation to this loss. The SRA's most recent published analysis of claims paid by the Compensation Fund[25] does not include a full breakdown of the areas of work from which the claims arose, and it may be that the SRA does not collect data at this level of detail. Without this information, there cannot be any proper consideration of the potential detriment to consumers of removing access to the Compensation Fund in relation to claims arising from unreserved work.

[25] Economic Insight - SRA Compensation Fund review (2014)

The consultation states that there is no objection in principle to allowing consumers to trade off the protections they receive (including access to the Compensation Fund) where they perceive they receive benefits in relation to this trade off, such as reduced prices or greater accessibility to a service.[26] However, a crucial related issue in allowing consumers to exercise such preferences is whether consumers are able to appreciate or understand the differences in consumer protection between different providers. Research suggests that consumers often do not recognise these distinctions.[27] One could therefore question the wisdom of removing access to the Compensation Fund for consumers who may not realise the importance of this protection until the time they come to make a claim. As discussed in detail in response to Question 27 below, requiring solicitors to provide information to clients on the protections available may not overcome the confusion created by the SRA's proposals and the potential for significant consumer detriment of removing access to the Compensation Fund. In addition, we are unaware of any economic analysis which confirms the changes in the regulatory regime will result in reduced prices and/or greater accessibility of service.

The SRA will also have to address the practical implications of removing access to the Compensation Fund for clients of solicitors working in unregulated entities.

First, the SRA's approach to calculating contributions to the Compensation Fund (currently £548 for firms, and £32 for individuals) will have to be reviewed if solicitors operating from unregulated firms would no longer have to contribute. Currently, 50% of annual Compensation Fund contributions are paid by firms, and 50% by individual solicitors. Contributions to the Compensation Fund would be significantly reduced if substantial numbers of solicitors chose to operate from unregulated firms (and hence did not pay the individual solicitor levy), and/or even a relatively small number of large firms, due to the higher percentage of non-reserved work they carry out, moved non-reserved work to an unregulated provider (and hence did not pay the firm contribution).

However, it is vital that the remaining contributions to the Fund are sufficient to meet the demands on it. It is the long standing approach of the Fund to maintain a minimum reserve fund as a contingency against unexpected numbers of claims or unexpectedly large claims, which includes forecasting contribution requirements to avoid the position of the contribution spiking and then dropping significantly in consecutive years. Given that the impact assessment notes how little can be known about the extent to which solicitors may choose to operate from unregulated entities/firms may decide to hive off non-reserved work, it is difficult to assess to what extent Fund contributions will be impacted, and how the contributions structure should be altered. It would clearly be undesirable to change contribution structures on a continual basis to take account of changing numbers of firms and

[26] Looking to the Future - flexibility and public protection, Annex 6, p.97
[27] Looking to the Future - flexibility and public protection, Annex 5, pparagraph 28

individuals contributing to the Fund. Indeed, it is difficult to envisage how funding arrangements can be amended to enable fair contributions. Smaller firms, who due to the nature of the work they undertake are unable to hive off unreserved work to another entity, would most likely end up paying increased contributions to make up the shortfall to the Fund caused by larger firms and their solicitor employees moving out of SRA regulation. It is problematic that the review of Compensation Fund contributions will not occur until a later date. This makes it very difficult to obtain a full picture of the impact of the proposals and to able to comment fully.

Second, it is unclear how contributions would be collected when a solicitor moves between regulated and unregulated firms. The administration involved tracking solicitors and collecting levies on a tranched basis would clearly not meet the objective of reducing regulatory burdens on solicitors, or administrative costs of the regulatory regime which are ultimately borne by consumers.

Third, the proposed framework would beg the question as to why a solicitor in a regulated firm who carries out only unreserved work and does not hold client money, should have to contribute to the Fund. While it would be impractical to police the collection of contributions in this way, this in addition to the issues raised above demonstrates inconsistencies in the proposed approach and raises questions about the fairness of the proposals in the way that regulation will apply to individuals solicitors and different profiles of firms.

Question 26: Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

We do not agree that individual solicitors should be able to operate from unregulated entities without mandatory PII cover. We are strongly opposed to the proposal in principle.

All work done by a solicitor in private practice is currently covered by the firm's PII. The current arrangement provides unrivalled protection for the consumer, providing assurance that if anything goes wrong they will receive fair settlement, regardless of the type of work undertaken or the circumstances in which the work is carried out. It is unacceptable for individuals to be left destitute or without some level of redress arising from a solicitor's negligence. Mandatory PII cover is fundamental to both consumer protection and the maintenance of public trust in the profession.

There is also a potential risk that a firm with a poor claims record that would affect its ability to obtain PII could be attracted by the proposal as it would allow them to carry out unreserved work from a new unregulated entity without PII in place. Arguably these are the firms whose clients would need the protection the most. We also struggle to understand how solicitors would be able to comply with Principle 6 to act in the best interests of their client, without PII cover in place. It is clearly not in the best interests of the client for their solicitor to be uninsured, as this impacts the client's ability to recover any losses. If the SRA agrees that in order to comply with principle 6, solicitors would in reality be compelled to purchase PII, one must question why the SRA's proposals do not attach PII requirements to individual solicitors. We request clarity from the SRA on this point.

Part of the SRA's reasoning for this proposal is that it would be unclear how a solicitor in an unregulated provider, who may be working as part of a team, is supposed to separate out their own insurance requirements from those of their team. We would argue that it is precisely the fact that the SRA is seeking to differentiate and separate out the role of a solicitor, their high professional standards and regulation of the solicitor from the unregulated entity itself, that has necessitated addressing the issue of individual insurance.

As demonstrated in response to Question 27, the proposal creates unnecessary complexity and uncertainty, and any possible benefits would be outweighed by the significant reduction in client protection.

Question 27: Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

Under the SRA's proposals, solicitors carrying out unreserved work from unregulated entities would have two options:

1. Choose to have no PII cover

Given that there is no requirement to do so, solicitors working in an unregulated entity could choose not to obtain PII. As PII is one of the most costly elements of regulation, there is a real possibility that some solicitors may choose to operate uninsured. This would be particularly alarming in the case of a sole practitioner. Solicitors who choose to operate uninsured without due regard to the personal liability they could incur in the absence of PII cover, would be placing themselves in a potentially ruinous situation. PII protection does not exist purely for the benefit of the public, but also for the benefit of solicitors, as confirmed by the House of Lords in *Swain v The Law Society*.[28]

There would also be nothing to prevent a solicitor's terms of engagement specifying that they cannot be sued for an amount greater than the value of the retainer. This dilution of clients' existing financial protections is not acceptable. Consumers could be left facing hardship as a result of the actions of solicitors regulated by the SRA. The reputation and strength of the solicitors' profession as well as the credibility of the SRA would suffer if clients go uncompensated as a result of a solicitor having no PII cover. This damage would not be possible to repair.

The SRA's proposal is made all the more alarming when one considers the amount of claims by solicitors' firms on their PII that could relate to unreserved work. It is clearly not in solicitors' or clients' interests for there to be no insurance cover in relation to work which, although unreserved, still carries significant exposure to claims.

As stated in response to Question 26, we also struggle to understand how solicitors would be able to comply with Principle 6 to act in the best interests of their client, without PII cover in place.

The Law Society considers that all solicitors in all circumstances should be subject to mandatory PII cover, and would urge the SRA to reconsider the proposal.

2. Choose to obtain PII cover

Solicitors working in an unregulated entity and such entities themselves may wish to

[28] [1983] 1 AC 598

purchase insurance against negligence claims in any event.

A solicitor in an unregulated entity could try to obtain cover on their own behalf, or the entity might take out insurance to cover all the solicitors it employs. In both of these scenarios, there is uncertainty as to the availability, suitability, and affordability of PII that could be purchased on the open market.

First, the wide SRA minimum terms and conditions (MTC) protection would not be replicated in standard commercial PII arrangements. While solicitors' clients are currently protected by comprehensive PII cover (which also includes run off cover), the gaps in coverage between the SRA MTCs and a standard PII policy negotiated by the solicitor or entity would leave solicitors' clients with less protection than the current entitlement, or than when instructing a solicitor from a regulated entity. The SRA has not provided sufficient justification for reducing consumer protection in this way and the resulting asymmetry is confusing.

Second, the potential cost to solicitors or the unregulated entity of purchasing PII is difficult to estimate. Underwriters write risk on the basis of claims exposure. The market currently prices in risk to premiums, so firms with low exposure by reference to the work they undertake (e.g. crime, legally-aided work and employment law) already pay lower premiums than firms undertaking high risk work (e.g. conveyancing). If a firm carrying out predominately unregulated work chose to move out of SRA regulation, there may be limited scope for premium reduction because the risk remains unchanged. Moreover, participating insurers take comfort in the fact that those they insure are SRA-regulated and that the SRA has the power to intervene if necessary. The PII regime plays a role in regulating solicitors as firms with poor claims records will face higher premiums and could face difficulty obtaining insurance at all. Insurers may consider that the claims exposure is increased in an unregulated entity where there is no regulatory oversight of business processes. In the case of solicitors purchasing PII on an individual basis, they would also lose the benefit of lower premiums as a result of the ability to bulk purchase PII to cover the work of the entire firm.

It is therefore by no means certain that unregulated entities or individual solicitors would be able to purchase PII at an affordable cost. Indeed, the SRA's impact assessment makes no attempt to forecast the availability and price of PII for those who would wish to purchase it. There is no analysis or evidence to show that premiums would be reduced; or that reduced premiums would in any event provide greater access to justice as a result. The proposal risks creating considerable consumer detriment for an uncertain and unquantifiable benefit arising from an aspiration for increased access to legal services.

Third, the proposal appears to be based on the assumption that clients will understand the fact that their solicitor does not have insurance, or is insured to a lesser degree than that required by SRA-mandated insurance. Clients differ significantly in their experience of acquiring legal services and their ability to

understand and specify their preferences and requirements. Business consumers who are regular users of legal services may understand their protections and even actively seek to determine whether the level of protection is appropriate for their matter, but the same cannot be said for infrequent, unfamiliar users of legal services. Indeed, there is evidence to suggest that the consumer protection landscape in the legal services market is poorly understood.[29] There is considerable scope for consumer confusion through a mistaken belief that in gaining advice from a solicitor through an alternative legal services provider they are subject to the same protections as if that solicitor worked in a regulated provider. The proposals will only serve to increase the confusions around the different protections attached to services, and lead to decreased confidence in the legal profession and irreparable damage to its standing.

This confusion will not be overcome by requiring solicitors in these circumstances to make sure that their clients understand whether and how the services they provide are regulated and the protections available to them (proposed Outcome 8.9). It is alarming that the case study provided by the SRA[30] suggests that Outcome 8.9 would be met if the solicitor explained the business does have compulsory insurance, but does not state the level of such cover. There would be nothing to prevent a solicitor or unregulated entity from obtaining cheap and ineffectual 'nominal' cover simply to be able to inform clients that they hold PII.

The consultation states that there is no objection in principle to allowing consumers to trade off the protections they receive under different service/provider models where they perceive they receive benefits in relation to this trade off, such as reduced prices or greater accessibility to a service.[31] Again, this incorrectly assumes that consumers understand the difference between regulated and unregulated entities, and appreciate differences in consumer protection in each case, while evidence suggests they may not. [32]

[29] Looking to the Future - flexibility and public protection, Annex 5, pparagraph 28
[30] Looking to the Future - flexibility and public protection, Annex 9, page 204
[31] Looking to the Future - flexibility and public protection, Annex 6, page 97
[32] Looking to the Future - flexibility and public protection, Annex 5, pparagraph 28

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?

Yes. The Society believes that regulation should apply consistently and fairly to the provision of legal services in order to protect consumers. It would not be in the consumer and the wider public interest for solicitors to offer the same service but with different standards of consumer protections according to whether they were employed by a regulated firm or by a Special Body.

Special bodies play an important role in providing legal services to vulnerable people and it is especially important that clients entrusting matters of significant importance to their solicitors have access to appropriate redress. If reserved activities undertaken by Special Bodies fall within SRA regulation, these bodies should be required to maintain PII.

Question 29: Do you have any views on what PII requirements should apply to Special Bodies?

Under the current Practice Framework Rules, solicitors employed by Special Bodies must have a 'reasonably equivalent' level of cover to that required by the SRA Indemnity Insurance Rules. This provides clients of Special Bodies with equivalent protection to that provided to clients of SRA-regulated entities.

The Law Society believes that clients of Special Bodies should be entitled to PII protection in the same way as clients of traditional law firms. Requiring Special Bodies to obtain MTC level PII has the advantage of ensuring that there is consistency in the level of consumer protection offered to clients.

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?

Question 31: Do you have any alternative proposals to regulating entities of this type?

The Society's concerns about the proposal that solicitors should be permitted to deliver non-reserved legal services to the public through alternative legal services providers would not be overcome by the imposition of a threshold on non-SRA regulated firms. Indeed the introduction of an arbitrary threshold could make matters even more confusing for clients. Our concerns around the proposal to allow solicitors to work in unregulated providers and its impact on client protection and the reputation and standing of solicitors would remain for these firms. In conclusion, the Society believes that regulation should apply consistently and fairly to all legal services (individuals and entities) in order to protect buyers of legal services and it is not in consumer and the wider public interest for there to be regulated and unregulated providers offering the same service but with different standards of consumer assurance and protections.

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?

It is not clear what the proposed position is on intervention into a solicitor's individual practice within an unregulated entity. The SRA has the power to do this. However, as has been highlighted, it could prove to be difficult to untangle the practice of the solicitor and the unregulated entity thus making this difficult. It would therefore seem unlikely that the SRA would use this power often. However, the SRA does not appear to be ruling out the possibility.

We are unclear how the SRA's additional powers to request information could help it in investigations where intervention was not an option, for the reasons described above. We consider that the same issues would arise as to the information owned by the unregulated entity (and as such presumably outside the jurisdiction of the SRA) and that owned by the solicitor.

Question 33: Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

We agree that all work within a recognised body or an RSP should remain regulated by the SRA.

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3.

1. Have you encountered any particular issues in respect of the practical application of the test (either on an individual basis, or in terms of business procedures or decisions)?

No

4.

2. Do you agree with our proposed model for a revised set of Principles?

Yes. I am a solicitor of 5.5PQE. Last year, I wished to set up on my own and earn my own money from the profession I had taken many years to study. To do so would have cost me thousands and thousands of pounds in unrequired PII (as my proposed turnover was so low) and would result in multiple fees being paid to the SRA just so I could practice. I cannot afford to do that. And I am not alone. In my experience we already have a two-tier legal profession. Rich established law firms and then solicitors who either are (1) discouraged or simply cannot set up on their own or (2) are drowning in PII bills that are unnecessary and mean they cannot make sufficient profit.

The Law Society has never said anything relevant to me in this regard; as to how to address the widespread inequality in the profession. The SRA has and I think this is a fantastic idea that promises to enfranchise those poorer solicitors who are so often overlooked.

5.

3. Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

Absolutely

6.

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?

No

7.

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?

No, they appear clear to me.

8.

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?

Yes, I believe so.

9.

7. In your view is there anything specific in the Code that does not need to be there?

No.

10.

8. Do you think that there anything specific missing from the Code that we should consider adding?

No.

11.

9. What are your views on the two options for handling conflicts of interests and how they will work in practice?

I think they are practical and commercial and subject to their application, are theoretically sound.

12.

10. Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

Yes

13.

11. In your view is there anything specific in the Code that does not need to be there?

No

14.

12. Do you think that there anything specific missing from the Code that we should consider adding?

No

15.

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?

No

16.

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.

The promote a culture of responsibility and good governance and would therefore always be minded to keep them.

17.

15. How could we improve the way in which the COLP/COFA roles work or to provide further support to compliance officers, in practice?

Succinct and free handbook

18.

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?

There is no new risk. Provided both the solicitor and the customer are aware of the arrangements then they enter into an agreement knowing full well the terms. A solicitor, by definition, has been trained well and must act with the client's best interests at heart. This is all the protection the customer needs. If things go wrong, as they do in all practices, then it is cheaper to arrange non-Law Society backed insurance which at present is a cartel that only benefits big and wealthy law firms.

19.

17. How likely are you to take advantage in the greater flexibility about where solicitors can practice as an individual or as a business?

I would seize the opportunity to work this way.

20.

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?

I think that this point is highly unfair and will serve only to foster the two tier system between rich and large law firms and sole practitioners that already exists. There is no reason why a sole practitioner cannot perform as well as a solicitor in a multi-partner law firm. To treat them differently is arguably discrimination.

21.

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?

From my experience, this works well. The balance between ensuring good oversight of new lawyers and allowing for autonomy has been struck well.

22.

20. Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

Yes

23.

21. Do you agree with the analysis in our initial Impact Assessment?

Yes

24.

22. Do you have any additional information to support our initial Impact Assessment?

No

25.

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?

No. Again, I don't see the risk. The money is always held on trust regardless. What difference does the name on the bank account make? The argument is always beyond reproach that client money is client money.

26.

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?

No view.

27.

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? If not, what are your reasons?

This is inextricably linked to the issue of PII. If it means lower costs of business for sole practitioners then I am in favour. The current insurance market for the protection of clients is closed and controlled by the Law Society. The benefit of being within the Compensation Fund is completely outweighed by the cost of purchasing Law Society backed insurance.

28.

26. Do you agree with our proposal not to make individual PII cover for solicitors a regulatory

requirement on the individual solicitor?

100% yes.

29.

27. Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

The only difficulties likely to emerge are that big law firms can be challenged on price by smaller ones. I hope the SRA has the nerve to ignore the pressure from big business and the Law Society (who have always sided with big law firms) and see this change through to completion.

30.

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?

No. For reasons given.

31.

29. Do you have any views on what PII requirements should apply to Special Bodies?

None. It should be a matter for individual businesses.

32.

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?

Agree.

33.

31. Do you have any alternative proposals to regulating entities of this type?

N/A

34.

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?

No

35.

33. Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?

Yes