

Solicitors Regulation Authority - written representations in response to comments from mandatory consultees

Consultee: Lord Chief Justice

Comment: The Public Interest

"..I remain concerned that the application fails to recognise the clear distinction drawn by Parliament between the regulatory objectives of protecting and promoting the public interest on the one hand and the protection and promotion of the interests of the consumer on the other. The SRA's application continues to risk emphasising the consumer interest at the detriment of broader public interest in access to justice and the protection of the constitutional principle of the rule of law. The SRA's regulatory regime must acknowledge that different approaches may be needed in order to support the various regulatory objectives set out in the Act."

SRA Response

The SRA Handbook, including the SRA Principles, puts the public interest clearly at the heart of our regulatory regime. The very first Principle is to "uphold the rule of law and the proper administration of justice"; and Principle 3 is to "behave in a way that maintains the trust the public places in you and in the provision of legal services". Other Principles cover other fundamental duties, such as the duty to act in the best interests of each client.

Note 2 to the Principles states that where two or more Principles come into conflict, the Principle which takes precedence is the one which best serves the public interest in the particular circumstances, especially the public interest in the proper administration of justice.

We, therefore, can reassure the LSB and the Lord Chief Justice (LCJ) that the broader public interest is fully supported by our proposals, and indeed underpins them, although we acknowledge that this may not have been sufficiently emphasised in the application itself.

We are focused on achieving and promoting each of the LSA 2007 regulatory objectives: protecting and promoting the public interest, supporting the constitutional principle of the rule of law; improving access to justice; encouraging an independent, strong, diverse and effective legal profession; increasing public understanding of the citizen's legal rights and duties and promoting and maintaining adherence to the professional principles. We are also committed to protecting and promoting the interests of consumers, and promoting competition in the provision of legal services. We do not see these regulatory objectives as being divisible - all must be achieved and we are confident that our Handbook, and the processes that we are putting in place to implement our new regulatory regime, pay due regard to each.

Comment: Improving Access to Justice

"I have emphasised previously the importance of ensuring that regulatory regimes facilitate access to justice and not merely legal services. In this respect it is disappointing to see the definition of 'access to justice' which is set out in paragraph 5.5 of the SRA's application. In my view access to justice is more than access to legal advice and services from law firms and ABSs; it includes access to ADR and to legal advice which does not or does not intend to lead to litigation."

SRA Response

Although we accept that we may have rather narrowly defined "access to justice" for the purposes of paragraph 5.5 of our application, the SRA firmly believes that the public interest, the interests of consumers, and the constitutional rule of law are promoted by individuals/organisations having access to a wide range of support and services (including ADR and legal advice) which may not, and are not intended to, result in litigation. We strongly support the more informal, proportionate (and often free) methods by which consumers may resolve disputes with, e.g., their bank, or obtain compensation from the DWP in respect of an industrial injury. These may involve the consumer being directed towards and dealing directly with a particular ombudsman or government-provided compensation scheme. We see the remedies which such schemes provide as a part of the wider justice system. We will continue to play our part in providing information to consumers in support of this broader concept of "access to justice".

In the application for authorisation process, we will determine applications in a way which is compatible with the regulatory objectives including the objective of improving access to justice (see Rule 6.1 of the SRA Authorisation Rules), based on the interpretation of access to justice as set out by the LCJ, rather than simply access to legal advice.

Comment: Working with stakeholders

The LCJ urges the SRA to engage with a wider range of stakeholders, including the judiciary and with regulatory bodies in other sectors. He also considers that constructive engagement with the Equality and Human Rights Commission (EHRC) would be valuable.

SRA Response

We recognise the need for wide stakeholder engagement and we welcome any opportunity for wider stakeholder involvement.

The judiciary: we greatly value feedback from the judiciary on matters affecting the rule of law and access to justice. Recent examples of our working with the judiciary are our direct engagement with Lord Justice Jackson during his recent review of legal costs in litigation and our work with the Civil Justice Council regarding third party funding of litigation.

Regulatory bodies in other sectors: we maintain close links with a broad range of regulatory bodies in other sectors, and have agreed a Framework Memorandum of Understanding (FMoU) in relation to the regulation of MDP ABSs. This FMoU has been developed, and will be supported, by an MDP Working Group which will facilitate the regulation of MDPs, address regulatory gaps and overlaps, etc. in the public interest. Many regulators and professional bodies are represented on the Working Group.

In addition, a number of regulators from different sectors are members of our ABS Reference Group (e.g. BSB, ILEX, RICS and the actuarial professions) which has met quarterly and examined key issues. We have also had regular meetings with others, including financial regulators, as part of our Financial Assurance Reference Group.

EHRC: We have developed a strong relationship with the EHRC in the course of investigating disproportionate regulatory outcomes following Lord Ouseley's report, and we continue to update the EHRC periodically on our work arising out of the report. We are engaging with the EHRC on other issues, in particular discrimination in the professional indemnity insurance market, and we continue to develop our relations and work in close cooperation.

Consultee: Legal Services Consumer Panel (LSCP)

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Comment: Need for SRA to review new arrangements

"...it is important to give time for the new arrangements to bed down. However, as the SRA is undergoing significant change, and because it has designed a regulatory framework for new market conditions, inevitably it will not have got everything right. Therefore, the SRA should keep its processes under continuous review, refining its approach to delivering outcomes-focused regulation and with an eye on revising the code of conduct in the medium term."

SRA Response

We will be reviewing continuously (particularly in the early days) how our new arrangements and processes are working in practice, and will fine-tune them to deal with any unforeseen difficulties. We look forward to continuing our productive engagement with all our stakeholders to help us identify and resolve any problems.

In addition, we are planning to commission independent research into the effectiveness of our new regulatory regime amongst those whom we regulate, consumers of legal services and key stakeholders, on a phased basis commencing 12 months after implementation. Our research will enable us to assess, over time, the extent to which our new regulatory regime meets the regulatory objectives as the market dynamics of the legal services sector change.

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Comment: The Code of Conduct

The LSCP comment that the Code of Conduct is not in the form which LSCP would have preferred. LSCP had suggested the SRA start with a blank sheet of paper; develop a small number of outcomes that were firmly rooted in the consumer experience. The code should have been written in language that consumers could easily understand, and it should be accompanied by a customer charter. Instead, the SRA transferred the current rules into a new format. For example, the existing Principles were retained (with the addition of four new ones). The SRA's consumer research found that people did not relate to them, saying they seemed generic with little relevance or influence for actual outcomes. In addition, there is a long and detailed list of outcomes and Indicative Behaviours framed around the provider's behaviour, as opposed to there being set out a few core outcomes framed in terms of consumer experience. This dilutes the message to the profession that regulation is intended to benefit consumers. The code is likely to be difficult for most lay people to understand due to the length of the document and style of language.

SRA Response

We have not simply transferred the existing rules into a different format. We carefully considered each of the existing rules to determine: first, its purpose - i.e. the outcome it seeks to achieve; and second, whether that outcome should be reflected in the new Code of Conduct. Where we have retained restrictions/requirements this is because we consider these are an important means of achieving the regulatory objectives.

Further, it is clear from the Code that achieving the right outcome for clients, within the framework of the broader public interest, is central to all outcomes.

Our approach to supervision will be focused on the extent to which these outcomes have been achieved.

We are also developing material specifically for consumers to help them understand what outcomes they can expect when buying legal services.

Comment: Consumer vulnerability

The LSCP draw attention to the new British Standard on inclusive services provision and the requirements for identifying and responding to consumer vulnerability. The standard identifies "risk factors" (e.g. illness or bereavement) which increase the likelihood of detriment. Organisations' processes and policies can increase the risk of consumer vulnerability.

The LSCP urged SRA to place requirements on firms within the Code of Conduct and in the SRA's regulatory toolkit. The LSCP recommended that risk assessment should, in addition to the number of consumers affected, consider the severity of impact and the type of consumers affected, including those in vulnerable circumstances - these points remain missing from the risk assessment model (although LSCP note that consumer vulnerability does factor in the SRA's enforcement strategy).

The LSCP had recommended that the Code's requirement for providers to address consumer vulnerability should be promoted from an IB to an Outcome, but this has not been addressed.

SRA Response

The protection of consumers' interests is a fundamental aspect of the Code and this is reflected in the fact that the very first chapter deals with client care. However, this is not the sole purpose of the Code. The Code reflects solicitors' duties not only to their clients, but also to, for example, the wider public, the courts, the proper administration of justice and to their regulator. In some cases these wider duties will impinge on the solicitor's duty to act in the best interests of clients.

We believe the Code does address the needs of vulnerable clients, in particular Outcome 1.5, which requires that the service provided takes account of the client's particular needs and circumstances. A firm would not achieve this Outcome if it did not take account of the client's vulnerability, which is one of many factors which needs to be considered and is expressed as an IB.

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Comment: Supported proposals

The LSCP state that apart from the issues raised above, the Panel considers that the SRA has got the detail of its proposed arrangement broadly right. They note that some aspects (e.g. consumer engagement programmes, monitoring access to justice and the conflicts of interests regime) are at the planning stage or treated at a high level, and success will depend on how the SRA implements these provisions.

The proof of OFR (which LSCP supports) will be in the eating, but there are two key risks:

1. SRA must place responsibility on providers to think through what behaviours are required to produce good outcomes for consumers, but without creating too much uncertainty for providers, since this might stifle innovation;
2. SRA must get tough with providers that abuse the freedoms given to them; it must enforce on the basis of the high-level Principles.

SRA Response

We welcome the LSCP's support for our proposals. We will be carefully monitoring our regulatory processes to ensure that the benefits of OFR are achieved.

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LSCP approve the SRA's plans to strengthen our internal capacity on consumer issues. All SRA staff will need to be sensitised to the issues concerning consumers. The Panel urge us to develop capacity on behavioural insight in order to understand the impact of our policies on consumer behaviour.

SRA Response

We note these comments. We are currently reviewing the consumer pages on our website. It is intended that these will set out clearly what clients can expect from their solicitor and a summary of the requirements of the Code. We are also ensuring that the culture of the SRA puts consumers' interests as one of our central concerns.

We wish to put on record our thanks to the LSCP for their encouraging comments. We look forward to continuing to work with the Panel.

OFT, Lord Chief Justice and LSCP - comments on separate business provisions

The SRA notes that the OFT, the Lord Chief Justice and the Legal Services Consumer Panel ("LSCP") all make reference to the "separate business" provisions in Chapter 12 of the Code of Conduct in their responses. The OFT suggests that the LSB should consider proposing measures designed to mitigate concerns relating to consumer choice and competition. The Lord Chief Justice welcomes the "separate business" provisions and states that it is "essential" that any regulator can regulate reserved and non-reserved legal activity to the same standard. The LSCP also express support for the provisions so that where an organisation is regulated by the SRA, all of its legal activities are regulated.

SRA Response

The SRA is committed to ensuring that the regulatory regime, including the "separate business" provisions, does not impose unnecessary restrictions on actual or prospective providers of legal services. We consider that, pending the review of the current list of reserved legal activities, the provisions strike the appropriate balance between putting the interests of consumers at the heart of legal services delivery, and meeting the regulatory objectives set out in the LSA.

It is, firstly, important to be clear what we mean by the "separate business" provisions. Chapter 12 of the Code of Conduct identifies a category of "prohibited separate business activities" which are mainstream legal services which members of the public would expect to be regulated. The list of prohibited separate business activities includes reserved legal activities (RLAs) under the LSA and some non-reserved legal activities. Prohibited separate

business activities cannot be carried out through a separate business which is not regulated by the SRA or other approved regulator. Permitted separate business activities can be carried out through a separate business which is not regulated by the SRA or other approved regulator. Permitted separate business activities include: estate agency; management consultancy; practising as a lawyer of another jurisdiction; and providing legal advice or drafting legal documents where such activity is provided as a subsidiary but necessary part of some other service which is one of the main services of the separate business.

The provisions do not exclude the possibility of unreserved legal activities being performed in a separate business which is not regulated by the SRA or other approved regulator. In addition, authorised bodies are free to own, have an interest in, or be connected with separate businesses which are providing permitted business activities on condition that safeguards are in place to ensure that consumers are not misled about the extent to which the permitted business activities are regulated. Examples of the innovative business structures and arrangements already being implemented as permitted separate businesses include:

- joint ventures with independent financial advisers;
- management consultancy businesses owned by traditional law firms;
- a separate business providing claims management services;
- separate businesses providing estate agency services.

Research undertaken on behalf of the SRA supports the view that the separate business provisions in the new Code meet the regulatory objectives, including striking an appropriate balance between protecting and promoting the public interest, improving access to justice, protecting and promoting the interests of consumers, and promoting competition in the provision of services by authorised bodies.

We acknowledge the concerns of the OFT regarding the separate business provisions. We would make the following points:

- an additional balancing mechanism is provided via the grant of waivers. In the event that the “separate business” provisions have unintended consequences or result in an unjustifiable restriction in a particular case, the SRA will consider granting a waiver;
- in order to ensure that the “separate business” provisions and all other restrictions in the Handbook continue to be compliant with the LSA regulatory objectives and do not unduly restrict competition, the SRA will, as stated above, be commissioning independent research on the effectiveness of the regulatory regime in delivering public interest, consumer and competition benefits;
- we are committed to conducting a review of the separate business provisions in the light of the LSB’s review of the RLAs. An extension to the RLAs would facilitate the lifting/liberalisation of the separate business provisions whilst maintaining the necessary level of consumer protection.