



## 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.

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.

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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 21<sup>st</sup> 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-rides 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 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)?**

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 Bodies 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 title 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.