Cardiff & District Law Society

SRA "Looking to the future' Consultation | Cardiff & District Law Society Response to Consultation Questions

21 September 2016

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.

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