



The Law Society

SRA consultation on the Regulation of International Practice

Law Society response

February 2012

supporting
solicitors

SRA consultation on the Regulation of International Practice

Response to the consultation

Introduction

This response has been prepared by the Law Society, the representative body for more than 140,000 solicitors in England and Wales. The Law Society negotiates on behalf of the profession, and lobbies regulators, government and others.

The Law Society welcomes the opportunity to comment on the SRA's proposals on the regulation of international practice. It seems prudent for the SRA to review the regulation of international practice at this time due to the interest from the international community in the SRA's new regulatory regime, particularly around the provisions of the Legal Services Act 2007 and the introduction of ABS's. Also the way in which the SRA currently regulates international practice can yield illogical results in terms of who is captured by SRA regulation. Within this review, it is important for the SRA to address both the regulatory obligations it may have overseas but also the regulatory impact of foreign lawyers and firms on practices in England and Wales.

We agree, in principle, to the proposal put forward on group level recognition and believe that this offers a sensible framework within which the SRA can regulate international practice. However, whilst recognising that this green paper is setting out high level proposals, we would welcome much more detail on the practicalities of the approach.

We have highlighted questions requiring further thought relating to the supervisory requirements and application of the principles overseas to entities that are part of a group and to individual solicitors practising outside of England and Wales. Specifically, it is unclear how the SRA intends to 'divorce' the principles from the outcomes and indicative behaviours (IBs) in the Code of Conduct (the 'Code') 2011. We question whether using the principles in this way is the best approach for the SRA to adopt, and this is discussed further in question 19.

It is important that there is a proportionate regulatory regime for entities and solicitors overseas, whilst ensuring that the reputation of the English and Welsh legal profession is maintained. We welcome an approach that means that individual solicitors will be subject to the same requirements as overseas entities and that there will not be a greater burden imposed on individuals who are practising overseas. However, further detail needs to be provided in order for these proposals, including the potential impact that they may have on firms and individual solicitors, to be effectively analysed.

The Law Society believes that it is essential, going forward, for the SRA to consider resources and its ability to regulate internationally to the extent proposed. For example, the SRA's ability to process applications will be crucial to the new Registered Foreign Lawyer (RFL) proposals, as the applications will need to be considered individually. The SRA has noted that it needs to adopt a shared organisational awareness of its approach to international issues, however it is unclear how it will accommodate this additional regulatory activity. Furthermore, we

note that the paper does not consider the potential costs, or savings, to the profession and we would welcome further clarity on this point.

Any proposals pursued by the SRA should be subject to a full and thorough equality impact assessment, as well as further consultation.

We have answered the consultation questions in more detail below.

Questions

1. Have we selected the right balance of regulatory objectives to target internationally?

The Law Society agrees that, in considering the regulation of international practice, the SRA should take into account the regulatory objectives set out in the Legal Services Act 2007.

The regulatory objectives need to be balanced against each other carefully and the objectives highlighted by the SRA in its paper seem to be the ones that are most relevant to international practice. We believe that protecting and promoting the public interest should be an overriding objective as it is integral to all other objectives, as is set out in [our response](#) to the Legal Services Board's (LSB's) consultation on *'Enhancing consumer protection, reducing regulatory restrictions'*.

2. Have we identified clear enough outcomes for regulation internationally?

In our view, these outcomes are a good starting point for what the SRA is aiming to achieve with its proposals for regulating international practice. They are, however, only a starting point and there is still a great deal of detail in relation to all of these outcomes that requires further consideration by the SRA.

The SRA's first outcome, of ensuring consumer protection, is paramount. This relates to the SRA's question about whether there is any justification for regulating foreign legal service providers that are providing services to the England and Wales consumer market, and this is discussed further in question 9.

Another of the outcomes is ensuring that there is adherence to the SRA's professional principles by both individuals and practices. This is another essential outcome and is an area that requires considerably more thought by the SRA, particularly as to how this would work practically i.e. how will the principles be applied and how will the SRA measure an individual's or practice's adherence to the principles? This point is examined in more detail in question 19.

Tied in with both of the above outcomes is the SRA's recognition that the multi-jurisdictional nature of law firms is complex. This is an important point for the SRA to have made as it is recognising that the complex nature of law firms needs to be taken into account with any new regulatory proposals. It is crucial that any approach adopted by the SRA is proportionate and takes into account local laws and regulation.

We agree that the last outcome on avoiding extra-territoriality or unnecessary duplication with other regulators is important, yet there is very little detail in the paper about how the SRA intends to achieve this. The proposed group level recognition approach, and the intention to apply only the principles to the parts of the group and individual solicitors outside of England and Wales, does to an extent address this outcome as it will hopefully avoid unnecessary duplication with the rules in other jurisdictions. However, the fact that there is still quite a lot of detail to be worked out on a practical level means that it is difficult, at this point, to be able to evaluate whether the SRA's proposals will enable it to meet this outcome.

3. Have we chosen the right tests against which to assess any resulting regime for international practice?

It is important that any tests are proportionate and reflect the regulatory objectives and outcomes. We believe that these tests are a good starting point but that, as the SRA firms up the details and practicalities of its approach, they are expanded to provide considerably more information. Specific detail in relation to these tests is discussed throughout the rest of the response.

4. Do we need to authorise any entities outside England and Wales or should we simply regulate individuals?

The Legal Services Act 2007 allows the SRA to regulate not only individuals but also firms. As the SRA's regulatory regime has shifted towards entity based regulation it is important, in our view, that this regulatory approach is reflected in the SRA's proposals in relation to international practice. Not to adopt an entity based approach to the regulation of international practice has the potential to be confusing.

With this in mind, we agree with the SRA proposal to adopt group level entity based regulation to international practice, however, would like to see more detail with regards to how this would work in practice.

5. Is it possible to separate regulatory oversight from firm structure?

We believe that the principle of group level recognition seems a sensible way forward but would welcome more information about the practicalities of this approach.

6. How do we define those firms whose operations outside England and Wales would be part of group recognition?

In our view, further clarity needs to be provided on these definitions. It is unclear what it means in practice to say firms "headquartered" or "with a substantial centre of gravity in England and Wales". We think that the SRA should consider carefully whether to develop the concept of "headquartered", as this is a term that is often deliberately avoided in international and global businesses because it can be perceived as unhelpful either from a management or competitive/market positioning perspective. It is also unclear what is meant by

“substantial centre of gravity”? Would this take account of a firms’ structure evolving and changing?

7. Would we inadvertently create other regulatory gaps by following this approach?

We agree, in principle, with the SRA’s proposed approach of group level recognition and from the detail provided in the paper do not believe that this approach creates any regulatory gaps.

8. Are there other types of entity that currently require recognition that are not covered in the approach we outline?

It does not appear so.

9. Is there any justification for regulating foreign legal service providers, where these are providing services to the consumer market?

The Law Society recognises the importance for a balance to be struck between the need for regulation, or recognition, of foreign legal service providers and any potential impact this may have on the role of England and Wales as a competitive global centre for legal services.

This question of regulating foreign legal service providers is intrinsically linked to the boundaries of reserved work and the implications if this is extended. This is discussed further in question 17 but, essentially, any discussion along these lines has the potential to impact significantly on foreign legal service providers and this is an area requiring serious consideration by the SRA.

In thinking about whether there is justification for regulation, the consultation paper notes that no evidence has been presented to the SRA of any harm to the legal market or to consumers as a result of lack of regulation of foreign legal service providers. At the present time, there seems to be no justifiable reason for an authorisation scheme which would essentially result in the regulation of foreign law firms.

For this same reason, we do not see any justification for a registration scheme for foreign firms practising in England and Wales. We note that there is a perceived lack of transparency about the requirements for new foreign law firms in some quarters and a registration regime could result in the perception that there are clearer and more transparent requirements for foreign law firms. We also recognise that there may be consumer expectation that the SRA should, in some way, recognise and address the presence of foreign law firms in England and Wales.

However, it is imperative that any proposals are proportionate and will not inhibit competitiveness. In relation to this proposal to recognise foreign law firms it is essential that it would be clear to consumers what the role of the SRA is and that this is not regulation by the SRA, thus does not result in the same consumer protection mechanisms. There is a potential tension in consumers’ understanding of SRA recognition of foreign law firms with an understanding of the extent of the SRA’s involvement and regulatory remit. It is not apparent to us

how the SRA could achieve clarity around this and there is a real danger that consumers would be misled by such a scheme.

If the SRA were to consider pursuing a registration scheme we would welcome clarity on how it will address these concerns and also further attention being given to timescales, potential costs and the potential resource impact of such a scheme.

We view the SRA proposal that a foreign law firm, with subsidiary operations in England and Wales which contains solicitor partners and has the majority of its turnover outside England and Wales, could have the option of choosing the SRA as its lead regulator worldwide, as a sensible one if adopted proportionately. This has the potential for the SRA to be viewed as an attractive regulator on a global scale, thus resulting positively on England and Wales as a global centre for legal services. It is important that the cost implications of such a proposal are considered and we would welcome more information on how this concept of a 'lead regulator' would work in practice. Managing multiple regulatory relationships is a key challenge for international and global businesses, particularly in the context of adhering to regulatory regimes which are at different stages of maturity or accommodate new concepts e.g. ABSs.

10. Are there circumstances in which solicitors might need to work overseas that are not currently covered by the current rules?

N/a- The SRA outlines who it does and does not currently regulate in the paper.

11. Does group authorisation impose sufficient oversight to protect the public interest effectively?

Based on the information provided on the SRA's proposal of group recognition, we believe that, in principle, it is a proportionate approach for the SRA to adopt. The SRA recognises in its consultation paper that further deliberation is required in relation to how reserved activities could be properly undertaken within the group and we would welcome clarity on this point. We would also welcome further thought on some of the practicalities of group authorisation for firms. For example, how does this fit in with the regulatory regime and authorisation process that a firm will already be adhering to?

There are several issues around the proposal of group recognition that require further consideration, particularly in relation to supervision and these have been addressed in question 19.

12. Is automatic recognition of the legal professionals of other jurisdictions accompanied by a greater reliance on individual practitioner checks for suitability, a sufficiently rigorous approach?

We agree that the SRA's proposed stringent test on individual suitability is a sufficiently rigorous approach to recognising legal professionals from other jurisdictions. It seems advantageous for English and Welsh law firms to bring into their partnerships lawyers from other countries who were previously barred because, for example, their home rules required them to give up their practising certificates when joining a foreign firm.

We think that the SRA's ability to process the number of applications it would receive is an important factor in this proposal, as these would surely have to be processed individually? We would welcome further attention being provided on the practicalities and potential resource implications of this proposal.

13. Does foreign legal manager status for regulated foreign lawyers based in the UK, mirroring the lawyer manager status granted to other regulated UK legal professionals, offer adequate guarantees that standards will be upheld?

We agree that the SRA's proposed category of foreign legal manager in replacement to the current RFL (Registered Foreign Lawyers) regime, and the obligations put on them to adhere to the SRA principles (or other overseas practice provisions, explored in question 19) except where there were conflicts with their own professional rules of conduct, is a sensible and proportionate approach. Along with what is suggested at question 14, it would however require amending the RFL provisions of the Courts and Legal Services Act 1990 and would require careful thought and consideration.

14. Is it appropriate to retain RFL status as an option for lawyers joining an authorised body or its wider group, where they have no home regulator or have had to surrender their regulated status?

We understand that the proposal to deal with foreign lawyers who have no home regulator or have had to surrender their regulated status in joining a non-domestic law firm is not to "retain" the current RFL status but to introduce a new category of "Recognised Foreign Lawyers" or any other terminology that would reduce confusion. We think that in creating a new category along these lines it would be advantageous for English and Welsh law firms to bring into their partnerships lawyers from other countries, who were previously not able to do so, and would also be more satisfactory than bringing them in as non-lawyer managers under the Legal Services Act 2007.

As with question 13, any proposed amendment to the current statutory framework would require careful thought and consideration.

15. Is it appropriate to replace the requirement for individual RFL registration for foreign lawyer partners based abroad with a requirement for initial approval and some training requirement in the professional principles where these partners are in SRA-regulated bodies?

The proposed approach would seem appropriate provided the training requirements put on overseas-based foreign lawyers remain proportionate and accessible for member firms to operate.

16. Are there other aspects of RFL status, such as the limited rights to conduct reserved immigration work or the portability of the status between firms that are important and would be lost in such a proposal?

Any aspects of the current RFL status requiring amendment to the current statutory framework needs careful consideration.

17. If the boundaries of reserved legal services are extended, does it add anything to have a separate authorisation process for foreign providers?

The Legal Services Act 2007 provides a route for legal activities to become regulated, and those providing them to come under the Legal Ombudsman's remit, through reservation. In [our response](#) to the LSB's consultation on '*Enhancing consumer protection, reducing regulatory restrictions*', we outlined that we believe there is a need for the LSB to consider:

- the reservation of will writing
- widening the current reservation relating to the grant of probate to, 'the administration of an estate following a grant of probate or letters of administration'
- whether there is scope for a review of conveyancing and litigation.

We note that in its response to the LSB consultation, the SRA has argued for all legal services to be regulated in order to provide better protection for consumers. There seems to be a very important question here around the implications for foreign law firms if reserved legal activities are extended. Potentially, foreign legal service providers could either benefit in a possible exemption or, more significantly, fall under SRA regulation. Depending on the extent of the reservation, this would be a crucial issue for foreign legal service providers and is an issue that needs serious consideration. With this in mind, it is not only an authorisation process that should be considered in relation to foreign providers but potentially supervision, enforcement and any other aspects of the SRA regulatory regime that foreign legal providers may potentially have to comply with.

18. How can we make the recognition of European law firms more straightforward? Would it make sense to combine a Framework Services Directive and Establishment Directive approach, so that we would give automatic recognition to a European firm opening a branch in England and Wales, regardless of its structure, and only require full authorisation if a firm intended to bring solicitors into the partnership or if its partners wanted to make use of article 10 of the Directive which allows for assimilation into the profession?

The EU Establishment Directive gives important rights to English and Welsh solicitors establishing in other EU Member States as well as to European lawyers establishing in England and Wales, including the right to practise English and Welsh law and to have access to reserved activities under certain conditions. It seems important for the SRA to review its process of authorisation to make it more straightforward for European law firms to establish while at the same time achieving the right balance with other regulatory objectives in terms of protecting the public interest and ensuring consumer protection.

In that context, the development of non-lawyer involvement in law firms is not only limited to England and Wales. It seems important that the SRA applies the

same standards of authorisation to European law firms that have non-lawyer involvement as it would to ABSs in England and Wales.

19. Are the kind of supervisory requirements suggested above for overseas offices under group supervision appropriate?

The group supervisory requirements appear to adopt a proportionate approach and broadly meet the outcomes that the SRA has set out in section 2 of its paper (also discussed in question 2). However, this view is based on proposals which are currently drafted at a strategic level. We have noted several points on this suggested approach which require further thought and consideration, and these are set out below.

With regards to group level recognition we believe that further attention needs to be given to how individuals and entities, that are part of a group overseas, would be expected to adhere to the SRA principles on a day-to-day basis. For example, it is not clear how the SRA intends to separate the principles from the 2011 Code. Several of the principles reference chapters in the Code e.g. principle 4 on acting in the best interests of your clients states that it is important for you to observe chapter 3 on conflicts of interest and chapter 4 on confidentiality. How exactly can the principles be 'divorced' from the outcomes and IBs? Could practices and individuals take the view that in order to achieve compliance with the principles, the easiest route to take would be to follow the outcomes and IBs in the Code, thus resulting in a more onerous regulatory regime than intended by the SRA?

Furthermore, clarity is required as to exactly how the SRA will measure the application of the principles to individuals and entities in the parts of the group not in England and Wales. One principle that is potentially problematic is principle 9 on encouraging equality of opportunity and respect for diversity. Can this principle be applied in other jurisdictions? There may be situations where the implementation of this principle results in the contravening of national laws, although we expect that the current position on this will be maintained (if compliance with a principle/rule results in breaching local law you may disregard it to the extent necessary to comply with that local law).

Following on from these points and thinking about the practicalities of this proposal, it is likely that for group supervision to work the principles as currently set out in the Handbook will need to be entirely 'de-linked' from the outcomes and IBs in the 2011 Code. As such, we suggest that a more practical solution would be for the SRA to consider creating a separate set of provisions to apply to overseas practice, which could be entirely disassociated from the outcomes in the Code. In terms of how this would work on a day-to-day basis and how adherence to the provisions would be measured, these overseas provisions could include a specific set of outcomes that must be adhered to.

We understand that there may be reluctance to create new overseas provisions which moves away from the principles, however we believe our suggested approach addresses the problems inherent in using the principles in the way proposed by the SRA. If the SRA believes that there is a particular reason for the principles to be applied to overseas practice (which is not clear from the consultation paper) it is essential both that they are de-linked from the Code and that there are some limited specific outcomes for overseas practice attached to them. It is vital that there is clarity about how individuals and entities will be expected to meet overseas practice provisions. This is regardless of whether

there is a separate set of provisions, as we have suggested, or whether the SRA principles, which reference specific outcomes for overseas practice, apply.

Another part of the group supervisory approach is the proposal that when the SRA is in discussion with the recognised firm in England and Wales, it would expect to cover issues such as the effectiveness of the risk and compliance systems and patterns of complaints. It is unclear from this explanation how burdensome this would be on firms. How would this feed into the formal information reporting requirements that a firm will already be adhering to? Furthermore, there is an expectation that one individual would be responsible for this oversight but not necessarily that this would be the COLP or COFA. More information would be helpful from the SRA on how it expects these individuals would work together as there would be considerable overlap in the sort of information that would need to be shared. If the responsibility for this oversight did rest on the COLP or COFA, it would be helpful to know what the expected additional burden would be. Some of these points are touched on further in question 24.

We agree with the approach of adopting training where it is required, however it is essential that this is proportionate and thought needs to be given about who would be providing such training e.g. would it be the firms, or the SRA itself?

20. How should the Handbook deal with the specific issue of different conflict rules in different jurisdictions?

This is a complex area and it is crucial that the SRA gives the issue of conflict rules in different jurisdictions very careful consideration. Currently, this is a problem area for firms engaged in international work and is an area where clarity from the SRA is extremely important.

This is a difficult question to be able to evaluate fully as a result of the high-level nature of the SRA proposals. Principle 4 on acting in the best interests of clients references chapter 3 on conflicts in the 2011 Code and, as is noted in question 19 above, the principles in the Handbook will need to be de-linked from the outcomes and IBs in the 2011 Code. Our response to question 19 also highlights that it should be considered whether applying the principles is the most appropriate and proportionate way to regulate. However, we understand from the proposals that English and Welsh solicitors will not be required to comply with the SRA conflict rules (outcomes set out in chapter 3 of the 2011 Code) when working overseas, rather will need to comply with whatever rules/obligations/principles apply to overseas practice.

21. Is it appropriate to treat different types of Verein structures differently for supervision purposes and if so, what level of supervision/information is appropriate for these different types, bearing in mind the legal limits of the SRA's regulatory reach over any Verein structure?

It is unclear from the paper exactly how this would work in practice and we would welcome more information on these proposals.

- 22. Should the SRA seek the powers to require foreign firms to register in some form or would this potentially mislead consumers as to the extent of this regulation?**

This is addressed in question 9 above.

- 23. Should the SRA create a lighter supervisory regime for European law firms that are not practising English and Welsh law but which are still required to register with us under the Establishment Directive?**

It is unclear from the consultation paper what would be meant by a lighter supervisory regime and we would welcome further details on this proposal.

- 24. Are the sort of compliance tests outlined above the right ones?**

Following on from some of the comments made on group supervision in question 19, it is important that clarity is provided on how these compliance tests fit in with the existing compliance requirements that a firm will already be adhering to. For example, how will these compliance tests relate to chapter 10 in the 2011 Code on 'You and your regulator'? The focus of this chapter is on co-operation with your regulator so presumably this will apply to the English and Welsh headquarters in relation to international regulation? Will there be a separate set of compliance tests that those engaged in international activity would have to adhere to?

We would welcome more information on some of the practicalities of these compliance tests. It is unclear how burdensome considering complaints from other regulators internationally would be, both from the SRA and a firm's perspective. Also, if there are jurisdictions with no regulators and hence no data, what are the implications of this? There may be international regulators that do not record complaints, or if they do may not want to share them with the SRA. It seems as if there are several potential problems with the parts of the SRA's proposals that involve sharing information or communicating with other regulators internationally, both in terms of costs, resources, consistency and fairness.

- 25. Will it always be appropriate to hold the English and Welsh practice to account for actions undertaken elsewhere in a "group" and if not, what alternative enforcement arrangements can we put in place?**

This seems a sensible proposal.

- 26. Should there be a new overseas practice chapter of the Handbook or can these issues be dealt with simply by including guidance and qualifications within the existing structure of the Handbook?**

For the sake of clarity we believe that there should be a document, whether or not it is in the Handbook, where all the regulatory requirements relating to international practice are consolidated. It is important, whatever new proposals are adopted, that clarity and certainty are provided to the profession, both in

England and Wales and internationally, on what the relevant requirements and responsibilities are.

It is likely that including guidance in the existing structure of the Handbook would not be helpful both because of the volume of information already in the Handbook and because most of the information will probably not be relevant to entities internationally. Wherever the new overseas practice requirements are set out, the 2011 Code will need to be amended to reflect this as it currently outlines the overseas practice requirements at the end of each chapter in the Code.