

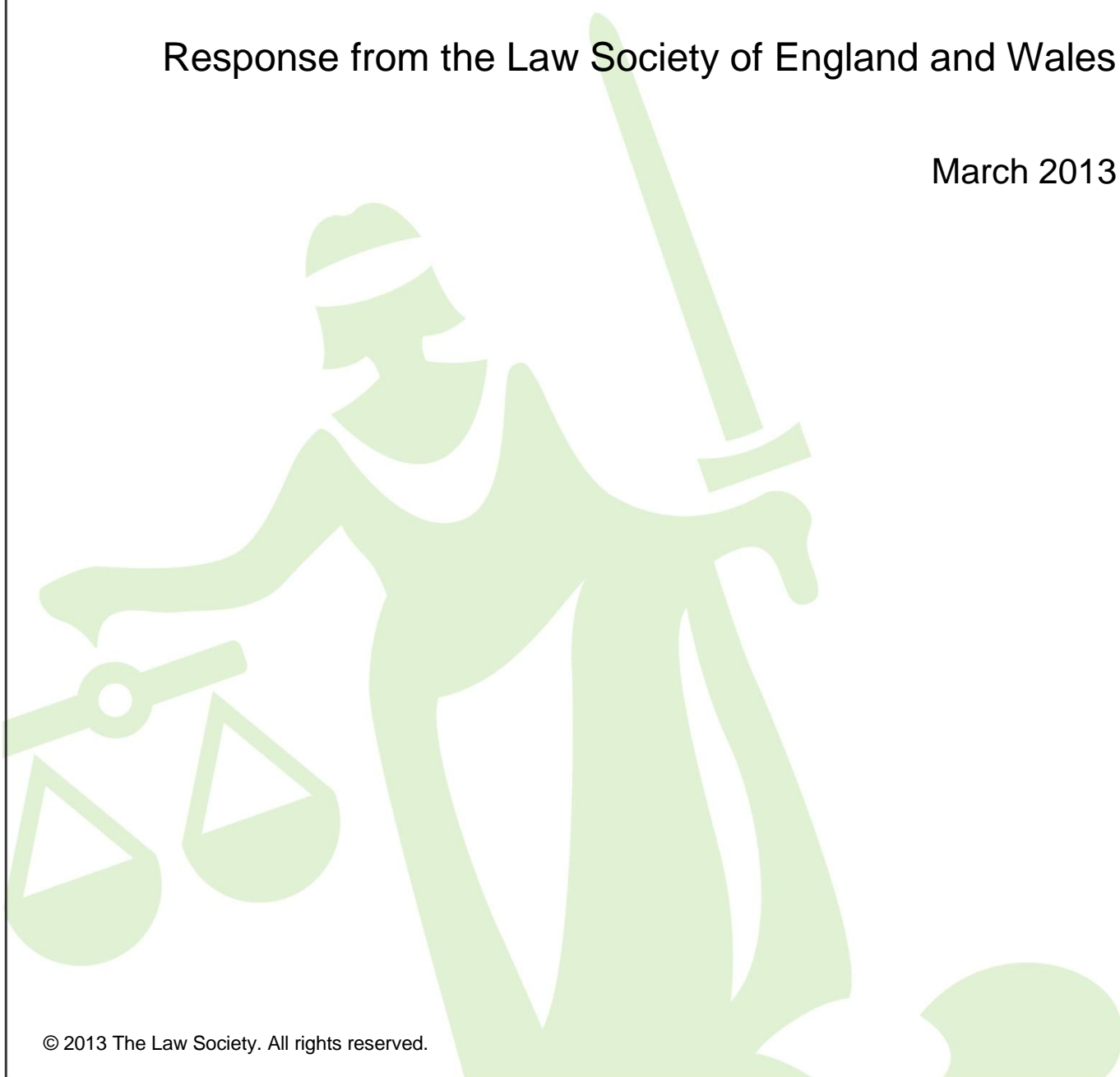


The Law Society

SRA consultation on Handbook Amendments Relating to International Practice

Response from the Law Society of England and Wales

March 2013



Executive summary

We agree that the SRA's review of international regulation is important as the way in which the SRA currently regulates firms in this sphere can yield illogical results in terms of who is captured by regulation. It is essential that the SRA ensures that its regulatory regime does not inhibit solicitors from practising as freely as possible overseas but, nevertheless, maintains the integrity and high standards of the profession.

The pre-eminent position of English law as a choice for global commerce should be recognised, along with the fact that the competitiveness of English and Welsh firms is vital. A balance needs to be struck between promoting the brand of English and Welsh solicitors and ensuring that any risks are adequately addressed. This can be complicated as different jurisdictions have significantly diverse regulatory requirements, covering not just the ways in which overseas lawyers can offer services but the ethical rules that apply generally. The complexity of international practice should not be underestimated.

The SRA still has some further thinking to do around its latest proposals. We understand that this is a complex area and that more detailed proposals will follow once responses to this consultation have been considered. Our key points in response to the proposals set out in the SRA's consultation paper are:

- We agree that there should be a new chapter in the SRA Code of Conduct (the 'Code') and that all the international regulatory requirements applying to authorised individuals and entities should be consolidated.
- We understand the rationale for using the Principles as a starting point for a new overseas chapter as they represent the core ethical behaviours expected of firms and individuals. However, further work is required to ensure that the Principles are delinked from the outcomes in the Code, so that clarity is provided to those firms and individuals practising overseas.
- The content of the new chapter will, to some extent, be dependent on the SRA's approach to the Principles but we have a number of comments on the detail of the proposed new chapter, as currently drafted. We question whether all of the outcomes are relevant and note that there appear to be too many unnecessary Indicative Behaviours (IBs).
- The SRA proposes a new outcome in chapter 7 of the Code, which would apply to individuals and entities practising in England and Wales that undertake overseas practice. Those individuals/entities are required to manage the risk of non-compliance posed by branch offices and other 'connected practices' internationally. We have a number of concerns about this proposed approach. For example, the definition of 'connected practices' seems particularly problematic, and the approach may be more complex for firms to manage (than that set out in the SRA Green Paper). This is explored more fully in our response.

Response

SRA Proposals: A new overseas practice chapter (13) in the Code of Conduct for overseas practice would rest substantially on the application of the SRA Principles and apply to SRA-regulated entities and individuals that are established in another jurisdiction

We agree with the proposed decision to include a new overseas practice chapter in the Code and that it is a much clearer approach for all the regulatory requirements relating to overseas practice, so far as possible, to be consolidated.

The Principles

We understand why the SRA suggests using the Principles as a starting point for a new overseas chapter in that they represent the core ethical behaviours expected of SRA-regulated firms and individuals.

As stressed in our previous response to the SRA Green Paper, if the SRA intends to use the Principles as the basis on which to formulate regulatory provisions in relation to overseas practice, it needs to separate them from the outcomes in the Code. Several of the Principles reference chapters in the Code (for example Principle 4 links to chapter 3 on conflicts of interests and chapter 4 on confidentiality) and there is a risk that using the Principles inevitably imports the provisions in the Code. The consultation paper recognises this point and notes that any application of the Principles would have to ensure that the 'domestic' outcomes in the Code would not be reapplied by the back door. The SRA specifically asks for views about whether it should modify or disapply the Notes to the Principles.

In order to ensure this separation between the overseas provisions and the outcomes in the Code, the creation of amended 'Notes' to the Principles seems to constitute the most appropriate approach. This way, the variety of different circumstances of overseas practice could be reflected. Any modification of the Principles and/or 'Notes' must reflect the same standard of ethical behaviour required of those practising in England and Wales.

It is essential, in any future iteration of these proposals, that the SRA clarifies how exactly the Principles should be interpreted. Once the SRA has determined how to adopt the Principles and/or Notes, consideration should be given as to whether this information, along with the number of proposed outcomes and IBs in the new chapter, reflects a proportionate approach. We would take the opportunity to comment on more detailed proposals.

The new chapter

The content of the chapter will be dependent, to some extent, on the SRA's approach to the Principles. We have a number of comments on the detail of the proposed new chapter, as currently drafted. We have prepared a revised version (at Annex A). We are particularly concerned that there are too many IBs, many of which are unnecessary, and question the relevance of all of the outcomes. Our comments are:

- Point 1 – The purpose of (13.3), on 'behaving in a way which is proper and appropriate for a person authorised by the SRA' is not clear. The SRA states that it is intended to provide a baseline of behaviour below which the behaviour of a regulated person should not fall, yet adherence to outcomes (13.1) and (13.2) would ensure this. It does not seem necessary for this outcome to be included

and it could create circumstances in which the SRA determines what is appropriate in relation to local rules. This would be both impractical and difficult from the SRA's perspective but also unattractive for firms as it potentially creates an uncertain regulatory regime. Furthermore, the SRA states that there may be an extreme scenario where a regime's local requirements would involve 'seriously improper conduct' but we cannot envisage any circumstances where this may arise. The potential implications of this outcome are unclear, particularly if the intention is to prevent English and Welsh firms from acting in certain ways, and we strongly recommend that it is removed.

- Point 2 – Outcome (13.4) replaces the current requirement to apply in full the outcomes in chapter 3 on conflicts of interest and chapter 4 on confidentiality to overseas practice. We agree with the move away from requiring the 'domestic' outcomes of these chapters to apply in the international context and that this represents a significant reduction in the potential for the dual application of conflicting regulatory requirements.

IB (13.8) which is, "failing to explain to a client, who is not a sophisticated user of legal services internationally or in the local jurisdiction, how the legal services you provide are regulated locally or what other protections are available to them", is intended to be read together with outcome (13.4). However, IB (13.8) is non-mandatory and draws a distinction between sophisticated and local clients that outcome (13.4) does not. This point in relation to 'sophisticated' and local clients should be made more explicit and included in outcome (13.4). Clients' interests are often multijurisdictional, with firms aiming to offer a seamless service across different jurisdictions, and so we agree with the aim behind this drafting. We have suggested revised wording in Annex A. Further, if this distinction is to be made it would also be useful for the SRA to clarify what it means by 'sophisticated' client in order for there to be certainty as to who would need to meet this outcome in full.

- Point 3 – Outcome (13.7) states that "you comply with chapter 10 of the SRA Code of Conduct ("You and your regulator") to the fullest extent possible without breaching local law or regulations". This clearly sets out the requirement to report serious misconduct (as specified by outcome (10.5) in chapter 10) but it is not clear how the rest of the Handbook would apply. Outcome (10.1) is that "you ensure that you comply with all the reporting and notification requirements in the Handbook that apply to you", but it is not apparent, for example, how the Authorisation Rules would apply or how this relates to the COLP/COFA role. It is essential that due clarity is provided on these points.
- Point 4 – We question whether IB (13.1) on encouraging equality and diversity is required bearing in mind Principle 9, on encouraging equality of opportunity and respecting diversity, and the requirement to meet outcomes (13.1) and (13.2).
- Point 5 – The proposed position with regards to conflicts is unclear. The proposed IB (13.2) on conflicts of interests is in fact an outcome in chapter 3 of the Code. This is confusing because it is written out of context and does not acknowledge the exceptions that currently apply domestically. It is essential that clarity is provided in this area as conflicts of interest can raise complex problems, exacerbated by the differences between regulatory regimes. We strongly recommend that this IB is removed, as it does not assist in clarifying the position.

It is our view that entities and individual solicitors should comply with the conflict rules applicable in the jurisdiction where the work is being done. Where more than one jurisdiction is involved in a transaction then the regulatory requirements

of the jurisdiction with the higher standards should apply. We suggest that this position is reflected in the new chapter.

- Point 6 – The proposed IB (13.3) on ensuring clients have the benefit of insurance or other indemnity in relation to professional liabilities is the position that is currently set out in chapter 1 of the Code. We believe that the current position should be maintained.

SRA proposal: A new outcome in chapter 7, ‘Management of your business’, of the Code of Conduct which would apply to individuals and entities practising in England and Wales that are involved in overseas practice.

Individuals/entities are required to manage the risk of non-compliance posed by branch offices and other connected practices internationally. This new outcome replaces the SRA’s earlier proposal to apply the Principles across a law firm’s ‘group structure’ and instead requires SRA-regulated law firms to ‘identify, monitor and manage risks to your compliance with the requirements of the SRA Handbook’ arising from overseas offices and connected practices.

The SRA Green Paper put forward a proposal for ‘group level recognition’, which in our response to that paper we agreed offered a sensible framework for the SRA to regulate international practice, subject to more detail about the practicalities. As highlighted above, the SRA’s latest thinking is that there is a new outcome in the Code, requiring SRA-regulated entities in England and Wales to “identify, monitor and manage risks to your compliance with the requirements of the SRA Handbook which may arise in connection with your overseas offices and connected practices”.

We are concerned with the SRA’s revised approach and view the definition of ‘connected practices’ as particularly problematic. The SRA has specifically asked for views on the proposed definition provided in the consultation paper, which is:

- *‘connected practice’ means a legal practice outside England and Wales which
is a parent undertaking of your firm;
is a subsidiary undertaking of your firm;
is managed on a joint basis with your firm; or
is subject to some level of managerial, operational or strategic control
by you*

This new definition looks up as well as down, by including a parent undertaking. This implies that a London office of a US law firm could control its US parent, which we understand is not the SRA’s intention, but clarification is required on this.

Furthermore, it is unclear what ‘some level of managerial, operational or strategic control’ is intended to capture. The SRA’s explanation of connected practices is that this definition would not incorporate membership of law firm networks or best friend relationships which are arms-length. Clarification is needed that the definition would also not include alliance partners or associations, which we believe that the SRA does not intend to catch within this definition.

With regards to Verein structures, a Verein does not fall within the definition of a ‘connected practice’ and would not be regarded as a ‘parent undertaking’ as specified in section 420 of the Financial Services and Markets Act 2000. Verein structures should not fall within the SRA’s regulatory remit as there is no financial or business integration. A Verein structure is simply a way of trading with other law

firms, but sharing a common brand. We understand that this is the SRA's position but confirmation on this point is required.

If the SRA takes forward the approach as suggested in its consultation paper, it needs to address the difficulties around this definition. Other concerns that need to be addressed are:

- An amendment needs to be made to the outcome to make it clear that it is “applicable parts” of the SRA Handbook that apply. Which other parts of the Handbook would be applicable needs to be made explicit.
- The SRA has not yet defined in detail what reporting and notification requirements might be associated with outcome (7.11) but states that these would most likely be in the form of a single annual return made by the SRA-regulated entity in England and Wales, setting out basic information on the structure of its entire group of ‘connected practices’. It is essential that more information is provided on this, particularly as there are several aspects of this proposed new approach where the reporting requirements are unclear.

Generally, we suggest more thinking needs to be done by the SRA around these proposals.

SRA proposal: The SRA wants to clarify how it applies and disapplies regulatory requirements depending on whether a regulated person is practising in England and Wales or overseas. There are a number of glossary changes to be made to existing terms and new terms that need defining.

We agree that it seems sensible for the SRA to apply the rules to individuals depending on whether they are flying into another jurisdiction to undertake work under the umbrella of an SRA-regulated law firm in England and Wales, or if they are permanently established in another jurisdiction.

We note that the SRA feels strongly that managers should continue to take responsibility for firm-wide compliance wherever they are based and we agree this is sensible in principle. It needs to be clear though, in the Code, what domestic provisions apply to a manager based overseas.

We note that there is no mention of solicitors in in-house practice overseas but assume that this regime will apply to them. More detail is needed on this in the next set of proposals.

We would take the opportunity to comment on more detailed proposals to reform the application provisions.

Annex A: Revised new overseas chapter in the SRA Code of Conduct

Chapter 13 – Overseas practice

This chapter applies to overseas practice and does not apply to your practice in England and Wales. The SRA primarily regulates the provision of legal services by solicitors, firms and other regulated persons in England and Wales. However, the SRA does expect and require you to behave in a way which is proper and appropriate for a person authorised by the SRA, wherever services are provided. A failure to do so may result in the SRA taking regulatory action. Such action may include limiting or removing your right to practice as an individual or entity regulated by the SRA.

When practising overseas you are not required to achieve the outcomes set out in other chapters of the SRA Code of Conduct. ~~In many circumstances, however, the outcomes set out in the other chapters will be indicative of the standard of behaviour expected.~~

Outcomes

When practising overseas, you must achieve these outcomes:

O(13.1) subject to Outcome 13.2, you comply with the Principles;

O(13.2) if compliance with the Principles would give rise to a breach of local law or regulations, you comply with the Principles to the fullest extent possible without breaching local law or regulations;

~~O(13.3) you behave in a way which is proper and appropriate for a person authorised by the SRA to provide legal services;~~

O(13.4) clients are aware:

- who regulates the legal services being provided;
- the client protections which are in place in relation to the services being provided;
- the insurance or other indemnity in relation to professional liabilities which is available for the benefit of the client; and
- how confidentiality will be maintained by you;

Clients who are a sophisticated user of legal services internationally or in the local jurisdiction may not need to provide this information.

O(13.5) you do not cause, contribute to or facilitate a failure to comply with the SRA's regulatory arrangements by persons practising in England and Wales;

O(13.6) you comply with chapter 10 of the SRA Code of Conduct (you and your regulator) to the fullest extent possible without breaching local law or regulations.

Comment [R1]: We suggest that this is removed. It is confusing as it implies that other chapters of the Code should be considered. See full response for points on the Principles and new chapter.

Comment [R2]: How the Principles apply, along with relevant 'Notes', needs to be clearly outlined in the next set of SRA proposals on this issue. See full response for our view on the Principles.

Comment [R3]: See Point 1 in full response.

Comment [R4]: See Point 2 in full response.

Comment [R5]: See Point 3 in full response.

Indicative behaviours

Acting in the following way(s) may tend to show that you have achieved these outcomes.

IB(13.1) running your business or carrying out your role in the business in a way that encourages equality of opportunity and respect for diversity to the extent permitted by local law or regulations;

Comment [R6]: See Point 4 in full response.

IB(13.2) not acting if there is a client conflict, or a significant risk of a client conflict;

Comment [R7]: See Point 5 in full response.

IB(13.3) ensuring clients have the benefit of insurance or other indemnity in relation to professional liabilities which takes account of:

- a) the nature and extent of the risks you incur in your overseas practice;
- b) the local conditions in the jurisdiction in which you are practising;
- and
- c) the terms upon which insurance is available;

IB(13.4) if you are an employee of a firm, a manager of an authorised body or a sole practitioner, providing information to your firm to allow them to meet the reporting and notification requirements in the SRA Handbook;

Comment [R8]: It is not clear which other requirements in the Handbook apply- this should be made explicit.

IB(13.5) notifying the SRA if you are convicted of a criminal offence or become subject to disciplinary action overseas;

IB(13.6) if you are an employee of a firm, a manager of an authorised body or a sole practitioner, informing the SRA immediately if you believe that your firm is in serious financial difficulty;

IB(13.7) providing the SRA with documents held by you and any necessary permissions to access information as soon as possible following a notice from the SRA to do so;

Acting in the following way(s) may tend to show that you have not achieved these outcomes.

IB(13.8) failing to explain to a client, who is not a sophisticated user of legal services internationally or in the local jurisdiction, how the legal services you provide are regulated locally or what other protections are available to them;

Comment [R9]: See Point 2 in full response.

IB(13.9) entering into an arrangement which restricts your ability to provide information to the SRA.