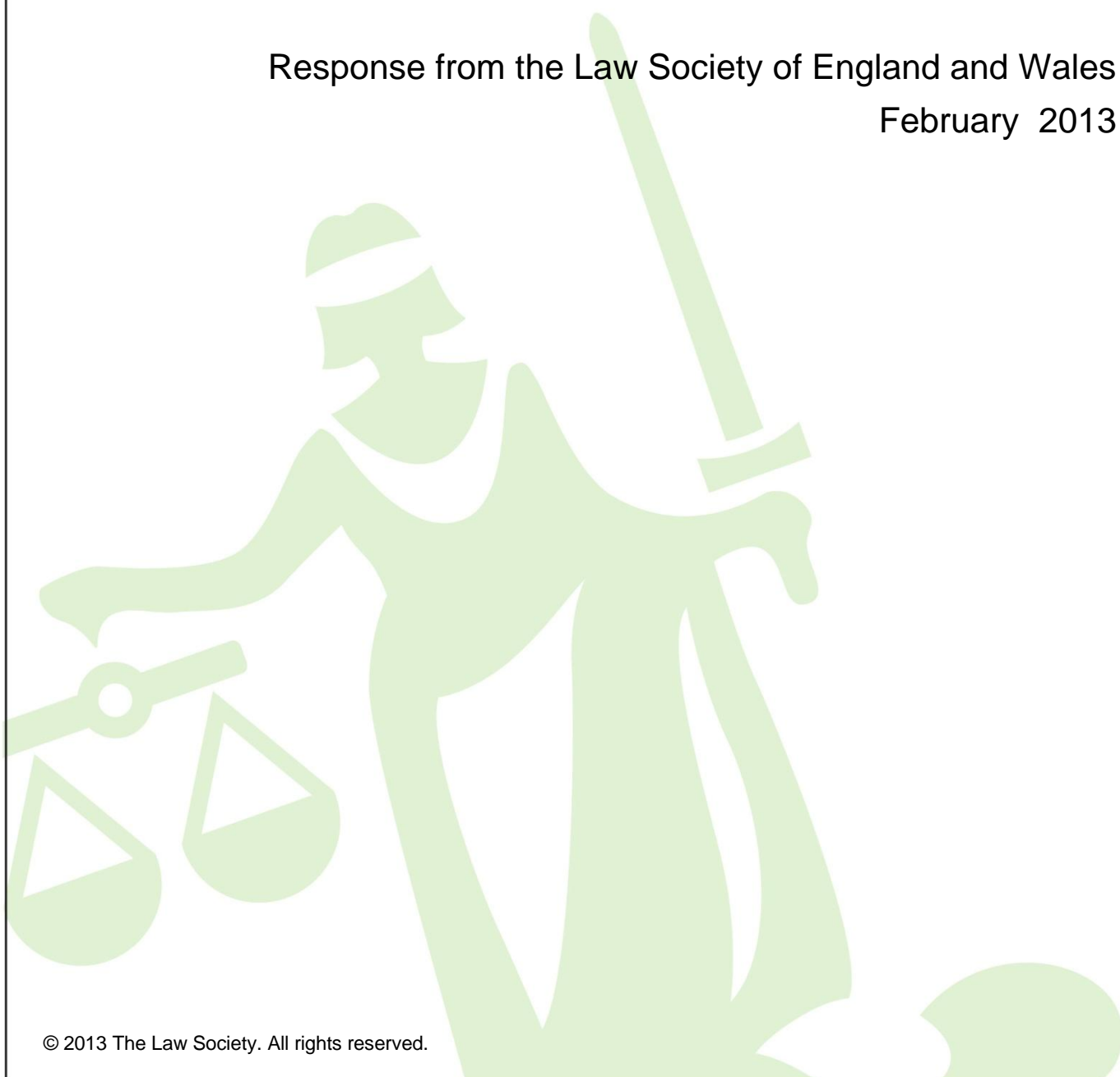




The Law Society

SRA Red Tape Initiative: Removing unnecessary regulations and simplifying processes

Response from the Law Society of England and Wales
February 2013



Introduction

This response has been prepared by the Law Society, the representative body for more than 166,000 solicitors in England and Wales. The Law Society welcomes the opportunity provided by the SRA to comment on, and contribute to, this important initiative to remove any unnecessary regulatory processes. In drafting this response we have consulted with representatives from a variety of practices as well as the Law Society's committees and Regulatory Affairs Board.

We are encouraged by the intention behind this initiative, particularly the SRA's firm commitment to regularly reviewing its regulatory processes and procedures. We agree with Charles Plant's statement in the foreword to the paper that it is essential that regulation which serves little purpose should be removed. We are aware of areas where bureaucratic processes hinder the business of practices and have provided more detail on this in our response.

It is important that the SRA's commitment to reviewing its regulatory processes and procedures should work in tandem with the internal review of how it organises itself in the context of an outcomes focused regulatory regime, and to reflect a proportionate and targeted regulatory approach. We are aware of an increasing number of waivers being issued by the SRA and think that a comprehensive statement with information on how, and on what basis, these decisions are made should be provided by the SRA.

The Law Society agrees in principle that solicitors, as responsible professionals, are best placed to manage their own business matters and should not need to make requests of the SRA unless the matter is outside the bounds of normal practice. This principle could be used to guide a full review. However, in the case of some of the proposals contained within this consultation document, it should be recognised that there are cases where it is necessary for the regulator to offer a level of assurance and protection; this applies specifically in the case of those seeking to enter the profession. What is required of the SRA is a fair and proportionate relationship management system. This is not the current model offered to all practices.

We are concerned that the SRA has included in its proposals, some matters which raise difficult issues of policy that seem to us to amount to more than 'red tape' – we are referring particularly of proposals 1 and 2 – and we think there is a risk that the SRA may not be grappling appropriately with some of the issues raised by these questions.

Furthermore, 'red tape' is in some cases used to describe processes, which doubtless require administration but in context are not needless procedures. For example, offering necessary protections to vulnerable trainees. If these processes are to be abolished then the SRA will need to consider how those protections are provided. There must be a full impact assessment so that removal of checks at one point in the system does not simply cause bureaucracy at another, or later, stage.

The SRA notes that, in some cases, there is a simple transfer of responsibility from the SRA to the practice, which may cause additional bureaucracy for smaller practices. It may well be that many of the proposals could work well for many large practices (and we would not wish to prevent this) but there may well be risks for others, their employees and their clients and, in our view, the SRA needs to consider how to maintain protections for these cases. Within a system of risk based, outcomes focused regulation (OFR), it may well be that the use of a more developed system of notification could be devised on a wide range of issues. This would enable the SRA

to follow up on matters reported in those cases where the notification gave cause for concern.

The timing of some of these proposals, particularly on elements of education and training, may be inappropriate given that the long awaited Legal Education and Training Review recommendations are due soon. These could lead to significant alterations in the current regulation of legal education and training, which may render these changes unnecessary or inappropriate, and thus bring no greater certainty of structure or cost for those concerned. It is also unclear why the SRA should pre-empt policy questions around in-house practice, of which there are a number, ahead of the coming review this year.

The Law Society has proposed a number of amendments to the Handbook which would reduce the burden of regulation on individuals and practices.

Response to the SRA's 10 proposals

Proposal 1 – Remove restrictions on charging by in-house lawyers employed in not-for-profit organisations

To delete Rule 4.16 (b) (i) and (ii) of the Practice Framework Rules (PFR) to enable in-house lawyers employed by a law centre, charity or other non-commercial advice service, to charge for the provision of legal services.

We are not in favour of the removal of restrictions on charging by in-house lawyers employed in not-for-profit organisations. The reason why special bodies existed in the first place was because they operated to provide free advice on a not-for-profit basis, taking advantage of funding from Government, public bodies and charities, often where there was a gap in the market. Such charging may diminish the distinction between special bodies and practices providing advice on a commercial basis.

However, we recognise that the funding basis is changing. If such bodies are permitted to charge fees, we urge that processes are put in place to ensure that they do not compromise their not-for-profit status. Further, rules and guidance should be provided so that special bodies are aware of the requirements here.

There is also a significant risk that clients might not understand charging structures, which would leave room for disputes. It is therefore essential for clients to have:

- Clarity as to the nature of the services that are being provided for the fee;
- Clarity about when other charges may be made; and
- The opportunity to dispute and question the level of service.

This reflects the Society's position as set out in response to the LSB's consultation, "Regulation of special bodies/non-commercial bodies".

Proposal 2 – Allow in-house solicitors employed by local authorities to charge charities for legal services

To amend Rule 4.15 (e) Practice Framework Rules to enable local government in-house solicitors to act for charities and to make a charge for both contentious and non-contentious work

As is noted in the introduction to this response, we question why such a proposal is included in a 'red tape' exercise and are firmly of the view that this should be considered in the wider context of a review of in-house practice. We urge the SRA to consider any policy change of this nature in the context of the planned comprehensive review. This proposal represents a change in policy and presents the risk that an ad hoc policy decision will result in an inconsistent and incoherent regulatory framework.

The current Rule, 4.15 (a), permits a solicitor employed in local government to act for another organisation or person to which or to whom the employer is statutorily empowered to provide legal services, subject to the conditions, if relevant, specified in (b) to (g) of that rule. Condition (e) prohibits charging a charity for non-contentious work and in relation to contentious work, requires the employer to indemnify the charity in relation to the solicitor's costs in so far as they are not recoverable from any other source.

In its consultation paper, the SRA's justification for the amendment is that local government is undergoing significant change so that services and organisations that have traditionally been part of the local authority are being transferred into stand alone entities; often charities. The specific example provided is that solicitors employed by the council currently provide legal services to maintained schools under service level agreements, for which a charge is made in both contentious and non-contentious matters.

While we do not view the specific example provided on schools/academies, where there may be current difficulties, as problematic, there are far wider implications to an amendment of this sort. It seems that local government in-house solicitors will be able to compete with private practitioners, without entity regulation, in areas where previously this would not have been possible. This suggests that local government in-house solicitors will be at an advantage to firms in private practice, who have higher regulatory costs and burdens; it is unclear why this should be the case. Such services could of course be provided if the organisation in which the solicitors worked were to become an ABS.

We believe that the proposal needs to be significantly limited and consideration given to the precise terms of its provisions.

Proposal 3 – Approval of RELs and RFLs as new managers and owners

It is proposed that changes are made to the SRA Authorisation Rules for Legal Services Bodies and Licensable Bodies 2011 (SRA Authorisation Rules) so that Registered European Lawyers (RELs) and Registered Foreign Lawyers (RFLs) are deemed to be approved as suitable to be managers or owners of authorised bodies. This would be subject to strict notification requirements on the part of the individuals concerned and additional safeguards including the possibility of withdrawal of the approval where the individual is not considered to be suitable for that appointment.

We can see significant advantages to this proposal where the practices concerned are large with a large number of partners and have major overseas practices. We are aware that admission of new non-solicitors as partners can be delayed weeks, and potentially months, unless the SRA grants waivers, because of the lengthy process to admit non-solicitors.

However, in the context of smaller practices, there may be significant regulatory risks in RELs and RFLs becoming owners and managers if they do not have sufficient knowledge of the regulatory system and requirements, particularly if a strong COLP and COFA are not present. The requirements governing RELs and RFLs are relatively light and, in particular, RELs do not have to demonstrate any knowledge of the regulatory requirements here. This could lead to dangers for the integrity of practices where such RELs were owners or managers and the SRA may wish to scrutinise, in particular, practices with a small number of owners and managers who are RELs and RFLs. This may produce additional work for the SRA in approving an REL or RFL as a COLP or COFA if then nominated to either of those positions.

We assume that the omission of reference to Exempt European lawyers (EELs) is an oversight as it seems illogical that the SRA is not streamlining the process for EELs, but only for RELs and RFLs. EELs are the least risky as, by definition, they will be practising outside England and Wales.

Proposal 4 – COLPs and COFAs in related entities

Where there is a main UK-regulated body, it is proposed that it should be possible for the Compliance Officer for Legal Practice (COLP) and the Compliance Officer for Finance and Administration (COFA) for that body to be able to apply to be the COLP and COFA for any related entities, without the need to be a manager or an employee of the related entities. It is also proposed that it should be possible to complete applications to the SRA relating to multiple related entities in one process.

We agree with this proposal which appears to us to be sensible and proportionate.

Proposal 5 – Trainee secondments

To amend Regulation 11 of the SRA Training Regulations to remove the need for training establishments to apply for approval to second their trainees to other organisations.

We have sympathy with this proposal because the existing system is laborious and provides little value to anyone. However, it is very important that trainees on secondments receive proper value from that secondment. Most large practices with proper training programmes will achieve this and, in principle, we can see that there is little need for them to secure approval in advance for this. However, there is a danger that some practices will not make the necessary checks and may arrange secondments which are unsuitable or unhelpful and, without some scrutiny, this may lead to poor results for trainees. In addition, training principals in smaller practices would need some guidance from the SRA as to whether a particular secondment is appropriate or not.

If this amendment were to be made, the SRA would need to have in place procedures to ensure that the dangers that concern us do not arise, which means that this proposal requires a great deal more consideration before it is progressed. Further, if poorly managed, this may not be a cost neutral change.

Proposal 6 – Reauthorisation of training establishments

To remove the requirement for authorised training establishments to seek reauthorisation every three years.

The Society's concern about this proposal is that it may lead to some trainees receiving sub-standard training. There is anecdotal evidence which suggests that some training contracts are not meeting the present basic requirements. Reauthorisation provides an opportunity for the SRA to check that the practice is providing a suitable environment and suitable training. It may well be that for most practices the three year period is too short and we recognise that many practices will continue to provide excellent training, with no need for reauthorisation, and that the requirement in these circumstances is unnecessarily bureaucratic. However, practices do not stay the same for ever and training may well vary as circumstances change. We believe that there needs to be some check to ensure that standards are maintained.

If the SRA is to abolish this requirement, it needs to set out how it will ensure that training establishments continue to meet the appropriate standards and to do so sufficiently regularly to ensure that practices have no incentive to cut corners in this area.

Proposal 7 – Equivalency of 'time to count'

To amend Regulation 7 of the SRA Training Regulations 2011 Part 2 - Training Provider Regulations to remove the 'half-equivalent' provision which recognises previous legal experience but only allows a reduction in the period of a training contract by half of this time.

The Law Society is in favour of this move to recognise equivalent time spent undertaking relevant legal work within the environment of a regulated legal entity. This is due to the increasing frequency of reports that potential entrants to the profession are being taken on by practices as 'paralegals' initially to ensure that they are suitable before beginning a training contract. In these cases it would be useful for the trainee to be able to count this time as directly equivalent.

The Society is aware, however, that many training principals are currently unwilling to sign off on previous work experience as it is not within the bounds of a training contract or monitored by them personally. This is one issue where the SRA could provide guidance or transparent criteria to aid both parties in recognising where suitable work experience has been undertaken. Such guidance would do more to remove any artificial barriers that exist for trainees and give training principals the reassurance they require to apply the rule in confidence. It is the responsibility of the training principal to sign the trainee off at the end of their training contract, but the SRA should support them in this crucial role.

Proposal 8 – Time limit of academic qualifications

To amend Regulation 4 and 5 of the SRA Training Regulations 2011 Part 1 - Qualification Regulations to remove the time limit on certificates of completion of an academic award.

The Law Society is concerned about this proposal for a number of reasons. It seems to us in particular to be very likely that academic knowledge will date significantly as the law changes and that people who have been outside the legal field for a significant period may find that their memories of what they have learned fade significantly. LPC providers have already reported that they run 'catch-up' classes for those who do not recall their first year of QLD studies sufficiently to cope with the demands of the LPC course. An individual who completed their academic stage more than seven years ago is likely to be in a similar, if not worse, position.

We recognise, however, that the barrier may well cause difficulties for people with protected characteristics or from disadvantaged socio-economic backgrounds who may well need to work elsewhere before taking the LPC and that, if they have been working in a legal environment, the concerns about up to date legal knowledge may be less concerning.

However, it is not clear to us that all LPC providers will ensure that individuals have an appropriate level of legal knowledge. They are under no obligation to meet any standards set by the regulator and can allow anyone on to their courses provided they have sufficient funds. Many individuals begin LPCs with unrealistic expectations of their future career prospects and we can see that people without the right knowledge may well be spending money on course with no real likelihood of obtaining a training contract.

We also recognise that there is an inconsistency with the position with regards to the time limit on the LPC. It may be, indeed, that the skills taught on the LPC might date

more readily, though they would be supplemented by the training contract or work based learning requirements.

The Society would not oppose the SRA providing a small extension of the current time limit, although this should be approached with caution. It would be most useful for those facing this situation to have clear, to the point and readily available information on the grounds for a waiver being granted. This would enable those considering an LPC after a gap to judge whether it was most appropriate for them.

In our view, however, this may be better looked at through some proper research, possibly in the context of the LETR before going ahead with this proposal.

Proposal 9 – Student re-enrolment

To amend Regulation 14 of the SRA Training Regulations 2011 Part 1 - Qualification Regulations to remove the need for student re-enrolment after 4 years.

The Law Society is in favour of this proposal, which seems to sensibly recognise that the enhanced admission process, which includes Criminal Records Bureau disclosure and the enhanced Suitability Test, now in place for checking the suitability of entrants to the profession, has overtaken previous measures and rendered re-enrolment unnecessary.

Proposal 10 – QLTS eligibility

To amend Regulation 2.5 and add a new Regulation 2.6 to the Qualified Lawyers Transfer Scheme Regulations (QLTSR) 2011 to enable us to allow applicants who do not need to take any of the QLTS assessments to progress to admission without a certificate of eligibility being issued.

The Law Society supports this proposal as it recognises that the existing procedures may be in breach of Directive 2005/36. It is also a common sense measure to enable those lawyers from the Republic of Ireland and Northern Ireland to practise within England Wales without undue restrictions. The low risk of other foreign lawyers being admitted is mitigated through the process of assessment of eligibility and suitability prior to admission.

Other suggested amendments to the Handbook

The Law Society proposes a number of amendments to the Handbook which would assist individuals and practices, and reduce the burden of regulation on them.

Code of Conduct

- **Chapter 1 on Client Care, Outcome (1.10)** – Outcome (1.10) states, 'clients are informed in writing, both at the time of engagement and at the conclusion of your complaints procedure, of their right to complain to the Legal Ombudsman...'

Most corporate clients do not have the right to take complaints to the Legal Ombudsman, as the Legal Ombudsman will only consider complaints from individuals, very small businesses, charities or clubs.

Law Society practice notes on Complaints Management and Client Care letters have been amended to reflect the fact that, in our view, where no such right exists, the outcome cannot de facto be met. The SRA has been informed of our position on this but outcome (1.10) should be amended to reflect this point.

- **Chapter 1 on Client Care, IB (1.20)** – This IB requires solicitors to 'justify' keeping any financial benefit they gain as a result of acting for a client. We are not clear how a solicitor might achieve this. We requested clarity from the SRA on this area in our last response to the Handbook consultation and this would still be welcome.
- **Chapter 8 on Publicity, IB (8.8)** – We are concerned that IB (8.8) suggests practices cannot charge client due diligence (CDD) as a disbursement. This has been highlighted as an area where the SRA will take enforcement action in their supervision and enforcement strategy for conveyancing, making this more of a rule than an IB. We would like to understand why this prescriptive rule has been put in place and whether there is a possibility of more flexibility. Illustrative examples would assist in this. We do not understand why practices should not be permitted to do so, provided that the fact and the cost is made clear to the client in advance.

Accounts Rules

- **Rule 20.2** – We have previously submitted that the unpaid client account limit needs to be reassessed in line with the burdens placed on the profession.

Currently, if a client cannot be traced where £50 or less is owed, it is up to the solicitor to decide what steps to take, weighing up the cost of investigating the client's whereabouts against the value of the amount held. Solicitors are able to 'self-certify' balances of £50 or less on unclaimed client accounts, and these funds can be released to charity without prior SRA approval once all efforts to reimburse the client have been exhausted. However, for larger amounts, practices are often required to enter into a lengthy and burdensome process, involving the provision of information, form-filling, and conducting further investigations.

While it is important that solicitors do go to these lengths where the amount justifies it, we believe that a £50 de minimis imposes significant burdens on practices, and that a proportionate increase would ease this burden without endangering client money.

It is common for solicitors to be left with a surplus in excess of £50. The administrative cost and drain on resources that practices bear when dealing with these amounts is costly and unhelpful, and is typical of the sort of red tape that practices should be able to dispense with.

We believe that the de minimis amount should therefore be raised to £250 to more accurately reflect circumstances in which further investigation into clients' whereabouts is justified. We feel that – once reasonable efforts have been made to reimburse the client have been made – it would be appropriate for solicitors to 'self-certify' funds themselves, rather than entering lengthy administrative processes. In line with outcomes-focused regulation flexibility should be built into the drafting to reflect circumstances in which costly measures might have to be taken.

- **Rule 14** requires, in effect, that client money be paid into a client account within 2 days. This short timeframe means that this rule is sometimes breached by practices and leads to the majority of accountant's reports being qualified. In some cases, practices direct clients to pay all money into the client account, allowing them to remove office money in the longer timeframe allowed of 14 days and thus avoid breaches. We believe that the SRA should reconsider the timeframe and identify whether lengthening it would pose any significant risk, and that this is an issue that needs to be considered as part of the wider client money review. It is possible that increasing the timeframe would cut the number of qualified accountant's reports, allowing the SRA more easily to identify accountant's reports that raise serious issues.
- **Rule 29.25** states that suspense client ledger accounts may be used only when you can justify their use; for instance, for temporary use on receipt of an unidentified payment, if time is needed to establish the nature of the payment or the identity of the client. There are two particular situations where use of a suspense account could be justified and would be of assistance:
 - To hold small unclaimed sums after proper attempts have been made to pay it back to relevant clients so that one combined payment can be made to a charity after a period of time has elapsed.
 - To hold LSC money due back to the LSC because it was paid in error and the LSC may refuse to take it back.

Both the above examples enable practices to tidy up their client ledgers. We think that as long as the individual client is mentioned in the narrative, there does not seem to be any good reason why this should not be permitted.

- **Rule 32** – Delivery of accountants' reports. Practices holding client money are normally required to submit an annual accountant's report. This should provide an important independent verification of the integrity of a practices client account. However, reports are frequently qualified by the accountant due to minor breaches of the Accounts Rules. This means that it is difficult for the SRA to identify, from the large number of accountants reports it receives, where there is a serious problem. As things currently stand, the accountants report represents a cost burden on the profession (in terms of fees and time) and yet does not appear to be providing the SRA with useful or timely information in a format which is readily analysed. The requirements of accountants report should be considered as part of the wider client money review.

Practising Regulations

- **Regulation 3(k)(iii) or (iv)** set out that Regulation 3 applies where an applicant has been a member or director of a company / LLP which has become insolvent or bankrupt. The effect of Regulation 3 is that a solicitor must apply early for their practising certificate and outside of a bulk renewal. This allows the SRA to consider whether a condition should be applied to the practising certificate.
- The SRA has clarified that, as the regulation makes no stipulation that the solicitor must have been a director or member of the company or LLP respectively at the time that the insolvency event or that he was such a director or member within a certain period prior to the insolvency event, that Regulation 3 should apply widely. So, a solicitor that was involved in setting up a company as a director 10 years ago and has had no involvement since, would be subject to Regulation 3 if that company were to become insolvent. This is disproportionate and risks large numbers of solicitors becoming subject to Regulation 3 needlessly, adding an administrative burden for solicitors and the SRA. In our view, a time limit should be included in the regulation.

Suitability test

- The Suitability Test should be accurately reproduced in application forms, or, if there is a conscious decision not to do so, appropriate guidance should be given. There are two discrepancies:
 - In 6.1(a) in the Suitability Test there is a reference to the applicant having been made “the subject of a serious disciplinary finding, sanction or action by a regulatory body...” In contrast, the question in the application form omits the word “serious” while otherwise using identical words.
 - In 6.1(c) in the Suitability Test the words are “have significantly breached the requirements of a regulatory body” the question in the application forms omits the word “significantly”.

The omission of these words means that solicitors are required to give details of minor regulatory actions and provide a considerable amount of additional information as well as names of referees. This presents a significant burden on the solicitor as well as the SRA as it needs to assess the additional information.

Authorisation Rules

- **Rule 8.7** – This Rule requires practices to submit an annual information report to the SRA. Currently the information sought by the SRA during its renewal process has been limited. However, the SRA has indicated that the information it will seek is likely to increase. The SRA should commit to:
 - carrying out a cost / benefit analysis of any data request
 - only requiring practices to submit information which it cannot obtain from elsewhere at a lower cost
 - where possible providing practices guidance about what data will be required by the SRA as part of the annual information report 12 months in advance. This will allow practices to capture that data in the format required by the SRA. Thus saving practices money and improving the quality of data the SRA will receive.

- **Rule 8.5** (take all reasonable steps) for the COFA is in the wrong place and it gives the impression that the COFA must record absolutely everything. We understand that this is a drafting error so it would be helpful if this could be amended during this exercise. This is highlighted below:

(c) *The COLP of an authorised body must:*

(i) ***take all reasonable steps to:***

(A) *ensure compliance with the terms and conditions of the authorised body's authorisation except any obligations imposed under the SRA Accounts Rules;*

(B) *ensure compliance with any statutory obligations of the body, its managers, employees or interest holders in relation to the body's carrying on of authorised activities; and*

(C) *record any failure so to comply and make such records available to the SRA on request; and*

(e) *The COFA of an authorised body must:*

(i) ***take all reasonable steps to*** *ensure that the body and its employees and managers comply with any obligations imposed upon them under the SRA Accounts Rules;*

(ii) *record any failure so to comply and make such records available to the SRA on request; and.....*