The Law Society

Response to SRA Consultation: Looking to the future – flexibility and public protection

September 2016

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Introduction

1. The Law Society of England and Wales ('the Society') is the professional body for the solicitors' profession in England and Wales, representing over 165,000 solicitors. The Society represents the profession to Parliament, Government and regulatory bodies and has a public interest in the reform of the law.

2. The response to this consultation, "Looking to the Future - flexibility and public protection", should be considered together with the Society's response to the SRA's consultation, "Looking to the Future: Accounts Rules Review", which reviews the accounts rules.

3. On 1 June 2016, the SRA released a consultation "Looking to the Future-flexibility and public protection" which proposes that the Solicitors Code of Conduct be replaced with two separate, shorter and simplified codes, a code for solicitors and a code for firms. This is one of a number of consultations that have been or will be released by the SRA reviewing the regulatory framework for solicitors and firms. Other consultations which may be released over the next year or so include the SRA's review of the solicitors qualifying exam and further consultations on the SRA's handbook, and possible changes by government to the framework for regulation of legal services.

4. There are other contemporaneous consultations and reviews of the legal services market including a consultation on the review of the SRA Accounts Rules; and a Ministry of Justice consultation into changes to the regime governing alternative business structures, which closed on 3 August 2016.

5. There is also a market study of the supply of legal services in England and Wales by the Competition and Markets Authority (CMA) for consumers and small businesses, which is due to report by January 2017.

6. The current regulatory framework was put in place following the Clementi Review which included an in-depth review and analysis of the legal services market. The regime which was implemented is less than 10 years old, and in some aspects less than five years old but is nevertheless undergoing radical and extensive, multi stakeholder reviews which potentially overlap. These piecemeal changes create uncertainty, threaten viability and increase risk of irreversible harm.

7. Stability and certainty of the legal system is vital to the economy and the legal services market. The legal services market directly contributes £25.7 billion[1] to the UK economy, and when the UK legal services market grows by 1%, 8,000 jobs are created and £379 million is added to the whole of the economy[2].

8. The impact of regulation on costs is recognised and the Government's Principles of Regulation[3] emphasise that regulation is only justified where, among other criteria, analysis of the costs and benefits demonstrates that the regulatory approach is superior by a clear margin to alternative self-regulatory or non-regulatory approaches. Further there is a general presumption that regulation should not impose costs and obligations on business, social enterprises, individuals and community groups unless a robust and compelling case has been made.

9. In the interim report on its legal services market study, the CMA sets out high level criteria for assessing the impact of regulatory change and the direct costs of regulation are identified as a factor. The CMA also stated that there were "risks with a wholesale change to a regulatory framework. There is a risk of harming competition, for example, if such a change results in extending, rather than reducing, the scope of regulation beyond the currently reserved activities without justification. It is likely that wholesale reform would result in significant design and transition costs and a period of regulatory uncertainty".

10. This is of particular concern at the present time when the country as a whole and the legal framework is going through a period of unprecedented uncertainty and instability following the referendum decision for the UK to leave the European Union. Unless there is a clear and significant harm that requires addressing urgently, it would be more reasonable to put any such regulatory framework changes on hold at least until the immediate issues around Brexit are addressed.

11. Where other services or markets have been subject to such wide ranging reviews, there has often been a trigger event (such as the 2008/9 financial crisis) or significant, clamorous public complaints (utilities market). This is not

[1] 'Economic value of the legal services sector', Law Society Research Unit, March 2016 (http://www.lawsociety.org.uk/support-services/research-trends/a-25-billion-legal-sector-supports-a-healthy-economy/)

[2] £25.7bn is the real (constant 2012 prices) gross value added (GVA) by the sector in 2015 and the correct basis for considering the sector's contribution to overall gross domestic product. The turnover of the sector in 2015 (as used by the Legal Services Board, was £30.2bn is the Office for National Statistics nominal turnover figure for the sector. Turnover is higher than GVA because it includes goods and services used by the legal services sector but produced by other sectors and because it has not been converted to 'real' terms.

[3] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/468831/bis-13-1038-Better-regulation-framework-manual.pdf

the case with the legal services sector. **The Society is of the view that there is insufficient evidence of significant clear and present "harm" generated by the current system which would require systemic and radical reform such as is proposed.** The Society believes that the proposals are poorly evidenced and misconceived in that they will demonstrably beyond reasonable doubt create consumer confusion and harm, will not address the actual unmet legal needs, nor assist with access to justice. We are not aware of any in-depth analysis, study or investigation of the impact of the proposals or likely achievement of the articulated objectives.

12. The primary purpose of the regulatory framework is to protect the consumer and the public interest. The current proposals will on the contrary erode consumer protections and have serious implications in a number of areas which we consider later in this submission. Furthermore, the proposals are substantially incomplete and lacking in clarity and guidance. This is likely to give rise to additional costs and add to the regulatory burden on regulated solicitors and firms, in particular smaller firms that are most likely to provide legal services to smaller businesses and individual consumers.

Summary of concerns with the specific proposals

13. The Society considers the SRA's proposals to be misconceived. We have significant concerns with:
    - the definition and evidence for "unmet legal need" which is the basis of the case for the proposals, as described in **the Initial Regulatory Impact Assessment**;
    - **the substance and content of some of the proposals**; and
    - **the consultation process** by which the SRA is seeking views on its programme of change.

14. Notwithstanding our overriding concern that the proposals are misconceived, we have in good faith reviewed the specific proposals with our members to ensure that there is a complete response representing the breadth of views of the profession.

The Initial Regulatory Impact Assessment

15. The principal reason articulated in the consultation for the proposals appears to be that the reforms would address the challenge of unmet legal need, which it is posited has arisen primarily because of a lack of flexibility and innovation leading ultimately to unaffordable costs. We have examined the evidence for unmet legal needs which is relied on and found that the evidence is neither robust nor sufficient. This is corroborated by the fact that, in their Interim Report, the CMA did not find it necessary to make a market investigation reference under section 131 of the Enterprise Act 2002. We

have set out in Appendix 1 a full analysis of the evidence on which the SRA's proposals are based and why it is flawed and even dangerous to use it for these purposes.

The substance and content of the proposals

16. We have significant concerns with the substance and content of the proposals, not least for consumer protection. The proposals will enable solicitors to work for unregulated entities providing unreserved services to the public. Such solicitors will be subject to a new code of conduct for solicitors but the organisations they work for will not be subject to the SRA's proposed new code of conduct for firms which will continue to uphold a range of current protections for clients and consumers. Such organisations will not be subject to any SRA Code or enforcement powers. This has potentially serious implications in a number of areas including client protection (and confusion), legal professional privilege and professional supervision. It will in our view lead to the creation of a two tier profession with a significant risk that the SRA's proposals will undermine the positive reputation held in relation to England and Wales solicitors and in the long-term, undermine the global competitiveness of UK law. We provide further details below.

The consultation process

17. The Society is concerned that consultees have been asked to respond to a consultation paper with inadequate detail of what is actually being proposed and what the consequences of the proposed changes are likely to be.

18. In particular, there is no clearly defined vision for the future of the regulatory framework, nor will it be possible to have this until the CMA has completed its market study and the Government has clarified if and when it will bring forward a further consultation on regulatory independence, which it is considering in the context of the CMA's preliminary findings[4]. The Code of Conduct and Principles are the most simple and workable aspects of the current regulatory regime and in least need of change. There are more significant related aspects still to be presented including the practice framework itself, the authorisation rules and enforcement. However, all are intrinsically linked and without an understanding of the related changes in all these areas, we question the efficacy of this partial consultation. In particular, as is made clear in the economist's report published by the SRA as part of the consultation[5], the planned guidance to support the profession in its efforts to understand what is clearly intended to be a very different regulatory regime has importance that cannot be underestimated,

[4] https://www.gov.uk/government/speeches/legal-services-regulation
[5] Looking to the Future - flexibility and public protection, Annex 6: Economist's Report

particularly in the light of the removal of the indicative behaviours. The profession is simply not in a position to make fully informed comments on the proposals and reach a judgment on the impact of the new practice framework and how effective the new Codes of Conduct would be without being provided with the intended additional guidance, which will replace the provisions in the Code that have been removed, and with all necessary information as to how the new form of regulation will be supervised and enforced.

19. Under the Gunning Principles:

    - consultation must take place when the proposal is still at a formative stage;
    - sufficient reasons must be put forward for the proposal to allow for intelligent consideration and response;
    - adequate time must be given for consideration and response; and
    - the product of consultation must be conscientiously taken into account.

20. We have serious concerns that the Gunning Principles are not being followed in this case.

21. In addition, the consultation has not provided any information or modelling on how the changes would be likely to change the balance of firms that would remain fully regulated by the SRA and what the consequent impact on the practising certificate (PC) and/or firm fees might be, and thus the balance of regulatory burden. This has the potential to impact the number of firms offering reserved services and ultimately impacts competition in the market and the cost of services especially at the small firm end of the market. This also raises diversity implications because solicitors from a black, Asian or other ethnic minority background are over-represented as sole practitioners and in firms with fewer than five partners[6].

22. The codes are shorter and simpler and the overarching Principles have been reduced from 10 to 6, losing the principle "provide a proper standard of service" amongst others. This is both a standards and client protection issue. Furthermore the language in the codes is so lacking in specificity that firms will spend more time trying to establish what will comprise compliance; there will also clearly be a wide margin of discretion for the regulator to decide what constitutes compliance.

23. The lack of detail in the consultation on the prior points makes it difficult to form a comprehensive view of the costs and benefits of the proposals.

[6] http://www.lawsociety.org.uk/support-services/research-trends/annual-statistics-report-2015/

24. Most seriously, there does not appear to have been any consideration of the international implications of the proposals for the reputation of the profession or, in practical terms, how the proposals would impact international firms.

25. The consultation paper is noticeably lacking in detail on how the SRA would deal with issues of enforcement, particularly with respect to ensuring that solicitors employed by an unregulated entity do not undertake reserved work, not least because (i) issues commonly cross between areas of legal activity and (ii) the boundary between reserved and unreserved services is sometime less clear cut than the terms would suggest. As observed by Mayson and Marley, "reserved instrument activities" is not a familiar concept even for some solicitors. The intention of relying on the distinction as a basis for distinguishing between entities that need or do not need to comply with the Code of Conduct is likely to lead to confusion and uncertainty.

26. In conclusion, the piecemeal approach to the regulatory review as a whole and the fact that this current consultation is just one of a number of linked consultations, means that it is particularly problematic to have any real understanding of how the new regime will work. The Society believes that it is difficult to properly review the issues when very significant elements of the new framework remain unclear including the future structure of the PC and firm fees, the practice framework rules and the section of the handbook that deals with enforcement.

Our concerns

<u>The Initial Regulatory Impact Assessment</u>

27. All consumers should have access to justice, regardless of social background or wealth. There are clearly unmet legal needs in certain sections of the population but the most significant unmet legal need relates to the removal of legal aid provision. Many consumers, in particular among the most vulnerable communities, do not have the means to pay for legal services at any price point and for them there is no realistic prospect of addressing their legal need without some restoration of publicly funded legal services.

28. Not all issues which have a legal element rationally require legal advice and not all consumers who have a legal issue wish to seek legal advice. There are many issues which may have a legal perspective but which consumers are often content to self-manage. This is a positive and healthy societal approach. It is not in the interests of consumers, the markets or society to encourage excessive and unnecessary use of legal processes to deal with simple matters – e.g. technically receiving a parking fine potentially results in

a "legal need". However it would not be rational or justified to take legal advice each time a parking fine is administered.

29. We are concerned that the evidence for unmet legal need which is the driver of the proposals is not robust and was not designed from a qualitative perspective to be used for justifying substantial regulatory reform. Our detailed analysis of the evidence for unmet legal need as articulated and relied upon for the proposals under discussion is contained in Appendix 1 to this response.

The substance and content of the proposals

Implications of the proposals for consumer protection, perceptions of the profession and the global competitiveness of UK law

30. While it is asserted that the proposals would be likely to deliver improved access to quality services at affordable prices, enhanced standards, increased employment opportunities and a strengthened solicitor brand, we believe the opposite is more likely.

31. In particular, we believe the SRA's proposals would lead to
    - weaker consumer protection because of the implications for:
        - legal professional privilege;
        - professional indemnity insurance and the Compensation Fund;
        - prevention of conflicts of interest;
    - creation of a two tier profession and greater client confusion;
    - lower professional standards;
    - other significant issues including:
        - contract protection;
        - disproportionate impact of regulation on smaller firms and sole practitioners;
        - impact on in-house practitioners;
        - impact on special bodies;
        - overlap between the two Codes of Conduct.

32. In this way, the proposals create a risk of significant damage to the standing of the solicitor profession at home and internationally.

Weaker consumer protection

33. As discussed above, the proposals would enable solicitors to work for unregulated entities providing unreserved legal services to the public. Such solicitors would be subject to the proposed new Code of Conduct for Solicitors but the entities they work for would not be regulated.

34. Despite receiving advice from a solicitor, clients of unregulated firms provided by a solicitor working in an unregulated entity would have none of the protections that clients in regulated firms have and will continue to have.

35. This has potentially serious implications with respect to legal professional privilege, professional indemnity insurance (PII) and the Compensation Fund, prevention of conflicts of interest, contractual protections, professional supervision and standards and the standing of the solicitor profession. We summarise the differences in protection at Appendix 2 and will discuss some of these points below and in the scenarios at Appendix 3 and Appendix 4.

Legal Professional Privilege

36. Legal professional privilege (LPP) is one of the most important rights recognised by English law. Having existed for over 400 years, LPP is treated under English law as a fundamental common law right and as a human right. It is a necessary corollary of the right of every person to seek legal advice and it plays a crucial role in ensuring the proper administration of our justice system. Accordingly, it is a precious right, vigorously protected by our judiciary and usually treated with the utmost respect by Parliament when it legislates. Despite the central position that LPP occupies in our justice system, it can easily be overlooked that this is a right, not of lawyers or the legal profession, but of clients. As noted in Passmore, "all privileged communications are necessarily confidential ones; but it by no means follows that all confidential communications are privileged, since it is only the confidential relationship between lawyer and client that can give rise to such a claim."[7]

37. A serious concern stems from the proposals regarding LPP. Clients of unregulated firms, despite receiving their advice from a solicitor with a practising certificate, will not have the benefit of LPP. In general, in order that communications may be protected by LPP, the advice given must be from a solicitor with a current practising certificate. The problem in this context however would arise as the contract / retainer would be between the consumer and the unregulated entity, not the individual solicitor. In order for the advice from a solicitor in an unregulated entity to attract privilege, the contract / retainer would have to be between the individual solicitor and the client, not the firm. Although it would be theoretically possible to make arrangements to circumvent the issue, the client would then only have redress against the individual solicitor and not the firm if the advice was negligent or wrong. We take the view that such arrangements would be inherently problematic and risky, for solicitors and clients, and furthermore not in keeping with the solicitor's role as an officer of the court. These proposals therefore present a substantial risk that by using an unregulated

[7] Privilege. Sweet & Maxwell [London; 2013]

provider, consumers would find that they do not benefit from protections which they had assumed they would, or only become aware of the lack of protection when they have a significant legal issue for which they want to be able to claim LPP but find they cannot. In such situations, it will be too late for the consumer to do anything about it. There are many completely foreseeable issues around lack of privilege, including confidentiality and insurance. We have prepared a scenario exploring the issues, which is contained in Appendix 3.

38. LPP is under attack in a number of ways and the Society is very involved in the fight to protect LPP. Under the principles of the rule of law and access to justice, LPP should be capable of attaching to advice to clients from a solicitor holding a current practising certificate wherever he or she practises and we are extremely concerned by any attempts to dilute LPP or make it more difficult to obtain or enforce. A situation where clients are unclear or misinformed about their entitlement to a right to LPP is also clearly unacceptable.

39. Finally, we do not believe that it is right in principle for LPP to be a distinguishing feature of the regulatory framework or a distinguishing factor between regulated and unregulated service providers. If one part of the solicitor profession is unable to give legally privileged advice, this is a slippery slope that could erode the concept of LPP; a cornerstone of the justice system, a key right of clients and a major factor in the high standing of the solicitor profession at home and abroad.

Professional Indemnity Insurance (PII) and the Compensation Fund

40. The proposals allow solicitors to operate from unregulated entities without mandatory PII in place. This risks eroding a key element of current client protection, and would also leave the individual solicitors concerned exposed to significant personal liability if they chose to operate without PII. The PII regime also plays an important quasi-regulatory role in encouraging good risk management and behaviours.

41. Additionally, clients of unregulated entities will not have access to the Solicitor's Compensation Fund. Arguably, clients of an unregulated entity would be exposed to much greater risk due to the lack of regulatory controls and oversight. We note that in view of higher risks with unregulated firms it would not be prudent to expose the Fund to the risk of a potentially significant pool of claims that could deplete the Fund's reserves. However the result is a significantly eroded client protection regime.

42. The proposal to counter this is that solicitors working in an unregulated entity would be required to make sure that their clients understood whether and

how the services they provide are regulated and the protections available to them. We would point out that even for those working within the legal sector, insurance and client protections are complicated topics and not easily digested and understood. It is highly likely that even with such a requirement in place, the overwhelming majority of clients will not fully comprehend the implications of purchasing their legal services through an unregulated provider.

Prevention of conflicts of interest

43. Under the proposals, solicitors providing services through an unregulated provider would be regulated as individuals and would be subject to the requirements set out in the Code of Conduct for Solicitors around conflict and confidentiality. However, this would not be true for the unregulated entities themselves or for non-regulated individuals employed by them. Unregulated entities would therefore be able to act in situations where regulated firms would not, creating an uneven playing field, and creating a risk of conflicts in the unregulated entities that would not be present had the client engaged a solicitor in a regulated firm. In such situations, the client might not be aware of a potential or real conflict of interest or appreciate that the unregulated entity was itself not subject to the rules on conflict.

44. The protection of confidential information is a fundamental feature of the solicitor's relationship with clients. As the SRA says in its guidance, "It exists as an obligation both as a matter of the common law and as a matter of conduct." Equally, a solicitor who acts in the face of a conflict of interest involves not only breaching their fiduciary duty to their client, but is putting at risk the important principle that justice must not only be done but be seen to be done. There is a real risk to the perception of justice if a solicitor is seen to act whilst having a conflict of interest.

45. It seems invidious that unregulated entities employing solicitors should not have to comply with a regulatory conflict of interest policy given the concept of conflicts of interest is recognised globally as a serious ethical issue that corporations and government bodies strive to address in many ways, from legislation to internal rules and codes. There is clearly a danger of downgrading professional standards with this proposal and consequentially a seriously negative impact on the standing of the profession internationally where conflict of interest is taken very seriously by Bar Associations. There is agreement internationally on the principle that lawyers should not act when the interests of their clients may conflict. The Council of Europe Recommendation on the freedom of exercise of the profession of lawyer lists the avoidance of conflicts of interest as one of the principle duties of lawyers

towards their clients[8]. A European Parliament resolution recognises that certain rules which are necessary in the specific context of a profession – including the avoidance of conflicts of interest – are not to be considered restrictions of competition within the meaning of Article 81(1) EC Treaty.[9]

46. Furthermore, clients would certainly be at risk. The Society would point to the 2016 Online Survey of Legal Needs, which found that:

- for 48% of issues, respondents checked if their main advisor was regulated (more likely for those aged >55);

- for 38% of issues, respondents did not. Of the 38% of issues where regulatory status was not checked, in over half of cases (52%) the respondent assumed the advisor would be regulated and therefore did not check; in 17% of cases they did not think regulation was important; in 8% of issues they did not know what regulation meant and in a further 8% they did not know how to find information about regulation.

47. There are also inherent risks to solicitors themselves in that a solicitor working in an unregulated entity might unwittingly act in a conflict situation.

48. The proposals will also act as a push to firms to become unregulated for fear of losing clients to unregulated competitors. This has been identified as an issue by some firms we have consulted. It has been suggested that a US style system for conflicts might be adopted generally, however although this might alleviate the position, the US system requires an extraordinary number of waivers and additional paperwork.

Creation of a two tier profession and greater client confusion

49. The SRA's proposal would effectively divide the profession in two by creating a second class of solicitors, delivering unreserved work through unregulated entities and without protections that have been traditionally available to those who consult solicitors.

50. Clearly this scenario will create confusion to consumers. Apart from confusion regarding the client protections available, we believe it will be difficult for consumers to differentiate the type of firm they are instructing. While an unregulated entity will not be able to use the term ‘solicitor's firm’ or ‘solicitors’, it would be able to use titles that included the words "law", "legal services" or "lawyers" and as they are unregulated, there will be no

[8] Recommendation No. R 2000-21 of the Committee of Ministers to member states on the freedom of exercise of the profession of lawyer

[9] European Parliament resolution on scale fees and compulsory tariffs for certain liberal professions, in particular lawyers, and on the particular role and position of the liberal professions in modern society (2001)

means to require them to publicise the fact that the entity is not regulated. There is no prohibition against unregulated firms advertising that they employ solicitors, which would be even more confusing. The situation would be further muddied by the fact that "lawyer" is not a protected title and, as things stand, can be used by any person when supplying unreserved legal services.

51. The potential for consumer confusion is clear. Many consumers are unlikely to appreciate the distinction between a regulated 'solicitor's firm' and an unregulated 'law firm' or 'legal services firm' and the differences in the protections available when supplied with the same service by unregulated and regulated providers.

Lower professional standards

52. We have mentioned above a number of proposals which we believe will have a lowering effect on professional standards, such as the erosion of LPP, and the elimination of the regulatory conflicts regime and PII. However, there is a further proposal which would mean that newly qualified solicitors with no experience would be able to set up their own unregulated firms. It is very common for regulators to prevent newly qualified professionals, such as in medicine, from setting up on their own immediately after qualification because of their lack of experience and the risk of consumer detriment. Our understanding is that the SRA has conducted research that shows that the most problematic solicitors are those at the very beginning and very end of their careers. For example, research conducted by Nottingham Law School for the SRA suggests that it is not until they have gained four years of post qualified experience that new entrants are more confident of their legal expertise and turn their attention to developing a wider skill set, as part of their aspirational career trajectory[10].

53. If that support and supervision were not available it could place clients at risk, as well as risking the standing of the solicitor profession itself, at home and internationally. We provide more detail on this important subject in our response to Question 19.

54. In 'Mapping the Moral Compass', Richard Moorhead and others[11] have examined how individuals, systems and cultures combined to increase or reduce ethical risk in the context of lawyers working in-house in business and government. They estimated that 30-40% of in-house lawyers sometimes experienced ethical pressure to advise on unlawful and/or unethical

[10] http://www.sra.org.uk/documents/SRA/research/sra-cpd-final-report-september.pdf
[11] C Godinho, S Vaughan, P Gilbert and S Mayson - http://www.ucl.ac.uk/laws/law-ethics/cel-events/ELIHL-survey-report

practices; in 10-15% of the sample, such pressure was described as 'elevated'. The research establishes links between a stronger commercial orientation and weaker ethical inclination, with other conceptions of the in-house role, such as 'neutral adviser' and 'exploitation of uncertainty' can also be problematic. The research indicates that behaviour is not always consistent with the approach required under professional codes. Stronger ethical infrastructures, as well as individual, team and professional orientations are all associated with more ethical and more professional in-house lawyers.

55. In addition to the above, the prospect of intervention is a powerful incentive for compliance. The SRA would not be able to intervene in an unregulated entity. The effect of this lack of enforcement power could have serious implications on the behaviours of the entity and, by extension, the solicitors within it.

Other significant issues arising from the consultation

56. There are a number of areas of ambiguity in the proposals that require further clarification from the SRA. These include:

Contract protection

57. It is important to note that the terms of business of a regulated entity can be restricted in a way that an unregulated entity's terms may not. There is case law to the effect that retainers with a regulated solicitors' firm cannot be terminated without cause[12], the solicitor has a duty to warn clients of matters which fall outside the normal scope of the retainer and to inform the client of problems identified or new information learned during the course of a retainer.[13] These obligations on solicitors' firms as determined by the courts underpin the values of an independent legal profession, imposing restrictions that curtail commercial incentives for contractual terms that are not beneficial to the client.

58. Conversely, there are no such restrictions on an unregulated entity's terms of business. The protection currently afforded to clients is open to erosion if the courts were to take the view that unregulated entities are not subject to the same contractual restrictions even if a solicitor employed by the entity carries out the work.

59. On a separate point, although solicitors would be subject to the principles contained in the Code of Conduct for Solicitors, there would be no obligation on the unregulated entity to have systems in place for dealing with client

[12] Buxton v Mills-Owens [2010] EWCA Civ 122
[13] Credit Lyonnais [2002]EWHC 1510; Mortgage Express v Bowerman [1996] 2 All ER 836

files, including retention of files when the matter is complete or the entity closes down. This could undermine a solicitor's ability to comply with their obligations to their client under the Code.

Disproportionate impact of regulation on smaller firms and sole practitioners

60. Under the current fees structure, 60% of the net funding requirement for the Law Society and SRA is received from practising fees paid by solicitor firms. The remaining 40% is collected from individuals' PC fees.[14]

61. Practising fees are charged to solicitor firms according to each firm's annual turnover in the accounting period prior to October (when fees are collected). A payment structure with turnover bandings is published annually by the SRA.[15] The proportion of turnover charged declines as turnover increases. However, the 200 firms with the highest revenue contribute over 40% of total fees paid by all firms (estimate for the year 2014-15) due to the scale of their turnover.

62. Unreserved work accounts for the majority of solicitor firms' turnover. Hence if solicitor firms' unreserved work were switched to unregulated providers, the turnover base that underpins practising fees paid by firms would be reduced (perhaps markedly). As a result, total fees received from firms, under the current bandings, would fall.

63. There is no information about any prior analysis of the projected impact of its proposals on fees, in particular the turnover based firm fee. Without this information, and an assessment of the impact on the SRA's costs, it is impossible to derive a full picture of what the consequences of the proposals might be.

64. We understand that some firms feel they will have no choice but to establish unregulated entities through which to provide unreserved services, in order to remain competitive. As stated above, we have real concerns about how these changes might ultimately affect the fees for smaller firms who may, collectively, find themselves making up the shortfall in fees.

65. Unintended consequences could be a proportionately higher burden of practising fees on smaller firms and sole practitioners, who do not find it cost effective (or possible) to split their business between regulated and unregulated services. This is likely to result in higher costs for consumers at

[14] Details of the funding arrangements are contained in the document: http://www.legalservicesboard.org.uk/projects/independent_regulation/PDF/2015/20150723_SRA_TLS_To_LSB_Section_51_Application.pdf. Practising fees also go to fund the levies that the Law Society Group pays under the Legal Services Act to fund the Solicitors Disciplinary Tribunal, Legal Services Board, and Legal Ombudsman.

[15] For example the 2014-15 fee structure: http://www.sra.org.uk/mysra/fees/fee-policy-2014-2015.page

the less economically well off end of the market for regulated (and possibly unregulated) services as a result.

Impact on In-house practitioners

66. By ceasing to separate out core regulatory provisions for in-house solicitors, the SRA will put in-house solicitors on an equal footing with other solicitors. The Society welcomes this acknowledgment that in-house solicitors are (as they always have in fact been) an equal part of the profession. However, we suggest that there needs to be a review of the Code to ensure that in-house solicitors are not caught by any provisions which should only apply to solicitors in private practice or vice versa. There are currently no in-house specific provisions in the code and this seems to be likely to raise issues in the future because in-house roles are very different from private practice.

67. It is proposed that in-house solicitors should no longer be prevented from only acting for their employer. This is intended to enhance access to justice for consumers. In practice, this change will mean that any in-house solicitor can provide advice and assistance to the public, provided they are not carrying out one of the reserved legal activities. In the case of local authority in-house solicitors, this may be attractive as it could permit them to provide advice to other bodies and authorities without having to obtain a waiver. However, this will result in increasing conflicts of interest situations, with the need to comply with the Code of Conduct for Solicitors. They will also face potential liability exposure, which will realistically have to be covered by their employer's indemnity. In addition, they too will not be able to provide advice which is covered by LPP.

68. With respect to in-house solicitors, it is difficult to envisage in what circumstances they would wish to act for third parties, or in what circumstances they would be permitted to do so. Many employers prohibit employees taking on other work as it is not in their interests for them to do so.

69. We have received specific feedback to the proposals from in-house lawyers working in Local Government, who are not in favour of the new proposals for a number of reasons. They remain concerned about the lack of clarity as to whether they can provide service to more than one local authority or body. These proposals do not address the issue. In addition the unregulated entity proposals are unattractive for the following reasons: they wish to remain regulated and intend to carry out unreserved work, the lack of LPP; the lack of regulation of conflicts rules; the fact that public procurement rules prevent local authorities from engaging unregulated firms; and because they are concerned that legal work that is partially funded by the tax payer through Council Tax could be delivered via an unregulated firm. Those

clients/consumers should receive the same quality of work and protections as consumers of regulated firms.

Impact on Special Bodies

70. The consultation is being used as an opportunity to address the position of 'special bodies' – not for profit organisations such as trade unions, law centres and Citizens Advice. These bodies have been subject to transitional arrangement provisions in the Legal Services Act 2007, meaning that while the solicitors they employ are regulated by the SRA, the body remains unregulated. The SRA's suggested new approach is to treat special bodies in the same way that it currently treats multi-disciplinary practices[16]. Special bodies play an important role in providing access to justice for vulnerable people who may not be able to afford access to legal services. We believe that, as well as considering the impact of the proposals on bodies such as Law Centres, there needs to be a detailed analysis of the impact on the market, and other providers in the market, of bringing these providers into the regulated sphere.

Overlap between the two Codes of Conduct

71. There is overlap between the two Codes, most noticeably in areas such as conflict, complaints and client information/identification. It is not clear which would take precedence in the event of there being a conflict between the two Codes.

[16] MDPs - alternative business structures providing a mixture of legal and non-legal services - where reserved activity is SRA regulated and non reserved activity is not subject to the provisions of the Handbook.

Consultation questionnaire form

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)?

The content of the test itself is fair and discharging the burden of the suitability test is straightforward in administrative terms but it is unclear what level of scrutiny is given to these returns to ensure that only those who are suitable are admitted to the profession. Further information regarding this process would be welcome as a way of showing greater transparency of the regulatory process.

The Law Society is aware of concerns regarding the timing of the suitability test. The Society was supportive of the removal of student enrolment prior to the start of the Legal Practice Course as it was unnecessarily costly and bureaucratic. However, the Society noted at the time that there may be issues which arose as a result of this and that it was essential that students have proper information to alert them to any likely problem at an early stage. There were also notable benefits to the previous arrangement. First, they enabled any concerns about a student's character to be addressed before the student embarked on the period of recognised training, at which point there has already been a significant outlay in time and money. Secondly, the requirement to undergo the process placed students on notice that their conduct may seriously affect their ability to pursue a legal career. It offered them an opportunity to engage at an early stage with the implications of being a professional. While it is accepted that each individual must take responsibility for their behaviour and should take advantage of the information available on the SRA website about character eligibility, it is not realistic to expect a student to understand the complex technicalities for reaching the SRA's suitability standards.

Unfortunately, although students can request an early appraisal of any issues that may cause problems regarding their suitability, the Society understands that it is not widely understood what this process is and when it should be applied for. The Society is aware, anecdotally, of situations arising whereby firms are routinely having to query trainees when they begin their placements and deal with issues, which the person concerned had not recognised must be declared, at this late point. There may also be situations where firms do not check, which raises issues about client protection. This represents a waste of a significant outlay in time and money on their part.

Clear and appropriate information regarding the suitability test should be made available to students at an early stage in order to make it obvious to students where previous conduct may prevent them from joining the profession and to give them a clear idea of the conduct they will be expected to demonstrate over the ensuing

years if they wish to join the profession.

Question 2: Do you agree with our proposed model for a revised set of Principles?

The Society has concerns with some aspects of the proposals as set out below.

New Principle 1: Uphold the rule of law and the proper administration of justice

This is current principle 1. We welcome its retention. However, we would reiterate that it is important to understand what "the rule of law" truly means. While a solicitor who is acting illegally may damage trust in the profession, it does not follow that the solicitor is also failing to uphold the rule of law. We would refer to The Rule of Law by Lord Bingham[17] which advances eight principles by way of expansion of the basic concept, the latter being: "that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts." These are primarily obligations of the state, not of individuals.

New Principle 2: Ensure that your conduct upholds public confidence in the profession and those delivering legal services

This is a reworking of current principle 6 ("behave in a way that maintains the trust the public places in you and in the provision of legal services") but brings in a new obligation with respect to providers generally.

There are two substantive changes.

First, the absence of any reference in the new wording to the importance of regulated individuals behaving in a way that retains public trust in them personally.

Secondly, it is illogical for regulated individuals and firms to be placed under any regulatory obligation with respect to non-regulated individuals and providers, and the proposed loosely worded reference could deter regulated individuals and firms from pointing out why the public should have greater confidence in the regulated sector, for example because of their professional training and the higher levels of client protections.

We propose that the new Principle be redrafted as follows:

*Proposed alternative wording for New Principle 2: Ensure that your conduct upholds public confidence **in you and** in other regulated individuals and firms"*

New Principle 3: Act with independence

[17] The Rule of Law by Tom Bingham, Penguin Books, 2011.

This is a reworking of current principle 3 ("not allow your independence to be compromised"). The Society does not have any concerns with the revised wording.

New Principle 4: Act with honesty and integrity

This is a reworking of current principle 2 ("act with integrity").

The Society has concerns with this proposed new principle not least because a requirement to be honest, including with respect to client money, is significantly weaker than a requirement to protect it, as required by current principle 10 ("protect client money and assets"), which it is proposed to remove. This proposal is presumably to facilitate the other proposal that solicitors working in unregulated entities should not be able to hold client money in their own name.

The absence in the new principles of any reference to the importance of protecting client money and assets raises concerns from the perspective of professional standards and consumer protection. Arguably, such protection would become even more important in an unregulated entity which do not and would not have to comply with the SRA's accounts rules. We therefore believe the new set of principles should retain an explicit reference to the protection of client's money and assets, ideally in a separate principle.

New Principle 5: act in a way that encourages equality, diversity and inclusion

This is a reworking of current principle 9 ("run your business or carry out your role in the business in a way that encourages equality of opportunity and respect for diversity"). The substantive change is the addition of a reference to inclusion. However, the word "act" seems a significant watering down of the current wording and the Society would prefer to retain "run your business or carry out your role" in place of "act".

We are also concerned that, while equalities legislation will apply to unregulated entities, this Principle will not. The SRA should address this issue in its equality impact assessment.

New Principle 6: Act in the best interest of each client.

This is a minor change to the wording of existing principle 4 ("act in the best interests of each client"). The Society does not have any concerns with this wording.

Question 3: Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

As noted above, we are concerned 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 personally.

We would prefer absolute clarity and therefore propose that the new Principle be redrafted as follows:

*Proposed alternative wording for New Principle 2: Ensure that your conduct upholds public confidence **in you and** in other regulated individuals and firms"*

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?

Current Principles

The SRA is proposing the removal of four current principles:

a. Current principle 5 ("provide a proper standard of service to your clients")

The Society believes that this Principle should be retained as this is central to the profession and reflects the high level of quality that consumers can expect from a regulated individual. Its removal gives rise to concerns from the perspective of professional standards and consumer protection.

b. Current principle 7 ("comply with your legal and regulatory obligations and deal with your regulators and ombudsmen in an open, timely and co-operative manner")

The Society does not object to the removal of this principle.

c. Current principle 8 ("run your business or carry out your role in the business effectively and in accordance with proper governance and sound financial and risk management principles")

The Society does not object to the removal of this principle, provided that current principle 10 is retained.

d. Current principle 10 (“protect client money and assets")

As noted above, the removal of this principle raises concerns from the perspective of professional standards and consumer protection. Arguably, such protection would become even more important in an unregulated entity which does not have to comply with the SRA's accounts rules. We therefore believe that the new set of principles should retain an explicit reference to the protection of client money and assets, ideally in a separate principle.

The loss of principles 5 and 10 cause particular concern. In addition to the reasons cited above, these principles are so closely associated with what consumers have come to expect of a solicitor that they might be said to epitomize the brand on which consumer confidence is in large part founded. We can see only risks and no benefits in removing what are often seen as two hallmarks of the profession from the core principles.

At Appendix 3, we provide a scenario showing what could happen in a worst case scenario.

Other Principles arising from the newly revised ones

While confidentiality is arguably implicit in the principle that regulated individuals should "act in the best interest of each client", the Society believes it would be helpful to include a specific reference given its importance to consumers and to compliance with professional standards.

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?

We take the view that it would be helpful to the profession to provide a thorough and developed suite of scenarios, particularly as it is proposed that the indicative behaviours be removed from the Codes. As examples of the types of scenarios which we would consider to be useful, we suggest the following:

- A scenario that deals with a sole practitioner who establishes an unregulated entity in order to provide unreserved legal services. The scenario would cover how this practitioner might manage the operation of a regulated and separately unregulated business in practice. It would be particularly interesting to understand how the sole practitioner can guard against client confusion when practising in the circumstances set out above.

- A scenario that explores a practising solicitor working in an unregulated entity who is asked to represent a client who has clear conflicts with existing clients of that entity. We understand that in such a situation the solicitor would be able to represent the client. It would therefore be valuable to understand the parameters around management of such conflicts.

- A scenario that outlines whether, under the new proposed Codes of Conduct, a solicitor firm of conveyancers can act for a buyer and a seller, or for a borrower and a lender, in a conveyancing transaction and be compliant with 6.1-6.5 of the proposed Code of Conduct for Solicitors.

- A scenario that explores the impact of the proposals on the giving and receiving of undertakings ie between a solicitor in an unregulated entity and a solicitor in a regulated entity. Undertakings are the oil in the engine of legal transactions and help ensure they can take place. If in such circumstances, a solicitor in an unregulated entity were to breach an undertaking, what would be the consequences in terms of reparations to the affected consumer? Under what, if any, circumstances would undertakings from an unregulated firm be acceptable to regulated firms and others?

- A scenario that explores a solicitor who owns and practises through an unregulated entity who wishes to place advertisements online and in a newspaper. It would be useful to understand in more detail what the advertisement can say about the unregulated firm employing solicitors with and without practising certificates.

- A scenario that explores how an in-house lawyer (perhaps working for a local

authority) might provide legal services to the public. How this service would be managed, charged out, and how conflicts and risks would be managed.

- A scenario that explores how a solicitor working in an unregulated firm would manage conflicts, bearing in mind that they would be bound by the conflict rules from the solicitors code but may be working with colleagues who are totally unfamiliar with the concepts of conflict, confidentiality and disclosure.

- As set out in our answer to Question 20, we believe it would be helpful for the SRA to provide a case study on the information that should be displayed about consumer protections, including the level of detail required and expectations as to the prominence of the information presented.

Our consultation with some firms indicates that they are concerned about the removal of indicative behaviours from the handbook because of their usefulness in indicating how the regulated community can best comply with their regulatory requirements.

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?

As the Code's purpose would be to forestall misconduct, there is a balance to be struck between excessive detail and brevity. Clarity is important but so is predictability.

We know that our members, particularly those from smaller firms, like certainty. Many members would rather have a definitive 'do this' or 'don't do that' approach, so that compliance is more straightforward and there is less scope for genuine misunderstandings or disputes with the regulator. Without such certainty, disputes with the regulator about whether or not a particular behaviour is acceptable are more likely, as is uncertainty about the circumstances in which enforcement action will be triggered.

In addition, we are concerned that the language used in the Code is often vague or loosely constructed. This creates a risk that behaviour that is clearly within the current Code may be regarded as incompatible with the new Code and that a member carrying on practice in a fully compliant way now might be in breach under the new Code. There is real concern that both of the new Codes would give the SRA too much discretion. There is clearly a need for the SRA to provide more information and ensure that it acts in a consistent way and to make an explicit commitment to those subject to regulation that it will be consistent, fair, open, transparent and predictable about the circumstances in which it will decide to take or not to take action.

We understand that guidelines are planned and should mention the concerns of many that they are not yet available.

Specific examples of where the Code is lacking in clarity are set out in our answer to Question 13.

Question 7: In your view is there anything specific in the Code for all solicitors that does not need to be there?

No. On the basis of the partial information provided about the new regulatory framework and the SRA's approach, the Society has not so far identified anything specific in the proposed new Code that should be removed.

On the contrary, as noted in our response to Q6, we believe the Code needs more detail and guidance in order for it to be effective and provide clarity to the regulated community.

We would also reiterate that, without the full picture in relation to the new framework and the SRA's approach, it is difficult to reach a definitive judgment on the proposals.

Question 8: Do you think that there anything specific missing from the Code for all solicitors that we should consider adding?

It is not possible to respond to this question with any real certainty as we have not seen the guidelines or other parts of the proposed regulatory reforms.

However, on the basis of what has been set out so far, we have identified three issues on which the Code should be revised:

Unsolicited approaches to clients

The Society is extremely concerned by the proposed removal of Outcome 8.3 in the current Code, which states: "you do not make unsolicited approaches in person or by telephone to members of the public in order to publicise your firm or in-house practice or another business;".

Solicitors who make such unsolicited approaches to clients are not acting in the client's best interests, but rather their own. This explicit prohibition provides an essential protection for clients who are at their most vulnerable when such approaches are made – at the police station, court or prison. Its removal would undermine the protection currently provided to clients in this situation, which prohibits the solicitor from carrying out this behaviour.

The prohibition that the consultation proposes to remove also supports the Government's Duty Solicitor scheme by helping to ensure that anyone arrested can exercise their right to free legal advice from the duty solicitor. Removal of the prohibition would undermine the efficient running of the scheme.

The justification for proposing the removal of the prohibition is that it is "*covered by new 1.2 in the Code for Solicitors and new 1.1 in the Code for Firms to a certain extent.*"

The relevant clauses are as follows:

- new 1.2 in the Code for Solicitors: "*You do not abuse your position by taking unfair advantage of clients or others.*"
- new 1.1 in the Code for Firms: "*You do not abuse your position by taking unfair advantage of clients or others.*"

Clearly, the new clauses carry significantly less weight than the current explicit prohibition. We believe their wording is too weak and unclear to provide certainty to the public, members of the profession and the Legal Aid Agency that unethical behaviour is prohibited and will not be tolerated.

We therefore recommend that the Code of Conduct for Solicitors, RELs and RFLs, and the Code of Conduct for Firms should maintain the current wording of Outcome 8.3, which explicitly prohibits such unethical behavior.

Firms being reasonable or forming reasonable views

A number of references to firms being reasonable or forming reasonable views have been dropped. We would argue that if a solicitor acts reasonably but makes a mistake, it is right in such circumstances that being reasonable should not provide a defence to a request for an injunction or other mandatory order or costs. However, it would also seem unfair to make the actions of the solicitor in such a situation a potential offence that is subject to disciplinary consequences.

Systems to identify and deal with potential conflicts

We note that references to systems to deal with potential conflicts and confidentiality have been lost within the new drafting of the Codes of Conduct. We believe that this causes a problem. We assume that the omission has taken place because there would be general rules about systems. In our experience, and the case law supports this, the biggest single problem for firms in these areas is poor systems, particularly systems for picking up conflicts, or systems for establishing where special protections will be needed to protect confidential information. The SRA approach therefore, while being logical, would quite possibly be unhelpful to firms.

Undertakings

We have particular concerns about the position where a solicitor in an unregulated provider gives an undertaking to a solicitor in a regulated firm or to others who would need to place reliance on it. Undertakings have become a crucial element of the practice of law in the UK and are used to expedite matters that, in the absence of an undertaking, would cause considerable delay and inconvenience to the practitioner and the client.

Even though an undertaking relates to an individual solicitor, the Society has significant concerns regarding an undertaking provided by a solicitor employed by an unregulated provider. We believe that solicitors in a regulated firm would be highly unlikely to accept an undertaking from an unregulated provider due to a lack of protections if things go wrong.

We take the view that undertakings are sufficiently important to warrant protection in both of the codes, making clear that they are not just an enforceable agreement, but that breach can give rise to disciplinary proceedings.

Please also refer to our response to Question 5 which includes a suggested scenario

in relation to undertakings.

Question 9: What are your views on the two options for handling conflicts of interests and how they will work in practice?

The need for clarity around handling of conflicts is paramount. One particularly difficult area is conflicts relating to buyers and sellers in conveyancing transactions. We refer to our suggestion for a specific scenario to be created on this topic in our response to Question 5.

We read the two options set out in the consultation as follows:

- Option 1 largely replicates the 2011 Code, in prohibiting a solicitor from acting where there is a conflict or significant risk of conflict, for example as would exist if an individual solicitor were to act for a buyer and a seller, unless specified circumstances are met and protections are provided;

- Option 2 would narrow the ability to act given that it provides for a complete bar on acting where there is an actual conflict, and requires protections to be put in place if there is a significant risk of a conflict.

We would take the view that Option 2 would quite possibly be unworkable as it is not always possible to identify where a conflict exists. It is too restrictive and unnecessary. Because of the difficulty in identifying where conflicts exist, this option would present risks from a consumer protection perspective.

It may be helpful to set out our thinking to both options in more detail, at the same time commenting on some of the more subtle changes in emphasis:

<u>Option 1</u>

The proposed new rule 6.1 reproduces the old outcome 3.4 dealing with a conflict between the solicitor's own interests and those of the client. It is proposed that there should be an absolute bar to acting (as in the current Code). Under general law such a conflict could be waived. We are not aware of any pressure to change this.

The proposed new rule 6.2 effectively reproduces old outcomes 3.5 to 3.7, and deals with conflicts between clients. In addition to dropping indicative behaviour, it makes a number of changes to the existing rules. First (in 6.2 (a)), the old rule that if someone was to act for more than one client, the clients had to have 'a substantial common interest'. This is to be replaced by saying that the clients need both 'an agreed common purpose and a strong consensus how that purpose is to be obtained'. We take the view that this is weaker, because it allows one firm to act for more than one client on a matter even if the clients have little or no common interest in the matter. There is no explanation for the change.

A further protection has been changed (6.2(iii)). Under the old rules the solicitor had to be satisfied that it was reasonable to act for all clients. This has been dropped. We find this somewhat unsatisfactory, particularly as it would affect less sophisticated clients, who might not understand the implications of giving consent. There is a restatement of the need for the benefits to the clients having to outweigh the risks, but the old requirement was that this was something the solicitor had to have been satisfied about whereas the new requirement is a pure objective test.

Three old protections have been dropped. The first (outcome 3.7 (a)) was that the solicitor had to explain the risks of acting for more than one party and be satisfied that all clients understood this; this was similar to what happens when, for example, one spouse agrees that a house should be mortgaged to support a loan to the business of the other spouse. We would argue again that dropping this is wrong although it may be argued that no consent can be 'informed' without an explanation process (but this should be made clearer). The second (outcome 3.7 (c)) was that other than the matters for which client consent had been given there was no other client conflict. We can see that this protection added little. The third is that without specific client consent, no individual could act for more than one client on the matter. We assume that this was dropped because the issue has been picked up in the code for individuals.

Finally, these conflict rules are to apply to both firms and individuals, in more or less identical terms. But, recognising that some parts of the rule need to apply to individuals, the question remains as to how the application of the whole of the rule works? Is it to be the responsibility of each solicitor on engagement to see that informed client consent has been given? We do not foresee that this would be straightforward. It would be wrong for the senior lawyers acting to be able to just pass responsibility onto the firm, irrespective of what they know or do. We feel that more precise drafting would be beneficial.

<u>Option 2</u>

This would be a complete bar on acting where there is an actual conflict, and protections where there is a significant risk of a conflict. The protections would be (a) informed client consent in writing, (b) where appropriate, putting in place effective safeguards to protect confidential client information, and (c) ceasing to act for one or more of the clients if an actual conflict arises.

This is justified, in paragraph 64, as taking an 'approach which recognises the safeguards around the current exceptions are really about preventing potential conflicts from becoming real ones'. This is incorrect. The existing safeguards were drafted recognising that the parties may have an essentially common interest but still have opposite interests in some respects. These are just examples of a situation that arises not infrequently in a commercial law practice. We understand that when the original rule was drafted, one example which was being held in mind was a solicitor acting for all the partners on forming a partnership, or all owners, when

drafting articles of association. The clear common interest is obvious, but behind it individuals will often have different views on their personal rights in many respects. What a solicitor might typically do is say that he or she will raise the issues where interests may differ and ask the clients to agree how to deal with them and then, in effect, just be the scribe. However, narrowing the scope of the mandate in this way will not always work. Similar issues can be found in drafting a trust deed. We fear that Option 2 would create very real difficulties in these types of situations and could be a recipe for uncertainty.

Also Option 2 seems to abolish the ability in Option 1 and the current rules for a firm to act for more than one client in pursuit of the same object (often where an intermediary is doing some sort of controlled auction for shares in a company or some sort of property). We can see no reason to open this up to uncertainty.

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 refer to our answer to Question 6.

Specific examples of where the clarity of the proposed new Code could be improved are set out in our answer to Question 13.

Question 11: In your view is there anything specific in the Code for SRA regulated firms that does not need to be there?

No. On the basis of the information provided so far about the new regulatory framework and the SRA's approach, the Society has not identified anything specific in the proposed new Code for SRA regulated firms that should be removed.

On the contrary, as noted in our response to Q10, we believe the Code needs more detail and guidance in order for it to be effective and provide clarity to the regulated community.

We would also reiterate that, without the full picture in relation to the new framework and the SRA's approach, it is difficult to reach a definitive judgement.

Question 12: Do you think that there is anything specific missing from the Code for SRA regulated firms that we should consider adding?

We would repeat our point that without seeing all of the guidance which the SRA intends to publish, it is difficult to respond to this question with any real certainty. On the basis of what is available, we would suggest the following:

We note the absence of 1.3 from the Code – the provision about undertakings. It is unclear whether entities should not be giving undertakings, or that an undertaking has to be attached to an individual solicitor to be enforceable.

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?

Remarks in relation to drafting on Confidentiality and disclosure

Proposed rule 6.3 in the Code of Conduct for Solicitors (and proposed rule 6.1 in the Code of Conduct for Firms) tracks existing outcome 4.1 (and its equivalent) provided the definition of client continues to cover former clients (ie by replacing "clients" by "clients or former clients". We would expect that to be the case but note that proposed rule 6.5 expressly refers to former clients so an explicit reference to former clients is also needed in proposed rules 6.3 and 6.1 in the Code of Conduct for Solicitors and the Code of Conduct for Firms respectively.

Proposed rule 6.4 (about the duty to disclose) incorporates existing outcomes 4.2 and 4.3. There is an oddity in the new rule in the version of the draft code which applies to firms, as the draft rule expressly says that it only applies to individuals. But if it only applies to individuals why does it need to be in the rule for firms? The underlying point of course is that in cases like Kelly v Cooper (a case about estate agents), the courts have made it clear that there is no general assumption that information known to one person in a firm is to be attributed to another.

We note that proposed rule 6.4 has two additions to outcomes 4.2 and 4.3. The first is that a solicitor does not need to pass on information to the client which the solicitor has reason to believe will cause the client serious physical or mental injury. This seems to apply only where the client is an individual, and not (for example) where the client is a company of which the vulnerable person is a controller or director. The second is to reflect general law about the mistaken disclosure of information in a privileged document which need not be disclosed to a client. This reflects case law. In the case of these new exceptions, saying that they are exceptions to the duty to disclose is not at all the same as saying that disclosure cannot be made, which is surely what is intended (certainly in relation to the second of them).

Proposed new rule 6.5 (not acting if to do so puts client confidential information at risk) largely tracks existing required outcome 4.4. This area is the one which has led to most of the recent reported cases on conflicts and confidentiality, although the cases do not refer to the SRA Code of Conduct. It is worth noting that the existing rule was altered some time ago to refer to having ‘information barriers which comply with the common law’. The proposed new rule just refers to measures which result in ‘there being no real risk of disclosure’. This reflects the common law and is consistent with the way in which the new Code of Conduct is drafted.

We would make a couple of points on proposed rule 6.5. The first is that having introduced a reference to former clients (which proposed rule 6.3 does not do) it

then uses the term inconsistently so that, on the face of it, a former client consent is not enough to escape the prohibition on acting, although a current client consent does. Secondly, we are puzzled why this rule, with its references to effective measures, applies to individuals?

Further points in relation to drafting: Code of Conduct for Solicitors

- The paragraph below the Principles on page 45 of the consultation, implies (when it says 'They apply to conduct and behaviour relating to your practice') that the Code does not apply to a solicitor's private life. This should be clarified.

- As worded, by comparison with the provisions in the current Code that this would replace[18], rule 1.4 could be read as meaning that the solicitor is responsible if their client misleads the court or others, or is responsible for other acts or omissions, even if the solicitor was not aware that any mischief was taking place. In light of this, we suggest that rule 1.4 should be reworded as follows:

  1.4 You do not mislead or attempt to mislead your clients, the court or others, either by your own acts or omissions or ***by knowingly*** *allowing or being complicit in another person misleading the court or others* ~~*the acts or omissions of others (including your client)*~~*.*

  We would also note that rule 1.4 must be read in the context of the wider requirement that solicitors must always act in good faith and that misleading anyone whilst acting as a solicitor would potentially breach that requirement in addition to rule 1.4.

- rule 2.4 appears to originate from the Bar Standards Board Code of Conduct. Read in isolation, 'properly arguable' could be confusing for solicitors. It might be interpreted as not being able to put forward instructions which may lack credibility, as opposed to arguments with no legal basis. We assume that guidance will clarify this point.

- rule 3.1 is poorly worded.

- rule 3.4 The term 'Client's attributes' is vague and lacking any legal meaning. It is therefore inappropriate for a Code of Conduct. Moreover, it is unclear what that word encompasses that would not be covered by "needs and circumstances".

- rule 4.2 'Others' might more helpfully read "Others, for example lenders, trustees etc."

[18] O(5.1) "You do not attempt to deceive or knowingly or recklessly mislead the court"; and O(5.2) "You are not complicit in another person deceiving or misleading the court."

Further points in relation to drafting: Code of Conduct for Firms

- In the Code of Conduct for Firms, Cooperation and information requirements section, the text needs to clarify what is meant by 'you'.

- rule 4.2 of the Code of Conduct for Firms, greater clarity is needed on what is meant by 'competent'.

- It is disappointing that rule 7.1 provides very little detail to shed light on applicable outcomes in the SRA Code of Conduct for solicitors and RELS 2017.

Finally, rule 7.8 in the Code of Conduct for Solicitors requires guidance to accompany it. The current code says that a solicitor has to act reasonably to take action. It now depends what 'remedial action' means. We also wonder if the SRA can require a solicitor to take action in these circumstances or if this falls outside its jurisdiction.

Question 14: Do you agree with our intention to retain the COLP and COFA roles for recognised bodies and recognised sole practices? In responding to this question, please set out the ways in which the roles either assist or do not assist with compliance.

There are arguments on both sides and this is an issue requiring debate and careful consideration.

Recognised bodies and recognised sole practices need to ensure compliance and, in particular, that an understanding and appreciation of professional standards and ethics are properly embedded. Arguably, by specifying COLP and COFA roles, the regulator relieves those regulated of the need to decide how best to achieve this. It has also been suggested by practitioners that the COLP and COFA roles have served to reduce the ethical knowledge and awareness of individual practitioners. This potential is mentioned in the findings section of the SRA commissioned Independence, representation and risk report, where it is suggested that the perception of COLPs and COFAs as the 'holder' of professional values raises 'the question of whether such has the potential for individual lawyers to become less aware of, and less interested in, their own professionalism, professional identity and professional obligations.[19]

However, it could be argued that those regulated should determine for themselves how they comply with regulatory requirements and the SRA should find ways of promoting and regulating individual professionalism. Alongside this, any individuals tasked with responsibility for ensuring compliance must demonstrate and maintain the necessary skills and experience, and be subject to appropriate accountability and responsibility controls.

We recommend that the SRA conducts and acts on a survey of individual COLPS and COFAs aimed at identifying specific ways of reducing the burden of reporting, while ensuring that the regulatory framework helps to promote individual professionalism, professional identity and professional obligations.

[19] Independence, Representation and Risk: An Empirical Exploration of the Management of Client Relationships by Large Law Firms: Claire Coe and Dr Steven Vaughan, commissioned by the SRA, 2015.

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?

The Society will shortly publish its 2015 Regulation Survey. Of those who responded to this survey, 91% were the Compliance Officer for Legal Practice (COLP) at their firm. The findings from the survey could inform the nature of further support for this post. Responses indicate the need for clear, unambiguous and effective regulation. In this context it is worthwhile noting the following:

- there was a decline since the 2012 survey in the proportion of firms that thought that the SRA's enforcement procedure is understood by the industry as a credible deterrent and being used in a way that serves to better protect consumers;

- compared with 2012, a smaller proportion of firms agreed that guidance supplementing Handbook regulatory rules is useful, and that principles, outcomes and indicative behaviours provide sufficient guidance on compliance obligations;

- keeping up to date with changes to outcomes and indicative behaviours was the most commonly reported problem with OFR reported by firms; and

- changes to the regulatory regime which would introduce a principles based code only with outcomes and indicative behaviours removed were predicted to negatively affect professional and ethical standards on balance (and particularly so amongst large firms).

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 refer to our comments in our introduction and in the sections that follow.

It is possible that some commercial firms, wishing or feeling compelled to take advantage of the liberalisations offered by the new rules may decide to split the provision of their legal operations into two entities: a traditional firm, which would continue to carry out all reserved[20] work, perhaps retaining only a small percentage of the firm's current partners, solicitors and other staff; and a new unregulated entity, which would carry out all unreserved work and employ solicitors with practising certificates as well perhaps as some solicitors without a practising certificate.

In principle, while clients of the new unregulated entity would be less protected than clients of a traditional firm there would be some cost benefits for such firms in taking such steps. The new unregulated entity would not be required to pay entity regulatory and compliance costs, practising certificate costs for non-practising solicitors, contribute to the Solicitors Compensation Fund, take out professional indemnity insurance, employ COLPs, COFAs and other compliance staff, or comply with client account rules.

Furthermore, foreseeable unintended consequences would be that the regulatory burden and cost moves across to smaller firms and sole practitioners who are less able to divide their businesses between regulated and unregulated work; as BAME solicitors are over-represented among smaller firms, this will have diversity implications. This will result in a further restriction on access to justice and increase unmet legal needs as the smaller firms service the less well off demographic.

If many firms elected to go down this route, the Regulator would have to take steps to avoid a significant reduction in income. This would seem likely to lead to higher PC and firm fees, which would have significant negative financial consequences for sole practitioners and firms that chose not to change their business model. In particular, this would be likely to have a disproportionately negative impact on smaller firms for which the cost of changing their business model was not justified by the size of their client base or the high proportion of reserved work they undertake; such firms would have to operate at a competitive disadvantage because their entire business (including reserved and unreserved work) would be subject to the regulatory regime.

In addition, this would also have the effect of making reserved activities such as conveyancing and litigation potentially significantly more expensive for consumers as

[20] http://www.legalservicesboard.org.uk/can_we_help/faqs/Reserved_Legal_Activities.htm

the payment base for regulatory costs to be captured would be very much smaller than now. In addition, regulatory costs would be disproportionate for small and medium-sized firms, which generally carry out a mix of reserved and unreserved activities and may not have a big enough client base/business to justify splitting their business into two separate entities, one regulated and one not. Small and medium sized firms would therefore be likely to have to operate at a competitive disadvantage because their entire business (ie reserved and unreserved work) would be subject to the regulatory regime and its costs, whereas unregulated entities would fall outside this and have lower costs as a result. Ironically, the largest law practices, servicing the largest corporates, would be likely to pay proportionally less than the smallest firms servicing individual consumers; the proposals therefore threaten the viability of established small firms, which may result in forced close down and insolvencies with negative consequences for the communities they serve, especially where the firms concerned conduct legal aid work - exacerbating the ability of vulnerable communities to access justice. There would also be negative implications for competition and for the reputation of the profession.

Another unintended consequence is that solicitors may circumvent the restriction on unregulated entities offering reserved work by making applications to judges to act as paid McKenzie Friends on behalf of their clients. The right to appear before and address a court, including the right to call and examine witnesses, and the right to carry out the conduct of litigation are reserved legal services, and as such it can only be exercised lawfully by a lawyer who is regulated by an approved regulator.

A McKenzie Friend can ask the court to be allowed to conduct litigation if the litigant in person is unable to do so. This means that under the current proposals a solicitor who works in an unregulated firm (who under the new rules would not be able to exercise rights of audience by virtue of being employed in an unregulated entity) can ask a judge to allow them to conduct litigation as an unregulated McKenzie Friend. Faced with qualified solicitors making requests to act as paid McKenzie Friends, Judges may be inclined to treat such applications favourably to avoid dealing with the scenario that the case is run by a litigant in person with the consequential impact that has on the length of the case and the quality of the legal arguments and process. However, this potential workaround would inevitably sow further confusion for both consumers and those working within the legal profession, and inevitably degrade the position of the solicitor as an officer of the court, as well as erode legal professional privilege.

It also raises the question as to whether a solicitor who is permitted by the Judge to work in this capacity should be regulated for that work. The Judicial Executive Board are currently considering prohibiting those McKenzie Friends who are allowed to litigate from being able to claim costs from the other side. If this were to happen it would further confuse the status of solicitors who apply to have the same status as a McKenzie Friend who gains permission to litigate.

There appears to have been no analysis of the list of the consequential risks that

would result from allowing solicitors to deliver non-reserved legal services to the public through unregulated providers comprehensively identified in Table 1 of the Economist's report. It would be useful to have an analysis of how these risks would be mitigated.

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?

Not applicable.

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 agree with the 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 authorised entity. We would be concerned about relaxing this provision and thereby allowing the creation of structures that would avoid the requirement for entity regulation altogether and allow solicitors to provide reserved legal services on a consultancy/freelance basis. Any such relaxation would put clients of sole practitioners outwith current protections for clients and consumers and create consumer confusion.

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?

Current Rule 12 effectively requires that a solicitor needs to have three years Post-Qualified Experience (PQE) and to have undertaken a management course before they are able to set up a business as a sole practitioner. This requirement overlaps to a certain extent with the authorisation rules, which allow the SRA to assess the skills and knowledge of an individual of an applicant. However, Rule 12 sets out a clear requirement about the experience an applicant should have before setting up a new firm.

We are surprised that the consultation states that data analysis indicates newly qualified solicitors do not pose a significant risk to the delivery of a proper standard of service and would be interested to see this data. Current rules prevent newly qualified solicitors setting up in business on their own and therefore we are not clear what evidence would be available about their ability to deliver proper services in this type of situation. Furthermore, research has indicated that those who have been practising for less time are more likely to have complaints raised against them, indicating experience is a factor in complaints being raised against solicitors (Pearn Kandola 2010, p30).

We agree that the current requirement to undertake a 12 hour unspecified course on management skills may not be effective. However, lack of understanding of regulatory requirements and particularly the accounts rules is often the cause of solicitors appearing before the SDT following serious regulatory failings and in many cases loss of client money. Making sure that those setting up a new firm have a good understanding of the regulatory requirements, whether it is through a prescribed course or some other method, would seem to us to be essential.

We believe that some form of the 'qualified to supervise' rule should remain, although we agree it would be sensible to move any requirements to the authorisation rules. We believe that there should be a clear rule that prevents newly qualified solicitors from setting up a firm until they have sufficient experience and that those wishing to set up a firm should be required to demonstrate an adequate knowledge of the regulatory requirements.

In considering this question, the Society has been mindful of the conclusions of the independent, comprehensive case file review commissioned by the SRA 'to identify whether there is disparity in the way the SRA applies its policies and procedures in dealing with BME practitioners as compared to others with a view to identifying

potential improvements to such practices, policies and procedures to maximise fairness and consistency…'[21] The current proposals would seem to contradict the findings of that report.

[21] http://www.sra.org.uk/sra/equality-diversity/reports/independent-comparative-case-review.page

Question 20: Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

We believe that it is crucial that consumers understand the protections that they have with regulated provider versus non regulated providers. The proposed new Code of Conduct for Firms does not include any requirements in relation to this matter, and we recommend that the requirement set out at paragraph 8.9 of the Code of Conduct for Solicitors is mirrored in the Code for Firms.

Prospective clients should be clear about the protections in place when they decide to engage a solicitor. Outcome 8.9 of the SRA 's proposed Code of Conduct for Solicitors requires the solicitor to 'make sure that clients understand whether and how the services you provide are regulated and about the protections available to them'. This requirement does not differ substantively from Outcome 1.7 in the current Code of Conduct, which applies to firms and solicitors: 'you inform clients whether and how the services you provide are regulated and how this affects the protections available to the client.'

The SRA asks whether it should require firms to display 'detailed' information about consumer protections. The meaning of 'detailed' is not explained. It is therefore not clear under what circumstances firms could be confident that they have met the requirement. We would urge the SRA to issue guidance for firms on the information that should be displayed, including the level of detail required and expectations as to the prominence of the information presented. This could be in the form of case study examples, to aid solicitors in considering how to present information on consumer protection to the public.

We note the fact that the SRA is only able to impose any requirement of this kind on regulated firms highlights an imbalance between the information that might be available to consumers who use unregulated legal service providers and which would be available to clients of regulated firms.

While the SRA does not have any power to require unregulated entities to display information and the protections available to consumers, it does have a duty to ensure that its actions do not increase consumer confusion.

Question 21: 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?

The initial impact assessment provides an overview of the thinking behind the changes proposed in the consultation but there is limited empirical evidence to back up some of the assumptions made in the assessment. A comprehensive equality assessment has not yet been made and is essential before any of the proposals are adopted.

Please see Appendix 1 for our detailed analysis of the initial impact assessment.

Code of Conduct for Firms

The new Code is designed to make it easier to comply and reduce the burden of regulation for firms. However for smaller firms, in particular, good guidance will be essential to help make it easier to comply. Alongside this is the need to have in place, and well understood, a credible enforcement approach. Without these, there is a risk that the new code will not reduce the burden on small firms but, on the contrary, will increase the burden.

The current approach to guidance is patchy and while there are good examples such as the recent toolkit for continuing competence which has been widely welcomed, the guidance on consumer credit left many questions unanswered. It would be helpful to see the guidance that will be made available in order to assess whether it will plug the gap for small firms left by the removal of more detailed rules and indicative behaviours, as soon as possible.

Where a regulator provides guidance and toolkits, there is a risk that they quickly become understood as regulation and treated as such, stifling innovation and adding to costs. However, that risk has not been identified in the assessment. There is no information on how the proposals would be enforced, which would help to assure the profession and the public that the regulations would be enforced in an effective and proportionate manner.

The current enforcement function was previously identified as a problem area in 2012/2013 by the LSB and is still not rated as satisfactory. Given the ongoing issues and the importance of the enforcement function to the success of these changes, it would be helpful to have assurance as to how performance in this function will be improved.

It is noted in the consultation that regulatory changes may create some costs. However, there is little indication of the likely scale of these impacts. This is an area whether further work is needed, to ensure the costs do not outweigh any benefits.

One of the benefits highlighted is that the new Code will be online, freely accessible and searchable. As this is the case with the current Code, we do not believe this can be seen as a particular benefit of a new Code.

Changes in Practice Framework Rules

One of the main drivers behind the changes in the PFR is the concept of unmet legal need. This has been exemplified in the impact assessment by the small proportion of people and firms seeking advice about a 'legal' matter and the number of people without wills. Research indicates there are number of reasons why people do not seek legal advice, cost being only one of them. Many people are happy to resolve their own 'legal' problems, indeed there has been a Government drive for them to do so, e.g. raising of small claims limit, creation of Ombudsman etc. Others do not perceive a problem as being a 'legal' problem. Similarly, the reasons for people not having a will are varied, with the reason cited most often, is that 'an individual has nothing to leave'. There is no doubt that for some the cost of legal advice is a factor in not seeking advice but the SRA provide no empirical evidence that:

- alternative legal providers will enter into markets where there is significant unmet legal need;
- services will be provided at a significantly lower cost by unregulated providers.

The scenarios provided on the possible impacts in the market are limited at best and do not appear to take account of information available on the unregulated market. For instance, the SRA considers it likely that will writers will employ solicitors to provide legal advice through their firms. However, the vast majority of specialist will writers are small providers or sole practitioners[22]. Similar assumptions are made about unregulated providers carrying indemnity insurance, while this is common in certain areas of the unregulated market, this is not the case in other areas (Ibid).

There is an assumption that if the regulatory requirements are removed, alternative legal service providers will enter the market and innovate which will in turn drive down costs and reach new consumers. In reality, the CMA's initial assessment is the regulatory framework is not inhibiting innovation.

The assessment does not recognise the serious risk to consumers of these new arrangements. There is a limited recognition that some consumers may suffer as a result of a lack of client protections within alternative legal providers. No evidence is offered as to how this conclusion has been reached. Nor, as noted above is there any clear quantification of the benefits.

[22] Unregulated Legal Service Providers: Understanding supply-side characteristics, p 17 https://research.legalservicesboard.org.uk/wp-content/media/Economic-insight-in-depth-unregulated-research.pdf)

The SRA recognises that there may be some impact on smaller firms, who may not be able to take advantage of the reforms either for logistical reasons e.g. size; monetary reasons e.g. unable to invest in setting up a new business and lack of expertise. The suggestion that the rational response is for firms to close or sell their businesses is unhelpful and in itself may create an unmet need. There must be a risk that reserved legal services deserts are likely if these proposal are implemented.

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?

The Law Society does not support the proposal for solicitors to provide certain legal services through alternative legal service providers for the reasons set out in this response. Clearly, client money and assets need to be protected at all times and in all circumstances.

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?

The consultation proposes that, in line with the arrangements for solicitors working in alternative legal services providers (ALSPs ie unregulated providers), in-house solicitors and solicitors in special bodies should not be permitted to hold client money in their own name. This means that there would be no rules/protections with respect to the handling of client money in these entities[23]. There is, however, a distinction between solicitors working in special bodies and in-house solicitors[24]/solicitors working in ALSPs. In the former, in contrast to the proposed position with in-house solicitors/ALSPs, solicitors are able to deliver reserved legal services direct to the public. This brings the authorised person within the scope of legal services specific regulation. Reserved activities generate a significant proportion of the claims against solicitors and, as such, carries a higher risk profile requiring the application of proportionate protections. It should be noted that special bodies can deliver identical services to traditional firms.

It is also noteworthy that special bodies play a distinct role in the legal services market, in that they particularly provide 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. We accept that protection should be proportionate to risk (including tailoring regulatory measures to reflect client base) and should not impose unnecessary burdens but consider that solicitors working for special bodies should be permitted to hold client money personally and be subject to the requirements of the Accounts Rules.

In line with the fact that in-house solicitors and ALSPs will be permitted to only offer non reserved legal services to the public and in recognition of the fact that the regulatory net is based on reserved activities, we agree that solicitors working therein should not be permitted to hold client money in their own name.

[23] The SRA's impact assessment details that it has granted waivers to its current rules to permit businesses employing solicitors in-house to hold client money – so this is a live issue.
[24] In-house solicitors offer, and will continue to offer, reserved legal services activities but only do so in relation to their employer – the SRA proposal for change is that they could in future provide non reserved legal services to the public.

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?

We have discussed elsewhere in this response our concerns relating to the SRA's proposal to allow solicitors to practise from unregulated entities. In the event that the proposed framework is established however, we agree that if solicitors operating from unregulated entities are not required to hold professional indemnity insurance (PII), their clients should not have access to the Compensation Fund. It would not be prudent to open the Fund to claims arising from work done by solicitors in unregulated entities, which are not subject to the Accounts Rules, Code of Conduct for Firms, and do not have mandatory PII protection which is itself a driver of effective risk management. Where work is not carried out through a regulated firm, clients are arguably exposed to much greater risk due to the lack of these controls and regulatory oversight. Denying access to the Fund for these clients guarantees that the Fund cannot be depleted by a potentially significant pool of claims. The Fund is owned by solicitors and its reserves are a result of contributions they have made subject to the existing rules confining payouts to claims arising from work carried out within a regulated firm.

Despite this, we do recognise the significant decrease in consumer protection and other practical issues that will arise if clients of solicitors working in unregulated entities do not have access to the Compensation Fund. We have explored these issues in more detail below, as we are concerned that the SRA has not fully considered all the repercussions of allowing solicitors to practice from unregulated entities, including the impact on the Compensation Fund.

The consultation proposes that clients of solicitors working in unregulated entities should not have access to the Compensation Fund on the basis that their solicitor would not be able to hold client money or carry out reserved work. However, it is not the case that claims to the Fund are solely linked to misuse of client money, breaches of the Accounts Rules (which apply only to firms not regulated by the SRA) or reserved work. A gap in consumer protection will be created where solicitors commit fraud when carrying out unreserved work (to take as examples: deliberately selling ineffective family trust deeds, forging documents, or convincing a client to alter a will in order for the solicitor to inherit money) as the client would not be eligible to claim from the Compensation Fund in relation to this loss. The SRA's most recent published analysis of claims paid by the Compensation Fund[25] does not include a full breakdown of the areas of work from which the claims arose, and it may be that the SRA does not collect data at this level of detail. Without this information, there cannot be any proper consideration of the potential detriment to consumers of removing access to the Compensation Fund in relation to claims arising from unreserved work.

[25] Economic Insight - SRA Compensation Fund review (2014)

The consultation states that there is no objection in principle to allowing consumers to trade off the protections they receive (including access to the Compensation Fund) where they perceive they receive benefits in relation to this trade off, such as reduced prices or greater accessibility to a service.[26] However, a crucial related issue in allowing consumers to exercise such preferences is whether consumers are able to appreciate or understand the differences in consumer protection between different providers. Research suggests that consumers often do not recognise these distinctions.[27] One could therefore question the wisdom of removing access to the Compensation Fund for consumers who may not realise the importance of this protection until the time they come to make a claim. As discussed in detail in response to Question 27 below, requiring solicitors to provide information to clients on the protections available may not overcome the confusion created by the SRA's proposals and the potential for significant consumer detriment of removing access to the Compensation Fund. In addition, we are unaware of any economic analysis which confirms the changes in the regulatory regime will result in reduced prices and/or greater accessibility of service.

The SRA will also have to address the practical implications of removing access to the Compensation Fund for clients of solicitors working in unregulated entities.

First, the SRA's approach to calculating contributions to the Compensation Fund (currently £548 for firms, and £32 for individuals) will have to be reviewed if solicitors operating from unregulated firms would no longer have to contribute. Currently, 50% of annual Compensation Fund contributions are paid by firms, and 50% by individual solicitors. Contributions to the Compensation Fund would be significantly reduced if substantial numbers of solicitors chose to operate from unregulated firms (and hence did not pay the individual solicitor levy), and/or even a relatively small number of large firms, due to the higher percentage of non-reserved work they carry out, moved non-reserved work to an unregulated provider (and hence did not pay the firm contribution).

However, it is vital that the remaining contributions to the Fund are sufficient to meet the demands on it. It is the long standing approach of the Fund to maintain a minimum reserve fund as a contingency against unexpected numbers of claims or unexpectedly large claims, which includes forecasting contribution requirements to avoid the position of the contribution spiking and then dropping significantly in consecutive years. Given that the impact assessment notes how little can be known about the extent to which solicitors may choose to operate from unregulated entities/firms may decide to hive off non-reserved work, it is difficult to assess to what extent Fund contributions will be impacted, and how the contributions structure should be altered. It would clearly be undesirable to change contribution structures on a continual basis to take account of changing numbers of firms and

[26] Looking to the Future - flexibility and public protection, Annex 6, p.97
[27] Looking to the Future - flexibility and public protection, Annex 5, pparagraph 28

individuals contributing to the Fund. Indeed, it is difficult to envisage how funding arrangements can be amended to enable fair contributions. Smaller firms, who due to the nature of the work they undertake are unable to hive off unreserved work to another entity, would most likely end up paying increased contributions to make up the shortfall to the Fund caused by larger firms and their solicitor employees moving out of SRA regulation. It is problematic that the review of Compensation Fund contributions will not occur until a later date. This makes it very difficult to obtain a full picture of the impact of the proposals and to able to comment fully.

Second, it is unclear how contributions would be collected when a solicitor moves between regulated and unregulated firms. The administration involved tracking solicitors and collecting levies on a tranched basis would clearly not meet the objective of reducing regulatory burdens on solicitors, or administrative costs of the regulatory regime which are ultimately borne by consumers.

Third, the proposed framework would beg the question as to why a solicitor in a regulated firm who carries out only unreserved work and does not hold client money, should have to contribute to the Fund. While it would be impractical to police the collection of contributions in this way, this in addition to the issues raised above demonstrates inconsistencies in the proposed approach and raises questions about the fairness of the proposals in the way that regulation will apply to individuals solicitors and different profiles of firms.

Question 26: Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

We do not agree that individual solicitors should be able to operate from unregulated entities without mandatory PII cover. We are strongly opposed to the proposal in principle.

All work done by a solicitor in private practice is currently covered by the firm's PII. The current arrangement provides unrivalled protection for the consumer, providing assurance that if anything goes wrong they will receive fair settlement, regardless of the type of work undertaken or the circumstances in which the work is carried out. It is unacceptable for individuals to be left destitute or without some level of redress arising from a solicitor's negligence. Mandatory PII cover is fundamental to both consumer protection and the maintenance of public trust in the profession.

There is also a potential risk that a firm with a poor claims record that would affect its ability to obtain PII could be attracted by the proposal as it would allow them to carry out unreserved work from a new unregulated entity without PII in place. Arguably these are the firms whose clients would need the protection the most. We also struggle to understand how solicitors would be able to comply with Principle 6 to act in the best interests of their client, without PII cover in place. It is clearly not in the best interests of the client for their solicitor to be uninsured, as this impacts the client's ability to recover any losses. If the SRA agrees that in order to comply with principle 6, solicitors would in reality be compelled to purchase PII, one must question why the SRA's proposals do not attach PII requirements to individual solicitors. We request clarity from the SRA on this point.

Part of the SRA's reasoning for this proposal is that it would be unclear how a solicitor in an unregulated provider, who may be working as part of a team, is supposed to separate out their own insurance requirements from those of their team. We would argue that it is precisely the fact that the SRA is seeking to differentiate and separate out the role of a solicitor, their high professional standards and regulation of the solicitor from the unregulated entity itself, that has necessitated addressing the issue of individual insurance.

As demonstrated in response to Question 27, the proposal creates unnecessary complexity and uncertainty, and any possible benefits would be outweighed by the significant reduction in client protection.

Question 27: Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

Under the SRA's proposals, solicitors carrying out unreserved work from unregulated entities would have two options:

1. Choose to have no PII cover

Given that there is no requirement to do so, solicitors working in an unregulated entity could choose not to obtain PII. As PII is one of the most costly elements of regulation, there is a real possibility that some solicitors may choose to operate uninsured. This would be particularly alarming in the case of a sole practitioner. Solicitors who choose to operate uninsured without due regard to the personal liability they could incur in the absence of PII cover, would be placing themselves in a potentially ruinous situation. PII protection does not exist purely for the benefit of the public, but also for the benefit of solicitors, as confirmed by the House of Lords in *Swain v The Law Society*.[28]

There would also be nothing to prevent a solicitor's terms of engagement specifying that they cannot be sued for an amount greater than the value of the retainer. This dilution of clients' existing financial protections is not acceptable. Consumers could be left facing hardship as a result of the actions of solicitors regulated by the SRA. The reputation and strength of the solicitors' profession as well as the credibility of the SRA would suffer if clients go uncompensated as a result of a solicitor having no PII cover. This damage would not be possible to repair.

The SRA's proposal is made all the more alarming when one considers the amount of claims by solicitors' firms on their PII that could relate to unreserved work. It is clearly not in solicitors' or clients' interests for there to be no insurance cover in relation to work which, although unreserved, still carries significant exposure to claims.

As stated in response to Question 26, we also struggle to understand how solicitors would be able to comply with Principle 6 to act in the best interests of their client, without PII cover in place.

The Law Society considers that all solicitors in all circumstances should be subject to mandatory PII cover, and would urge the SRA to reconsider the proposal.

2. Choose to obtain PII cover

Solicitors working in an unregulated entity and such entities themselves may wish to

[28] [1983] 1 AC 598

purchase insurance against negligence claims in any event.

A solicitor in an unregulated entity could try to obtain cover on their own behalf, or the entity might take out insurance to cover all the solicitors it employs. In both of these scenarios, there is uncertainty as to the availability, suitability, and affordability of PII that could be purchased on the open market.

First, the wide SRA minimum terms and conditions (MTC) protection would not be replicated in standard commercial PII arrangements. While solicitors' clients are currently protected by comprehensive PII cover (which also includes run off cover), the gaps in coverage between the SRA MTCs and a standard PII policy negotiated by the solicitor or entity would leave solicitors' clients with less protection than the current entitlement, or than when instructing a solicitor from a regulated entity. The SRA has not provided sufficient justification for reducing consumer protection in this way and the resulting asymmetry is confusing.

Second, the potential cost to solicitors or the unregulated entity of purchasing PII is difficult to estimate. Underwriters write risk on the basis of claims exposure. The market currently prices in risk to premiums, so firms with low exposure by reference to the work they undertake (e.g. crime, legally-aided work and employment law) already pay lower premiums than firms undertaking high risk work (e.g. conveyancing). If a firm carrying out predominately unregulated work chose to move out of SRA regulation, there may be limited scope for premium reduction because the risk remains unchanged. Moreover, participating insurers take comfort in the fact that those they insure are SRA-regulated and that the SRA has the power to intervene if necessary. The PII regime plays a role in regulating solicitors as firms with poor claims records will face higher premiums and could face difficulty obtaining insurance at all. Insurers may consider that the claims exposure is increased in an unregulated entity where there is no regulatory oversight of business processes. In the case of solicitors purchasing PII on an individual basis, they would also lose the benefit of lower premiums as a result of the ability to bulk purchase PII to cover the work of the entire firm.

It is therefore by no means certain that unregulated entities or individual solicitors would be able to purchase PII at an affordable cost. Indeed, the SRA's impact assessment makes no attempt to forecast the availability and price of PII for those who would wish to purchase it. There is no analysis or evidence to show that premiums would be reduced; or that reduced premiums would in any event provide greater access to justice as a result. The proposal risks creating considerable consumer detriment for an uncertain and unquantifiable benefit arising from an aspiration for increased access to legal services.

Third, the proposal appears to be based on the assumption that clients will understand the fact that their solicitor does not have insurance, or is insured to a lesser degree than that required by SRA-mandated insurance. Clients differ significantly in their experience of acquiring legal services and their ability to

understand and specify their preferences and requirements. Business consumers who are regular users of legal services may understand their protections and even actively seek to determine whether the level of protection is appropriate for their matter, but the same cannot be said for infrequent, unfamiliar users of legal services. Indeed, there is evidence to suggest that the consumer protection landscape in the legal services market is poorly understood.[29] There is considerable scope for consumer confusion through a mistaken belief that in gaining advice from a solicitor through an alternative legal services provider they are subject to the same protections as if that solicitor worked in a regulated provider. The proposals will only serve to increase the confusions around the different protections attached to services, and lead to decreased confidence in the legal profession and irreparable damage to its standing.

This confusion will not be overcome by requiring solicitors in these circumstances to make sure that their clients understand whether and how the services they provide are regulated and the protections available to them (proposed Outcome 8.9). It is alarming that the case study provided by the SRA[30] suggests that Outcome 8.9 would be met if the solicitor explained the business does have compulsory insurance, but does not state the level of such cover. There would be nothing to prevent a solicitor or unregulated entity from obtaining cheap and ineffectual 'nominal' cover simply to be able to inform clients that they hold PII.

The consultation states that there is no objection in principle to allowing consumers to trade off the protections they receive under different service/provider models where they perceive they receive benefits in relation to this trade off, such as reduced prices or greater accessibility to a service.[31] Again, this incorrectly assumes that consumers understand the difference between regulated and unregulated entities, and appreciate differences in consumer protection in each case, while evidence suggests they may not. [32]

[29] Looking to the Future - flexibility and public protection, Annex 5, pparagraph 28
[30] Looking to the Future - flexibility and public protection, Annex 9, page 204
[31] Looking to the Future - flexibility and public protection, Annex 6, page 97
[32] Looking to the Future - flexibility and public protection, Annex 5, pparagraph 28

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. The Society believes that regulation should apply consistently and fairly to the provision of legal services in order to protect consumers. It would not be in the consumer and the wider public interest for solicitors to offer the same service but with different standards of consumer protections according to whether they were employed by a regulated firm or by a Special Body.

Special bodies play an important role in providing legal services to vulnerable people and it is especially important that clients entrusting matters of significant importance to their solicitors have access to appropriate redress. If reserved activities undertaken by Special Bodies fall within SRA regulation, these bodies should be required to maintain PII.

Question 29: Do you have any views on what PII requirements should apply to Special Bodies?

Under the current Practice Framework Rules, solicitors employed by Special Bodies must have a 'reasonably equivalent' level of cover to that required by the SRA Indemnity Insurance Rules. This provides clients of Special Bodies with equivalent protection to that provided to clients of SRA-regulated entities.

The Law Society believes that clients of Special Bodies should be entitled to PII protection in the same way as clients of traditional law firms. Requiring Special Bodies to obtain MTC level PII has the advantage of ensuring that there is consistency in the level of consumer protection offered to clients.

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?

Question 31: Do you have any alternative proposals to regulating entities of this type?

The Society's concerns about the proposal that solicitors should be permitted to deliver non-reserved legal services to the public through alternative legal services providers would not be overcome by the imposition of a threshold on non-SRA regulated firms. Indeed the introduction of an arbitrary threshold could make matters even more confusing for clients. Our concerns around the proposal to allow solicitors to work in unregulated providers and its impact on client protection and the reputation and standing of solicitors would remain for these firms. In conclusion, the Society believes that regulation should apply consistently and fairly to all legal services (individuals and entities) in order to protect buyers of legal services and it is not in consumer and the wider public interest for there to be regulated and unregulated providers offering the same service but with different standards of consumer assurance and protections.

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?

It is not clear what the proposed position is on intervention into a solicitor's individual practice within an unregulated entity. The SRA has the power to do this. However, as has been highlighted, it could prove to be difficult to untangle the practice of the solicitor and the unregulated entity thus making this difficult. It would therefore seem unlikely that the SRA would use this power often. However, the SRA does not appear to be ruling out the possibility.

We are unclear how the SRA's additional powers to request information could help it in investigations where intervention was not an option, for the reasons described above. We consider that the same issues would arise as to the information owned by the unregulated entity (and as such presumably outside the jurisdiction of the SRA) and that owned by the solicitor.

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 agree that all work within a recognised body or an RSP should remain regulated by the SRA.

Appendix 1: The Initial Regulatory Impact Assessment: Unmet legal Need

1 Pleasance and Balmer wrote:

> "*Legal need is a contested concept. It has been used to refer to occasions when people experience legal problems but fail to obtain the services of lawyers to assist with resolution. However it is generally recognized that legal mechanisms do not always provide the most appropriate route to solving problems that raise legal issues. Attempts to define legal needs have therefore come to place emphasis on understanding of options and preferences."*[33]

2 All consumers should have access to justice, regardless of social background or wealth. There are clearly unmet legal needs in certain sections of the population but the most significant unmet legal need relates to legal aid removal. For those consumers it is questionable that they would be able to afford to obtain legal advice at any cost point. The evidence relating to other unmet legal need is not so robust as to provide definitive evidence to justify changing the regulatory framework.

3 Not all issues that have a legal element require legal advice and not all consumers who have a legal issue wish to seek legal advice. There are many issues which may have a legal perspective but which consumers are often content to self-manage. There are many sources of self-help advice, including online and from official; bodies such as Citizen's Advice Bureaux, which help citizens decide if they have a problem that they may need legal advice to resolve, whether from a legal adviser who specialises in the problem such as a solicitor or one of the many other organisations who may be able to help (for example https://www.citizensadvice.org.uk/law-and-rights/legal-system/). This is a positive and healthy societal approach. It is not in the interests of consumers, the markets or society to encourage excessive and unnecessary use of legal processes to deal with simple matters – e.g. technically receiving a parking fine potentially results in a "legal need", although it would not be rational or justified to take legal advice each time a parking fine is administered.

4 However, there are pockets of the legal services sector where there are access to justice concerns and these should be addressed as they affect the most at risk and vulnerable consumers.

[33] https://research.legalservicesboard.org.uk/wp-content/media/How-People-Resolve-Legal-Problems.pdf

5 In summary, there are different levels of legal need across society, with the serious unmet legal need residing at the least affluent levels of society where the removal of legal aid across many areas has created serious unmet legal need.

6 With the implementation of the Legal Aid, Sentencing & Punishment of Offenders Act, ordinary people are finding it increasingly difficult to access justice because of issues including the steady erosion of legal aid, the ongoing programme of court closures and increases in court fees, as well as changes to the rules regarding the ability of clients to recover legal costs.

7 The impact on the most vulnerable is a major concern for the Society, which continues to campaign for an improvement in the current state of access to justice so that this unmet legal need can be met. The Society recently launched a campaign to raise awareness of the fact that legal aid advice for housing is disappearing in large areas of England and Wales, creating legal aid deserts. We are also working with the Bar Council and others to examine the potential for some of the gap to be addressed through a Contingent Legal Aid Fund .

8 While the consultation asserts that the proposals would have this effect, we do not believe that the analysis of the available evidence in the Initial Regulatory Impact Assessment (IRIA) bears this out.

9 When legal need is defined by presenting respondents with a list of issues ranging from very minor (and which individuals judge to be so and are content to deal with themselves) to very serious issues, and include issues that have traditionally been catered for by the not-for-profit sector (until the impacts of the Legal Aid, Sentencing & Punishment of Offenders Act started taking effect), a finding that solicitors are not used for every legal need identified does not constitute evidence that there are substantial amounts of actual unmet need generally. Ours is not an increasingly litigious society and we should not be taking action that would encourage the seeking of legal advice where rationally no legal action should be taken.

- **IRIA paragraph 21 states that "Many individual people and small businesses are unable to access legal services from a solicitor at a cost they can afford."**

10 This is an over simplification. Research demonstrates that cost is not the primary reason why consumers decide against seeking help from a professional adviser. According to the Legal Services Board's 2012 Legal Needs Survey, people do nothing about legal issues mainly because they lack awareness about what can be done or where to go for help. Reasons are primarily related to the type of legal need, complexity of the need and previous experience. Incidence of taking action increases as the seriousness of the problem increases. For those who deal with matters themselves, cost was found to be an issue but not the overriding issue. The main reasons were that they didn't think the problem would be difficult to resolve (24%), confidence in their ability to handle the matter alone (17%), the fact that they had

enough time to handle the matter alone (11%), whereas only 9% thought it would cost too much to seek advice from a professional.

11 These findings are corroborated and, added to, by the 2016 Online Survey of Legal Needs commissioned by the Legal Services Board (LSB) and the Society. While the survey does not purport to be nationally representative of people with legal needs, its large sample size of legal issues (16,000) means that it provides a robust basis for exploring problem resolution strategies. The fact that its findings are corroborated by other research also lends weight to the survey.

12 According to the 2016 Online Survey, almost half of issues considered were handled by respondents themselves or with help from family and friends and fear of cost was a reason for just one in ten of this group. Of those one in ten, 43% did nothing to find out about the actual costs of advice or assistance. This indicates that a substantial issue relating to cost is perception.

13 Multivariate modelling of the 2016 survey data demonstrated that the factors with the greatest influence on issue handling strategy were not cost but rather:

- type of issue;
- whether or not the respondent characterised the issue as legal; and
- the respondent's perception of the severity of the issue.

- **IRIA paragraph 21 states that "Fewer than one in ten people experiencing legal problems instruct a solicitor or barrister."**

14 This is highly selective use of available evidence and significantly understates the use of solicitors. The evidence is an analysis by Pleasence and Balmer of 2012 Civil and Social Justice panel data, which focuses on 15 civil justice issues.

15 However, this research did not examine more common transactional issues. According to the LSB's 2012 Legal Services Benchmarking survey, which did examine transactional issues as well as civil justice issues (28 issues in total), 42% of respondents with a legal problem had taken some form of advice from a solicitor.

16 The Legal Services Consumer Panel's 2015 tracker survey estimated that 34% of a nationally representative sample of the public had used a legal service in the previous two years; of these, 62% had used a solicitor in the previous two years.

17 In the Pleasence and Balmer study, cited in the consultation, the top three reasons for not instructing a lawyer identified by respondents for civil justice issues were:

- no need (48%);
- cost (23%); and
- the issue was not considered to be sufficiently important (6%).

18 The authors of the report concluded that 'The findings confirm the complexity of behaviour, and the importance of problem severity, problem type and perceptions/understandings. Our findings do not suggest any broad crisis of access to justice, with market rationing operating to channel more severe problems towards advice and formal process and some inaction appearing entirely rational. However, the legal services market and civil justice system do not ensure fair and equal access to justice, with deficiencies attributable largely to the difficulty of enabling vulnerable populations with limited capability and resources (e.g. those with health problems, low levels of education and/or lower income) to access appropriate help in a complex legal services market in which innovations to broaden service reach have often emanated from outside of the traditional legal professional sphere.'

19 As the proposals have the potential to increase complexity, it is unclear how they would stimulate the type of innovation that could reasonably be expected to address access issues for those with limited capability and resources.

20 As regards capability, the economic rationale supporting the proposals refers to some proposed 'consumer-facing guides' (public and business guides) which the regulator intends to produce: to reduce the information asymmetry between consumers and providers of legal services; reduce search costs for consumers; allow consumers to influence quality improvements and place pricing pressure on providers; and boost demand for legal services. Without further information on the form of these guides, and on how they will be tested against users' actual needs, it is impossible to assess their likely success.

21 Given the importance of public legal education in helping to address access issues identified by experts, much more clarity and specificity about the proposed guides should have been included with the consultation. Without that detail, it is impossible to judge how the guides will mitigate against increased complexity. We know from research commissioned by the LSB that an independent legal advice and guidance site was thought to be more useful than published guides; that 'just in time' aids are more useful to consumers than 'just in case' aids; and that better understanding of legal services consumers decision making is required in order to identify the types of tools and aids that would in practice be most useful to consumers. It is unlikely that a set of guides published by the regulator would fully meet potential consumers' information needs in a more, not less, complicated market.

- **IRIA paragraph 21 states that "The picture is very much the same for small businesses, the majority of whom have little contact with solicitors or law firms. Over half of small businesses that experience a problem try to resolve it on their own. Accountants are consulted more often than lawyers when small businesses need advice."**

22 This statement is based on the Legal Services Board's 2015 survey of small businesses (<50 employees) 'Understanding the legal needs of small businesses'. While the report's findings have been summarised, some of the complexities detailed therein are worth highlighting.

23 Business demand for specific types of legal services varies by size of firm and, again, reasons other than cost play a part. For the smallest of small firms, other deterrents include:

- the problem/s not necessarily requiring legal advice;
- the owner/s of the problem not knowing who to approach;
- fear of loss of reputation within the industry and the loss of future work; and
- having 'coping' strategies.

- **IRIA Paragraph 21 states that "This demonstrates substantial legal need not currently being met by regulated lawyers, including solicitors."; and paragraph 82 states that "This indicates there is substantial legal need not currently being addressed from existing suppliers"**

24 The consultation does not include any quantification of the volume or value of need that is not being met. The term 'substantial' appears not to have accounted for the range of different reasons that deter people from seeking legal advice (from solicitors or otherwise). Those who identify cost as a deterrent to seeking advice are a minority and other factors are more important in decision making.

25 Even if it were the case that more people and small businesses would seek the advice of a solicitor if solicitor prices were lower, the consultation does not provide an analysis that demonstrates how savings made by the fact that unregulated entities employing solicitors would not have to meet the costs of regulation will reduce the price paid by consumers substantially. There is no answer to the question 'how much cheaper will these proposals make services'? This is a fundamental point which has not been addressed.

- **Paragraph 82 of the Initial Regulatory Impact Assessment states that: "Our proposals are intended to allow greater competition and choice in areas of law with growth potential because there is unmet legal need. We know for example that a significant proportion of the population do not have a will. In the case of small firms, the most common problems relate to trading, employment and taxation ... The vast majority of firms in this sector currently have little contact with a legal adviser. Less than one in ten small firms either employed in-house lawyers or had a retainer with an external provider. Over half of firms experiencing a problem tried to resolve it themselves, more often seeking advice from an accountant than a lawyer. This indicates there s substantial legal need not currently being addressed from existing suppliers of legal services."**

26 The consultation does not appear to have identified the specific areas with growth potential. An assumption that where there is an unmet need, there is

potential for growth, cannot be correct when ‘need’ has been so broadly defined. To identify areas with potential for growth, there would be a need to develop a much better understanding of the extent to which the different reasons for not seeking professional help to date apply to different types of need. The idea also seems to assume that it is possible to provide professional services at the lowest levels of affordability. Without an understanding of which areas are likely to be attractive to alternative legal businesses, it is very unlikely that impacts can have been properly assessed.

27 The consultation asserts that stronger entry, expansion and competition will lead to increased choice in the market for unreserved services in areas with growth potential, which have not been identified. However, the economist’s report supporting the proposal indicates that this will not happen if: (i) consumers’ do not see solicitors’ and others’ services as substitutes, or (ii) solicitors’ activity is not switched to alternative legal services suppliers. The conclusion that ‘unmet need’ will be addressed assumes that the ‘unmet need’ is in sectors of the unreserved market where the above two conditions do not pertain.

28 The approach taken in the consultation to tackling ‘unmet need’ rests on reducing cost, but as noted already the body of research points to other factors being more influential on people’s choices about problem resolution. The consultation does not appear to consider these complexities. For example, on the consumer side, the 2016 Online Survey of Legal Needs commissioned by the LSB and the Society, showed that doing nothing was most strongly associated with the following types of issue: personal injury; clinical negligence; work injury; unfair treatment by the police; and discrimination. Many of these areas are subject to government initiatives to deter people from using a lawyer.

29 Furthermore, handling an issue alone or with informal help was most closely associated with consumer and probate issues. Probate is a reserved area and the main motivations for people handling consumer issues alone were that (i) respondents thought they would be easy to resolve and (ii) they had time available. Taking these examples, it is also unlikely that the proposals would help to improve take-up of advice. On the other hand, a perverse incentive might arise for solicitor firms to reduce the supply of reserved services, including some firms stopping reserved activity altogether, thereby reducing the supply of reserved services.

30 The 2016 Online Survey indicates that over two-thirds of the issues presented to respondents were not thought of as a ‘legal issue 'at first. An element of this percentage is likely to result from the very broad definition of ‘legal issue’, which includes matters such as consumer issues that people are generally content to deal with themselves. However, clearly there is also an actual lack of understanding of legal rights, processes and forms of redress. Consumer facing guides, as proposed by SRA, would be unlikely to address the capability need identified by Pleasence and Balmer.

31 In terms of severity of problems, the highest mean average scores achieved in the 2016 Online Survey concerned homelessness issues, problems with rented property, clinical negligence, domestic violence, immigration and divorce/dissolution.

32 The lowest average scores related to consumer issues and making wills. The SRA's sweeping approach to describing 'substantial unmet need' includes issues that people would still do nothing about even if costs were lowered.

- **IARA paragraph 82 states that: a "significant proportion of people don't have a will"**

33 Will making is already open to competition between reserved and unreserved providers, and many unreserved providers opt into self-regulation. In its interim report on a market study on the supply of legal services in England and Wales, the CMA noted that "There are a large number of suppliers of wills and probate services. There is also some variation in the types of providers consumers can choose. Despite this there is some evidence that competition may not be working as well as it could be. There are clear asymmetries of information between the consumers of wills and probate services and the providers. It does not appear to be easy for a consumer to assess their level of legal need or the likely price and quality of available suppliers." As noted, the Society will be working with the CMA to support more information being supplied to clients, while ensuring that critical client protections remain in place.

34 It is not at all clear how the issues identified by the CMA would be addressed by the proposal to allow solicitors to set up or work in an unregulated entity).

35 Will-making is known to be associated with age[34] and cost is not the main reason for people not making wills. According to Moneywise, the main reason people do not make wills is apathy:

- 25% of people without one say they plan to have one written when they get older; and

- 11% say it has never occurred to them to write one.

36 Although the Moneywise research indicates that 'many people are also worried about the costs involved', the organisation points out that wills 'can be relatively inexpensive at around £120 for a single person and £200 for a couple'

[34] 90% of people aged 75-84 had a will in 2015 up from 82% in 2013 (http:www.willaid.org.uk/press/research) compared with 11% of those aged 18-24 in 2013 (http://www.wills-advice.co.uk/top-five-reasons-young-people-make-will/). 2010 research by ICM for TLS found that 7% of 18-25 year olds had a will compared to 20% of 25-34 year olds, 41% of 35-44 year olds, 55% of 45-54 year olds, 64% of 55-64 year olds and 81% of 65 years olds.

(without mentioning the DIY options available). This aligns with the finding highlighted earlier that will issues are, on average, perceived as low severity and that perceived severity is a major determinant of problem resolution strategy (from the 2016 Legal Services Board / Law Society Legal Needs survey).

- **IARA paragraph 82 states that "Over half of firms experiencing a problem tried to resolve it themselves, more often seeking advice from an accountant than a lawyer."**

37 The proposals might help solicitors retain work from small businesses that might otherwise go to an accountant and may possibly improve the take-up of legal advice by small businesses because they would enable solicitors to work in accountancy practices and other organisations with closer links to the small business community. The potential for increased choice is again underpinned by the idea (in the SRA economist's paper) that stronger entry, expansion and competition in the market for unreserved services would arise. However, the economic rationale accepts that this will not happen if (i) purchasers do not see alternative legal providers and traditional providers as substitutes and (ii) solicitors' activity is not switched to alternative legal services suppliers.

38 The authors (Blackburn et al) of the LSB's 2015 survey of small businesses, cited in the consultation, deduce that, in general, the demand for specific types of legal services will vary by size of firm and certain services will be required earlier on as the business grows. They go on to say: "What we cannot establish at this stage, however, is whether the demand for legal services is being fully met or constrained by other factors".

39 The survey's findings indicate that small firms are thought to use their accountants more frequently than any other provider because it is a necessary relationship for taxation and compliance purposes and it is set within an 'institutional' trust framework. Small business owners do not regard lawyers as part of their natural business problem resolution strategies and are not accessing legal services because of perceived and real barriers. In contrast, accountants benefit from both institutional and relational trust because of the frequency of contact and a greater understanding amongst firms of what accountants provide.

Appendix 2: Consumer protections for clients of solicitors working in regulated firms and unregulated providers if the proposals were implemented

	Client instructs solicitor in a regulated firm [reserved and/or non-reserved activities]	**Client instructs solicitor in an unregulated firm** [non- reserved activities only]
Conflicts	The solicitor is bound by the conflict rules in the Code of Conduct for Solicitors which stipulate that the solicitor cannot act in a conflict situation. The firm is subject to the conflict rules in the Code of Conduct for Firms.	The solicitor is bound by the conflict rules in the Code of Conduct for Solicitors, but the firm is not subject to the Code of Conduct for Firms. *Risks to consumers:* • *A solicitor will be able to represent a client who has clear conflict with existing clients of that entity. No conflict rules apply to entity/other employees risks solicitor acting in a conflict situation (e.g. no firm conflict management systems);* • *A solicitor with 2 clients in conflict can pass one client to another solicitor or person in the firm and avoid the conflict rules which apply under the Code of Conduct for Solicitors.*
Confidentiality	Code of Conduct for Solicitors and Code of Conduct for Firms both contain confidentiality requirements. The following rules apply to regulated entities: • where appropriate, you put in place effective safeguards to protect your clients' confidential information; • you do not act for a client in a matter where	Code of Conduct for Solicitors contains confidentiality requirements, but the entity is not subject to the Code of Conduct for Firms. The rules opposite do not apply. Common law rules of confidentiality would apply. It would be for the individual solicitor to ensure they are complying. *Risks to consumers:* • *Risk of disclosure of confidential information from lack of controls at firm level, particularly where the*

	that client has an interest adverse to the interest of another current client or a former client for whom you hold confidential information which is material to that matter unless all effective measures have been taken which result in there being no real risk of disclosure of the confidential information.	*firm acts for 2 clients who would be regarded as a conflict under the SRA rules.*
Legal Professional Privilege (LPP)	Applies fully.	LPP does not attach to the entity. *Risks to consumers:* • *Clients are unable to prevent sensitive legal advice being disclosed and used against them in court;* • *A situation where clients are unclear or misinformed about their entitlement to a right to LPP is undesirable.*
Standard consumer protections are available but there are special issues which impact provision of legal advice: • *Issue of enforcement and therefore access to redress - query whether public enforcers such as Trading Standards would interfere in the provision of legal advice (more concerned with higher profile issues such as sale of unsafe products);* *Risk to consumers:* • *If the entity/solicitor does not have the ability to pay any compensation owed, the client is left without redress in the absence of PII cover;* • *Potentially greater freedom for unregulated entities' terms of business to include terms that are in their commercial interest and are not beneficial to the client.*		
Regulatory protections (before event/ongoing)		
Education and training requirements	For the first three years of practice, supervision is required and a solicitor may not set up on	Newly qualified solicitors with little experience could set up an unregulated firm.

	their own.	*Risk to consumers:* • *Risks to delivery of a proper standard of service. Evidence that experience is a factor in complaints being raised against solicitors (Pearn Kandola 2010, p30).*
Firm business and managerial standards	Yes.	No - firm not subject to Code of Conduct for firms.
Provide information about protections	Yes.	Yes - must state whether PII is in place, and make clear that there is no access to the Compensation Fund. *Risk to consumers:* • *Evidence of poor understanding of protections, so question whether consumers will take note of and understand the reduced protections and how these may affect them.*
Regulatory protections (redress)		
Access to Legal Ombudsman	Yes. Must inform client of right to complain about the solicitor or the firm to the Legal Ombudsman.	Yes. Must inform client of right to complain about the solicitor, but not about the unregulated provider, to the Legal Ombudsman.
Holding client money	Yes, and must comply with SRA Accounts Rules. PII or the Compensation Fund would in principle be available in the event of a LeO judgment against an insolvent firm.	Solicitor cannot hold client money, but no restriction on the employing entity holding client money. However, in practice, while anti-moneylaundering legislation does not prevent unregulated entities setting up client accounts, banks may be reluctant to do so because of the compliance costs associated with these accounts. *Risk to consumer:* • *No access to Compensation Fund in event of dishonesty resulting in loss of client money;*

		• *No guarantee of proper procedures and safeguards in unregulated entities for holding any client money?* • *If the entity loses this money/goes insolvent, client may not be able to recoup the money;* • *A LeO judgment against the solicitor would be enforceable but in practice only if the solicitor had the means to pay.*
PII protection	Yes - the regulated firm must hold PII on SRA-mandated minimum terms and conditions.	Solicitor/ unregulated entity not required to hold PII. If solicitor/entity does not purchase PII, client must fall back on standard consumer protections. *Risk to consumers:* • *If the entity/solicitor does not have the ability to pay any monies owed in the event of a successful claim and there is no PII in place, the client is left without redress;* • *If the entity/solicitor has obtained PII, this may not be on the SRA minimum terms and conditions of PII, resulting in less comprehensive cover and affecting the client's ability to obtain redress;* • *A standard PII policy held by the firm would not include run-off cover, resulting in no redress for a client who brought a claim after the entity had closed down.*
Access to Compensation Fund	Yes.	No. *Risk to consumers:* • *No redress for loss caused by solicitor dishonesty in relation to unreserved work.*
Sanctions for misconduct	Yes.	Yes.

Appendix 3: Scenario illustrating the risks to a client in engaging a solicitor working in an unregulated provider

This scenario is based upon information made available by the SRA in its Looking to the Future consultation on 1 June 2016. This consultation contains the draft codes of conduct for solicitors and firms but not the supporting guidance. Further relevant detail is also awaited in the Practice Framework Rules consultation.

What happens

- **Client engages an unregulated provider**

Z, a company, engages an unregulated provider, Small Business Law (SBL), to help it buy a small business. At the introductory meeting, SBL takes money on account from Z and advises that a lawyer will need to be involved. Subsequently, SBL allocates the case to a solicitor employed by SBL to work on the acquisition.

- **SBL's solicitor explains to the client the implications of engaging an unregulated provider**

In line with the obligation to act in the client's best interest, SBL's solicitor explains the client protection implications of engaging an unregulated provider rather than a regulated firm. This includes the lack of Legal Professional Privilege (LPP) and the consequences of the fact that Z's client money is already held in an account managed by SBL. Additionally, SBL's solicitor explains the conflict rules applicable to regulated individuals and emphasises that these mean that SBL's solicitor is not allowed to represent any other clients whose interests would conflict with those of Z. Finally, SBL's solicitor informs Z that SBL has a separate division that is acting for the seller of the business but that this will save money for Z and that confidentiality will not be a problem as there are sufficient firewalls in place preventing information "leaking" to the seller. Z is not deterred from retaining SBL by any of the above information.

- **The client transfers a large sum to SBL but then decides not to proceed**

The day before the sale is scheduled to take place, Z transfers a very large sum of money to SBL. However, late that afternoon, Z becomes aware that the target business has undisclosed liabilities and decides to withdraw the proposal to buy the business.

On examining the papers, Z identifies that SBL's solicitor appears to have provided a poor service because the liabilities had been disclosed during the due diligence work previously carried out.

The risks to the client

- **Risk to the client arising from the use of an office account**

Z asks SBL to return its money but is advised that the money was placed in an office account which had a large overdraft. As soon as the large deposit was placed in the account, the bank had contacted SBL to say that its overdraft limit had been reduced by the sum of the deposit. The money therefore cannot be accessed.

- **Risk to the client arising from the lack of professional indemnity insurance[35]**

Z has heard of professional indemnity insurance (PII) and therefore decides to makes a formal claim for professional negligence only to discover that SBL does not hold any form of PII.

- **Risk to the client arising from the lack of legal professional privilege[36]**

In the meantime Z is sued by the seller of the business. As the case progresses, Z is forced to disclose the advice and information that Z had received from SBL. Z's new solicitor explains that, as Z did not engage SBL's solicitor via a direct retainer, communications and documents that passed between SBL and Z do not attract legal professional privilege.

Z loses the case and is required to pay the seller compensation and the seller's costs.

- **Risk to client because SBL does not have to observe conflict rules**

In the course of the case, Z becomes aware that information provided in confidence to SBL has been shared with the seller. While SBL's solicitor had made it clear that he would keep Z's affairs confidential he subsequently left SBL and, after leaving, did not have any control over the files held by SBL.

Z's new solicitor advises that there may have been some legal obligations on SBL to maintain confidentiality with respect to the information provided. However, as there is no evidence that SBL's solicitor, ie the solicitor that advised Z originally, had acted in breach of SRA rules, Z's only remedy will be to claim compensation from SBL through the courts. Z could also report the matter to the Information Commissioner's Office.

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[35] Professional indemnity insurance (PII) is insurance that covers civil liability claims arising from a solicitor's work in private legal practice. These claims most commonly involve professional negligence.

[36] Legal professional privilege (LPP) is a privilege against disclosure, ensuring clients know that certain documents and information provided to lawyers cannot be disclosed at all. It recognises the client's fundamental human right to be candid with his legal adviser, without fear of later disclosure to his prejudice. It is an absolute right and cannot be overridden by any other interest. LPP does not extend to everything lawyers have a duty to keep confidential. LPP protects only those confidential communications falling under either of the two heads of privilege - advice privilege or litigation privilege. For the purposes of LPP, a lawyer only includes regulated solicitors and employees of a regulated firm, barristers and in-house lawyers.

- **Risk to the client because the SRA cannot handle complaints about SBL**

Z decides to complain about SBL to the SRA. However, the SRA advises that, despite its name, SBL is not regulated by the SRA and the SRA cannot take any action against SBL. While Z is able to complain about SBL's solicitor to the SRA and the Legal Ombudsman (LeO), Z is not able to complain about SBL because it is an unregulated provider.

Z decides to make a complaint to LeO about SBL's solicitor

- **Risk to the client because the Legal Ombudsman (LeO) is unable to investigate Z's complaint**

In the meantime, LeO contacts Z in relation to the complaint about SBL's solicitor, ie the solicitor that advised Z originally. The individual no longer works for SBL and has tried without success to get access to the files on the case held by SBL. LeO has taken the pragmatic view that without this information, the individual cannot properly respond and the complaint therefore cannot be properly investigated.

LeO informs Z that it is taking no further action.

Appendix 4: Scenario illustrating the practical consequences for a solicitor working in an unregulated provider

X is a solicitor working in an unregulated organisation that provides non-reserved legal services. The organisation is not regulated by the SRA or any other approved regulator. When taking on a new client, X makes it clear that, whilst she is personally regulated by the SRA as an individual practising solicitor, the organisation she works for is not. In particular, X will need to maintain records showing that, in line with the Code of Conduct for Solicitors, she has provided clients with appropriate information about whether and how the services she provides are regulated and the protections, if any, available to clients. The information provided will need to inform clients about their right to complain about her services and her charges and how such complaints can be made. The information will also need to set out the distinction between reserved and unreserved work so that the client understands from the outset that circumstances may arise in which X will no longer be able to provide services to them.

X is required to maintain an up to date understanding of the Code of Conduct for Solicitors and what she is required to do in order to comply with its requirements. In particular, this requires X to have a good understanding of the distinction between reserved and unreserved work, so that she does not fall foul of the regulatory prohibition on solicitors conducting reserved work in an unregulated entity. X will also need relationships in place with a number of solicitors who, subject to availability, would be able to take over any reserved work that arose.

Senior management of the unregulated organisation decides that it cannot afford to take out professional indemnity insurance (PII). While X is not required by the SRA to have PII for her work as it is being carried out in an unregulated entity, X decides that she would like to put something in place to mitigate the risk and so that she is not at a disadvantage to regulated solicitors offering the same service from a regulated firm. It is unlikely that X will be obtain the high level of PII coverage required by the SRA for qualifying insurance, as insurers are unlikely to offer these terms outside of the regulated market. X will also need to be clear as to her engagement / contract with the unregulated provider and the extent, if any, to which the organisation will provide a guarantee of her work and how such guarantees impact on her own liability.

Legal professional privilege would not attach to communications between a client and the organisation for the purpose of seeking legal advice or providing it to the client. However, some clients are aware of the importance of LPP and, where this is the case, X will need to have a direct retainer from the client in order for the legal advice to attract LPP, although in practice, we envisage this may be difficult to set up. X will need to keep a careful record of what advice she provides that is capable of attracting privilege and what is not. As a regulated individual, X is not allowed to hold client money in her own name. However, the unregulated firm she works for is able to hold and handle money for and on behalf of clients without having to comply

with the SRA's rules. Clients will need to be made aware that the individual solicitor will not hold the money and of the implications in relation to the compensation fund.

In addition to keeping abreast of regulatory changes, X will remain responsible for meeting regulatory continued competence training requirements, particular to ensure that she maintains professional standards and complies at all times with the regulator's requirements and does not act in any way such as to bring the profession into disrepute. This is likely to involve a certain amount of costs that she will have to meet herself.

Finally, X will need to maintain records of all of the work she handles while employed by the organisation to ensure that she can respond effectively should a client complain or pursue litigation against her after she is no longer employed by the organisation.