The Law Society

The Architecture of Change Part 2 – consultation on the new SRA Handbook

Law Society response
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supporting solicitors

The Architecture of Change Part 2 – the new SRA Handbook
Response to the consultation
Introduction

This is the Law Society's response to the Solicitors Regulation Authority's (SRA) consultation on the Architecture of Change: the new SRA Handbook. This response should be read in conjunction with our previous responses on this issue.

The Law Society recognises that outcomes-focused regulation (OFR) can, in principle, be a mechanism by which the overly prescriptive regulation currently applied to the profession can be relaxed and made more proportionate. However, there remain substantial concerns about

- the extent of the obligations intended by the outcomes and
- the capacity of the SRA to introduce the necessary cultural and systemic changes in the timescales proposed.

Further, while an initial cost benefit analysis has been carried out, it is not yet possible to fully scope the impact of the proposed changes for all types of practice in terms. It would be possible to separate the introduction of the new handbook from other parts of the SRA's project which may be a more realistic and manageable approach for SRA to adopt.

We have previously made clear that we have considerable concerns about whether SRA have provided sufficient detail to allow for proper consideration of the proposals and assessment of their likely impact upon the profession and the public. This, second and final consultation on the proposed Handbook and Code of Conduct addresses only some of these concerns. There remains a lack of clarity as to the SRA's intention in drafting a number of the provisions of the Code, not least on conflict of interest which is a matter of crucial importance not just to the profession but to all types of clients. There is also considerable uncertainty over interpretation in respect of a number of areas (including the outcomes) especially in light of the decision to omit detailed guidance. The replacement of rules with risk-managed outcomes may impact the market in a number of ways. This should be fully investigated prior to the final decision being taken to ensure the changes do not adversely affect the regulatory objectives.

This continuing lack of clarity on:

- the detail of the provisions;
- the intention behind the drafting of parts of the Code
- the 'real world' impact and
- the burden on the profession both financially and as a regulated community.

when considered against the backdrop of a rapidly diminishing window of opportunity to comment, make it difficult for the Society to support the implementation of OFR. Until the SRA is able to rectify this information and knowledge deficit, and we are in a position to fully comprehend and assess the full impact of the proposals, we will continue to have reservations regarding the move to OFR in the manner and within the timescales proposed by the SRA. We accept that not everything will need to be ready on 1 October 2011 to allow implementation of OFR however some elements such as a change in culture within the SRA are essential. Given the significance of the changes it is almost certain that some difficulties will arise. The SRA will need to have in place contingency plans for dealing with such difficulties, as is required.

We would also add that our consideration of these many complex issues has been additionally hindered by the fact that the Cost Benefit Analysis and the Delivery paper outlining how the SRA will drive OFR through a risk based approach were only released at the end November. Much of the work set out in the policy statement remains to be done. When evaluated it may go some way to deal with certain concerns. The proposed timetable for implementation should be considered in light of this.

Turning to the specifics of the consultation, we welcome the fact that the description of indicative behaviours has been changed to clarify their status and that the SRA has confirmed that non compliance with indicative behaviours will not, of itself, constitute grounds for disciplinary action. However, we believe that the SRA should ensure that it is clear that indicative behaviours are just one of many possible means of meeting the outcomes. It is essential that the establishment of OFR is not undermined by the SRA treating non-compliance with the 'indicative behaviours' as suggestive of failure to achieve the required outcomes. The method by which outcomes are achieved should be irrelevant in a truly outcomes-focused system. To give indicative behaviours the perception of a semi-mandatory or 'best practice' status would indicate that the avowed move away from over-prescriptive regulation has not been realised in practice and that the essence and spirit of a genuinely outcomes and principles based system has been lost.

The SRA plan to introduce different types of supervision for firms depending on the risk it believes each firm poses to the regulatory objectives. We support this approach, as a way of targeting resources more effectively. However, this approach has the potential to disadvantage firms which receive a high level of supervision (and thus are likely to incur higher costs as a result of regulation). The SRA will need to ensure that this new system does not disproportionately affect a particular type of firm or of solicitors e.g. BME firms unless there is a clear justification for doing so.

The SRA has provided some guidance within the new Handbook in the form of notes. This guidance is not as informative as the accumulated guidance embodied in the current Code. Further, the extent to which the SRA intends to issue guidance outside of the Handbook is unclear and clarification is essential. There is some risk that the regulated community will be bound by piecemeal guidance of indeterminate status until such time when a firm becomes non-compliant, leading to a new ruling. We would not wish to see a situation develop whereby a cumulative accretion of regulatory action against firms deemed non-compliant begins to constitute an ad-hoc set of precedents that implicitly guide the interpretation and implementation of the Code by other firms. Further, we question whether it is prudent to plan to issue substantive guidance only retrospectively.

The stated intention is to publish the handbook online only, rather than publishing in hard print. This method of publication could act as an encouragement to frequent revision and would place yet another burden on firms - especially those that are smaller and cannot allocate staff to concentrate on the necessary compliance work. We suggest SRA should develop its policies for review of the handbook. The SRA may wish to consider following the Government's common commencement dates when updating the Code, to create greater certainty about when updates are likely.

In our previous response, we expressed considerable concerns about the proposals regarding conflicts of interest. We believe the new proposals are intended to reflect the existing rules, albeit in an outcome-focused format. However, there remain concerns regarding the clarity of expression in drafting of the outcomes. In particular, the

application of the outcomes to conveyancing transactions contains notable omissions, for example in relation to the established market practice of acting on the terms of the CML handbook for buyer and lender on a standard residential mortgage. Fundamentally it is not clear whether the outcomes, as drafted, allow a solicitor to act for both buyer and seller. Nor is the SRA's intended outcome clear. This is an area where there should be absolute clarity for solicitors and clients.

The replacement of rules that set standards by outcomes that are unclear may put at risk certain regulatory objectives. There is an emphasis within the Code on the relationship between clients and solicitors. However, the relationship between professionals is also significant. It is important for clients and commercial interests, as well as for the work of the courts, that solicitors are able to rely without hesitation upon uniformity of practice across the profession where it comes to issues such as conflict, confidentiality and undertakings. This enables routine commercial transactions to proceed smoothly and economically. This requires a set of quickly and easily enforceable obligations that sanction any failure to adhere to professional obligations.

The new system, at both the authorisation and supervision phases, relies in part on firms' self reporting changes to their practice, breaches of regulatory requirements and financial difficulties. However, as noted previously, the proposed rules as they currently stand contain a myriad of reporting requirements. We are concerned that this will mean that the SRA will be overwhelmed with reports under the various different rules as solicitors either misinterpret the requirements or take a risk averse approach to reporting. We also note there is a certain amount of overlap between various reporting requirements both within the Code and also in the authorisation rules, whilst different uses in terminology (for example, any 'change' compared with 'material change') make the requirements unclear. This may mean that solicitors do not report information as they are required which, in itself, could be a regulatory breach and lead to enforcement action. As noted previously, we think there should be a simplified set of requirements and clear guidance about what does and does not need to be reported to ensure transparency.

The Law Society still has serious concerns about the SRA's capacity to implement the proposed changes in such a short timescale. We do not consider that the current timescales allow enough time for the effect of the new rules to be considered comprehensively and for the SRA to assure itself that the system they propose will be effective and fit for purpose. The SRA needs to be able to seek the views of practitioners and, if necessary, refine its proposals following further consultation so as to satisfy itself that the new Handbook does achieve its stated purpose and does not create unintended consequences. The proposed changes are substantial and if imperfectly designed and/or implemented the consequences could be grave, not only in terms of cost but also reputation at home and abroad.

Effective regulation is essential to protect clients and the public interest. We do not believe that it is in the public interest for a new system of regulation to be implemented until the SRA has satisfied itself and the profession, that the system (and its deployment of that new system) is robust and fit for purpose. While we recognise that the SRA has made progress in changing its organisational structure and is implementing a process of staff assessment and review, we believe that the change in culture required to implement OFR successfully cannot be fully achieved in the time allowed. It is, however, essential that this cultural change is achieved before fully implementing OFR. In order to establish confidence there would need to be palpable evidence of change and, as yet, there seems to be little current evidence of this under the existing system of regulation. To seek to regulate in an outcomes-focused manner with the SRA's current culture and approach to supervision and enforcement, is likely

to result in 'regulatory ambush'. This in turn would cause a further loss of trust between the regulator, the regulated community and other stakeholders.

The new system of enforcement tends to blur the separation between investigation and enforcement. It is essential that decisions regarding disciplinary action are taken independently. This is particularly important as the SRA will have greater powers to take disciplinary action. If separation is not maintained then the SRA will risk accusations of unfairness.

The Law Society does not consider that it can comment fully on the Suitability Test without further information on any other requirements or tests that might be applied to authorised role holders and, in particular, to owners. We believe that a comprehensive policy statement is necessary. There is a lack of information about how the Authorisation Rules will fit into the overall ABS licensing system and further information on this is needed in order to give full advance information as to how the SRA would intend to deal with the authorisation of ABS and changes to them.

We are also concerned about the resource implications of this programme and the adequacy of the information about the cost of change. Despite the initial cost benefit analysis, the amount of resource required to operate the new approach to regulation remains very much open to question, the cost of updating the regulatory system and the ongoing cost of some of the proposals. The cost of regulation is already very high. It would be unacceptable for it to rise further. For this reason, we are most concerned that an initial and preliminary cost benefit analysis to identify the impact has only been made available for consideration towards the end of the consultation period.

While we agree there is a need for a transition of at least six months to enable practitioners to become familiar with the new Code, there should also be clear guidance about how the new Code and old Code will apply. The transition period will be needed to enable firms to

- familiarise themselves with the new Handbook
- provide training to staff on the new Handbook
- update their systems and polices.

The transition period should not be shortened if there are delays in finalising the rules. Rather, the implementation should be delayed. Further consideration ought to be given to a phased introduction of different elements of the SRA project which includes OFR, ABS and change to the arrangements for Professional Indemnity Insurance (PII) which is targeted for the start date for ABS. While ABS could be introduced without much change to the current Code we believe that the timetable for the overall project should be reviewed to enable SRA to gain the confidence of the profession for such major changes.

Annex A
The Architecture of Change Part 2 – the new SRA Handbook
Consultation questions

1. Do you have any comments on the Introduction to the Handbook?

The Law Society is pleased that the Introduction to the Handbook makes it clear both that indicative behaviours are not mandatory, and that firms and individuals have choices in terms of how they meet the outcomes. We note that it has been specified that non-compliance with indicative behaviours will not constitute grounds for disciplinary action of itself and agree this is a proper approach. However, we believe that the SRA should go still further in this regard. It is essential that the establishment of Outcomes Focus Regulation (OFR) is not undermined by the SRA treating non-compliance with the 'indicative behaviours' as suggestive of failure to achieve the required outcomes. Either the outcomes have been met and the principles upheld or they have not – the method of attainment being otherwise irrelevant in a truly outcomes-focused system. To give indicative behaviours even the perception of a semi-mandatory or 'best practice' status would indicate that the avowed move away from over-prescriptive regulation has not been realised in practice and that the essence and spirit of a genuinely outcomes and principles based system has been lost.

In this context therefore, we note that in the introduction to the Code, as opposed to the Introduction to the Handbook, indicative behaviours are described as a non-exhaustive list of the kind of behaviours which may establish compliance with, or contravention of the Principles. We remain concerned that solicitors might feel obliged to rely on indicative behaviours to achieve compliance in circumstances where they might not have been best placed to do so. We therefore believe, that indicative behaviours should be described more in terms of broad guidance to the regulated community in the Introduction to the Code. In any event, it should reflect the description in the Introduction to the Handbook by specifying that they will not constitute grounds for disciplinary action.

We believe that the Introduction should state that the new Handbook seeks to regulate in order to guard the reputation of the profession, as well as in the consumer interest and that of the general public. Although the Handbook sets out the standards and requirements that are expected of the regulated community for the benefit of their clients and the general public, we believe that its purpose is also to make regulation more proportionate and better tailored to regulated individuals and entities. This should be explicitly stated in the Introduction.

2. Do you have any comments on the implementation timetable?

The Law Society has previously raised serious concerns about the SRA's capacity to implement the proposed changes in such a short timescale and these concerns remain. We do not consider that the current timescales allow enough time for the effect of the new rules to be considered comprehensively, for the SRA to

- assure itself that the system it proposes will be effective and fit for purpose and
- that it is in a position to implement it effectively.

We note that some elements of the OFR strategy will be implemented later than others e.g. the annual reporting and the transition of sole practitioners to authorised bodies. However, we still believe that implementing the major aspects of the move to OFR in the short timescales suggested will be difficult to achieve. There is a risk that firms will

be left practising in a climate of uncertainty with many issues unresolved or subject to late revision or alteration

Effective regulation is essential to protect clients and the public interest and to maintain the confidence of the profession. As stated in our introduction to this response, we do not believe it could be in the public interest for a new system of regulation to be implemented until the SRA has satisfied itself and the profession that the system is robust and fit for purpose. While we recognise that the SRA has made progress in changing its organisational structure and is implementing a process of staff assessment and review, we think that the change in culture required to implement OFR successfully will be very difficult to achieve in the time allowed. It is, however, essential that this cultural change is palpable before fully implementing OFR, as to seek to regulate in an outcomes-focused manner with the SRA's current culture and approach to supervision and enforcement, is likely to result in 'regulatory ambush'. This is in turn would cause a further loss of trust between the regulator, the regulated community and other stakeholders. We are also concerned at the overlap between supervision and investigation leading to enforcement. This is especially concerning as the majority of breaches are likely to be determined by SRA within its new disciplinary powers.

3. Do you have any comments on the revised Principles, application provisions and notes to the Principles?

As stated in our response to the SRA's first consultation on the new Handbook, we would also seek to reiterate that 'professional' should be used in place of 'proper' throughout the Principles, for consistency. The term 'professional' is an important one, implying the need to act with integrity and to maintain the reputation of the profession as a whole. It is for this reason that it is included in the Legal Services Act 2007.

Generally, we think it is important that Principles and Outcomes are drafted accurately and precisely to avoid potential confusion for the regulated community. In the absence of a comprehensive framework of rules the profession will develop a variety of methodologies of working and of best practice. This will make it more difficult for firms to have confidence in their dealings with each other.

The Law Society wishes again to highlight its concern that the Principles are not drafted in a manner consistent with the professional principles in the Legal Services Act (LSA). Principle 5 refers to a 'proper standard of service'. For consistency, this should reflect the LSA by referring to a 'proper standard of work'. We are also disappointed that the Principles remain cumbersome in form, with the exception of Principle 9 as amended. We believe that they should be redrafted to make them shorter and more easily readable. In particular, we remain concerned about the lengthy drafting of Principle 7, and question whether Principle 10 needs to be included at all as its substance is already necessitated by compliance with Principles 1 – 8.

We further note that client confidentiality has not been explicitly included within the Principles as cited in our response to the first consultation on the proposed new Handbook. We note that this has been impliedly covered to some degree in the Principles and in chapter 4 of the Code. However, we believe that specific reference to this should be made in the introductory paragraphs to the Principles.

As the SRA are not able to describe all the relevant and necessary ingredients for an effectively managed business we believe it is crucial that the SRA explains how it plans to assess whether a business is being run effectively as per Principle 8. In particular, we would like clarification on what steps the SRA will be taking to ensure

that its staff have the skill set required to carry out this function. As stated in our response to the first consultation, it is not clear that the SRA currently has the tools to perform this task. In this respect, we are also disappointed that the use of the term 'effectively' has not been removed. We feel that the use of this word is too subjective and may confuse the profession. We therefore believe that this word should be deleted.

Further, we believe that the SRA should provide details of how firms will be assessed for compliance with Principle 9. We remain concerned that the Principle goes beyond statutory requirements for businesses, and it is unclear to what extent firms will be required to take positive action to promote equality and diversity. The SRA should provide guidance to this effect, and it should be made clear that oversight of firms' compliance with Principle 9 will be executed proportionately.

4. Do you have any comments on our approach to guidance?

We note that the SRA intends to take steps to publish additional material on its website to assist the regulated community with the transition period, although we had previously understood from the SRA that it did not intend to produce guidance. The SRA should provide further details as to how it intends to ensure consistency across a range of proposed guidance, and how it will ensure that such guidance will be readily available to the regulated community.

It is unclear how far the SRA intends to go with regards to the issuing of guidance outside of the Handbook. There is some risk that the regulated community will be bound by piecemeal guidance of indeterminate status until such time when a firm becomes non-compliant, leading to a new ruling. We would not wish to see a situation develop, whereby multiple changes of the Code have to be introduced, or a cumulative accretion of regulatory action against firms deemed non-compliant begins to constitute an ad-hoc set of precedents that implicitly guide the interpretation and implementation of the Code by other firms. We question whether it is prudent to issue substantive guidance retrospectively

While we acknowledge that indicative behaviours have been somewhat expanded and may be helpful as quasi-guidance, we note that they are not as informative as the accumulated guidance embodied in the current Code. Furthermore, we do not believe that the 'Notes' sections as they currently stand are a substitute for full guidance.

We also remain concerned that the glossary has not yet been produced, as this may serve to hinder the profession in its adoption of the new Handbook. We would welcome an update as to the status of the glossary.

5. Do you have any comments on the revised Code?

In our response to the first consultation, we noted that the current chapters within the Code were broad-ranging, with long lists of outcomes and indicative behaviours which were difficult to read and absorb. The numbering made navigation through a hard copy of the Code quite difficult. We proposed that it would be helpful if the numbering of outcomes and indicative behaviours could be prefaced with the number of each chapter. Whilst we welcome the fact that the Principles have been removed from the beginning of each chapter, we still feel that the numbering should be reconfigured so that outcomes and indicative behaviours can be identified easily with reference to each chapter.

General comments

The current rules have been developed to enable solicitors to establish uniformity and to avoid misunderstanding of their obligations.. We believe that chapters 3 and 4 of the draft Handbook in particular are unclear and will lead to confusion.

The Overview of the Code states that 'You must strive to uphold the spirit of the Code'. Without further guidance, we believe that this is too ambiguous and it is unclear how the profession would execute this. In addition, there is some ambiguity as to the use of 'you' throughout the Code, and whether it is referring to the entity or the regulated individual. Specifically, it is difficult to know which parts of the Code's definition of 'you' apply, and where and when they do so.

By stating that individuals might be required 'to demonstrate how you have nevertheless achieved the outcome' in the section on 'Non-mandatory provisions', we believe that the regulated community may be confused as to where (and on who) the burden of proof lies and the weight and nature of evidence necessary to discharge any burden that might be imposed. As currently drafted, we believe that the SRA retains too much discretion in determining compliance. It remains unclear as to what lengths firms will have to go to in order to demonstrate compliance, what level of justification they must provide for their processes and in what circumstances they might be required to do so. It is unclear, as to how non compliance with some outcomes will be determined in the absence of any obvious detriment or default flowing from a solicitor's action or the processes that they have established. It would be wholly unacceptable for the SRA to require a solicitor to justify their processes against a 'theoretical' failure or to require them to demonstrate that an objective has been met in the absence of any evident default or, as appropriate, complaint.

While we understand that the introductions to each chapter are useful as a summary of the aims of each chapter, we note that the status of these introductions is unclear. It would be useful for clarification to be provided as to the application and status of these sections.

Chapter 1 - Client Care

We are pleased that the preamble has been redrafted, and refers explicitly to 'your obligations in conduct'. However, we remain concerned that it refers to clients' 'expectations and responsibilities', which does not correspond to any given outcome.
The Law Society agree with the removal of 'prompt' from outcome 5 and its replacement with 'delivered in a timely manner', which is less onerous. We are also satisfied that outcome 6 has been redrafted so that it is left to the regulated individual's judgment as to what is 'suitable for the client's needs'. However, for clarity, it would be prudent to refer to fee arrangements that are 'lawful', rather than 'legal', as legal and illegal are normally used when referring to criminal matters.

Outcome 10 appears to repeat the sentiment of outcome 9. It is unduly prescriptive and unsuitable for an outcomes focused approach. If required as a result of third party intervention then it would be better to reproduce that requirement verbatim rather than attempt to construct it as an outcome. As currently drafted, it requires that all clients are informed of their right to take a complaint to the Legal Ombudsman. However, most corporate clients do not have this right, as the Legal Ombudsman will only consider complaints from individuals and very small businesses, charities or clubs. It should be clarified that only those that are able to make a complaint to the Ombudsman need be informed. If outcome 10 is to be retained, we believe that it

should refer to ‘any right to complain’, rather than specifically to the client’s right to complain.

We believe that outcome 11 merely serves to restate outcome 1. It is not clear to whom the regulated individual should be acting ‘fairly’. If this is to be retained, it would be more appropriate to state that complaints are dealt with ‘objectively’ rather than ‘fairly’.

We remain concerned that indicative behaviour 3 requires that clients are told ‘in writing’ as to the name and status of the person dealing with the matter. This is too onerous and prescriptive, and it is unclear why this has not been amended in view of changes to indicative behaviour 16, which no longer requires written confirmation in relation to fee arrangements. We believe that the Code is generally inconsistent about the recommended means of communication in differing circumstances. The SRA’s expectation should be definitive. It would be more in line with outcomes-focused regulation if the regulated community were given the autonomy to choose the appropriate means of communication in the absence of a prescribed mode.

The rationale for the insertion of indicative behaviour 9, which relates to the refusal to act where a client proposes to make a gift of significant value, is unclear. Without further commentary, it is difficult to understand why this has been added here. It would seem more appropriate for this indicative behaviour to be moved to chapter 3 (Conflicts of Interest). Further, we believe that the third bullet of indicative behaviour 17 is unclear; it is difficult to see how individuals might evidence that they can ‘justify keeping’ a financial benefit. This should be clarified.

Chapter 2 - Equality and diversity

We welcome the redrafting of some of the language in this chapter, particularly that the terms ‘employees’ and ‘managers’ are used consistently throughout the chapter and that outcome 4 has been redrafted. However, we still believe guidance is required for outcome 3 which states, ‘your policy is made available to the SRA, clients and other relevant third parties upon request’. While we support the requirement of disclosure generally, the SRA should provide a template by way of separate guidance for this outcome to ease the administrative burden on firms.

We are pleased that indicative behaviours 2 and 3 have been re-drafted. As previously noted, we remain concerned that indicative behaviour 5 is unnecessary as no other chapters in the Code link indicative behaviours to losing court cases or hearings. We also still believe that an additional indicative behaviour should be added to address ‘being able to demonstrate that action is taken where necessary in response to monitoring’.

Further, on the introductory line of the preamble, which states, ‘This chapter is about encouraging equality of opportunity and respect for diversity and preventing unlawful discrimination, in your relationship with your clients and others’, it is unclear to what extent the use of the word ‘encouraging’ is implying positive action. To reiterate our comment in regard to Principle 9, we remain concerned that this suggests a requirement to go beyond statutory requirements for businesses, and it is unclear to what extent firms will be required to take positive action to promote equality and diversity. The SRA should clarify further what it expects of the regulated community in this regard.

Chapter 3 – Conflicts of interest

Our comments on this Chapter are dealt with in question 6 of this response.

Chapter 4 - Confidentiality and disclosure

Some of the language used in this chapter requires further clarification. The multiple use of 'client' in the preamble is confusing, and it is unclear as to whom the SRA is referring. The preamble notes that, 'Such situations often also give rise to a conflict of interests…' The use of 'such situations' in this way is unclear, and this should be clarified by the SRA. As noted above, there is particular confusion as to what force the preamble has in this chapter. We would welcome further clarification on this.

For clarity, we believe that outcome 1 should be redrafted to state that, 'The affairs of clients are kept confidential by you and your firm unless disclosure is required or permitted by law, including by client consent.' It would also be helpful for consistency if indicative behaviour 1 mirrored outcome 5 in referring to 'systems' in the plural.

We are pleased that our comments on outcome 4 have been accepted and that some of this outcome has been redrafted, including changing the language from 'consent' to 'informed consent'. However, we believe that the use of 'and' should be reinserted at the end of outcome 4(c) so that it is applied in conjunction with outcome 4(d). We also still think that it would be beneficial to add a further clause to outcome 4 which states, 'a firm should be aware of, and able to demonstrate, when they have acted in such a situation and where appropriate, what information was provided to the client'.

Indicative behaviour 3 refers to outsourcing services such as word processing and photocopying. However, outsourcing can relate to many other services, including data management and accounting. As currently drafted, we believe that this behaviour is inappropriately restrictive, and there is a risk that the regulated community would perceive this as only applying to the areas referred to. We recommend that 'word processing and photocopying' should be deleted, and the relevant indicative behaviour should just refer to 'outsource services'.

It is not clear in indicative behaviour 7 whether informed consent is required before disclosing details of bills sent to clients to third parties in relation to the collection of book debts. The SRA should provide more information generally in relation to the use of informed consent throughout the Code. Note 2 should also be expanded to provide further detail as to the implementation of effective safeguards and information barriers.

Chapter 5 - Your client and the court

Outcome 1 of the draft Code states that a regulated individual must 'not attempt to deceive or mislead, *or knowingly allow another person(s) to deceive or mislead*, or recklessly deceive or mislead, the court'. We are concerned that use of 'another person' goes beyond the current rule, and it is unclear as to what extent this duty applies. In the context of criminal law, we believe that outcome 1 could create problems where a duty towards an opponent is created in a transient situation in which instructions can quickly change. It could also create a conflict of interest for a defense practitioner where the prosecution fails to present a clear picture of the defendant's role or their antecedents for sentence. Practitioners would be obliged to correct them to the detriment of their client. Further, use of 'recklessly' lowers the bar and will mean that practitioners are forced to make a judgement as to whether another person is acting 'recklessly'. This is likely to put practitioners in a difficult position, particularly as such judgements are likely to have to be made quickly within the Court arena. This

could lead to the point at which practitioners could be accused of professional misconduct in circumstances where details of misdemeanours might not have been clear. We therefore believe that outcome 1 should be redrafted so that only intentional misconduct is penalised, in light of the gravity of the conduct alleged.

As noted in our response to the first consultation on the new Handbook, the outcomes do not mention the duty to continue to act in the absence of a client who has absconded in the course of a criminal trial. Guidance note 6 of the existing Code deals with this and might be usefully added as an indicative behaviour relating to outcome 5.

We note that outcome 6 now states, 'you ensure that evidence relating to sensitive issues is not misused'. As drafted, the outcome indicates that regulated individuals only need to ensure that evidence relating to sensitive issues is not misused. Further, it would be helpful for the SRA to clarify what sort of sensitive issues are being referred to here.

Chapter 6 - Your client and introduction to third parties

We welcome the changes that have been made to indicative behaviour 1, where more specific information has replaced the previous iteration. However, as previously noted, none of the indicative behaviours seem relevant to outcome 2, which states, 'clients are fully informed of any financial or other interest which you have in referring the client to another person or business'. We believe that guidance should be provided to help determine how much detail about a financial or other interest is required. In addition, the end of indicative behaviour 2 should be re-drafted to ensure that the contract offered would be of the kind that is suitable for the needs of the client.

Chapter 7 - Management of your business

We are disappointed that guidance to outcome 1 has not been provided to clarify what will be deemed 'a clear and effective governance structure and reporting lines'. There is a need for a degree of proportionality and this is acknowledged in the initial cost benefit analysis. Given this, guidance is necessary. We also believe guidance should be provided for outcome 2, as it remains unclear as to what amounts to 'effective systems and controls'. For this, we believe it would be beneficial to refer to specific quality systems such as Lexcel to evidence that practitioners are compliant. It would also be useful to cite Law Society Practice Notes as another way to assist with the development of effective systems and controls to achieve compliance with Principles, rules and outcomes.

Outcome 5 states that regulated individuals must comply with legislation applicable to their business, including anti-money laundering and data protection legislation. We are concerned that it still provides for strict compliance with a legal obligation rather than an actual outcome. The UK government and law enforcement agencies accept that the anti-money laundering regime is meant to be applied by a risk-based approach and even the best procedures will not ensure a zero tolerance outcome. We believe that this should be reflected in the Handbook. We would propose that the outcome be re-drafted to require that firms maintain systems and controls to enable compliance with legislation applicable including anti-money laundering and data protection legislation.

We believe that outcome 9 is not compatible with the outcomes relating to overseas outsourcing. It would seem that the outcome effectively prevents a firm from outsourcing all of its business activities. While we recognise the SRA's aim in including outcome 9(b), we are not convinced of the practicality of a contractual agreement that requires an outsourcer to allow the SRA access to the extent set out. It

is unlikely that outsourcers would agree to a contract term which allows the SRA to enter their premises and inspect anything related to outsourced activities or functions. Indeed, where outsourcers carry out work on behalf of firms operating in other jurisdictions, allowing the SRA this level of access may conflict with their obligations to these other firms and the regulatory requirements placed upon them. The outcome, as currently drafted, is likely to prevent SRA regulated firms from outsourcing work and will therefore put them at a competitive disadvantage. 'Operational functions' potentially covers a multitude of functions which could be said to be outsourced, such as software maintenance, or the transmission of emails to outside servers. In these cases, the firm often has no possibility of negotiating the SRA's required contractual arrangements with the outsourcer and thus would be restricted in obtaining these types of services. We therefore recommend that outcome 9(b) be deleted. If, the outcome is retained, it should be redrafted to allow the SRA reasonable access to information as far as it relates to regulated work done on behalf of the regulated firm by the outsourcer.

The Law Society recognises that Legal Process Outsourcing is an area of growth and believe that this is an area where the SRA should provide more guidance to firms on how they can comply with their professional obligations. Given the fast changing nature of this market the SRA should ensure that regulation in this area is not overly prescriptive and thus unnecessarily restrictive.

We are pleased that what were previously indicative behaviours G and H have been deleted. However, we remain concerned that indicative behaviour 4 is too onerous in view of the current status of indicative behaviours. As stated in our response to the first consultation on the new Handbook, full business continuity planning may be a difficult task for many firms. In addition, we believe that chapter 7 should be cross-referenced with Annex F1 by adding further indicative behaviours. It is apparent that certain sections of Annex F1 are pertinent to this chapter and are conspicuous by their absence. Please refer to our comments relating to Annex F1.

Chapter 8 - Publicity

We are pleased that for clarity, the use of the word 'publicity' has replaced the term 'communications' in indicative behaviour 1.

We note that the additional wording in outcome 1, which states that publicity should not 'diminish the trust the public places in you and in the provision of legal services', is too subjective and difficult to evidence. If the SRA is to retain this, further clarification about as to why this wording has been added should be provided.

While we agree with the content of outcome 5 which reflects current legislation, we believe that the added detail describing what firms must include on their letterhead, website and emails is too detailed and prescriptive.

Further, in the absence of a defined term for 'regulated activities', it is difficult to understand how indicative behaviour 1 applies in relation to disclosure of the manner in which the regulated individual is regulated for the purpose of those activities.

We also believe that the new wording in indicative behaviour 5 relating to unsolicited approaches is over-prescriptive, and that the previous wording was satisfactory. In addition, it is unclear, not withstanding its non mandatory status, as to whether indicative behaviour 10 de facto requires that firms not use the term 'solicitors' if none of the managers are in fact solicitors. The SRA should provide greater clarity as to the circumstances in which a firm can and cannot use the term 'solicitors' in its publicity.

The issue of how a firm can pass on the individual costs of electronic client due diligence (CDD) searches, which are a method of complying with the Money Laundering Regulations 2007, has been a point of contention between the profession and the SRA for some time. We have set out our concerns below -

Indicative behaviour 8 provides:

You may tend to show that you have not achieved the [publicity] outcomes if you describe overheads of your firm (such as normal postage and telephone calls and charges arising in respect of client due diligence under the Money Laundering Regulations 2007) as disbursements in your advertisements.

The Law Society believes it is a commercial and relationship management decision for a firm as to whether they pass on the costs associated with anti-money laundering compliance generally. However, we have a number of concerns with the approach set out in the draft handbook to resolve the question of how such costs can be passed on.

As a preliminary point, we believe that this is an issue which should not be raised only in the section on publicity. While we appreciate that there are issues regarding headline pricing and the advertising of such, the question of how CDD costs can be passed on is more fundamental than this.

The key question is whether these costs are overheads or disbursements.

We appreciate that disbursement is defined in the Solicitors Account Rules as: any sum spent on behalf of the client or trust.

We also appreciate that case law makes it clear that the disbursement is an expense which a solicitor incurs to a third party for the client in respect to other people's work which the solicitor is not directly responsible for and which the solicitor simply passes on to the client at cost. The expense must be reasonable and must be for the benefit of the client.

It is important to recognise that there are a range of costs associated with CDD under the Money Laundering Regulations 2007.

Some are clearly overheads such as salary costs for those within the firm undertaking CDD and other compliance activities, file storage costs and normal office costs such as photocopying. These fail to qualify as disbursements as they are not third party work.

There are however another set of costs which can be specifically identified to the individual client, are incurred by a third party undertaking specialised research activity and relate to the complexity and risk associated specifically with that client.

The costs for undertaking electronic searches or commissioning investigative reports to verify the client's identity or to identify and verify the client's beneficial owners are such costs. Costs undertaken to establish source of funds and source of wealth may be similar costs. From surveys of our members we understand that such costs range generally from £1.50 to around £250 per client, but some reports have cost up to £20,000 for a particularly complex client.

We accept that there are arguments both ways as to whether the costs incurred for CDD are for the benefit of the solicitor, in complying with their regulatory obligations; or

for the benefit or the client so as to enable them legally to access services which they are prohibited from accessing without CDD being adequately completed.

However, given that the SRA is meant to be moving towards an outcome focused regulation approach, with the best interests of the client as the primary objective, we find the insistence that such charges are not for the benefit of the client and that they should be included as overheads is somewhat perverse.

If the SRA are not disputing the actual passing on of the cost to the client, should the firm choose to do so, then the total bill will be essentially the same to the client and they are not financially disadvantaged irrespective of the manner in which the charge is passed on.

If the charge is to be passed on as a disbursement:

- The client can clearly see that they are being charged for external CDD
- The client can clearly see how much they are being charged for external CDD
- The firm can only pass on the actual cost of the external CDD

If the SRA's approach in the draft handbook is followed and such costs are classed as overheads, clients will still be charged them. However, they will not know that they are being charged nor will they be able to assess how much they are being charged for them. We cannot see that such a lack of transparency is in the client's interest.

Finally we are aware of other regulatory bodies that supervise solicitors' competitors for anti-money laundering purposes who have taken an 'outcomes approach' and are allowing these costs to be passed on to clients as clearly identified disbursements.

We would encourage the SRA to review its application of the definition of disbursements with respect to

- external CDD checks
- related source of funds checks and
- source of wealth checks.

Chapter 9 - Fee sharing and referrals

We are disappointed that our comments in relation to the outcomes and indicative behaviours regarding fee sharing and referrals have not been acknowledged in the new draft of the Handbook. In particular, we reiterate that outcome 3 should be redrafted. It is currently too vague and, as previously stated, clients may be misinformed at the hands of other parties involved in the decision over which the regulated individual has no control and possibly little influence.

In outcome 1, we believe that it is unclear who 'your' refers to. The SRA should also provide a definition of what an 'arrangement' is, for clarity.

Further, in indicative behaviour 1 it is difficult to see how the regulated individual might determine what would amount to being 'reputable'. The SRA should define the term or provide further detail as to its application.

Chapter 10 - You and your regulator

The Law Society remains concerned that this chapter is contrary to the spirit of a reciprocal relationship between the SRA and those that it regulates. The SRA should publish information relating to the steps it intends to take in order to maintain such a relationship.

Notwithstanding further amendment and the removal of the term ‘significant breaches’, we remain particularly concerned about outcome 3 which requires firms to notify the SRA of changes to relevant information, including serious financial difficulty. We would reiterate that a firm which might objectively be considered to be in such difficulties, but which is still trying to recover and believes that it is making progress, may not consider it worthwhile or indeed necessary to report this to the SRA and thereby, would risk disciplinary action. We would also again ask that the SRA provide clear information about the action it is likely to take following receipt of such reports. The regulated community will be in a better position to comply if individuals are aware of cases where the SRA has treated such reports confidentially, proportionately and creatively. For instance, by allowing a firm to

- wind down in an orderly fashion,
- merge with another firm or
- reorganise its business to increases its profitability.

We believe that a relatively high bar should be set by the SRA for what they regard as serious. The definition of ‘serious’ might be linked to the inability of a firm to meet professional obligations.

We are pleased that what was previously outcome 9 (now outcome 11) has been redrafted so that firms have the opportunity to ‘investigate whether any person may have a claim for redress’, rather than immediately informing clients of any act or omission which could give rise to a claim.

We are also pleased that amendments have been made in line with our comments about what were previously indicative behaviours C and G (now indicative behaviours 5 and 7).

We note that the SRA has now included the term 'you' in outcome 5, to make clear that the outcome is intended to impose a duty on the regulated community. However we repeat our previous point over the need for a definition of ‘you’ in the context of the regulated individual and/or a regulated entity. However, there is still a role for the SRA to play in achieving the outcome. Therefore the extent of a regulated person's responsibility still needs to be clarified.

Chapter 11 - Relations with third parties

Outcome 1 should state that the regulated community ‘do not abuse [their] position to take unfair advantage’, rather than the current iteration which is too vague as to when and how the individual should ensure that they do not take unfair advantage by virtue of their title, knowledge or experience.

We also believe that outcome 2 should be amended so that undertakings are to be performed ‘within the agreed timescale, or in the absence of an agreed timescale, within a reasonable timescale.’ The current iteration is too subjective and allows for regulated individuals to rely on what might be construed as a ‘reasonable timescale’ in any event.

The SRA should provide further clarification as to the meaning of indicative behaviour 1, and how it relates to the outcomes in this chapter.

In addition, we believe that indicative behaviours 2 and 3 should be redrafted to state that monies and / or documents should not be returned if they are the subject of a suspicious activity report and they are awaiting consent or if consent has been refused.

Chapter 12 - Separate businesses

We have previously advocated the retention of the distinctions maintained by this chapter and continue to support safeguards on the confidentiality of clients of professional firms. We agree that, in the interests of consumer protection, there is a need to restrict all regulated firms, including ABS, from providing non-reserved legal activities through a separate business. It will be key that those involved in a regulated entity are not able to set up complex business structures to avoid the provisions of chapter 12.

We believe that the SRA should provide guidance in relation to how the Separate Business Rule relates to the 'Subsidiary and Necessary' Rule. We note that enforcement of this has historically been inconsistent.

Chapter 13 – Application and waivers

We have no comments on this chapter.

Chapter 14 - Interpretation

We believe that the following definitions need further clarification and / or amendment:

"Conveyance of land" does not include a mortgage or charge of land in the case of an individual mortgage. We believe that this definition should reflect the current rule.

The definition of "prohibited separate business activities" needs to be re-worded to make it easier to understand, perhaps using less double-negatives.

For clarity, the definition of "permitted separate business" in section (k) should be redrafted as follows:

providing legal advice or drafting legal documents not included in (a) to (j) above, where:

- such activities are provided as a subsidiary but necessary part of some other service of the separate business; and
- that other service is one of the main services of the separate business.

Draft SRA Accounts Rules (Annex D)

As there is no specific question on the draft Account Rules, we incorporate our comments here. In our last response we made several comments on the draft SRA Accounts Rules and are disappointed that only a few of these have been incorporated by the SRA. We previously noted that the unpaid client account limit in Rule 22 (2a) should be increased from £50 to £100, as the current limit imposes significant burden on firms. We believe this increase would significantly ease the current burden on firms without endangering client money. We also highlighted that clarity is required on

whether signed authority is required for every transfer from a client account, as this is not clear from Rule 23. We think it would be very burdensome to require firms to obtain signed authority for every transfer in this situation. In addition, we urge the SRA to reconsider the comments we made in our last response in relation to rules 22-27, 32-33, and 35-49 and to incorporate these comments into the Rules.

Please note our comments above regarding the definition of disbursements.

6. Do you have any comments on Chapter 3 (Conflicts of interests)?

The Law Society considers that the newly drafted outcomes are an improvement on the previously proposed outcomes reflecting more fully the existing rules but in an outcome-focused format. However, we have serious concerns about the quality of the drafting of the outcomes and whether they fulfil the SRA's declared policy intention. It is essential to have clear conflict rules, as uncertainty over interpretation will lead to confusion in the regulated community

The preamble of chapter 3 states, '…the overriding consideration will be the best interests of each of the clients concerned and, in particular, whether the benefits of you acting for all or both of the clients outweigh the risks'. This is an important statement and, as noted above, further clarification is required on what status the preambles to the chapters have.

Acting for buyer and seller

The current rule ordinarily prevents a solicitor from acting for a buyer and seller in the same transaction. There are exceptions to the above that are widely accepted and understood. It is unclear from the drafting of the current proposal, whether the SRA intends that the current position be retained, or means to allow solicitors to act for a buyer and seller generally where they believe they can manage the risk of conflict. If, as has been stated, the SRA take the view that, save in exceptional circumstances, the interests of a buyer and seller are always in actual or potential risk of conflict then this should be made clear by inclusion of a suitable outcome.

The Law Society believes that the new provisions could allow solicitors to act for buyer and seller in certain situations. For instance, a large conveyancing firm, with sophisticated systems for ensuring separation of information and teams working on the same transaction, might believe they can act for a buyer and seller. The firm could argue that there is no significant risk of the duties of the firm conflicting, because their systems mitigate against this. The position would be that their clients would not have given any informed consent to the firm acting. This is contrast to the position of 'sophisticated' clients, who will need to provide informed consent, to a firm acting for another party whose interest conflict, or may conflict, with their own, under outcomes 4 or 5. This may mean that complicating factors such as referral and linked chain transactions may or may not have been fully explained to clients. While the SRA has attempted to prevent the above scenario by including in the notes a comment to the effect that, conveyancing is an area with a high risk of conflicts, non-mandatory notes are no substitute for proper and clear drafting of the outcomes. We are unclear as to whether such liberalisation of the position set out in the existing rule was the SRA's intended outcome. If so, it is a substantial change in policy with significant implications for solicitors and should be consulted upon fully. If this is not the SRA's intention, then the SRA should be clear in regard to the acceptability of acting for buyer and seller and construct an outcome to reflect the fact that such activity is not permitted.

The Law Society also notes that unlike sophisticated clients whose solicitors are using the exceptions in outcome 4 or 5, clients of the firm in the example above i.e. who are engaged in a residential transaction, will not need to be told of the potential risks, or give informed consent under the rules, for the firm to act for both buyer and seller. We believe that all clients should be made aware that their solicitor intends to act for buyer and seller, and that informed consent from both parties is obtained if this is to be the case.

The issue of acting for buyer and seller appears to have been dealt with differently by different approved regulators. We are aware that the Council for Licensed Conveyancers allows its members to act for both buyer and seller in a transaction. This creates a regulatory disparity which is likely to confuse clients and put the solicitors' profession at a disadvantage. Assuming that it is the SRA's intention to continue to prohibit the practice of acting for buyer and seller, it is unclear how the two regulators have come to their differing views on the risks posed by acting in identical circumstances and the evidence they have used to justify that position. We believe this is an area that needs further consideration, and urge the SRA to consult separately on this issue.

Exceptions to outcome 3

We have concerns regarding the drafting of the exceptions. We are concerned about the definition of 'substantially common interest' within outcome 4, as this definition appears to exclude any transaction involving land. This would mean that solicitors would not be able to act in a conflict situation, using the exception in outcome 4, where the transaction involved any transfer of land or leases. This is much more restrictive than the current rules. We believe that the definition should be redrafted.

Both outcome 4 and 5 exclude transactions where the 'sole' purpose is the conveyance of land. A more appropriate word might be 'primary' or 'principal' to avoid creating a loophole whereby additional frivolous elements are included in the transaction to defeat the purpose of the outcome. The definition of 'conveyance of land' should be widened to include charges.

The indicative behaviours provide no details on the use of information barriers or so called 'Chinese walls'. It would be helpful to provide information on this issue within the indicative behaviours to provide a measure of guidance to the profession as to how the SRA sees such mechanisms interacting with the provision of Chapter 3, particularly in terms of assessing whether a 'significant risk' of a conflict arising is likely. Similarly there is no information on what should happen if a conflict arises. This should also be included.

We note that solicitors will now be able to act in conflict cases where clients are competing for the same objective, provided that they meet certain requirements. We believe that this will allow solicitors to act in a wider range of cases and welcome this change.

Own Interest conflicts

We note that the proposed new Handbook prevents solicitors from acting where their own interests conflict, or where there is a significant risk that they will conflict, with a client's interests. Currently, the Code of Conduct provides detailed guidance regarding the issue of own interest conflicts. This guidance should be maintained within the new Handbook.

Indicative behaviour 2 requires that you have a system for identifying own interest conflicts which takes into account the appointment of you or a member of your family to a public office. We think that the definition of family should be clarified.

Conveyancing provisions

The current rules do not provide any clarity regarding when a solicitors may act for a lender and buyer. Currently solicitors may act for a buyer and lender, despite their differing bargaining powers and the risk of conflict, where there is a standard mortgage arrangement in place. This is, in part, because the current Code includes detailed requirements and a standard certificate of title. This does much to redress the position of the buyer. This section of the Code came about as a result of lengthy negotiations between the Law Society and the Council for Mortgage Lenders to reach a mutually acceptable basis upon which standard conflicts could be managed. We are concerned that the new Handbook no longer contains these provisions and would urge that they be reinstated.

7. Do you have any comments on the application of the financial services rules to ABSs?

We support the extension of these rules to ABS.

8. Do you have any comments on the revised Authorisation Rules?

Rules

The Law Society does not believe that the current rules adequately set out tests for financial background, knowledge and understanding of ethics for non-lawyer owners and managers. It is vital that these matters are fully considered and brought within the scope of the authorisation process.

Further we consider that protection of the public is paramount and the authorisation rules form a key part of the necessary protection of the public. However these rules form only part of the necessary system and must be looked at together with all other relevant regulations. We believe that a comprehensive policy statement and review is necessary.

We are not satisfied regarding the definition of ‘material interest'. We believe that further consideration is needed regarding the threshold at which a non-lawyer manager or owner is scrutinised. We consider that, in view of the practical impossibility of identifying owners acting in concert, that the level should be set below 10%. This is necessary to reduce the risk of a small group of individuals with "non-material" interests working together to control a law firm

We note that rule 6 has been slightly altered. However, we do not believe that our concerns regarding access to justice have been adequately resolved through these minor changes. The licensing rules are required to specify, not just that the SRA will tackle the issue, but also how the SRA, as a licensing authority, will take account of the objective of improving access to justice. As noted previously, we do not consider that the rule as it stands fulfils this provision. Further we believe that the other regulatory objectives should be supported by requirements detailed in the authorisation process.

We note, that when determining an application for authorisation, the SRA will take into account, not only any relevant information regarding an employee, manager or interest

holder but also any person they are related to; acting together with; or are affiliated with, who the SRA believes may have influence over that person in their role. We have serious concerns over this provision for a number of reasons. There is a lack of clarity in the provision about what an 'affiliate' might be and what the SRA would consider 'influence' to be. Given the potentially wide nature of this provision we believe that this is an area where the SRA would need to provide further clarification and guidance. Considering the position and interrelationships of employees of a large firm could prove a time consuming and expensive task, let alone those that might influence them. In most, if not all cases, this would be a wholly disproportionate response to the risk posed, and therefore we assume that the SRA does not plan to do this. We are therefore unclear how the SRA plans to take this issue into account when making a decision. Significant further consideration needs to be given to this provision and how it will work in practice. We would welcome a dialogue with the SRA on this issue.

In respect of rule 8, we still have concerns about the number of reporting obligations that the SRA proposes to place on solicitors and compliance officers. These obligations seem to overlap in places and require a considerable amount of information to be reported. We believe that this is likely to lead to the SRA being overloaded with reports. In addition, having reporting requirements spread throughout the rules is unhelpful and unlikely to encourage compliance. The requirement at Rule 8(7)(c) appears disproportionate. While the SRA has provided guidance, in the form of a list of where such requirements can be found within the Handbook, it is essential to provide a summary of all the requirements in one place to help ensure compliance.

We note that rule 8 has been updated to clarify the duties of COLPs and COFAs. Further clarifications have also been provided in the guidance and within the SRA's policy statement. The guidance in the policy statement is more reassuring than the rule – setting out that COLPs will be expected ensure that firms put in place systems and controls for compliance and to oversee those controls but that ultimate responsibility for compliance remains with the governing body of a firm. However, this differs markedly from what many had envisioned after reading the rules. This is an area which requires clarification.

The SRA requires that compliance officers are of sufficient seniority and have sufficient responsibility to carry out their role. However, we believe that where a person is refused for the role of a compliance officer, because of lack of seniority / responsibility, this should not lead to regulation 3 of the Practising Regulations being triggered.

The rules provide that a COLP must be a lawyer of England and Wales. As we noted previously, we think that this provision conflicts with the requirements of the Establishment Directive and therefore should be reconsidered. We do, however, recognise the importance of ensuring that any COLP has a good understanding of the regulatory arrangements for solicitors in England and Wales. We think that it is essential that any applicant is able to demonstrate this understanding.

Further, rule 8.5 (b) (i) states that, 'The *COLP* of an *authorised body* must take all reasonable steps to ensure compliance with…'. It would be helpful for guidance to be provided concerning what constitutes 'all reasonable steps' that a COLP is expected to undertake.

Broadly, we have concerns regarding the wide-ranging responsibilities placed upon compliance officers and particularly those placed on the COLP. A COLP is responsible for ensuring compliance with the terms and conditions of a licence, which are broadly drafted and include compliance with regulatory requirements and any other enactments. The COLP must also notify the SRA of any failure in compliance. It is

impractical for one person to have such a wide ranging responsibility and such an extensive remit will conflict with other statutory roles. The notification requirements have no element of 'materiality' and we believe that they will be burdensome to both compliance officers and the SRA. The role of COLP goes further than that of HOLP, as set out in the Legal Services Act 2007. However, the SRA have provided no justification for the extension of the role. The SRA should ensure that the role of the COLP is limited to an extent that it is practical to fulfil.

The SRA must give 28 days notice of the imposition of conditions on an authorisation that has already been granted. However, there appears to be no requirement for the SRA to provide reasons. The Regulators' Compliance Code requires that regulators provide clear reasons for taking formal enforcement action. We believe that the SRA should provide the reasons for the decision to take any formal action against a firm, including the imposition of conditions. We are disappointed that the rules have not been updated to ensure that this occurs. Failure to provide reasons for taking formal action leaves the SRA open to questions about the transparency of its processes.

As we noted previously, the wording of rule 20 on the 'notification of third parties' has been changed considerably from the original regulation 6. We had hoped that the SRA might provide some commentary on the reasons for this in the latest consultation. However, we have been provided with no justifications for the considerable change in scope. For this reason our previous comments stand. We believe that the word 'publish' should be removed. We also believe that the list of parties currently in place is comprehensive and therefore see no need for there to be a catch all of 'any persons' included in the rule.

If an employee fails to comply with the SRA's regulatory arrangements then this can lead to revocation or suspension of their employer's authorisation. We do not think that an employee's failure to comply with regulatory arrangements should mean that a firm's authorisation is revoked. If the body did not put in place appropriate governance arrangements to help ensure the employee's compliance, or systems to identify non-compliance, then this may be a credible reason for revocation. However, this appears to be covered by 22.1(a)(xii). We cannot envisage a situation where it would be proportionate to revoke the authorisation of a firm for the acts of an employee alone.

In general we found that the new guidance is useful although, as stated above, further guidance on the reporting requirements would be helpful. We noted that the guidance for rule 8.2 suggested that firms should analyse and monitor the effectiveness their compliance arrangements before applying for authorisation. As firms will be unable to operate without authorisation, firms may be limited in the type of monitoring they can do pre-authorisation.

9. Do you have any comments on the proposed approach to reporting and notification?

As we stated in our previous consultation response and above, we believe that the current plethora of reporting obligations within the rules is confusing and is likely to lead to duplication in reporting. The notification requirements should form a distinct section of the Handbook, which would provide clarity and make any duplication more apparent.

The lack of materiality in relation to most of the reporting requirements will mean that a large amount of information will be reported. This will be costly and burdensome for both the profession and the SRA. We are concerned that so much data will be reported that it will be impossible for the SRA to analyse and interpret it in an efficient

and effective manner. We believe that an element of materiality should be incorporated into the requirements, and guidance should be provided on what should be reported.

The consultation document provides limited information about the SRA's data requirements and thus it is difficult to respond fully to this portion of the consultation.

We note the plans for self-assessment and believe that this has the potential be a valuable tool for regulation. However, regulated entities can often seem compliant 'on paper' while in practice they are not. Thus, data supplied in this way will need to be used in combination with other verified data. We understand that some of the self assessment data can be used for benchmarking. However, we believe that for benchmarking to be useful, the data will need to be put in context and this is likely to be difficult to achieve.

We agree with the tests to determine what data should be required of firms, set out by the SRA in its consultation document. We believe that there should always be a justification for collecting data. The consultation paper provides little information about the thinking behind the data that the SRA has selected for the examples provided. We hope to see a clear summary of the thinking behind selecting data and the impact assessment of collecting such data. The SRA should also look to other sources of data before asking the regulated community. For instance, data on complaints will be available from the Legal Ombudsman, thus, there should be no need to ask firms for this information.

While the tests are useful when deciding if it is worthwhile collecting the data, consideration also needs to be given to the practicalities of doing so. The SRA will need to give solicitors sufficient notice of the data it plans to collect and the format required, to ensure solicitors are able to provide it. In general, the SRA should consult with solicitors on the data it plans to collect, to ensure that it is feasible to do so.

10. Do you have any comments on the changes to the SRA Practising Regulations?

As noted above, we believe that, where a person is refused for the role of a compliance officer because of lack of seniority / responsibility, this should not lead to regulation 3 of the Practising Regulations being triggered.

Also, as noted above, we do not believe that authorisation should be withdrawn from a sole practitioner because of the actions of an employee.

11. Do you have any comments on the proposed changes to the SRA Practice Framework Rules?

We are concerned about the changes to the rules which will mean that in-house lawyers can no longer offer reserved legal activities, *pro bono*, to the public. *Pro bono* work carried out by solicitors allows many people access to justice that they might otherwise be denied. We note that the SRA hope to be able to resolve this issue with the LSB. The Law Society would like to extend its support to the SRA on this matter.

We note that the current exception allowing in-house lawyers to provide legal services to members of their association has been redrawn. While we do not want to see such a provision being abused, we are concerned about the impact that the changes might have. We would hope that the SRA would provide further information on the impact it expects the changes to have on the provision of legal advice.

In general, we believe that guidance is helpful. However, guidance note (iv), under in-house practice, lacks clarity. We are unclear who would be considered a 'senior legal adviser' and are unsure how practical it will be to have a requirement for direct access placed in an employment contract. We are also concerned that the guidance sets out that an in-house lawyer 'must' have 'direct access'. If this is the case it should be included in the rules.

12. Do you have any comments on the proposed changes to the SRA Recognised Bodies Regulations?

We do not have any comments on these changes.

13. Do you have any comments on the revised SRA Disciplinary Procedure Rules?

Rules

We are concerned that the rules have been updated to allow adjudicators to request any additional information. This power will allow adjudicators to request full disclosure of all documents regardless of their relevance to the decision. If the SRA wishes to gain the power to require full disclosure then this should be consulted on separately, with full details of why the power is needed and the impact the SRA expects the changes to have. This is not the only example within the consultation where the SRA has sought to extend powers using widely drafted 'catch all' clauses. In most cases, there has been no justification for the extension in powers included within the consultation or any attempt to assess their impact. The powers appear to make, what is already an extremely complex regulatory system, even more so and to add to uncertainty. We believe this lacks transparency. If the SRA believes that it needs additional powers to regulate solicitors effectively it should be upfront about the additional powers it seeks and how it intends to use them.

We welcome the SRA's plans to take into account financial means when imposing the unlimited fines. However, we do not believe that such a system needs to be applied to recognised bodies, where the fines are limited by the rules. We also do not believe that solicitors should be forced to provide information on their financial status. It will be in a solicitor's best interest to do so, to ensure that the fine is proportionate. However, they should not be forced to provide personal financial information where they do not wish to do so.

We note that the SRA has taken into account some of our previous comments when redrafting the rules. However, there remain some unresolved issues. We would hope that the SRA will take on board the comments from our last response regarding the disqualification of the COLP and COFA. As we noted previously, disqualification as a COLP or COFA could have very serious consequences for a sole practitioner or a partner of a small firm as, if there is no replacement, they will automatically be deemed not to be authorised. The SRA has noted this in its consultation paper. However, it is not clear what has been done to resolve this issue. We do not believe that the rules should allow for a secondary route for a smaller firm's authorisation to effectively be revoked. This would seem to us to be unfair, to be disproportionate and to lack transparency.

In our previous response, we also noted that condition (1)(a)(iii) was circular as, in order for the SRA to make a finding or disciplinary decision it must have found that a person has failed to comply with their regulatory or professional obligations. We believe this condition should be clarified or removed.

We have raised concerns about the SRA's 'fast track' process on several occasions. These concerns are made even more pressing by the SRA's policy of publishing prosecution notices. We hope that the SRA will provide clear and detailed criteria about when it uses this process.

Review Criteria

The criteria for imposing a financial penalty set out in appendix 1 have been updated to reflect the SRA's move to a more proportionate enforcement approach. In general we welcome the changes that have been made. However, we are concerned that some of the criteria relate to the admission of guilt. There will always be 'grey areas' regarding regulatory requirements and a solicitor may consider that they, to the best of their knowledge, have complied. The SRA should not be adverse to solicitors putting forward arguments about why they consider that they have complied nor should it punish solicitors for doing so.

The Law Society wrote to the SRA on 14 April 2010 regarding its publication policy. Having a publication policy should not be confused with complying with the regulatory principle of transparency. Transparency is a much wider concept involving:

- openness in dealing with solicitors and clients and
- openness about processes, procedures and policies.

We have serious concerns about the current policy, in particular regarding the publication of prosecution notices. These notices do not necessarily relate to solicitors who have had any regulatory decision made against them; the decision has merely been passed onto another authority who has certified that there is a case to answer. More worryingly, the information supplied is not updated to reflect either changes in the charges or the eventual outcome of the case. This does not appear to be in keeping with the principle of transparency.

Given the intention, in future, is to use conditions on authorisations and practising certificates to help ensure compliance, rather than as a tool to prevent solicitors practising, we believe that the publicity policy as it relates to conditions should be updated. We see no reason for conditions such as those relating to attendance at training courses to be published. If the SRA is satisfied that a solicitor is fit to practise (as evidenced by their issuing of a practising certificate without limitation on the manner and scope of a solicitor's practise) there can be no public interest in publishing these types of conditions. The Law Society believes that only conditions relating to limitation of a solicitor's right to practise should be published. These should be published at the time the condition is applied and removed when the condition is removed - without a notice to say that it has been removed being published. We see no reason why it is in the public interest to continue to publish a decision to impose a condition after the SRA has seen fit to remove the condition and presumably deemed the solicitor fit to practise without limitation.

In general, we welcome the review criteria for disqualification from authorised roles set out in appendix 3. However, we are concerned that disqualification is being seen as a potential deterrent. The overriding consideration should be the suitability of the person to remain in the role. The SRA may need to prevent someone from acting as a COLP because they lack the seniority necessary to fulfil the role. This should not be a disciplinary issue. We do not believe that disqualification should be seen as a penalty akin to striking off or be used as a deterrent. We also note that most of the criteria relate to situations where misconduct has occurred, however, the powers allow

disqualification even where misconduct has not occurred. We hope to see more detailed criteria covering situations where there has been no misconduct, if the SRA plans to use disqualification powers in such cases.

14. Do you have any comments on the SRA Cost of Investigations Regulations?

The Society agrees that the costs of investigations should in general be borne by those found to have committed acts of misconduct. We strongly support the SRA's request for a section 69 order which will give it equivalent cost recovery powers in respect to ABS as it currently has for non-ABS.

15. Do you have any comments on the changes which we have made to the regulations concerning training, admission and rights of audience?

The structure and format of new regulations is clear. With regards to the changes of substance, outlined in the consultation paper:

Removal of age criteria for eligibility to attempt the Common Professional Examination (CPE)

We see no reason to continue to impose an arbitrary age requirement on individuals who wish to sit the Common Professional Examination (CPE), and as such we are supportive of the removal of the age criteria. However, we are concerned that the definition of 'mature student' does not provide adequate guidance to individuals about the standard of 'general education' expected by the SRA. The SRA must be able to define what standard it would consider sufficient as a base line, for example, whether it is GCSE or A level, or whether a sufficient standard would have to include English. We feel that further explanation of this definition is necessary to provide individuals with more certainty about their eligibility to be considered a "mature student".

Removal of age requirement from "qualifying employment" definition

The consultation paper states that the SRA proposes to remove the age limit from the definition of 'qualifying employment' within the new Training Regulations. However in the definition of 'qualifying employment' in the Part 1 – Qualification Regulations, the 18 year age specification remains. We assume that this is an oversight. We are nevertheless supportive of the removal of this age specification, given that the Institute of Legal Executives (ILEX) definition of the same term does not specify an age at which the qualifying employment must be undertaken.

Amendment to the point at which Exempting Law Degree students must apply for student enrolment

We support this proposal.

Amendment to the validity period of certificates of student enrolment

We support this proposal.

Additional requirement on providers of training contracts to check potential trainees' student enrolment

The proposal to impose an additional requirement on providers of training contracts to check potential trainees' student enrolment seems reasonable and proportionate. We do question how far the training provider is expected to go to check student enrolment.

The SRA should make it clear whether it expects that sight of the certificate of enrolment is enough, or whether the provider must check with the SRA.

Additional regulation to govern termination of training contracts arising from case law

The SRA proposes to introduce additional regulation to reflect recent case law governing the termination of training contracts. The new provision states that the training contract can be terminated if "the training establishment business closes or changes so much that it is not possible to properly train you". While we recognise that this provision is in keeping with case law, we would urge the SRA to provide more guidance on the types of changes in the business that would justify the termination of a training contract. This would provide more certainty to trainees and businesses, and prevent this provision being abused.

Amendment to the Professional Skills Course (PSC) and training contract commencement requirements

We support the proposal to amend the Professional Skills Course (PSC) and training contract commencement requirements. This will allow students to take advantage of the greater flexibility of the new Legal Practice Course.

Addition of exemptions from LPC subjects

We are supportive of the proposals to allow exemptions from LPC subjects based on accreditation of prior learning, subject to the reservations that we outlined in our response to the SRA's separate consultation on this issue. We hope that the SRA will take these issues, and the issues raised by others who have responded to this consultation, into account before finalising the new Training Regulations. We are supportive of the additional proposal for a five-year limit on the age of qualifications.

Specific comments on the revised regulations are as follows:

Annex F5 – Training Regulations [2011]

Qualification regulations

As outlined above, we think that the SRA should provide more guidance on the definition of 'mature student'.
Regulation 18(5) states that the professional qualification relied upon for the exemption application should be at the "same level as that of the LPC". As with the definition of 'mature student', we feel that more guidance is required as to what levels of academic attainment are being referred to, and what level the LPC is currently classified at.

As we have previously stated, we are supportive of the increased flexibility provided by the disengagement of Stage 1 and Stage 2 in the new LPC, and the variety of study and training opportunities that this provides. We appreciate that this created a number of regulatory issues in relation to the training contract, which the SRA now appears to have resolved. However we feel that the guidance to Regulation 21 requires further clarification, in order to take into account the option to extend the training contract if additional time is needed to satisfactorily complete any outstanding qualifications, as allowed by Regulation 20(2)(ii). The guidance allows for re-assessment during the period of the training contract, should the trainee fail to pass any Stage 2 assessment. It also states that the training establishment will apply to the SRA for termination of the training contract should the trainee not pass Stage 2 before the end of the training contract. However the guidance does not seem to take into account the provision in

Regulation 20(2)(ii) for the training contract to be extended, in order for the trainee to complete their qualifications. It may be that the SRA does not in fact wish for this to occur in relation to full-time training contracts, however the guidance should be amended to reflect this, and to be reconciled with the Regulation.

Training provider regulations

It would be helpful to refer to the sample training contract record available on the SRA website in the guidance to Regulation 6.

SRA CPD regulations

We have no comments on these Regulations.

Annex F6 – Admission Regulations [2011]

We have no comments on these Regulations.

Annex F7 – Qualified Lawyer Transfer Scheme Regulations [2011]

We have no comments on these Regulations.

Annex F8 – Higher Rights of Audience Regulations [2011]

The definition of 'trainee solicitor' in these Regulations should be amended to be consistent with the definition of the term found in the Qualification Regulations: "any person receiving workplace training with the express purpose of qualification as a solicitor, *at an authorised training establishment, under a training contract…*". We have no further comments on these Regulations.

16. Is the SRA Suitability Test a robust, clear, transparent and fair assessment for members of the profession and authorisation as role-holders in ABSs and RB?

The overarching purpose of the suitability test is to minimise the risk of unsuitable owners causing harm to the public and the reputation of the English and Welsh legal system. Achieving this aim is essential in the public interest – it also benefits all entities regulated by the SRA, thus new owners who are serious about their duties will understand the need for a comprehensive test.

Requirements of the test

The Law Society is concerned that part 1 of the Suitability Test might cover speeding or parking offences. We believed that this would lead to the SRA receiving a large amount of information which would have a limited bearing on a person's fitness to become or remain a solicitor. The guidance should make it clear that these types of offences do not need to be declared.

We do not believe that County Court Judgements should always be seen as a bar to entering into or remaining in the profession. The SRA should be proportionate when considering whether a CCJ should prevent a person from entering the profession.

An important indicator of a potential owner's suitability is how they have behaved in other regulatory environments. If the SRA uncovers evidence that potential owners have consistently breached, for example, Health and Safety requirements, then SRA

would have strong grounds to consider them as being unfit to own a law firm, as they will have been shown to fail to take their legal responsibilities sufficiently seriously. We would appreciate an explanation as to how the SRA plan to investigate such matters.

While, as noted above, we recognise that the SRA does need to consider regulatory history when assessing suitability, the Law Society is concerned about the proportionality of the section on regulatory history. We believe that the presumption of refusal because a person has previously breached regulatory requirements may be disproportionate, if breaches are minor and have not occurred consistently. It also appears to provide the SRA with a mechanism of 'striking off' solicitors who have been in breach of the regulations without the due process of going to the SDT.

The current test refers to the relations and affiliates of mangers, owners or compliance officers. As noted above, this may have equality and diversity implications. It is also unclear what the definition of 'affiliates' is or how the SRA would gain evidence about an applicant's affiliates. The Law Society is unsure whether this part of the test is a substitute for the requirement placed on a licensing authority to have regard to an owner's associates or an additional test.

It is important to note that the Law Society does not consider that it can comment fully on the Suitability Test without further information about all requirements or tests that might be applied to authorised role holders and, in particular, to owners. We believe that a comprehensive policy statement is necessary.

Equality and Diversity issues

The Law Society has previously raised concerns with the SRA about the inclusion of mental health issues or addiction to alcohol or drugs as criteria that are taken into account when assessing character and suitability. In the current consultation paper, the SRA notes that these issues will not of themselves be grounds for failing the Test, however they will still be "taken into account when considering an individual's overall suitability and the public interest." This statement is further explained in the Equality Impact Assessment, which notes that there may be cases where a person's "physical or mental health may be relevant" when the SRA is evaluating a person's conduct that has been cause for concern. Issues of this nature could be "considered as either mitigating or aggravating factors."

There is no legal requirement to disclose a disability, including a mental health condition. The SRA's explanation of how these issues will be taken into account implies an inappropriately negative view of mental health issues and gives an impression of doubt as to whether someone with such issues is fit to practice.

Unless an actual issue has occurred of which the SRA needs to investigate, the SRA should not need to take mental health or addiction into account. We therefore do not agree that these factors need to be considered in the public interest. If a person has passed exams and undergone training to become a solicitor and managed their mental health issue effectively, it would seem discriminatory to consider failing the Suitability Test on the grounds of public interest. Many people manage mental health conditions whilst in employment, and indeed, while holding senior roles in complex organisations. The SRA criteria should concentrate on the management of a mental health issue when it occurs rather than trying to build it into the Suitability Test, no matter how qualified the reference to mental health is.

While the approach set out by the SRA in itself may not be discriminatory, it would be open to challenge and would not provide a best practice approach to managing mental

health. The context of the text should encourage disclosure, reassure that disclosure will not affect a person's ability to pass the Suitability Test and have some means of capturing the steps taken to manage the condition, such as a care plan drawn up by the individual which expresses the steps that need to be followed if and when they become ill during the course of their work as a solicitor.

The approach currently being proposed by the SRA is a medical model approach which is prone to problems when considering equality legislation, primarily because it assumes that the disability is a problem. A social model approach, described above, would be far more effective in encouraging disclosure and would be less open to challenge under the disability provisions contained within the Equality Act 2010.

The SRA is right to have taken mental health issues and drug and/or alcohol addiction out of the list of issues considered as part of the Suitability Test. However, if these issues are indeed to be taken into account as part of their assessment of conduct, this should be made clear in the Test itself. It is vital that the SRA clearly outlines exactly what issues they will take into account when assessing character and suitability, how they propose to take these issues into account (i.e. in this case, as evidence to be taken into account by the SRA where a disclosure has been made) and what weight they propose to give to these issues.

We are also concerned by Clause 10(viii) of the test, in relation to applications by individuals seeking to become an authorised role holder. This clause states that the SRA may refuse the application if:

"we have evidence reflecting on the honesty and integrity of a person you are related to, affiliated with, or act together with where we have reason to believe that the person may have an influence over the way in which you will exercise your role".

While we recognise that the SRA must have regard to an owner's associates when assessing their suitability we believe that this test goes much further than is necessary. We do not consider that this clause should be included in the Test for all authorised role holders. We also believe that this part of the test raises equality and diversity issues which do not appear to have been considered fully. The Equality Act 2010 specifically introduces the concept of discrimination by association and perceptive discrimination and the proposed text in the Test could cause problems in this context. Rather than relying on 'affiliation' the text should rely on strict evidence criteria and should also clearly define what the SRA mean by 'influence' in this context. 'Perceiving' undue influence related to a protected characteristic would also be problematic.

What the text seems to be trying to discern are conflicts of interest or the potential for blackmail or other similar activity, however this leaves the SRA at risk, particularly in terms of:

- Association with an ex-offender with a protected characteristic;
- Solicitors affiliated with other solicitors who have been subject to disciplinary procedures which may be the result of an undisclosed disability;
- Other people with protected characteristics that the SRA believes to have some undue influence over a solicitor.

17. Do you agree with our proposal to apply the existing compensation fund to ABSs?

The Law Society understands that on many levels having a single compensation fund would be easier to administer, but does have several concerns to this approach.

We accept that the overall risk profile for most varieties of ABS may not over time be radically different from traditional law firms, assuming the fitness to own provisions are effective. However, we are not yet convinced that they will be. There is considerable risk to the fund from large scale failure and SRA have no experience of regulating large scale and unfamiliar forms of ABS which will be able to operate without any fetter on their size or scale.

In any event, different considerations apply to Multi-Disciplinary Practices (MDPS). We do not yet have full details of the SRA's proposal regarding how it will regulate MDPs, and have yet to be consulted on this matter. The detail contained in the consultation paper is not sufficient.

We support the SRA's proposition that work outside the scope of solicitors' services would in principle not be covered by the Compensation Fund, but we would like more information on how this will operate in practice. There is a real risk that this approach could create an incoherent and unconvincing regulatory approach. There is a strong chance that there will be uncertainty about the boundaries between work which the SRA regulates and work it does not. Naturally, and understandably, there will be strong pressure on the SRA to err on the side of clients, and thus in practice to apply the protection of the Compensation Fund even to work which the SRA intended to exclude from cover.

If there is a significant risk that the compensation fund would be vulnerable to claims and pressure of the sort described above, there is a strong argument for requiring the SRA to set-up a separate compensation fund for ABS.

This is a matter the Law Society takes very seriously. It could potentially affect the Council's willingness to apply to be designated as an ABS licensing authority, or the terms on which it would do so. The consultation states that the SRA will take steps to mitigate the risks associated with MDPs but it does not contain enough details on the tools that will be used to do this for the Society to assess. We must therefore defer making a judgment on this question until fuller information about the SRA's intentions is available. We will need a proper period of consultation to consider the matter after we have seen details of the SRA's proposals.

18. Do you agree with our proposal to adopt the same compensation fund rules for ABSs, by extending the application of the existing rules?

Throughout this process, the Law Society has consistently emphasised the importance of clients of ABS firms having the same protection against losses caused by dishonesty or failure to account as do clients of non ABS firms. Adopting the same compensation fund rules for ABS is the most sensible way of doing this, but it may be necessary for a separate fund to be established in respect of ABS if the issues in regards to MDPs are not satisfactorily resolved.

The Law Society agrees with the SRA that ABS must ring-fence client money arising from SRA regulated activity in order to protect such money. We agree that it is not acceptable simply to treat all money held for clients in an MDP, where there are multiple regulators or professional bodies with different rules, in the same manner.

19. Do you agree with our proposal for the compensation fund to cover acts or omissions of owners of licensed bodies who are neither managers nor employees?

We agree with this proposal as it is important that clients receive protection no matter who is at fault. This question highlights the importance of having in place a robust suitability test for owners of licensed bodies and adequate risk assessment tools to identify potential problems early on before they become serious.

Furthermore, owners – even if not also managers – must take responsibility for the practices of their entity. The SRA must ensure owners are required to meet losses before considering using the compensation fund. There must be no abdication of responsibility to a separate but insolvent business when the parent company has the means to meet a claim.

20. Do you have any comments on our equality impact assessment and are there any additional equality issues that we should consider as we work further on the Handbook?

We are pleased to read that the SRA intends to closely monitor regulatory outcomes across all of the protected characteristics to identify any ongoing issues and the causes of these issues. We hope that the SRA will publish the results of its work in this area.

In relation to specific sections of the equality impact assessment:

Conduct of legal services

The SRA should go further to mitigate the potential impact on BME and female groups by providing additional support for small firms, to assist with compliance with new SRA rules and procedures. Any additional assistance due to the profile of small firms (BME and female majority) could be taken under the positive action banner. Historically, the SRA's procedures have disadvantaged BME and small firms in a number of ways and therefore a positive action approach could be justified.

SRA Account Rules

Disproportionate forensic investigations against BME and male solicitors, and solicitors over the age of 41, needs to be addressed further, as this has effects in terms of achieving entry criteria for accreditation schemes and PII premiums. Efforts should be made to hold consultations with these groups following implementation of the changes, to ensure no additional disadvantage occurs.

Specialist Services

BME groups and female solicitors are disadvantaged by a number of SRA policies and procedures, therefore any further disadvantage should be deemed as unacceptable. The accumulated disadvantages endured by these groups of practitioners should be a real concern for the SRA given its Public Equality Duty with regard to both gender and race, where there are obligations to foster positive relations. Introducing yet further practices which disadvantage these groups would be difficult to justify. SRA should therefore further assess these risks and consult further in the future to monitor impact.