

Consultation response

SRA: Regulating international practice

Overview

1. **The Panel's statutory remit means our interest is primarily focused on services provided in the consumer market to clients in England and Wales.**
2. **The SRA should seek to achieve the following consumer outcomes:**
 - **Open markets where consumers can choose between lawyers who compete to offer services designed to meet their individual circumstances;**
 - **Foreign lawyers permitted to practise in England and Wales are suitable and have the right knowledge and skills;**
 - **Consumers receive ethical and high quality advice from all SRA-regulated persons whoever they are and wherever their services are delivered from;**
 - **Consumers are adequately protected when dealing with foreign lawyers and have access to redress;**
 - **Consumers are aware of any differences in regulatory protections when dealing with foreign lawyers;**
 - **The regulatory regime is future proof and anticipates emerging risks; and**
- **The SRA's regulatory regime serves both the corporate and consumer markets well and does not favour one at the expense of the other.**
3. **Unregistered foreign lawyers providing non-reserved services should not face additional requirements than solicitor firms in England and Wales. However, the issues give greater urgency to the LSB's scope of regulation work. We would welcome the SRA developing a voluntary registration scheme. The SRA should also target action on: alerting consumers to the potential pitfalls and what they can do if something goes wrong; building a better evidence base on the market and risks to consumers; and developing links with international enforcement organisations. There may also be scope to make use of the Legal Ombudsman's voluntary jurisdiction.**
4. **A key consumer risk is poor quality advice, which may relate to technical competence, poor service, language issues and professional ethics. The SRA can learn from other sectors such as medicine, where the regulator has conducted research and is planning to give greater support to professionals.**
5. **The proposals on automatic recognition of titles coupled with suitability tests for Registered Foreign Lawyers and lawyers**

applying under the Qualified Lawyers Transfer Scheme are supported.

6. **We agree that the Handbook should apply in full to the overseas operations of solicitors firms providing legal services to clients back home, so that consumers have equivalent protections had such firms been based here.**
7. **Offshoring and onshoring may grow in the consumer market. The outsourcing of routine legal work can lead to cheaper prices without diminution of standards. The key risks are likely to be around data security. Domestic firms remain responsible to consumers for handling personal data safely and for standards of work more generally. There is a role for the SRA in rule-making, supervision and enforcement, alongside agencies such as the Information Commissioner.**

The proposals

8. The Solicitors Regulation Authority (SRA) has previously published a paper on the international challenges that it is facing and outlined the actions it proposed to take in order to respond to them. The consultation document sets out ideas on how the SRA Handbook should apply outside England and Wales and how the SRA might regulate international practice more generally.
9. The key proposals are as follows:
 - Narrowing the application of the Handbook to cover only those entities that are branches of a law firm or related to a law firm group that is headquartered in England and Wales;

- For these types of practices, a new approach based on a single, group level recognition which would cover all of the individual entities under that group – only the SRA principles to be applied;
- Reform to the Registered Foreign Lawyers regime in order to simplify the process of bringing new partners from different jurisdictions into SRA-regulated practices through automatic recognition of legal titles from other jurisdictions coupled with the application of suitability tests for individuals entering into ownership or management. Also to register foreign lawyers to enable them to accede to partnership where they cannot currently get recognition due to local circumstances;
- How the SRA intends to supervise and carry out enforcement in relation to entities under group supervision; and
- Discussion of issues concerning foreign firms for whom there is currently no explicit registration regime.

The Panel's response

10. The SRA's consultation paper is in the form of a Green Paper and the Panel's response is also in this spirit. We have focused on identifying the key outcomes that the SRA should seek to achieve for consumers and specific issues arising from the proposals.
11. Our statutory remit is to represent the interests of consumers in England and Wales. Therefore, whilst we commend the SRA for considering provision of legal services by home lawyers to overseas clients this is not within our purview.

12. The Panel represents a wide range of consumers, but we prioritise those who lack buying power in their dealings with lawyers and who are less able to give voice to their own interests. Much of the paper focuses on services purchased by corporate clients operating in global markets. Instead, our principal focus is on services delivered by foreign lawyers to individual consumers.

Key consumer outcomes

13. The Panel suggests the SRA seek to achieve the following consumer outcomes in regulating international practice:

- Open markets where consumers can choose between lawyers who compete to offer services designed to meet their individual circumstances;
- Foreign lawyers permitted to practise in England and Wales are suitable and have the right knowledge and skills;
- Consumers receive ethical and high quality advice from all SRA-regulated persons wherever they are and wherever their services are delivered from;
- Consumers are adequately protected when dealing with foreign lawyers and have access to redress;
- Consumers are aware of any differences in regulatory protections when dealing with foreign lawyers;
- The regulatory regime is future proof and anticipates emerging risks; and
- The SRA's regulatory regime serves both the corporate and consumer markets well and does not favour one at the expense of the other.

14. Our starting point is that consumers benefit from the global market place and the SRA should avoid protectionist measures. Foreign lawyers can bring new ideas and innovation that enhance competitiveness. Whilst it is important that all lawyers serve the diverse client base, foreign lawyers may bring specific expertise to serve the legal needs of our multicultural communities. Also, UK-based law firms can make use of global markets to deliver services more efficiently, for example through offshoring.

15. The risks to consumers are the opposite of these outcomes: unnecessary entry barriers limit choice and innovation; there are gaps in consumer protection; confusion about differences in protection; and consumers receive poor quality advice. In the sections below, we briefly discuss these benefits and risks in light of the proposals in the paper.

Unregistered foreign lawyers

16. The consultation paper discusses the position of foreign law firms providing legal services to consumers in England and Wales outside of SRA regulation. SRA regulation does not bite because the firms carry out non-reserved activities (although they are subject to general law). This could happen more often as developments in technology facilitate greater online delivery, for example automated documents such as wills. There is no need for such firms to have a physical presence in our jurisdiction.
17. This raises wider issues around the scope of regulation, which the Legal Services Board (LSB) is currently considering. In principle, foreign firms should not be regulated when this is not a requirement for

domestic firms. Indeed, such a step is likely to be contrary to competition rules as it would create an unlevel playing field by imposing additional entry barriers.

However, the current position is unsatisfactory because the existing list of reserved activities is an accident of history rather than based on a consumer protection rationale. Therefore, foreign firms may offer services, such as will-writing, where the evidence suggests regulation is justified.

18. We are concerned that consumers will purchase services from foreign firms being unaware they are based overseas or the extra difficulties this could mean should it become necessary to pursue redress. Our research indicates that consumers assume that all legal services are regulated.¹ There are lessons from the experience during the credit crunch of depositors with funds in UK branches of overseas banks. Customers were exposed to the compensation systems used by other countries, which they found difficult to understand and which offered inferior redress to that offered for UK banks. We note from the SRA's international challenges paper that there has been very little enforcement activity by overseas bars outside of their own jurisdictions.
19. Another dimension is detriment due to the actions of overseas law firms when the consumer is not the client. Citizens Advice has reported an example of a US law firm engaged by UK retailers as a civil recovery agent. Such agents pursue cases of low-value alleged theft by individuals by sending letters demanding a substantial sum of money as 'compensation' for their alleged shoplifting or employee theft, and threatening civil court action (and related

extra costs) if the sum demanded is not paid promptly. As the US firm is not actually regulated to practise law in the UK, it could not itself pursue an unpaid demand in the courts so uses a domestic law firm to act as its 'agent' in pursuing unpaid demands with further demand letters.² The SRA has acted against solicitors in this area, but its powers will be limited in relation to overseas firms.

20. The consultation paper suggests as options a foreign firm registration scheme involving provision of simple information to the SRA, or an authorisation scheme that would draw firms into the scope of domestic regulation. We see the risks to consumers as giving greater urgency still to the LSB's task of rationalising the list of reserved activities. As an interim measure, we would welcome the SRA pursuing a voluntary registration scheme for foreign firms. However, any measure with an element of compulsion would require further analysis of the risks to consumers and then legislation. This would also not resolve the competition law issues. Such a process may also be overtaken by the rationalisation of reserved activities.
21. The Panel would welcome action by the SRA in three areas. Firstly, alerting consumers to the potential pitfalls and the steps available to them if something goes wrong. Secondly, building a better evidence base on the market and risks to consumers. Thirdly, developing links with international enforcement organisations to enable sharing of intelligence and co-ordination.
22. There may also be scope to encourage foreign firms to make use of the Legal Ombudsman's voluntary jurisdiction, should this part of the Act be switched on. The

Legal Ombudsman will already have to plan for dealing with foreign firms with an ABS licence. Furthermore, EU proposals would open up the possibility of the organisation accepting cross-border disputes in future. Foreign firms may welcome the opportunity to enter the scheme in order to demonstrate their commitment to consumer protection, even if policymakers decide that additional regulation of their activities is unnecessary.

Ensuring foreign lawyers are competent

23. A risk to consumers is that foreign lawyers give poor quality advice to consumers. This may relate to technical competence, poor service or professional ethics. There is no reason why foreign lawyers should be expected to provide inferior advice by virtue of their being from overseas. However, there are specific risks: their qualifications may leave knowledge gaps, there may be language issues which make it difficult for consumers to understand the advice they give, and they may need support in adjusting to the cultural expectations and business methods operating here. The SRA must also ensure that its own practices do not discriminate against foreign lawyers.
24. The headlines of botched operations by foreign doctors are not representative of the typical standards of care that foreign doctors provide overall. However, the General Medical Council's data shows differences in respect to complaints about poor practice. Non-UK qualified doctors are more likely to receive "high impact" decisions at each stage of its fitness to practise process. These decisions relate to complaints referred for further investigation at initial triage by the GMC, the proportion

of complaints investigated that are subsequently referred for adjudication, and the proportion of complaints resulting in doctors being erased or suspended from the medical register. Independent researchers have suggested two possible explanations. One is that real differences exist in the fitness to practise of different groups of doctors who are referred to the GMC. A second is that the GMC's processes tend to discriminate against certain groups of doctors.³

25. We encourage the SRA to learn from other sectors, such as medicine, with experience of regulating overseas professionals. The GMC plans to commission further independent research to increase understanding both of referral patterns and its own processes, continue to work with groups representing overseas trained doctors, encourage a diverse range of applicants to apply to become fitness to practise panellists and provide equality and diversity training for all staff involved in fitness to practise work. It also intends to develop a basic induction programme which all doctors would have to complete before they practise.⁴

Registered foreign lawyers

26. The SRA's Registered Foreign Lawyers (RFL) regime recognises members of certain overseas professions as being sufficiently regulated in their home jurisdictions as to make it appropriate for them to be managers of recognised bodies. Once having passed the domestic route, a person may then seek to become supported by an English solicitor (or firm) as

a candidate for RFL status. They would then be subject to individual suitability tests.

27. The SRA's data suggests that RFLs mainly serve corporate clients, which is not our main focus. However, RFLs also serve the UK's immigrant populations as well as UK nationals living overseas and so impact on the consumer market. We see that the SRA cannot practically second-guess the suitable qualifications in each foreign jurisdiction. So, the proposals to replace the existing regime by giving more or less automatic recognition of legal titles coupled with the application of suitability tests – a shifting in focus from approving the title to the individual concerned – are a sensible step. The consultation paper is silent on what the suitability test will cover; we look forward to hearing details about this.
28. As RFLs do not practise English law, their technical knowledge in this respect is not an issue, although the SRA must ensure that foreign lawyers do not slip into unauthorised areas – an issue raised in the SRA's international challenges paper. However, RFLs will come from a variety of cultural backgrounds which may influence their practise methods. The SRA will need to be satisfied that RFLs conduct themselves according to the ethical and professional standards that they are expected to meet in dealing with clients. Therefore, there may be benefit in requiring prospective RFLs to take a course in ethics.
29. Another lesson from medicine is struck-off overseas professionals later found to have been in trouble with standards bodies in their own and other countries. This stresses the importance of the SRA having good

relationships with legal and non-legal regulators in other countries, in addition to carrying out its own entrance checks.

Qualified Lawyers Transfer Scheme

30. The Qualified Lawyers Transfer Scheme (QLTS) allows qualified lawyers who have followed the full route to qualification in a Recognised Jurisdiction to apply to become qualified as solicitors in England and Wales. All international applicants must apply for a Certificate of Eligibility, which enables them to apply to take the QLTS assessments. Applicants are tested against Day One Outcomes – the outcomes each solicitor who qualified via the domestic route is expected to have achieved at the point of admission as a solicitor. The tests cover technical skills and practical assessments. The process also involves English language testing. Upon completion of these stages, individuals can then apply for admission to the roll of solicitors. This involves a Suitability Test relating to the person's character, suitability, fitness and propriety and is assessed on information such as previous criminal convictions, financial mismanagement, dishonest behaviour and regulatory history.
31. As successful QLTS applicants will enjoy the full practising rights of domestic solicitors, the quality risks to consumers are higher than for RFLs. However, the SRA only proposes to give automatic recognition to overseas titles, i.e. the stage which leads to the Certificate of Eligibility. The QLTS assessments and the Suitability Test will remain. These are the most important parts of the application process as they test the candidate's skills and character. In light of

this, the Panel is comfortable with the SRA's limited proposals in this area.

Consumer protection

32. The SRA is proposing that the Handbook should apply in terms of the principles to all solicitors' firms or individual solicitors wherever they are practising. This means there are some outcomes which it would not seek to apply abroad because it feels that there is potential for conflict with local rules. However, there is a close read across from the principles to the outcomes so there is not much which would not already be captured under the principles. The main differences in approach would relate more to the reporting and compliance expectations on firms. In general, in the case of a large international city firm, the Handbook regime would not apply in full to the overseas branches (or linked LLPs) of a firm which has a practising address in England and Wales. However, in cases where firms are simply supplying services back here from an overseas location, firms would still need to obtain individual authorisation of offices and the Handbook would apply in its entirety.
33. Based on this understanding, the Panel would be content with these arrangements as foreign firms providing to the UK consumer market would be subject to a consumer protection regime which is equivalent to what would apply were they based here, with the same level of protection for clients. The key principles are to avoid gaps in consumer protection arrangements and achieve consistency in the expectations that clients can expect from providers wherever they operate from.
34. The SRA's international challenges paper highlights the increase in domestic law firms outsourcing elements of legal work to be carried out by a semi-trained or unlicensed lawyer working in a Legal Process Outsourcing (LPO) provider based overseas or in the UK. Typically, work may be outsourced to a captive law department, an external law firm or legal services support company.⁵ Although this practice is increasingly common in the corporate arena, there are also examples in the consumer market.
35. Although the work is outsourced, domestic firms remain responsible to consumers for the quality of legal service they deliver. There is no reason why routine legal work cannot be delivered efficiently overseas and result in cheaper prices without diminution of standards. Should this not happen, outsourcing does not affect the consumer's ability to seek redress, if necessary by going to the Legal Ombudsman. A greater emphasis on entity-based regulation from October 2011 also helps as it places more responsibility on regulatory office-holders.
36. However, of course, it is better to prevent quality problems than deal with them later. As the SRA has identified, this impacts on wider issues including the boundaries of reserved activities and the regulation of paralegals, both of which are the subject of major reviews. The SRA has choices to make around supervision, but there are also issues around supporting consumers in making informed choices as it is difficult for consumers to make value for money comparisons between providers.

37. There may be additional risks when legal work is outsourced, foremost of which in the consumer market is data security. Other markets where outsourcing in consumer markets is standard have exposed risks such as identity theft and sale of personal information without consent. Domestic law firms are subject to the jurisdiction of the Information Commissioner who may impose substantial penalties. The rules apply to the method used to transfer personal information to and from the data processor, as well as the work itself.⁶ There is a key role also for the SRA in rule-making, supervision and enforcement.

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¹ Legal Services Consumer Panel, *Quality in legal services*, November 2010.

² Citizens Advice, *CAB evidence briefing: Uncivil recovery, Major retailers' use of threatened civil recovery against those accused of shoplifting or employee theft*, December 2010.

³ General Medical Council, *The state of medical education and practice in the UK*, 2011.

⁴ Ibid.

⁵ Orijit Das, *Legal Process Outsourcing: transforming the legal landscape*, in Legal Services Board, *The future of legal services: emerging thinking*, 2010.

⁶ http://www.ico.gov.uk/upload/documents/library/data_protection/practical_application/outsourcing_-_a_guide_for_small_and_medium_businesses.pdf