

# Consultation response

## SRA: Architecture of change Part 2 – the new SRA handbook

### Overview

1. **The Panel is pleased that the Solicitors Regulation Authority (SRA) has taken on board some comments made in the Panel’s earlier submissions, particularly in relation to treating clients fairly and consumer engagement.**
2. **The Panel supports specific proposals in relation to conflicts of interest, the new suitability test and making Alternative Business Structures (ABS) subject to the same indemnity insurance requirements, as well as acts or omission by ABS owners being included within scope of the compensation fund.**
3. **The separate business should be maintained. Removing the rule would lead to consumers losing existing protections and create a regulatory environment that is even further out of step with consumer expectations than the present arrangements.**
4. **More detail on the proposed information requirements in relation to risk assessment is required. This includes how self-assessment will be verified and the associated compliance and enforcement regime.**

### The proposals

5. The Consultation Paper (‘the Paper’) outlines the SRA’s response to earlier consultations and puts forward a series of new proposals, including:
  - revised client care outcomes;
  - a new SRA suitability test;
  - new conflict of interest rules;
  - the SRA’s approach to requiring information and risk assessment;
  - additional consumer engagement measures;
  - maintenance of the separate business rule; and
  - increased regulation of advice provided by in-house lawyers to external clients.
6. The Paper states that further consultation on the SRA’s risk assessment approach will be undertaken in early 2011 and signposts a fundamental review of education and training.

### Panel’s response

7. The Panel has given substantive input on previous SRA consultations on outcomes-focused regulation. Our earlier comments on the Handbook remain, except where there have been positive changes as noted below. This response focuses on outstanding issues.
8. The Panel is pleased the need for solicitors to treat customers fairly is explicitly included

within the revised code as a core outcome. The omission of such a requirement was one of our key concerns with the earlier draft. However, we remain of the view that all the outcomes should be centred on the consumer. The Council for Licensed Conveyancers draft revised code has demonstrated that this can be achieved in a legal services context.

9. The Panel supports the proposals relating to consumer engagement, particularly the publication of outcomes that consumers can expect from a solicitor, which has similarities with our idea of a customer charter. The Panel would be happy to comment on a draft version. We have also been pleased to note the joint initiative with the Bar Standards Board (BSB) to establish a “legal services stakeholder network” to give the public a direct say in how legal services are regulated.
10. The Panel supports a number of specific proposals contained in the Paper, namely:
  - *Conflicts of interest rule* – the removal of the detailed conveyancing provisions from the conflict rules will allow the application of general conflict provisions to this practice area.
  - *Suitability test* – the strengthening of existing requirements and the application of the same test for all types of authorisation will provide stronger and more consistent consumer protection.
  - *Financial protection arrangements* – more detailed comments on this topic will be made through a separate submission to the financial protection consultation; however, the Panel supports ABS firms being subject to the same indemnity insurance

requirements, as well as acts or omission by ABS owners being included within scope of the compensation fund.

## Detailed comments on specific proposals

### Separate business rule

11. At present, the SRA uses the separate business rule to ensure that legal services supplied by a solicitor are regulated whether or not they are a reserved activity. The rule has potential benefits and weaknesses for consumers. On the one hand, the rule ensures that solicitors cannot avoid regulation by establishing a separate entity to conduct unreserved activities. However, in the context of ABS, if the rule imposes regulation which is not necessary to protect consumers, this could create barriers to entry that may limit competition.
12. The Panel considers that the separate business rule should be maintained. There are very few reserved activities, thus removing the rule would lead to consumers losing existing protections. Research by Professor Stephen Mayson<sup>1</sup> showed that the list of reserved activities is an accident of history rather than the consequence of a clear policy rationale. In this light, the argument that an activity is unreserved for a reason and so businesses should be free to decide how to deliver such services is unconvincing. Moreover, our research on quality assurance<sup>2</sup> found that consumers assume all legal services are regulated. Therefore, it would be unhelpful to create a regulatory environment that went even further against consumers’ expectations.

## Risk assessment and information requirements

13. The consultation paper and Policy Statement '*Delivering outcomes-focused regulation*' emphasise the importance of information collection to the SRA's risk assessment processes.
14. Initial details about information requirements appear sensible, particularly the use of diverse data types and sources. However, the SRA still needs to address two issues:
  - *The centrality of self-assessment* - The SRA is considering a self-assessment process similar to that used in Australia. Whilst self-assessment can bring benefits,<sup>3</sup> it relies on trust between the regulator and the regulated. Until this is well established, the SRA should employ some random verification of assessments to ensure accurate reporting. This should apply to all firms, separate from the SRA's other checks on firms which are considered more 'risky'.
  - *Compliance and enforcement* – it is unclear what incentives/disincentives will be used to encourage accurate information reporting. There should be clear penalties for firms which knowingly withhold information or provide incorrect information, and the SRA needs ways of finding out if this has occurred. The Australian model relies on a role similar to the Compliance Officer for Legal Practice (CoLP) taking personal responsibility for the veracity of the information provided. The Panel assumes the SRA will adopt a similar approach given that CoLPs will be

responsible for ensuring compliance with regulatory requirements.

15. The SRA may already be considering these issues; however it would be useful if more details were included in the forthcoming consultation on this matter.

## Education and Training requirements

16. The consultation highlighted the review of education and training, which has since been announced as a joint exercise by the SRA, the BSB and Institute for Legal Executives. The Panel would welcome the opportunity to participate.
17. The paper sets out a number of options for education and training; these should be considered as part of the wider review rather than decided now. The Panel's advice to the LSB on quality assurance raised a number of issues, including a need to review Continuing Professional Development (CPD) as a matter of urgency. The Panel hopes that the SRA will consider those recommendations which apply to approved regulators. We are pleased to note that the SRA has already committed itself to a review of its CPD regime.

## January 2011

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<sup>1</sup> Professor Stephen Mayson, *Discussion Paper: Reserved Legal Activities: History and Rationale*, 2010.

<sup>2</sup> Legal Services Consumer Panel, *Quality assurance*, 2010.

<sup>3</sup> See Parker, Gordon and Mark, *Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales*, *Journal of Law and Society*, Volume 37, Issue 3, pages 466–500, September 2010