LEGAL SERVICES CONSUMER PANEL

Consultation response

SRA: Multi-disciplinary practices

Overview

1. **There are fewer MDPs than expected and the Panel recognises the harm that too much regulation, for example due to an overly restrictive licensing approach, can cause consumers. This has to be balanced against the risks were the SRA to loosen controls too far, for example: consumers being misled about the level of the protection they are getting; complex business structures that exploit loopholes in the regulation so consumers fall through the cracks; or regulation being taken away when the risks suggest it should be preserved.**

2. **The SRA is right not to limit regulation within an MDP to reserved activities only and to maintain the principle that where authorised persons provide legal services within an SRA authorised entity that activity must be SRA regulated.**

3. **We are concerned that the SRA's plans for considering the suitability of external regulators may not be workable. There are issues around likelihood of fit, the highly variable quality of self-regulation, responding to changes at external regulators and avoiding regulatory arbitrage. The SRA is adamant that it will not be assessing the quality of external regulators, but consumers may be insufficiently protected if the SRA steps back while these bodies perform poorly.**

4. **We agree SRA regulation should not apply where the activity is incidental to the non-legal service. However, having a defined list of services where the exception could apply might be too restrictive; instead the SRA could guidance including a non-exhaustive list on what is more likely to be granted a waiver and rely on other elements of the proposals, namely disclosure rules and ensuring that services which are integral to reserved work are captured.**

5. **The proposals on multiple teams are supported; the suggested criteria make this a relatively low risk area.**

6. **The SRA's proposal that non-reserved legal activities integral to the provision of reserved services should continue to be SRA regulated is vital due to the scope for both consumer confusion and complex business structures. We can see some practical difficulties around the point in a case at which the service becomes integral that will need to be worked through, for example general legal advice escalating into litigation.**

7. **We consider that estate administration is often integral to probate as these can be sold as a seamless package. Further, the non-reserved elements of conveyancing should be treated as integral to the reserved instrument activities which relate to transferring land.**

The proposals

8. A multi-disciplinary practice (MDP), in the context of this consultation, is a licensed body that combines the delivery of reserved legal activities with other legal and other professional services.

9. The Solicitors Regulation Authority (SRA) has so far licensed fewer MDPs than might be expected and is concerned that some of the rules in its Handbook may have become an impediment to the effective licensing and regulation of some licensed bodies; and in particular, those rules that require all legal activity within an SRA authorised MDP to be regulated by the SRA.

10. The consultation proposes that where an SRA authorised ABS that is an MDP carries out non-reserved legal activities, the SRA may agree that these activities will not be SRA regulated subject to **all** the following conditions being met:

- The activity not being carried out or supervised by an authorised person
- The type of activity being subject to suitable external regulation
- The ABS having procedures in place to ensure that clients are aware that the activity is not SRA regulated
- The activity not being of a type that the SRA defines as integral to the provision of reserved services

11. The consultation also discusses the links between this issue and other emerging features of a more dynamic legal market, including the impact of any rules changes on the separate business rule, and clarifies the individual regulatory obligations of solicitors practising in authorised non SRA firms.

The Panel's response

12. What we want to achieve as a result of this consultation exercise, is:

- Consumers have a wider choice of providers because the legal services market is attractive to potential MDPs and regulation is proportionate to the risks
- An appropriate share of risk for consumers where necessary protections are preserved and there is always access to redress
- A transparent regulatory framework that minimises the scope for confusion and helps consumers make informed choices
- A joined up regulatory system that does not allow businesses to exploit loopholes so consumers are not protected
- In the longer-term, a consistent approach across licensing authorities which minimises risks of regulatory arbitrage

Q1.Do you agree with our analysis of the problems facing MDP applicants and the need to make changes?

13. One root of the current difficulties is that the list of reserved activities is an accident of history and is not based on any consumer protection rationale, such that regulation is not based on risk. Another root is the overall regulatory architecture in the UK which is organised on quite narrow sectoral boundaries which do not reflect the way in which modern businesses sell services to consumers who prize the convenience and other benefits of one-stop shops. Ideally, there would be action to tackle the root causes of the problems the SRA describes. However, the reality is that the current government has ruled out action in the near

future to redesign the regulatory landscape. Therefore, the Panel accepts that the SRA must do the best it can within an imperfect situation. It is unacceptable that the SRA has to make so many waivers to its rules to accommodate MDPs; this undermines the general rules that apply to all. Within this context, the Panel welcomes the review.

14. The Panel also acknowledges the harm (or absence of benefit) that consumers may suffer due to overregulation of MDPs. While we see evidence of some considerable innovation since the introduction of ABS, much of which has originated from new entrants, it is true that numbers of MDPs have been limited to date. Where there are excessive restrictions, this can limit the benefits to consumers that result from free and fair competition, such as greater choice and lower prices. This has to be balanced against the risks to consumers that might result if the SRA loosened controls too far, for example: consumers being misled about the level of the protection they are getting; complex business structures that exploit loopholes in the regulation so consumers fall through the cracks; or regulation being taken away when the risks suggest it should be preserved to protect consumers.

Q2. Do you agree with the proposed external regulation exception?

15. We are pleased the SRA has ruled out putting forward an option for consultation that restricts SRA regulation within an MDP to reserved activities only. Although such a policy would be possible under the Legal Services Act, as we state above, this would not be a risk based approach due to the reserved activities lacking any consumer protection rationale. Research for the Legal Services Board estimates that only 20% of all legal advice needs are met by regulated lawyers.[1] Research for the Legal Ombudsman estimates some 130,000 service providers in England and Wales operate outside the regulated domain.[2] Furthermore, the reserved activities account for a minority of the legal work conducted by solicitors and other authorised persons. If the ambit of regulation was confined just to the reserved activities, very little legal work would in fact be regulated – we do not consider this is what Parliament intended when it passed the 2007 Act.

16. We will address the four conditions in turn against the corresponding questions below. However, we support the SRA proposals to maintain the principle that where authorised persons provide legal services within an SRA authorised entity that activity must be SRA regulated. These proposals should be evaluated from a consumer journey perspective and we agree with the SRA's view that consumers who instruct solicitors for a legal service will rightly have the expectation that this brings with it SRA regulatory protection. If the reserved activities lack a sensible rationale, it is unreasonable to expect consumers to navigate through an irrational system. Research by the Panel[3] and the SRA[4] has shown that consumers expect all legal services to be regulated. Where legal services are provided by solicitors, we do not consider it possible – even with mandatory disclosure rules – to educate consumers about regulatory rules that confound such deep set assumptions.

Q3. Do you agree with the way that we propose to consider the suitability of external regulation?

17. By external regulator, the SRA means the regulatory arrangements of a body that exercises regulatory functions in relation to a particular description of persons with a view to ensuring compliance with rules (whether statutory or non-statutory). The SRA will not purport to judge the adequacy of other regulatory arrangements for the purpose for which they were created, but instead consider if these provide enough of a fit such that imposing SRA regulation would lead to unnecessary duplication and conflict and deter applications from MDPs. The SRA will expect to see minimum features to that external regulation in order for SRA activity regulation to be disapplied, in particular that the rules apply to all non-reserved legal activity and will be sufficient to ensure the ten SRA principles in its Handbook will be complied with.

18. If SRA regulation is to be disapplied, some assessment is needed of the alternatives. We agree that other bodies recognised under the Legal Services Act should be 'passported' in since the fit is clear and they have been externally approved as suitable. However, it is unclear how the SRA will assess suitability in other situations in an accurate and consistent way in practice. These questions need to be addressed:

- Another regulator may be a suitable fit initially, but this may change – how will the SRA keep its assessment up to date and how will it deal with situations where the regulator becomes an unsuitable fit, for example due to rule changes?
- How realistic is it that regulatory regimes designed primarily for other purposes will be a good fit with the SRA Principles (that are designed for the legal services setting)? How can the SRA assure consumers that other regulators will to a necessary extent supervise the legal activities that would otherwise have fallen within scope of SRA regulation?
- The SRA is careful to avoid suggestions it will assess the quality of regulation in other regimes, but frankly, this will be the key concern for consumers. Isn't there a danger that the proposals would offer consumers false assurance?
- By referring to non-statutory rules, the SRA implies that self-regulatory regimes may be suitable alternatives. However, the quality of self-regulation is highly variable – how will this be assessed in practice? (The Consumer Codes Approval Scheme may provide a good proxy indicator.) There is a risk of groups of businesses inventing trade associations to exploit the SRA's rules – how will this situation be avoided?
- Other licensing authorities may decide to introduce similar arrangements. The Legal Services Board has a role here, but could such regimes be consistent and avoid a race to the bottom?

19. We note the SRA will expect complaints procedures to be in place. In light of the ADR Directive creating an expectation that all consumers should have access to ADR (even though it will remain optional for traders to participate) we hope that being a member of a ADR scheme certified by the competent authority will be a minimum expectation set by the SRA.

Q4. Are there any other non-reserved legal activities (in addition to activity as part of human resources advice) that you consider we should allow outside of SRA activity regulation as minor and subsidiary to a non-legal service?

20. The SRA proposes that it should have discretion to allow types of activity to fall outside SRA regulation where the non-reserved legal activity is a minor and subsidiary part of that service. The type of client that would tend to access the advice will form part of the SRA's considerations. The SRA will create a defined list of any services where this exception could apply.

21. In relation to the overall approach, we agree it would be disproportionate to apply SRA regulation where non-reserved legal activities are incidental to the main service being offered. Otherwise the very broad definition of legal activity in the 2007 Act means that a large range of situations could be captured and many businesses could inadvertently cross regulatory boundaries. Differentiating between types of client in terms of their being able to make their own judgements about when to purchase specialist legal advice is also sensible, although applying broad labels could be misleading – a small business seeking employment advice for the first time could be just as vulnerable as an employee.

22. We suspect many of the situations when the incidental activity exception could arise will involve general legal advice. While the SRA has previously expressed a view that all legal advice should be regulated, the Panel has always reserved judgement and stressed the need to collect evidence to inform a cost benefit analysis given the potential negative effects on access to justice, as seen in countries such as the US that have strict unauthorised practise rules. Another example is activities that might be described as public legal education that may be provided pro bono; over-regulation may restrict services to low income groups.

23. While we support the proposal we are not convinced that a defined list of services where the exception could apply would be effective in practice and indeed could be too restrictive when based on risk. A better approach might be for the SRA to develop guidance including a non-exhaustive list on what is more likely to be granted a waiver. There should be transparency around these decisions to give stakeholders confidence this has been appropriately applied and the guidance could be periodically reviewed.

Q5. Do you agree with our proposal in relation to cases involving multiple teams?

24. This proposal relates to cross over issues when a non-legal professional wants input from a lawyer and vice versa. The SRA wants consumers to be clear which regulator is responsible in each scenario. The SRA's general position is that where a service involves both authorised persons and other professionals then any legal activity engaged in will be SRA regulated. However, where the authorised person is involved in a minor or subsidiary role in a mixed team and will not be providing a service identifiable to the client as a legal service, the SRA proposes that, where appropriate, this could be included in the external regulation exception. The SRA

Principles and certain sections of the Handbook will continue to apply to individual solicitors. This exception would be subject to the other conditions being met and all of the following applying:

- The involvement of the authorised person is subsidiary
- The authorised person is not providing reserved services in the same matter
- The client has not directly engaged the authorised person or legal team
- The authorised person is not carrying out a discrete piece of work that is identifiable to the client as a legal service
- The authorised person's work is not separately billed to the client
- The authorised person is not handling client money

25. The Panel's concern is that regulation should attach to the entity that assumes responsibility for delivering the service package overall, but solicitors should not escape personal accountability should their work fall short on quality or ethical grounds. Avoiding complex business structures that fall in a no man's land between regulatory borders is another concern. We also wish to minimise consumer confusion about their level of protection and where they should turn to voice dissatisfaction and concern.

26. Consistent with our approach to the last question, in the circumstances described, where the lawyer has a small role, the activity is not obviously legal in nature and there is no direct contract or payment between the lawyer and client, we consider this to be low risk and the SRA should avoid imposing its own regulation where suitable external regulation already exists. Therefore, we agree multiple teams could be included in the external regulation exception under the proposed conditions.

Q6. Are there any other non-reserved legal activities that should be considered as integral to the provision of reserved services?

27. The SRA proposes there are categories of case which are routinely so closely linked to the provision of reserved services that it would not be appropriate to have different regulatory regimes applying to different parts of the work within the same entity and these should continue to be SRA regulated. The examples given in the consultation are claims management, insurance companies, and debt collection and counselling work.

28. We agree with the SRA's central proposal. This is a high risk issue due to the scope for consumer confusion, and complex business structures exploiting gaps in the framework such that consumers are unprotected and/or unable to obtain redress. We do not consider it realistic or fair to expect most consumers, who tend to purchase legal services infrequently, to understand and deal with such technical matters.

29. The extent to which activities linked to litigation should always fall under SRA regulation is something we would like to explore further with the SRA. General legal advice on a dispute could quite easily progress to litigation, but this could draw too much activity within the regulatory net. Also, at what point during the delivery of a legal service on a dispute does an activity become integrally linked? As the Panel's

recent report on fee-charging McKenzie Friends illustrated, it can be unclear to providers when giving assistance and advice crosses into conducting litigation due to uncertainty about the meaning of 'ancillary functions' in the Act.[5]

30. One of the problems with the reserved activities is that they are narrowly defined. For example, the reserved instrument activities relating to transferring land do not cover all services sold as 'conveyancing' to consumers. This allows unregulated firms to carry out the non-reserved part of this service and sub-contract the reserved part to authorised persons. The Panel considers these sorts of situation to be activities that are integral to the provision of reserved services and so should be SRA regulated.

31. We disagree with the SRA that estate administration should be excluded from this category. Probate and estate administration services are commonly sold as a joined-up package/seamless service; any regulatory barrier may seem artificial to consumers. Further, advice given in connection with the administration of an estate could well, in our view, be treated as legal advice within the broad 2007 Act definition, since it relates to the application of the law.

Q7. Do you have any comments on the draft changes to the SRA Handbook in Annex A?

32. No

Q8. Are there any other ways in which you consider the SRA could act to make its regulation of MDPs more proportionate and targeted?

33. We have nothing to add to the detailed comments in response to earlier questions.

Q9. Do you agree with our analysis of the disadvantages of option 2?

34. Option 2 is to maintain the current position of regulating all legal activity within an ABS, and require all MDPs to either submit to dual regulation or to separate their businesses out and seek a waiver.

35. The Panel endorses the view that the opportunity costs of regulatory restrictions have to be weighed carefully alongside the benefits that can be accrued from removing or mitigating certain risks to consumers. The need to balance access to justice and consumer protection is the common thread running through the Panel's current work programme and making these trade-offs is a familiar challenge to us. As previously stated, the continual issuing of waivers is not sustainable and risks making regulation less transparent, so we accept the status quo cannot be maintained in future.

36. While agreeing with the SRA's analysis in this section of the paper, we would caution against over-reliance on information remedies. This has to be seen in light of research on consumer behaviour and the SRA's own research suggesting high levels of non-compliance with disclosure rules. Its compliance benchmarking exercise based on visits to 200 firms, found that most firms in the sample had four or five incidences of non-compliance and that '*the main area of*

non-compliance was around provision of information to consumers (costs, services, regulation and how to complain)'.[6]

Q10. What changes to the separate business rule do you think that we should consider for further consultation?

37. The Panel's view on the separate business rule, which has been closely aligned with the SRA Board's position, has been given in other documents.[7] We have no further comment to make at this time.

Q11. Do you agree that Recognised Bodies should be able to provide a wide range of professional services if they wish to do so?

38. 'Recognised Bodies' are traditional solicitor practices. The SRA's preliminary view is these practices should not have to bring in non-lawyer ownership and apply to become an ABS in order to offer a wide range of multi-disciplinary professional services.

39. The Panel's remit is confined to consumers of legal services so we unable to comment on non-legal services provided by solicitors.

Q12. Do you agree with our analysis in Annex B of the impact of the proposals in Option 1, and are there any other impacts or available data or research that we should consider?

40. We have nothing to add to our comments in response to previous questions.

June 2014

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1 BDRC Continental, Legal Services Benchmarking, June 2012.

2 Legal Ombudsman, Annual Report 2013-14.

3 Vanilla Research, Quality in Legal Services, November 2010.

4 GfK NoP, Consumer attitudes towards the purchase of legal services, 2010.

5 Legal Services Consumer Panel, Fee-charging McKenzie Friends, April 2014.

6 SRA, Attitudes to regulation and compliance in legal services, February 2012.

7 See: Legal Services Consumer Panel, Response to SRA consultation on its new Handbook, January 2011; Legal Services Consumer Panel, Response to LSB consultation on the regulation of non-commercial providers, July 2012.