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Dear Margaret

RE: THE ARCHITECTURE OF CHANGE PART 2 – THE NEW SRA HANDBOOK – FEEDBACK AND FURTHER CONSULTATION

The City of London Law Society ("CLLS") represents approximately 14,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees. This response in respect of the SRA consultation "The Architecture of Change Part 2 – the new SRA Handbook – feedback and further consultation" has been prepared by the CLLS Professional Rules and Regulation Committee (the "PR&RC"). The PR&RC is made up of a number of solicitors from twelve City of London firms who have specialist experience in the area of the regulation of the profession. The CLLS Land Law Committee and Training Committee (with the Associates Forum) also contributed to parts of this submission (see Annexes F and I of this document respectively).

This submission provides specific, in depth commentary on the various sections of the Draft SRA Code of Conduct (the "new Code"), namely:

(a) The five sections of the new Code (as set out in Annex C of the consultation paper):

a. You and your client (Annex A of this document)
b. You and your business (Annex B of this document)
c. You and your regulator (Annex C of this document)

d. You and others (Annex D of this document)
e. Application, waivers and interpretation (Annex E of this document);

(b) The new Code as it relates to land transactions (see Annex F of this document); and

(c) The Solicitors' Code of Conduct 2007 (the "current Code") and the new Code as they relate to overseas practice (see Annex G of this document).

The submission also comments on the SRA Authorisation Rules for Legal Services Bodies and Licensable Bodies (as set out in Annex F1 of the consultation document) (see Annex H of this document) and provides a response to some of the questions contained in the consultation paper as they relate specifically to legal education and training (see Annex I of this document).

In the commentary we have sought to address the key issues arising from the consultation. As to the implementation timetable itself, we trust that the SRA will ensure that it does not curtail proper consideration (and further consultation if necessary) of the points raised in this and other responses.

At points in this submission we refer to issues we raised in our 20 August 2010 response to the SRA consultation "The Architecture of change: the SRA's new Handbook", which we refer to here as our "August Response".

The CLLS also supports the Bird & Bird LLP 10 November 2010 submission to this consultation in relation to COLP and COFA related matters, a copy of which accompanies this response.

Yours sincerely

David McIntosh
Chair
CLLS

Annex A

Detailed comments on new Code (as set out in Annex C of the consultation paper)

Section 1: You and your client

We were pleased to see that many of the changes that we previously suggested be made to this Section (as well as, no doubt, the suggestions of others) had been reflected in the amended draft.

We have no new points to make on the amended wording contained in the current Handbook draft except as mentioned below.

We remain of the view stated in the August Response, namely that Principle 8 is so vaguely expressed – in particular the requirement to:

> "run your business or carry out your role in the business effectively and in accordance with proper governance and sound financial and risk management principles;"

that it seems to make poor performance of any particular role (i.e. not carrying out your role in the business "effectively") constitute a regulatory breach.

Furthermore, we believe that the entire Chapter could benefit from a clearer definition of what constitutes a "client". The current definition of "client", from Chapter 14, simply states that "where the context permits, [it] includes prospective and former *clients*". We believe that it would be preferable to specify throughout the Handbook what sort of clients are envisaged in each rule. This is as there is a well established difference between the duties that solicitors owe to (current) clients, former clients and prospective clients. To current clients, a solicitor has fiduciary duties *inter alia* to act in their best interests and to disclose certain types of information. To former clients, the duty is only to maintain confidentiality. As such, the specific definition of client type is especially important in the context of the rules on conflicts and confidentiality and disclosure obligations, and in terms of Principle 4, which requires solicitors to "act in the best interests of each client".

Chapter 1 - Client care

As mentioned in the August Response, the Indicative Behaviours for Chapter 1 omit the exceptions currently contained in Rule 2 relating to circumstances where it is inappropriate to provide certain information to clients. These exceptions are of particular relevance to CLLS Corporate Member firms, who work regularly for the same sophisticated clients on similar matters.

In terms of the Outcomes contained in this Chapter, we suggest the following:

- We remain of the view that what are now Outcomes 1, 2 and 3 would be more appropriately recast as Indicative Behaviours, rather than as Outcomes.

- In addition, Outcomes 9, 10, 11 and 14 appear to overlap to some extent and have been drafted more as rules than Outcomes. Furthermore, it is unclear why four Outcomes on the client's right to complain are actually required. On this basis, we suggest that Outcomes 9, 10 and 14 be conflated into a single Indicative Behaviour which simply reflects the overall policy objective that solicitors should ensure that their clients know how, to whom and where they can or should complain.

- Furthermore, it is unclear how the requirement in Outcome 9 that clients be informed in writing at the outset of their matters would work (e.g. where a firm has an annual panel retainer or umbrella terms with a client, with multiple matters being carried out under it). As such, it may be more appropriate to re-word the Outcome as follows:

  > "*clients* are informed in writing ~~at the outset of their matter~~ as appropriate at the start of the relationship of their right to complain and how *complaints* can be made;"

- In addition, the requirement in Outcome 10 that clients be informed in writing both at the outset of their matters, and if appropriate, at the conclusion of the complaints procedure, as to their right to complain to the Legal Ombudsman, the time frame for doing so and full details of how to contact the Legal Ombudsman, does not appear to accurately reflect the current position: for many clients there is no right to complain to the Ombudsman.

- Furthermore, although essentially the new proposed version of the Handbook has replicated current Rule 20.09 (2) (a)[1] in new Outcome 16 (so that clients have to be told about circumstances which may give rise to a claim), it has not replicated current Rule 20.09 (2) (c)[2]. As a result, there is no obligation, under the proposed new Code, to notify insurers of such circumstances. However, it is felt that such an obligation where legally permissible would be in all parties' interests as it could help to bolster "circle of confidence"-type arguments which could only help to preserve client confidentiality and privilege.

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[1] "If a client makes a claim against you, or notifies an intention to do so, or if you discover an act or omission which could give rise to a claim, you must:

...(a) inform the client that independent advice should be sought (unless the client's loss, if any, is trivial and you promptly remedy that loss);"

[2] If a client makes a claim against you, or notifies an intention to do so, or if you discover an act or omission which could give rise to a claim, you must:

…(c) notify your compulsory professional indemnity insurer under the Solicitors' Indemnity Insurance Rules or 15.26 or, if appropriate, the Solicitors Indemnity Fund Ltd."

In terms of the Indicative Behaviours contained in this Chapter, we suggest the following amendments:

- Indicative Behaviours 7 and 8 appear to overlap in respect of allegations of fraud. We repeat our view that the wording of those Indicative Behaviours should be clarified in order that they be consistent with each other.

- In addition, Indicative Behaviour 8 suggests that the clients' informed consent should be sought where a solicitor seeks to limit his/her liability to the client to a level above the minimum required by the SRA Indemnity Insurance Rules. We are concerned that this additional effective requirement may complicate the existing law on exclusion and limitation (the Unfair Contract Terms Act 1977 and the case law application of the Act), where the client is already protected by the law and the term "informed consent" is not well used in the case law. It is unclear what effect this additional obligation would have on a court looking to see whether a limitation clause was (i) properly incorporated into the contract (taking into account *contra proferentem*) and (ii) reasonable.

- Many firms include provisions in their terms of business which prevent an increase in liability where the firm is jointly and severally liable with another advisor (such as an accounting firm) and where that other firm has capped its liability. Such a provision can be seen as limiting liability, and it would be unreasonable to require firms to get informed consent to this sensible provision. This clause is common in terms of many other professionals and, as such, an amendment that makes it harder for solicitors to include it would put solicitors at an unnecessary disadvantage.

- Furthermore, we would suggest the wording of Indicative Behaviour 22 (which relates to receiving instructions from an individual client when the solicitor acts jointly for others) be amended to take into account the situation where the solicitor is instructed by someone who is not in fact the client (e.g. a lawyer in an overseas jurisdiction). As such, perhaps the reference could be to a "person" instead.

Chapter 2 - Equality and diversity

No comment at this stage.

Chapter 3 – Conflicts of Interests

The comments below represent our views on the conflicts provisions of the Handbook generally. Our specific comments relating to conflicts as they relate to land law transactions are set out below in Annex F.

In terms of the Preamble contained in this Chapter, we suggest the following amendments:

- The sentence starting at line 8 be amended to read:

"In deciding whether to act in these circumstances, the primary consideration will be the best interests of each of the clients concerned and, in particular, whether you are satisfied that each client reasonably believes that the benefits of you acting for it outweigh the risks".

The reason for the suggested change is that it should not be for the solicitor to judge whether it is in the clients' best interests, but for the solicitor to be satisfied that the client believes this to be the case and that the client's belief is reasonable.

In terms of the Outcomes contained in this Chapter, we suggest the following amendments:

- Outcome 1 should be recast as an Indicative Behaviour in the Chapter, on the basis that it effectively sets out the means for achieving an Outcome, rather than the elements of an Outcome itself. If this change is made, then we believe that it would be better to replace the word "effective" with "appropriate" or "adequate". This would be on the basis that we believe that this provision's intention is to ensure that solicitors do not act when there is a conflict, rather than to ensure that they have "effective" systems in place (considering that the latter requirement is already covered by Outcome 2 in Chapter 7[3]). On this basis, the wording of the suggested new Indicative Behaviour could read:

  "you have ~~effective~~ appropriate systems and controls in place to enable you to identify and assess potential *conflicts of interests*;"

- In regard to Outcome 4, we suggest that (a) be amended to read:

  "You have a reasonable belief that the client understands the relevant issues and risks".

  This is not only tighter wording; it also reflects the fact that sophisticated clients (such as those with in-house counsel) will be familiar with asking their outside lawyers to act under the common interest exception, and will not want it and the associated risks explained to them each time.

- For Outcome 5, we suggest the same amendment as for Outcome 4.

In terms of the Indicative Behaviours contained in this Chapter, we suggest the following amendments:

- In regard to Indicative Behaviour 1, we suggest that the first bullet point be amended to read:

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[3] Outcome 2 Chapter 7 states "you have effective systems and controls in place to achieve and comply with all the *Principles*, rules and outcomes and other requirements of the Handbook, where applicable;"

> "Your firm acts for another client on the same or on a related matter and the interests of such other client conflict or there is a significant risk that they may do so".

Firms do, of course, have many clients with different interests but this is only of significance if the firm is thinking of acting for a second (or subsequent) client with a different interest on the same or related matter. This is what any conflict system needs to be able to pick up.

- Again in regard to Indicative Behaviour 1, we suggest you amend the third bullet to read:

> "In circumstances where you are considering whether to act for two or more clients on the same or related matters, it is likely that two or more members of your firm would need to negotiate against each other on behalf of their respective clients".

The new Code's current wording does not make it clear that it is the involvement of the other lawyers in the relevant lawyer's firm which is relevant.

- In terms of Indicative Behaviour 2, we suggest you change the second word ("system") to "procedures". This is because the identification of "own interest conflicts" will usually be dependent on procedures which require each lawyer to declare any personal interest as and when the issue arises. What is important is that the firm clearly requires each lawyer to make such a declaration. The word "system" suggests a pre-existing record of each lawyer's personal interests, which is unrealistic, would be a costly overhead to maintain, and would put solicitors at a disadvantage. (See also our later comments on the definition of "system" in other contexts, below.)

In addition, we do not agree with the application to/definition of "overseas practice" as it applies to this Chapter (although see more generally our comments in Annex G on the overseas application of the new Code). As we read the current provisions, a partner ("manager") in an English LLP must ensure that all branch offices comply with the rules, plus any other overseas subsidiary entity practising overseas if he/she is a partner in ("[has] an ownership interest in") that overseas entity (such as for internal control purposes). This proposed application is unacceptably wide and should not be implemented, even pending the SRA's promised review of the extra-territorial effect of the rules.

Finally, we believe that the definitions of "client conflict" and "conflict of interests", as defined in Chapter 14, should be amended as follows:

> ""*client conflict*"
>
> > for the purposes of Chapter 3, means any situation where you owe separate duties to act in the best interests of two or more <u>current</u> *clients*

in relation to the same or related matters, and those duties conflict, or there is a significant risk that those duties may conflict;"

""*conflict of interests*"

means any situation where:

(a) you owe separate duties to act in the best interests of two or more current *clients* in relation to the same or related matters, and those duties conflict, or there is a significant risk that those duties may conflict (a "*client conflict*"); or

(b) your duty to act in the best interests of a *client* in relation to a matter conflicts, or there is a significant risk that it may conflict, with your own interests in relation to that or a related matter (an "*own interest conflict*");"

Chapter 4 - Confidentiality and disclosure

In terms of the Preamble contained in this Chapter, we suggest the following amendments:

- We suggest you delete "conduct duties" in line 4, and insert "duty of confidentiality".

- In the fifth paragraph of the preamble, we suggest you insert the word "personally" after the use of "you" in each of lines 2 and 3, so that it reads:

"This duty of disclosure applies in relation to each matter on which you personally advise a client and is limited to information of which you personally are aware which is material to that matter."

- Also in the fifth paragraph, line 4, we suggest you delete "except in very limited circumstances, where safeguards are in place" and replace it with "except where a client has agreed a different standard of disclosure".

In terms of the Outcomes contained in this Chapter, we suggest the following amendments:

- For Outcome 1, we disagree with the deletion of the words "and former clients". We appreciate the definition of "client" in Chapter 14 includes former clients, where the context permits, but given the significance of the fact that duties of confidentiality continue to apply to former clients, we believe that it should be made clear that, in this context, "client" includes "former client".

- For Outcome 4, for the reason given above, we believe that the words "or former client" should be inserted after "client" in the first line.

- Furthermore, we believe that the reference in this Outcome to the need for "informed consent" potentially undermines the ability to rely on consent from "Client B" contained in previously agreed standard terms of business, which is currently accepted under the existing Code and Guidance.

- Again for Outcome 4, we do not agree with the references to the ability or inability to trace B in (b) and (c). There is no such reference in current Rule 4.05. There may well be instances where B can be traced, but where it is not possible to seek consent. The obvious example is where the instructions from A are themselves confidential and it would be a breach of confidence to mention such instructions to B for the purposes of obtaining B's consent. We therefore suggest you delete in (b) the words "you are unable to trace B" and you rewrite (c) to read:

  > "It is not possible to obtain informed consent from B but you put in place effective safeguards including information barriers which comply with the common law".

In terms of the Indicative Behaviours contained in this Chapter, we suggest the following amendments:

- For Indicative Behaviour 1, we suggest that you replace the word "system" with the word "procedures".

- We suggest you tighten the language of Indicative Behaviour 2 by amending this to read

  > "You comply with your fiduciary duties at law in relation to confidentiality and disclosure"

- We suggest that Indicative Behaviour 4 be amended on the basis that it is not consistent with Outcome 4. Furthermore, the requirement that there be "specific informed consent" in order for the exception in Indicative Behaviour 4 to a solicitor's duty to disclose to his/her client "all information material to the *client*'s matter of which they are personally aware" to apply is not consistent with the current option of allowing consent to be gained in standard terms of business.

- Moreover, the proposed wording of Indicative Behaviour 7 (which states that disclosing details of bills sent to *clients* to third parties, such as debt factoring companies in relation to the collection of book debts, unless the client has consented, indicates non-compliance with the Principles) would place restrictions on debt collecting as a form of outsourcing. It is unclear why debt collecting should be treated differently within the Handbook from other forms of outsourcing, or why the wording has been drafted in a way which seems inconsistent with Outcome 9 (Chapter 7).

Chapter 5 - Your client and the court

We consider that Note 1 at the end of Chapter 5 is confusingly drafted (e.g. "you may need to consider") but in any case is unnecessary given Principle 1 and what is said in paragraph 2 of the Notes to the Principles about the precedence of the Principle which best serves the public interest in the proper administration of justice.

Chapter 6 - Your client and introductions to third parties

No comment at this stage.

Annex B

Detailed comments on new Code (as set out in Annex C of the consultation paper)

Section 2: You and your business

Chapter 7 - Management of your business

In terms of the scope of this Chapter, we suggest the following amendments:

- In the August Response the CLLS asked for further clarification about the scope of Chapter 7's application in two respects:

  - First, we asked how these management provisions would be applied extraterritorially to affiliated entities (which therefore crossed over our comments on international aspects). This question has still not been addressed satisfactorily.

  - Second, we asked for clarification about who (i.e. which "you") the Outcomes in Chapter 7 applied to, given that most of the management obligations are only capable of being fulfilled by the firm and its senior management or its "managers" as a whole, and not by individual solicitors or individual partners within a large firm. There seems to have been some attempt to address this question in the lead in to Chapter 7, which describes how everyone has a role to play in the efficient running of a business, although the wording acknowledges that that role will depend on the individual's position within the organisation. It states that "overarching responsibility" for the management of a business in the broadest sense rests with the managers of the firm. However, this does not really seem to qualify the applicability of the required Outcomes for each solicitor or partner within a large firm. Applying the provisions of Chapter 13, it is unclear how the explanatory language in the lead in to Chapter 7 could be interpreted as "any other provision" disapplying the outcome requirements for those who do not have management roles or who have no real ability to influence the way in which their firms seek to comply with the Chapter 7 Outcomes. Accordingly, the wording of Chapter 7 remains a concern, especially for those lawyers (including partners) in a large firm who may not even be aware, still less be involved in approving, of the way in which the firm is dealing with its business management responsibilities.

In terms of the Outcomes contained in this Chapter, we suggest the following amendments:

- It would be useful if the word "system" (as used in Outcomes 2, 4 and 8) could be defined in Chapter 14 (no definition for the term currently appears) to make it clear that a reference in the Handbook to a "system" is not necessarily to an IT system. One way of wording such a definition would be to state that

"system means a system, process, policy or procedure designed to result in the desired outcome."

- Furthermore, we suggested in our August Response that the management objectives in Chapter 7 should be reformatted to remove specific behaviours which had been expressed as mandatory Outcomes. Unfortunately, this point has not been addressed in the new Code. Our response also sought clarification that compliance with these Outcomes could be achieved by simply having the relevant systems in place (rather than needing to have the relevant systems in place and needing to have them judged as being "effective"), and queried how the effectiveness of various systems could be judged. These points have also not been addressed in the new Code. It thus remains unclear how the SRA will determine whether certain management systems are acceptable. As such, the CLLS would like to see guidance produced which reflects the needs of particular types of firms, such as Corporate firms, so we can understand better how compliance with these Outcomes will be assessed. This should also be considered in the context of our comments on Principle 8 (see Annex "A", above), which requires that solicitors run their businesses or carry out their roles "effectively". On this basis, we believe that it would be useful for such further guidance to clarify what "effectively" means in this context.

- Furthermore, in our August Response we requested clarification of how the Outcome 9 (previously Outcome 10) outsourcing provisions would work. Our concern related to the extent to which it was intended to regard the subcontracting of specialist, local or overseas advice, even by way of instructing Counsel or other specialist legal experts, as an outsourcing of legal services, so as to be affected by this requirement. This concern has not been addressed in the new Code. The implication of the drafting, therefore, is that all such subcontracting would fall within the scope of what is now Outcome 9. Therefore it seems implied that firms would need to ensure that the wording will not adversely affect their ability to comply with, or the SRA's ability to monitor their compliance with, their obligations in the Handbook, and that it is subject to contractual arrangements enabling the SRA to obtain from, inspect the records of, or enter the premises of, the third party in relation to the outsourced activities (a new requirement). This would seem to be quite onerous and unnecessary in relation to the outsourcing of legal activities to lawyers' businesses which are themselves separately regulated either here or overseas. Firms obtaining certain types of overseas advice could also find it very difficult to comply with the provisions.

- In the August Response we also asked for clarification in relation to the scope of the outsourcing requirements relating to "operational functions". We asked whether this was intended to apply not just to major outsourcing of IT or Finance activities, but to all operational third party sourcing activities. The main concern is whether these requirements could restrict legitimate third party sourcing arrangements, especially if they involve offshore activities, unless the SRA is in a position to extend its monitoring and inspection of premises to other jurisdictions.

- More generally, we remain concerned that the wording of Outcome 9 is also too broad. There are all sorts of operational functions which firms could be said to outsource and in respect of which (b) is impractical. Arguably, firms outsource the transmission of emails to organisations which own servers. They similarly outsource software maintenance to the likes of Microsoft. It seems to us that the whole issue of outsourcing needs further thought.

In terms of the Indicative Behaviours contained in this Chapter, we suggest the following amendments:

- The specific matters referred to in Indicative Behaviour 3 are not all "business continuity risks". We would suggest the removal of "continuity" from this Indicative Behaviour so that it reads "identifying and monitoring business risks including ……". Some business continuity risks are already dealt with adequately in Indicative Behaviour 4.

Chapter 8 - Publicity

No comments at this stage.

Chapter 9 - Fee sharing and referrals

We note that the express exemption granted in the current Rule 9, whereby the provisions do not apply to referrals between lawyers (including businesses carrying on the practice of lawyers), has not been included in the new Code.

Clearly lawyers would have duties of disclosure and to avoid personal conflict which would oblige them to give sufficient information so the party being referred understands the situation, and is able to make an informed decision. In this regard the extension of these requirements to lawyers might not be too onerous.

We do however have concerns about the way this would impact on the proper conduct of the business of our Member firms in the following situations, and where express exceptions may be appropriate:

- Where firms have consultancy arrangements with lawyers, which may include provisions for payment to the consultant on the introduction of work. Typically, these are one-off arrangements with individuals who are otherwise practising on their own account;

- Routine referring of business to, and receiving referrals of business from, lawyers (and other regulated professionals such as accountants). These referrals are commonplace and arise for a number of reasons including, for example, conflicts, a lack of the requisite expertise within a firm (e.g. divorce or family matters) or jurisdictional matters. Such referrals are not characterised by payment in return for referral of business. Nor do they involve other non-monetary arrangements linked to the introduction of

clients, such as the provision of free or below-cost services in exchange for the referral of other business; and

- Bulk buying/central procurement. These arrangements include where a framework agreement facilitating the call-off of legal services by participants on agreed terms is in place. These arrangements may involve the payment of a fee by the legal provider to the party which has put in place the framework. Bulk or central-buying arrangements also exist for the call-off by purchasers of legal services, where a rebate may be due to the central-buying agency, calculated by reference to the volume of business delivered. Here, the individual purchasers of legal services will already be aware that they are purchasing pursuant to the central-buying arrangements.

Note also our comments on the overseas application of this Chapter in Annex G.

Annex C

Detailed comments on Draft SRA Code of Conduct (as set out in Annex C of the consultation paper)

Section 3: You and your regulator

Chapter 10 – You and your regulator

In the August Response we raised concerns regarding the scope of the reporting obligations in Chapter 10 and the practical implications of these obligations, not only for practitioners but also for the SRA. We continue to have concerns about how this section of the new Code will operate.

Interaction between different reporting duties within the Handbook.

The Handbook imposes a number of reporting obligations, for example, under the Accounts Rules, the Authorisation Rules, and the Code itself. By and large, where reporting obligations arise outside the context of Chapter 10, these are very specific and relate, for example, to changing the composition of a firm's membership. It seems appropriate for those sorts of obligations to be contained within the relevant rule rather than be aggregated in to Chapter 10. However, we believe that duties to report *ad hoc* or non specific matters arising in the course of practice should be consolidated into Chapter 10 so that practitioners will understand clearly what is expected of them.

Reporting under Rule 8.5

In the following section we make some observations on the detail of the proposed text regarding Rule 8.5 and the COLP and COFA roles. While we have commented on the detail of the text, we have concerns of a fundamental nature concerning these roles and would refer you to our August Response and to our endorsement of the points made separately on this subject by Roger Butterworth of Bird & Bird LLP (as above).

In this regard, the reporting duties contained in the Authorisation Rules raise concerns. In the words of the SRA, the Authorisation Rules are intended to "cover all matters relating to the authorisation of a firm to practise and including initial and continuing requirements for application and approval of the body itself, its managers, owners and relevant employees"[4]. However, the reporting requirements in Rule 8.5 go far further than is required for authorisation purposes, and cut across the general reporting duties in Chapter 10.

Specifically, a COLP is required, as soon as reasonably practicable, to report to the SRA any failure to comply with *any* statutory obligations relating to the firm, its employees or its managers in relation to the carrying out of authorised activities. This cannot possibly be appropriate; it could oblige the COLP to notify the SRA of a minor

[4] 'The architecture of change' Consultation 21 August 2010 para 104.

health and safety infraction of no practical consequence at all. Moreover, the obligations are contained in a rule that allows for no discretion, rather than in the form of an outcome. As such, they are not compatible with the SRA's espousal of a risk based strategy and the concept of 'freedom in practice'.

Furthermore, Rule 8.5 requires a COFA to report *any* failure to comply with the obligations imposed under the Solicitors' Accounts Rules. This is unnecessarily stringent and means that firms would be in breach of the rules if they failed to report any minor clerical infringement, no matter how trivial. This is in direct contradiction to the requirement set-out in guidance note (iv) to Rule 47 of the Accounts Rules, which states that "trivial breaches" can be ignored by reporting accountants when they prepare their annual reports to the SRA. Further, guidance note (v) recognises that it is inevitable that trivial breaches will occur, and gives some guidance about what should be considered in determining whether a breach is trivial. It would appear sensible to also apply this exception to the requirement to report "any" breach, otherwise the SRA is in danger of being inundated by firms reporting wholly insignificant clerical errors.

We suggest that rather than introduce a separate set of reporting requirements in relation to regulatory matters in Rule 8.5 of the Authorisation Rules, the reporting duties regarding statutory and regulatory issues applying to the COLP and the COFA be removed from the Rules and consolidated into Chapter 10 of the new Code. Chapter 10 already addresses the concept of materiality in relation to reporting (though see our comments on that below) and it is our view that it would not in fact be necessary to add anything beyond what is already included in Outcome 3 to cover the area. Furthermore, we note that the matters covered by (i) of the guidance notes to Rule 8 duplicate aspects of the Code and, if needed at all, would also be more appropriately covered in the Code rather than in the Authorisation Rules.

When the Duty to Report arises

In the August Response, we observed that the reporting duties in Chapter 10 employed a 'hair trigger'. We suggested in that response that the SRA might create a 'POCA-like situation' with associated inefficiency for all involved, and proposed some drafting to address this risk.

We note that the SRA has amended its reporting threshold to refer to 'serious' rather than 'significant' failure, and that it has adopted a common terminology in the Chapter. However, we do not think that this change alone is likely to address the problem. For example, any allegation of error or negligence could amount to a breach of Principle 5 (proper standard of service) or of Outcome 5 of Chapter 1. We query whether the SRA really wishes to receive a report of every such instance affecting members of the profession, and we are also concerned that any such reports might be disclosable in any proceedings against a firm.

Assuming that such issues would be reportable if they were 'serious', how would firms be able to make that calculation? Is seriousness in the context of a negligent mistake to be assessed by reference to the potential losses involved, or perhaps by reference to whether the error has occurred or is likely to occur again? Should firms

rather try to decide whether the failing in question was particularly egregious? We feel that the present proposals are still too wide and that they would be unworkable in practice. We think that the *ad hoc* reporting obligations should be limited to financial matters and matters of misconduct rather than error.

We also suggest that detailed guidance should be circulated regarding the way that firms should apply Chapter 10. We would strongly recommend that this be developed in conjunction with the CLLS and/or the Law Society. This would enable practitioners to contribute to the dialogue and to use the practical experience of managing their own firms to assist with 'calibrating' the provisions in order that the SRA can achieve its regulatory objectives without undue burden on the firms or, indeed, the regulator. We would be very happy to take an active part in such a project.

Specific Drafting Comments

The SRA has introduced the concept of written notice into Chapter 10 (Outcome 8 in the Notes section). We feel that it would therefore be logical to make Outcome 9 operate on the basis of written notice from the SRA. This would benefit all parties by providing clarity. The Outcome would therefore read "on receipt of written notice from the SRA, you produce for inspection..."

Annex D

Detailed comments on Draft SRA Code of Conduct (as set out in Annex C of the consultation paper)

Section 4: You and others

Chapter 11 - Relations with third parties

Our specific comments in relation to this Chapter are as follows:

- In the August Response we mentioned our view that the maintenance of a system recording undertakings (which was at that time recommended in the Indicative Behaviour) was unnecessary as it was not usual practice in larger firms. However, it does not seem that our view was taken into account in the current version of the new Code, and Chapter 11 of that Code now contains a note to the effect that the Chapter should be read in conjunction with Chapter 7 (Management of your business) in relation to the system "**you will need to have in place** to control undertakings" (emphasis added). While we understand that the Indicative Behaviours in the new Code are not mandatory, we believe that the addition of this note effectively makes the requirement to maintain a register of undertakings a mandatory requirement. We continue to oppose the suggestion that a register of undertakings must be maintained. Undertakings are a long-established part of a solicitors' practice and their monitoring and management is well-entrenched.

- We also mentioned in our August response that the definition of "undertaking" should be qualified to apply only to undertakings given in the course of practice or as a solicitor. While this suggested amendment was also not included in the revisions to the new Code, the current Code (Rule 10.05) makes it quite clear that the obligations in relation to undertakings relate to undertakings given "in the course of practice" or "as a solicitor". As such, we reiterate our earlier view that the definition should be changed.

Chapter 12 - Separate businesses

There needs to be a clearer definition of what is meant by “You” as it is used in the Chapter. Under the revised draft, "You":

- Must not own, have a significant interest in or actively participate in a separate business which conducts prohibited separate business activities, or

- (If a firm) must not be owned by or connected with a separate business which conducts prohibited separate business activities

It appears that, as used in the Chapter, “You” means a solicitor or other recognised body or authorised person. The term has not been defined in the new Code. However, we note that the term was defined in the earlier draft as “a person who provides services through a business regulated by the SRA, a solicitor, REL or RFL who is an

owner, manager or employee of an authorised non-SRA firm or is employed in in-house practice".

In the definition of "prohibited separate business activities", the words "tribunal or enquiry" could be omitted in (a) and (b) given the extended definition of "court".

Annex E

Detailed comments on Draft SRA Code of Conduct (as set out in Annex C of the consultation paper)

Section 5: Application, waivers and interpretation

Chapter 13 - Application and waivers

The comments on the application provisions in our August Response are still very relevant to the planned review of overseas application referred to in Annex A. We have nevertheless restricted ourselves in this response to the current provisions as an interim solution pending completion of the review.

We note the substitution of "lawyer controlled body" for "authorised body" in Chapter 13 (3) and are concerned that this change has rendered the application vague and unnecessarily ambiguous. Nevertheless, we do accept that this ambiguity exists in the current Code through the identical definition of "solicitor-controlled recognised body" contained in Rule 24. It is also noted that the definition in Rule 24 was introduced by the 31March 2009 update of the current Code.

Although it is not a new issue, we would strongly suggest that this ambiguity should be resolved, and we see two possible approaches:

- Revert to "authorised body" so that the overseas practice of all licensed or recognised bodies is regulated (which was effectively the position pre 31 March 2009); or

- Retain "lawyer controlled body" but develop the definition to remove some of the interpretive challenges.

The first approach has the benefit of simplicity and regulatory certainty. However, we are concerned that it may not have a proportionate effect as it could, for example, bring into SRA regulation the overseas offices of a predominantly US firm with a small recognised branch office in England.

The second approach is more likely to deliver a proportionate regulatory outturn and is generally preferred. The following terms in particular need clarification:

- “Share of control” - we assume that this refers to direct control through voting rights exercised by individual lawyers as opposed to indirect control mechanisms which may exist through contractual obligations and/or the partners or members agreement.

- “delegated authority” (e.g. by the generality of the partners to the management board).

- “Largest” (or “equal largest”) - in many firms the largest group will be clearly identifiable. However, references to "equal largest" may lead to difficulties

where control is evenly split between, say, England and Wales solicitors and US attorneys.

In addition, the control of most firms is in a continual state of flux and, where finely balanced, may fluctuate; the same firm may be subject to the overseas application of the Rules today, and no longer subject to them tomorrow when a group of principals leave or join. This could result in considerable regulatory uncertainty for some firms and administrative chaos. Clear guidance is required to manage this situation.

With reference to the draft SRA Accounts Rules, we note that the provision extending the application of the overseas accounts rules to unauthorised bodies on the basis that they are majority owned or controlled by England and Wales solicitors, irrespective of whether any such solicitors are practising in such offices, has been transcribed into Rule 53. This perpetuates the somewhat arbitrary application of the overseas accounts rule, is anomalous in the context of the way all the other rules are applied overseas, and results in duplication of effort and cost in jurisdictions where local rules also apply. We would like to see some alignment with the general application provisions and, at the very least, the removal of the burden of duplication in countries where the handling of client money is already competently regulated.

As mentioned in the August Response, the CLLS has a keen interest in ensuring that the Code's overseas application is proportionate, does not result in unnecessary dual regulation, and respects the local cultural and professional diversity of the countries and lawyers involved. To this end, the CLLS would welcome the opportunity to assist the SRA in the development of the new application provisions.

Chapter 14 – Interpretation

We have commented above on the definitions of various terms contained in the new Code in the contexts in which they would be applied, including:

- "client" (Section 1, introduction and Chapter 4 (see Annex A));
- "system" (Section 1, Chapter 3 (Annex A); Chapter 7 (see Annex B));
- "overseas practice" (Section 1, Chapter 3 (see Annex A));
- "client conflict" and "conflict of interests" (Section 1, Chapter 3 (see Annex A));
- "undertaking" (Section 4, Chapter 11 (see Annex D)); and
- "lawyer controlled body" (Section 5, Chapter 13 (see Annex E))

Annex F

Detailed comments on Draft SRA Code of Conduct (as set out in Annex C of the consultation paper) as it relates to land transactions

In general terms, we do not understand the SRA approach to conveyancing conflicts. Although no change of substance has been flagged in the covering commentary, the proposed drafting of the new Code contains changes.

It is possible to transfer real property either by way of a "conveyance of land", as that is defined in the Code, or by the transfer of a "corporate wrapper" in which a property is held. In our view, there is no difference in the risk of conflicts dependant on which method of transfer is used. Currently, the conflict rules provide for such a difference. We recommend a review of why the rules on conflicts need to be different depending on the method of transfer of the asset.

There are some significant differences in the proposed draft to the current position. Set out below is the CLLS Land Law Committee's response to these changes, which we endorse.

There are two matters of particular interest to our commercial real estate clients:

- The ability to have the same lawyer act for two parties under the "substantially common interest exemption" (for example where the property is being purchased by a consortium of purchasers), and

- The ability to have the same law firm act for two clients competing for the same asset (for example potential purchasers in an auction bid for a property).

The proposed drafting indicates that where real estate is transferred by means of a transfer of title, neither of these is possible. Where the asset is transferred by another means, they are possible. We do not understand the reason for the difference or why these restrictions are necessary.

Introduction

This section has been produced by the CLLS Land Law Committee as an adjunct to the main CLLS response.

We note that the general approach adopted in the new Code is that there should be a stripped down code which will deliver a more flexible approach to regulation.

We are concerned, in particular, by:

- The proposed removal of the specific provisions in respect of conveyancing conflicts contained in the current rules, and

- The proposal that Outcome 4 and Outcome 5 in Chapter 3 should only apply where the sole purpose of the transaction is not the conveyance of land.

Each proposal would have a far reaching effect which we believe may go beyond what is intended.

The new Code should make it clear that acting for both parties in a transaction does not necessarily create a conflict of interest.

In particular, the new Code as drafted appears to prevent a lawyer acting for both lender and borrower, which is in contrast to the existing position and would cause serious problems, especially for the residential property market.

We also have some detailed points on the drafting of the new Code in respect of conflicts of interest.

We make some comments on Chapter 11 – Relations with third parties.

We attach an appendix to this Annex F, which highlights the differences between the position under the current Code and the new proposals.

Our overall conclusion is that the specific provisions in the current Code which expressly authorise lawyers to act for more than one party in conveyancing transactions (e.g. 3.09 and 3.17) should be retained.

Chapter 3 – Conflicts of interests

When is there a conflict of interest?

We believe the new Code should specify, perhaps in Note 1 to Chapter 3, that where a lawyer is acting for two parties in a conveyancing or leasing transaction, or acting for both the borrower and lender on the grant of a mortgage, it is not automatically an indication that there is a client conflict.

We believe that the simple fact of acting for more than one client in a conveyancing transaction (as in any non-conveyancing transaction) is not, by definition, a client conflict and should not fall automatically within the definition of a "conflict" in the new Code.

The effect of the new Code, as drafted, is that a lawyer can never act for two parties in a conveyancing or leasing transaction or on the grant of a mortgage (as to which see our comments below). We do not consider this to be appropriate. It is a significantly different position from that under the current Code.

Effect on conveyancing transactions of Outcomes 4 and 5

Outcomes 4 and 5 provide that, where there is a client conflict, lawyers can only act if they comply with specified conditions and the sole purpose of the transaction is not the conveyance of land.

Our concern is that conveyancing transactions are receiving particular, more restrictive treatment than other transactions, which are permitted, even if there is a client conflict, provided other specified conditions are satisfied. There is no such treatment for conveyancing, where there is an absolute bar on acting for one or more current clients if there is a client conflict.

The current Code recognises the high risk nature of certain aspects of conveyancing with specific rules and guidance covering conveyancing and lending. These allow lawyers, subject to conditions, to act for clients on opposite sides of a conveyancing transaction, whether or not at arm's length. The rules and guidance provide clarity for lawyers as to when they can act, but also protect their clients (for example, lawyers cannot act if a conflict exists or arises).

In contrast, the new Code creates a different position in relation to conveyancing because of the absolute prohibition on conveyancing in Outcome 4 and Outcome 5, and the effect of Note 1 highlighting that conveyancing may give rise to a high risk of a conflict. A practical consequence is that whilst at present a firm can act for two clients who are both seeking to acquire a property at tender, this would not be possible under the new Code.

In consequence, we propose that Outcome 4 (d) and Outcome 5 (f) are deleted. The existing specific provisions in respect of conveyancing should be retained.

Interpretation of Outcomes 4 and 5

We consider that issues may arise in determining whether the sole purpose of the transaction is or is not the conveyance of land. It is not uncommon for a property to be offered for sale on the basis that the seller will either sell the property in the normal manner, or will sell a Special Purpose Vehicle ("SPV") which holds legal title to the property. In the former case, the sole purpose of the transaction is clearly the conveyance of land. It is not equally clear how the possible purchase of the SPV will be categorised. Does the ability of lawyers to act for two potential purchasers, for example where there is a tender, vary, dependent upon whether their intention is to purchase the land or the SPV?

Again, where a property is subject to open market competition, would a firm be able to act for one potential purchaser and also act for the mortgagee of another potential purchaser?

A transaction for acquisition of assets may have a number of elements, one of which is a straightforward conveyance of land. We consider that Outcome 4 (d) and Outcome 5 (f) are potentially ambiguous. Where there is a client conflict, is the effect to:

- Prevent a lawyer acting on all elements of a transaction where one of its purposes is the conveyance of land; or

- Prevent a lawyer acting on that element of the transaction relating to the conveyance of land, but allow the lawyer to act on the other elements of the transaction; or

- Allow a lawyer to act on all elements of a transaction where one of its purposes is the conveyance of land (since, in that situation, conveyancing is not the sole purpose).

We would be grateful if the SRA could clarify its intention.

Definitions of "conveyance of land" and "substantially common interest"

The definition of "conveyance of land" in the new Code is as follows:

> "means, for the purposes of Chapter 3, the transfer of land for value, and the grant or assignment of a lease or some other interest in land for value"

Having regard to Section 205 of the Law of Property Act 1925 which defines "conveyance" to include a mortgage and the use of, in the definition, words such as "grant of an interest in land for value", we consider that this definition includes a mortgage or charge. In consequence the new Code, as drafted, acts as a total prohibition on acting for both borrower and lender.

We do not believe that this should be the case. We propose that a charge or mortgage should be expressly excluded from the definition of "conveyance of land".

We note that the definition of "substantially common interest" requires that the situation "(b) does not involve a transfer of land or the grant or assignment of a lease or some other interest in land".

This being the case, no conveyancing transaction could ever come within Outcome 4 of Chapter 3. We propose that limb (b) of this definition should be deleted.

If limb (b) of the definition is retained, is the effect that a lawyer cannot act if there is a client conflict and there is a substantially common interest, even if only a small part of the transaction relates to the transfer or grant of a property interest?

The definition of conveyance of land refers to a transfer "for value", but there is no such reference in limb (b) of the definition of substantially common interest. This renders the latter definition much wider. Is this intended?

The definition of "substantially common interest" should appear in alphabetical order before "substantial ownership interest".

Chapter 11 - Relations with third parties

Outcome 3 provides that where a solicitor acts for a seller of land, the solicitor informs all buyers immediately of the seller's intention to deal with more than one

buyer. The current provision in Rule 10.06 provides that the trigger for informing the other conveyancer is when the seller either:

- Instructs the solicitor to deal with more than one prospective buyer; or
- To the solicitor's knowledge:
    - Deals directly with another prospective buyer (or their conveyancer); or
    - Instructs another conveyancer to deal with another prospective buyer.

We are concerned by the possible difficulty of determining when the seller has the "intention" to deal with more than one buyer. This seems to us to be rather more opaque than the existing wording and possibly requires earlier notification than the current basis (which is often interpreted in practice as requiring notification when instructions are received to send out a second contract). We are concerned that the need for a lawyer to come to a conclusion as to the intention of his client might lead to unnecessary conflict between the lawyer and client as to whether that point has been reached. Further, if the Seller forms an intention (whether or not known to its lawyer) and then does not act on it, no mischief has arisen and there should be no reason to alert other buyers.

We note that Outcome 3 requires the solicitor to inform "all buyers". Should not the obligation be to inform "all buyers' lawyers"? This is the approach adopted in the existing rule.

We note that Indicative Behaviour 4 in Chapter 11 replicates existing Rule 10.04, with one exception. We are concerned that with the current widespread use of email and the common use of "reply to all" in emails, there could be an inadvertent breach of this Indicative Behaviour. Would it be necessary, for example, at the outset of any transaction, to obtain the consent of the other lawyer to copying emails to that lawyer's client? Where a lawyer addresses email correspondence openly to another lawyer and his client, for example by cc, should the recipient be able to "reply to all" without any further consent? It is always open to the originator to include his/her client by way of bcc, thus preventing an automatic direct response to his/her client from the recipient.

Appendix to Annex F to illustrate some key differences in relation to the treatment of land transactions between the current Code and the proposed new Code

Topic	Current Code	Proposed new Code	Comments
Acting for buyer and seller OR acting for landlord and tenant, in either case for value	Rules 3.07 to 3.10 Expressly permitted in three instances so long as (a) written consent is obtained from both parties; (b) no conflict of interest exists or arises; (c) seller is not a developer or builder and (d) certain rules where two different offices are concerned. The three instances where acting for both parties is permitted are: (a) both parties are established clients; or (b) consideration is £10,000 or less and the transaction is not the grant of a lease or (c) the parties are represented by two separate offices in different localities.	Chapter 3 There is no express acknowledgment that acting for both parties will not necessarily result in a conflict of interest, and no list of occasions in which acting for both parties is permissible. This has led some lawyers to take the view that acting for both parties will inevitably result in a conflict of interest.	There is a *volte-face*. Currently there is specific authority to act for both parties provided that certain safeguards are observed. Under the proposed new Code, there is a perception that acting for both parties is likely to constitute a conflict of interest.
Acting for borrower and lender, for value	Rule 3.16 and 3.17 Expressly permitted in the case of a "standard mortgage" provided there is no conflict of interest, the mortgage instructions do not go beyond the limits in 3.19 (see below) and (for the borrower's private residence) the approved certificate of title is used. A "standard mortgage" is a mortgage on standard terms provided in the normal course of the lender's activities and where a significant part of the lender's activities consist of lending.	Chapter 3 There is no express acknowledgement that acting for both parties will not necessarily result in a conflict of interest, and no list of occasions in which acting for both parties is permissible. This has led some lawyers to take the view that acting for both parties is not permitted under the new Code as it will inevitably result in a conflict of interest.	Again, there is a *volte-face*. Currently there is specific authority to act for both parties provided that certain safeguards are observed. Under the proposed new Code, there is a perception that acting for both parties is likely to constitute a conflict of interest. If lawyers believe that they are not permitted to act for both lender and borrower in a typical residential conveyancing transaction, this will slow down the speed of residential conveyancing, and increase the borrower's costs as there will be a separate fee payable to the lawyers acting for the lender.

Topic	Current Code	Proposed new Code	Comments
	Rule 3.19 This sets out the limits of what lenders can require lawyers to do, when they are also acting for the borrower. This was incorporated (in a different guise) in 1999 in order to protect lawyers from lenders who were making unreasonable demands of the borrower's lawyer.	Chapter 3 There is no equivalent in the new Code	If it remains the norm for lawyers to act for both lender and borrower on residential matters, lawyers will once again be at risk of lenders making unreasonable demands of them. Yet the risk of this happening has not reduced in any way. Indeed, as the mortgage market has tightened, it becomes a greater concern.

Annex G

Comments on the comparison of the provisions of the current Code and new Code as they relate to overseas practice

We have the following specific comments. (Refer also to our comments in relation to Chapter 3, above.):

The definition of "overseas practice"

The drafting of the definitions relevant to the overseas application of the Code of Conduct are opaque, very confusing, and the intention of the SRA is not clear.

Many CLLS members have extensive foreign legal practices that are already regulated in their local jurisdictions, and early clarification of whether it is the SRA's intention to extend the application of the Code of Conduct (or any other parts of the new Handbook) beyond that set out in the current Rule 15 would be welcomed.

In particular, we are concerned that the definition of "overseas practice" in the new Code appears to have the effect of extending application of the rules outside of England and Wales beyond that under the current Code, to include any legal business in which an England and Wales solicitor or recognised body has an ownership interest.

"Overseas practice" is defined in the new Code as "means ***practice from an office*** outside England and Wales, except in the case of an *REL*, where it means *practice from an office* in Scotland or Northern Ireland".

"Practice from an office" is separately defined as "includes ***practice*** carried on: (a) from an office at which you are based; or (b) from an office of a ***firm*** in which you are the sole practitioner, or a *manager*, or in which you have an ownership interest, even if you are not based there".

The definition of "practice" includes *inter alia* "the activities, in that capacity of: "(b) a solicitor" and "(e) an authorised body". And "firm" is defined as "means an *authorised body* or any business through which a *solicitor* or *REL practises* other than *in-house practice"*

The problem here appears to be the inclusion of "in which you have an ownership interest, even if you are not based there" which applies the provisions of the new Code to any overseas business (not just an authorised body) in which an England & Wales solicitor or an authorised body has an ownership interest. Contrast this with the overseas application of the current Code by virtue of Rule 15 (2) which limits the application solely to the actual practice of a "solicitor (or REL) controlled recognised body" from outside of England and Wales.

Many of the CLLS member firms have overseas legal businesses which are not recognised bodies, in which solicitors (by virtue of that capacity) or an SRA recognised body have an ownership interest, but in which the solicitor is not based,

and which is not a branch of the recognised body. Where an England & Wales solicitor is physically practising from such an overseas business, the new Code will clearly apply to the practise of that individual personally. Any extension of the overseas application of the new Code to these legal businesses beyond this (which are commonly the practices of local lawyers) is unnecessarily intrusive, may put these businesses at a competitive disadvantage, and is disproportionate.

If the analysis is correct, we believe that this situation should be remedied by the removal of "in which you have an ownership interest, even if you are not based there" from the definition of "practice from an office" pending the wider review of overseas application of the SRA Handbook.

We note that the definition of "lawyer controlled body" has been reinstated to the Code of Conduct. This does not appear to impact on the above analysis. It does however add to the general confusion. We note that the definition of "lawyer controlled body" in the Code and "lawyer controlled recognised body or licensed body" in Rule 51 of the SRA Accounts Rules are identical, and would suggest the term is harmonised between the two sets of rules.

Application of Chapters of the new Code to an overseas practice

Subject to the comments on the redrafted application provisions elsewhere in this response, and the concern about the definition of overseas practice detailed above, we welcome the changes made to the overseas application clauses as appended to each Chapter which have generally retrenched to the current position under Rule 15 of the current Code.

We remain of the view that the provisions applying the Outcomes to an overseas practice, currently appended to each Chapter of the new Code, should be drawn together in one place. This would deliver a clear overview, make interpretation easier, and mean that users would not have to thumb through the whole of the new Code to locate applicable provisions.

The two main areas where a material extension of scope remains are:

- Chapter 7 of the new Code (“Management of your business”) (see Annex “B”, above). We do nevertheless recognise that the Outcomes contained in this Chapter should and will be achieved by any well run firm, and we are thus happy to endorse them as we recognise that compliance with them will have benefits for firms and their clients; and

- Chapter 9 (fee sharing and referrals of business). The fee sharing obligations contained in Rule 8 of the current Code did apply to an overseas practice, the referrals of business provisions in Rule 9 did not; instead, there was a general obligation to ensure that there was no breach of core duties or any other provisions of the current Code in respect of such.

It has to be accepted that local custom and practice in respect of referrals differs significantly, and this approach may be alien in some jurisdictions. We nevertheless

accept that compliance with the Principles and duties of disclosure would necessitate transparency and accept this extension as reasonable.

The SRA review of overseas regulation

We also welcome the SRA's commitment to undertake a more general review of the regulation of overseas practice in the next 12 months. This is a matter of keen interest to the CLLS membership: many have significant overseas practices and find the current regime cumbersome and, sometimes, an unnecessary duplication of regulation which can put their firms at a competitive disadvantage when competing with local lawyers.

Our previous offer to assist the SRA in developing its approach to overseas regulation remains on the table. The early publication of a detailed plan and timetable for the proposed review would greatly help our members in planning for the implementation of the new Handbook in their firms.

As our initial contribution to the review, our comments in the August Response are reproduced below:

The business models of international firms vary dramatically. At opposite ends of the spectrum there are:

- Firms which are made up of predominantly England and Wales solicitors operating internationally and advising on English law and utilising only a small number of local lawyers; and

- Firms with large English offices but with virtually no England and Wales solicitors/English law capacity in their offices outside of England.

The application of regulation must be sufficiently sophisticated to deliver a nuanced application of the new Code appropriate to each overseas business if it is to achieve a proportionate and un-bureaucratic regulatory outcome.

We accept that the SRA has a legitimate interest in the regulation of:

- Individual England and Wales solicitors practising as such wherever they are in the world, and irrespective of whether or not each solicitor's firm or employer is subject to these rules;

- Overseas branch offices of an authorised body, but only in respect to the manner in which the business is structured and managed; and

- Non-solicitor managers of an authorised body (whether lawyer or non-lawyer) in respect to the management of the authorised body only.

We draw a distinction between regulations which address the structure and proper management of an overseas branch of an authorised body (e.g. the provisions contained in Section 2 ("You and your business"), Section 3 ("You and your

regulator") and Chapter 12 ("Separate businesses")), and the regulation of the delivery of legal services supplied by individual lawyers within that branch office (e.g. the provisions contained in Section 1 ("You and your client")).

Where the services are delivered by England and Wales solicitors, these will be properly subject to SRA regulation by virtue of the above. Where the services are delivered by lawyers of another jurisdiction, each will be subject to regulation by their own codes of conduct and supervised for compliance by their respective professional bodies. In this situation we do not think it appropriate for the SRA to overlay its own rules; the lawyers concerned should not be subjected to dual, and possibly conflicting, regulation. This problem is especially acute where the branch office is primarily or exclusively the practice of local lawyers.

Our detailed comments on the provisions are as follows:

	Provisions of the current Code which will apply under the new Code	**Location in new Code**	**Consultation Paper 2 Commentary**	**Consultation Paper 3 Commentary**
Rule 2	2.01 – Taking on clients 2.02 – Client care 2.03 – Information about the cost 2.05 – Complaints handling	**Chapter 1 – Client care** – all	CURRENT CODE - does not apply to an overseas practice. replaced with express provisions dealing with: commissions - 15.02(2). limitation of liability by sole practitioners - 15.02(3). contingency arrangements for work undertaken in relation to contentious proceedings - 15.02(4). NEW CODE - all outcomes apply to an overseas practice except for 7 (clients are protected by compulsory PI insurance) and 8 (informing clients of right to complain to the ombudsman). These outcomes are replaced by equivalent outcomes tailored/relevant to an overseas business.	NEW CODE - the proposed application in the second Handbook consultation has been withdrawn. The new provision dis-applies the outcomes in Chapter 1, replacing them with provisions broadly corresponding to the "current Code". The following outcomes must be achieved for an overseas practice: **OP(1)** you properly account to your *clients* for any *financial benefit* you receive as a result of your instructions unless it is the prevailing custom of your local jurisdiction to deal with *financial benefits* in a different way; **OP(2)** *clients* have the benefit of insurance or other indemnity in relation to professional liabilities which takes account of: (i) the nature and extent of the risks you incur in your *overseas practice*; (ii) the local conditions in the jurisdiction in which you are *practising*; (iii) the terms upon which insurance is available; and you have not attempted to exclude liability below the minimum level required for practice in the local jurisdiction;
Rule 3	3.01 – Duty not to act 3.02 – Exceptions to duty not to act 3.03 – Conflict when already acting 3.04 – Accepting gifts from clients	**Chapter 3 – Conflicts**- all	CURRENT CODE - applies to an overseas practice with the exception of 3.07 and 3.22 where the land which is the subject of a conveyance is outside of England and Wales. NEW CODE - not stated, content of Chapter 3 subject to separate consultation.	NEW CODE - all the outcomes in Chapter 3 apply to an overseas practice. The exceptions in the current Code relating to land have been withdrawn along with the provisions to which they refer.
	3.05 – Public office or appointment leading to conflict 3.06 – Alternative dispute resolution (ADR)			
	3.07 – Acting for seller and buyer			

	Provisions of the current Code which will apply under the new Code	Location in new Code	Consultation Paper 2 Commentary	Consultation Paper 3 Commentary
	in conveyancing, property selling and mortgage related services 3.08 – Conveyancing transactions not at arm's length 3.09 – Conveyancing transactions at arm's length 3.10 – Conditions for acting under 3.09 3.11 – Property selling and mortgage related services 3.12 – SEALs and participating firms 3.13 – Conditions for acting under 3.11 3.14 – Special circumstances in property selling and conveyancing 3.15 – Conflict arising when acting for seller and buyer 3.16 – Acting for lender and borrower in conveyancing transactions 3.17 – Standard and individual mortgages 3.18 – Notification of certain circumstances to lender			
	3.19 – Types of instruction which may be accepted 3.20 – Using the approved certificate of title 3.21 – Terms of rule to prevail 3.22 – Anti-avoidance 3.23 – Waivers Annex – Certificate of title			
Rule 5	5.01 – Supervision and management responsibilities 5.03 – Supervision of work for	**Chapter 1 – Client care** – in part (particularly (5.01(1)(a)(d)(e)(f)(g)(h)(i),	CURRENT CODE - does not apply to an overseas practice. Replaced with express provisions dealing with:	NEW CODE Chapter 1 - the proposed application in the second Handbook consultation has been

	Provisions of the current Code which will apply under the new Code	Location in new Code	Consultation Paper 2 Commentary	Consultation Paper 3 Commentary
	clients and members of the public	5.03) **Chapter 7 – Management of your business** – in part (5.01(c)(j)(k)(l)) For 5.02 see **Authorisation and Practising Requirements** section of the Handbook	restriction on setting up a sole practitionership outside of England and Wales (15.05(2)). minimum practising experience requirements for at least one manager (15.05(3)). A general obligation on solicitors, RELs, recognised bodies and managers practising outside of England and Wales to ensure that the firm is managed and supervised properly (15.04). NEW CODE Chapter 1 - all outcomes apply to an overseas practice (see Rule 2 above). Chapter 7 - all outcomes apply to an overseas practice. A&P requirements - apply to regulated individuals and bodies.	withdrawn and replaced with three provisions specific to an overseas practice. None of these relate to the provisions contained in the current Rule 5. Chapter 7 - all outcomes continue to be applied to an overseas practice (as in the second Handbook consultation). A&P requirements - apply to licensed/regulated individuals and bodies (as in the second Handbook consultation).
Rule 6	6.01 – Duty not to discriminate 6.02 – Evidence of breach 6.03 – Equality and diversity policy 6.04 – In-house practice 6.05 – Waivers 6.06 – Meaning of terms	**Chapter 2 – Your clients and equality and diversity** - except 6.05 and 6.06	CURRENT CODE - does not apply to an overseas practice. NEW CODE - two of the 5 outcomes apply to an overseas practice, specifically: not discriminating without lawful cause or victimise or harass in the course of your professional dealings; and not putting clients and staff who are disabled at any disadvantage in comparison with those who are not.	NEW CODE - the proposed application in consultation paper 2 has been withdrawn. The new provision dis-applies the outcomes in Chapter 2, replacing them with a new outcome which must be achieved for an overseas practice: OP(1) You do not discriminate unlawfully according to the jurisdiction in which you are practising.
Rule 7 - Publicity	7.01 – Misleading or inaccurate publicity 7.02 – Clarity as to charges 7.03 – Unsolicited approaches in person or by telephone 7.04 – International aspects of publicity 7.05 – Responsibility for publicity 7.06 – Application 7.07 – Letterhead, website and e-mails	**Chapter 8 – Publicity** - all	CURRENT CODE - applies to an overseas practice subject to the following: Rule 7 does not apply to websites, email, text messages or similar communications from offices in an EU state other than the UK; and Rule 7.07 - letterhead, website and emails - does not apply to an overseas practice. Replaced with express provisions dealing with: naming of RELs on the letterhead of an office in Scotland and Northern Ireland; and making it clear on the firm's letterhead that it is the letterhead of a law firm.	NEW CODE - the proposed application in the second Handbook consultation has been withdrawn, only outcomes 1 and 4 now apply to an overseas practice: Outcome 1 your *publicity* in relation to your *firm* or *practice* or for any other business is accurate and not misleading, and is not likely to diminish the trust the public places in you and in the provision of legal services. Outcome **4** *clients* and the public have appropriate information about you, your *firm*

	Provisions of the current Code which will apply under the new Code	Location in new Code	Consultation Paper 2 Commentary	Consultation Paper 3 Commentary
			NEW CODE - all outcomes apply to an overseas practice with one exception; letterhead, website and email do not need to include the words "regulated by the SRA".	and how you are regulated. In addition an overseas practice must comply with one additional outcome: **OP(1)** *publicity* intended for a jurisdiction outside England and Wales must comply with ….. **(a)** any applicable law or rules regarding *lawyers' publicity* in the jurisdiction in which your office is based and the jurisdiction in which the publicity is received.
Rule 8 – Fee sharing	8.01 - Fee sharing with lawyers and colleagues 8.02 – Fee sharing with other non-lawyers	**Chapter 9 – Fee sharing and referrals** - all	CURRENT CODE - applies to an overseas practice. NEW CODE - all outcomes apply to an overseas practice.	NEW CODE - the outcomes apply to an *overseas practice*, except where they conflict with the SRA European Cross-Border Practice Rules which will prevail in any conflict.. The inclusion of express reference to the ECBPR is useful clarification but does not in any practical way change the position from that under the current Rule 8.
Rule 9	9.01 – General 9.02 – Financial arrangements with introducers 9.03 – Referrals to third parties	**Chapter 6 – Your client and introductions to third parties –** 9.03 only **Chapter 9 – Fee sharing and referrals** - 9.01 and 9.02	CURRENT CODE - does not apply to an overseas practice except for an express obligation to ensure that referrals do not breach the core duties or "any other applicable provisions of these rules". NEW CODE Chapter 6 - all outcomes apply to an overseas practice. Chapter 9 - all outcomes apply to an overseas practice.	NEW CODE Chapter 6 - all outcomes apply to an overseas practice (as in the second Handbook consultation). Chapter 9 - the outcomes apply to your *overseas practice*, except where they conflict with the SRA European Cross-Border Practice Rules which will prevail in any conflict (as in the second Handbook consultation).
Rule 17 – Insolvency practice	17.01 – when accepting an appointment or acting as an appointment holder as an insolvency practitioner, obligations to comply with the Insolvency Joint Code of Ethics,	**Chapter 3 – Conflicts**	CURRENT CODE - does not apply to an overseas practice except in relation to appointments appertaining to orders made in courts of England and Wales. NEW CODE - not stated, content of Chapter 3 subject to separate consultation.	NEW CODE - this express provision has not been reproduced in the new Code.
Rule 19	19.01 – Independence	**Chapter 6 – Your client and introductions to third**	CURRENT CODE - does not apply to an overseas practice except where regulated services are	NEW CODE Chapter 6 - all outcomes apply to an overseas

	Provisions of the current Code which will apply under the new Code	Location in new Code	Consultation Paper 2 Commentary	Consultation Paper 3 Commentary
		parties **Chapter 9 – Fee sharing and referrals**	conducted from an office in Scotland and Northern Ireland, or into the UK from an office outside of the UK (this is covered by core duty of independence - 1.03). NEW CODE Chapter 6 - all outcomes apply to an overseas practice. Chapter 9 - all outcomes apply to an overseas practice.	practice (as in the second Handbook consultation). Chapter 9 - the outcomes apply to your *overseas practice*, except where they conflict with the SRA European Cross-Border Practice Rules which will prevail in any conflict (as in second Handbook consultation).

Annex H

Comments on the SRA Authorisation Rules for Legal Services Bodies and Licensable Bodies (as set out in Annex F1 of the consultation document)

General Comments

We have commented below on specific sections of the Authorisation Rules. Generally, we are concerned that the scope of the Rules will create uncertainty and inconsistency in relation to the new regulatory regime. As the SRA says, "authorisation is the function which considers applications from individuals to become solicitors or managers of firms and from organisations to be recognised as approved suppliers of legal services". The draft Rules are far more extensive than is required to achieve these purposes - they deal in detail with conduct and regulatory responsibility. In so doing they create a second strand of conduct regulation which is confusing, inflexible, not risk based and not always entirely consistent with the provisions of the Code.

We have addressed in Annex C the problems created by the different reporting regimes under the new Code and Rule 8.5. Another example of regulatory overlap and confusion would be the requirement to comply with the 'professional principles'. Those regulated by the SRA will have to comply with the 'SRA Principles' in the new Code and with the 'professional principles' in Rule 8.2 of the Authorisation Rules. The different sets of principles cover essentially the same ground but differ in phraseology and impact. For example, it is a 'professional principle' that 'the affairs of clients should be kept confidential' and firms must ensure this happens (Authorisation Rule 8.2 (a) (ii)), but Outcome 1 of Chapter 4 of the Code provides (rightly) that the obligation is qualified, being to keep the affairs of clients confidential "unless disclosure is required or permitted by law or the client consents".

Clearly the 'professional principles' are derived from the Legal Services Act and ought to form part of the regulatory regime, but why does the SRA feel that the requirements of the Act are not already adequately addressed by the provisions of the Code (which applies to regulated individuals, traditional firms and ABS's as well as to in-house lawyers and overseas lawyers)? If they are not addressed, would it not be better to amend the Code rather than to have parallel requirements in rules meant to deal with authorisation?

We would strongly urge the SRA to amend the Authorisation Rules so that they fulfil their core function only, with ongoing obligations regarding the management of a regulated business and/or ethical behaviour being consolidated within the Code. This could be achieved by the insertion of appropriate cross references from the Authorisation Rules as necessary. For example (and see our comments elsewhere on the roles), if the SRA ultimately requires all firms to appoint a COLP and COFA, the Authorisation Rules could deal simply with the suitability requirement for the person, with Chapter 7 of the Code addressing the associated duties and obligations.

Taking the approach advocated above would not only make the regime more coherent (and thereby easier for the regulated to comply with), but would also allow the SRA

to modify only one set of rules going forward. To revert to the earlier example, as presently drafted, the SRA would have to ensure that any guidance regarding managing confidentiality addressed the relevant provisions in the Authorisation Rules and in the Code, it would be more straightforward just to amend or comment on one consolidated set of requirements.

Specific Comments

Rule 1.1

As a drafting matter, it is very unhelpful to have to cross-refer to two sets of definitions in order to understand and interpret the Rules. It would be much more convenient for the reader if all relevant definitions were repeated in full within the text of Rule 1 rather than requiring the reader to flick through two different sets of definitions in order to find the relevant italicised phrase.

Where possible the definitions used in the Authorisation Rules and the new Code (and throughout the Handbook) should be aligned; in particular confusion could arise in relation to "material interest" in the former and "substantial ownership interest" in the latter.

Rule 1.2 (gg) (i)

There is a cross-referencing error – Rule 1.2 (v) should say (s).

Rule 7.2 (a)

The impact of making every authorisation subject to the general conditions in Rule 8 is unclear. What is then the effect of a breach of the provisions of Rule 8.1 (a) on a firm's authorised status? It does not seem to be suggested that there is an automatic cessation of authorisation if a condition is not fulfilled, which we think would be unworkable and unreasonable given the width of the Rule. However, it would be helpful for this to be expressed and clarified either in the drafting or in the guidance notes.

Rule 8.2

To extend the points made in the general section above, there is overlap between Rule 8.2 about suitable arrangements being in place to ensure compliance etc and the provisions of Chapter 7 of the Code. Because Rule 8.2 has to be complied with "at all times" and because this is a condition of authorisation (as stated above), this means that these provisions become a continuing obligation applicable as a regulatory "rule" rather than as a matter of compliance with the general Principles and Outcomes as described in the Code. If that is really what is intended, it undermines the Outcomes-Focussed approach, at least so far as putting in place "suitable arrangements" in this area is concerned. To avoid confusion on this point, it would be helpful if the Rules were explicitly subordinate to the requirements of the Code or, at a minimum, if the guidance notes in relation to Rule 8.2 were clearer in this regard than simply advising the reader to "see also Chapter 7 of the Code". Further, the Guidance Note (i) to this

Rule implies that the areas for consideration are mandatory. We suggest that the areas for consideration are omitted. We do in any event in our comments on Chapter 11 of the Code, take issue with the proposal that a firm should maintain a system for the recording of the giving and discharge of undertakings, as being both unnecessary and impractical. The further language in the Guidance Note as to the monitoring and enforcement of a system in relation to undertakings simply reinforces a view that the maintaining of a register of undertakings is a mandatory requirement (whether under the Code or these Rules)."

Rule 8.5

In the following section we make some observations on the detail of the proposed text regarding Rule 8.5 and the COLP and COFA roles. As we observed in Annex C above, we have concerns of a fundamental nature concerning these roles and would refer you to our August Response and to our endorsement of the points made separately on this subject by Roger Butterworth of Bird & Bird LLP. Our additional observations are as follows:

- Rule 8.5 (a) (iii) requires an authorised body to designate as its COLP someone who has sufficient seniority and is in a position of sufficient responsibility to fulfil the role. We are concerned that, at least for many large firms, changes would be required to partnership agreements or governance arrangements if anyone other than the Firmwide Managing Partner were to be given this responsibility, yet we understand that the SRA are not enthusiastic about managing partners performing this role.

- Rule 8.5 (b) (i) requires the COLP to "take all reasonable steps to ensure compliance". Whoever performs this role, it will be really helpful to have more detailed guidance about what sort of steps will be regarded as sufficient for this purpose. There is an implication that a failure to cover the "common areas for consideration" set out in guidance note (i) may not constitute "reasonable steps", yet not all the matters covered are either sufficiently explained or commonly adopted practices among our member firms. For example, what are "appropriate checks on contractors"?

- Also within Rule 8.5 (b) (i) there is reference to compliance with "any statutory obligations". It would be helpful to have clarity as to whether this is intended to have extra-territorial impact. Normal principles of statutory interpretation would lead to the conclusion that, where it is not expressed to have worldwide effect, such a reference should be construed as only relating to statutory obligations under the laws of England and Wales. But query if that is what the SRA intends here. Is it intended to cover only statutory obligations relating to legal practice, or all objections, such as health and safety? It would also be helpful to understand the SRA's views regarding how this responsibility should interact with the role of MLRO at a firm and whether the SRA expects that the role of insurance mediation compliance officer will survive and if so whether that role should be carved out of the roles of the COLP and COFA.

- Rule 8.5 (b) (ii) requires the COLP to report to the SRA any failure "so to comply". As a drafting matter, it is ambiguous whether this refers to a failure of the COLP to comply with the requirement to take all reasonable steps or whether, as seems to be assumed in the guidance notes, this is intended to refer to the failure of the body to comply with the terms and conditions of authorisation or any of its statutory obligations. The same issue arises on the drafting of Rule 8.5 (d) (ii). It could be clarified by better drafting (though we would advocate its being consolidated in to Chapter 10 of the Code).

- We have a major concern in relation to the obligation to report non-compliance that has been covered elsewhere in our response. This partly relates to the absence of any materiality threshold that may require thousands of inconsequential minor breaches of, say, health and safety regulations or even the failure to send out a client care letter on a particular matter, on the one hand, and the deterrent effect which will be highly undesirable, if partners are reluctant to notify and escalate matters of concern to the COLP for fear of being reported to the SRA, on the other hand.

- Rule 8.5 (c) covers the designation of the COFA and seems to indicate that the SRA envisages quite an imbalance between the two roles. The COFA is in fact only required to be responsible for ensuring compliance with the Accounts Rules and not compliance with all finance and administration matters, as the title would indicate. In particular, general responsibility for statutory compliance falls back to the COLP. It would be helpful to understand how the SRA thinks that the two roles will be scoped and will operate in practice. Where would the responsibility for the firm's own process lie (i.e. matters not related to the Accounts Rules)? If a firm has to appoint a COFA (particularly with that title) it may well decide to divide up responsibility for the management of compliance tasks between the COFA and COLP. This raises the issue of whether the COLP can properly delegate responsibility for matters that are allocated to him/her under the rules (for example, compliance with administrative law and regulation) to the COFA and how the SRA will deal with the two officers. There may well be different views as to where the boundary lies between legal practice and administration, and the same issue may fall within both functions, depending on its application. For example, information security may be within the remit of "administration" (where for example it is the IT aspect of a firewall) but where the application of information security touches on an information barrier, it may fall properly into the scope of "legal practice". We envisage that this may lead to most of the communications between a firm and the SRA involving both the COLP and the COFA.

Rule 13 (2)

We note that RFLs and RELs have been removed from the list of persons, meaning that only "a solicitor who holds a current practising certificate" will be *prima-facie* approved as suitable to be a member or owner of an authorised body. The other professions authorised under the Legal Services Act (e.g., barristers, FILEX etc.) are similarly excluded.

Providing these lawyers can meet the conditions set out in 13 (2) (b), (c) and (d) and their good standing with the relevant regulator is established, we question the justification for their exclusion.

Rule 14.1

Because of the definition of “manager” set out in the Code, this Rule will not cover non-member partners. Large international firms tend to have significant numbers of these partners in offices outside London, many of whom will currently be RFLs. As currently drafted, there will be no process which would apply under Rule 14 to allow such a person to be registered in future, although the impact of the use of the “manager” term in the Practice Framework Rules will also mean no requirement for such a person to be registered in future will arise. Query if that is really what the SRA intends.

The guidance note to Rule 3 of the Practice Framework Rules states that (with the exception of lawyers who qualify for admission as European Exempt Lawyers ("EEL")) "a foreign lawyer must be registered with the SRA as an RFL to be a manager, member or owner of a recognised body".

The exclusion of RFLs from the list in Rule 13(2) creates an anomalous situation where such a lawyer wanting to join an authorised body would have to go through a dual approval process; one for recognition as a foreign lawyer, a second for approval as a manager. As above, we question how this additional barrier to entry can be justified and whether it is a proportionate response to the risk. At the very least, we would like to see the two authorisation processes aligned.

In the case of REL and EEL applicants, we also question whether these additional barriers are acceptable under the relevant EU Directives.

Rule 22.1 (ix) and (xiii)

Under these provisions, there will be an extremely broad discretion to allow the SRA to revoke or suspend authorisation because the provisions cover failure to comply with duties “under any enactments”, as well as the circumstances where “for any other reason” it is in the public interest to revoke or suspend authorisation. The uncertainty which these very broad provisions create (with no materiality threshold concerning breach of “any enactment” for example) is unreasonable and may create difficulties for ABSs and other legal service providers when seeking to obtain debt or equity finance because of the uncertainty over the future of the business thereby created. We would ask the SRA to consider producing guidance covering the sorts of circumstances where the SRA would expect to consider invoking the broad discretion under (xiii) and the introduction of a materiality threshold in (ix).

Annex I

Responses to the consultation paper questions as they relate to legal education and training

Set out below is the CLLS Training Committee's response (with contribution from the CLLS Associates Forum) to the consultation paper questions as they relate to legal education and training, which we endorse:

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

Overall, we support the approach (as outlined in paragraph 227 of the Consultation Paper) which is proposed for the new Handbook in relation to the recasting of the regulations for training, admission and rights of audience.

Picking up the request for further feedback in paragraph 225 of the Consultation Paper, our comments are as follows:

Requirements for the standard of English language skills of new entrants

The effective practice of law requires sophisticated language skills to understand, apply and communicate what can be complex concepts. Therefore, our view is that it is reasonable to expect new entrants to the profession, whatever their background, to have a high level of English language skills. The new Qualified Lawyers Transfer Scheme has introduced language skills requirements designed to ensure that all would-be entrants to the profession following that route have language skills equivalent to that possessed by a domestic graduate. That is an appropriate standard which we feel should be applied to all entrants to the profession, whichever route they may follow to qualification.

The LPC continuing to be a lifetime qualification

Given that law and practice is dynamic and so can change (sometimes very quickly) as circumstances demand, putting some limit on the currency of an LPC qualification is, in principle, a sound idea. If that is an appropriate step to take, what should the period of currency be and should all LPC graduates be treated in the same way irrespective of what they have been doing after completing the LPC?

The period of "currency" needs to be long enough so as not to prejudice the many LPC "graduates" who struggle to obtain Training Contracts after completing the Course while not being so long that their knowledge is out of date to too great an extent. On that basis, our view is that the LPC qualification should remain "current" for five years.

We are, however, aware of a minority of cases where an LPC "graduate" has been unable to obtain a Training Contract after completing the Course, has worked in the long term as a "paralegal", but eventually (more than five years after completing the LPC) has obtained a traineeship. Should the bar be applied to the LPC of such a

person? Our view is that such a person is in a different position from someone who has left the law altogether for many years. However, we also recognise that such a person may have been working in a relatively narrow field of practice. Therefore, our view is that such a person should be given credit for the extent to which their practical experience has enabled them to maintain their knowledge of the law and practice covered by the LPC, accepting that this may give them exemption from only part of the whole Course.

The value of management training

We support the concept of encouraging solicitors to acquire/develop managerial skills. However, the term "managerial skills" can cover a very wide range of personal, inter-personal and business skills. The skills an individual solicitor needs can be very different depending on the stage he or she has reached in his or her career, the role he or she is performing and the nature of the organisation in which he or she works.

There is, therefore, a danger in applying a "one size fits all" approach just as there is in trying to set up a management training structure which will meet the needs of the different "levels" of a very diverse profession.

Therefore, we take the view that moving away from the current or planned compulsory management training for solicitors at a fixed stage in their careers when they take on specific roles is a pragmatic solution.

We would, however, advocate that solicitors should be encouraged (but not required) to acquire/develop managerial skills through meeting their annual CPD requirements. The reason why we do not want the ***annual*** CPD requirements to include an element of managerial skills is that such an obligation would be difficult to meet over a career lasting decades. While formal training on the skills is undoubtedly valuable, the skills are best developed by a ***combination*** of training and practical experience. Therefore, a general, annual training course requirement would be over the top.

Looking at the "changes of substance" set out in paragraphs 228-237, our views are as follows:

Removal of age criteria for eligibility to attempt the Common Professional Examination (paragraph 229)

We support the planned removal of the arbitrary age requirement (of being at least 25 years old) currently imposed on non-graduates wishing to attempt the CPE. Our only comment on this proposal is that the definition of "mature student" needs to be expanded to give clear guidance on what is the standard of "general education" which these applicants must have achieved.

Removal of age requirement from "qualifying employment" definition (paragraph 230)

We support the proposal to remove the requirement that ILEX members can only count experience gained after the age of 18.

Amendment to the point at which exempting law degree students must apply for student enrolment (paragraph 231)

We support this proposal.

Amendment to the validity period of certificates of student enrolment (paragraph 232)

We support the proposal to extend the validity of the certificate.

Additional requirement on providers of Training Contracts to check potential students' student enrolments (paragraph 233)

While we support this proposal in principle, we would ask that there be some more clarity on the precise nature of the obligation to check the student's enrolment which would be imposed on the "training provider". If the training provider merely has to see the original certificate, we feel this is a sensible step. If the training provider has to confirm the student's enrolment with the SRA, this will be burdensome and bureaucratic for both the training providers and the SRA. We assume the intention is to require the former, not the latter.

Additional regulation to cover termination of training contract arising from case law (paragraph 234)

It is entirely reasonable that the Training Contract can be terminated if "the training establishment's business closes or changes so much that it is not possible to properly train you" but what is meant by "changes so much"? Further guidance on this point is needed.

Amendment to Professional Skills Course (PSC) and Training Contract commencement requirements (paragraph 235)

We support this proposal.

Additional exemptions from LPC subjects (paragraph 236)

We have previously responded to the SRA's consultation on the accreditation of prior learning and would refer the SRA to our Response to that previous consultation.
Aside the comments we have made above, we have no specific points to raise in relation to Annexes F5-F8.

Question 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 RBs?

We broadly support the proposals in the Consultation Paper, subject to one point.

We are concerned by the reference in paragraph 239 to mental health issues or addiction to alcohol or drugs not of themselves being grounds for failing the Test but that issues of this nature will be taken into account when considering an individual's overall suitability and the public interest.

We agree that if some issue has arisen as a result of mental health or addiction which calls a person's "character and suitability" into question, the SRA needs to investigate this and it may be a reason for exclusion. However, it is not necessary under general law to disclose a disability and as the proposal is currently written, it could be interpreted as indicating that the mere fact of mental health or addiction problems could affect the person's suitability.

We do not believe that this is the SRA's intention and so there needs to be clarity as to when and how mental health issues and addiction will be taken into account under the Test.

Question 20: Do you have 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 the comments in paragraph 272 to the effect that the code makes it plain that the controls which firms should put in place should be appropriate to the nature, scale and complexity of the firm. We have no further comments to make on the equality impact assessment.

THE CITY OF LONDON LAW SOCIETY
PROFESSIONAL RULES AND REGULATION COMMITTEE

Individuals and firms represented on this Committee are as follows:

C. Perrin (Clifford Chance LLP) (Chair)

R. Butterworth (Bird & Bird LLP)

R. Cohen (Linklaters LLP)

Ms S. deGay (Slaughter and May)

A. Douglas (Travers Smith LLP)

Ms A. Jucker (Pinsent Masons LLP)

J. Kembery (Freshfields Bruckhaus Deringer LLP)

Ms H. McCallum (Allen and Overy LLP)

Ms J. Palca (Olswang LLP)

M. Pretty (DLA Piper UK LLP)

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10 November 2010

Ms Margaret Hope
Solicitors Regulation Authority
Ipsley Court
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Dear Ms Hope

Architecture of Change Part 2 - Compliance Officers

I enclose, as an early contribution to the current consultation, views on behalf of my firm on the COLP and COFA roles under the current proposals.

We will be making a fuller contribution in due course, but having completed the analysis on this particular aspect thought it beneficial to share it with you at an early opportunity.

Whilst the SRA has continued with its proposals for these two compliance officers, we suggest that the SRA has not have fully clarified the drafting, or fully considered all the implications of the proposals as currently drafted.

Yours sincerely

Roger Butterworth

Roger H Butterworth
General Counsel

For and on behalf of Bird & Bird LLP

cc: David Whitney Esq., Relationship Manager, SRA
Ms Jemma Ralph, Senior Relationship Manager, The Law Society
Chris Perrin Esq., Professional Rules and Regulation Committee, CLLS

BIRD& BIRD LLP

Response to SRA Consultation – 21 October 2010

The Architecture of Change – Part 2

Compliance Officers

1. Introduction and Summary

1.1 The SRA's latest consultation is here:

http://www.sra.org.uk/sra/consultations/OFR-handbook-October.page

This response is limited to Rule 8 of the draft SRA Authorisation Rules, and in particular the roles of Compliance Officers. Furthermore, this response is concerned only with the application of Rule 8 to recognised bodies (traditional law firms) and not licensed bodies (ABSs).

1.2 We have questions and misgivings about both the substance and the drafting of Rules 8.1 and 8.5 and consider it may be helpful to raise them at an early stage in the consultation.

1.3 As we said in response to the earlier consultation: "We appreciate the logic of having a Head of Legal Practice (HoLP) and Head of Finance and Administration (HoFA)...However, we are not convinced that these positions need to be extended to other types of firms such as recognised bodies which are comprised of solicitors and lawyers and are regulated as employees etc. of a recognised body and also individually as solicitors and lawyers of their local law society/bar. – Bird & Bird LLP"

1.4 We summarise some of our views as expressed in this paper as follows:

1.4.1 We suggest that it is wrong that Rule 8 requires greater scope of individual responsibility on the part of managers than that required under Principles and the Code of Conduct.

1.4.2 We suggest that the SRA review the range of enactments relevant and the geographical reach. We suggest that "enactments" (and "statutory obligations") be limited.

1.4.3 We suggest a requirement which is limited to that which is necessary for effective regulation, not least because that seems to be harmony with the requirements of the Legal Services Act as regards ABSs. To avoid the duplication the obligations of the MLRO under the Proceeds of Crime Act and Money Laundering Regulations ought to be excluded from the COLP's duties in the same way that compliance with the Accounts Rules is excluded.

1.4.4 It is odd that a policy decision seems to have been taken so far to make the COFA's role as narrow as is strictly necessary, but to make the COLP's role as wide as possible. We are not arguing for an enlargement of COFA's role, but suggest it is incongruous for the COLP to have responsibility for financial matters – it is not the way a commercial enterprise would ordinarily be organised.

1.4.5 Rule 20.06 of the Code of Conduct 2007 is an obligation on firms and solicitors to report "**serious misconduct**" of any recognised body, manager or employee – that is of one's own firm or any other. By contrast Rule 8.5 has no "materiality" qualification. Rule 8.5 echoes the position of MLRO's who are bound to report to SOCA the immaterial, as well as the material. We suggest that this potentially wasted effort on the part of the SRA and firms be avoided. We suggest a narrow scope for the COLP's duty

to report to the SRA, not least because that seems to be harmony with the requirements of the Legal Services Act as regards ABSs.

1.4.6 Even in the best run law firms particularly employee risk and compliance directors, and even partners, may be most reluctant to accept the duties and potential unique personal exposure to action by the SRA for someone else's defaults. The position may go therefore by default to the managing partner where, strongly arguably under the current proposals, it belongs.

1.4.7 There can be significant advantages for the firms themselves and the SRA to have an individual with expertise and the managing partner's ear, whether or not a partner, focussing on risk and compliance. But, we suggest, with only internal obligations to he firm, and not external obligations to the SRA. We suggest that the SRA's proposals will have the opposite of the intended consequences, namely if managing partners become COLP it may diminish the role of the person who is risk and compliance officer for internal purposes.

1.5 In an analysis of this length inevitably some suggestions may contradict one another. It may not be necessary, or indeed logically possible, to accept all our suggestions in order to achieve the desired end result.

2. Legal Services Act

2.1 Rule 8, as it applies to traditional law firms, is modelled on parts of the Legal Services Act as it applies to ABSs, as applied across to traditional law firms in the interests of a level playing field.

2.2 By way of background we point out that under the Legal Services Act:

- s 91 requires the HOLP to take all reasonable steps to ensure compliance with the **licence** and to take all reasonable steps to ensure compliance by managers or employees who are authorised persons to comply with s 176 in relation to **reserved activities**, and report any failures to comply;

- s 176 requires each regulated person to comply with the relevant regulatory arrangements **as they apply to him**;

- under Part 3 of Schedule 11 the practising requirements of the licence are limited to practice specific matters, including a duty to comply with s 176, but as regards authorised persons the duty is limited to **reserved legal activities**.

2.3 We will not labour the point on each occasion that it is relevant below, but we make the point here that accordingly for ABSs under the Act:

- licence requirements are limited to practice specific matters, not the whole range of legislation;

- authorised persons compliance is only in respect of reserved legal activities, not the whole business of the entity;

- each regulated person to comply so far as regulatory arrangements apply to him;

- the licence requirements are narrowly focused; and

- the HOLP only monitors authorised persons as regards reserved activities.

2.4 We note that under the regulatory objectives in s28 of the Act that regulatory activities should be transparent, accountable, proportionate, consistent and targeted

only at cases in which action is needed.[1] In particular, we suggest that the SRA should not seek to oversee requirements of statutes which are of general application (health and safety etc.) and limit is ambit, and therefore that of the COLP and his reporting obligation, to matters of professional regulation.

3. Principles, Code of Conduct and Authorisation Rules

3.1 We note Principle 7 of the draft Code of Conduct requiring that "**you** must ... [7] comply with **your** legal and regulatory obligations".[2]

3.2 We note also Outcome 3 under Chapter 7 of the draft Code of Conduct requiring that "**you** identify, monitor and manage risks [to compliance][3] with all the Principles, rules and outcomes and other requirements of the Handbook **if applicable to you** and take steps to address the issues identified". And Outcome 5 that "**you** comply with legislation applicable to your business..."

3.3 "**You**" in the draft Code of Conduct refers to solicitors, RELs, RFLs and to authorised bodies.[4]

3.4 Whilst the Code of Conduct is based on outcomes, so allowing flexibility in how firm's live up to the Principles, the Authorisation Rules are *rules* and so must be interpreted and complied with as such.

4. Rules 8.1 and 8.2

The Rule

4.1 We note Rule 8.1, which is intended to have general application:[5]

> 8.1 **Compliance with regulatory arrangements**
>
> (a) An *authorised body* and its *managers* must ensure that:
>
> (i) any obligations imposed from time to time on the *authorised body*, its *managers*, *employees* or *interest holders* by or under the ***SRA*'s *regulatory arrangements*** are complied with; and
>
> (ii) **any other obligations imposed on the *authorised body*, its *managers*, *employees* or *interest holders*, by or under any enactments** are complied with.

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[1] Legal Services Act:
28 Approved regulator's duty to promote the regulatory objectives etc
(1) In discharging its regulatory functions (whether in connection with a reserved legal activity or otherwise) an approved regulator must comply with the requirements of this section.
(2) The approved regulator must, so far as is reasonably practicable, act in a way—
(a) which is compatible with the regulatory objectives, and
(b) which the approved regulator considers most appropriate for the purpose of meeting those objectives.
(3) The approved regulator must have regard to—
(a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and
(b) any other principle appearing to it to represent the best regulatory practice.

[2] It is outside the scope of this note to comment on the Principles, but any qualification to "entitlement" or "statutory obligations" in Rule 8 of the Authorisation Rules should also be considered to be reflected in Principle 7.

[3] Correction required.

[4] See Draft SRA Code of Conduct, Chapter 13. Though a cross reference at least in Chapter 14 would assist. The meaning of "**you**" for the Principles does not appear to be defined.

[5] See 8.1(c). Key phrases emboldened for emphasis.

Who has the obligation

4.2 Now, Outcome 3 of Chapter 7 is expressly limited to authorised bodies and/or solicitors managing risks in compliance with the Principles etc. "**if applicable to you**," and, we presume, Principle 7 is impliedly so limited – "**you** must ... comply ...". But, by contrast Rule 8.1 requires:

- the authorised body to ensure compliance by the body and by its managers and employees, not unreasonably we suggest; and

- each manager to ensure compliance by the body and by its managers and employees, which we suggest is an unreasonable enlargement of the sense of Principle 7 and Outcome 3 of Chapter 7.

4.3 In the case of Bird & Bird LLP, this means each partner being responsible for compliance by in excess of 200 partners across 14 countries, so we suggest it is onerous for each manager to have this obligation. Approximately two thirds of our partners are not solicitors of England and Wales, and are located and practise from offices outside the UK, so it is unreasonable for them to be expected to be responsible for compliance by the LLP and all members and employees, with the whole body of SRA regulation in England and Wales and, so far as overseas practice requires, elsewhere in the case of the authorised body.

4.4 We suggest that it is wrong that Rule 8 of the Authorisation Rules requires greater scope of individual responsibility on the part of managers than that required under Principles and the Code of Conduct. In particular, the decision in **Akodu v Solicitors Regulation Authority**[6] approved the statement in Cordery on Solicitors[7] that 'there is no vicarious liability in conduct.'

4.5 We suggest that 8.1(a) be redrafted to the effect that:

- the authorised body must ensure compliance as per (i) and (ii), that is by the body itself and by its managers, employees;[8]

- the managers must ensure their *own* compliance individually, but are not responsible for compliance by the body or by other managers or by employees or interest holders.

Possible drafting duplication

4.6 Now, " (cc) "*regulatory arrangements*" [in Rule 8.1(a)(i)] has the meaning given to it by section 21 of the *LSA*, and includes all rules and regulations of the *SRA* in relation to the *authorisation*, *practice*, conduct, discipline and qualification of *persons* carrying on *legal activities* and the accounts rules and indemnification and compensation arrangements in relation to their *practice*.[9]

4.7 We note that many/all of the SRA's regulatory arrangements will have the status of delegated legislation so, absent express interpretation to the contrary, will also be included within both "enactments" and "statutory provisions" referred to below.

4.8 As the SRA's regulatory arrangements in 8.1(a)(i) are mainly/wholly delegated legislation then "enactments" in 8.1(a)(ii) also applies to the SRA's regulatory arrangements. This duplication is not in the current drafting harmful, but is inelegant.

4.9 We suggest express interpretation be added for "enactments" and, if it is correct that it includes delegated legislation, in particular the SRA's regulatory arrangements, that the reference in (ii) be to "enactments other than the SRA's regulatory arrangements."

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[6] [2009] EWHC 3588 (Admin)
[7] At Paragraph J2225
[8] But see also below on the scope of required compliance.
[9] Rule 1 Interpretation.

Interest holders

4.10 The rule also requires ensuring compliance by "interest holders" – this refers to investors who are not managers. There would not be any for a traditional law firm, but suppose the firm has a major equity investor and therefore becomes an ABS, any control that the authorised body or managers may have on the interest holder would only arise through contract and presumably, while there will be a contractual relationship between the authorised body and the investor, it is probably unlikely there would be one between all the managers and the investor. So we suggest it is onerous for each manager to have this obligation in respect of compliance by interest holders.

4.11 As regards "interest holders" we suggest that the authorised body be required to take reasonable steps to ensure compliance by interest holders, but that managers have no such responsibility under this rule.

Which enactments

4.12 Rule 8.1(a)(ii) requires compliance by the authorised body and managers with "any enactments." This is not limited to those that apply to lawyers as such. Indeed, oddly it is not limited to those that concern the business of the authorised body, so could extend to compliance by managers and employees in their personal capacity, for example, the payment of taxes due personally. We understand that current practice is to interpret the existing Rule 1 to apply to the private lives of solicitors, so for example a drink drive conviction is a breach of Rule 1.01.[10] There is a world of difference, we suggest, between the existing Rule 1 which refers to upholding the rule of law, acting with integrity and not diminishing trust (so that drink driving may be culpable, but a speeding offence not) and draft Rule 8 which requires compliance with "any enactment" (or "any statutory obligations"). The implied sense of materiality in the existing Rule 1 is absent from the draft.

4.13 A policy decision is required as to the ambit of "enactments," is to be all statutory obligations (even outside the SRA's usual concern or process of enforcement) or only those statutory obligations concerning professional regulation of the supply of legal services? We suggest the latter, not least because it seems to be harmony with the requirements of the Legal Services Act as regards ABSs.

4.14 For example, on its face it includes:

- Proceeds of Crime Act and Money Laundering Regulations;
- Companies Act, Limited Liability Partnerships Act and/or Partnership Act as appropriate;
- Taxes Act on partners and employees as well as the authorised body;
- Data protection;[11]
- Employment legislation;
- Health & safety legislation;
- Environmental legislation;
- Planning Acts,[12]

including equivalent legislation outside the UK.

[10] Though arguably submitting to the sentence shows respect for the rule of law.
[11] Probably appropriate to retain.
[12] One could make the same point as regards equality and diversity, but we know the SRA is wedded to enforcing that.

4.15 This is a formidable list, whether or not it is to be limited to those that concern the business of the authorised body.[13] With, in the case of Bird & Bird, in excess of 200 managers across 14 countries it is onerous for each manager to have this obligation (see above), and inappropriate even for the authorised body's own compliance if it extends to compliance outside the business of the authorised body.

4.16 The obligations of 8.1(a)(i) apply essentially to England & Wales, but extend to other countries to the extent that the Code of Conduct (and other relevant requirements) apply the rules to "overseas practice." By contrast, Rule 8.1(ii) does not, however, apparently have any geographical limitation.

4.17 We note the use of "enactments" in 8(a)(ii), but "statutory obligations" in 8.5(b)(i)(B), with no apparent difference of intent. We suggest that the same term be used in both places and that "statutory obligations" is the better term to use.

4.18 We suggest that the SRA review the scope of 8(a)(ii) and, in particular the range of enactments relevant and the geographical reach. We suggest that "enactments" (or better "statutory obligations") be limited to:

- [a list of statutory obligations concerning professional regulation of the supply of legal services] *(preferred)* OR [those with which the body, managers, employees and interest holders are required to comply in the carrying on of the [authorised activities] OR [business] of the firm];

- Such statutory obligations under the law of England & Wales (and in the case of overseas practice only to the extent that such statutory obligations require compliance outside England & Wales).

Employees

4.19 We note an organisational point here, which arises also below. The definitions in Chapter 14 of the draft Code of Conduct apply, so "employee" has its extended definition so (sensibly) includes employees of the firm's wholly owned service company and also consultants where there is exclusive control or they are designated as a fee earner. Bird & Bird uses a service company to employ non-partner staff in the UK and it is clearly appropriate for the rules to apply to those staff as if true employees.

5. Rule 8.2

5.1 We note that under Rule 8.2:

> **Suitable arrangements for compliance**
>
> (a) An *authorised body* must at all times have suitable arrangements in place to ensure that
>
> (i) the body, its *managers* and *employees*, comply with the ***SRA's regulatory arrangements*** as they apply to them, as required under section 176 of the *LSA* and Rule 8.1 above; and
>
> (ii) the body and its *managers* and *employees*, who are *authorised persons* in relation to a *legal activity* which the body is authorised to carry out, maintain the *professional principles*.

5.2 It is reasonable in concept that 8.2 underpins 8.1 by requiring arrangements to be in place (monitoring, review, enforcement etc.) to ensure compliance with 8.1 not only by the authorised body, but also by its managers and employees.

[13] Contrast 8.5(b)(i)(B) where there is an attempt to qualify – see below.

6. **Compliance Officers under Rule 8.5**

The Rule

6.1 We note that there will be a requirement for two compliance officers:

> **Compliance officers**
>
> (a) **An *authorised body* must at all times have an individual who:**
>
> **(i) is a *manager* or an *employee* of the *authorised body*;**
>
> **(ii) is designated as its *compliance officer for legal practice* ("*COLP*");**
>
> **(iii) is of sufficient seniority and in a position of sufficient responsibility to fulfil the role; and**
>
> **(iv) whose designation is approved by the *SRA*.**
>
> (b) **The *COLP* of an *authorised body* must:**
>
> **(i) take all reasonable steps to ensure compliance with:**[14]
>
> - **(A) the terms and conditions of the *authorised body's authorisation* except any obligations imposed under the SRA Accounts Rules; and**
> - **(B) any statutory obligations of the body, its *employees* or its *managers* in relation to the body's carrying on of authorised activities; and**
>
> **(ii) as soon as reasonably practicable, report to the *SRA* any failure so to comply.**
>
> (c) **An *authorised body* must at all times have an individual who:**
>
> **(i) is a *manager* or an *employee* of the *authorised body*;**
>
> **(ii) is designated as its *compliance officer for finance and administration* ("*COFA*");**
>
> **(iii) is of sufficient seniority and in a position of sufficient responsibility to fulfil the role; and**
>
> **(iv) whose designation is approved by the *SRA*.**
>
> (d) **The *COFA* of an *authorised body* must:**
>
> **(i) take all reasonable steps to ensure that the body and its *employees* and *managers* comply with any obligations imposed upon them under the SRA Accounts Rules; and**

[14] There has been an attempt in the new consultation to clarify the language, but it does not seem to have come out right as the old language has not been deleted from the lead in to 8.5(b)(i). The text set out above is after the presumed intended deletion. We suggest that the SRA clarify what was intended in the consultation

(ii) as soon as reasonably practicable, report to the *SRA* any failure so to comply.

(e) The *SRA* may approve an individual's designation as a *COLP* or *COFA* if it is satisfied, in accordance with Part 4, that the individual is a suitable person to carry out his or her duties.

(f) An *authorised body* must have suitable arrangements in place to ensure that its *compliance officer*s are able to discharge their duties in accordance with these rules.

(g) A designation of an individual as a *COLP* or *COFA* has effect only while the individual:

(i) consents to the designation;[15]

(ii) in the case of a *COLP*:

- (A) is not *disqualified* from acting as a Head of Legal Practice of a body licensed by the *SRA* or any other *approved regulator*;
- (B) is a *lawyer of England and Wales* and is an *authorised person* in relation to one or more of the *reserved legal activities* which the body is authorised to carry on;

(iii) in the case of a *COFA*, is not disqualified from acting as a Head of Finance and Administration of a body licensed by the *SRA* or any other *approved regulator*.

6.2 We note that in reality there is a third compliance officer, albeit not one subject expressly to these rules, namely the Money Laundering Reporting Officer (MLRO). See below.

Candidates

6.3 Rules 8.5(a) and (c) specify the requirement: the COLP and COFA must each be a manager or employee of the authorised body. It is appropriate to look at the group structure of an international firm such as Bird & Bird. Bird & Bird LLP is a recognised body which carries on legal practice in England & Wales and through branches in three further European jurisdictions. So obvious candidates as COLP and COFA would be the General Counsel (a partner) and the Chief Financial Officer (an employee, in fact of a wholly owned service company), unless the positions are made wholly unattractive and/or it is thought only the Chief Executive Officer (managing partner in most firms) (also a partner) should hold either or both of the positions.

6.4 As only one COLP and one COFA is possible there is no option to have such persons for London and different persons (for COLP) for the overseas practice in each branch outside England & Wales or (for COFA) for Accounts Rules compliance in such branches, even if that were desired – we are not advocating that as particularly desirable.

Subsidiary LLPs

6.5 In addition, and not unusually, Bird & Bird has other recognised bodies in the group. Taking one, Bird & Bird (Spain) LLP (a UK incorporated LLP) practises in Spain, but for technical reasons its members are limited to three London resident partners of Bird & Bird LLP, with the local Spanish "partners" (who are members of Bird & Bird LLP) being consultants to Bird & Bird (Spain) LLP. It has its own local finance

[15] Interesting if the COLP resigns unexpectedly. The practice is then in breach, and cannot remedy the breach until a replacement is approved by the SRA.

director who, in group terms, reports to the London Chief Financial Officer of Bird & Bird LLP. So the persons eligible to be COLP or COFA are: any member of Bird & Bird (Spain) LLP, any employee/consultant to Bird & Bird (Spain) LLP (as mentioned, "partners" locally are consultants) or (as COFA) the local finance director (an employee).

However, if the COLP and COFA of Bird & Bird LLP were the General Counsel and the Chief Financial Officer then, noting that their remit extends to the branches outside England & Wales (see above), it would make commercial sense for their to be also COLP and COFA of Bird & Bird (Spain) LLP. However, neither is a member or employee (even with extended definition) of that entity.

To make this possible it would be possible for the General Counsel to become a member of Bird & Bird (Spain) LLP (subject to there being no adverse consequences, the existing members having been selected on technical grounds), but not the Chief Financial Officer (unless the entity is to become an ABS). To make the General Counsel and Chief Financial Officer employees (which includes consultants) of Bird & Bird (Spain) LLP would be possible, but somewhat artificial, with possible adverse tax consequences.

As these are new positions we suggest that there would be merit in the SRA permitting alignment of the rules and commercial logic, if the firms concerned so wish. Accordingly, we suggest the SRA amend Rule 8.5(a)(i) and (c)(i) to extend member and employee to include any member and employee of any subsidiary undertaking of the authorised body or any parent undertaking of the authorised body. In such a case the SRA may wish to seek confirmation from the subsidiary undertaking or, as the case may be, parent undertaking of the authorised body that it accepts that its member or employee will carry out such duties.[16]

6.6 Incidentally, of more general application, the SRA should consider in such situations accepting that the parent undertaking (in this case Bird & Bird LLP, a recognised body) undertakes certain head office functions for its subsidiary undertaking (Bird & Bird (Spain) LLP, also a recognised body). A difficulty currently arises with the RB Forms. If a London (head office) contact is given for Bird & Bird (Spain) LLP the SRA assumes the next year that such a person is an employee, whereas he is in fact a partner or employee only of Bird & Bird LLP.

Reasonable

6.7 In 8.5(b)(i) what is meant by "reasonable"? Just because there has been a breach of 8.1 by the authorised body or its managers or employees does not mean that the COLP ought to have taken steps to ensure compliance. The judgment of the COLP will be affected by his knowledge and budgetary constraints and directions of the governing board or managing partner. The balance between COLP and management will potentially be quite delicate. We suggest that the SRA provide guidance on the meaning of "reasonable" and how it is to be judged, taking into account real world considerations to avoid penalising a COLP who is generally competent and doing his best, and deterring people from coming forward to accept the responsibility. The default COLP in any firm would be the managing partner if nobody else would accept it; in sizeable firms the SRA would probably prefer a dedicated person (partner or employee) as the point of contact for the purposes of liaison as outlined in the OFR Relationship Management Pilot, so should not make the responsibility too onerous.

[16] Incidentally, of more general application, the SRA should consider in such situations accepting that the parent undertaking (in this case Bird & Bird LLP, a recognised body) undertakes certain head office functions for its subsidiary undertaking (Bird & Bird (Spain) LLP, also a recognised body). A difficulty currently arises with the RB Forms. If a London (head office) contact is given for Bird & Bird (Spain) LLP the SRA assumes the next year that such a person is an employee, whereas he is in fact a partner or employee only of Bird & Bird LLP.

Statutory obligations

6.8 In the detailed text of 8.5(b)(i) taking (B) first, the reference to compliance with statutory obligations[17] of the body, partners and employees is qualified by "in relation to the body's carrying on of **authorised activities**."

See the above discussion on 8.1(a)(ii), as the same suggestions largely apply here also.

The effect of this qualification in 8.5(b)(i)(B) is not, however, clear; does it mean:

- those with which the body, managers, employees and interest holders are required to comply in the carrying on of the authorised activities of the body; or
- those with which the body, managers, employees and interest holders are required to comply in the carrying on of the business of the body; or
- those with which the body, managers, employees and interest holders are required to comply in the carrying on of the business of the body to the extent regulated by the SRA, which in practice means the body's entire business in England & Wales and elsewhere to the extent that the Code of Conduct etc. applies to overseas practice).

6.9 Whichever option applies the qualification has some limiting function. We suggest the SRA consider its intentions and redraft the requirement for clarity. We suggest a requirement which is limited to that which is necessary for effective regulation, not least because that seems to be harmony with the requirements of the Legal Services Act as regards ABSs.

Drafting

6.10 Turning to (A), we note that the "terms and conditions" referred to are those of Rule 7 which in turn incorporate the "general conditions of Rule 8."

6.11 So, running 8.5(b)(i)(A) and 8.1 together:

> (b) **The *COLP* of an *authorised body* must:**
>
> **(i) take all reasonable steps to ensure compliance with:**
>
> **(A) (i)** any obligations imposed from time to time on the *authorised body*, its *managers*, *employees* or *interest holders* by or under the ***SRA*'s *regulatory arrangements***; and
>
> - (ii) **any other obligations imposed on the *authorised body*, its *managers*, *employees* or *interest holders*, by or under any enactments,**
> - **except any obligations imposed under the SRA Accounts Rules.**

6.12 The problem with this is that it incorporates the obligation to comply with enactments *without* the qualification of 8.5(b)(i)(B) which applies to statutory obligations under (B), which is puzzling and, as currently drafted, takes away any benefit of the qualification (however it is interpreted). We suggest that this drafting difficulty be dealt with.

6.13 Furthermore, while the SRA Accounts Rules are expressly excluded from (A), they are (as delegated legislation) within (B); we suggest that the exclusion of the Accounts Rules be moved so it is an exclusion to (A) and (B).

[17] We have already commented on the difference from the term "enactment" used in 8.1.

POCA and the MLRO

6.14 The Proceeds of Crime Act and Money Laundering Regulations place certain obligations on the authorised body as carrying on regulated activities and on the nominated officer (Money Laundering Reporting Officer or MLRO). The COLP and MLRO may be the same person or different persons. Now, Chapter 7 Outcome 5 requires "you comply with legislation applicable to your business, including anti-money laundering and data protection." The way Rule 8.1(a) is written requires the authorised body to ensure that mangers and employees (which would include the MLRO) comply with, among other things, the Proceeds of Crime Act and Money Laundering Regulations, so it turns out that by virtue of Rule 8.5 the COLP's responsibilities duplicate those of the MLRO (and indeed he has to ensure that the MLRO carries out his personal responsibilities) albeit that the MLRO's obligations have a criminal sanction for breach and the COLP is responsible only to the SRA.

To avoid the duplication the obligations of the MLRO under the Proceeds of Crime Act and Money Laundering Regulations ought to be excluded from the COLP's duties in the same way that compliance with the Accounts Rules is excluded. [18]

Financial matters

6.15 In contrast to the breadth of obligations on the COLP, the COFA is correctly concerned only with the Accounts Rules. Whilst the finance director (CFO) as an accountant is a natural for the role, the scope of the COFA's duties has no interest in the authorised body's obligation to keep proper financial records (other than for client money) or to prepare annual accounts and submit them to audit[19] (other than for client money). So the "F" role in COFA is somewhat limited. And the "A" role is non-existent! Is the office being given the right name?[20]

6.16 One might say that these further obligations are adequately regulated by statute of general application, so there is no call to impose a personal duty on a COFA enforceable by the SRA. However, depending exactly on what is meant by the COLP's role as currently expressed, it seems that those very duties concerning financial matters are indeed part of the COLP's role. We ask if it is intended that the COLP is responsible for compliance of financial matters clearly within a finance director's role (other solely than the Accounts Rules).

6.17 In particular, the finance director has personal responsibilities to HMRC regarding tax compliance, at least in the case of a company being extended to LLPs also. It seems wrong that the COLP has a parallel responsibility to the SRA for the same matters.

6.18 It is odd that a policy decision seems to have been taken so far to make the COFA's role as narrow as is strictly necessary, but to make the COLP's role as wide as possible. We are not arguing for an enlargement of COFA's role, but suggest it is incongruous for the COLP to have responsibility for financial matters – it is not the way a commercial enterprise would ordinarily be organised.

Breadth of responsibilities

6.19 And we suggest that the COLP's responsibilities should not include, for example:

- Employment legislation;
- Health & safety legislation;
- Environmental legislation;

[18] In addition, the firm will have a Complaints Officer and a Financial Services Complaints Officer (for finance mediation).

[19] A responsibility of the designated members of an LLP under statute.

[20] Depending on the scope of paragraph 20 of Schedule 11 (accounts) it is possible that the same question be raised concerning HOFA.

- Planning Acts.[21]

Enforcement of these additional matters is not a concern of the SRA. We suggest these matters be clarified by redrafting. We suggest that the COLP only be responsible for legal/professional regulatory matters, and not the entire body of legislation that affects the firm in the carrying on of its business. Rule 8.5(b) should, we suggest, be redrafted accordingly.

6.20 It is logically possible, in our opinion, for these wider matters to be covered by Rule 8.1 as obligations on the authorised body (but not, we suggest on each manager, except in respect of himself), but to be excluded from the COLP's responsibilities under Rule 8.5.

6.21 See also the above discussion on enactments. We suggest that the potential breadth, and uncertainties, regarding enactments/statutory activities are unattractive to potential candidates as COLP.

6.22 Again, we suggest a narrow scope for the COLP's duties, not least because that seems to be harmony with the requirements of the Legal Services Act as regards ABSs.

7. Duty to Report

7.1 Rule 20.06 of the Code of Conduct 2007 is an obligation on firms and solicitors to report "**serious misconduct**" of any recognised body, manager or employee – that is of one's own firm or any other. By contrast Rule 8.5 has no "materiality" qualification.[22]

7.2 This echoes the position of MLRO's who equally, and unreasonably in many people's view, are bound to report to SOCA the immaterial, as well as the material. This results in a lot of time being spent in reporting matters of no real consequence and SOCA as recipient being inundated with the immaterial. We suggest that this potentially wasted effort on the part of the SRA and firms be avoided by:

– removing the COLP's and COFA's duty to report, relying on the successor to Rule 20.06; or

– at least, restricting the duty to material breaches and giving guidance on the meaning of material.

7.3 The COLP and COFA each have a duty to report breaches. We suggest that it be made clear that the firm and the COLP and COFA will be exempt from liability for what might otherwise be a breach of confidentiality owed to clients and that which is subject to legal professional privilege for reporting in good faith under the Rule whether or not there turns out to have been an actual breach.

7.4 We also suggest that an exclusion of the duty to report be granted to the extent that to do so would be a breach of law or regulation under the law of a country outside England & Wales.

7.5 We point out one disadvantage of the personal duty to report would be that managers and employees would feel discouraged from notifying the COLP of breaches, which would be counter-productive to the SRA's aims. It would we suggest be a handicap to the COLP doing his intended job, and contrary to the spirit of the well run organisation the SRA should be encouraging in law firms to be, making best use of a compliance role internally.

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[21] There may be more that ought to be excluded.

[22] Compare section 91, Legal Services Act 2007 in relation to ABSs and Heads of Legal Practice –
(3)The Head of Legal Practice of a licensed body must—
(a)take all reasonable steps to ensure that the licensed body, and any of its employees or managers who are authorised persons in relation to an activity which is a reserved legal activity, comply with the duties imposed by section 176, and
(b)as soon as reasonably practicable, report to the licensing authority such failures by those persons to comply with those duties as may be specified in licensing rules.

7.6 Again. we suggest a narrow scope for the COLP's duty to report to the SRA, not least because that seems to be harmony with the requirements of the Legal Services Act as regards ABSs.

8. **SRA's views so far**

8.1 The SRA has given its response as follows (emphasis added):

> 137. We are retaining the titles of COLP and COFA. We believe it is not appropriate to use HOLP and HOFA since the LSA only applies to ABSs and, in any event, we believe the change of title does not alter the responsibilities.[23]
>
> 138. We are strongly of the view that having COLPs and COFAs who are specifically responsible for implementing appropriate controls is in the interests of all firms and also the public.[24] The responsibilities of COLPs and COFAs take nothing away from the responsibility of other individuals to operate within those controls and for the governing body to oversee those controls, whether that is the principals of a traditional law firm or the directors of an ABS. We note that it is already common amongst firms to allocate responsibility for compliance and finance to particular individuals, and these proposals are very much in line with that approach. Whilst we accept that the LSA (*per force*) applies only to ABSs, our experience of disciplinary cases and interventions shows a clear need for specified individuals within firms to be responsible for implementing appropriate systems and controls.[25] Further we do not accept that there is clear evidence that the risks for ABSs will be significantly different from those for traditional law firms.
>
> 139. Our primary concern is the implementation of effective controls by the firm as a whole. If failings within a firm are identified, we will investigate the circumstances that gave rise to those failings, **for example, if it appears that the COLP/COFA was not given appropriate authority or resources, or was not listened to, then we will take appropriate action against the firm either instead of, or in addition to, any action against the COLP or the COFA.**
>
> 140. In all its decision making, including the removal of approval of a COLP/COFA, the SRA intends to be proportionate and transparent. However, **if we believe that it is not in the public interest that an individual continues to hold a particular role, then we will take appropriate action**, whilst enabling the firm to make other arrangements, if possible.
>
> 141. We have amended the Authorisation Rules to make it clear that COLPs and COFAs can be employees but, whether a manager or an employee, the COLP/COFA should have sufficient authority to fulfil the role effectively. **Reporting lines will play an important part in our assessment of a COLP's/COFA's actual authority.**
>
> 142. Our competition analysis has highlighted the wide discretion granted to the SRA in relation to certain rules. We recognise that it is of vital importance that the SRA acts proportionately and in a manner that takes into account the potential impact on competition of its decisions.

8.2 With reference to para 139 above, it may be little comfort to the COLP that in addition to, or instead of, action against him there may be action against the firm corporately, when the COLP will almost certainly report to he managing partner, who is not named by the SRA as a target for personal action in that paragraph.

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[23] Except that "Head ..." equates to chief executive, managing director or managing partner, whereas "Compliance Officer ..." is clearly intended to be someone else.

[24] This underlines intention to have someone other than the managing partner etc.

[25] We suggest that there is a distinction between responsibility internally (as already exists within sizeable firms) and responsibility externally.

8.3 Under paragraph 140, again it is the COLP who is in the firing line personally not (at least not expressly) the managing partner and/or managing board members.

8.4 Under any governance arrangements of a traditional law firm it is the managing partner (whether by that name of as chief executive officer) who is vested with the powers and duties of day to day management. Those duties include risk and compliance, indeed it would be manifestly wrong in principle to exclude them. So, the general expectation would be that the COLP reports to the managing partner, with possibly dotted lines for periodic or by exception notifications to a management board, risk committee or audit committee. The role of the COLP, outside a team of compliance personnel, is to advice, guide, monitor and report – it is essentially an advisory, not line management, role. Heads of country or department will report to the managing partner alone and not to the COLP. The only way the COLP could even take reasonable steps to **ensure** compliance (as opposed to having a suitable system of advising, guiding, monitoring and reporting) would be, we suggest, if the COLP were, in fact, managing partner. In the real world the SRA's expectations of the COLP are too high.

8.5 If the SRA disagrees with this analysis would the SRA please give guidelines as to what seniority and responsibility, and what reporting lines, would satisfy it to approve an appointment as COLP under Rule 8.5(a)(iv).

8.6 Even in the best run law firms particularly employee risk and compliance directors, and even partners, may be most reluctant to accept the duties and potential unique personal exposure to action by the SRA for someone else's defaults. The position may go therefore by default to the managing partner where, strongly arguably under the current proposals it belongs.

8.7 One option which we invite the SRA to consider is to remove the requirements for a COLP and COFA from the Authorisation Rules – Rules 8.1 and 8.2 would remain (preferably modified as suggested above). But make the appointment of COLP and COFA, with sufficient seniority and authority, indicative behaviours under Chapter 7 of the Code of Conduct, but with no imposition of personal responsibility to the SRA, though the SRA would be notified who they are, and if no appointments are made an explanation would have to be given (so comply or explain).

8.8 There can be significant advantages for the firms themselves and the SRA to have an individual with expertise and the managing partner's ear, whether or not a partner, focussing on risk and compliance. But, we suggest, with only internal obligations to he firm, and not external obligations to the SRA. We suggest that the SRA's proposlas will have the opposite of the intended consequences, namely if managing partners become COLP it may diminish the role of the person who is risk and compliance officer for internal purposes.

9. Conclusion

9.1 Whilst this paper has focused on the detail of drafting, we conclude with some summary remarks. which go also to the rationale of the compliance officer roles.

9.2 The HOLP (and HOFA) roles for ABSs in the Act are the starting point. Under the so-called Tesco law (or more likely AA law and Co-Op law) model for commoditised legal services the organisation model is likely to be hierarchical with solicitors in a minority. Having one (HOLP) who is very senior and required to take responsibility fro compliance is understandable. He may even be the managing director. Even so, the range of subjects for which the HOLP takes responsibility to the SRA appears to be narrow.

9.3 A traditional law firm is quite different: all giving legal advice are in England and Wales likely to be solicitors – and so subject to discipline for breaches of professional regulation – and the organisational structure is much flatter than in a commercial non-legal organisation. The COLP is, from the title, presumed to be someone other than the managing partner yet, in affirm of lawyers, is expected to take responsibility

for compliance by the firm as a whole and all its partners and employees, and for a wider range of compliance than the HOLP.

9.4 There is value to the SRA, as well as to the law firm, in having a person responsible internally for compliance with profession regulations. However, making the position onerous, and therefore particularly unattractive for employees and partners alike, may result in firms adopting in effect a default option of appointing the managing partner as COLP, along with his many other duties. This could diminish the usefulness of the role to the SRA and the firm. The COLP's responsibilities should be internal only.

9.5 We hope that the SRA finds it helpful to have these points raised early in the consultation.

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