The City of London Law Society

4 College Hill
London EC4R 2RB

Tel +44 (0)20 7329 2173
Fax +44 (0)20 7329 2190
DX 98936 - Cheapside 2

mail@citysolicitors.org.uk

www.citysolicitors.org.uk

Solicitors Regulation Authority
Regulation and Education
The Cube
199 Wharfside Street
BIRMINGHAM
B1 1RN

DX 720293 BIRMINGHAM 47

By DX and email: consultation@sra.org.uk

14th September 2016

Dear Sirs

Response of the CLLS Professional Rules and Regulation Committee to the SRA Consultation on the SRA Handbook Review: Looking to the future – flexibility and public protection (June 2016)

Structure of this Response

This response is presented in two parts, Part A (General Comments and responses to the consultation questions) and Part B (Mark-up of Suggested Changes to draft new Codes of Conduct, and Explanatory Notes).

Part A records, under the heading "General Comments", the views strongly held by CLLS member firms that the proposals to allow solicitors to be employed and practise within the alternative sector raise a number of serious risks and concerns. This part of our response should therefore be viewed by the SRA as the response of the CLLS member firms more generally. It draws upon and reflects the data collected from CLLS member firms by means of the questionnaire exercise referred to in paragraph A.2 below. The CLLS represents 58 member firms, whose 15,000 solicitors make the largest contribution internationally to the financial success of English law. For more information about the CLLS, the CLLS's Professional Rules and Regulation Committee ("PRRC") and other specialist CLLS Committees, see the CLLS website.

Part B addresses the day-to-day practicalities of living with new Codes of Conduct, should the SRA decide to take its split Code idea forward (despite the reservations expressed in Part A). The mark-up of suggested changes has been put together by PRRC Committee members, each of whom are regulatory compliance experts and Heads of Compliance/Risk, GC or similar at

leading City law firms. Should the SRA proceed with its proposals, the PRRC hopes to have the opportunity to engage with the SRA constructively about the final form of the new Codes, in order that the end product works as well as possible not just for City law firms but the profession as a whole.

Part A – General Comments:

1. **Length/style of Consultation**

CLLS member firms have found it hard to decipher, from this long consultation paper, what all the relevant issues are. It is not until question 16 (of 33) that the consultation questions begin to address the substance of the SRA's proposals whilst some key facts (e.g. that an unregulated provider could act, through solicitors, for both a buyer and a seller of a business) do not get drawn out. We would have expected each key change to be accompanied by a specific question and, as a consequence, we are unclear whether some changes (e.g. the apparent obligation to now tell former clients, as opposed to simply current clients, that they may have a claim against a firm) are intentional or are drafting errors.

The net effect is that we think it could be a challenge for "ordinary" solicitors, as opposed to compliance professionals, and other stakeholders (such as insurers) to penetrate this consultation and respond to it thoughtfully. We therefore recommend that future consultations reflect this feedback and also reflect Gunning principles.

2. **Our Questionnaire**

CLLS member firms were asked to consider a shorter and more focussed questionnaire to generate the data needed to draft this response. A copy of the CLLS questionnaire is annexed. The response rate was excellent, with a number of firms sending the CLLS very considered submissions.

3. **Wider Context**

We wanted to flag that the CLLS also found it hard to comment on the SRA's proposals in the absence of the wider context of those other regulatory reforms/initiatives which have yet to be completed.

For example, when responding to the SRA's "Training for Tomorrow" consultation ("TFT"), the CLLS expressed concerns that the SRA's proposals might damage the reputation of the solicitors profession– we would like to understand, therefore, where the SRA's TFT proposals now stand in order that we can consider whether taken together with these proposals they might, cumulatively, risk greater reputational damage to the profession.

Similarly, it occurs to us that the SRA's proposals may be out of step with work being done by others. For example, the Competition & Markets Authority ("CMA") published its Legal Services Market Study interim report on 8 July, during the SRA's consultation period. The CMA's interim report suggests that, in the consumer/SME market, it is greater transparency about pricing and quality (in the form of consumer feedback) which

would drive competition – not liberalisation of use of the solicitor title. Will the SRA take this into account when considering what to do next?

In addition, the outcome of the independence debate is not yet known – an important part of that debate is whether the regulatory model should change so that the SRA regulates individuals to a base level whilst the Law Society regulates the entry standards, competency and ethics of the profession of solicitors.

Further, just as we were finalising this response, the LSB published its "vision for legislative reform of the regulatory framework for legal services in England and Wales" which, among other things, calls for a new legislative framework for regulating legal services, a fully independent regulator and activity (not title) based regulation.

How will the SRA take these issues into account when considering what to do next?

4. Unmet Legal Need

We feel unqualified to comment on statements included in the consultation regarding unmet legal need. Whilst we favour access to justice, we wonder whether much of the perceived unmet legal need can be attributed to the withdrawal of Legal Aid, in which case greater competition/more choice will probably do little to solve the problem. We think the consultation should be clearer on evidencing the unmet legal need and how the SRA's proposals will address it.

If the hurdle for putative consumers of legal services is price, which the CMA's interim report suggests, deregulation is unlikely to solve that, given we already have an unregulated legal services market which evidently is not (if there is unmet legal need) providing services at the right costs level.

In addition, we think that greater thought needs to be given to whether removing a requirement for entity regulation around solicitors will (i) reduce costs and (ii) as a direct consequence reduce legal fees to the consumer.

5. Damage to the Solicitors Profession and English Law Globally

The CLLS member firms who responded to our questionnaire unanimously agreed that there are significant issues involved with solicitors being permitted to practice using their solicitor title in unregulated entities, including around risks to client confidentiality.

In summary, CLLS member firms consider it is inevitable that removing one layer of regulation in its entirety (i.e. entity-based regulation) from those operating as solicitors will result in increased risks to consumers using those services directly; and if the deregulation for some solicitors forces solicitors in regulated entities to review their approach to regulation to seek to regain a level playing field, potentially all consumers. This could result in damage to the reputation of the solicitors profession.

The question to our mind is not whether there is risk of reputational damage – there is clearly risk of that; instead the question is whether that risk is worth taking in order to satisfy the unmet legal need identified. We see insufficient evidence that these

proposals will solve that (see above) and so do not think at this stage the risk is worth it. Other solutions should be investigated.

The cumulative effect of these proposals and of TFT could well be that consumers/competitors will form/exploit the impression that there is nothing special about being a solicitor – that solicitors are just another service provider. This impression, even if mistaken or more prevalent in only some areas of the market, could be damaging to the perception of the profession as a whole, including City/commercial solicitors internationally, and therefore the strength/reputation of English law globally.

6. Privilege

The SRA paper asserts (on the basis of undisclosed advice to the SRA from Counsel) that legal advice given by solicitors, to members of the public, working in unregulated businesses will not attract privilege. We worry about the impact this may have on the perception of privilege more generally. Changing the regulatory regime so that the advice of only certain solicitors attracts privilege, depending on where they work, could be viewed by some as eroding privilege.

The SRA has suggested that the availability of privilege might be addressed by individual solicitors contracting with clients direct but this may not be an attractive or realistic proposition for City firms (should they choose to hive their unreserved work across to an unregulated entity) or their unregulated competitors. Sophisticated clients will, we think, want to contract with the entity, not an individual they do not know, and the individual solicitor's personal assets would still be at risk, notwithstanding any indemnities from his/her employer. The CLLS has not sought advice from Counsel on the privilege aspects of the SRA's proposals, and may wish to do so should the SRA decide to move ahead as articulated in this consultation. At this point, we are, therefore, commenting principally on the practicalities only of the work-around proposed by the SRA – whilst we see contracting with individual solicitors (rather than unregulated providers) as a messy solution (and one which a number of sophisticated clients may not be attracted to), it may transpire to be feasible for some businesses. It may be complicated and reliant on carefully crafted engagement letters but this is not necessarily a concern for our part of the legal services market, or our competitors. We do, however, wonder whether the SRA's suggested workaround might mean that the individual contracting solicitor has to become a "recognised sole practitioner" - effectively making him/her an entity for the purposes of SRA rules, and thereby introducing the full weight of entity-based regulation. Is this something which the SRA has considered?

Clients have not had to think about privilege when instructing solicitors to date, as any legal advice from them would attract privilege. Clearly privilege is important to clients but how important it is to them and when is currently difficult to quantify. In some circumstances, privilege may not be important to clients – for example, accountants give tax advice and this does not attract privilege. A requirement to give clear and transparent information on whether advice given by a solicitor, working in an unregulated business, attracts privilege will be key – however, we have reservations as to whether:

(A) such information will always be read/understood/capable of evaluation at the right time by consumers (even if sophisticated), see further below; and

(B) whether, for example, a junior solicitor will have the clout to compel his/her unregulated employer to provide it properly.

7. Limits of Transparency Information

We doubt that all clients will read/understand transparency information given to them by unregulated providers, even if sophisticated. Even if transparency information is read, it may be too difficult in some cases to evaluate it at the time it is given. In addition, we think that the SRA's emphasis and reliance on the giving of transparency information increases the risk of "mis-selling" by some unregulated providers, who simply won't get the detail right or will fail to draw a client's attention to the most pertinent information in any particular case. If this were to result in a significant number of claims, some unregulated providers will go bust – which has the obvious potential to damage the solicitors profession.

The consultation implies that it will be for solicitors in regulated entities to use their consumer protection strengths as an "advertisement tool". Given that "solicitor" already has a meaning in the English culture, we think the burden should instead be on unregulated entity solicitors to explain that, in their case, solicitor does not mean what the consumer might assume. This would not, however, be a welcoming message at the start of a trusted adviser relationship and goes to the unworkability of these proposals in relation to producing a level playing field.

8. Shift of Burden and Risk to the Consumer

These proposals appear to shift to the consumer the burden of choosing the right service, against the backdrop that those most in need of protection will be unable to do so. (Indeed even the most sophisticated clients could struggle to understand the difference between PII on Minimum Terms and Conditions and PII on market norm terms). Because the term "solicitor" has such resonance already, that burden of deconstructing what it means in different circumstances is a heavy one, and we suggest an impossible one for most clients.

9. Unlevel Playing Field

Creating a two tier regulation system would potentially mean that accountancy firms, consulting firms and foreign law firms employing solicitors would compete with traditional law firms for unreserved work whilst having the benefit of more liberal regulation. They will escape entity-based regulation on conflicts (possibly), information security, PII and risk management not only to the detriment of consumers but to the City law firms competing with them. This highlights the need for the SRA to press Government to revisit the list of reserved activities in the Legal Services Act 2007, and to consider whether it forms the right basis for a risk-based approach to regulation.

Answers to Specific Consultation Questions:

1. **Have you encountered any particular issues in respect of the practical application of the Suitability Test (either on an individual basis, or in terms of business procedures or decisions)?**

We think that the reporting thresholds in the Suitability Test are set too low. For example, we wonder why the SRA would wish to know whether a solicitor has been given a PND for littering. The reporting of trivial matters such as these wastes SRA resources, takes up COLP time and causes anxiety for the individual concerned unnecessarily. It is not possible for firms/solicitors to take a pragmatic or proportionate view on trivial reporting matters, given that failure to report is treated by the SRA as prima facie evidence of dishonesty. This underlines the need for the SRA to draw the line at an appropriate level.

We favour a comprehensive review and consolidation of all SRA reporting obligations, with an appropriately high and consistent materiality threshold being introduced across the board.

Further, the Suitability Test does not describe the standards expected of solicitors, instead simply listing certain things which need to be reported. It does not therefore "speak" to individuals, does not articulate what "suitability" is and cannot therefore be used by firms as an effective training tool.

2. **Do you agree with our proposed model for a revised set of Principles?**

If the Principles are to apply to business services staff (as well as to regulated firms and solicitors), they should include a reference to confidentiality. Everyone who works in a law firm has an important role to play in protecting clients' information and this should be clear in the Principles (not relegated to the Codes, which may not apply to all staff).

This could be done by introducing a new Principle 7 or adding to Principle 6 stating that you must protect your client's confidential information.

3. **Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?**

We do not understand why the SRA is proposing to re-word what is currently Principle 6 – what might be wrong with the existing formulation is not explained in the consultation paper. The existing formulation is well understood and we favour its retention, in the absence of a good reason to change it.

We have two specific comments on the revised formulation. First, we think that use of the word "ensure" could set a higher standard than the existing obligation to "maintain" and is unrealistic. Secondly, we think that the reference to "those delivering legal services" is too wide, given that this would catch the unregulated sector. The Principle should instead refer to upholding public confidence in "you and your profession".

4. **Are there other Principles that you think we should include, either from the current Principles or which arise from the newly revised ones?**

See our answer to question 2 above.

5. **Are there any specific areas or scenarios where you think that guidance or case studies will be of particular benefit in supporting compliance with the Codes?**

On balance, we are not in favour of the SRA developing guidance or case studies, which could become additional regulation "by the back door". You have said that feedback from stakeholders suggests that individuals and firms find the status of the existing Indicative Behaviours confusing, which is why you are not replicating them in your new Codes. If you develop guidance and case studies, you risk replicating this problem. There is also a danger that issuing such guidance and/or case studies would have the practical effect of making the Handbook "long, confusing and complicated" which would defeat the SRA's aim of attempting to simplify it in the first place. The Codes need to be clear – and that may mean that they have to be longer – to remove the need for additional guidance.

Further, we think it is for our representative bodies, not our regulators, to issue any guidance or case studies the profession may find helpful, in a manner which supports solicitors and does not goldplate regulation.

If the SRA does produce guidance or case studies, we think it should consult on these, whether formally or informally with stakeholder groups, before they are issued. In this eventuality, we would like to explore with you further what role the CLLS could play in preparing/reviewing City-based case studies and guidance.

6. **Have we achieved our aim of developing a short, focused Code for all solicitors, wherever they work that is clear and easy to understand?**

Our members do not agree that the existing combined Code is "long, confusing and complicated". Further, simplification for its own sake can be dangerous – whilst superficially attractive, reducing the amount of text to read and recall, the introduction of new terminology just to reduce the number of words can easily create ambiguities. A split Code is, however, logical if the SRA is to permit solicitors to use their solicitor title in unregulated firms (as to the undesirability of which, see our General Comments above.)

That issue aside, we asked our member firms whether they were in favour of two Codes, or one. The majority of firms who responded favoured the retention of a combined Code of Conduct, stating that, in their experience, when individual solicitors think of their professional obligations, they think of ethics in a broader sense. They know what the parameters are, and consult with dedicated compliance professionals in the firm's central team when they need help – including in relation to conflicts analysis. These firms did not see how a split Code would, therefore, help to "reconnect" their lawyers as they do not consider that they are ethically disconnected. Their lawyers receive regular ethics training and know how to issue-spot, and seek further guidance when they need it. The fact that they do seek that guidance does not mean that they are abrogating their professional responsibilities to either the firm or its central Compliance/Risk team. In fact, the opposite is true – it demonstrates that they are in

touch with their personal regulatory responsibilities. In addition, the introduction of two Codes might necessitate a substantial re-education and training programme, in firms, for no obvious benefit and at considerable cost.

A minority of firms who responded thought a split Code was a good idea which, if linked to good internal training, could help to refocus individuals' attention on their personal ethical and regulatory responsibilities. In addition, our in-house lawyer client contacts may find a split Code easier to navigate and therefore to understand what the SRA expects of them as solicitors.

We are concerned that the Code for Solicitors will not contain enough detail to support individual solicitors in unregulated entities who are the ones most at risk of challenges to their professional requirements.

7. **In your view is there anything specific in the Code that does not need to be there?**

See our further comments and mark-up of the Codes in Part B of this response.

8. **Do you think that there is anything specific missing from the Code that we should consider adding?**

See our further comments and mark-up of the Codes in Part B of this response.

9. **What are your views on the two options set out for handling actual conflict or significant risk of a conflict between two or more clients and how do you think they will work in practice?**

We are very strongly in favour of Option 1, with the amendments set out in the attached mark-up.

The two existing exceptions (auction and substantially common interest) are very important to and frequently used by many of us/our clients and we would like to see these explicitly replicated in the new rule – we would not wish instead to rely on SRA assurances that there is no conflict/significant risk of one in the circumstances covered by those exceptions.

We asked our members whether they thought the SRA should consider the introduction of a new informed consent exception.

The majority of those responding thought that a sophisticated client exception, requiring informed consent, would (although some anticipated using it in limited circumstances only) be a useful extension to the conflict rule, offering greater flexibility to clients and helping to alleviate some of the level playing field concerns referred to in our answer to question 16 below. Some thought that, if a sophisticated client exception were to be introduced, it should not be available in a litigious/similar context but only where there is "indirect adversity".

In contrast, some of those responding thought that the existing exceptions are sufficiently broad. If an informed consent exception were to be introduced, they thought it would need to be made clear that it is for sophisticated clients and should be only

used sparingly – this, they thought, could be difficult to define, lend itself to abuse and therefore risk damaging the solicitors profession.

10. **Have we achieved our aim of developing a short focused Code for SRA regulated firms that is clear and easy to understand?**

See our answer to question 6 above. Also see our further comments and mark-up of the Codes in Part B of this response.

11. **In your view is there anything specific in the Code [for SRA regulated firms] that does not need to be there?**

See our further comments and mark-up of the Codes in Part B of this response.

12. **Do you think that there is anything specific missing from the Code [for SRA regulated firms] that we should consider adding?**

See our further comments and mark-up of the Codes in Part B of this response.

13. **Do you have any specific issues on the drafting of the Code for Solicitors or Code for Firms or any particular clauses within them?**

See our further comments and mark-up of the Codes in Part B of this response.

14. **Do you agree with our intention to retain the COLP and COFA roles for recognised bodies and recognised sole practices? [14a. In responding to this question, please set out the ways in which the roles either assist or do not assist with compliance.]**

In summary, the majority of our members are in favour of retaining the roles, although some do not feel strongly either way (principally because they are of the view that their firms have personnel in quasi - COLP/COFA roles in any event).

Our members have a range of views as to whether the roles have given them any additional benefits, over and above having a Head of Compliance/Risk, General Counsel or similar, with the majority considering that there is a benefit, albeit not necessarily substantial for City firms. A clear majority see the roles as having assisted in re-enforcing the role of Head of Compliance/Risk, General Counsel or similar, though in general such roles pre-dated the COLP/COFA regime.

Whilst, in principle, reminding partners and employees of the firm's obligation to report breaches (through the COLP and COFA) strengthens the compliance function, it has possibly been handicapped by the SRA Handbook omitting a requirement on partners and employees to report to the COLP and COFA, leaving that to the firm's own policies.

The COLP role has become well known in firms, but the COFA role less so, in part owing to the confusing title: the COFA is not (as COFA) responsible for finance, and certainly not responsible for administration. This is a drawback if the role is to be taken seriously day-to-day by the rest of the firm for whom simplicity of roles and titles is important.

So long as the SRA Accounts Rules required an external audit, the COFA role was largely otiose especially as most firms of any size have a well-defined finance director role. Now that the requirement for an external audit is being abolished this, is not, we suggest, the right time to abolish the COFA role, as the COFA may have a more useful function in the future than the past.

Whatever the correct interpretation of the remit of the COFA (see below), the bulk, if not all, of a firm's compliance with the Companies Act (as modified for LLPs) on accounting matters confusingly remains with the COLP; the COLP has to be a solicitor, as much of compliance concerns technical legal matters, but he/she has responsibility to the SRA for the bulk of accounting compliance, even though the firm, if of any size, will have a professionally qualified accountant as finance director.

Given that firms have had to establish structures to support the COLP/COFA roles, they see no benefit in abolishing them.

15. How could we improve the way in which the COLP/COFA roles work or provide further support to compliance officers, in practice?

Taking up the point in our answer to question 14 above, we suggest the addition of an obligation in the SRA Handbook on partners and employees to notify possible breaches to the COLP/COFA. We also suggest consideration of whether, if an individual partner or employee does so, he/she is deemed to discharge his/her responsibility under the Handbook to the SRA (paralleling how reporting obligations work under the Proceeds of Crime Act 2002).

We suggest clarifying confusion over the COFA role (and consequently COLP role also as, on the drafting of Authorisation Rule 8.5, they are mutually exclusive), in particular:

(A) Responsibility for compliance with the SRA Accounts Rues is clear, but confusingly the COFA is not responsible for the Accounts provisions of the SRA Overseas Rules, so the COLP is – that defies logic.

(B) It is sometimes asserted that as financial instability might imperil the safety of client money, so the COFA's role extends to financial stability. Maybe it should be; our members are divided on the point with, on balance, a majority in favour as the COFA is usually the finance director (or, at least, UK finance director) but, if that is the correct current interpretation, it is also unclear where the dividing line lies between COLP and COFA.

(C) A majority of our members consider that responsibility for all aspects of the keeping of financial records, production of annual accounts, financial compliance, including compliance with the Companies Act (as modified for LLPs) on accounting matters, financial stability and payment of taxes by the firm should rest with the COFA, not the COLP. Finance directors often do not understand why such responsibility rests with the COLP, who is a solicitor.

(D) The title, COFA, is confusing – for what part of "administration" is he/she responsible?

16. **What is your view of the opportunities and threats presented by the proposal to allow solicitors to deliver non-reserved legal services to the public through alternative legal service providers?**

Our views are as follows:

(A) **Damage to solicitors profession** – Our members think that the SRA's proposals pose a threat to the profession. See further paragraph 5 of our General Comments above. The proposed changes will establish a two tier system and the existence of unregulated firms, with no requirements as to client confidentiality or conflicts at a structural level, could undermine the profession.

(B) **Unfair conflicts regime** – The SRA's proposed changes could mean that (for example) accountancy firms will be able to employ solicitors to do unreserved work but that the SRA's conflict rules will only apply at an individual level – so a non-SRA regulated firm might act for, say, both a buyer and a seller of a business (provided the same solicitor does not act for both clients and, possibly, client waivers were in place). We think it is unfair that non-SRA regulated firms will benefit from a more liberal conflicts regime. Although we cannot currently measure/quantify the impact of this, it is potentially detrimental to all City/commercial law firms. We would reiterate here the point made at paragraph 6 of our general comments, namely that we think the SRA should clarify its thinking on the conflicts position – do you consider that an unregulated provider could act for (example) buyer and seller of a business provided the same solicitor was not on both teams? This seems possible at first blush, as the SRA conflict rules would only bite at the individual level – but might those individuals risk breaching SRA Principles (e.g. obligation to act in client's best interests) by agreeing to represent a client in circumstances where he/she could be negotiating terms with/against a colleague?

(C) **Privilege** – Clients have not had to think about privilege when instructing solicitors to date, as any legal advice from them would attract privilege. See further paragraph 6 of our General Comments above.

(D) **Transparency information solution flawed** – We doubt that many clients will read/understand transparency information given to them, even if sophisticated and transparency information provided by the unregulated sector is up to the mark. See further paragraph 7 of our General Comments above.

(E) **Entity-based regulation as a kite mark** – Clients simply have not had to think about how much they value entity-based regulation to date. It automatically comes as part of any law firm offering. That said, we think that sophisticated clients will expect it to continue to be part of the offering – they expect to contract with properly run businesses with sound risk management systems/controls and stringent confidentiality obligations. This is why we do not think they would want to contract with an individual solicitor working for an unregulated provider (e.g. as a mechanism to ensure privilege).

(F) **Unrealistic burden on individual solicitors** – We are concerned about the number of very specific obligations placed on individual solicitors, in the new

Code for solicitors, with which they cannot properly comply in isolation from the organisation in which they work. Rules 8.6 to 8.9, for example, give individuals obligations in respect of client information and publicity. In both cases, the Code for Firms does not contain equivalent obligations. Further, if a solicitor is working for an unregulated entity, how can solicitors realistically comply with obligations such as these – particularly if they are in a minority, and relatively junior?

17. How likely are you to take advantage in the greater flexibility around where solicitors can practice as an individual or as a business?

It would be possible, under the SRA's proposed new approach, for City law firms to split off the unreserved part of their business into a separate business (to avoid SRA regulation at an entity level), provided they gave their clients the right information about the protections available to them. We asked our members whether they saw this as an opportunity to "hive across" their unreserved work (e.g. corporate, M&A, commercial, financing) to a new business which those firms would effectively "self-regulate", free from the constraints and cost of SRA regulation and with the availability of US-style conflict waivers (should they want to offer them to two or more clients who may seek to instruct the firm on the same/a related matter).

The majority of firms responding thought this was a highly unattractive idea – it would be too messy for any law firm which did not genuinely intend to run two separate businesses (with separate buildings, employees, technology systems etc). In addition, for general risk management purposes, most firms would want to replicate many of the systems/controls they currently have in place which also ensure compliance with SRA rules. Additionally, if there were to be such a separation, the firm would lose the benefit of the "designated professional body" regime under the Financial Services and Markets Act 2000 and might well conclude it needed to be authorised by the FCA. There would therefore, be no savings to them in "hiving across" their unreserved business. Clients expect us to have those systems/controls and so they are part of our offering. Privilege could also be a stumbling block, as could the views of local law societies/bars/regulators in other jurisdictions.

If the SRA's proposals go ahead, it is something which City law firms, would, however, need to keep under review and to monitor developments, especially if our fears of being put at a competitive disadvantage prove correct.

18. What are your views about our proposal to maintain the position whereby a sole solicitor (or REL) can only provide reserved legal activities for the public (or a section of the public) as an entity authorised by the SRA or another approved regulator?

Our members are not in favour of solicitors being permitted to practice, using their solicitor title, for entities which are not regulated by the SRA. It therefore follows that they favour maintaining the position whereby sole practitioners must be SRA authorised, as entities, to provide reserved activities to the public.

19. What is your view on whether our current "qualified to supervise" requirement is necessary to address an identified risk and/or is fit for that purpose?

There is a requirement for a rule which ensures that every firm is supervised by someone with a minimum level of practice experience, otherwise there is a risk to the profession and consumers. Rule 12 of the existing SRA Practice Framework Rules was drafted for a time when the vast majority of firms were single site and relatively small and so having a single such person in each authorised firm made some sense. The rule does not, however, reflect the modern day reality of the proliferation of multi-office and multi-national firms. In this context, it would make sense to require that each office of an authorised firm be supervised by a suitably qualified and experienced practitioner. Some overseas Codes, in Hong Kong for example, go further and are more specific about what supervision means in practice which might also be a sensible extension of the current SRA rule.

The question about unregulated providers recruiting junior solicitors and then not being able to support them is a separate, but related issue (see further 16(F) above). In relation to your reference to emerging data suggesting that newly qualified solicitors "do not present a significant risk to the delivery of a proper standard of service", we think this is may be due to the internal management structures of SRA regulated firms, including the appropriate allocation of (less complex, less risk-inherent) work to NQs and clear guidance, briefing, monitoring and ongoing supervision by more experienced solicitors, and not because NQs are of their nature less risky practitioners.

20. Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

Given what we say in this response about the assumptions consumers make when they instruct a solicitor, we think the regulatory emphasis should be on ensuring that solicitors who work in unregulated entities give consumers detailed information about the protections which are not available to them (but would be if they used a regulated provider) – for example, we think that consumers (including sophisticated consumers) will assume that when they are being advised by a solicitor (regardless of whether the solicitor works for a regulated/unregulated entity), the advice they receive will be privileged and insured. If this is not the case, because the consumer is contracting with an unregulated entity, the solicitor providing the services should be obliged to make this clear. However, we acknowledge that this would place significant compliance burdens on individual solicitors employed by unregulated services providers, particularly if they are junior and the employer is a large enterprise.

21. Do you agree with the analysis in our initial Impact Assessment?

We think you have given insufficient weight to the risks summarised in paragraph (viii) on page 45 of your Impact Assessment, namely (a) consumer confusion around different protections and (b) the erosion of the solicitors profession. In addition, we query whether risks to client confidentiality have been given due regard.

Further, we do not think that consumers would necessarily benefit from your proposed changes in the ways summarised in paragraph (vii) of your Impact Assessment. In particular, we do not think that consumers will have a better understanding of the legal

services market as a consequence – in fact, the opposite is likely to be true. Consumers (even sophisticated consumers) will make assumptions about the benefits/protections available to them when advised by a solicitor, and these will not be countered by detailed transparency information – which could be too difficult to absorb, impossible to evaluate at the time of instruction and places the onus on the consumer to do due diligence on the unregulated provider which they are unlikely to be equipped and/or have the time to do.

22. Do you have any additional information to support our initial Impact Assessment?

We feel unable to answer this question, given that we have no dedicated resources to investigate the issues.

23. Do you agree with our approach that solicitors working in an alternative legal services provider should not be allowed to hold client money in their own name?

We agree with your specific proposal that solicitors who work outside of an "authorised body" should not personally hold client money.

As we understand it, this approach does not prevent the organisation in which the solicitor is employed holding client money, and that an unauthorised vehicle to which an SRA authorised law firm chooses to hive-off its unreserved work could hold client money notwithstanding the fact that the individual solicitor/principals and employees of that entity could not hold client money in their own names. Such an unregulated law firm would not appear to have any obligation to comply with the SRA Accounts Rules when holding client money, even if it was an all solicitor owned business. If our analysis is correct, this lacuna in the draft rules could present a considerable risk to the clients of such an unregulated solicitors firm, and to therefore to reputation of the profession.

Although not of direct interest to CLLS members firms, we are also concerned about how your approach would play out for an unincorporated solicitor sole practitioner or general partnership which only engages in unreserved activities, and chooses to do so without being authorised as a "recognised sole practitioner" or "recognised body" respectively. We believe that the effect of draft rule 4.2 would be to prohibit the holding of client money by these service providers, irrespective of whether doing so was essential to the viability of their practices. If our interpretation is correct, this would deny these providers the opportunity to exploit the rule change, and put them at a commercial disadvantage as against their incorporated competitors.

In justification for your approach to the holding of client money, we note paragraph 124 of the consultation which says that the SRA considers "that it would be artificial and confusing to have different obligations on an individual solicitor compared to the business in which they are working. The compliance responsibility would place an unrealistic, disproportionate, and impractical burden on the individual solicitor." We believe this same statement is equally pertinent to a number of other obligations contained in the draft SRA Code of Conduct for Solicitors, RELs and RFLs which the SRA is seeking to impose on solicitors working in unregulated businesses, and highlights significant flaws in the regulatory approach being proposed.

24. What are your views on whether and when in house solicitors or those working in Special Bodies should be permitted to hold client money personally?

Given that this response is being made on behalf of City law firms, which are CLLS members, we do not feel qualified to comment on this question, and therefore defer to the in-house community.

25. Do you agree with our proposal that the SRA Compensation Fund should not be available to clients of solicitors working in alternative legal services providers? [Question 25a. If not, what are your reasons?]

We neither agree nor disagree. However, we do think that consumers will assume that they have access to the fund, so transparency information given by solicitors working for alternative providers would need to make it clear that this protection is not available. As stated above, we think that consumers (even sophisticated consumers) will find the transparency information which unregulated providers will need to give them too difficult to absorb and impossible to evaluate at the time of instruction. We also think that it will place the onus on the consumer to do due diligence on the unregulated provider which they are unlikely to be both equipped and/or have the time to do. Consumers should be able to assume that, when they are advised by a solicitor, this automatically brings them certain protections.

In addition, we would be concerned if the Compensation Fund were to be available to firms which did not have PII obligations. This could increase the chances of inappropriate claims being made on the fund.

26. Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

No. Our members very strongly feel that PII cover should be compulsory, even for the unregulated sector, if a solicitor is advising. We think it is important that any user of a solicitor's services (whether through a regulated firm or an unregulated entity) should have complete confidence that there is PII available (on the minimum terms and conditions) in the event of an error by the solicitor. For example, we would be concerned if an unregulated entity providing tax or employment services could offer the services of a solicitor in circumstances where the client would have no insurance protection in the event that the solicitor was negligent.

However, an associated PII requirement may make solicitors less attractive hires for alternative providers.

27. Do you think that there are difficulties with the approach we propose, and if so, what are these difficulties?

Whilst, in theory at least, consumers can ask providers what their commercial insurance levels are and choose to proceed with a properly insured provider only, this (unfairly) place the onus on the consumer to do due diligence on the unregulated provider. As stated above, we think they are unlikely to be equipped and/or have the time to do this. Any consumer (regardless of how sophisticated) would be stretched to evaluate the comparative benefits of commercial insurance cover with the same amount of PII cover

on the minimum terms and conditions, for example. Consumers should be able to assume that, when they are advised by a solicitor, this automatically brings them certain protections – including minimum PII on industry-wide standard terms.

28. **Do you think that we should retain a requirement for Special Bodies to have PII when providing reserved legal activities to a public or a section of the public?**

Yes.

29. **Do you have any views on what PII requirements should apply to Special Bodies?**

No. See our answer to question 24 above.

30. **Do you agree with our view that it is not desirable to impose thresholds on non-SRA regulated firms, which are mainly or wholly owned by SRA authorised solicitors?**

Not imposing threshold standards would simply be, we think, an inevitable consequence of your proposals to allow solicitors to practice as solicitors for unregulated entities. We are not in favour of this.

31. **Do you have any alternative proposals to regulating entities of this type?**

We think that solicitors should only be able to provide services to the public, as solicitors, through SRA regulated entities. We believe the SRA should focus on revisiting the definition on reserved legal services and working with all relevant parties to achieve a re-draft of these.

32. **Do you have any views on our proposed position for intervention in relation to alternative legal service providers, and the individual solicitors working within them?**

We are not clear what your proposed position is. However, we would expect you to act in the best interests of consumers, including by use of your intervention powers, if necessary.

33. **Do you agree with our proposal that all work within a regulated body or an RSP should remain regulated by the SRA?**

Yes. We think the alternative would be too messy and very confusing for clients. Realistically, City law firms would not, for example, wish to operate a different approach to conflicts depending on whether work was reserved/unreserved and any law firm wishing to do this is bound to run into difficulties – as work on a matter can involve a blend of the two and/or flip from one to the other.

Annexure to Part A

SRA Handbook Review – Questions for CLLS Member Firms

Background:

1. On 1 June 2016, the SRA published a consultation called "Looking to the future – flexibility and public protection" – marking the first phase of the SRA's review not only of its Handbook but also its regulatory approach. The purposes of this note is to alert and seek the reaction of CLLS member firms to the principal issues this consultation poses for City law firms. For the reasons summarised below, the impact of the changes being proposed could be quite radical and has the potential to affect the entire sector (not just high street firms).

2. Whilst the SRA emphasises, in its consultation paper, the need to simplify its rules and reconnect individuals with their personal regulatory obligations, the real driving force for change is the perceived "unmet need" of individual consumers and small businesses for legal advice – which the SRA plans to address by enabling solicitors to practice in unregulated entities, delivering non-reserved* legal services.

3. This explains why the SRA needs to tackle its Code of Conduct first (notwithstanding that it is arguably the simplest part of the current Handbook), splitting it into two versions – one Code which apply to SRA regulated firms/entities and another Code which will apply to individual solicitors alone.

4. If it goes through unchanged, the SRA's review package will mean, for example, that:

   (A) firms which are currently SRA regulated will be able to "hive across" their unreserved work to entities they set up in the unregulated sector and employ solicitors in such entities (whose turnover will not be subject to the annual charge on renewal of recognised body status) to undertake that work;

   (B) existing businesses (e.g. other professional services firms) will be able to diversify into legal services, employing solicitors to deliver non-reserved legal services to clients using their "solicitor" title;

   (C) existing businesses which employ in-house solicitors will be able to use their in-house departments to provide non-reserved legal services to the public;

   (D) existing alternative legal service providers (which currently deliver non-reserved legal services to the public through unqualified staff) will be able to employ solicitors to undertake/supervise this work, so seeking what the SRA calls "brand enhancement"; and

---

* Reserved legal activities are, in summary: rights of audience; the conduct of litigation; reserved instrument activities (including the preparation of transfers of and charges over real property in E&W); probate activities; notarial activities and the administration of oaths.

(E) new firms may be established to deliver non-reserved legal services, also using solicitors to undertake/supervise this work and taking the opportunity to achieve "brand enhancement".

5. In summary, solicitors who work for non-SRA regulated firms will only be subject to individual-based regulation, which does not mandate risk management, such conflicts avoidance and the purchase of PII cover, at an entity level. In addition, it may be that privilege will not attach to the advice which clients of unregulated entities receive.

6. To help to set the tone for the CLLS's response to this consultation, and subsequent consultations on the Handbook review, please answer the questions which follow – sending your response to kevin.hart@citysolicitors.org.uk by Friday, 29 July 2016.

Questions:

1. Do you think that splitting the SRA Code of Conduct will help to reconnect individual solicitors with their personal regulatory responsibilities, or do you favour the retention of a combined Code where individuals and the firm are "in it together"? In your experience, do practitioners find the existing Code of Conduct "long, confusing and complicated"?

2. Even if you do not think the SRA's proposals will affect your market, do you think the changes could pose a threat to the strength/value of the solicitor brand in general (e.g. because the consumer protections available to clients instructing unregulated firms may be significantly reduced, and some unregulated firms may lack the appropriate systems, controls and infrastructure to support the solicitors they employ in meeting their individual regulatory responsibilities)?

3. The SRA's proposed changes would mean that (for example) accountancy firms will be able to employ solicitors to do unreserved work but that the SRA's conflict rules will only apply at an individual level – so a non-SRA regulated firm could act for, say, both a buyer and a seller of a business (provided the same solicitor does not act for both clients). Do you think it is unfair that non-SRA regulated firms will therefore benefit from a more liberal conflicts regime, and how might this affect your business?

4. The SRA has put forward two alternative formulations for its reworded conflict rule. One is similar to the current rule, whilst the other does not replicate the "auction" and substantially common interest exceptions (although it is not clear whether this is just a drafting issue or whether the SRA really intends to dispense with the availability of these two exceptions). How important are those exceptions to you in practice? Further, given that the SRA is apparently consulting on substantive changes to the conflicts rules, would you like to see other changes introduced? For example, do you think that the SRA should also consider an informed consent exception, perhaps only when dealing with sophisticated clients?

5. The SRA has sought advice from Counsel on privilege and has been advised that legal advice given by unregulated firms may not attract legal professional privilege, even if that advice is given by a solicitor (although this could be subject to work arounds – e.g. if the client contracts with the solicitor rather than the firm). If this advice is right, how

important do you think this would be to your clients when deciding whether to instruct a regulated or unregulated provider?

6. If given transparency information by an unregulated firm about the protections available to them when using such a firm, do you think this will help clients (even if sophisticated) make the right choices about what they need? Do you think that solicitors working for unregulated firms should be required, as a regulatory matter, to offer minimum levels of PII to their clients?

7. It would be possible for you to split off the unreserved part of your business into a separate business (to avoid SRA regulation at an entity level), provided you give your clients the right information about the protections available to them. Do you see this as an opportunity to "hive across" your unreserved work (e.g. corporate, M&A, commercial, financing) to a new business which you would effectively "self-regulate", free from the constraints and cost of SRA regulation and with the availability of US-style conflict waivers (should you want to offer them to two or more clients who may seek to instruct you on the same/a related matter)? Why might his be attractive/unattractive to you?

8. Do you think that your clients value entity-based regulation and see it as a "kite mark"? Alternatively, do you think your clients would be happy to continue to instruct you if you became a "self-regulated" entity – bearing in mind that you could choose to maintain the same levels of PII and adopt certain risk management systems across the board?

9. The SRA is currently of the view that all work, whether reserved or unreserved, must be regulated if done by an SRA regulated firm. Do you think it should reconsider this? Are you attracted to the idea that the SRA should only regulated reserved work?

10. Whilst the SRA is minded to retain the COLP/COFA roles for all SRA regulated firms, they would like views on how these roles are working in practice, their value and how effective they are. Do you agree that the roles should be retained in broadly the current form? In your opinion, how do the roles assist with/hinder compliance? The COFA's role is currently limited to compliance with the SRA Accounts Rules, leaving all other aspects of finance and financial stability to the COLP. Given that the COFA is typically an accountant, do you agree that the role of the COFA should be extended to both the Overseas Accounts Rules and all other aspects of finance and financial stability?

Part B of CLLS Consultation Response

CLLS PRRC Comments on Draft SRA Code of Conduct for Solicitors, RELs and RFLs [2017]

The SRA Principles comprise the fundamental tenets of ethical behaviour that we expect all those that we regulate to uphold. This includes you, as well as authorised firms and their managers and employees in so far as is relevant to their roles[1]. The principles are as follows:

You:

1. uphold the rule of law and the proper administration of justice
2. ensure that your conduct ~~upholds~~ maintains public confidence in ~~the~~ you and your profession[2] ~~and those delivering legal services~~
3. ~~act with~~do not allow your independence to be compromised[3]
4. act with honesty and with integrity[4]
5. ~~act~~ perform your role in a way that encourages equality, diversity and inclusion[5]
6. act in the best interests of each ***client*** and protect their confidential information[6]

The Code of Conduct describes the standards of professionalism that we, the SRA, and the public expect of individuals (solicitors, registered European lawyers and registered foreign lawyers) authorised by us to provide legal services. They apply to conduct and behaviour relating to your practice, and comprise a framework for ethical and competent practice which applies irrespective of your role or practice setting but subject to the Overseas Rules relating to your practice outside England & Wales[7]; ~~although s~~Section 8 applies only when you are providing legal services to the public or a section of the public.

You must exercise your judgement in applying these standards to the situations you are in and deciding on a course of action, bearing in mind your role, responsibilities and the nature of your clients and areas of practice. You are personally accountable for compliance with the Code - and our other regulatory requirements that apply to you - and must always be prepared to justify your decisions and actions. Serious misconduct or a material ~~breach~~[17] may result in our taking regulatory action against you. A breach may be ~~serious~~ material[17] either in isolation or because it comprises a persistent failure to comply or pattern of behaviour.

The Principles and Codes are underpinned by our Enforcement Strategy, which explains in more detail our approach to taking regulatory action in the public interest.

Maintaining trust and acting fairly

1.1 You do not unfairly discriminate by allowing your personal views to affect your professional relationships and the way in which you provide your services.

1.2 You do not abuse your position by taking unfair advantage of ***clients*** or others relying on your advice[8].

1.3 You perform all ***undertakings*** given by you, and do so within an agreed timescale or if no timescale has been agreed then within a reasonable amount of time.

1.4 You do not mislead or attempt to mislead your ***clients***, the ***court*** or others relying on your advice[8], either by your own acts or omissions or allowing or being complicit in the acts or omissions of others (including your ***client***).

Dispute resolution and proceedings before courts, tribunals and inquiries

[NB Our litigation experts, through the CLLS Litigation Committee, note that it is proposed to delete current Outcome 5.5 and IBs 5.4, 5.5, 5.7 (b) and 5.9 and that the proposal is that this may possibly be replaced by SRA guidance. They consider that it would be useful to continue to have a specific rule equivalent to Outcome 5.5 noting that when professional obligations require solicitors to do things that are likely to be contrary to their clients' interests or wishes it is extremely valuable to have a specific rule to point to.]

2.1 You do not misuse or tamper with evidence, or attempt to do so.

2.2 You do not seek to influence the substance of evidence, including generating false evidence or persuading witnesses to change their evidence.

2.3 You do not provide or offer to provide any benefit to witnesses dependent upon the nature of their evidence or the outcome of the case.

2.4 You only make assertions or put forward statements, representations or submissions to the ***court*** or others tribunals or inquiries[8] which are properly arguable.

2.5 You do not place yourself in contempt of ***court***, and you comply with ***court*** orders which place obligations on you.

2.6 You do not waste the ***court's*** time.

2.7 You draw the ***court's*** attention to relevant cases and statutory provisions, or procedural irregularities of which you are aware and which are likely to have a material effect on the outcome of the proceedings.

[NB Generally, concerning rules relating to advocacy, it is important for these to be consistent with those applicable to barristers and, if not, can the SRA explain why

they should be different?]

Service and competence

3.1 You only act for ***clients*** on instructions from the ***client***, or from someone ~~authorised to~~who can properly[9] provide instructions on their behalf. If you have reason to suspect that the instructions do not represent your ***client's*** wishes, you do not act unless you have satisfied yourself that they do.

3.2 You ensure that the service you provide to ***clients*** is competent and delivered in a timely manner.

3.3 You maintain your competence to carry out your role and keep your professional knowledge and skills up to date.

3.4 You consider and take account of your ***client's*** attributes, needs and circumstances.

3.5 Where you supervise or manage others providing legal services:

(a) you remain accountable for the work carried out through them; and

(b) you effectively supervise work being done for ***clients***.

3.6 You ensure that the individuals you manage are competent to carry out their role, and keep their professional knowledge and skills up to date.

Client money and assets

4.1 You properly account to ***clients*** for any ***financial benefit*** you receive as a result of their instructions except where they have agreed otherwise[10].

4.2 You safeguard money and ***assets*** entrusted to you by ***clients*** and others.

4.3 Unless you work in an ***authorised body***, you do not personally hold ***client money***.

Referrals, introductions and separate businesses

Referrals and introductions

5.1 In respect of any referral of a ***client*** by you to another ***person,*** or of any third party who introduces business to you or with whom you share your fees, you ensure that:

(a) ***clients*** are informed of any financial or other interest which you or your business or employer has in referring the ***client*** to another ***person*** or which an ***introducer*** has in referring the ***client*** to you;

(b) ***clients*** are informed of any fee sharing ***arrangement*** that is relevant to their matter;

(c) the agreement is in writing;

(d) you do not receive payments relating to a referral or make payments to an ***introducer*** in respect of ***clients*** who are the subject of criminal proceedings; and

(e) any ***client*** referred by an ***introducer*** has not been acquired in a way which would breach the ***SRA's regulatory arrangements*** if the ***person*** acquiring the ***client*** were regulated by the ***SRA***.

Separate businesses

5.2 You ensure that ***clients*** are clear about the extent to which the services that you and any ***separate business*** offer are regulated.

5.3 You do not represent a ***separate business*** or any of its services as being regulated by the ***SRA***.

5.4 You only:

(a) refer, recommend or introduce a ***client*** to a ***separate business***; or

~~(b) put your ***client*** and a ***separate business*** in touch with each other; or~~[11]

(~~c~~b) divide, or allow to be divided, a ***client's*** matter between you and a ***separate business***,

where the ***client*** has given informed consent to your doing so.

5.5 Where you and a ***separate business*** jointly publicise services, you ensure that the nature of the services provided by each business is clear.

Conflict, confidentiality and disclosure

Conflict of interests

6.1 You do not act if there is an ***own interest conflict***[12] ~~a conflict of interest between you and your ***client*** or a significant risk of such a ***an own interest conflict***[12]~~.

6.2 You take reasonable steps to satisfy yourself that your business or employer has effective systems and controls to identify and monitor conflicts of interest as appropriate[13]

6.3 You do not act in relation to a matter or particular aspect of it if there is a ***client conflict*** or a significant risk of such a conflict in relation to that matter or aspect of it, unless:

(a) the ***clients*** have an agreed common purpose in relation to the matter or the aspect of it, as appropriate, and a strong consensus on how that purpose is to be achieved; or

(b) the ***clients*** are ***competing for the same objective*** which, if attained, by one ***client*** will make that objective unattainable ~~to~~by the other ***client***:

and the conditions below are met, namely that:

(i) all the ***clients*** have given informed consent, given or evidenced in writing, to you acting; and

(ii) where appropriate, you put in place effective safeguards to protect your ***clients'*** confidential information; and

(iii) the benefits to the ***clients*** of doing so outweigh the risks to the ***clients*** of you acting.

Confidentiality and disclosure

6.43 You keep the affairs of current and former ***clients*** confidential unless disclosure is required or permitted by law or the ***client*** consents and you take reasonable steps to satisfy yourself that where your business or employer holds information confidential to your clients or former clients your business or employer has effective systems and procedures to protect that confidential information[14].

6.54 Where you are acting for a ***client,*** you make that ***client*** aware of all information material to the matter of which you have knowledge, except when:

(a) the disclosure of that information is prohibited by law;

(b) your ***client*** gives informed consent, given or evidenced in writing, to the information not being disclosed to them;

(c) you have reason to believe that serious physical or mental injury will be caused to your ***client*** or another if the information is disclosed; or

(d) the information is contained in a privileged [or confidential][15] document that you have knowledge of only because it has been mistakenly disclosed.

6.65 You do not act for a ***client*** in a matter where that ***client*** has an interest adverse to the interest of another current or former ***client*** ~~or a former client~~ for whom your business or employer holds confidential information which is material to that matter, unless:

(a) ~~all~~ effective measures have been taken which result in there being no real risk of disclosure of the confidential information; or

(b) the ***client*** or former ***client*** has given informed consent, given or evidenced in writing, to you acting, including to any measures taken to protect their information.

Cooperation and accountability

7.1 You keep up to date with and follow the law and regulation governing the way you work.

7.2 You are able to justify your decisions and actions in order to demonstrate compliance with your obligations under the ***SRA regulatory***

arrangements.

7.3 You cooperate with the ***SRA***, other regulators, ombudsmen and those bodies with a role overseeing and supervising the delivery of, or investigating concerns in relation to, legal services.

7.4 You respond promptly to the ***SRA*** and:

(a) provide full and accurate explanations, information and documents in response to any proper request or lawful requirement[16];

(b) ensure that relevant information which is held by you, or by third parties carrying out functions on your behalf which are critical to the delivery of your legal services, is available for inspection by the ***SRA***.

7.5 You do not attempt to prevent anyone from providing information to the ***SRA***.

7.6 You notify the ***SRA*** promptly if you become aware:

(a) of any material changes to information previously provided to the ***SRA***, by you or on your behalf, about you or your practice; and

(b) that information provided to the ***SRA***, by you or on your behalf, about you or your practice is or may be false, misleading, incomplete or inaccurate.

7.7 You ensure that a prompt report is made to the ***SRA*** or another ***approved regulator***, as appropriate, of any serious misconduct[17] in breach of their ***regulatory arrangements*** by any ***person*** regulated by them (including you) of which you are aware. If requested to do so by the ***SRA*** you investigate whether there ~~have~~ has been any serious ~~breaches~~ misconduct that should be reported to the ***SRA***.

7.8 You act promptly to take ~~any~~ appropriate remedial action requested by the ***SRA***.

7.9 You promptly inform ***clients*** ~~promptly~~ for whom you are acting[18] of any act or omission which could give rise to a claim by them against you. If requested to do so by the ***SRA*** you investigate whether anyone may have a claim against you.

7.10 Any obligation under this section or otherwise[19] to notify, or provide information to, the ***SRA*** will be satisfied if you provide information to your firm's ***COLP*** or ***COFA***, as and where appropriate, on the understanding that they will do so if necessary.

When you are providing services to the public or a section of the public:

Client identification

8.1 You take appropriate steps to ~~identify~~ establish[20] for whom you are acting

~~for~~ in relation to any matter.

Complaints handling

8.2 You ensure that, as appropriate in the circumstances, you either establish and maintain, or participate in, a procedure for handling ***complaints*** in relation to the legal services you provide.

8.3 You ensure that ***clients*** are informed in writing at the time of engagement about their right to complain about your services and your charges, and how ***complaints*** can be made.

8.4 You ensure that ***clients*** are informed, in writing:

(a) both at the time of engagement and, if a ***complaint*** has been brought at the conclusion of your ***complaints*** procedure, of any right they have to complain to the ***Legal Ombudsman***, the time frame for doing so and full details of how to contact the ***Legal Ombudsman***; and

(b) if a ***complaint*** has been brought and your ***complaints*** procedure has been exhausted:

(i) that you cannot settle the ***complaint***;

(ii) of the name and website address of an alternative dispute resolution (ADR) approved body which would be competent to deal with the ***complaint***; and

(iii) whether you agree to use the scheme operated by that body.

8.5 You ensure that ***clients' complaints*** are dealt with promptly, fairly and free of charge.

Client information and publicity

8.6 You give ***clients*** information in a way they can understand. You ensure they are in a position to make informed decisions about the services they need, how their matter will be handled and the options available to them.

8.7 You ensure that ***clients*** receive the best possible information about how their matter will be priced and, both at the time of engagement and when appropriate as their matter progresses, about the likely overall cost of the matter and any costs incurred.

8.8 You ensure that any ***publicity*** you are responsible for in relation to your practice is accurate and not misleading, including that relating to your charges and the circumstances in which ***interest*** is payable by or to ***clients***.

8.9 You ensure that ***clients*** ~~understand~~ are given clear and accessible information about[21] whether and how the services you provide are regulated and about the protections available to them.

When acting as part of a team[22]

8.10 When you are providing services to the public or a section of the public together with other individuals regulated by the SRA, any obligation under this section to take steps, establish or maintain or participate in procedures or to provide information to clients or others will be satisfied if other individuals regulated by the SRA with whom you are acting on any matter, do so on your behalf or in a manner which encompasses satisfaction of your own obligation.

Supplemental notes

Powers, commencement/transitional provisions

Explanatory Notes for the SRA on Solicitors' Code mark-up

1. It would be helpful to clarify that the Principles only apply to employees who are not solicitors insofar as they are relevant to their roles, not more generally for matters arising outside their work context, notwithstanding and subject to the impact of the "public confidence" Principle 2.

2. "Maintaining" public confidence is more appropriate than "upholding" it, the latter suggesting a more onerous positive obligation. That would be consistent with current Principle 6. The reference to "those delivering legal services" also seems far too broad when applied to the alternative unregulated sector – it is maintaining confidence in the solicitors' profession which needs to be protected, not the reputation of other multi-disciplinary/corporate service providers whose services may happen to include legal advice. Consistency with text with which the profession has become familiar would also be highly desirable here.

3. This formulation, with which the profession has become familiar, better reflects expected behaviours. A positive obligation to "act with independence" is easily capable of being misconstrued, especially by non-professional employees to whom the Principles will apply.

4. Small change but designed to ensure the obligation is a double one – i.e. to act with honesty and to act with integrity – and this is not an attempt to redefine what it means to act with integrity to require not acting dishonestly.

5. This is important to clarify that behaviour outside of a work context, especially by non-solicitor employees, is not caught by this Principle requiring encouragement to diversity and inclusion etc. (although it might separately of course impact Principle 2 if behaviour fails to maintain confidence etc.). If the SRA is trying to promote a change in this respect, it should be expressly consulting on this aspect.

6. Adding express reference to protecting confidentiality is extremely important to those non-solicitor employees bound by the Principles but not by the Code. It is also a sufficiently fundamental obligation, including for solicitors practising in unregulated entities, as to mandate its inclusion at Principles level. We have no strong views whether this is just added at the end of Principle 6 or highlighted by adding a new Principle 7.

7. Important to qualify by reference to the Overseas Rules otherwise this drafting would seem to override them.

8. Need to clarify this so it does not apply (when referring to "others" for example) to those with whom you are negotiating in the best interests of your client.

9. The word "authorised" is likely to cause confusion. Would it cover ostensible authority in a corporate context for example? This alternative provides more

clarity.

10. Client consent is needed as an exception to allow certain benefits to be retained as at present is permitted with consent. If this is not stated some would have concerns about whether consents contained in their terms of business, for example, would mean it was "proper" not to account the client for benefits received from third parties in connection with a retainer.

11. This can be deleted as it is covered by "introduce" in 5.4 (a) and therefore the text simplified.

12. Better to use the definition of own interest conflict in the Glossary. As drafted, this looks like it catches client conflicts too which is not intended.

13. This is important to ensure that within unregulated businesses a solicitor takes reasonable steps to satisfy him/herself that his/her business or employer has satisfactory conflicts management systems and controls in place in order to protect the solicitor's clients.

14. Extremely important confidentiality protection for information held within the unregulated sector – not just about a duty of confidentiality but about how the business protects information from attack, leakage and loss. Not just a key consumer protection, but also needed to support junior solicitors working, in the minority, in unregulated businesses.

15. The SRA should consider whether it is appropriate to extend this to cover confidential information which may not be privileged if, for example, it has emanated from the unregulated sector.

16. Important changes to highlight that the SRA has to make a proper and lawful request for information etc. before a solicitor is obliged to respond.

17. It is very important to retain a different level of breach, currently described in the Code as "serious misconduct" which goes way beyond material breach of the Principles or Code, as the basis for reporting breaches by other solicitors or regulated firms outside your own firm. Consider clarifying in the Glossary a definition of "serious misconduct". At present it is settled that this involves breaches involving dishonesty or which involve a serious arrestable offence as previous SRA guidance has made clear. To highlight the distinction also consider changing the terminology to "material" breaches instead of referring to "serious" breaches throughout. Many will assume that the change in terminology is intended to imply a change in substance to something more serious than material breaches.

18. It is very important that this is changed to clarify that as at present only current clients need to be notified of possible claims against you. As at present this would be done "promptly" so this has been added. If the SRA wants to change this important requirement to extend (significantly beyond what is currently expected of fiduciaries) it to cover clients for whom you have acted in the past

but are not currently advising, this should be subject to a separate consultation to which we expect PI insurers would wish to respond. Gunning principles could be relevant here, as the change is not highlighted in this consultation, nor explained.

19. It would be helpful for this to apply more generally, not just for section 7.

20. Use of the term "identify" is likely to cause confusion with anti-money laundering requirements. "Establish" would be better.

21. Solicitors cannot really ensure their clients actually "understand" what they tell them so they can only sensibly be required to provide clear and accessible information.

22. This new provision would be very helpful, especially for those operating within the unregulated sector without a COLP or risk and compliance support and also for those who operate providing services in teams alongside other solicitors to relieve individuals of having to take steps etc. themselves when someone else working with them will have done so, in effect, on their behalf.

CLLS PRRC comments on Draft SRA Code of Conduct for Firms [2017]

The SRA Principles comprise the fundamental tenets of ethical behaviour that we expect all those that we regulate to uphold. This includes all individuals and firms that we regulate, including authorised firms and their managers and employees in so far as is relevant to their roles[1]. The principles are as follows:

You:

1. uphold the rule of law and the proper administration of justice
2. ensure that your conduct ~~upholds~~ maintains public confidence in ~~the~~ you and your profession[2] ~~and those delivering legal services~~
3. ~~act with~~ do not allow your independence to be compromised[3]
4. act with honesty and with integrity[4]
5. perform your role ~~act~~ in a way that encourages equality, diversity and inclusion[5]
6. act in the best interests of each ***client*** and protect their confidential information[6]

This Code of Conduct describes the standards and business controls that we, the SRA, and the public expect of firms authorised by us to provide legal services. These aim to create and maintain the right culture and environment for the delivery of competent and ethical legal services to ***clients***~~consumers~~. If you are a MDP, the SRA Principles and these standards apply in relation to your regulated activities.

Sections 8 and 9 set out the requirements of managers and compliance officers in those firms, respectively.

Serious misconduct or material[16] breach may lead to our taking regulatory action against the firm itself as an entity, or its managers or compliance officers, who ~~all share~~ each have ~~responsibility~~ responsibilities for ensuring or taking reasonable steps to ensure that the standards and requirements are met[7]. We may also take action against employees working within the firm for ~~any~~ material breaches[16] of the principles ~~for which they are responsible~~by them. A breach may be ~~serious~~material[16] either in isolation or because it comprises a persistent failure to comply or pattern of behaviour.

Maintaining trust and equality and diversity

1.1 You do not abuse your position by taking unfair advantage of ***clients*** or others relying on your advice[8].

1.2 You monitor, report and publish workforce diversity data, as ***prescribed*** by the ***SRA***.

[Why are there no equivalent provisions to 1.3, 1.4 and 2.1-2.7 in the Solicitors' Code? These provisions seem just as applicable to authorised firms as they are to individual solicitors. These provisions could be incorporated under Paragraph 3.1 (Applicable Outcomes in the SRA Code of Conduct for Solicitors and RELs 2017).]

Compliance and business systems

2 .1 You have effective governance structures, arrangements, systems and controls in place ~~that~~ designed to ensure[11]:

(a) you comply with all the ***SRA's regulatory arrangements***, as well as with other regulatory and legislative requirements, which apply to you;

(b) your ***managers*** and ***employees*** comply with the ***SRA's regulatory arrangements*** which apply to them;

(c) your ***managers***, ***employees*** and ***interest holders*** and those you employ or contract with do not cause or substantially contribute to a breach of the ***SRA's regulatory arrangements*** by you or your ***managers*** or ***employees***;

(d) your ***compliance officers*** are able to discharge their duties under rules 9.1 and 9.2 below.

2.2 You keep and maintain records to demonstrate compliance with your obligations under the ***SRA's regulatory arrangements***.

2.3 You remain accountable for compliance with the ***SRA's regulatory arrangements*** where your work is carried out through others, including your ***managers*** and those you employ or contract with.

2.4 You actively monitor your financial stability and business viability of your regulated activities. Once you are aware that you will cease to operate, you effect the orderly wind- down of your activities.

2.5 You identify, monitor and manage all material risks to your business, including those which may arise from your ***connected practices.***

Cooperation and information requirements

3.1 You keep up to date with and follow the law and regulation governing the way you work.

3.2 You cooperate with the ***SRA***, other regulators, ombudsmen and those bodies with a role overseeing and supervising the delivery of, or investigating concerns in relation to, your legal services.

3.3 You respond promptly to the ***SRA*** and:

(a) provide full and accurate explanations, information and documentation in response to any proper requests or lawful requirements[15];

(b) ensure that relevant information which is held by you, or by third parties carrying out functions on your behalf which are critical to the delivery of your legal services, is available for inspection by the ***SRA***.

3.4 You act promptly to take ~~any~~ appropriate remedial action properly requested[15] by the ***SRA***.

3.5 You promptly inform ***clients*** ~~promptly~~ for whom you are acting[17] of any act or omission which could give rise to a claim by them against you. If requested to do so by the ***SRA*** you investigate whether anyone may have a claim against you.

3.6 You notify the ***SRA*** promptly:

(a) of any indicators of serious financial difficulty relating to you or your regulated activities;

(b) if a ***relevant insolvency event*** occurs in relation to you;

(c) of any change to information recorded in the ***register***.

3.7 You provide to the ***SRA*** an information report on an annual basis or such other period as specified by the ***SRA*** in the ***prescribed*** form and by the ***prescribed*** date. [NB SRA to provide further details of what is to be required here.]

3.8 You notify the ***SRA*** promptly if you become aware:

(a) of any material changes to information previously provided to the ***SRA***, by you or on your behalf, about you or your ***managers***, ***owners*** or ***compliance officers***; and

(b) that information provided to the ***SRA***, by you or on your behalf, about you or your ***managers***, ***owners*** or ***compliance officers*** is or may be false, misleading, incomplete or inaccurate.

3.9 You promptly report to the ***SRA*** or another ***approved regulator***, as appropriate, any serious misconduct[16] or material breach of their ***regulatory arrangements*** by any ***person*** regulated by them (including you) of which you are aware. If requested to do so by the ***SRA*** you investigate whether there have been any ~~serious~~ material breaches that should be reported to the ***SRA***.

Service and competence

4.1 You only act for ***clients*** on instructions from the ***client***, or someone

~~authorised~~ who can properly[9] to provide instructions on their behalf. If you have reason to suspect that the instructions do not represent your ***client's*** wishes, you do not act unless you have satisfied yourself that they do.

4.2 You ensure that the service you provide to ***clients*** is competent and delivered in a timely manner, and takes account of your ***client's*** attributes, needs and circumstances.

4.3 You ensure that your ***managers*** and ***employees*** are competent to carry out their role, and keep their professional knowledge and skills up to date.

4.4 You have an effective system for supervising ***clients'*** matters.

Client money and assets

5.1 You properly account to ***clients*** for any ***financial benefit*** you receive as a result of their instructions except where they have agreed otherwise[10].

5.2 You safeguard money and ***assets*** entrusted to you by ***clients*** and others.

Conflict and confidentiality

Conflict of interests

6.1 You do not act if there is an ***own interest conflict***[12] ~~conflict of interest between you and your **client**~~ or a significant risk of an ***own interest conflict***[12] ~~such a conflict~~.

6.2 You do not act in relation to a matter or a particular aspect of it if there is a ***client conflict*** or a significant risk of such a conflict in relation to that matter or aspect of it, unless:

(a) the ***clients*** have an agreed common purpose in relation to the matter or the aspect of it, as appropriate, and a strong consensus on how that purpose is to be achieved; or

(b) the ***clients*** are ***competing for the same objective*** which, if attained, by one ***client*** will make that objective unattainable ~~to~~ by the other ***client***:

and the conditions below are met, namely that:

(i) all the ***clients*** have given informed consent, given or evidenced in writing, to you acting;

(ii) where appropriate, you put in place effective safeguards to protect your ***clients'*** confidential information; and

(iii) the benefits to the ***clients*** of doing so outweigh the risks to the ***clients*** of you acting.

Confidentiality and disclosure

6.3 You keep the affairs of current and former ***clients*** confidential unless disclosure is required or permitted by law or the ***client*** consents.

6.4 Any of your individual employees who is acting for a ***client*** makes that ***client*** aware of all information material to the matter of which ~~the~~ that individual has knowledge except when:

(a) ~~legal restrictions prohibit them from passing the information to the ***client;***~~ disclosure of that information is prohibited by law

(b) the ***client*** gives informed consent, given or evidenced in writing, to the information not being disclosed to them;

(c) ~~there is evidence~~ the individual has reason to believe that serious physical or mental injury will be caused to the ***client*** or another if the information is disclosed; or

(d) the information is contained in a privileged [or confidential][13] document~~s~~ that the individual has knowledge of only because ~~they have~~ it has been mistakenly disclosed.

6.5 You do not act for a ***client*** in a matter where that ***client*** has an interest adverse to the interest of another current or former ***client*** ~~or a former ***client***~~ for whom you hold confidential information which is material to that matter, unless:

(a) ~~all~~ effective measures have been taken which result in there being no real risk of disclosure of the confidential information; or

(b) the ***client*** or former ***client*** has given informed consent, given or evidenced in writing, to you acting, including to any measures taken to protect their information.

Applicable Outcomes in the SRA Code of Conduct for Solicitors and RELs 2017

7.1 The following sections of the SRA Code of Conduct for Solicitors, RELs and RFLs 2017 apply to you in their entirety as though references to "you" were references to you as a ***firm***:

(a) Referrals, introductions and separate businesses (5.1 to 5.5);

(b) [Include 1.3, 1.4, 2.1-2.7 as referred to above?]

(c~~b~~) Standards which apply when providing services to the public or a section of the public, namely Client identification (8.1), Complaints handling (8.2 to 8.5), and Client information and publicity (8.6 to 8.9).

Managers in SRA authorised firms

8.1 If you are a ***manager***, other than a manager based outside England & Wales with no management responsibility for your *firm's* business in England & Wales, you are responsible for compliance by your ***firm*** with this Code. This responsibility is joint and several if you share ~~management~~ responsibility with other ***managers*** of the ***firm***[14].

Compliance officers

9.1 If you are a ***COLP*** you take all reasonable steps to:

(a) ensure compliance with the terms and conditions of your ***firm's authorisation***;

(b) ensure compliance by your ***firm*** and its ***managers***, ***employees*** or ***interest holders*** with the ***SRA's regulatory arrangements*** which apply to them;

(c) ensure that your ***firm's managers***, ***employees*** and ***interest holders*** do not cause or substantially contribute to a breach of the ***SRA's regulatory arrangements***; and

(d) as soon as reasonably practicable, report to the ***SRA*** any serious misconduct or material[16] breach of the terms and conditions of your ***firm's authorisation***, or the ***SRA's regulatory arrangements*** which apply to your ***firm***, ***managers*** or ***employees***;

save in relation to the matters which are the responsibility of the ***COFA*** as set out in rule 9.2 below.

9.2 If you are a ***COFA*** you take all reasonable steps to:

(a) ensure that your ***firm*** and its ***managers*** and ***employees*** or the ***sole practitioner*** comply with any obligations imposed upon them under the ***SRA Accounts Rules***, rule [ ] of the Overseas Rules and in relation to financial controls, financial compliance, financial stability or financial viability;

(b) as soon as reasonably practicable, report to the ***SRA*** any serious misconduct or material[16] breach of the ***SRA Accounts Rules*** which apply to ~~them~~your firm and its managers and employees or the sole practitioner.

Supplemental notes

Powers, commencement/transitional provisions.

Explanatory Notes for the SRA on Firm Code mark-up

1. It would be helpful to clarify that the Principles only apply to employees who are not solicitors insofar as they are relevant to their roles, not more generally for matters arising outside their work context, notwithstanding and subject to the impact of the "public confidence" Principle 2.

2. "Maintaining" public confidence is more appropriate than "upholding" it, the latter suggesting a more onerous positive obligation. That would be consistent with current Principle 6. The reference to "those delivering legal services" also seems far too broad when applied to the alternative unregulated sector – it is maintaining confidence in the solicitors' profession which needs to be protected, not the reputation of other multi-disciplinary/corporate service providers whose services may happen to include legal advice. Consistency with text with which the profession has become familiar would also be highly desirable here.

3. This formulation, with which the profession has become familiar, better reflects expected behaviours. A positive obligation to "act with independence" is easily capable of being misconstrued, especially by non-professional employees to whom the Principles will apply.

4. Small change but designed to ensure the obligation is a double one – i.e. to act with honesty and to act with integrity – and this is not an attempt to redefine what it means to act with integrity to require not acting dishonestly.

5. This is important to clarify that behaviour outside of a work context, especially by non-solicitor employees, is not caught by this Principle requiring encouragement to diversity and inclusion etc. (although it might separately of course impact Principle 2 if behaviour fails to maintain confidence etc.). If the SRA is trying to promote a change in this respect, it should be expressly consulting on this aspect.

6. Adding express reference to protecting confidentiality is extremely important to those non-solicitor employees bound by the Principles but not by the Code. It is also a sufficiently fundamental obligation, including for solicitors practising in unregulated entities, as to mandate its inclusion at Principles level. We have no strong views whether this is just added at the end of Principle 6 or highlighted by adding a new Principle 7.

7. This more accurately reflects relevant responsibilities. It is misleading to suggest that compliance officers share the same responsibilities as managers.

8. Need to clarify this so it does not apply (when referring to "others" for example) to those with whom you are negotiating in the best interests of your client.

9. The word "authorised" is likely to cause confusion. Would it cover ostensible authority in a corporate context for example? This alternative provides more clarity.

10. Client consent is needed as an exception to allow certain benefits to be retained as at present is permitted with consent. If this is not stated some would have concerns

about whether consents contained in their terms of business, for example, would mean it was "proper" not to account the client for benefits received from third parties in connection with a retainer.

11. This change is necessary to avoid the impact that there is in effect an absolute guarantee of compliance ("effective to ensure"). Having systems and controls etc. in place which are "designed to ensure" compliance would better reflect what is intended by 2.1. Not every breach of the Code of course should also mean that there has been a breach of 2.1 just because, by definition, systems and controls have not been effective to prevent that breach.

12. Better to use the definition of own interest conflict in the Glossary. As drafted, this looks like it catches client conflicts too which is not intended.

13. The SRA should consider whether it is appropriate to extend this to cover confidential information which may not be privileged if, for example, it has emanated from the unregulated sector.

14. It is important to clarify the responsibilities of managers based outside England and Wales in international firms and who the SRA intends should be treated as having management responsibility for these purposes. Our mark up reflects what in practice we understand to be the current status quo at least so far as enforcement is concerned.

15. Important changes to highlight that the SRA has to make a proper and lawful request for information etc. before a solicitor is obliged to respond.

16. It is very important to retain a different level of breach, currently described in the Code as "serious misconduct" which goes way beyond material breach of the Principles or Code, as the basis for reporting breaches by other solicitors or regulated firms outside your own firm. Consider clarifying in the Glossary a definition of "serious misconduct". At present it is settled that this involves breaches involving dishonesty or which involve a serious arrestable offence as previous guidance has made clear. To highlight the distinction also consider changing the terminology to "material" breaches instead of referring to "serious" breaches throughout. Many will assume that the change in terminology is intended to imply a change in substance to something more serious than material breaches.

17. It is very important that this is changed to clarify that as at present only current clients need to be notified of possible claims against you. As at present this would be done "promptly" so this has been added. If the SRA wants to change this important requirement to extend (significantly beyond what is currently expected of fiduciaries) it to cover clients for whom you have acted in the past but are not currently advising, this should be subject to a separate consultation to which we expect PI insurers would wish to respond. Gunning principles could be relevant here, as the change is not highlighted in this consultation, nor explained.

Yours faithfully

THE CITY OF LONDON LAW SOCIETY

Professional Rules and Regulation Committee

Individuals and firms represented on this Committee are as follows:

Sarah de Gay (Slaughter and May, Chair)

Tracey Butcher (Mayer Brown International LLP)

Roger Butterworth (Bird & Bird LLP)

Raymond Cohen (Linklaters LLP)

Sonya Foulds (Freshfields Bruckhaus Deringer LLP)

Annette Fritze-Shanks (Allen & Overy LLP)

Antoinette Jucker (Pinsent Masons LLP)

Mike Pretty (DLA Piper UK LLP)

Jo Riddick (Macfarlanes LLP)

Chris Vigrass (Ashurst LLP)

Clare Wilson (Herbert Smith Freehills LLP)