



THE LAW SOCIETY
of SCOTLAND
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Consultation Response

Solicitors Regulation Authority (SRA) consultation: Looking to the future – flexibility and public protection

The Law Society of Scotland's response
September 2016

Introduction

1. The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. As a statutory professional membership body pursuing legal excellence, the Law Society of Scotland supports the needs and requirements of the Scottish solicitor profession in delivering legal services to Scottish, UK and global businesses and consumers.
2. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.
3. We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law.
4. In preparing this response, we have consulted with Multi-National Practices. We have also suggested to Multi-National Practices that they may wish to consider responding directly to consultation.

General comments

5. Having considered the consultation proposals, we have general views and comments which we express in this response. We also use this opportunity to raise concerns regarding the extent to which some Multi-National Practices and individual solicitors, both Scottish and English qualified, may be subject to overlapping and potentially conflicting regulation.
6. As the professional body representing and regulating Scottish solicitors, we concur with the view of the SRA that the legal sector is evolving at a dramatic pace, not just in England and Wales, but throughout the United Kingdom and beyond. The changes in how legal services are delivered, the emergence of cross border firms,

the growth of new areas of business, the increasing internationalisation of legal services, the changing demands of clients and advances in technology have all impacted on the UK legal services market. The advancements in the legal services market are unlikely to crystallise and, in our view, will continue to evolve at pace. The current UK legal market requires a modern, transparent, responsive and agile approach which can evolve as the market does.

7. We have recently published a paper which sets out the challenges faced by the legal profession in the current market place. Although our paper is focused on the Scottish perspective, many of the themes and issues which we touch upon are shared by the UK legal services market as a whole.¹
8. We note part of the SRA policy intent is that the proposals will help to develop competition and improve access to justice, through increased availability of services and the possible reduction of the costs associated with those legal services, which will benefit the consumer. In principle, we are supportive of developing the legal services market throughout the UK and agree that proposals to strengthen competition and improve access to justice through affordability, availability and accessibility, on the strict understanding that consumers are afforded adequate and consistent protections, are to be welcomed.

Overlapping and potentially conflicting regulation

9. By way of background there are currently 586 Scottish solicitors practising in England and Wales and 28 cross border firms.² Many of these solicitors and firms are also subject to some degree of regulation by the SRA, or work in firms or businesses which are SRA regulated (to a greater or lesser extent). There are also a number of English qualified solicitors working for firms in Scotland.
10. In general, the current requirements (both in relation to the establishment, structuring and management of a “cross-border” practice and in relation to its provision of legal

¹ The Solicitors (Scotland) Act 1980 -The Case for Change
<http://www.lawscot.org.uk/media/732471/The-Solicitors-Scotland-Act-1980-The-case-for-change-Regulation-Pa.pdf>

² Figures correct as at 19 August 2016

services in each jurisdiction) are regarded by many solicitors practising in both jurisdictions as unduly complex and difficult to identify and apply in practice. How the requirements of the different regulatory regimes will inter-act in a particular set of circumstances are found by many solicitors practising in both jurisdictions to be uncertain and unpredictable.

11. This creates, at best, an unnecessarily onerous and disproportionate regulatory burden and, at worst, increases the risk of regulatory failure. Significant issues arise where firms and individual solicitors are conflicted in the application of the current regimes, walking a potential regulatory tightrope to balance the application of both sets of rules which can prove problematic and may raise potential risk. The current restrictions and requirements, in our view, inhibit and discourage competition in the legal services market to the detriment of the consumer.

12. Where there is a necessity and unavoidable requirement for dual regulation, for example where cross border firms employ suitably qualified solicitors to carry out reserved areas of work, then we would suggest that this should be proportionate and applied through cooperation between the SRA and the Law Society of Scotland. We believe that the two organisations should work together to ensure the firms have proportionate regulation which helps them flourish to the benefit of the consumer, and promotes the growth of the regulated legal services sector.

13. Whilst the same considerations can obviously apply outwith the UK jurisdictions, our view remains that improving the position “intra-UK” (or at least between Scotland and England and Wales) is an area which requires further consideration.

The creation of two separate codes

14. We note the policy intent of the SRA proposals is to provide flexibility and enhanced public protection, adaptable to the changing legal sector, by setting out two separate Codes of Conduct; a Code of Conduct for solicitors and a Code of Conduct for firms, which is intended to simplify and replace the current detailed and prescriptive requirements. We are supportive of the proposal to modernise the Codes, focusing on a streamlined approach centred on flexibility.

15. We believe that the separation and modernisation of the Codes will achieve the policy intent, ensuring solicitors are clear about their personal obligations and at the same time, firms will be clear on the systems, processes and controls they need to provide a professional legal service for consumers.

The unregulated legal sector

16. As in England and Wales, Scottish solicitors are not permitted to provide "reserved" legal services to the public through an unregulated legal service provider.³ However, we recognise that there are a number of alternative legal service providers operating outside of regulation and who do provide legal services to the public. This is something which affects the whole UK legal services market and something we have recently raised with the Scottish Government.⁴ We do not believe that this is in the solicitor profession or consumers' interest.

17. In our view, there is also a very strong case, from a consumer protection perspective, for the regulation of the legal services market to be harmonised so that all those offering and providing any legal advice or services are regulated. This would ensure that consumers enjoy and have the benefit of consistent and assured protection, as is currently afforded to all those seeking advice and representation from a regulated firm of solicitors.

18. We also agree that it is paramount to ensure that the public is not only afforded protection if something goes wrong, but is also made aware of the level of protection which they have and is in a position to make an informed choice when choosing the provider of the legal service.

Conflicts of interests

19. We note option 2 does not focus on outcomes but is focused on preventing potential conflicts developing into actual conflicts. We prefer Option 2. This, in our view, is

³ Solicitors (Scotland) Act 1980 section 26

⁴ The Solicitors (Scotland) Act 1980 -The case for change paragraphs 45 – 51

<http://www.lawscot.org.uk/media/732471/The-Solicitors-Scotland-Act-1980-The-case-for-change-Regulation-Pa.pdf>

more easily understood, making it clear that you should never act if there is an actual conflict. For those Scottish solicitors and firms who have to navigate the issue of dual regulation, the current rules on conflicts of interest can often be problematic, with the rules in England / Wales broader than those of Scotland. We prefer Option 2 as this is much closer to the Scottish position.

Legal Professional Privilege

20. We note that the consultation rightly considers LPP (para 149-155) in the context of alternative legal service providers. LPP, referred to in Scotland as the ‘obligation of confidentiality’ is key to the rule of law and is essential to the administration of justice as it permits information to be communicated between a lawyer and client without fear of it becoming known to a third party without the clear permission of the client. Confidentiality between solicitor and client is one of the most important principles in this professional relationship.

21. Many UK statutes provide express protection to LPP and it is vigorously protected by the courts. Any proposals which may or will dilute this fundamental principle will be strongly resisted and must be considered very carefully. We fully concur with the comments and concerns of the Law Society of England and Wales⁵ that there should be no attempt to erode the principle of LLP and this should not be used as a distinguishing factor between regulated and unregulated providers.

Practice Framework Rules 2011

22. We note that, unfortunately, the SRA has chosen not to include the revised Practice Framework Rules for views and comment. We would welcome confirmation on when the SRA intends to publish the revised Rules, particularly as the detailed rules on where a qualified English solicitor may practice are relevant to how a provider of legal services chooses to structure itself.

⁵ The Law Society: SRA handbook consultation - looking to the future flexibility and public protection briefing for solicitors August 2016

SRA Overseas Rules 2013

23. We note further that the consultation document makes no mention of the SRA Overseas Rules and Principles, nor is it clear if the rules and principles have been considered and the interaction between these rules and the proposed changes. We would welcome clarification of this and also if the SRA intends to propose similar changes to the Overseas Rules.

For further information and alternative formats, please contact:

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