



18 January 2011

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Ms Margaret Hope
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By e-mail to margaret.hope@sra.org.uk

Dear Ms Hope

THE ARCHITECTURE OF CHANGE – PART 2

The ICAEW is pleased to respond to your request for comments on The Architecture of Change – Part 2.

Our response focuses on four elements.

Two areas (in house arrangements and the separate business rule) are considered further in this Part 2 Consultation. The other two (the Accounts Rules and use of the phrase solicitor) are not mentioned in the Consultation but are so integral to operation of the Code itself that we need to make further comment.

1. SAR

We are disappointed that the final form Accounts Rules do not reflect the changes suggested in *the Architecture of Change Part 1* Consultation response in August 2010, or our separate letter to the SRA, save for the limited clarification in relation to “out of scope money”.

We anticipate the process will need to be revisited next year as (inter alia) further rules will be required for ABS holding mixed funds.

There is an intention to consult further on the role and content of the accountants report regime. This is welcomed, and we sincerely hope that the SRA will use this time to reignite work on the SAR to ensure they are fit for purpose, and provide firms and their accountants with the clarity required.

Again we offer our assistance to the SRA.

2. In house arrangements

Our member firms contain a number of solicitors working within them in a variety of capacities. They report to us that the in house rules are unclear and difficult to navigate.

The proposed Code revisions do little to resolve this lack of clarity and in the absence of fundamental revision, we have suggested that explanatory notes are issued.

3. Separate Business Rule

The SRA did not take up our offer in our response to the *Architecture of Change Part 1* in August 2010 to stress test hypothetical business models that would be impacted by the retention of the rule in its current form.

We understand the overarching wish of the SRA to prevent regulated firms and individuals providing restricted legal services from providing non reserved activities through a separate business.

However the introduction of ABS and the growth of “portfolio” careers where individuals may wish to practice in different capacities at different times needs to be addressed. This area requires more work to ensure that restraints of trade are not retained unnecessarily as this would prevent the widening of access to legal services, and that individual solicitors and ABS firms are not subject to competitive disadvantage.

4 Use of the term Solicitor

Wrapped up within the issues relating to working in house and the operation of the separate business rule, are the Code restrictions placed on the use of the term solicitor which we do not feel sit comfortably with ABS and the variety of in house roles that exist.

Yours sincerely

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RESPONSES TO SPECIFIC QUESTIONS/POINTS

Q1 Do you have any comments on the Introduction to the Handbook?

The Regulatory Objectives are set out at the end of the text and give a useful factual background for the Introduction and its structure. On a purely presentational basis, the Introduction could be enhanced if the Objectives and their supporting text were set out at the start of the chapter.

Q2 Do you have any comments on the implementation timetable?

We remain concerned that insufficient work has been done with other non law regulators to date on issues previously identified and which do not seem part of the planned timetable including

- the operation of ABS MDPs and in particular a clear and sustained “stress test” of potential cross profession ABS models
- the role of in house lawyers in a variety of business structures

These were referred to in paragraphs 11 and 18 of our Consultation response to the *Architecture of Change Part.1* and we are happy to debate these further with the SRA.

Q3 Do you have any comments on the revised principles, application provisions and notes to the Principles?

We welcome the proposals set out in paragraph 62 of the Consultation, including inter alia the use of FAQs and similar guidance materials. As suggested above this structure could be used to help practitioners navigate the in house and separate business rules in particular

Q4 Do you have any comments on our approach to guidance?

Please see our previous comment

Q5 Do you have any comments on the revised Code?

The in house framework is still confusing to navigate. We have identified on several occasions to the SRA the four key but distinct roles adopted by in house lawyers (see question 12 of our Part 1 response) but these distinct roles do not seem to have had any impact on the Code revisions.

Solicitors working within ICAEW member firms have reported they cannot readily understand the complex rules and request clarity: a view we suspect shared by in house lawyers elsewhere, particularly those working in professional firms.

If the SRA is not prepared to clarify the Code, then we suggest this is done outside the Code itself by way of explanatory note and flowchart.

Q6 Do you have any comments on Chapter 3 (Conflicts of interests)

You have quoted our comments on financial gifts in the Part 1 Consultation in paragraph 84 and have introduced IB (9) which we welcome. May we suggest some additional wording to complete the clear intended ambit of IB (9) as follows; our additional wording is in red -

IB (9) refusing to act where your client proposes to make a gift of significant value (or grants an indirect significant benefit) to you or a member of your family (or to a business associated therewith), or a member of your firm or their family, (or to a business associated therewith) unless the client takes independent legal advice;

Q7 Do you have any comments on the application of the financial services rules to ABSs?

No

Q8 Do you have any comments on the revised Authorisation Rules?

Q9 Do you have any comments on the proposed approach to reporting and notification?

Whilst we agree that the legislation envisages that HoLPs and HoFAs are relevant for ABS (rather than non ABS firms for which COLP and COFA have been chosen) we suspect that the public will not appreciate the distinction and will find the nomenclature confusing. An “across the board” description may be preferable for entities providing regulated reserved legal services.

In terms of data collection, defaulting or potentially defaulting firms may deliberately fail to answer sensitive financial questions in relation to banking covenants correctly. We are still not sure what resources (in particular the skill and experience of personnel involved) will be put in place by the SRA to assess risk and support firms in need of assistance.

The real test is not what data is collected, but what is actually done with it and this remains impossible to answer at this stage.

Q10 Do you have any comments on the changes to the SRA Practising Regulations?

There is nothing we can usefully add at this stage.

Q11 Do you have any comments on the proposed changes to the SRA Practice framework Rules?

The Consultation notes that there was limited response to question 18 of the *Architecture of Change Part 1* consultation, and a lack of understanding of the legal background to the point at issue. We are not surprised.

We have highlighted in previous consultations responses and again herein that the in house rules require a fundamental overhaul to take account of the variety of roles undertaken by in house lawyers, as the professional and business imperatives affecting each category are very different. One size no longer fits all.

The changes proposed at this stage focus primarily on special bodies, and do not take account the other roles undertaken. We trust that the SRA will take up our previous offer to assist before the in house rules become enshrined.

Q12 Do you have any comments on the proposed changes to the SRA Recognised Bodies Regulations?

Q13 Do you have any comments on the revised SRA Disciplinary Procedure Rules?

Q14 Do you have any comments on the SRA Cost of Investigations Regulations?

Q15 Do you have any comments on the changes which we have made to the regulations concerning training, admission and rights of audience?

There is nothing we can usefully add at this stage.

Q16 is the SRA Suitability Test a robust, clear transparent and fair assessment for members of the profession and authorisation as role holders in ABS and RBs?

It appears so.

Q17 Do you agree with our proposal to apply the existing compensation fund to ABS?

Q18 Do you agree with our proposal to adopt the same compensation fund rules for ABS by extending the application of the existing rules?

Q19 Do you agree with our proposal for the compensation fund to cover acts or omissions of owners of licensed bodies who are neither managers nor employees?

It seems sensible to ensure uniformity across entities regulated by the SRA and to extend the rules as suggested.

Q20 Do you have any comments on our equality impact assessment and are there any additional equality issues that we should consider as we work further on the Handbook?

We have identified a number of issues in this response and separately with the SRA relating to the operation in practice of the separate business rule, use of the term solicitor and a lack of rule clarity when a solicitor wishes to be engaged in different capacities.

The continued maintenance of these restrictions on the basis of preceived historical expediency will have a direct impact on diversity. Women or BME lawyers in particular may be subject to unfair and unnecessary competitive disadvantage, and actively prevented from participating in the supply of legal services thereby reducing access to justice for consumers.

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