MULTI-DISCIPLINARY PRACTICES

ICAEW welcomes the opportunity to comment on the consultation paper *Multi-Disciplinary Practices* (MDPs) published by the Solicitors Regulation Authority (SRA) on 7 May 2014, a copy of which is available from this link..

This response submitted June 2014 reflects the views of ICAEW as a regulator. ICAEW Professional Standards is the regulatory arm of ICAEW. Over the past 25 years, ICAEW has undertaken responsibilities as a regulator under statute in the areas of audit, insolvency, investment business and most recently Legal Services. In discharging our regulatory duties we are subject to oversight by the FRC's Conduct Committee, the Irish Auditing and Accounting Supervisory Authority (IAASA), the Insolvency Service, the FCA and the Legal Services Board.

ICAEW is the largest Recognised Supervisory Body (RSB) and Recognised Qualifying Body (RQB) for statutory audit in the UK, registering approximately 3,500 firms and 9,300 responsible individuals under the Companies Acts 1989 and 2006.

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ICAEW is a Designated Professional Body (DPB) under the Financial Services and Markets Act 2000 (and previously a Recognised Professional Body under the Financial Services Act 1986) currently licensing approximately 2,400 firms to undertake exempt regulated activities under that Act.

ICAEW is a Supervisory Body recognised by HM Treasury for the purposes of the Money Laundering Regulations 2007 dealing with approximately 13,000 member firms.

ICAEW is an accredited body under the Financial Conduct Authority (FCA) Retail Distribution Review (RDR) arrangements.

ICAEW is provisionally designated an Approved Regulator and Licensing Authority for probate under the Legal Services Act 2007 (the Act); this designation is under process at the time of making this representation.

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ICAEW is a world-leading professional accountancy body. We operate under a Royal Charter, working in the public interest. ICAEW's regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the UK Financial Reporting Council. We provide leadership and practical support to over 142,000 member chartered accountants in more than 160 countries, working with governments, regulators and industry in order to ensure that the highest standards are maintained.

ICAEW members operate across a wide range of areas in business, practice and the public sector. They provide financial expertise and guidance based on the highest professional, technical and ethical standards. They are trained to provide clarity and apply rigour, and so help create long-term sustainable economic value.

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BASIS OF CONSULTATIVE RESPONSE

1. Although the regulatory arm operates separately from the membership functions of ICAEW many regulatory interests are of mutual interest, and usually responses to consultations are made jointly for ICAEW as a whole. This representation is accordingly offered in that vein.

2. However there are some competing interests in this particular representation where different views are held within the organisation; for example a more proportionate approach is welcomed by the members as providing better opportunity for them to engage in the full gamut of non-reserved legal services, but equally the regulatory arm may have ambitions to license in those areas and therefore such an approach might be disadvantageous to its future evolution.

3. Indeed ICAEW as a prospective Approved Regulator and Licensing Authority for probate is a competitor in waiting for the SRA and it might be considered that representations might be inappropriate and possibly anti-trust. The SRA and the Legal Services Board (LSB) have acknowledged this potential conflict and asked us nevertheless to contribute to the consultation based on our wider understanding of some of the regulatory areas and principles, and our commitment as an organisation to better regulation. This we are happy to do as part of this consultation, though there are some commercial areas below we have chosen not to comment on.

MAJOR POINTS

Support for the initiative

4. We welcome the proposals contained in the consultation paper which seeks to modify the approach the SRA takes in considering applications to them as a licensing authority for Alternative Business Structures (ABS), particularly where applicant firms are already operating under a regulatory regime. This equivalence approach is one that has been long established in the UK accountancy profession and indeed is part of the EU law for the regulation of audit. The declared aim for the SRA is to determine, develop and implement a more proportionate regulatory framework for the authorisation and supervision of MDPs providing legal and non-legal services, and is an approach we fully endorse.

5. It seems to us part of the problem with the existing approach is related to how ‘legal services’ is itself defined. Regretfully the definition given in Section 12 of the Legal Services Act 2007 (the act) is loosely drawn, and as a consequence we have found from our experience in dealing with the various bodies as a would be licensor of ABS that the LSB, the Legal Ombudsman (LeO) and the SRA have all taken mixed and very broad interpretations of what legal services are. In our view these interpretations risk bringing into regulation areas of everyday business that have hitherto never been regulated and significant scope creep is potentially occurring as a consequence.

6. Part of the objectives set out in the consultation is to apply better regulation principles and to reduce the burden of regulation on small business. We believe these objectives are immediately compromised in this consultation by continuing to apply a wide interpretation to what constitutes ‘legal services’ and not seeking to adapt it to the particular circumstances that can arise in an ABS. As virtually every aspect of professional life is affected in some way by legislation from Parliament the definition applied is almost a carte blanche to regulate anything that moves in an ABS, and a more innovative approach would seem to be required, perhaps defining around the individual delivering the service rather than the service itself.

7. We believe that some of the difficulties in regulating this area faced by the SRA stems from its traditional background of regulating the individual and the firm as one. The ABS brings in a differentiator between regulation of the firm and regulation of the individual and accepts that there may be different regulatory bodies involved through the conflict provisions in sections 52-54 of the act. This brings challenges then in how the brand of the professional body is reflected and how quality is sustained.

8. ICAEW as an audit regulator has had to manage this process since audit regulation was introduced in the 1990's, and a number of the firms it licenses have Responsible Individuals (audit principals) that are members of other accountancy bodies. ICAEW approaches the differentiation by applying the "Chartered Accountants" mark to firms led its members, but treating as ordinary member firms those licensed for audit where they are led by non ICAEW principals. The result is a two tier level of quality where both meet the quality levels required of Companies Act legislation but the Chartered brand aspires to a higher level beyond that.

9. We believe that SRA is facing this sort of dilemma, but currently seeking to bring the ABSs up to a quality level commensurate with the individual solicitor status rather than expressly recognising the two tiers. This creates tensions either ends of the spectrum in either over-engineering the ABS or devaluing the value of the overall Solicitor brand in compromising standards. If the differentiation were to be more expressly set out then we suspect the proposals might be more acceptable to Law Society members.

10. The consultation includes proposals to relax the separate business rule. Although we strongly agree that the rule as it stands is not conducive to the effective function of the act and is anti-competitive in nature, we believe a number of the outcomes the rule is seeking to achieve especially in the area of consumer protection are important. Regretfully an approach of "separate business rule light" as seems to be propounded is in our view the wrong way to tackle this as it weakens the regulatory thrust of the rule. Rather than dilute the rule it may be better to determine a new one that sustains the same outcomes but achieves them in a more flexible framework which recognises the business models under the act.

11. We welcome the clarification of Practice rule 1.1(d) governing what legal services a solicitor might be able to perform in a non-SRA ABS. Some discussions around this rule had suggested a very narrow interpretation that risked limiting the role of solicitors in ABSs and thus stifling access to market. We considered that with the many checks and balances contained within the act, limiting of solicitors in this way was inappropriate, and this clarification is an important step in enabling ABSs to flourish.

RESPONSES TO SPECIFIC QUESTIONS

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

12. The analysis provided resonates with our own view of the market and the difficulties the SRA has created for itself and its applicant firms in attempting in its accreditation process to enforce a rule structure that largely pre-dates the emergence of ABSs. ABSs have their own unique characteristics that do not always sit comfortably with a traditional service environment. It is necessary to revert to first principles to determine what the key outcomes should be, and then ensure the structure as presented meets those outcomes, even though they might not adhere to a traditionally viewed pattern. We recognise that this is what the SRA is seeking to do in this consultation.

13. Part of the difficulties emanate from the lack of an agreed definition of legal services as it perhaps could or should be regulated. Regretfully the definition given in the Legal Services Act 2007 under section 12(3)(b) is loosely drawn, and therefore can be interpreted as narrowly or as widely as the user might wish. The examples given in the paper at paragraph 12 include the traditional service environment where the boundaries are perhaps quite fine, but the

interpretations applied can extend to almost all walks of life as that is what Parliament over the last 800 years has legislated over.

14. The ABSs that are beginning to emerge in the market are innovative and bring very different product offerings. But the impact of a widely drawn legal services definition is to bring the traditional operational and non-regulated aspects of their business under the regulation of the SRA under current rules. An ABS therefore which included a car servicing capability would bring into regulation the legal advice given by a car mechanic in issuing an MOT under the Road Traffic Acts, or a doctor in a surgical practice committing a patient under the Mental Health Act could have this decision regulated by the SRA. A retail arm that might offer catering services to the elderly and has to present food compliant with the Health & Safety legislation would have their risk judgments brought into the regulatory legal framework.

15. This approach is illogical and in some ways dangerous as the existing consumer protection environment in those services could be supplanted by a legal regulatory framework which would not always be as well versed in the intricacies of the particular profession and would be impossible for the SRA with current resources to police properly.

16. The situation is more marked in the regulated professions; there are potential collisions which are not easily resolved. The accountancy profession is an important example as for example the audit element is regulated by international and European law, and therefore the regulatory conflict illustrated is not just UK based but international. The definition of legal services currently applied can extend to an audit opinion expressed under the Companies Act, which is already regulated in the UK by the FRC and the Financial Conduct Authority, and indeed by audit oversight bodies overseas where UK based entities are listed on overseas stock exchanges. The SRA simply does not have the vires to apply its own rules over those applying in this market.

17. The work around of a separate entity with a separate business rule waiver may be a short term sticky back plaster solution, but is inherent with further risks to the consumer which ironically the separate business rule was meant to protect against.

18. The analysis presented takes the line that where legal services are performed in an environment that is already regulated by an existing body, then some reliance will be placed on that and the regulatory burden reduced. For ICAEW its audit, DPB and Insolvency regulated areas, as well as those under its Practice Assurance regime, would be considered as one of those existing bodies, which is an approach we fully welcome, and accords with the proportionality requirements of the legislation. We do however question the determination to bring in activities that are not regulated by other bodies – for example undertakers or renting agents – as the regulatory burden will effectively discourage those sorts of bodies from applying to become ABS.

19. We appreciate there is an underlying question of brand, reputation and quality. The SRA and the Law Society seek to uphold and promote a cadre of professionals who operate to the highest standards and therefore individuals in whom the public can place greater trust than the ordinary man in the street. These are values which resonate with us as a body and which we seek to uphold for the accountancy profession. However the Legal Services Act brings responsibilities to regulators which are based primarily around the regulation of firms, not individuals. A firm may be made up of many skilled individuals, but in an ABS not all of them may be solicitors and indeed none of them may be.

20. ICAEW as an audit regulator is required to license firms for audit under the Companies Act 2006 which may not have any principals who are members of ICAEW. Those firms attain the qualities necessary to achieve registration for audit, but they are not classified as ICAEW Chartered Accountant firms per se. The principals as individuals are members of different bodies with different values and they may not be chartered accountants, which we consider to be the higher brand value.

21. We believe the challenges brought by licensing ABSs are very similar, but the SRA is struggling to reconcile its role as a regulator of firms versus that of a regulator of individuals. In this context we can understand the limiter of the Solicitors Act referred to in Paragraph 22, but we do not see the failure of the Legal Services Act to contain the provisions of the Solicitors Act as to be empowerment to apply it to firms where there are no solicitors at all.

22. The policy change therefore appears to be proportionate in taking account of other regulatory environments, but appears to be disproportionate in applying it to low risk non-solicitor practices outside such regulatory environments that still may be able to exhibit the controls and safeguards appropriate to achieve the statutory objectives. In other words the quality controls and safeguards required under the Act, rigorous though they may be, are likely to not be as stringent as those of the Law Society – that is what makes it distinct as a profession - and attempts to bring ABSs into this framework actually risks devaluing that brand at one extreme, and denying worthy applicants to market at the other.

23. Accordingly in our view the SRA should reconsider more objectively what it defines as legal services and sets out clearly the standards it expects of the individuals it regulates versus the entity firms it regulates. A change of terminology to denote a different tier of regulation may be appropriate to aid such distinction.

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

24. We agree with the principle of exception, but are not convinced by some of the components of the proposed policy. We comment on the 4 precepts in the paragraphs below.

(a) The activity not being carried out or supervised by an authorised person

25. We understand the rationale behind this precept, as this could affect the way the consumer may view the quality of the work being done and the remedies afforded him, though some of this would be covered in precept (c). However in a number of small to medium sized practices the regulatory supervisory role would be undertaken by the same individual for Legal services, audit and insolvency, and therefore there could be regulatory conflict through this rule. In addition this draws into regulation work currently unregulated and this is inconsistent with the government red tape challenge guidelines. If the definition of legal services (just for ABSs) were more tightly drawn this rule might be more practical, pragmatic and proportionate.

(b) Suitable regulation by an external regulator

26. We have argued for some time in various discussions with the SRA and LSB that the SRA should set out a number of key regulatory outcomes and establish if an existing regulatory environment addresses these; if it does then it should rely on that environment and confine its due diligence to other matters outside those outcomes. We believe the SRA has already had to carry out this task for a number of ICAEW member firms with the same positive outcome, and therefore it would seem to be commercially sensible for such a regularly tested environment to be accepted for similar applicant ICAEW member firms.

27. The outcomes listed in paragraph 36 are not necessarily those we follow in our own assessments, but are ones which we would endorse as part of the SRA process. However it is in our view not enough to accept these principles as undertakings, but for them to be regularly assessed as part of a regular monitoring programme. We would therefore see a monitoring process as part of a number of the outcomes listed. ICAEW's Practice Assurance regime ensures member firms are assessed at least once every 8 years and on shorter periods where high risk services or circumstances prevail.

28. In the same vein we would see the published list referred to in paragraph 39 being subject to some refreshment process to ensure that the original equivalence assessment continues to hold good.

29. We would caution the observation in paragraph 36 that the rules should apply to all non-reserved legal activities that the MDP may carry out outside the SRA regulated activity. This comment is too widely drawn and pre-supposes that say accountancy firms are subject to the same regulatory environment. For example ICAEW's Practice Assurance Scheme does not apply to accountancy firms whose activities principally fall outside the definition of accountancy services set out in the Council Statement of Engagement in Practice. From ICAEW's perspective however most of its registered firms would comply with the 10 attributes listed.

(c) Terms of engagement

30. We believe that setting out clearly for the consumer the basis under which the work is being provided and in particular the remedies available where the service falls short of the standard expected is a fundamental part of doing business. The requirement is part of ICAEW's ethical and practice standards.

(d) The ABS having procedures in place to ensure that client are aware that the activity is not SRA regulated.

31. The procedures are effectively captured in requirement (c) which encapsulates what is required here. Whilst cautioning once again on what is 'legal service' we would agree that where a legal service is an integral part of a multi service offering then the regulatory cover should apply to the full service, subject to any other statutory regulatory oversight. For example an ABS's solicitor may advise on the distribution rules as part of the audit and the presentations to the audit committee; this area is regulated by the FRC and we would not expect the SRA to have any regulatory powers in those circumstances save as far as any misdemeanour by the individual where he would at a personal level be subject to the regulations of the SRA.

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

32. See the answer to Q2 above.

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

33. Whilst the definition of non-reserved legal activities is so widely drawn, we could list down every single activity and service provided by an accountancy firm which invariably has some form of law attached to it. It is ironic in the example quoted in paragraph 42 reference is made to the equality and diversity requirements, as bodies with the equality duty under section 149 of the Equalities Act 2010 have to exercise 'due regard' to equality in any business advice or decision. The realistic step back from that as "impracticable" needs to be exercised more widely in the context of business as a whole.

34. In paragraph 42 reference is made to legal activity that is 'a subsidiary part of the exercise of that profession'. This may form a better basis of definition linked to the normal lack of association of a solicitor in the delivery of such advice or services. This would fit for example with the cases listed in paragraph 12.

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

35. We have set out a number of our thoughts on this in the answers to question 2 above. We think however the scope of regulation should be applied around the individual and not the service. Accordingly we believe that the SRA should consider regulating according to who supervised the engagement; so if supervised by a lawyer - SRA regulate the engagement even if a multi-service offering. If supervised by a Tax partner who is not a lawyer - SRA should not regulate, unless that tax partner in the role of an authorised individual for the reserved service was supervising an engagement embracing that reserved service. Then the SRA should of course regulate for the reserved activity and the services associated with that particular engagement. This rightly, in our view, puts the onus on the individual doing the work.

36. Conversely if the lawyer is not supervising an engagement, but merely performing a piece of non-reserved legal work that a non-authorised principle is leading on either as a single or multiple service, then the SRA oversight should be limited to the activity of the individual lawyer. In short the whole engagement should be an SRA matter if there is a lawyer responsible for the engagement, or if the non-lawyer who is an authorised individual performing the reserved service. Otherwise the lawyer is only regulated in relation to what they actually do. As it stands in the proposals, the SRA seem to suggest that involvement in any engagement by a lawyer (unless that involvement is extremely trivial) means the whole engagement is captured for SRA regulation. In our view, that cannot be right and is largely unworkable.

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

37. We welcome the realistic approach that has been taken to this area in the consultation document, and in particular the area of estate administration which was closely assessed during the LSB's consultation on the proposed reservation of this area. We do not feel that the state should seek through its regulators to extend regulation where the case is not proven, and the LSB's consultation was a clear example of the government's approach in this area. Accordingly we believe it would be wrong to seek to adjoin other services into the definitions determined in Schedule 2 of the Act.

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

38. We have no comment on these.

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

39. We have set out in earlier paragraphs areas where we think the proposals could be more ambitious in achieving the better regulation principles of proportionality, accountability, consistency, transparency and targeted. These are based around ring fencing the definition of legal services as appropriate to such practices, mitigating their embrace of normal professional activity by the non-legal professions, and structuring the approach to ABSs in a different fashion to that of individuals to take account of low risk environments outside the legal profession.

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

40. We agree with the analysis given, and in particular the limitation in choice to the consumer through a complex legal structure or disinclination by firms to enter the market in the first place because of the cost involved.

41. However we believe there are a number of other drivers that make this approach unsatisfactory; one of the outcomes sought through the separate business rule is to ensure appropriate insurance arrangements are applied across a firm however it is structured. The encouragement of separation of firm is in some ways paradoxical in achieving that objective. There are other methods of ensuring that the PI cover is properly effected without crippling the approach with a fixed rule.

42. Reference is made to the view of the consumer; it is correctly observed that his focus is on the successful delivery of a service, not on the complex routes through which to seek remedy for it going wrong. The use of a separate vehicle actually adds considerable complexity to the letter of engagement and throws into question the jurisdiction of the Legal Ombudsman over parts of the service provided where this sits across the two entities. This is not helpful to the consumer.

43. We also find the move to separate firms' businesses into separate entities moving in the opposite direction to BIS's initiative to make the ownership of corporates, (including LLPs) more transparent and less complex, and to Treasury's attempts to limit the development of such structures which can be seen as tax driven rather than regulatory in purpose.

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

44. We have challenged the application of the separate business rule with the SRA in the last two years as we have progressed our own application to become an approved regulator and licensing authority. This is primarily because every ABS, irrespective of which body licences them, would need to get approval from the SRA for a waiver under the current rules if one of its own solicitors were proposed as a principal in that ABS. This would mean effectively that other licensing authorities would need to consult a competing licensing authority in order to allow certain applications. This has a number of ramifications including;

44.1. Apparent anti-trust implications which could warrant scrutiny by the Competition Commission

44.2. Undermining of the authority of the Legal Services Board by effectively requiring a non-SRA licensing authority to report to two separate "oversight" bodies

44.3. Detriment to the competition amongst regulators as applicant firms would see it to be more straightforward to go to the SRA in the first place for licensing, cutting out the "middle man"

44.4. Deterrence to the formation of ABSs in the first place as solicitors would be unwilling to risk losing their personal professional accreditation by joining a firm that might not meet the criteria for the separate business rule

45. These all conflict the access to justice and consumer benefit objectives set out in the act. Although the SRA have indicated to us that they are unlikely to require waivers for the firms we may license, we are not sure that dispensation has been formally relayed to Law Society members and therefore the deterrence issue still remains. Formalisation of a new approach that is adapted to the newly emerging ABSs is therefore an important step we fully endorse, not only for the ABSs that the SRA itself licenses, but those being approved by other licensing authorities.

46. We are equally mindful however of the objectives behind the original imposition of the separate business rule. The outcomes particularly around protection of the consumer are key elements of the regulatory control process and ones that we subscribe to ourselves as a body. We would therefore see an approach of "separate business rule light" for ABS as being a sticky back plaster approach, and a better approach may be to re-examine the outcomes sought by the rule and set out a new regulatory framework that achieves these and is consistent with the new licensing regime under the act.

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

47. The aim of the Legal Services Act 2007 (LSA) was to open up and develop the market for legal services. The limitations caused by section 9(1)(a) of the Administration of Justice Act 1985 (AJA) as outlined in the consultation paper seem to us to be in direct conflict with the statutory objectives set out in section 1 of the LSA and in particular inhibit the development of ABSs with legal practices at their core. This places the SRA at a disadvantage to other licensing authorities and whilst we acknowledge this may to our own advantage, this is not healthy for the act's competition and access to justice statutory objectives. We agree that a revised approach and if necessary amendment to the AJA may be necessary in order for the SRA to operate successfully within the spirit of the LSA.

48. We note with approval the clarification of practice rule 1.1(d) of the SRA's Practice Framework rules 2011. In previous discussions ICAEW had had with the SRA it had been suggested by some officials that the rule covered non-reserved services and therefore considerably constrained the operability of qualified solicitors practising in ABSs outside those licensed by the SRA. This appeared to us to an inappropriate limitation given the LSA statutory objectives, and not necessarily what the rule itself was requiring. We therefore welcome this statement of clarification.

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

49. We broadly agree with the analysis given in Annex B concerning the impact of the option 1 proposals.

50. We however note that the survey referred to in paragraph 8 (that suggests the consumer market is more business than individual) is against a backdrop of an ABS licensing market that hitherto has been dominated by the SRA, and has accordingly been shaped in part by the processes and policies of the SRA in discharging that role. In other words the deterrents referred to in paragraph 2 may have significantly skewed the results of this survey, and the combination of the SRA's rule changes and the introduction of other licensing authorities may change the shape of this market quite significantly going forward.

51. In the paragraphs above we have noted some concerns around the separate business rule and the use of additional entities and waivers to reach a practical solution on this; we believe the point made about consumer confusion may be understated in this respect, and may not have been an issue hitherto owing to the early days of operation of the licensed ABSs. As consumers start encountering service deficiency and exploring the remedies under the letter of engagement the challenges are more likely to become apparent.

52. Part of the thrust of the document is that the processes to date have been a challenge and deterrence to would be applicants. It may have added value to the document to include the number of enquiries the SRA have had about the licensing of an ABS, the number of applications that have been made and the number that have translated into approval. This translation rate could then have provided a useful comparison benchmark to indicate benefits realisation from the proposed rule changes.