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Letter sent via e-mail: caroline.wallace@legalservicesboard.org.uk

Dear Caroline

Our colleagues have been discussing our recent application for approval to change certain regulatory arrangements. Most recently, [redacted] emailed some questions. This letter comprises our response. If you or the Team would like to discuss this further, please let myself or [redacted] know. For convenience, we have repeated your questions in bold.

We would like to know more about the rationale and evidence base for the SRA's assessment that rule 22.1(a)(iii) presents a regulatory barrier. In the SRA's email of 6 October, it confirmed that there had been no revocations or suspensions of authorisation under the rule, which might be an indication that it is not a regulatory barrier. However, in the telephone conference call on 7 Oct we recall that [redacted] mentioned that [redacted] thought there may have been one or two cases where authorised firms had been granted rights to administer oaths to meet the Rule 22 requirement. It would be helpful if the SRA could confirm how many such cases there have been and the circumstances.

Context

It may be useful at the outset to set out the context to our rule changes around the carrying on of reserved legal activities. Lawyers do not design their practices around whether activities are reserved or non-reserved: and even if they sought to do so, the distinction in many cases is open to interpretation (see for example the LSB's consideration of probate activities in its investigation of will-writing, probate and estate administration). Still less do consumers recognise the distinction in their buying choices. Our experience tells us that for most authorised firms and in house teams, the majority of work carried on is non-reserved, however those firms need the flexibility to carry on reserved work that they are competent to deliver when it would be in their client's interest to do so.

The legislative scheme that the Legal Services Act 2007 (the Act) provides is one of entitlement to carry on reserved legal activities rather than the actual delivery or intention to deliver reserved services. Thus it sets out a standard or framework for authorised persons that contributes to the delivery of the regulatory objectives including, where appropriate, in relation to non reserved activities. This concept of entitlement to deliver as opposed to actual delivery or intention to deliver is central to this matter.

Rationale and evidence base

The SRA's primary reason for initiating these rule changes was not that rule 22.1(a)(iii) presents a regulatory barrier (although we think it does have that effect). We have removed this rule because we consider it to be unnecessary – it is not serving any regulatory purpose and it is not targeted at any identified regulatory risk. It is for reason that we have never enforced this rule, rather than no firms would fall to be removed under the requirement. As set out in our May 2014 Policy Statement, we have set ourselves the test that: "the continuation of any existing regulatory intervention needs to be justified, rather than one of focusing on justifying its removal"

In doing so, our starting point is to consider whether our rules and regulations go beyond legislative requirements. This is the same approach that we are adopting in reviewing our Practice Framework Rules in relation to section 15 of the the Act – with the encouragement of the LSB. We believe that our existing requirements around the carrying on of reserved legal activities do go beyond the requirements of the Act.

The statutory framework in the Act is designed to provide a regulatory regime that enables individuals and bodies to carry on reserved legal activitiess: Section 13(1) of the Act states "The question whether a person is *entitled* to carry on an activity which is a reserved legal activity is to be determined in accordance with the provisions of this Act" [our emphasis]. Further, an authorised person in relation to a reserved legal activity can be a licensable body which, by virtue of such licence, is authorised to carry on the relevant activity by a licensing authority which is designated as a licensing authority in relation to the activity (section 18, section 74). Section 85 of the Act states that a licence must specify "the activities which are reserved legal activities and which the licensed body is authorised to carry on by virtue of the licence".

Therefore, whilst a licensed body is therefore "entitled" to carry on the relevant activities, the Act does not require them to do so.

This is perhaps unsurprising: the regulatory framework aims to take a risk based approach, setting out in section 1 the "regulatory objectives" to be achieved and placing a requirement on approved regulators to be "proportionate and targeted" in their approach (section 28). Therefore, we believe that our focus should be on ensuring, for all those who apply to us seeking authorisation to carry on reserved legal activities, that they have in place sensible controls around business systems and governance, and comply with a Code of Conduct that safeguards the competent and ethical delivery of those services.

The existing rule 22.1(a)(iii) of our Authorisation Rules introduced the concept of "intention" to carry on reserved legal activities – allowing us to suspend or revoke a body's authorisation if we are satisfied that it has no intention of carrying on or continuing to carry on the legal activities for which it had been authorised under the Authorisation Rules (see response below re: the legality of our changes). This suggests that we would police the work that the firm intends to carry on in practice. We do not consider this to be a proportionate or targeted intervention for the reasons given above, and nor do we consider it practicable to police "intent" in this way or see any legislative basis for doing so.

The power under 22.1 applies to all firms. Further, (unless specific restrictions are imposed at the request of the applicant or because of the SRA's assessment against authorisation criteria) both ABSs and traditional law firms, once authorised, are entitled to provide all the reserved legal activities as well as immigration work (Rule 7.1 of the Authorisation Rules). However, despite the blanket nature of that authorisation, our current rules require prospective ABSs to provide information about the reserved legal activities that they are seeking authorisation for as a matter of course. This has resulted in a culture in which ABS applicants (but not recognised bodies, or more traditionally structured law firms) are put to proof on their intention to carry on reserved legal activities before authorisation is granted. We consider that this is a difficult and an unnecessary hurdle for applicants to overcome. It creates an unlevel playing field and potentially hampers the ability of ABSs to develop their business organically, through taking on work (whether reserved or non-reserved) that they are competent and able to deliver, to meet client's needs.

Barriers to entry

Although whether or not existing rules present a regulatory barrier is not the SRA's test, our experience does show that the arrangements that we propose to remove have presented barriers in practice, particularly in relation to prospective new entrants. We are aware that a number of applicants that meet all the standards required to be authorised have nonetheless been advised that they will need to carry on reserved legal activities in order to be authorised.

We do not hold data on numbers and circumstances, but we are aware of a number of potential ABS applicants including commercial businesses, consumer associations and not-for-profit organisations, that have not proceeded with SRA authorisation because they have not been able, at the time of the application, to explicitly demonstrate that they will carry on specific reserved legal activities. This includes firms that know they will (in time) want to carry on reserved legal activities, but cannot say how long it may take before they reach the stage of doing so. These businesses employ (and in some cases are managed or owned by) solicitors. Achieving authorisation in advance is necessary for their solicitor employees to be able to practise as such, and to provide legal services to the public under our Practice Framework Rules.

We are also aware of at least one applicant that committed to undertake at least one oath per year to ensure compliance with our requirements. Having rules which artificially amend business practice in this way, serve no regulatory purpose and present a barrier that can easily be avoided do not appear to align to the better regulation principles or best regulatory practice. It is much more proportionate, targeted and transparent to focus on entitlement and the relevant standard for that.

Consultation and Board approval

We can confirm that we conducted a full consultation in accordance with our published approach [redacted] The responses to the consultation, and our response to the issues raised and subsequent proposals, were given full consideration by both our Standards Committee (which includes external lay and solicitor members) and Board. The Board was satisfied that the rules should be made as presented to the LSB.

2. **We would like clarification on the effect of the proposal around "reserved legal activities" on the range of firms that the SRA will authorise and regulate in the future. It is our current understanding it will be as follows:**
    a. **SRA will allow currently authorised firms to choose not to carry on reserved legal activities if they wish to (paragraph 17 of the application)**
    b. **Allow SRA to grant an application in relation to one or more RLA while removing the requirement for firms to carry out the activity (paragraph 18 of the application)**
    c. **The proposal "may encourage some existing providers of legal services who carry out non-reserved legal activities only and do not have to be regulated to enter regulation for the first time" (paragraph 38 of the application)**
    d. **Some firms may simply seek authorisation because they like the "badge of honour" SRA regulation may bestow (6 Oct email)**

This suggests to us that under the proposed new approach, firms will be able to seek SRA authorisation on a "voluntary" (the word you used in our 7 Oct discussion) basis, even though they have no intention of carrying on reserved legal activities. Please can you confirm our summary is accurate.

More generally, is it the SRA's policy intention with this proposal to enable entry into its regulatory sphere types of firms it previously has not regulated, as described in paragraph 38? If so, does the SRA regard this as an extension of its scope of regulation?

In our 7 Oct discussion, the SRA raised the example of a will-writing firm. We acknowledge this was not an example cited in the original application (but it could be an example of a firm referenced in paragraph 38). Could the SRA comment on whether an application for authorisation from a will writing business that has a solicitor as manager, but which does not provide reserved legal activities, will be accepted and regulated by the SRA even if it has no intention of ever providing RLA?

As now, SRA authorisation will remain compulsory for any individual or firm that wishes to be entitled to carry on reserved legal activities. They must be authorised at the point that they undertake a reserved legal activity or face the risk of criminal proceedings. However, any individual or firm of any kind that does not wish to carry on reserved legal activities may do so totally outside of legal services regulation, but if they are entitled to carry on reserved legal activities, they have a choice about where they conduct the non reserved services. The reform to the Separate Business Rule that the LSB has approved allows firms to separate out all non-reserved legal activities into separate businesses not authorised by the SRA or any other legal services regulator. While this offers firms a choice, it does not create a voluntary scheme.

To address your list in turn:

1. **SRA will allow currently authorised firms to choose not to carry on reserved legal activities if they wish to (paragraph 17 of the application)** As now, authorised firms will have the flexibility to carry on, or not carry on, any of the reserved legal activities for which they are authorised (unless restrictions have been explicitly applied at their request or because of our assessment of their competence and capability) at any particular point in time. The removal of Rule 22.1(a)(iii) will remove the expectation that SRA authorised firms must at all times be able to evidence their intention to carry on at least one reserved legal activity.
2. **Allow SRA to grant an application in relation to one or more RLA while removing the requirement for firms to carry out the activity (paragraph 18 of the application).** As above. For clarity, it should be noted that there is not currently a requirement for authorised firms to carry on one or more reserved legal activities at any point in time; rather we can revoke or suspend the authorisation if we are satisfied that the firm has no intention of carrying on the legal activities for which it has been authorised under the Authorisation Rules. As mentioned above, policing intent is unlikely to ever be effective and nor do we consider it necessary - the key question is whether the body meets our standards and requirements and is therefore *able* to deliver those services in a competent and ethical manner.
3. **The proposal "may encourage some existing providers of legal services who carry out non-reserved legal activities only and do not have to be regulated to enter regulation for the first time" (paragraph 38 of the application)** The change will lift the barriers highlighted above for currently non-authorised firms that meet all the standards required for authorisation but that cannot evidence an intention to carry on a reserved legal activity at the point of their application. It will provide the flexibility to deliver such services that we have judged them competent of delivering at any point in the future, resulting from a change of business model or the requirements of a particular case/client, without having to seek authorisation from us to do so at that time. There is no extension of regulatory scope beyond individuals and firms seeking authorisation entitling them to carry on reserved legal activities. This change might have the effect that you mention in the same way that our MDP reforms, reforms to the Separate Business Rule, or other liberalising and deregulatory measures might increase a businesses appetite for working within a regulatory regime. But that is simply making the existing regulatory scheme more flexible and fit for purpose rather than extending its scope beyond the current statutory remit.
4. **Some firms may simply seek authorisation because they like the "badge of honour" SRA regulation may bestow (6 Oct email).** The language above reflects the informal nature of the email correspondence referred to. The position is exactly the same as the scenario above. A driver in a firm's decision to seek authorisation may well be because the firm sees commercial or other reputational benefit in being able to show that it meets the SRA standards required to carry on reserved legal activities, as well as giving it the flexibility to carry on those activities at any point that it may be become beneficial for it to do so. This is no different to a firm choosing to continue to carry on its non reserved legal activities through a regulated business rather than separating into a separate business because they value the brand recognition and consumer confidence that regulation can bring in credence goods markets. This may be a side effect of the changes we make but is not their purpose.

A will-writing firm with a lawyer manager/owner and a relevant compliance officer which meets the requirements to become an ABS and also meets the standards required to be entitled to carry on one or more reserved legal activity, will be able to become authorised. Thus, an unregulated will writing firm that remained simply as a will-writing firm delivering only non-reserved activities in its current structure and ownership would not be able to choose to be regulated. It would need to change (for example employ an authorised person, have appropriate PII and much more) in order to meet our requirements to become authorised as entitled to deliver reserved activities. The question could just as easily be applied to an accountancy firm previously delivering non reserved tax advice that seeks to become an ABS by employing a solicitor as COLP and meeting the other regulatory requirements. Such a firm would gain from being able to offer their clients privileged advice but only because they have met the standards to become authorised and be entitled to carry on reserved legal activities. We would no longer ask the firm specifically what reserved legal activities it is seeking be authorised to undertake (although it may wish to request a restriction to, for example, probate, or the SRA may choose to restrict its authorisation). The expectation will have been removed that we would police the firm's intention to carry on the reserved activities at any point, but they would remain obliged to meet and comply with the regulatory requirements that apply across the whole regulatory regime in the same way as all the other diverse businesses that we regulate.

When we spoke on Wednesday we asked for your analysis of the legality in a regulator seeking to authorise firms whose practice does not need to be authorised. We also asked how this proposal had been assessed against your statutory duty to have regard to the principles of proportionality and targeting, and best regulatory practice. It would be helpful if you could address these questions in your response.

We have set out the analysis of our legal position above and also our assessment against our statutory duty to have regard to the principles of proportionality and targeting, and best regulatory practice. As set out above and in our May Policy Statement, we consider that the onus is to justify, with evidence, existing regulatory requirements rather than justify their removal. We can see no justification for the current requirements around reserved legal activities. We consider that it is squarely in line with the better regulation principles and best regulatory practice to remove rules that serve no regulatory purpose and which are not enforced. Further, levelling the playing field between ABS and traditional law firms can promote competition.

And, as previously asked in our email of 29 September, what assessment has the SRA made of the risks and impact of this change in approach? For example, the challenge of regulating a provider who does not need to be regulated.

We see no obvious risks with the change in approach – we will continue to regulate providers entitled to carry on reserved legal activities. We will also continue to regulate firms that choose to carry on reserved and non reserved legal activities in the same regulated business because they consider it best suits their and/or their clients' requirements. This includes the majority of traditional law firms.

Finally, we raised a technical drafting point with respect to the COLP/COFA deemed approval change. To confirm, our query is that in paragraph 6 of the application it states that the deemed approval arrangement will apply to firms with 1-4 managers. But this is not reflected in the actual new rule 13.3, it only refers to firms that have an annual turnover of no more than £600,000. Can you please clarify?

Thank you for highlighting this inconsistency. This reflects a drafting error in the application. The rules made are correct. Following consultation it was decided that £600k was the appropriate threshold for ensuring that the deeming provision was not extended to very large firms – thereby meeting the stated policy intention. The figure of £600k is based on the SRA's internal analysis of data held on current firms and structures; firms with turnover of under £600k are consistent with the SRA's definition of small firms. Paragraphs 18 and 19 of the SRA Board paper/summary of consultation are correct, and the Rules were drafted against this version. We apologise for this error.

We hope that this provides you with the additional information that you need to make your decision. We would appreciate an early response as we are under considerable time pressure to finalise the range of improving regulation changes in order to make the relevant handbook changes in November.

Yours sincerely

Crispin Passmore
Executive Director, Policy

[redacted]