

TO: Posts
FROM: Rupert Connell
SUBJECT: Separate Business Rule
DATE: March 6, 2015

Solicitors Regulation Authority poised to allow greater access to “more holistic services”

At last, some good news for hard-pressed businesses put off accessing the legal market by the high cost. The Solicitors Regulation Authority (SRA) is taking steps to repeal its outdated ‘separate business rule’ (SBR) which it recognises lags behind the market in the growing alternative legal services sector.

Background

It is an offence (section 14 Legal Services Act 2011) for anyone other than a practising solicitor (ie a solicitor licensed by the SRA and acting in that capacity) to carry on a defined set of ‘*reserved legal activities*’. These are:

- **exercising a right of audience** – appearing before and addressing a court, including calling and examining witnesses;
- **conducting litigation** – issuing, prosecuting or defending proceedings before any court in England and Wales etc;
- **reserved instrument activities** – preparing any instrument of transfer or charge for the purposes of the Land Registration Act 2002, making an application or lodging a document for registration under that Act, preparing any other instrument relating to real and personal estate, excluding wills or testamentary instruments, powers of attorney and most transfers of securities;
- **probate activities** – preparing probate papers for the purposes of the law of England and Wales or in relation to any proceedings in England and Wales;
- **notarial activities** – in accordance with section 1 of the Public Notaries Act 1801; and the administration of oaths.

It is also an offence (section 17 Legal Services Act) for anyone to pretend to be entitled to carry on a ‘*reserved legal activity*’ when he is not so entitled.

Legal services market restricted

A recent survey carried out by the Law Society of England and Wales found that just 45 per cent. of the work carried out by firms of solicitors involved ‘*reserved activities*’; yet for years practising solicitors have been prevented by the SBR from having close links with any separate business, ie non-SRA-regulated, that undertakes any service falling within a range of specified activities that is far more extensive than the list of ‘*reserved activities*’. In summary, the SBR provides a ‘closed shop’ that only allows practising solicitors to carry on any of these ‘*non-reserved legal activities*’

through a regulated legal practice.¹ By contrast, anyone who is not a solicitor is unimpeded by the restrictions and is therefore free to carry on any '*non-reserved legal activity*', provided they do not infringe sections 14 to 17 Legal Services Act 2011.

In a consultation paper dated 20 November 2014, the SRA concludes that the effect of this anomaly has been to limit access to the legal market and increase the cost of legal services. This is hardly surprising since, with certain exceptions, solicitors generally make no distinction between the fees they charge for '*reserved*' legal work and '*non-reserved*' work.

Prohibited business

Many services provided by solicitors including, but not limited to, '*reserved activities*', carry a much lower risk than others, yet law firms struggle to differentiate between these risk levels in their charging structures, especially where the services are provided by an experienced lawyer.² A separate business is one possible way of addressing this, but there is a high probability that it would be prohibited under the SBR. This is because the SBR contains a 'catch-all' that prohibits a practising solicitor from providing "legal advice or drafting legal documents ..." through a separate business even where the advice or documents do not constitute '*reserved activities*'.

Proposals to benefit business clients

In the corporate and business context, the SRA acknowledges that legal work may well not be focused around '*reserved*' legal services and that small and medium sized enterprises in particular often struggle to access legal services because of cost issues. In short, the SRA has recognised that the SBR can have detrimental effects on the market and the time has come to remove this in line with other recent reforms to the legal services sector.

Having balanced these considerations against its wider public interest protection purpose, the SRA has therefore proposed the abolition of the rule, subject to certain safeguards.³ The consultation closed on 12 February 2014. At the time of this posting, it is not known when the changes will be brought into effect either in their proposed, or a modified, form, or at all.

Aurelia Advisory welcomes the proposed abolition of the SBR because it will enable us to spread our own wings and provide an enhanced range of cost-effective services, focussed around '*non-reserved legal activities*' that are relevant to our clients in a changing environment for the legal sector.

The contents of this Post are subject to the disclaimer and other terms contained at www.aurelia.uk

¹ The SRA has power to grant waivers of its rules in exceptional circumstances.

² One of the largest overheads of solicitors' firms is the annual premium on the professional indemnity insurance they are required to pay as a pre-requisite to carrying on '*reserved legal activities*'.

³ These safeguards include requirements that solicitors providing services through a separate business do not hold themselves out as practising or even as non-practising solicitors (because of the way that term could be construed).