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The Law Society submission to the Legal Services Board on the Solicitors Regulation Authority's application for the approval of amendments to its regulatory arrangements in respect of the 'Looking to the future' Handbook reform proposals

20 August 2018

Dear Helen

We are writing to you with regard to the Solicitors Regulation Authority's (SRA) application for the approval of amendments to the Solicitors' Handbook.

The SRA notified the Law Society on the 9th of August that they have written to the Legal Services Board (LSB) under Schedule 4 of the Legal Services Act for a change to the SRA's regulatory arrangements in order to implement the revised Handbook rules.

The Law Society appreciates the benefits of a more flexible regulatory environment. However, relaxation in regulatory requirements should not be at the expense of the regulatory objectives to protect and promote the interests of consumers and the public.

The Law Society, and others, have expressed serious concerns throughout the consultation process about the SRA's proposals in its paper '*Looking to the future' Handbook reform*'.

The SRA has made limited changes to its proposals in response to these concerns, but in the main it continues to pursue fundamentally the same approach as it originally set out.

As a result, we have a number of objections which are set out in detail in our responses to the two SRA consultations – Handbook reform phase 1 and phase 2, which are appended to this submission. In this letter, we highlight two of the SRA's proposals:

SRA proposal for rule change	Law Society viewpoint	Other stakeholders with similar viewpoints
To permit "sole solicitors" (freelance solicitors) to act outside the protections of a	This proposal removes protections from which clients benefit if they use a regulated	Citizens Advice ¹ , the Legal Services

¹ Citizens Advice response to the SRA 'Looking to the future': phase two Handbook reforms, December 2017; published in the SRA consultation responses, June 2018, pp. 27-30.

<p>recognised sole practice. These solicitors would not be subject to entity regulation.</p> <p>Freelance solicitors could deliver non-reserved services. They could also deliver reserved services, subject to certain requirements, i.e. being engaged directly by the client, and not holding client money. Freelance solicitors will need to hold adequate insurance cover for both reserved and non-reserved work.</p>	<p>sole practitioner and a regulated firm. For example, a regulated sole practitioner and firm must have professional indemnity insurance equivalent to the SRA's minimum terms and conditions, and a person with three years' practising experience, whereas a freelance solicitor would not be obliged to purchase insurance to this level, and would be free to deliver non-reserved services without prior work experience.</p> <p>In addition, there is the lack of clarity regarding the protection of client money. The SRA proposes to restrict freelance solicitors undertaking reserved work from holding client money, but it is not clear whether similar restrictions will apply in relation to non-reserved work.</p> <p>It is unreasonable and unrealistic to expect clients to understand the difference between a recognised sole practice and a sole solicitor.</p> <p>We oppose this proposal.</p>	<p>Consumer Panel², and the Legal Ombudsman³ expressed concerns about weakening consumer redress protections, and the risk of consumer confusion arising from the freelance solicitors proposal.</p>
<p>Allowing solicitors to deliver non-reserved legal services from unregulated entities.</p>	<p>This proposal would remove or reduce crucial client protections, such as mandatory professional indemnity insurance, access to the compensation fund, and legal professional privilege.</p>	<p>Citizens Advice expressed concern regarding the proposals to remove the requirement for professional indemnity insurance and the</p>

² The Consumer Panel response to the SRA 'Looking to the future': phase two Handbook reforms, January 2018; http://www.legalservicesconsumerpanel.org.uk/publications/consultation_responses/documents/2018_0105_LSCP_Response_To_The_SRA_Handbook_Review.pdf

³ The Legal Ombudsman response to the SRA 'Looking to the future': phase two Handbook reforms, December 2017; <http://www.legalombudsman.org.uk/wp-content/uploads/2017/11/LeO-Response-to-LTTF-Phase-2-Handbook-Reforms.pdf>

	<p>We have seen no evidence that this rule change will deliver benefits or reduce the price of legal services. At the same time, it places an unrealistic burden on clients to understand the different regulatory status of solicitors working in different entities and different models of practice.</p> <p>We oppose this proposal.</p>	<p>restriction of access to the compensation fund.⁴</p> <p>The Consumer Panel raised concerns about consumer confusion, weakened consumer protections (no compulsory professional indemnity insurance and no access to the compensation fund), and the Legal Ombudsman's remit over complaints arising against unregulated entities.⁵</p> <p>The Legal Ombudsman was concerned about the removal of compulsory professional indemnity insurance and the compensation fund requirements. In addition, it was concerned about the lack of clarity over its jurisdiction, and potential problems with investigating complaints and enforcement of judgements.⁶</p>
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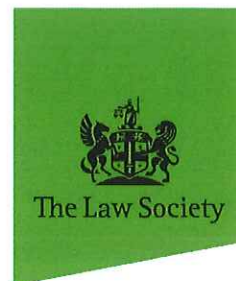
The Legal Services Act (LSA) 2007 places the onus on the LSB to consider whether the changes proposed by approved regulators are compatible with the regulatory objectives and made in a way which is transparent, accountable, proportionate, consistent and targeted.⁷

⁴ Citizens Advice response to the SRA consultation 'Looking to the future: flexibility and public protection, September 2016; published in the SRA 'Looking to the Future' consultation responses, June 2017; answers to questions 16 (p. 356) and 25 (p.359).

⁵ The Legal Services Consumer Panel response to the SRA consultation 'Looking to the future: flexibility and public protection, September 2016; http://www.legalservicesconsumerpanel.org.uk/publications/consultation_responses/documents/SRAFlexibilityandPublicProtection.pdf

⁶ The Legal Ombudsman response to the SRA consultation 'Looking to the future: flexibility and public protection, September 2016; paras 6-16, answers to questions 16, 25 and 26; <http://www.legalombudsman.org.uk/wp-content/uploads/2014/09/Looking-to-the-future-consultation-response-September-2016.pdf>

⁷ Legal Services Act 2007, section.28.



The LSB rules for changes to regulatory arrangements give a list of grounds upon which the application can be refused.⁸ It is important to note that any of these grounds is sufficient for the LSB to reject the proposals. The reasons why the LSB should reject the SRA's application for rule change in respect of these two proposals are:

- Granting the application would be prejudicial to the regulatory objectives as a whole.
- Granting the application would not be in the public interest.
- The alteration has not been made in accordance with the relevant procedures.⁹

No regulatory objectives will be enhanced as a result of these two proposals, and as we explain below, we believe the intended benefits will not be delivered. When making our case we have combined our arguments regarding the two proposals. The "freelance solicitors" proposal suffers from the same 'in principle' defects as the "solicitors in unregulated entities" proposal, with the exception for our complaint regarding the conduct of a proper consultation.

Objection 1: Granting the application would be prejudicial to the regulatory objectives.

The available research and weight of responses to the SRA's consultation show that the SRA's proposals to allow solicitors to work in unregulated entities, and on a freelance basis, would undermine the regulatory objectives. Two regulatory objectives, in particular, will be most at risk:

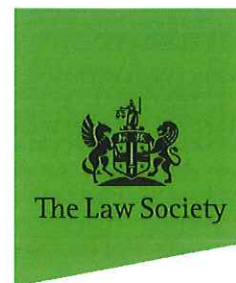
- a) Protecting and promoting the interests of consumers;
- b) Protecting and promoting the public interest.

Protecting and promoting the interests of consumers

Allowing solicitors to practise in unregulated entities will result in the removal of consumer protections. The protections that will be lost include mandatory professional indemnity insurance (PII) cover at the level of the minimum terms and conditions, and access to the compensation fund. In addition, there will be uncertainty about whether the Legal Ombudsman will have jurisdiction over service complaints relating to unregulated entities, and whether legal professional privilege (LPP) will apply to work conducted by solicitors within those unregulated entities.

⁸ LSB Rules for Rule Change Applications 2010; http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/rules_for_rule_change_applications_v2_November2010.pdf

⁹ Ibid.



Regarding LPP the SRA acknowledged that there may be circumstances where advice given by a solicitor working in an unregulated firm will not attract legal professional privilege.¹⁰ However, the SRA stated that:

*'LPP and how it relates to solicitors providing services in non-LSA regulated business is a matter of law for the courts and parliament, and not us, to decide.'*¹¹

We are concerned that such an approach will result in uncertainty for both solicitors and clients in comparison to the current state. Clients in particular will not have the knowledge to assess whether privilege attaches to the work the solicitor is doing. As a result, a fundamental personal right at the heart of the relationship between the solicitor and the client may fall away.

Crucially, there is no guarantee that the high degree supervision and compliance that flow from proper regulation will necessarily be a feature of the unregulated environment from which non-recognised sole practitioners would be providing legal services under these proposals.

Similarly, allowing solicitors to act outside the protections of a recognised sole practice will weaken existing consumer protections. Freelance solicitors would not be required to purchase PII at the level of the minimum terms and conditions. Freelance solicitors would be free to deliver non-reserved work without practising experience. Also, there appears to be a serious lack of clarity concerning the relaxation of restrictions, if any at all, to be placed on freelance solicitors holding client money in relation to non-reserved work.

Consumers will, as a result, be substantially less well protected when they use a solicitor in an unregulated entity or outside a recognised sole practice than if they use a solicitor, regulated by the SRA under the current rules.

The proposals will also increase consumer confusion. The SRA's approach is predicated on the assumption that consumers can understand and make informed choices about this loss of consumer protection. This would require consumers to draw distinctions between solicitors in unregulated entities, freelance solicitors and solicitors in regulated entities. For consumers, *en masse*, to be able to draw these distinctions is not a credible prospect in the near term, as the public do not currently have a sophisticated understanding of legal services regulation. There is robust evidence that supports this conclusion:

a) **The Law Society economic response to the SRA Handbook (2016)**¹².

This report contains a detailed critique of the SRA's proposals and the SRA's initial impact assessment. The report indicates that the SRA's proposals have not been designed with the consumer in mind. Consumers are likely to be worse off, as the proposed deregulation places an unacceptable burden on clients to understand differences in regulation and the management of risks.

¹⁰ The SRA application to the LSB for the approval of regulatory arrangements, August 2018, paras 171-173, p.41.

¹¹ The SRA application to the LSB for the approval of regulatory arrangements, August 2018, para 171, p.41.

¹² <http://www.lawsociety.org.uk/support-services/research-trends/economic-response-to-the-sra-handbook-review/>

- b) **The Competition and Markets Authority's (CMA) Legal Services Market Study (2016)**¹³ found that "*most consumers are not making informed decisions about the level of consumer protection that they require when purchasing legal service*". The CMA interim report also found that consumers tend to be unaware of the regulatory status of their legal services provider, assuming that their provider was regulated and/or being unaware of the implications of what that might mean.¹⁴
- c) **Consumer Behaviour research – A report by London Economics and YouGov for the Law Society (2017)**¹⁵. This report, based on behavioural experiments, concludes that "*consumers' knowledge of legal services regulation is low*". The report shows that although consumers believe regulation is important, they do not have a clear understanding of what it means for providers to be regulated. The research found that many people assumed all legal service providers were regulated in the same way, and when informed this was not the case they were shocked, upset or dissatisfied.¹⁶ It also notes that "*Individuals tend to underestimate the likelihood that a negative event may occur (overconfidence bias), undervalue the likelihood of a low probability but high impact event occurring (probability weighting) and tend to focus excessively on the present and fail to appreciate events happening in the future (present bias)*." All of which indicates that consumers are not well placed to make informed purchasing decisions about whether they need ex-post regulatory protections such as insurance.
- d) **Better information in the legal services market research – A report by Economic Insight for the SRA and the Legal Ombudsman (2018)**.¹⁷ The report confirmed limited consumer understanding of regulatory protections and the status of legal services providers. For example, the research found that the majority of people (57 per cent) thought all providers were regulated and only 20 per cent understood that this was not the case, whereas others (17 per cent) had no awareness of regulation at all. The research also demonstrated difficulties with shifting consumer awareness about legal service providers and different levels of protections.

The SRA's final impact assessment for phase one of the Handbook reform¹⁸ acknowledges the risk of consumer confusion, but the mitigations proposed by the SRA are insufficient. The proposed mitigations include requiring solicitors to be clear about the consumer protections

¹³ <https://www.gov.uk/cma-cases/legal-services-market-study>

¹⁴ CMA Interim Report, para 5.8.

¹⁵ Consumer behaviour research: A report by London Economics and YouGov for the Law Society, November 2017; <http://www.lawsociety.org.uk/policy-campaigns/consultation-responses/sra-consultation-looking-to-the-future-better-information-more-choice-law-society-response/>; <https://www.sra.org.uk/sra/how-we-work/reports/better-information.page>

¹⁶ Ibid, para 2.4.4 Awareness of and expectations about regulation and insurance.

¹⁷ Better information in the legal services market research – A report by Economic Insight for the SRA and the Legal Ombudsman, June 2018;

¹⁸ <https://www.sra.org.uk/sra/consultations/code-conduct-consultation.page>

attached to the services they provide and requiring them to develop a “*consumer information strategy*”. It is not credible to believe that these mitigations will result in consumers developing a sufficiently sophisticated understanding of legal services regulation. In addition, it is not clear how the obligation to provide regulatory information deals with bodies over which the SRA has no control.

Nor will the SRA’s September 2017 consultation on “Better Information, More Choice”¹⁹ mitigate against the risk of consumer confusion. The SRA’s accompanying impact assessment for this consultation notes in paragraph 10 that:

“Our proposals are most likely to assist middle income consumers because high net worth individuals are better positioned to make informed purchasing decisions. The most vulnerable consumers are less likely to benefit directly as they are unlikely to have the capacity to engage with more information and ways to choose a legal services provider.”

This statement shows that the very consumers who are likely to have unmet legal need (i.e. lower income groups) will be unable to benefit from the changes that the SRA is proposing. The London Economics and YouGov study referenced above also explains in some depth the limitations of the proposals in the Better Information, More Choice consultation.²⁰

We believe that despite the SRA’s best efforts to mitigate this risk, and despite ongoing efforts from the Law Society and the wider solicitors’ profession to improve client understanding, consumers will remain confused as a result of these changes, and will be unable to make informed choices between different categories of solicitors.

We have seen no support from consumer bodies for these proposals. The chair of the Legal Services Consumer Panel, Jane Martin, published a blog in August 2017²¹ which noted that the “*widening of access proposed by the SRA comes with substantial risk to consumers*”. It also noted that the “*SRA needs to be realistic about the risks that consumers can reasonably be expected to both understand and manage*”.

Lastly, the Legal Ombudsman (LeO) raised concerns that some of the proposed changes may lead to redress gaps and consumer confusion. For example, LeO indicated that the proposals would make it difficult for them to investigate consumer complaints if part of the service is delivered by other providers in the business who fall outside LeO’s jurisdiction. LeO also pointed out that consumers are unlikely to understand nuances between regulated and unregulated providers:

*“In our experience, consumers rarely appreciate the difference between a regulated and unregulated business, and choice is often driven by cost and word of mouth rather than assessment of the protections available to them. Consumers generally only become concerned with protection issues if a problem arises with the service they receive.”*²²

To summarise, there is no evidence that consumers will benefit from the new flexibilities they are being offered, but ample evidence that those flexibilities will reduce consumer

¹⁹ <https://www.sra.org.uk/sra/consultations/ltf-better-information-consultation.page>

²⁰ Consumer behaviour research: A report by London Economics and YouGov for the Law Society.

²¹ http://www.legalservicesconsumerpanel.org.uk/how_can_we_help/blog/2017/Blog_Entry_Chair_08_2017.html

²² Legal Ombudsman Response to Looking to the Future: phase two of Handbook reforms, para 30; The Legal Ombudsman Response to responded to Looking to the Future, September 2016.

protections and result in consumer confusion. The SRA has not provided any evidence that its proposed mitigation strategy would sufficiently mitigate against identified consumer risks. On the contrary, the SRA's own research reaffirms our concerns that consumers do not possess a sufficiently sophisticated knowledge of legal regulation and are highly unlikely to understand nuances in protections arising from different practice models. For example, the SRA's most recent consumer risk assessment undertaken in relation to the professional indemnity insurance consultation warns about over-reliance on information provision to offset significant consumer risks:²³

"Information on PII limits could be provided to consumers, but the level of information that they would require to make fully informed decisions is complex, particularly if they were expected to trade-off this information against price. Regulators therefore need to be realistic about the extent to which consumers will understand and respond to information given this complexity and the potential for information overload."

In our view, the proposed changes are clearly prejudicial to this regulatory objective.

Protecting and promoting the public interest

The points stated above (about the negative impact this proposal will have on consumers) are equally relevant to the LSB's consideration of whether these proposals will undermine the public interest. However, there are additional factors to consider here.

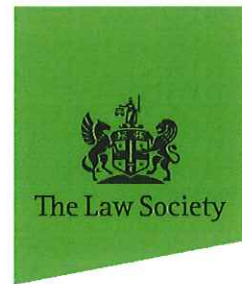
As the LSB mentioned in its 2010 publication, the public interest is "based on deserved public confidence in the legal system." Under the current regulatory framework, when a member of the public purchases legal services from a solicitor, they receive a clear and consistent set of regulatory protections. If they subsequently suffer a financial loss, as a result of negligence, then there is PII and a compensation fund in place to ensure that the consumer is recompensed appropriately. This strong and consistent set of protections ensures public confidence in the solicitor brand.

It seems inevitable that, if the proposed changes go ahead, a proportion of consumers will be surprised to find out that they are not eligible to receive regulatory protections such as PII when they use a solicitor in an unregulated entity or one undertaking work on a freelance basis.

This is likely to reduce public confidence in the title of "solicitor" which, in turn, could erode consumer trust in the entire legal services market and result in fewer consumers choosing to obtain advice when they have a legal need. Consumers put a very large weight on implicit attitudes when making complex purchasing decisions.²⁴ Public errors by one or two firms in

²³ Report: EPC Consumer risk in legal services, December 2017, p. 3;
<https://www.sra.org.uk/sra/consultations/access-legal-services.page>

²⁴ Dempsey, Melanie A., and Andrew A. Mitchell. "The influence of implicit attitudes on choice when consumers are confronted with conflicting attribute information." *Journal of Consumer Research* 37.4 (2010): 614-625.



a profession or industry can have a very powerful effect on customer perception of reliability and trust.²⁵

If the LSB were to approve this rule change application, it would be prejudicial to the public interest.

The intended benefits of the Handbook reform will not be delivered

The SRA's objective for the proposals to permit solicitors to deliver services direct to the public from unregulated entities and to work on a freelance basis, is based on the assumption that thereby competition will increase, and current unmet legal need will be reduced. In this section we set out why the proposed changes are unlikely to achieve those intended aims.

Competition impacts

First, in terms of competition impacts, it is important to note that at the moment anyone can offer non-reserved legal services to the public. To take the example of will-writing, currently the public have a choice between using regulated providers such as solicitors, barristers, legal executives or using other unregulated legal providers. The only restriction that the SRA currently impose is that if someone holds themselves out as a "solicitor" in providing non-reserved legal services, then they must do so from within the regulatory protections of an authorised entity. This is not a barrier to market entry. Anyone, regardless of qualification, can enter the market to deliver non-reserved legal services.

The current SRA rule, preventing solicitors from acting outside a regulated firm, ensures that the solicitor brand has a clear and distinct meaning in terms of the regulatory protections that the term "solicitor" entails. The clear and distinct meaning that can be attached to the title solicitor allows consumers to make a clear choice.

We are concerned that the effect of the SRA's proposed change is to undermine the clear meaning that attaches to the term "solicitor", and therefore make it more difficult for consumers to make informed choices between solicitors, other regulated providers and unregulated providers. In markets with information asymmetry and differing levels of service quality, it is essential that a variety of quality marks exist to inform consumers of the variety of quality available. In the absence of such signals, the market is likely to coalesce around a single low level of quality.²⁶ The London Economics and YouGov research we commissioned lends weight to the view that consumer behaviour is likely to develop in this way. Rather than improve competition, this change is likely to undermine it.

We note that the CMA considered the SRA's proposal in its 2016 report on the legal services market²⁷, and came to the opposite conclusion. The CMA concluded that the SRA's

²⁵ For example, in relation to pension mis-selling in the 1990s. See Vickerstaff, Sarah, et al. "Trust and confidence in pensions: A literature review." *Department for Work and Pensions Working Paper* 108 (2012).

²⁶ The market for lemons: Quality uncertainty and the market mechanism - G Akerloff - *Quarterly Journal of Economics*, 1970.

²⁷ <https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf>

proposed change could have a positive impact on competition. This conclusion appears to have been given a great deal of weight by the SRA in its decision-making, so we will explain why we believe the CMA did not consider all the relevant factors in coming to this conclusion:

- a) The CMA noted that “trust in quality standards is a relevant factor in consumer decision-making”.²⁸ The CMA treats this only as a negative, to the extent that it may result in people being less willing to use unregulated providers. As explained above, there is a strong case to be made that clear titles or “quality marks” actually enhance consumer choice and should improve competition. Behavioural research shows a clear behavioural bias by consumers towards easily understood rules of thumb or “heuristics”. The CMA did not take this into account in their analysis.
- b) The CMA did not consider the risk that there may be a reduction of public trust in the title of “solicitor” if consumers use a solicitor and subsequently suffer loss as a result of the absence of regulatory protections. This is a material risk that should have been considered.
- c) The CMA’s support is predicated on the assumption that the SRA will be able to mitigate the consumer protection risks. The CMA noted that *“provided that the measures that the SRA puts in place to mitigate the consumer protection risks are effective, we believe that the benefits to competition of removing the restriction would be likely to outweigh the consumer protection concerns identified.”*²⁹ As we have explained, the actions proposed by the SRA to address the consumer protection risks are unlikely to mitigate the risk, and are insufficient to give consumers the sophisticated understanding they would need in order to make an informed choice to trade-off regulatory protections in exchange for reduced cost.

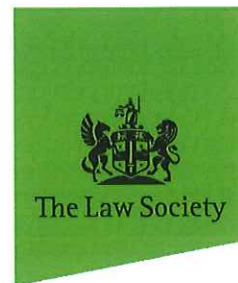
Unmet Legal Need

In order to justify the claim that these changes will reduce unmet legal need, there would need to be an explanation of how the proposals would result in more people securing legal advice than would be the case if the rules remained as they are. This would require estimates of:

- a) the likely cost savings that would result from the changes;
- b) the degree to which these cost savings would be passed on to consumers;
- c) the number of solicitors likely to make use of this flexibility;

²⁸ Ibid, para 5.98.

²⁹ Ibid, para 5.116.



- d) the number of additional consumers who seek legal advice as a result of these changes.

We are not aware that the SRA has provided these estimates. On the contrary, we believe that reducing consumer protections such as PII, the Compensation Fund and access to the Legal Ombudsman are likely to have negative impact on peoples' ability to obtain redress, and their ability to access justice.

As a direct result of these changes, some consumers would be left unprotected. Aside from the potentially devastating effects that this could have on individuals, there is a wider public interest. Public errors by one or two members of a profession which go uncompensated can have a powerful effect on public perception and trust. This in turn could lead to a reduced number of consumers seeking legal advice.

Given that consumers currently have a low level of understanding of legal services regulation, it is appropriate and proportionate for the regulator to set a high and consistent level of protection that all solicitors must meet.

The Law Society and LSB's 2015 Legal Needs Survey³⁰ demonstrates there is huge variety in how people seek to resolve their legal needs. There are many reasons why people decide to resolve their legal needs without seeking professional advice. For example, the survey indicates that many people choose not to use legal advisers because they feel confident at handling legal issues alone. This is particularly prevalent for wills, consumer and conveyancing issues. For others, cost may play a role, but it is not the main reason preventing people from seeking legal advice. Other factors such as lack of general knowledge about legal issues, limited understanding and capability of how to deal and resolve legal issues and low awareness of who to turn to for help are also important. These factors often constitute a more significant barrier than price for many legal services.

The survey also shows that for a minority of vulnerable groups it is not possible to obtain legal advice at any cost.

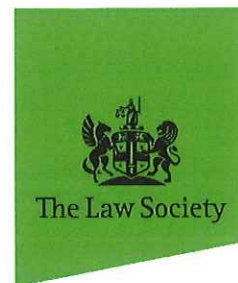
Before any conclusions can be drawn about whether the proposed regulatory changes will alleviate unmet legal need, there would need to be detailed consideration of which specific groups the changes were intended to help and whether the changes would assist in that aim.

Objection 2: Granting the application would not be in the public interest.

Protection and promotion of the public interest, support for the rule of law and access to justice constitute key regulatory objectives of the Legal Services Act. The SRA's proposals threaten to substantially weaken current consumer protections afforded to clients and consequently erode public trust in the solicitor profession and the rule of law.

Disproportionate poor outcomes for vulnerable clients

³⁰ <http://www.lawsociety.org.uk/support-services/research-trends/largest-ever-legal-needs-survey-in-england-and-wales/>



As explained earlier, at present clients who use a solicitor enjoy a set of uniform protections (LPP, PII, access to a compensation fund and the Legal Ombudsman) regardless of their social status and income.

The proposals to allow solicitors to practise in unregulated entities and on a freelance basis are likely to change this equilibrium, in particular with negative consequences for disadvantaged and vulnerable people.

Vulnerable people on low incomes tend to place greater weight on price than quality when making purchasing decisions. This is evidenced in the London Economics and YouGov study which found that:

“Participants tended to focus on price when comparing providers, and this tended to be more prevalent in potentially more vulnerable lower social grade participants.”³¹

“Price was ranked as particularly important by people in lower social grades (with an average ranking 9.4 out of 10).”³²

We are concerned that these reforms may result in the interests of the most vulnerable within our society being placed in the hands of unregulated providers with significantly reduced protections. This raises serious questions about equality before the law and equal access to justice.

In addition, as highlighted earlier the most vulnerable clients are the least likely to understand nuances between different categories of solicitors and the differing levels of regulatory protections they would receive depending on where and under what model a solicitor is operating. This is evidenced by both the SRA risk impact assessment to the consultation on “Better Information, More Choice”³³ and the London Economics and YouGov study. For example, the London Economics and YouGov research found that consumers in vulnerable circumstances face difficulties accessing or assessing the information needed to make a decision in relation to the purchase of legal services.³⁴

Despite acknowledging the problem, the SRA has not proposed any solution to mitigate against this material risk to vulnerable clients.

We are concerned that unmet legal demand will actually increase as the result of these proposals, as vulnerable clients will have less confidence in seeking legal advice.

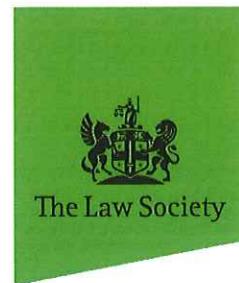
Risk of eroding public trust in the legal system

³¹ Consumer behaviour research: A report by London Economics and YouGov for the Law Society, p.11.

³² Ibid, p. 24.

³³ The SRA impact assessment, para 10; <https://www.sra.org.uk/sra/consultations/litf-better-information-consultation.page>

³⁴ Ibid.



The CMA report on the legal services market concluded that “consumers generally lack the experience and information they need to find their way around the legal services sector and to engage confidently with providers”.³⁵ In a market where there is a pronounced information deficit between what clients know and what practitioners know, and where it is difficult to gauge the quality of a service, sometimes until years after it is purchased, it is appropriate that regulatory protections are clear and consistent.

One of the strengths of the current regulatory framework is that the title ‘solicitor’ implies a certain set of regulatory protections which consumers can trust. Under the SRA proposals the protections available to clients will not necessarily be provided by individual solicitors. Given the likely inability of consumers to distinguish between the different brands of solicitor, the proposals mean that the public trust in the term ‘solicitor’ will be eroded.

Despite one of the underlying principles of the proposed new regulatory approach being ‘simplification, not complication’, the SRA proposals increase the complexity of regulation from a consumer perspective. The result is damage to the public interest and trust in the rule of law.

The SRA has not proffered any thought or proposed any credible solution to ensure that its proposals of multiple solicitor brands will not result in consumers and the public being misled and losing confidence in the system.

Given the pivotal role of the law in society, any deregulatory intervention must be carefully balanced to ensure that one does not override the other in a detrimental way or to bring about unintended consequences. As in any ecosystem, the balance is one which can be easily disrupted by seemingly small changes elsewhere in the system.

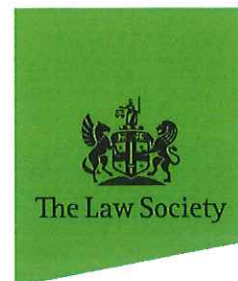
Broader potential impact

The SRA has not dealt with the indirect effects of the proposals on the wider national interests and the economy as a whole.

England and Wales is one of the leading global centres for legal services. The strength and stability of English law, the independent courts and the excellence of our legal service providers have resulted in England and Wales being the global governing law for contracts and the jurisdiction of choice for dispute resolution. Every year the legal services sector generates over £26billion of GDP, exports in the region of £4billion and jobs for 380,000 people.

The vibrant legal services market benefits both the domestic consumer in a wide choice of legal service providers and the public in terms of employment and economic outputs.

If trust in the status of solicitors is eroded, this is likely to make the English legal system a less attractive proposition when selecting the governing law for a contract or commercial business. This could undermine the international competitiveness of a major sector of the economy, and shrink the domestic market, leaving consumers with less choice.



The International Bar Association, of which the UK is a member, set out principles on a code of conduct for the legal profession that are recognised by reputable jurisdictions around the world.³⁶ The SRA's proposed changes go against the notion of these well-established international principles.

We are already aware of concerns from our EU counterparts about lowering the solicitor brand in relation to the prospect of mutual title recognition and reciprocal practising rights post Brexit.

That is why the threshold for triggering change within the profession should be high, based on clear and strong evidence of significant harm or inefficiencies, alongside a clear understanding of the gains to be achieved. Yet, the SRA has failed to consider a wider impact of the proposals in its impact assessment.

We believe the proposed changes are prejudicial to the public interest.

Objection 3: The alteration has not been made in accordance with relevant procedures

The LSB's rules for rule change applications³⁷ mention that any rule change must be made in accordance with the Better Regulation Principles set out in section 28 of the Legal Services Act. These principles are that the change must be transparent, accountable, proportionate, consistent and targeted. Section 28 also requires that regard must be had to any other principle representing regulatory best practice.

Analysis of consultation responses

We would request that the LSB examine the consultation process and consider whether it is both transparent and undertaken in accordance with regulatory best practice. In particular, we would draw attention to the June 2017 SRA document "Our response to consultation: Looking to the future – flexibility and public protection"³⁸. With regard to the proposal to remove restrictions as to where solicitors can practise, we are concerned that the support for the proposal has been overstated and the opposition to the proposal has been understated. The relevant paragraphs are 30-46.

Paragraph 30 stated:

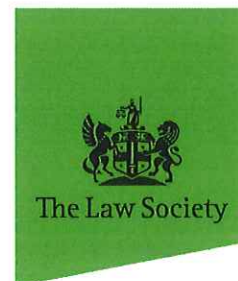
"... There was a diverse range of views. There was strong support from the CMA, as well as consumer and charity groups, yet also strong opposition from the Law Society and some solicitors."³⁹

³⁶ Principles on Code of Conduct for the legal profession, International Bar Association, 28 May 2011.

³⁷http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/rules_for_rule_change_applications_v2_November2010.pdf

³⁸ <https://www.sra.org.uk/sra/consultations/code-conduct-consultation.page>

³⁹ Ibid, para 30.



We are concerned that this lacks accuracy. As we have already noted, the CMA's support was caveated, but it did on balance support the SRA's proposals. More crucially, we cannot see evidence for the assertion that consumer groups and charities provided "strong support" for the proposals. The SRA published the full range of responses alongside their consultation response, which is a move we applaud. However, we have seen nothing in these published responses which justify the assertion that there was "strong support" from consumer groups.

This is an issue that was also picked up by the Chair of the Consumer Panel in a 2017 blog post⁴⁰:

"In its announcement, the SRA said its proposal was widely supported by consumer groups at a focus group meeting. We can only comment on what we have seen publicly from other consumer groups like Citizens Advice who have also warned against an imbalance between flexibility and access by saying:

"We are concerned about the proposal to allow unregulated legal service providers to employ solicitors who are not covered by indemnity insurance. We feel that clients have a general expectation that where they instruct a solicitor, they will have protection if things go wrong. The routes to redress can already be complicated for a client to navigate, adding a new form of solicitor service with reduced protection could leave clients disadvantaged and could ultimately reduce confidence in the legal services sector."

Like us, Citizens Advice has cautioned against severe reductions in consumer protection. We hope the SRA takes heed."

Like the Consumer Panel, we can see no evidence that there was strong support from consumer groups for the SRA proposals. We note that paragraph 31 of the SRA's consultation response states that this support existed at a focus group meeting.⁴¹ This is impossible for us to verify, but we would have very real concerns if informal feedback received at a focus group in 2016 was given greater weight than formal consultation responses.

What is more, we believe that it would have been transparent for the SRA to set out in its consultation response the number of respondents who supported the proposal to allow solicitors to practise in unregulated entities, the number of respondents who opposed it, and a breakdown in percentage terms. We believe this breakdown would paint a different picture to that which is outlined in paragraph 30 of the SRA's consultation response.

We acknowledge that the SRA is not bound to agree with the views and evidence put forward by consultation respondents. However, in order to be transparent, and act in accordance with regulatory best practice, the views of respondents must be analysed and summarised in a balanced and impartial manner. The way that the consultation response has been presented does not appear to be a balanced summary. It also raises a question about whether the SRA Board was fully cognisant of the degree of opposition to the

⁴⁰http://www.legalservicesconsumerpanel.org.uk/how_can_we_help/blog/2017/Blog_Entry_Chair_08_2017.html

⁴¹ Ibid, para 31.

proposals when they made the decision to press ahead with the rule change. This raises concerns about transparency and is a significant departure from regulatory best practice.

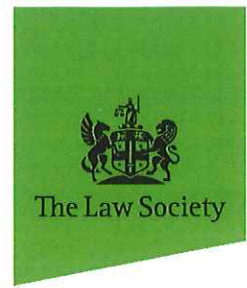
Inadequate impact assessment

Regulatory best practice includes a robust assessment of the likely impacts of a proposal. Although the SRA conducted a preliminary impact assessment of its proposal to permit solicitors to work in unregulated entities, and submitted an impact assessment at the stage of making decisions, these documents do not go far enough. In particular, there is an absence of any sort of cost-benefit analysis, which should be a prerequisite before a rule change of this nature is approved. There has also been an absence of analysis demonstrating that the SRA's preferred rule change (to permit solicitors to work in unregulated entities) is the most proportionate way of achieving the policy objective. The need for a robust quantitative impact assessment is a point that the Law Society has made consistently throughout the consultation process.

We accept that a full impact assessment, which includes an estimate of costs and benefits, is a time-consuming document to prepare. We also accept that there can never be certainty about the impacts of a future policy change, which is why such impact assessment must be built on realistic assumptions based on the available theory and evidence. However, there are many reasons why it is unacceptable not to have conducted a robust cost-benefit analysis to support the proposed rule change.

- a) There are clear risks to the regulatory objectives with this proposal. A cost-benefit analysis would have helped to make the case that the benefits outweighed the disadvantages.
- b) With such a large number of stakeholders putting forward a weight of arguments as to why the SRA should not proceed with this change, it is incumbent upon the SRA to produce robust evidence to explain why they have disregarded the views of respondents. For example, the Law Society alone put forward a consultation response, an economic critique, and shared the results of a survey of the profession and a survey of the public with the SRA.
- c) This is a change which will affect the level of trust that the public can place in the title of solicitor, as part of a Handbook reform programme that the entire solicitors' profession must comply with. Any consideration of proportionality would therefore indicate that the most robust possible cost-benefit estimates should be produced.

Without a cost-benefit analysis, or some sort of prediction of the specific impacts, it is impossible to effectively evaluate the policy to determine whether it met its original aims.



In conclusion, given the points raised above, it is not clear to us that the LSB would be in a position to approve the rule change. We also strongly recommend that the LSB reject the proposed rule change.

Kind regards

Christina Blacklaws

The Law Society President