

28 September 2018

Dr Helen Phillips
Chair
Legal Services Board
One Kemble Street
London
WC2B 4AN

Dear Helen,

I am writing to you to highlight our continued concerns about the Solicitors Regulation Authority's (SRA) application for approval of amendments to its Handbook.

The Panel has spent a good deal of time considering and responding to the SRA's proposals since the publication of the SRA's consultation documents '*Looking to the future Handbook reforms*'. We have appended our previous responses to this letter as they detail our objections in more depth.

It is important to emphasise that the Panel has always been supportive of the SRA's flexibility agenda. Markets need flexibility to thrive, to be competitive, and to be agile enough to respond to consumers' needs. The Panel also accepts that the drive towards increased flexibility is aligned with the need to find multi-faceted solutions to the problem of access to justice. Yet, regulators cannot pursue an unconditional or a blanket flexibility agenda if this leads to an indefensible reduction in consumer protection. Regulators with competing objectives, e.g. flexibility versus consumer protection, must ensure that the right balance is struck where different interests contend.

In our opinion, the SRA has failed to strike the right balance. We say this while accepting that a reduction in consumer protection may be defensible if a decrease in protection served a wider and broader interest. However, that wider interest must be articulated, evidenced, and the resulting consumer detriment managed effectively, with risks apportioned fairly and information to consumers made absolutely clear.

We also believe that the SRA has failed to consider, properly, the wider public interest at stake, or the damage to public confidence that may result as a consequence of these proposals. As you know, the requirement for solicitors to have Professional Indemnity Insurance (PII), and to contribute to a compensation fund offers protection to solicitors and consumers alike. Regulatory prescription for insurance safeguards

solicitors and consumers against loss, allowing them to contract with greater confidence and peace of mind. The market, consumers and the general public benefit from this confidence. In a changing landscape, with growing external uncertainties, new regulatory flexibilities and diverse partnerships, the risks are as significant as ever, if not more so. A scandal affecting one or more solicitors, leaving consumers with no recourse to recoup any or some money lost will erode public confidence. And quite frankly, it wouldn't matter whether these solicitors are working in unregulated entities or not, because consumers rightly expect the title of solicitor to come with a level of regulatory protection. Unfortunately, the SRA's proposals have gone too far to remove these well-established consumer protections.

It is equally worrying that the SRA proposes to use information remedies to mitigate against the reductions in consumer protection which its proposals will create. The Panel is very familiar with information remedies. We published a report in 2017¹ which warned against the inappropriate use of information remedies. We highlighted its mixed effectiveness across different regulatory sectors, and its limitations. The Panel is of the strong view that the reduction in consumer protections which accompany the SRA's proposals cannot be mitigated entirely by relying on information remedies. It is simply unsuitable for this purpose. More importantly, the SRA cannot compel businesses, which it does not regulate, to issue, monitor or supervise the adherence of regulatory information. It is also unlikely that the SRA will expand its supervisory activities to do so.

As noted above, the details of our objections are outlined in previous correspondence attached to this letter. We will therefore focus the rest of our submission on the SRA's flagship proposal - allowing solicitors to deliver non-reserved legal services from unregulated entities. We will also highlight the incredible layers of complexity and confusion that consumers are being asked to manage with the proposed permutations in protection.

Key concerns with allowing solicitors to work in unregulated firms and with the freelance solicitor proposals.

The Panel has been very vocal about its objections to the details around the proposal to allow solicitors to provide non-reserved legal services within unregulated businesses. Firstly, solicitors working within these businesses will not be required to have PII. Secondly, solicitors working in unregulated businesses will not contribute to the compensation fund. Thirdly, there are questions and uncertainties around access to the Legal Ombudsman because work carried out under the supervision of a solicitor, by a paralegal for instance, would appear to fall outside of the Legal Ombudsman's remit. These are substantial reductions in consumer protection without any significant mitigating benefits.

For a reduction in consumer protection of this significance, we expected the SRA to carry out an extensive impact assessment which detailed: the market benefits, the quantifiable cost benefits, the likely winners and losers, and variability of impact on vulnerable consumers. The point about vulnerable consumers is an important one, as nothing we have seen addresses the real disadvantages that vulnerable consumers will face as a result of these proposals. Instead, they are expected to navigate and deal with more complexity and confusion resulting from the varying levels of protection that will accompany the title 'solicitor'. We expected the SRA to defend the significant

¹ The development of information remedies in legal services, March 2017.

reduction in consumer protection with quantitative and qualitative evidence, and then to mitigate against the losses and risks identified. Unfortunately the SRA's impact assessment is thin on economic analysis and consumer research; the backbone of such a significant shift in policy.

In our 2016 response to the SRA, we said there should be an option for solicitors operating within unregulated businesses to contribute a lesser amount to the compensation fund, reflecting the fact that the level of risk is lowered – but not altogether removed. It is disappointing that this idea has not been explored further.

Information remedies will not plug the gap

The SRA proposes to use information remedies to highlight the reduction in consumer protection. But this skips over whether the reduction is justifiable in the first instance. Also, information remedies have limitations as highlighted in our report on the topic. In a market with existing information imbalance between providers and consumers, often in relation to a distress purchase, and where behavioural biases can render consumer decisions more prone to error, this additional layer of complexity, and the proposal to mitigate it with information remedies, seems overly ambitious. The SRA is not being realistic about the risks that consumers can reasonably be expected to both understand and manage.

Complexity and Consumer Confusion

The legal services market is complicated and difficult to navigate even for the savviest of consumers. We note that the CMA's assessment of the legal services market found 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"*². We know that consumers do not readily understand the difference between regulated and unregulated providers, let alone the varying protections these afford. Evidence from our own tracker survey bears this out every year. Moreover, our survey also highlights disparity amongst different groups of consumers where knowledge of regulation is concerned. For example, consumers from a White British background are more likely than those from a Black and Minority Ethnic background to report that it is easy to find information on regulation of services (72% White British, 59% BME)³

Evidence from the SRA's own research with the Legal Ombudsman showed limited consumer understanding of regulatory protections and the status of legal services providers⁴. The SRA's research found that 57% of people thought all providers were regulated.

We also refer to the Legal Ombudsman's cautionary note in its response which stated that *"in our experience consumers rarely appreciate the difference between 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"*

The SRA proposals will add extra layers of complexity to what is already a minefield for consumers. And to further compound this, the SRA also proposes a separate

² Legal Services Market Study, Final Report, December 2016

³ Legal Services Consumer Panel, Tracker Survey, 2017

⁴ Better Information in the legal services market research – A report by Economic Insight for the SRA and the Legal Ombudsman, June 2018

standard for freelance solicitors. Freelance solicitors will not be obliged to purchase insurance to the SRA's minimum terms and conditions under its submitted proposals.

The Panel cannot support these proposals because the reduction in consumer protection is tilted too far against consumers, without any quantifiable benefits. There is a lack of robust cost-benefit analysis which must accompany such a seismic shift in regulatory policy and reductions in consumer protection.

Yours sincerely,

A handwritten signature in cursive script that reads "S Chambers".

Sarah Chambers

Chair, Legal Services Consumer Panel