



Sent by email only to: consultation@sra.org.uk

21 September 2016

Dear Sir/Madam

Looking to the future: flexibility and public protection

The Panel welcomes the SRA's work on simplifying its handbook and paving the way for more future-proof regulation. We support a move that brings SRA rules closer towards principle based regulation alongside the development of clearer outcomes. However where there is greater risk of detriment for consumers posed by room for interpretation, there is a need for more prescriptive rules. We would also caution against relying too heavily on information remedies to mitigate these risks. Using a legal service can be an incredibly overwhelming experience and overloading consumers with information at the wrong stage, or in the wrong manner, may deter people from fully engaging – particularly those who are more vulnerable. This will be a continuing challenge for the SRA and providers to grapple with.

Maintaining professional standards

Principles and codes of conduct

Reducing and making the principles clearer is to be commended and it appears the ethos of the Principles is maintained. What will be of great value is an exploration of how the SRA interprets these in its supervision and enforcement actions, particularly how it ties in with the extensive work around a Question of Trust and appropriate disciplinary actions. It also provides clearer direction for those working in-house.

We welcome clarity within the codes of conduct, although there are some areas where the SRA has the opportunity to prescribe clear and good consumers outcomes for example under client information and publicity. As drafted the requirement is to ensure clients are in the position to make an informed decision, but there is no requirement to provide a likely overall cost ahead of engagement. The Panel has previously made repeated calls for price transparency, and argued for better costs information to enable consumers to make truly informed decisions. This is an opportunity for the SRA to answer those calls.

Requirement to be "qualified to supervise"

At present, any solicitor operating as a sole practitioner or a lawyer manager in an authorised body, or employed by a law centre, must be "qualified to supervise" by having completed 12 hours of management skills training, and been entitled to practise as a lawyer for 36 months in the past 10 years. The SRA has proposed redefining these requirements but left it open as to what they should be. The Panel would agree that there should be a minimum qualification level but with a lack of research into this it is difficult to advocate for a particular threshold. Whatever is in place ultimately will need to ensure minimum standards, as well as avoid excluding those returning to work or bringing experience from other services.

Consumer protection and information remedies

Increasing flexibility

At present, a solicitor can only provide legal services to the public if they are doing so through an SRA-authorized organisation. A solicitor can only carry out reserved legal activities to the public from an unauthorised firm if that firm does not provide legal services to the public. A solicitor also cannot provide non-reserved legal activities to the public unless permitted to do so. Unregulated legal professionals are free to and do carry out unreserved legal activities from unauthorised firms, for example will-writers or estate administrators. However, it is the SRA's view that solicitors are *'the people who are arguably best placed to deliver quality non-reserved legal services'*.

The SRA proposes to enable solicitors to make more of the solicitor 'brand' by:

- Removing restrictions on solicitors delivering non-reserved legal services to the public through an alternative legal services provider (unauthorised), while using the solicitor title.
- Solicitors will be subject to the new Solicitors Code.
- Solicitors will have to inform clients of the protections open to them, which depend on whether they work in an authorised or unauthorised firm.

The proposals are designed to improve flexibility of practise for solicitors, and the Panel understand that this is to encourage more diverse delivery methods of reserved and unreserved legal activity. We are supportive of a move to greater flexibility and can see the advantages, particularly where solicitors work with Law Centres or charities, or the ability to remove the practising/non-practising label.

The Panel's concern here is that although the SRA is looking to promote the solicitor 'brand' as a means by which consumers can choose their service, in reality this is hampered by the two distinct types of service created through the revised practising arrangements. One, of a solicitor providing reserved legal activities through an authorised firm, and another of a solicitor providing only unreserved legal activities through an unauthorised firm. While their training and qualification may have met the same standards, the two models do not offer the same service or level of client protection, as the current proposals do not require solicitors working in unauthorised firms to have PII or access to the compensation fund. For those unfamiliar with using a solicitor, there is a sizeable risk of confusion as we know that consumers are unclear about regulatory distinctions as they currently stand. There are further questions raised in relation to access to the Legal Ombudsman where the solicitor is operating in an unregulated firm, given that any work carried out under the supervision of the solicitor (by a paralegal for instance) would, at present, seem to fall outside of the Legal Ombudsman's remit. We would expect to see clear guidance around this area, as this potentially undermines the notion of there being more protection than that from an unregulated provider.

When one factors in the existing information asymmetries between providers and consumers, the frequency with which this is a distress purchase, and behavioural biases which make consumer decisions prone to errors this additional issue tips the allocation of risk unfairly towards consumers. Finding the right balance when it comes to who bears the risk is crucial to achieving well-functioning markets, as consumers will only drive competition if they are confident that regulation will protect them. The Panel has written previously on the levels of risk consumers should reasonably be expected to assume.¹

1

<http://www.legalservicesconsumerpanel.org.uk/ourwork/Financial%20Protection/2013%2006%2010%20riskandresponsibility.pdf>

Compensation fund and PII

The proposals currently set out that clients of solicitors working outside of a regulated firm will not be able to make a claim on the compensation fund under any circumstances. The proposals also set out that any solicitor working in an unauthorised firm will not be required to take out PII. While we support the drive to devise a more proportionate regulatory regime, the Panel remains concerned about the risk of consumer confusion around what protections are available and that the solicitor is unable to take or hold client money. These solicitors may not hold client money, but they are still open to negligence or fraud. While the Panel is keen to avoid unnecessary regulations, we cannot see that consumers should be relying on existing consumer protection legislation when a more accessible and lower cost alternative is available through the compensation fund. We believe that there should be the option for these solicitors to contribute a lesser amount to the compensation fund, reflecting the fact that the level of risk is lowered – but not altogether removed – by not handling client money. The Panel believes that Special Bodies should also be required to have PII however this should reflect the level of risk appropriately.

Across all these areas, there will need to be clear and simple ways to explain the differences in services available and protections afforded between solicitors working in different circumstances. We would ideally like to see 'informed consent' be given a glossary definition, and to see some consumer research carried out in order to establish the most effective ways of gaining informed consent from consumers. This is something we raised in response to the SRA's guidance on the separate business rule (SBR) in the context of managing referrals between regulated and unregulated businesses. Having this evidence would provide the profession with clear examples of what good looks like in this instance, particularly for vulnerable consumers whose information needs may differ. This would also support the firm's ability to evidence informed consent if required to by the SRA. There needs to be serious consideration given to just how much information is required to be given to the consumer, at present it looks to be too much.

Sole solicitors

The drive to increase flexibility has yet to be extended to sole solicitors, as the proposal currently stands to maintain the status quo for solicitors providing services to the public or a section of the public. The Panel can see that the two Codes proposed serve different purposes, and it makes sense to require a sole solicitor to be a part of a firm. However, increasingly new business models are emerging and, in the right circumstances, these can benefit consumers. The SRA will need to deal with these, and here it has an opportunity to ensure a minimum standard of regulation and protection across the board.

Lastly, we would urge collaboration with other regulators to tackle the risk of consumers falling down the gaps in terms of accessing legal services and having access to redress. Information solely from one regulator about their piece of the puzzle is not sufficient. All regulators involved must get together and agree boundaries and work to ensure there are no gaps for consumers to fall through. They should ensure that there are clear explanations to consumers about all aspects of service from both reserved and unreserved activities, from both regulated and unregulated (by the SRA) firms. This must be a combined effort to describe clearly the entire landscape to consumers so that they can make informed choices.

If you have any queries or would like to discuss this further, please contact the Panel Associate, Stephanie Chapman.

Yours faithfully,



Elisabeth Davies
Chair