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Consultation on the architecture of change: the SRA's new handbook

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation whose members help injured people to gain the access to justice they deserve. Our members are mostly solicitors, who are all committed to serving the needs of people injured through the negligence of others. The association is dedicated to campaigning for improvements in the law to enable injured people to gain full access to justice, and promote their interests in all relevant political issues.

APIL welcomes the opportunity to provide written comment relating to the new SRA handbook. APIL has several concerns regarding the move towards principles-based regulation, which are outlined in this letter.

General comments on principles-based regulation

As an organisation APIL understands that from October 2011 the legal landscape will change and new organisations (alternative business structures (ABSs) and legal disciplinary practices (LDPs)) that come into being will need to be regulated. Furthermore, we would also want to ensure that these new organisations were regulated to the same standard as traditional practices have been. In our view, moving towards principles-based regulation appears to make it easier for these organisations to comply. The impression given from the consultation paper is that ABSs and LDPs will benefit from a principles-based approach; however it is these organisations, where non-lawyer owners exist, that the consumer may need protecting from the most. It is essential that transparency, regulation and competent professional advice exists to achieve the necessary protection that the public deserve.

APIL believes that the current regulatory practice for solicitors is unsatisfactory and ineffective. Regulation of the legal profession should be based on clear rules with professional sanctions so that members of the profession instantly know what they can and cannot do. If requested, the SRA can now publish the disciplinary history of a solicitor and, therefore, it is essential that solicitors and those employed in their practices are told what the regulator expects of them in a clear manner.

It is also vital for the protection of the public, as well as the protection of the regulated person or business, that regulation is clear, transparent and has a detailed framework behind it. We believe there is a risk that a principles-based regime will not provide enough clarity and transparency and that the regulator must guard against this.

The Financial Services Authority's (FSA's) regulatory regime is principles-based regulation and, in our view, not specific enough. Whilst principles-based regulation can prevent loopholes being exploited, a broad brush approach means that it is difficult to predict with certainty the line the regulator will take on a particular issue. This can lead to an inability to robustly regulate.

We believe the regulator has to be particularly alert to the risks of regulating businesses which may have non-lawyer owners where those owners have been subject to different standards of regulation. There must be a 'level playing field' between regulated business structures; and all regulated businesses must have to abide by the same rules. To apply different standards to different business structures could potentially give one regulated business a commercial advantage over another. It is essential that the consumer is given the same amount, or level, of protection through regulation of solicitors, ABSs and LDPs as a whole group. There has to be the same level of protection to the public in all instances.

As stated previously, we believe that the current regulatory practice for solicitors is unsatisfactory and ineffective. We would suggest that a middle ground between the current rule system and the proposed principles-based regulation, such as one where principles flow from regulation, would be a more suitable system.

A further concern is that the proposed principles-based approach removes the detail and specific guidance, which solicitors need in order to be clearly aware of what they can and cannot do. Paragraph 30¹ of a previous consultation paper from the SRA,

¹ *Consultation on Outcomes-focused Regulation – Transforming the SRA's Regulation of Legal Services*, The Solicitor's Regulation Authority, Page 7 Paragraph 30.

Consultation on Outcomes-focused Regulation – Transforming the SRA’s Regulation of Legal Services, states that the SRA’s aim is to remove as much unnecessary detail and prescription as possible, in our view it is that detail which is needed for clarity and transparency.

Specific Comments

Paragraph 13

As an organisation, APIL agrees that ABSs and LDPs must be regulated to the same standard as the profession traditionally has been, and that this is essential to achieve the same degree of consumer protection for clients of firms of solicitors and ABSs.

Paragraphs 32 and 33

APIL believes that the principles are a fundamental part of the proposed principles-based regulations. The proposed principles are the basis on which the rest of the regulations are based. At paragraph 33 of the consultation paper², the SRA states that the principles embody the key requirements on firms and individuals involved in the provision of legal services by stating that the principles are so fundamental and failure to comply would be considered extremely serious. Paragraph 33 then goes on to say that, should two principles come into conflict then the principle which takes precedence is the one which best serves the public interest. We would ask the SRA who would make this decision? These statements offer no certainty to a person offering legal advice. What happens where a person offering legal advice has to decide which principle takes priority? Will they be considered as failing to comply if they get it wrong? We would suggest the SRA needs to state some kind of order of priority of the principles in terms of which best serve the public interest. This way the profession will be certain of which principles take precedence.

We would also suggest that some of the principles may appear to be too general, for example,

*Principle 2: Act with integrity*³

² *The Architecture of Change: The SRA’s New Handbook*, The Solicitor’s Regulation Authority, 28 May 2010, Page 7 Paragraph 33.

³ *The Architecture of Change: The SRA’s New Handbook*, The Solicitor’s Regulation Authority, 28 May 2010, Page 7 Paragraph 32.

We would agree that members of the legal profession should act with integrity; however, for the SRA not to expand on this or offer any more detail may leave this principle to appear too generalised.

Paragraph 50

Our members are not convinced that paragraph 50⁴ effectively deals with all issues of conflict that might arise when a solicitor is acting for clients where there is a common interest. For example this might become an issue for a personal injury lawyer when acting for more than one claimant in a group action and the defendant is uninsured. The solicitor needs to ensure the best outcome for each claimant and the defendant may only have one asset, his house for example. Therefore all claimants will be seeking damages from the same asset, which may not be as valuable as the total amount being claimed. This would obviously represent a conflict of interest for the claimant solicitor and this situation is not effectively dealt with in paragraph 50.

Paragraph 71

A further problem we have identified, which emphasises how clear and transparent the rules need to be, is the many subtle and complicated arrangements that exist within ABSs and LDPs. It may become apparent that organisations are falling foul of the rules regarding contingency fees⁵ and not know this, and there will be serious sanctions for this too. APIL's only concern in relation to referral fees is the protection of the injured person, and we believe the only way to achieve this is through a combination of regulation and education. Our policy on referral arrangements is that it is unrealistic to expect solicitors to police the activities of introducers. It is particularly important for there to be a culture of openness and transparency with referral fees with ABSs on the horizon as they will create an even more complex market. Injured people who are referred to a panel solicitor need to be made aware that they do have the right to choose their own solicitor and they should be free to exercise that right should they choose to do so.

APIL welcomes the SRA's approach to become a "fit for purpose" regulator and we also believe that significant reform of its traditional approach is necessary; however, we also believe the SRA will need to do significant ground work prior to this to rectify

⁴ *The Architecture of Change: The SRA's New Handbook*, The Solicitor's Regulation Authority, 28 May 2010, Page 9 Paragraph 50.

⁵ *The Architecture of Change: The SRA's New Handbook*, The Solicitor's Regulation Authority, 28 May 2010, Page 12 Paragraph 71.

the feeling about them amongst the profession. It is vital, in our view, that there is transparency and clarity in regulation and that detailed consideration is given to resolving the tension between professional and ethical standards on the one hand and commercial enterprise on the other. Our members believe that the SRA, in its transition to "fit for purpose" regulator, should become more approachable and the profession will become more open with them. One suggestion is for the SRA, when it notices things happening which are wrong, to announce to the profession what they have noticed, why it is wrong and what should be done as an alternative. This is, of course, unless the clients' interest was harmed in the process.

We hope that our comments prove helpful to the committee and look forward to engaging with you further in the future.

Yours sincerely

A handwritten signature in purple ink that reads "Katherine Elliott". The signature is written in a cursive, flowing style.

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