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Law Society submission to the SRA's rule change application for PII and the Compensation Fund

01 April 2019

Dear Helen,

Executive summary

The Law Society supports the decision of the Solicitors Regulation Authority (SRA) to import the existing rules for professional indemnity insurance (PII) and the Compensation Fund largely unaltered into the new handbook.

However, we have a number of concerns about the rules as they apply to “freelance solicitors”, who are self-employed, practise in their own name, and are engaged directly by their clients. Specifically, we are concerned that:

- The SRA's proposal that only freelance solicitors offering reserved services should be required to purchase PII would create confusion for the public and disrupt the system of consumer protections.
- The SRA previously acknowledged these difficulties but has not addressed them in its application, and we cannot see any justification for this apparent policy reversal.
- Freelance solicitors (or at least those providing reserved services) are required to purchase “adequate and appropriate” PII, but the SRA has not provided sufficiently clear explanations of what they mean by the term. Without a robust definition, enforcement action against freelance solicitors for not obtaining the expected level of cover will prove problematic.
- We have set out a range of factors that we believe ought to be taken into account, beyond minimum indemnity limits, when considering the minimally sufficient level of insurance for freelance solicitors.
- The current Transparency Rules do not require freelance solicitors to provide enough detail about their insurance arrangements for prospective clients to make properly informed decisions. We have suggested ways to strengthen the requirements to ensure that consumers are not disadvantaged.
- We are concerned that with a hardening market and freelancers representing an untested risk, they may struggle to secure cover in the insurance market.
- The removal of the prohibition on excluding liability below a minimum level of cover poses a further risk to consumers accessing the services of freelance solicitors.
- Run-off cover is an essential client protection, and it will be all the more important for clients of freelancers. It is a considerable omission for the SRA not to make specific provisions about freelancers' run-off requirements.

- We also have concerns about solicitors working in unregulated firms, who currently have to seek a waiver from the SRA and demonstrate that they have insurance which is equivalent to the Minimum Terms and Conditions (MTCs) if they want to provide advice to the public, but will have this obligation removed by the proposed rules.
- We believe that solicitors in unregulated firms should be required to maintain PII for the same reasons; avoiding public confusion and risks to the wider system of consumer protections.
- We believe that the SRA's refusal to extend Compensation Fund protections to the clients of freelance solicitors who have not purchased adequate and appropriate PII will create confusion among consumers, and put vulnerable members of the public at risk.
- We also think that freelance solicitors necessitate a re-think about how Compensation Fund contributions should be calculated and collected.

Until such time as these issues have been properly resolved, we believe that it would be against the LSB's regulatory objectives to approve the SRA's application in full.

Introduction

1. We are writing to you with regard to the recent Solicitors Regulation Authority's (SRA) application for the approval of amendments to regulatory arrangements in respect of the SRA Compensation Fund and Professional Indemnity Insurance Requirements.¹
2. The SRA notified the Law Society on 5 March 2019 that it had written to the LSB under Schedule 4 of the Legal Services Act for a change to the SRA's regulatory arrangements for PII and the Compensation Fund in order to implement the revised Handbook rules.
3. The Law Society supports the decision of the SRA to import the existing rules for PII and the Compensation Fund largely unaltered into the new handbook. However, we have concerns about the new rules now proposed for "freelance solicitors".
4. The Law Society accepts that the LSB has approved the creation of freelance solicitors and will fully support any of our members who choose to practise as freelancers, but we would be remiss in our duty to the public, the consumers of legal services, the profession, and individual members, if we did not make certain that the new rules ensure that everyone is well informed and provided with a proper level of protection.
5. While the retention of the current rules for authorised bodies means that the level of protection that consumers of legal services expect from solicitors remains mostly intact, the new rules governing freelance solicitors will lead to confusion, and transfer risk to an uninformed and unaware public.
6. Last year, in [our response to the SRA's consultation on reforming PII and the Compensation Fund](#), we set out in detail our concerns about the likely consequences of implementing a plan to substantially reduce the MTCs for solicitors' PII. Many of those concerns are applicable (with only slight adjustment) to freelance solicitors, so

¹ https://www.legalservicesboard.org.uk/Projects/statutory_decision_making/pdf/2019/FINAL_-_SRA_application_to_LSB_-_LTF_Comp_Fund_&_PII_v1.0_04_03_19.pdf

we would encourage the LSB to review that document and take into account the issues that it raises in connection to the perils of non-uniform PII cover.

7. The Law Society maintains its view that the “adequate and appropriate” level of PII for solicitors in England and Wales is the MTCs, currently required by the SRA. Any lower level of cover exposes the public to unacceptable risk.
8. We do not believe that the rules for freelance solicitors are fit for purpose. The principles of the public interest and the rule of law demand professional standards and trust in the profession of solicitors. These in turn demand that protections should be in place to guard against negligent failures by regulated persons with clear and uniform protections to reassure the public that it is safe to access legal services.
9. The suggested rules for freelancers fail to provide uniformity of protection, they are inadequately researched and cannot be justified by reference to empirical data or impact assessments. They do not – as worded – provide the minimal level of cover that the SRA consulted on, and presented in previous policy documents.
10. The LSB rules for changes to regulatory arrangements give a list of grounds upon which the application can be refused.² We strongly believe that that the LSB should reject the SRA’s application for rule change as granting the application would be prejudicial to the regulatory objectives as a whole, and in particular:
 - Protecting and promoting the interests of consumers;
 - Protecting and promoting the public interest.

The rules reverse previously stated policy without justification

11. The most pressing reason for the LSB to reject the proposed rules as they apply to freelance solicitors is that they are inconsistent with the policy objectives that the SRA set out after taking a considered view of the opinions of concerned stakeholders.
12. In response to the SRA’s Handbook consultation last year, the Law Society expressed misgivings about the SRA’s plan to allow freelance solicitors providing only non-reserved legal services to practise without any PII, if they chose to do so.
13. The Legal Services Consumer Panel also expressed concerns about the proposal in its response:³

“The draft regulation would also allow self-employed solicitors to provide non-reserved legal services without any key consumer protection. We acknowledge the improved consumer choice, however, we are concerned, first, on the in-existent level of protection, and second, on the increased consumer confusion this proposal could bring.”

²http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/rules_for_rule_change_applications_v2_November2010.pdf

³http://www.legalservicesconsumerpanel.org.uk/publications/consultation_responses/documents/20180105_LSCP_Response_To_The_SRA_Handbook_Review.pdf

14. The SRA sought to calm these fears, writing in its post-consultation report:⁴

“In response to concerns about PII for [freelance solicitors] we have extended the requirement so that cover must apply to all work conducted by the solicitor or REL, and not just to reserved activities. This will:

- reduce the potential for consumer confusion
- avoid situations where some cases are covered by an insurance obligation and some not
- prevent arguments by insurers over what does or does not constitute reserved legal activity.”

15. More concisely, this is a recognition that for the protection of consumers it is important that freelance solicitors are adequately and appropriately insured, regardless of whether they are providing reserved or non-reserved services.⁵

16. However, in its rule change application, the SRA has apparently reversed that decision, once again requiring only those freelance solicitors who offer reserved legal activities to purchase PII cover:⁶

“[F]or solicitors working as freelancers, in order to be entitled to carry on reserved legal activities, they must take out and maintain indemnity insurance that provides adequate and appropriate cover in respect of the (reserved and non-reserved) services that they provide.”

17. This change would leave clients who instruct freelance solicitors providing non-reserved activities, without adequate protections.

18. We have been unable to find any justification for reversing a policy the SRA clearly articulated in the bullet-pointed statement above. It is possible that the reversion to the earlier policy was accidental. The SRA had accepted the necessity for all freelance solicitors to purchase PII, and it is hard to see how that position can be reversed now.

19. For the SRA to be justified in this action, there would have to be overwhelming evidence that the absence of cover would not confuse consumers, create situations where some cases are covered and others are not, or lead to arguments by insurers about what constitutes reserved legal activities. We contend that no such evidence exists.

20. In our response to the LSB’s business plan we called for the LSB to uphold its own commitment to research, and for policy decisions to be justified by sound empirical data and analysis (none of which, from our reading, is present in this application). Even well-supported policies will be undermined if rules that are meant to implement them work contrary to the regulators’ intentions.

21. It would be incompatible with the LSB’s oversight role, and its regulatory objectives of protecting and promoting the interests of consumers and the public, if it were seen to be accepting a rule change application from a frontline regulator that has clearly set

⁴ <https://www.sra.org.uk/sra/consultations/ltrf-phase-two-handbook-reform.page#headingTwo>

⁵ It would also avoid the confusion that might arise where both types of work occur in a single case, such as when probate is obtained and then administration work is carried out.

⁶ https://www.legalservicesboard.org.uk/projects/statutory_decision_making/pdf/2019/FINAL_-_SRA_application_to_LSB_-_LTRF_Comp_Fund_&_PII_v1.0_04_03_19.pdf

out the multiple grounds on which the new rule will create risks for consumers, and jeopardise the efficacy of the system of public protections.

“Adequate and appropriate” insurance

The MTCs are the only “adequate and appropriate” insurance

22. While it is a considerable comfort that the SRA has decided to retain the MTCs for authorised bodies, we are still concerned about the SRA’s intention to allow some solicitors to offer services without this level of protection.
23. In our response to the SRA’s PII consultation, in a section called “Benefits of the current system” we set out the many reasons why the MTCs were an effective and proportionate PII response.⁷ The current MTCs provide clear, strong levels of protection, which ensure ease of doing business, and balance out inequalities in bargaining power between legal service providers of different sizes.
24. Nowhere in its application has the SRA provided data or analysis to support the introduction of differentiated PII rules for freelance solicitors. Absent this, or any clear evidence of good that would arise from the reforms, the LSB must not permit the SRA to introduce new arrangements that would jeopardise the demonstrable benefits that stem from uniform MTCs.

What would the SRA regard as “adequate and appropriate” insurance?

25. We have concerns about how freelance solicitors are to determine what is an “adequate and appropriate” level of insurance in the absence of a mandatory minimum level of cover.
26. Since its PII consultation last year, we have been asking the SRA to provide us with an indication of what would constitute “adequate and appropriate” insurance. We understand that it may vary depending on circumstances, but if our members are expected to obtain a level of cover – and may be penalised for failing to do so – then it is incumbent on the regulator to provide some means by which freelance solicitors can satisfy themselves that they are adequately and appropriately insured.
27. We have suggested that the SRA could provide a series of examples, showing freelance solicitors engaging in different kinds of work, which would give our members a sense of the sort of cover they need. Alternatively, the SRA could provide a list of factors that should be taken into account when determining an appropriate level of cover (something which might eventually be developed into an online “adequate and appropriate” PII calculator). But as yet none have been forthcoming.
28. If there is no reasonably robust definition, then enforcement action against freelance solicitors for not obtaining the expected level of cover will prove problematic and will be contested in all but the most egregious of cases.
29. The LSB should not approve the proposed rule changes without the SRA providing an empirically justified means by which the adequacy and appropriateness of a freelance solicitors’ PII can be determined.

⁷ <https://www.lawsociety.org.uk/policy-campaigns/consultation-responses/sra-consultation-protecting-users-of-legal-services-law-society-response/>

Minimally sufficient insurance

30. Although the Law Society believes that insurance at anything less than the level of the current MTCs would not be adequate or appropriate, we have given some thought to what a freelance solicitor's minimally sufficient insurance might look like.⁸
31. A minimum indemnity limit would need to be high enough to allay concerns about aggregation, and freelance solicitors with lower minimum indemnity limits should be subject to caps according to the value of transactions, the presence of which should limit the extent of clients' possible losses. This might allow freelancers to carry out a wide range of low-level, low-risk legal activities, with a low level of insurance.
32. Other features of the MTCs which are necessary to be reasonably confident that cover will provide "adequate and appropriate" protection for consumers and the public include, but may not be limited to, the following:
- the insurance must indemnify the freelance solicitor against civil liability to the extent that it arises from private legal practice in connection with their work as a freelancer solicitor;
 - it must indemnify them against defence costs;
 - there must be no monetary limit on the cover for defence costs (although the insurance may provide that liability for defence costs in relation to a claim which exceeds the sum insured is limited to the proportion that the sum insured bears to the total amount paid or payable to dispose of the claim);
 - there must be sufficient allowances made for the risk of aggregation;
 - the insurance should be underwritten by rated insurers;
 - excesses must not apply to defence costs;
 - the insurance must provide that, if an insured fails to pay to a claimant any amount which is within the excess within 30 days of it becoming due for payment, the claimant may give notice of the insured's default to the insurer, whereupon the insurer is liable to remedy the default on the insured's behalf. The insurance may provide that any amount paid by the insurer to remedy such a default erodes the sum insured;
 - no avoidance or repudiation of the insurance;
 - no adjustment or denial of the insurance;
 - no cancellation of the insurance;
 - no retroactive date;
 - provisions for run-off cover.

Transparency

33. On 6 December 2018 the SRA introduced new rules requiring firms to publish certain price, service and regulatory information. This was a response to the Competition and Markets Authority's legal services market study, requiring greater transparency for consumers accessing the market for legal services.⁹

⁸ The LSB has already accepted in principle the idea that freelance solicitors could operate with insurance requirements that are different, and less protective, than those of solicitors working in authorised bodies: https://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/2018/FINAL_Revised_LttF_Decision_with_Full_Annex_.pdf

⁹ <https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf>

34. Of the Transparency Rules that are already in effect, none touch upon the topic of PII. However, there is a portion of the Transparency Rules that will come into effect alongside the SRA's new Handbook, and part of these rules are applicable to PII.

35. The SRA Transparency Rules will create an obligation for freelance solicitors to inform clients about their insurance arrangements. The specifics of this duty are set out in the sections below:

4.3 A solicitor, an REL or RFL who is providing legal services to the public or a section of the public other than through a firm that is regulated by the SRA:

(a) where they are not required to meet the MTC, must before engagement inform all clients of this fact and specify that alternative insurance arrangements are in place if this is the case (together with information about the cover this provides, if requested); and

(b) where applicable, must inform all clients that they will not be eligible to apply for a grant from the SRA Compensation Fund.

4.4 Rule 4.3 does not apply to a solicitor, an REL or RFL that is working in an authorised non-SRA firm or a non-commercial body.

36. The Law Society supports the pre-engagement requirement for solicitors who are not obliged to meet the MTC to inform clients of this fact, and specify that alternative arrangements have been made. However, we do not believe that this provides the public with sufficient detail for them to make a properly informed decision.

37. Professional indemnity insurance is complex, and not easily understood by clients. If a member of the public wishing to engage a solicitor is informed that, "I don't have MTC insurance, but I've made alternative arrangements," then the freelance solicitor has met their obligation under the Transparency Rules, but has imparted almost nothing to the client.

38. The obligation for freelancers to provide details about their alternative insurance arrangements, with the modifier "if requested", places an onus on clients to ask for the details on the insurance level. Research shows that clients are barely aware of the differences between different legal professions.¹⁰ For example, the SRA's consumer risk assessment undertaken in relation to the professional indemnity insurance consultation warns about over-reliance on information provision to offset significant consumer risks:¹¹

"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".

¹⁰ Consumer behaviour research: A report by London Economics and YouGov for the Law Society; 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.

¹¹ <https://www.sra.org.uk/documents/SRA/consultations/pii-consumer-risk-legal-services.pdf>

39. The likelihood that someone hiring a freelance solicitor will know enough about the intricacies of solicitors' MTC PII cover to question the assurance "I've made alternative arrangements" is optimistic at best.
40. If there are to be solicitors operating on anything other than the MTCs, then there must be a clear requirement for them to inform prospective clients of this fact, prior to engagement, verbally and in writing. They should be required to set out briefly the requirements of the MTCs, and the ways in which their alternative arrangements differ from the protections that the client would receive if they engaged a solicitor working in an authorised body. Only then could it be said that clients may be aware of what risks they are taking.
41. To ensure consistency, the Transparency Rules should be amended to include requirements for the use of specific wording, coupled with guidance on where and how prominently information about alternative insurance arrangements should be displayed. This could include a table, giving a side-by-side comparison of MTC insurance versus their alternative.
42. The SRA's current requirements are not enough to ensure that prospective clients are properly informed, so approving the rules relating to freelancers, as they stand, would contravene the regulators' objectives of protecting and promoting the interests of consumers and the public.

Availability of PII cover for freelance solicitors

43. The SRA's proposals rely on the insurance market agreeing to provide cover to freelance solicitors, and we have significant doubts as to whether or not this will be forthcoming.
44. We have discussed the likely availability of "adequate and appropriate" PII with several leading brokers. Given the underlying state of the PII market, most were unwilling to make predictions about what is likely to happen with the conventional solicitors' PII market, let alone its appetite for an emerging and untested risk such as freelance solicitors. Nevertheless, the consensus view was that any insurance that will be offered will be on terms substantially less beneficial and protective than the SRA's MTCs.
45. Most said that they would not be interested in providing such cover, because of the relatively small profit to be made, and the risk that it could pose to their own errors and omissions insurance, should anything go wrong.
46. Furthermore, due to the relatively low premiums, most agreed that any brokers who did arrange cover would most likely provide it on a take-it-or-leave-it basis, with freelancers simply signing up for cover, with little or no advice about what was and was not covered. Terms were likely to be miscellaneous, broadly drawn, but with many exclusion clauses, the complexity of which would make it unlikely that any freelance solicitor would have a proper understanding of what protections they had in place. Indeed, in many instances they may not discover whether or not a claim is covered until it has been made.
47. Given the combination of reduced capacity and increasing premiums that we can expect with a hardening market for PII, it is likely that insurers' capacity will quickly be exhausted by traditional firms. How much insurance will be available for an emerging and untested risk exposure is far from certain.

48. If there is a lack of appetite within the PII market for this emerging risk as a standalone product, some freelancers may attempt to obtain insurance through other means, seeking to cover their potential liabilities through inappropriate personal liability insurance products. At best, insurers will add questions to their proposal forms to make sure they do not unwittingly take on this exposure. At worst, there could be a denial of coverage through non-disclosure which, without the protections offered by the MTCs, is a real potential detriment for client protection.
49. The SRA may need to take steps to cultivate a market in PII for freelance solicitors, because it would not be in the interest of consumers or the broader public for any freelancers to be authorised to practise without adequate and appropriate PII in place.

Exclusion of liability

50. In its application, the SRA confirm that clients of SRA-authorised firms should have the benefit of indemnity insurance, and that SRA-authorised firms must not exclude or attempt to exclude liability below the minimum level of cover required under its rules. The SRA Indemnity Insurance Rules (SIIR), amended on 4 December 2018, require that:

“An authorised body must take out and maintain qualifying insurance with a participating insurer and must take out and maintain professional indemnity insurance that provides adequate and appropriate cover in respect of current or past practice. Further it must ensure that its clients have the benefit of the indemnity insurance required under the rules and must not exclude or attempt to exclude liability below the minimum level of cover required under the rules.”
51. The specific requirement relating to the exclusion of liability does not apply to solicitors practising as freelancers. The SRA justifies this on the basis that the insurance requirements that apply to freelance solicitors are not comparable to those that apply to SRA authorised firms, and do not specify a minimum level of cover.
52. The SRA argues that any exclusion or limitation of liability is a matter for individual agreement between freelance solicitors and their clients, through the terms of engagement, and that regardless of the SRA’s insurance requirements, clients will be protected by general consumer law, which focuses on making sure that the terms of any contract for service are reasonable.¹² As such, it would expect any terms of engagement to be fair and reflect the balance of power or knowledge between the client and the solicitor.
53. So, if a freelancer was looking to limit their liability, the SRA would expect them to have considered their obligations under the code of conduct and ensured that they had taken into account the best interests of their client, not taken unfair advantage, made sure that their client was properly informed and understood the impact of the limitation of liability, and made sure that their terms of engagement were not unfair, and complied with consumer law.
54. We suggest that the adequacy limb of the “adequate and appropriate” test presupposes that in a given circumstance, there must be an indemnity limit below which a freelance solicitor’s PII would be considered inadequate.

¹² <http://www.legislation.gov.uk/ukpga/2015/15/contents/enacted>

55. Therefore, in any specific case falling outside the ambit of the MTCs, the minimally sufficient indemnity limit for that case must be regarded as the minimum level of cover below which it should not be permissible for a solicitor to exclude or limit liability.
56. We understand why – not yet having formulated a test to determine the adequacy and appropriateness of a freelance solicitor’s PII arrangements – the SRA may be reticent to apply to all solicitors the rule against excluding liability below the minimum level of cover. However, we insist that this rule is an unambiguous safeguard, providing reassurance to the public and a line in the sand for the profession. It should not be sacrificed for lack of proper consideration by the regulator or as an inconvenience.
57. The LSB should not approve PII rules for freelance solicitors unless it prohibits excluding or attempting to exclude liability below the minimally sufficient level of cover for any case. Allowing freelancers to operate without such a requirement poses a clear risk to the interest the consumers and the public, and would be incompatible with the LSB’s regulatory objectives.

Run-off cover

58. Run-off is an important protection for solicitors, former solicitors and their clients, providing a bulwark against historic liabilities when a firm has ceased to trade. Any claims made under a run-off policy will relate to work carried out before trading stopped. It covers legacy issues and in legal work – especially in areas such as conveyancing and property law, wills and probate, and personal injury – these can have a very long tail.
59. It is difficult to imagine the circumstances in which a solicitor’s PII arrangements could be regarded as “adequate and appropriate” if they did not include provision for run-off cover.

Freelance solicitors’ lack of a requirement for run-off cover

60. One of the most notable omissions in the SRA’s proposals is the absence of any requirement for freelance solicitors to purchase run-off cover.
61. Given the drive for greater flexibility which is the impetus for the introduction of this new class of solicitors, the need for clear rules on run-off cover is essential. If the SRA is empowering freelance solicitors to dip in and out of the market for legal services, then mandatory run-off is the only reliable means by which the regulator can ensure that clients remain adequately protected.
62. For freelance solicitors who were working flexibly – alternating between legal work and other activities – such run-off cover would ensure continuity of protection for clients during periods when they were not involved in the market for legal services, and it would have to be maintained for a period of at least six years when they finally ceased to practise the law (or longer if their work history required).
63. There can be no assumption that any insurer would provide freelance solicitors with run-off on the same whether-you-pay-for-it-or-not basis as they do for authorised bodies regulated by the SRA. This means that even if the SRA were to require freelancers to purchase such additional insurance, consumers would be at a

heightened risk of having unmet claims. This risk would demand even more SRA monitoring and enforcement mechanisms.

64. The LSB should not allow freelance solicitors to practise without a requirement for mandatory run-off cover, but the details of what that would look like and how it would work could only be determined with the support of research, and would warrant further consultation.
65. For the LSB to approve this application the SRA's proposals while this issue remains unresolved would contravene its objectives of protecting and promoting the interests of consumers and the public.

Sole practitioners' requirement for run-off cover

66. Following its Handbook consultation, the SRA wrote of its determination to bring in freelance solicitors, noting the particular benefits that might accrue to sole practitioners from black and minority ethnic (BAME) backgrounds:¹³

“We believe the potential benefits of increased flexibility for both freelance solicitors and their clients mean we should proceed with the proposal. It is artificial and disproportionate to force those solicitors who are genuinely working on their own into the same regulatory model as a firm that may employ hundreds of people. It increases costs for those individuals and these costs are likely to be passed on to clients. We know that BAME solicitors are disproportionately represented among sole practitioners and these proposals are particularly likely to benefit them.”

67. This seemingly fails to take account of the fact that in order to become freelance solicitors, sole practitioners would first have to cease trading as sole practitioners. This in turn would necessitate the purchase of run-off cover, which would be a high barrier for many practitioners who might otherwise consider freelancing.
68. Findings from the Law Society's most recent PII survey suggest the average cost of run-off for a sole practitioner is in excess of £21,000.¹⁴
69. The Law Society is sceptical about the benefits of the freelance model, but if the SRA is correct, then far from liberating a disproportionate number of BAME solicitors to practise more flexibly, they would be locked in to remaining sole practitioners, while newly qualified or employed solicitors were free to take advantage of the reforms. This would call into question the justification for the policy change, and could potentially create new problems for the equality and diversity of the profession.

Solicitors working in unregulated firms

70. The Law Society believes that solicitors delivering services to external clients from unregulated firms should also be covered by PII on the SRA's MTCs.
71. Under the current rules solicitors working in-house who wish to provide advice to the general public are required to apply for waivers, and show the SRA that they have PII cover “equivalent” to the MTCs. Under the proposed regime they would no longer be

¹³ <https://www.sra.org.uk/sra/consultations/lttf-phase-two-handbook-reform.page#headingTwo>

¹⁴ <https://www.lawsociety.org.uk/support-services/risk-compliance/pii/surveys/>

required to do this, which is another clear instance of consumer protections being removed.

72. Approving the parts of this application that apply to solicitors working in unregulated firms, without resolving this issue would imperil the LSB's regulatory objectives of protecting and promoting the interests of consumers and the public.

The Compensation Fund

73. The Law Society is pleased to see that the SRA intends to maintain the Compensation Fund without far-reaching changes, and that they will, in most instances, extend it to cover solicitors in non-commercial bodies and freelance solicitors.
74. We are reassured that the SRA's recognises the difficulties that the new system could pose to members of the public wanting to engage the services of a solicitor:¹⁵

“Under the new SRA Standards and Regulations, solicitors practising as freelancers can carry on reserved legal activities, subject to certain restrictions. Freelancers may also carry on non-reserved legal activities without any restriction. We do not think that it would be realistic for a client to be able to identify across the solicitor's client base, whether any work done involved reserved legal activities or whether they were complying with the restrictions for example, not to hold any client money, in order to determine whether a claim could be made.”

75. We are also heartened by their clear-eyed assessment that the “simplest and most practicable arrangement is therefore for the client to be able to make a claim on the Compensation Fund”,¹⁶ regardless of whether a freelance solicitor is providing reserved or non-reserved services.
76. Before we proceed, it is worth noting that the argument that the SRA has made here – that clients are unable to make easy distinctions between different types of solicitors or different types of legal work, and therefore require protection – is essentially a restatement of its previous position regarding the need for all freelance solicitors to carry PII, and once again underlines the need for uniform and comprehensive protections for consumers accessing the services of solicitors.

Access to the Compensation Fund where freelancers have not purchased adequate and appropriate PII

77. The SRA's accurate description of the circumstances here is also an effective argument against another of its policy suggestions relating to the Compensation Fund, which is that “given that freelancers, and solicitors in a non-commercial body, will not be subject to mandatory PII requirements which require them to obtain cover which meets our MTCs”,¹⁷ their clients will not be able to claim against the Fund if their solicitor has for whatever reason failed to acquire adequate and appropriate PII.

¹⁵ [https://www.legalservicesboard.org.uk/projects/statutory_decision_making/pdf/2019/FINAL - SRA application to LSB - LTF Comp Fund & PII v1.0 04 03 19.pdf](https://www.legalservicesboard.org.uk/projects/statutory_decision_making/pdf/2019/FINAL_-_SRA_application_to_LSB_-_LTF_Comp_Fund_&_PII_v1.0_04_03_19.pdf)

¹⁶ [https://www.legalservicesboard.org.uk/projects/statutory_decision_making/pdf/2019/FINAL - SRA application to LSB - LTF Comp Fund & PII v1.0 04 03 19.pdf](https://www.legalservicesboard.org.uk/projects/statutory_decision_making/pdf/2019/FINAL_-_SRA_application_to_LSB_-_LTF_Comp_Fund_&_PII_v1.0_04_03_19.pdf)

¹⁷ [https://www.legalservicesboard.org.uk/projects/statutory_decision_making/pdf/2019/FINAL - SRA application to LSB - LTF Comp Fund & PII v1.0 04 03 19.pdf](https://www.legalservicesboard.org.uk/projects/statutory_decision_making/pdf/2019/FINAL_-_SRA_application_to_LSB_-_LTF_Comp_Fund_&_PII_v1.0_04_03_19.pdf)

The Law Society believes that this would represent an unacceptable transfer of risk from the profession to the public.

78. It is concerning, because under their proposed rules the SRA should not have allowed any freelance solicitors to practise if they did not have adequate and appropriate PII in place (and we have argued that the activities of freelancers offering only non-reserved services and solicitors working in unregulated firms providing advice to the public should be similarly proscribed). Nevertheless, here the rules would place the burden on the client. Bearing in mind that freelance solicitors are intended, at least in part, to broaden access to legal services, it is likely that a higher proportion of their clients will be multiply disadvantaged, and among the consumers least able to shoulder such uncompensated losses.
79. The SRA is aware that this may cause difficulties, because they immediately state that they will “keep this issue under close review”,¹⁸ but this will come as cold comfort to any consumers who are left without compensation as a result.

Funding the Compensation Fund

80. There is also a question about the fairness of the way that the Compensation Fund is funded, which we would like to comment on at this time.
81. The level of contributions is set by the SRA Board, taking into account historical and existing claims, and analysis of future claims. On 12 June 2018, the SRA announced that it had set the level of contributions to the Compensation Fund for 2018/19, and that it would be increasing the levy for a second year running:
- Contributions for individual solicitors would increase by 125 per cent, from £40 to £90.
 - Firm contributions would increase by 116 per cent, from £778 to £1,680.
82. These contributions represent a substantial cost to our members, especially sole practitioners and small firms who, as entities, are required to pay the same flat rate contribution as firms with thousands of employees and turnovers in the hundreds of millions.
83. The Compensation Fund rules attached to this application do not appear to go into detail about how the contributions are to be set or collected, but the introduction of freelance solicitors provides a good opportunity to address the issue, because given the SRA’s intentions to enable solicitors to work more flexibly, we do not believe that it would want to levy the standard firm contribution from freelancers, for most of whom £1,680 would represent a considerable portion of turnover. But if they were only charged the individual solicitors’ fee, that would not fairly represent the risk that freelancers posed to the Fund, and would leave other solicitors working in traditional practices effectively subsidising their work.
84. The Law Society would be happy to work with the SRA to investigate the relative merits of a system of graduated Compensation Fund contributions for firms and freelancers, which might take into account factors such as number of fee earners, gearing, turnover, previous claims history, insurance arrangements, location, workload, practice area, and the like. This could make contributions more equitable, and more reflective of the risks that entities and individuals actually pose to the Fund.

¹⁸ [https://www.legalservicesboard.org.uk/projects/statutory_decision_making/pdf/2019/FINAL - SRA application to LSB - LTF Comp Fund & PII v1.0 04 03 19.pdf](https://www.legalservicesboard.org.uk/projects/statutory_decision_making/pdf/2019/FINAL_-_SRA_application_to_LSB_-_LTF_Comp_Fund_&_PII_v1.0_04_03_19.pdf)

It could also encourage good practice, as firms and freelancers take reasonable steps to reduce their risk factors.

Conclusion

85. In summary, given the concerns we have raised above, we do not believe that the LSB is in a position to approve the rule change application in its entirety.

86. While the rules that essentially replicate the current PII arrangements can be approved without increased risk to the interests of consumers or the public, the new rules – especially those relating to freelance solicitors and solicitors working in unregulated firms – cannot be safely implemented at this time.

Kind regards,

A handwritten signature in cursive script that reads "Christina Blacklaws".

Christina Blacklaws
President
The Law Society