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Dear Emily

Application by the Solicitors Regulation Authority to become a Licensing Authority

Thank you for your letter of 28 March inviting the Panel to provide advice on the above application. Under the Legal Services Act, the Panel is a mandatory consultee on applications from bodies to become licensing authorities. In deciding what advice to give, the Panel must, in particular, have regard to the likely impact on consumers of the Lord Chancellor making an order for designation as set out in the application.

Making an assessment of likely consumer impact does not lend itself to a precise formula. The Panel applies well established consumer principles – such as access, choice and redress – as reference points by which to analyse the issues. In addition, we identify the risks to consumers and the type and degree of possible harm, and then make a judgement as to whether the proposed arrangements are likely to promote access and offer sufficient protection. Finally, the regulatory objectives in the Legal Services Act underpin our assessment.

The Panel submitted detailed responses to all four consultations issued by the Solicitors Regulation Authority (SRA) which informed this application. The Panel has also met with officials on a number of occasions and we are a member of the OFR/ABS Reference Group. Therefore, this advice does not raise new issues, but highlights areas where the Panel supports or remains in disagreement with the SRA's approach.

Should the SRA's application be successful, it is important to give time for the new arrangements to bed down. However, as the SRA is undergoing significant change, and because it has designed a regulatory framework for new market conditions, inevitably it will not have got everything right. Therefore, the SRA should keep its processes under continuous review, refining its approach to delivering outcomes-focused regulation and with an eye on revising the code of conduct in the medium term.

Concerns about the application

The Consumer Panel encouraged the SRA to draft its new code from a blank sheet of paper, to meet the challenges of the 2010s, rather than seek to adapt the existing model. We urged the SRA to develop a small number of outcomes that were firmly rooted in the consumer experience. We said the code should be written in a language that consumers could easily understand and should be accompanied by a customer charter.

However, rather than think afresh about the requirements needed to deal with modern markets, the code essentially transferred the current rules into a new format. For example, the existing Principles were retained (with the addition of four new ones); however, the SRA's consumer research found that people did not relate to them, saying they seemed generic with little relevance or influence for actual outcomes. In addition, there is a long and detailed list of outcomes and Indicative Behaviours framed around the provider's behaviour, as opposed to a few core outcomes that are framed in terms of the consumer experience – this dilutes the message to the profession that regulation is intended to benefit consumers. Furthermore, the code is likely to be difficult for most lay people to understand due to the length of the document and the style of language.

Another broad issue where the Panel has remaining concerns relates to consumer vulnerability. As the new British Standard¹ on this topic makes clear, all consumers are different, with a wide range of needs, abilities and personal circumstances. These differences can put some consumers in a position of vulnerability or disadvantage during certain transactions and communications, potentially putting them at risk from financial loss, exploitation or other detriment. The standard identifies 'risk factors' related to a person's circumstances – such as bereavement, illiteracy, illness or disability – which could increase the likelihood of a consumer being at a disadvantage or suffering detriment. Furthermore, organisations and markets differ in the way that they provide services and interact with consumers, and organisations' policies and processes can contribute to, or increase the risk of, consumer vulnerability.

For these reasons, the Panel urged the SRA to incorporate consumer vulnerability concerns into its regulatory toolkit and to place requirements on firms within the code of conduct. However, our points have not been fully addressed, as follows:

- The Panel recommended that risk assessment should, in addition to the number of consumers affected, consider the severity of impact and the type of consumers affected, including those in vulnerable circumstances – these points remain missing from the risk assessment model, although we note that consumer vulnerability does factor in the SRA's enforcement strategy; and
- The Panel recommended that the code's requirement for providers to address consumer vulnerability should be promoted from an

¹ BS18477:2010, Inclusive service provision – Requirements for identifying and responding to consumer vulnerability.

Indicative Behaviour (voluntary) to an explicit outcome (mandatory)
– this was not implemented.

Supported proposals

These points aside, the Panel considers that the SRA has got the detail of its proposed arrangements broadly right. In addition, the application is consistent with a series of points that we raised during the consultations:

- A single regime across regulated entities means consumers have the same protections when dealing with ABS and traditional firms;
- The separate business rule is maintained so where an organisation is regulated by the SRA, all of its legal activities are regulated;
- The inclusion of a new outcome requiring solicitors to treat their customers fairly;
- A single compensation fund for all types of firm;
- All firms applying to be authorised as an ABS will need to submit a statement that indicates how they will improve or impinge on access to justice, whilst the SRA has indicated plans to monitor the overall impact of the regulatory framework on access to justice;
- The overall approach to conflicts of interest, including the removal of detailed conveyancing outcomes from this section;
- A new outcome to protect whistleblowers;
- The inclusion of a written complaints procedure as an Indicative Behaviour, whilst telling customers at the outset of their right to complain to the Legal Ombudsman is now a mandatory outcome;
- Guidance has been kept to a minimum and the SRA will not give formal recognition to guidance developed by representative bodies;
- The commitment to publish for consumers a set of key outcomes that firms are expected to achieve. In addition, the SRA plans to develop more consumer information materials; and
- The inclusion of mystery shopping within the supervisory toolbox.

These developments are encouraging, although the Panel observes that some aspects – such as consumer engagement programmes – have the status of plans or commitments so we will wish to see evidence that these have been followed through effectively. Furthermore, other elements of the framework – for example, monitoring of access to justice and the new conflicts of interest regime – are treated at a very high level and so success will depend on how the SRA implements these provisions.

Furthermore, whilst the SRA has addressed most of the substantive policy issues that the Panel raised, the proof of outcomes-focused regulation will be in the eating. The Panel supported the shift from a rules-based regime to an outcomes-focused approach, but warned of two key risks. Firstly, the SRA must retain the dynamic of placing responsibility on providers to think through what behaviours are required to produce good outcomes for consumers, but without creating so much uncertainty in the market that it induces paralysis and stifles innovation that would benefit consumers. Secondly, the SRA must get tough with providers that abuse the freedoms given to them; in particular, it must be willing to enforce on the basis of the ten high-level Principles in the code. Therefore, whilst the design of the

regulatory framework is crucial, the success of outcomes-focused regulation will greatly depend on its delivery.

The Consumer Panel also welcomes the SRA's plans to strengthen its internal capacity on consumer issues. This includes a new Consumer Affairs function, although the SRA will need to ensure that developing a strong consumer focus is seen as the shared responsibility of all staff rather than the task of one unit within the organisation. We particularly welcome the commitment to improve consumer engagement both directly with the public and with consumer representative bodies, and the recognition of the need to empower consumers in their dealings with lawyers. As part of this approach, we repeat a point made in response to the SRA's second consultation, of the need for it to develop capacity on behavioural insight in order to understand the impact of its policies on consumer behaviour.

Finally, we wish the SRA well should it become a Licensing Authority, and we look forward to continuing to work with it and the LSB in ensuring the smooth introduction of ABS, as the SRA develops its oversight of their subsequent service to consumers.

Please contact Steve Brooker, Consumer Panel Manager, for enquiries in relation to this submission.

Yours sincerely,

A handwritten signature in black ink that reads "Dianne Hayter". The signature is written in a cursive, flowing style.

Dr Dianne Hayter
Chair