



LawWorks Policy Consultation Response

SRA Corporate Strategy 2017-2020 – Consultation Response

Introduction

LawWorks is pleased to respond to the SRA's Corporate Strategy consultation which sets out what the SRA wants to achieve between now and 2020.

Today's legal market is marked by innovation and change, both of which the SRA has rightly foregrounded in its strategy for the next three years. The consequence of such innovation and change is a greater complexity in the market for legal services, not least in respect of the potential for new types of business models for delivering legal services, as permitted by the Legal Services Act 2007.

LawWorks welcomes the SRA's five strategic aims which together appear to be capable of addressing a more dynamic market place for legal services, as well as placing the SRA as an organisation in better shape to meet the demands of tomorrow. However, we also think the SRA's strategy needs to go further to address an underlying market problem in respect of categories of unmet demand for legal services, which the SRA's draft Corporate Strategy does not fully acknowledge. Whilst there is no magic bullet to addressing unmet legal needs, encouraging innovation, pro bono, public legal education, and supporting sustainable models for social welfare law practice must all have a role to play in making legal services more inclusive. We would encourage the SRA to use this corporate strategy to adopt a pro-active role in shaping a more inclusive legal services market, and ensuring that the regulatory environment is supportive of access to justice. This would also be consistent with the Legal Services Act's regulatory objectives.

About LawWorks

LawWorks is the operating name of the Solicitors Pro Bono Group, an independent charity which offers a range of support and brokerage services to bring together lawyers, who are prepared to give their time without charge, and individuals and community groups in need of legal advice and

support. LawWorks has 20 years of experience in supporting pro bono clinics and has seen the impact that good quality, timely legal advice has on clients' wellbeing, particularly the provision of advice on a range of legal issues, including housing and homelessness, welfare benefits, immigration, debt, childcare, employment and domestic violence and other related legal and money matters.

LawWork's overall view on the SRA's Corporate Strategy

Broadly speaking, the five strategic aims taken together represent an evolutionary approach to the SRA's role in market regulation, focussing on its 'effectiveness' and 'proportionality' as a regulator. In both this response, and our wider policy work, we identify the need to address the systemic problem of our legal services and system failing to sufficiently meet the needs of the public's legal problems, especially those on the lowest incomes and socially excluded or vulnerable people. The evidence on certain categories of unmet demand for legal services is now well established; the legal needs research has shown that a third of the population have unresolved civil legal problems at any one time, half, (although the figure varies in different surveys) get no legal advice at all in the face of multiple law related problems.¹ We therefore focus our response on the SRA consultation's final question, "*What have we missed?*" and urge the SRA to consider how the regulatory regime can address the well documented barriers to accessing legal services in today's society.

Pro bono is not, and should not be seen as an alternative to legal aid, nor to the funding of advice agencies and law centres. However, we believe that more can be done to enable and support pro bono's contribution in enabling access to justice.

Given the difficult situation many individuals face in accessing legal services, especially the most vulnerable and those least able to afford to pay – the solicitors' profession as a sector could risk





appearing out of touch unless its regulator encourages greater corporate social responsibility, including a commitment to pro bono work, and the sustainable provision of social welfare law services to improve access to justice. Indeed, as an “approved regulator” the SRA is specifically mandated under the Legal Services Act to:-

- improve access to justice
- increase public understanding of citizens’ legal rights and duties
- protect and promote the public interest, and
- support the constitutional principle of the rule of law

The SRA can influence this in a number of ways, such as promoting pro bono work as part of the core business of being a lawyer and law firms’ corporate social responsibility, and encouraging market entry and development of new models (for example in social welfare law) for delivering services to those with unmet needs or suffering legal exclusion. For example: unbundling, product commoditisation, online delivery platforms, and more widely available legal expenses insurance all have the potential to significantly reduce costs for legal services consumers. Social enterprise may also have a role in the alternative business structures (ABS) market.

New business models though can fit within a wider corporate social responsibility context. The foresight that many firms have shown by adopting and publishing corporate social responsibility (CSR) policies acknowledging the wider social context in which they operate, including commitments to pro bono work, is commendable in this respect. Such corporate responsibility looks beyond firms’ immediate client-base as well as beyond current consumers of legal services towards the wider “public interest”. Whilst CSR is not itself a regulatory matter, the SRA should be supportive of firms and the professions in developing active CSR policies, and this can help to develop a business case for pro bono.

The Law Society has shown strong leadership in encouraging and supporting the profession to undertake more pro bono activity, developing a Pro Bono Manual, Charter and Protocolⁱⁱ and actively promoting them throughout the profession. The Law Society has also been involved in recent initiatives, such as establishing (with LawWorks) a pro bono panel in response to terrorist attacks in London, and supporting pro bono activity following the recent Grenfell Tower disaster. We hope that the SRA can support this activity and the Law Society’s work.

However, we have been clear (as have the Law Society) that neither pro bono and nor market solutions alone can address the significant levels of unmet legal needs, and that Government and regulators need to look to wider public policy changes to help close the access to justice gap. In this response we therefore urge the SRA to adopt a more robust approach in its three year strategy in expressly acknowledging, and treating as a priority, the barriers that many people face in accessing legal services – and therefore in accessing justice. As part of this, we look to the SRA to support and encourage an even stronger pro bono culture for solicitors within law firms throughout England and Wales, but also to become an active agent for change and innovation in the legal services sector to address the underlying issues of legal exclusion.

The SRA’s strategic aims

We support the SRA’s proposed strategic aims as set out in the consultation, namely to:-

- 1. set and apply consistently high professional standards**
- 2. make sure regulatory requirements are proportionate, providing solicitors and firms the flexibility to innovate and better meet the needs of members of the public and businesses, while maintaining appropriate levels of public protection.**
- 3. increase the availability of relevant and timely information to help people make informed choices in the legal services market**





- 4. make sure our regulatory arrangements work as effectively as possible for the public, businesses, solicitors and firms in the context of constitutional developments within the UK and any new relationship with the EU.**
- 5. work better together and with others to improve our overall effectiveness, our responsiveness and the delivery of our regulatory functions.**

The references in strategic aims two and three to better “meet the needs of the public” and improve consumer information are especially welcome, as is the emphasis on professional standards. However, these objectives as currently framed are only a limited interpretation of the regulator’s duty around improving access to justice and promoting the public interest and the rule of law. Objective 3, for example, is framed narrowly about “choices” in the legal market, rather than about the wider benefits of public legal education in increasing legal capability and public understanding of citizens’ legal rights and duties. The reference in Objective 2 to providing solicitors and firms with the “flexibility to innovate and better meet the needs of members of the public and businesses” does not fully reflect the LSA regulatory objective of improving access to justice.

The scale of the challenge was well recognised in Phillip Paul’s (SRA Chief Executive) recent speech to the Westminster Policy Forum in which he explicitly states “Around two thirds of the public think that professional legal services are simply too expensive.. fewer than 1 in 10 people experiencing legal problems instruct a solicitor or barrister for their legal needs. That can’t really be acceptable. Legal services are simply unaffordable for the vast majority of the public.. we can’t have a two tier society where we write off most of the population from enforcing or defending their rights.”ⁱⁱⁱ We therefore hope that the SRA can use practical regulatory and policy tools at its disposal to put the access to justice duty into effect, and use its position as a key stakeholder to send out a strong

message – writ large in its corporate strategy and strategic aims - that access to justice should be at the heart of legal services policy.

Access to justice

We therefore believe that it is important for the SRA to direct greater energy and resources towards improving access to justice (especially for the most excluded), promoting the wider public interest, and supporting the rule of law in the period 2017 - 2020.

The impact of legal disputes and problems on the public at large is set out in stark terms in recent Ministry of Justice research which concluded that *"around a third of the population experienced legal problems, with certain groups more likely to experience problems than others, particularly those vulnerable to social exclusion (such as individuals on benefits, lone parents, those with a disability, those with low incomes). Around half of problems led to adverse consequences such as stress-related illnesses, physical ill-health, or loss of confidence. Some individuals reported experiencing multiple problems, with certain problem types clustering together, such as those relating to a relationship breakdown, or economic problems."*^{iv}

Regulators, as much as other policy stakeholders, have an important function and duty to advance access to justice, and the role of the legal services sector in improving access. The former Justice Secretary, Michael Gove MP, in 2015 offered the following observations about the sector: *“Despite our deserved global reputation for legal services, not every element of our justice system is world-beating. While those with money can secure the finest legal provision in the world, the reality in our courts for many of our citizens is that the justice system is failing them badly. There are two nations in our justice system...the wealthy, international class who can choose to settle cases in London with the gold standard of British justice. And then everyone else, who has to put up with a creaking,*





outdated system to see justice done in their own lives".^v

Whilst there has never been a 'golden age' for access to justice, developments over the past few years - including restrictions on legal aid, increasing court fees and costs, funding pressures on non-profit advice services and the commercialisation of a sector in which hourly rates commercial law sector hourly rates can now exceed £1,000^{vi} - have come together to create an increasingly difficult landscape for those on low and modest incomes who need legal services to access their rights. Acknowledging the problem is not enough, the SRA needs to be working collaboratively with its stakeholders – and especially with the Law Society – to address all aspects of the access to justice challenge.

Access to justice and the rule of law

As regards the SRA's statutory requirement to support the rule of law, the Supreme Court in its decision in *R (Unison) v Lord Chancellor* [2017] EWCA Civ 935 ("the Unison case") made the direct link between access to justice and the rule of law abundantly clear. In its decision, the Supreme Court declared the current employment tribunal fees as unlawful, ruling that court and tribunal fees must be "reasonably affordable" to all. The judgment discussed the history of the right to access the courts and demonstrated the practical application of the common law right of access to courts in different factual scenarios.

In the Unison case The Supreme Court stated, "*The constitutional right of access to the courts is inherent in the rule of law. The importance of the rule of law is not always understood. Indications of a lack of understanding include the assumption that the administration of justice is merely a public service like any other, that courts and tribunals are providers of services to the "users" who appear before them, and that the provision of those services is of value only to the users themselves and to those who are remunerated for their*

participation in the proceedings..... Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other..... People and businesses need to know, on the one hand, that they will be able to enforce their rights if they have to do so, and, on the other hand, that if they fail to meet their obligations, there is likely to be a remedy against them. It is that knowledge which underpins everyday economic and social relations.^{vii}

Regulated legal services which assist in obtaining remedies, resolving legal disputes and presenting issues before courts and tribunals are therefore important gatekeepers to quite fundamental rights. The Bach Commission's recent final report concludes that "*More and more people are unable to exercise their basic right to justice.*"^{viii}

Lord Justice Briggs, in his government sponsored review of the civil courts concluded, after analysing the various components which combine to render access to the courts as nugatory for many, including the cost of legal services, levels of public awareness of legal rights and the availability of legal aid, that "*the pervasive and indeed shocking weakness of our civil courts is that they fail to provide reasonable access to justice for the ordinary individuals or small businesses*".^{ix}

The SRA as a key regulator needs to take account of this landscape and develop its strategy in a context of policy change and review – including the long anticipated review of legal aid reforms. A joint submission by third sector and legal body stakeholders to the Justice Select Committee, in anticipation of the Government's review of legal aid following the introduction of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO"), concluded "The way in which the current civil legal aid scope rules have been drawn has had a particularly serious and disproportionate impact on disadvantaged and marginalised people





in the UK, who already experience the most obstacles in accessing justice and effectively claiming their rights.”^x

Whilst we respect that the SRA may be limited in the extent that it can take proactive policy positions (or effect policy change) on politically controversial issues of public funding, and political debate such as court costs and the scope of legal aid, there are nevertheless things that it can do as a regulator to give effect to the regulatory objective around access to justice. Such measures might include:-

- encouraging and facilitating pro bono work as part of social corporate responsibility;
- adapting the regulatory environment so that individuals and entities providing social welfare law services can thrive;
- challenging the sector over market gaps and promoting greater transparency for consumers, including clarity of information on diagnostic services (eg half hour free appointments) and pathways;
- developing tools, policies and programmes directed at early resolution and intervention, public legal education and information, and improving legal capability – in much the same way that the Financial Conduct Authority and predecessor body has taken on its brief on financial inclusion and capability;
- using its role as the primary accreditor of the system of qualifications and legal education, training and assessment to ‘design in’ social welfare law capabilities into the requirements of solicitor competencies (the SQE could be an opportunity to do this).

Pro Bono

The SRA’s regulatory objectives do not specifically reference support for pro bono, but we believe that this is implied in the LSA regulatory objectives. We have highlighted in other submissions both real and perceived regulatory barriers to solicitors undertaking pro bono work. In developing work and input into the proposed new SRA handbook (*Looking to the future consultation*)^{xi} we have

stressed the importance of taking a proportionate ‘risk based’ approach to pro bono work and the ‘entities’ (eg non-profit advice charities and clinics) that host pro bono lawyers, recognising that sometimes regulatory costs and compliance can have a chilling effect in respect of lawyers getting involved in new pro bono initiatives. Whilst the Legal Services Act makes no distinction between whether or not a service is provided for remuneration or for free, it is nonetheless important to refer back to the regulatory objectives in the treatment of pro bono work.

So for example in recent consultations we have particularly raised issues concerning:-

- the prohibition on in-house solicitors from undertaking "reserved activities" where those services are "part of [their] employer's business" (see Rule 4.10(c) PFR (and for the primary legislation 15.4 LSA));
- the difficulties in obtaining waivers in respect of regulatory requirements that are unsuited to pro bono models of delivery;
- the multiplicity of regulatory requirements around immigration, consumer and debt advice – all areas where there is a pro bono need – and absence of appropriate passporting arrangements with the SRA;
- clarity over “special bodies” and transitional protection arrangements.

We hope to continue being able to work constructively with the SRA on pro bono practice issues, and to find constructive solutions to these issues.

Addressing market gaps

The legal needs research from the *Civil Justice Survey*,^{xii} and subsequent panel surveys and research, have consistently shown that around at least a third of the population have unresolved civil legal problems at any one time, and that a significant percentage (around half, although the figure varies in different surveys) get no legal





advice at all in the face of multiple law related problems. This is evidence of a supply and demand mismatch – or market gap; put simply there is a lack of services appropriate to the needs of low income consumers, and a problem which recent legal aid cuts and restrictions have accentuated, with the withdrawal of an important public subsidy for the sector in servicing consumers in critical areas of law.

Last year's Competition and Markets Authority (CMA) study into legal services concluded that there needs to be far greater transparency of price and service quality in the legal market, as this is not a market in which consumers feel empowered or are able to shape what's on offer^{xiii} – this is especially true of vulnerable consumers. However the CMA review has only really touched the surface of this problem, given that there is a significant cohort of potential consumers who are not being reached at all.

One of the intentions of the Legal Services Act was to encourage different business models (eg alternative business structures – ABS), and attract new investment and innovation to offer a wider range of competitively and appropriately priced services for low income consumers. However as the CMA review has found, many ABS in the market do not differ greatly from traditional firms and their service offerings; the new regulatory structure has been used to bring non-lawyers into senior management roles and integrate more accountancy services, rather than to develop new business models or access new capital for services to meet unmet needs.

The challenge that the SRA should set itself going forwards should be how to encourage the practice of law and the sharing of legal expertise within a social enterprise context, the 'unbundling' of complex products and processes, and the development of a wider range of models and delivery platforms offered by new technologies and innovations in civil society. In making these points, we do not wish to suggest that the market can meet

all of the needs, and nor do we wish to suggest that there should be any lowering of professional standards, rather the that there is a potential to expand market for legal services for those on low incomes including those in receipt of benefits.

Initiatives and models from other jurisdictions could be drawn on, such as Bearfoot law in Uganda and Faboa in China, where for nominal subscription rates (equivalent of \$2 per month for Faboa) the public has access to online or telephone call-centre legal advice. The Faboa model uses a mix of paid and pro bono advice from over 45,000 qualified lawyers country-wide. Faboa is a commercial business that has over 12 million subscribers. The Law Society's recent report on *Technological Innovation in Legal Services* also suggests greater scope for using technology for streamlining legal services^{xiv} (also a priority for the Government's modernising courts agenda)

Conclusion

In conclusion the key issues we would like to see the SRA's Corporate Strategy 2017-2020 address (with clear commitments) are around:

- greater acknowledgement of the SRA's and, by extension, the profession's stake in improved access to justice and support for the rule of law;
- research and the development of realistic policies directed towards improving access to justice, including policies directed at early resolution and intervention, public legal education and information and encouraging pro bono work;
- working better with others to improve the sector's responsiveness to unmet demand for legal services; and,
- increased awareness among stakeholders of barriers to justice.

In giving access to justice greater emphasis in its Corporate Strategy for 2017- 2020 we urge the SRA to adopt a sixth "Strategic aim" encapsulating the commitments we have outlined above.





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ENDNOTES

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