

Response to the SRA Consultation: LOOKING TO THE FUTURE: FLEXIBILITY & PUBLIC PROTECTION

**A response by
The Chartered Institute of Legal Executives**

September 2016

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Introduction

1. The Chartered Institute of Legal Executives (CILEx) is the professional association and governing body for Chartered Legal Executive lawyers, other legal practitioners and paralegals. CILEx represents around 20,000 members, which includes approximately 7,500 fully qualified Chartered Legal Executive lawyers.
2. CILEx continually engages in the process of policy and law reform. At the heart of its engagement is the public interest, as well as that of the profession. Given the unique role played by Chartered Legal Executives, CILEx considers itself uniquely placed to inform policy and law reform relating to justice issues.
3. As it contributes to policy and law reform, CILEx endeavours to ensure relevant regard is given to equality, social mobility and human rights, and the need to ensure justice is accessible to those who seek it.

Overall Response

4. This latest SRA consultation is part of an ongoing historical and planned review and amendment of its regulatory arrangements, based on its new model of regulation as set out in its November 2015 Policy Statement¹. It seeks to provide focus through the replacement of the single code of conduct by 2 separate simplified codes (one for individuals and one for firms) and it also explicitly references other contextual developments in the sector including the Competition & Markets Authority (CMA) Legal Services Market Study and the existing and future reforms of the regulatory framework and legal services market. The other major element of the proposals consulted on is therefore that which seeks to permit solicitors to compete with 'providers in the alternative legal services market' by allowing solicitors to deliver non-reserved legal services to the public from entities not regulated by the SRA for the first time.

5. The SRA consultation refers to the issue of unmet legal need from the outset, both in the consultation paper and in its Initial Regulatory Impact Assessment. Regulation clearly has a part to play in relation to the health and effectiveness of the market but it is not a panacea. Interestingly, it should be borne in mind that the CMA legal services market study looked at the effectiveness of the market in relation to these elements too and significantly its interim report has concluded that the state of the market and its functioning does not justify a full-scale market investigation. In the context of that study, others have commented on the difficulty of defining what is meant by unmet legal need and of drawing conclusions from the behaviours of those seeking to resolve particular issues, ie seeking legal advice is a choice that may or may not be appropriate to an issue and the choice can therefore be to resolve it by other means. Whilst costs and availability are major factors, there are also many other sometimes complex factors at play.

6. There are no doubt access to justice issues that need to be addressed but regulation can only make a contribution to such complex problems rather than fix them completely. Reduced legal aid, increased court fees are examples of such issues that cannot be cured by regulatory change alone, for example. Therefore,

¹ 26 November 2015 - <http://www.sra.org.uk/sra/policy/regulation-reform.page>

the SRA should be realistic about the contribution that unregulated providers can make to solving access to justice problems and therefore the effect of permitting solicitors to practise from the unregulated sector. The CMA report rightly speaks of information provision to consumers as a key factor in them accessing the right services and arguably the need to enable them to make the right decisions about the optimum manner to resolve their issues. This includes understanding the differences between levels and types of that provision; this is critical and care will have to be taken not to simply blur the lines between services and providers that makes this harder. If anything, greater definition and clarity around specialism and specific services is required.

7. CILEx supports proportionate, right touch regulation that makes compliance easier, is outcomes focused, costs less and does not stifle innovation. However, those changes should not threaten or undermine consumer protection and they should be clearly understandable to consumers. Therefore, whilst there is some logic in the SRA assertion that the fact that unregulated providers could employ solicitors to deliver unreserved legal services, it may not be immediately apparent to consumers what the tangible value and benefits of that arrangement is (should a firm in that scenario choose to tell consumers). 'Drawing confidence from their professional status' may be one thing, but consumer confidence in using such a firm in such a way does not necessarily deliver real or demonstrable value to the consumer.
8. Similarly, there are real benefits to be derived from simpler, clearer regulation. CILEx supports the concept of targeted regulation based on the specialism of the lawyer and the nature of the services being delivered. Such changes, though, have to demonstrate that they are genuinely better than the previous regime. Not only that, but the changes should not threaten current rights and protections either.
9. Arguably, the SRA's proposals unfortunately do just that in relation to Legal Professional Privilege (LPP)². The proposals suggest that clients will not have the

² Paras 149 - 154

benefit of LPP in relation to advice received from a solicitor working from an unregulated entity as that advice, though from a solicitor, would be deemed to come from his or her unregulated employer. Such an arrangement, whilst apparently having some benefit for consumers in terms of access and cost, does however have the potential to cause confusion and risk. Consumers can have confidence that LPP attaches to advice given to them by lawyers³ but the SRA reforms risk erosion of this assurance by creating a tier of solicitor lawyers to whom it does not apply.

10. And this is just one aspect of where, potentially, the proposals risk creating parallel systems and roles for solicitors: consumers attracted to seeking services from solicitors in the unregulated sector not only may not have the benefit of LPP but also may find that the solicitor does not carry the usual level of professional indemnity insurance (PII) cover⁴ (though they will be expected to make this clear to clients⁵) nor will it be as straight forward for the SRA to intervene if things go wrong⁶, notwithstanding intervention is still possible in relation to a solicitor's individual practice.

11. This therefore represents a material difference in the professional status of some, but not all, solicitors. Unlike other lawyers, such as Chartered Legal Executives, who have operated under more targeted or outcomes-focused regulatory models, consumers may be confused by the imposition of new and variable standards for an already established brand such as solicitors. For consumers of services provided by Chartered Legal Executives, the public can be assured that they are trained in a particular specialism and are limited to practise in those areas; an important aspect of consumer protection. Whereas solicitors are trained and able to practise as generalists, and so changes to their regulatory standards that in effect remove certain consumer protections could pose increased risks. The confidence a consumer can have in a solicitor's professional status in an

³ To be clear the Supreme Court case *R (on the application of Prudential plc) v Special Commissioner of Income Tax* [2013] UKSC 1; [2013] 2 AC 185 (23 January 2013) cited at para 149 of the SRA consultation paper clarified that a qualified lawyer to whom LPP applied meant a solicitor or barrister or chartered legal executive

⁴ Paras 138 – 141; this includes access to the Compensation Fund

⁵ Para 115

⁶ Para 161

unregulated entity is not therefore going to be the same as one in a regulated structure. This will extend to other professional obligations too; the solicitor as an individual will remain bound by them but the unregulated entity will not and will therefore be able to circumvent them. As well as creating confusion for consumers, this may give unregulated firms employing a solicitor a competitive advantage at the expense of consumer protections. And yet, the best interests of the consumer would be served by ensuring consumers 'get what they pay for' ie clarity and certainty around the different roles and obligations of the various providers in the market.

12. Finally, there may be a risk that even greater deregulation occurs through these proposed changes: if enough of an incentive is truly created for unregulated providers, it is conceivable that regulated firms will seek to offload all their unreserved legal activities to unregulated vehicles. It is not clear what the impact of any such rush would be either on firms themselves or on the consumers but it is possible that some of the confusion and risk transfer cited above would be exacerbated.

Specific questions/answers

13. Building on the Overall Response to the issues and themes raised by the SRA's consultation above, CILEx addresses a number of the specific questions contained within it, below.

Question 1: Have you encountered any particular issues in respect of the practical application of the Suitability Test?

14. There are a number of dual qualified solicitors and Chartered Legal Executives who we would recommend should be directly consulted on any changes proposed following this review.

Question 2: Do you agree with our proposed model for a revised set of Principles?

15. As stated above, CILEx believes that there are real benefits to be derived from simpler, clearer regulation. However, if it is to truly mean better regulation, simpler rules need to be properly understood in order to be complied with. For example to 'uphold the rule of law and the proper administration of justice' goes to the heart of what it means to be a lawyer and explanation of what compliance with that principle really looks like may be needed. CILEx's Code of Conduct, for example, provides definitions and explanations of what is expected of members. The content of 'support package'⁷ of guidance and toolkits will therefore be crucial.

Question 3: Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

16. CILEx agrees that the drafting of this principle looks sound but, again, 'the devil will be in the detail'. Understanding how to comply with the Principles will be key and to that extent, it will be easier to judge that once the SRA's proposed revised Enforcement Strategy is seen.

Question 5: Are there any specific areas or scenarios where you think that guidance and/or case studies will be of particular benefit in supporting compliance with the Codes?

⁷ Para 52

17. The need for appropriate detail to aid compliance is critical. Therefore, a set of expectations or case study scenarios in relation to each of the revised principles is likely to be required. When the SRA previously changed its 'separate business rule'⁸, much clarity was needed for practitioners to understand what was actually possible for them to do in practice; the same will be true here in relation to permitting solicitors to practise from unregulated entities. There have also been many calls for greater clarity on what compliance looks like in relation to acting with 'independence'⁹ and case studies around that will be essential following the introduction of a shorter Code.

Question 6/10: Have we achieved our aim of developing a short, focused Code for all solicitors, wherever they work which is clear and easy to understand?

Question 7/11: In your view is there anything specific in the Code for all solicitors that does not need to be there?

Question 8/12: Do you think that there anything specific missing from the Code for all solicitors that we should consider adding?

Question 13: Do you have any specific issues on the drafting of the Code for Solicitors or Code for Firms or any particular clauses within them?

18. As stated above, the revised Codes for individual solicitors and firms are certainly shorter and more focused but it remains to be seen if they, and the accompanying 'support package' of guidance and toolkits are sufficient to make compliance clear to understand. For some more risk-averse firms who are not used to operating under a regulatory regime with fewer prescriptive rules, there is a risk that they will fall back on the certainties of operating under the 'old regime' rather than risk censure in the future from the SRA for an incorrect interpretation. It is possible therefore, subject to seeing the other related amended materials, that more should be added to the Codes.

⁸ November 2015

⁹ For example following publication of the SRA's report 'Independence, Representation and Risk' [Dr Stephen Vaughan and Claire Coe, 2015

Question 16: What is your view of the opportunities and threats presented by the proposal to allow solicitors deliver non-reserved legal services to the public through alternative legal services providers?

19. As stated in our overall response above, that whilst it is possible that this new permitted arrangement enables another avenue to access the services of solicitors there are risks associated with it. Unlike other lawyers, such as Chartered Legal Executives, who have operated under more targeted or outcomes-focused regulatory models, consumers may be confused by the imposition of new and variable standards for an already established brand such as solicitors. For consumers of services provided by Chartered Legal Executives, the public can be assured that they are trained in a particular specialism and are limited to practise in those areas; an important aspect of consumer protection. Whereas solicitors are trained and able to practise as generalists, and so changes to their regulatory standards that in effect remove certain consumer protections could pose increased risks. The confidence that consumers draw from their 'professional status' could be illusory if it is not clear that the solicitor in the unregulated entity does not have the same level of PII cover, does not have LPP attached to the advice he or she gives and is not as capable of being intervened against in the event of problems as a solicitor in a regulated firm. Any potential 'quality control and brand enhancement'¹⁰ would not be real. In addition, it is possible that firms will embark on greater deregulation by hiving off their unreserved legal services to an unregulated body if they feel unregulated providers have a commercial competitive advantage over them, which could be at the expense of consumer protections. The confidence in solicitors' professional status in those circumstances could be dissipated yet further. There is also the risk that the solicitor's role will actually be that of Practice Manager who will then delegate the work to unqualified staff. This will lead to increased personal risk to the solicitor with little protection in the event of fraud or negligence by third parties.

Question 19: What is your view on whether our current 'qualified to supervise' requirement is necessary to address an identified risk and/or is fit for that purpose?

¹⁰ Para 85

20. CILEx Believes that the SRA's current 'qualified to supervise' requirement is fit for the purpose of addressing an identified risk.

Question 20: Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

21. CILEx believes that it is important for there to be as much transparency and clarity as possible around the client protections available to consumers. This is arguably even more the case here in the context of the other suggested reforms where there is the capacity for a lack of clarity of the status of the solicitor and associated protections he or she carries to be exacerbated. However, as the SRA rightly acknowledges, it has no power over unregulated entities so there is an immediate challenge to requiring the provision of details information about client protections on a solicitor operating from an unregulated firm.

Question 21: Do you agree with the analysis in our initial Impact Assessment?

Question 22: Do you have any additional information to support our initial Impact Assessment?

22. As stated above, the Initial Regulatory Impact Assessment references the issue of unmet legal need, and whilst regulation clearly has a part to play in relation to the health and effectiveness of the market, it is not a panacea. Also, there is little in the assessment that seeks to gauge the effect, particularly on smaller firms, of stripping out of most prescription within the Code. The potential risk to consumers around the acknowledged reduction of consumer protections is similarly not tackled in detail.

Question 23: Do you agree with our approach that solicitors working in an alternative legal services provider should not be allowed to hold client money in their own name?

23. CILEx agrees that client protection is best served by not permitting solicitors working in alternative legal services providers to hold client money. This would be an example where the proposed Third Party Managed Account (TPMA) could be a successful alternative, as proposed in the SRA's Accounts Rules Review.

Question 24: What are your views on whether and when in house solicitors or those working in Special Bodies should be permitted to hold client money personally?

24. CILEx believes that in-house solicitors or those working in Special Bodies should not be permitted to hold client money personally. The level of risk for a solicitor in that position would be high, perhaps especially in relation to fraud or negligence perpetrated by others within the organisation. This in turn risks greater exposure for clients and the clients of such bodies tend to be disproportionately poorer and more vulnerable.

Question 25: Do you agree with our proposal that the SRA Compensation Fund should not be available to clients of solicitors working in alternative legal services providers? If not, what are your reasons?

25. CILEx agrees that clients of solicitors outside of authorised firms will not be able to make a claim on the Compensation Fund in any circumstances. This ensures the integrity of the client protections that are part of the framework for regulated entities as distinct from unregulated over which the SRA have no control. That said, this is another aspect to what we refer to above¹¹, namely there is the potential for confusion amongst consumers as to the level of protection they receive from a solicitor as a regulated individual; they would certainly be exposed to more potential risk. The level of the potential detriment is not covered in the Initial Regulatory Impact Assessment..

Question 26: Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?

26. CILEx sees real risk in removing the regulatory requirements on individual solicitors to hold PII cover. Whilst the need/extent to ensure employees are adequately indemnified is a firm's decision in the scenario in which a solicitor is practising from an Alternative Legal Services Provider, consumers will still assume that the solicitor will hold the usual level of cover. The proposal has the potential to create consumer confusion, reduce levels of protection and heighten risk.

¹¹ Para 10