



Bar Council response to the Looking to the future- flexibility and public protection consultation paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Solicitors' Regulation Authority consultation paper entitled "Looking to the future- flexibility and public protection".¹
2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Overview

4. The Bar Council does not propose to make substantive comments on the proposed new Principles or the two Codes of Conduct, with the exception of an observation on the Principles and some general concern about the approach being adopted.
5. The Bar Council has significant concerns about the proposal to allow solicitors to practise as such through bodies which are not regulated by the Solicitors' Regulation Authority (SRA), on a basis which is different from that on which other solicitors operate, because of the likely consequences for consumers and for the reputation and of the legal profession, both of which are matters of public interest. We consider that the possible benefits of the proposal are outweighed by the likely disadvantages.

Questions 1- 15:

¹ Solicitors' Regulation Authority (2016), Looking to the future- flexibility and public protection, accessible [here](#).

6. The Bar Council does not propose to comment on any of these questions, except in two respects. Although we have significant doubts as to whether the promulgation of a Code in the form proposed is the most economically efficient, effective and useful way in which to proceed with the regulation of solicitors, we leave it to those who will be subject to it to comment.
7. Our first comment is to note with concern that not all of the professional principles identified in the Legal Services Act 2007 (“LSA”) have been included in the proposed Principles, in view of the description of what the Principles represent in the draft Code. The explanation for this omission cannot readily be identified from the consultation paper.
8. Our second comment is that while simplicity and brevity have their value, so too does a Code of Conduct which records both those things which are required, and those which are unacceptable, as part of professional practice as a solicitor. The proposal appears to involve limiting the approach only to high-level principles. To leave such judgments below high level principles to be identified and made anew by individual solicitors every time an issue arises is likely to be unhelpful and economically inefficient, and may allow or encourage a few to justify unethical behaviour to themselves. This is not just a question of simplifying enforcement: it is a question of what is ethical. Enforcement deals with what is to happen only once something unethical has occurred. The two should not be confused by the SRA, or be allowed to become confused in the minds of others.

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

9. The Bar Council has grave reservations about this proposal as it stands in a number of respects; specifically, the loss of important protections for clients/consumers, the risk that this will create a two-tier market among regulated lawyers, and the overall threat to the reputation of the legal professions. In summary, we consider that advice or other legal services provided by a regulated lawyer, practising as such, ought always to involve (1) personal responsibility being taken by an individual lawyer for those services and for the lawyer’s own actions and decisions in the course of providing them (as the SRA proposes), but also (2) the same client/consumer protections – provided either by that individual lawyer or by the organisation through whom that lawyer is providing those services – whatever the circumstances. Those protections should include legal professional privilege (“LPP”), insurance, the availability of the compensation fund (in those situations not covered by insurance), and the avoidance of conflicts of interest.
10. The SRA’s proposals, as the consultation clearly acknowledges, would deny several key protections to clients of solicitors practising in unregulated firms. As well as expressly being ruled out of the compensation fund, they would no longer be able to rely on the minimum (or, indeed, any) insurance requirements that have been laid

down for solicitors. In addition, those clients who contract directly with the firm are likely to lose the right to LPP, despite receiving advice from a qualified solicitor, and may be exposed to risks of prejudice due to conflicts of interest with other clients of the solicitor's employer (including breaches of confidence). We believe the weakening of these vital client/consumer protections will work against the best interests of clients and consumers, will blur the lines between the regulated and unregulated sectors, is unlikely to be understood, and is likely to do real harm to reputation of the legal professions as a whole.

11. The SRA takes the view that, by allowing solicitors to practise in the unregulated sector, it is "adding to the protections available to consumers" in that sector because of the regulatory requirements and sanctions that attach to them as individuals (Paragraph 112). The consultation asserts that consumers "may draw confidence" from knowing that these firms employ qualified solicitors (Paragraph 15). The Bar Council agrees, but suggests that this confidence would in significant respects be based on the mistaken assumption that all the same protections will apply to clients of these solicitors as apply to clients of those who practise in regulated firms, which would not be the case under these proposals.
12. The Bar Council considers that compulsory insurance is an essential requirement of for a regulated professional who provides legal services. This is necessary both for the protection of the public and the upholding of the professions' reputation. We do not agree with the argument made in the consultation that, because solicitors may find it difficult to separate out their own practice from the wider firm, it is therefore acceptable to leave it to their discretion whether to have insurance at all. Rather than remove the requirement for compulsory insurance, solicitors working in such an environment (if that were to be permitted) should be required to ensure that they operate in such a way that clients are clear about when they are being provided with services by a solicitor and when they are not. If a satisfactory distinction cannot be made, then the right response (proportionate to the risks involved) is for the solicitor not to provide services as a solicitor in those circumstances.
13. The requirement on barristers, whether self-employed or employed, is that they "must ensure that [they] have adequate insurance.... which covers all the legal services [they] supply to the public" (at rC76 of the BSB Handbook). The Bar Council respectfully suggests that the same rule should apply to all solicitors practising as such. This would ensure a consistency in approach to public protection that would help promote public understanding.
14. The SRA seeks to mitigate the risk of false assumptions and consumer confusion by requiring individual solicitors, as well as regulated firms, to take responsibility for making information about consumer protections available. We suggest that this is unrealistic, especially in relation to the most vulnerable or inexperienced consumers of legal services. People tend not to realise that they need consumer protection until something has gone wrong, which is unpredictable. The availability of proper protections must be flagged up at the start. There will inevitably be a very real risk

of many clients believing that they do not need the additional protections because nothing will go wrong; but experience shows that it is inevitable that, in some instances, things *will* go wrong. Similarly, doing one's best to ensure that clients understand is not a guarantee of understanding, and is not a proper substitute for providing a protective mechanism in the event of a later breach of duty.

15. Inexperienced consumers are particularly likely to be looking for the cheapest option, if they are ineligible for legal aid, which the unregulated sector would offer. It would be especially unfair and divisive if such consumers received less protection than those able to afford a more expensive, regulated firm. Those likely to suffer disadvantage are especially likely to be from disadvantaged groups such as BAME communities. The proposals would entrench a two-tier legal service and would be iniquitous.
16. Evidence to support this includes the interim legal services market study by the Competition and Markets Authority, who found in their qualitative survey of individuals that "most... assumed that their legal services provider was regulated and had not checked their regulatory status before engaging them; others did not know what it might mean for a legal services provider to be regulated."²
17. We also question that part of the SRA's justification for removing these protections which suggests that it will reduce costs. We doubt there will be a significant saving and are concerned that any saving will be out of proportion to the risks. We would make four observations, in particular:
 - a. Solicitors in unregulated organisations will face an additional, upfront cost in advising prospective clients about the protections available to them if they instruct that solicitor compared with the greater protections of instructing another solicitor, and in ensuring that the potential clients have understood this. The organisation may or may not choose to pass that cost on to clients; either way, it will be a cost to the provider which will have an effect on the cost or viability of the service. It may not be significant in those cases in which substantial services will be supplied at a cost which justifies it, but it is likely to be significant as a proportion of the overall cost of providing the service where the service is relatively modest. In the latter type of situation, there is a risk of consumer detriment as a result of commercial pressure on the solicitor to keep the level of explanation to a bare minimum.
 - b. More significantly insurance costs would be expected to reflect risk. If the SRA is right that the risk of claims against solicitors providing only non-reserved services is significantly lower than in the case of reserved services, then the cost of insurance for non-reserved activities alone would be expected to be significantly lower, which would in itself reduce the cost of compulsory insurance. This assumes that insurance providers would be willing to

² Competition & Markets Authority (2016), Legal Services Market Study: Interim Report, page 59. Available [here](#).

provide insurance in this market and were able to do so profitably: if not, then that would undermine several of the SRA's own assumptions. If the SRA is wrong about the risks presented by non-reserved services, then there would be a clear need for an obligation to insure. Either way, we do not agree that any cost benefits that might flow from the removal of an obligation to insure outweigh the disadvantages in terms of consumer protection. We are also concerned at the risk to the reputation of both the profession and the effectiveness of its regulation – with a consequent risk to consumer/client confidence in both, and in our system of justice – from clients being faced with uninsured claims against a solicitor practising as such.

- a. The proposal takes no account of the fact that advice given in a situation which may relate to reserved activities, or which may in due course lead to the need for reserved activities, may itself be negligent, leading to harm to a client. We question the wisdom of drawing a distinction between the protections available for these different activities of a practising solicitor. This too presents a risk to clients and consumers, as well as to the profession and its regulation. It is also likely to lead to added confusion on the part of both clients/consumers and solicitors.
 - b. One important advantage of insurance is that it can provide a remedy for a client in the event of the insolvency of the insured solicitor or organisation, including (with some exceptions) in the event of fraud. In an excepted fraud situation, the compensation fund may step in. It is not easy to see how clients will be protected in these events if there is no compulsory insurance requirement, and no possibility of a claim on the compensation fund.
18. Furthermore, those clients in the greatest need of transparency will be those who contract with the unregulated firms, since they stand to lose the protections of LPP and the SRA's conflicts regime, in addition to the mandatory insurance requirements and access to the compensation fund. If, owing to commercial incentives, solicitors working in these entities were to come under pressure to do the bare minimum, or to present this information in a vague or misleading way, then it is not clear what the SRA sees as the remedy for this, or as the remedy for any adverse consequences suffered by clients. In this way, the SRA proposals risk creating a legal services landscape in which the most vulnerable clients receive the least protection, and in which there are not enough safeguards in place to prevent a race to the bottom between the least scrupulous unregulated providers.
19. The Bar Council is not convinced that simply restricting the use of the term "solicitor firms" is sufficient to ward off potential consumer confusion and the risks to the reputation of the profession and its regulation. The unregulated entities will presumably still be able to call themselves law firms, lawyer firms, or legal firms, and to describe themselves as employing solicitors. We think it is unrealistic to expect consumers to appreciate the distinction.

20. The Bar Council agrees that “the solicitor brand...will be strengthened if the reputation for excellence is matched by actual consumer experience” (Paragraph 84). However, the consultation offers no assessment of the likely impact on that experience when consumers receive less protection as a result of the new approach. The Bar Council does not accept that evidence of unmet legal need is evidence of a demand for less regulated, hence less protected, services.

Question 17: How likely are you to take advantage in the greater flexibility about where solicitors can practice as an individual or as a business?

Question 18: What are your views about our proposal to maintain the position whereby a sole solicitor (or REL) can only provide reserved legal services for the public (or a section of the public) as an entity authorised by the SRA or another approved regulator?

21. That Bar Council does not propose to comment on either of those questions.

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?

22. The Bar Council has concerns about the appropriateness of newly qualified solicitors being able to set up as sole practitioners. It is not clear how the SRA would assess their skills and knowledge in the absence of any post-qualification experience. Retention of prescriptive requirements, even in a revised form, in relation to this specific category would therefore seem to be a sensible approach.

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

23. Yes. The Bar Council believes greater transparency is in the interests of consumers. However, this merely enhances the risk of a two-tier market, given that there can be no equivalent requirement in the case of unregulated alternative providers to explain which protections they do not offer.

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?

24. The Bar Council does not propose to comment on these questions beyond what it has already said above.

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?

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?

25. The Bar Council does not propose to make substantive comments on these questions, but does have concerns about the proposed changes to the definition of “client money” in the separate consultation on the Accounts Rules running at the same time as this one. This would now exclude counsel’s fees from that definition, meaning they would instead be treated as the firm’s money. The Bar Council does not agree with this dilution of counsel’s ability to secure payment in cases of work already done, and we have responded to Question 2 of the Accounts Rules consultation accordingly.

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?

26. The Bar Council does not propose to comment on this question beyond what it has said above.

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

Question 27: Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?

27. Yes. For the reasons given in its response to Question 16 above, the Bar Council strongly disagrees with this proposal.

Questions 28 – 33: Do you think that we should retain a requirement for Special Bodies to have PII when providing reserved legal activities to the public or a section of the public?

28. The Bar Council does not propose to comment on these questions beyond what it has said above.

Bar Council
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For further information please contact
Ellie Cumbo, Head of Legal Affairs, Practice and Ethics
The General Council of the Bar of England and Wales
289-293 High Holborn, London WC1V 7HZ
Direct line: 02017 611 1319
Email: ecumbo@barcouncil.org.uk

