

SRA response

Development of authorisation to practise arrangements, Bar Standards Board consultation

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Introduction

1.

The Solicitors Regulation Authority (SRA) is the independent regulatory arm of the Law Society for England and Wales. We regulate individual solicitors, certain other lawyers and non lawyers with whom they practise, solicitors' firms and their staff.

2.

We welcome the opportunity to take part in this consultation, and have set out some comments below.

SRA comments

Q1. Do you agree with the arrangements described in Proposal 1? Do you have any suggested alternatives and/or improvements to the proposal?

3.

We agree with the proposed arrangements – the completion of an annual renewal form that draws together all of the various authorisation details should be supportive toward the Bar Standards Board (BSB)'s regulatory functions. We note the BSB's conclusion that the current arrangements described on pages 10 to 14 of the consultation paper (monitored by different mechanisms at different times of the year) are no longer fit for purpose, and we agree that Proposal 1 represents a suitable approach toward improving the renewal of authorisation process.

Q2. Do you think that it is reasonable for barristers who do not comply with the practising requirements in a timely manner to no longer be authorised to practise (and therefore be removed from the Barristers' register)?

4.



It is essential that the Barristers' register shows only those practitioners that have satisfactorily completed the annual renewal process. The BSB is right to conclude (at paragraph 51 of the consultation paper) that "...it is important that members of the public are able to look up barristers on the Register and feel confident that those barristers are currently permitted to practice by their regulator." If barristers that did not complete their practising requirements within the required timeframes were allowed to remain on the register and authorised to practice, the public could have no confidence in the reliability of the register or the regulated status of their barrister.

Q3. Do you agree that it is not necessary to have an appeal mechanism against withdrawing authorisation to practise and removal from the Register?

5.

We support the reasoning set out by the BSB at paragraph 64 of the consultation paper, and therefore agree that an appeal mechanism should not be required.

Q4. Is it appropriate to have a one month grace period?

6.

The inclusion of a short grace period should allow for exceptional circumstances to be identified and accounted for.

Q5. Do you agree with the arrangements described in Proposal 2? Do you have any suggested alternatives and/or improvements to the proposal?

7.

We have no specific comments on the proposed arrangements, although we agree that the BSB is right to have structured the proposal around the requirement to protect the interests of barristers' clients.

Q6. Do you think that Proposal 2 provides adequate regulatory safeguards for users of legal services?

8.

The safeguards described seem appropriate.

Q7. Do you think that non-compliance with the CPD requirements should result in non-authorisation to practise?

9.



Proposal 1 describes a scenario where compliance with the CPD requirements is a pre-requisite of being authorised to practice (alongside the other requirements set out at paragraph 54 of the consultation paper), and as such we believe completion of CPD requirements should hold appropriate weight in determining each individual practitioners' suitability to practice. We agree overall with the approach set out at paragraph 72 of the consultation paper.

Q8. Do you think that noting on a barristers' individual entry on the Register that compliance with the CPD requirements is outstanding would provide more incentive to comply with requirements in a timely manner?

10.

The realisation that cases of non-compliance will be noted on the Register may well prove to be an incentive for barristers to comply with the CPD requirements.

Q9. Do you foresee any problems in the proposals for the administration of barristers' practice? Will they present difficulties for chambers or employers? If yes, how could any problems or difficulties be resolved?

11.

We have no specific comments.

Q10. Do you agree that the transitional arrangements under rule 1102 should be brought to an end?

12.

We do not have a particular view on the management of the rule 1102 transitional arrangements.

Q11. Do you agree that no other changes need to be made to the rights of employed barristers in categories 2(b) and (c) above?

13.

We have no comments on this.

Q12. Do you agree that if individuals have not provided the necessary information to allow the BSB to determine their level of authorisation, it should be assumed that



*they are not authorised to exercise a right of audience?
If not, please explain why.*

14.

We agree that the BSB is right to try and address the anomaly referred to in paragraph 90 of the consultation paper, and the proposed approach may represent a suitable way of achieving this.

Q13. Do you agree that barristers' authorisations and permissions should be listed on practising certificates and on the Barristers' Register? If not, please explain why.

15.

We agree that information relating to barristers' authorisations and permissions should be publicly accessible, and therefore should form part of the Barristers' Register.

Q14. Do you agree that employed barristers should only be authorised to conduct litigation if they comply with all the requirements to do so?

16.

It is important for consumers to have clarity about the services that a particular barrister can provide them with; as such we agree that the BSB should require members of its regulated community to demonstrate they meet all the requirements for conducting litigation.

Q15. Do you agree that all barristers with practising certificates should be authorised to provide reserved instrument activities, probate activities and the administration of oaths? If not, what should be the basis for deciding which barristers should be authorised to carry out those activities?

17.

As the BSB itself confirms in paragraph 93 of the consultation paper, it has very little information on the extent to which barristers exercise these rights and has no evidence of any problems with the current arrangements. As such there may be scope to continue the existing arrangements for now but to also seek information from the regulated community to build a fuller, more informed picture of the take-up by barristers of these rights.

Q16. Do you agree that all barristers with practising certificates should be authorised to provide immigration advice and services? If not, what should be the basis for



deciding which barristers should be authorised to carry out those activities?

18.

As per our comments above, the BSB might usefully seek information from the profession regarding immigration services to develop an overview of the provision of such services by barristers. This information should help the BSB to justify a decision either way to authorise all barristers to provide these services, or to authorise on a case-by-case basis.

Q17. Do you think additional rules are needed to regulate these activities?

19.

We have no specific comments.

Q18. Is clearer guidance on holding out and requiring a client or potential client to sign a disclaimer in a prescribed form an adequate safeguard to ensure that members of the public are properly informed of the status of barristers who are not permitted to practise?

20.

The provision of clearer guidance to members of the BSB's regulated community who are not permitted to practice will be particularly important in addressing the significant issues described on pages 27 - 29 of the consultation paper. We note the confusion experienced by barristers themselves regarding this issue (paragraph 109 which states "...the Bar Council's ethics helpline...confirmed that they regularly receive calls from barristers who are unsure of what they are entitled to do and how they can describe themselves.") There is clearly scope for education and support from the BSB to address these problems, and until barristers themselves are comfortable with the definitions it is inconceivable that a consumer could be expected to understand them. We therefore agree that clear guidance is required.

21.

We believe that clients and potential clients must be armed with sufficient meaningful information to enable them to make an informed choice about their legal service provider. Our comments on the use of a client disclaimer to ensure there is transparency of this information are set out below.

Q19. If you disagree, please explain why and provide details of alternative proposals to protect the public in these circumstances.



22.

Please see our response to question 20.

Q20. Do you agree that the disclaimer should only be given when an individual has reason to believe that the client knows they are a barrister? If not, please explain why.

23.

If it is decided that a disclaimer system is to be used, we believe it is appropriate for all clients of that barrister to be required to sign such disclaimers. It seems potentially problematic to leave the decision to the barrister as to whether they believe a client is aware or not of their status, and is surely open to even greater confusion on the part of both the professional and the client as to whether or not a disclaimer is required. We note the points made in mitigation at paragraphs 129 and 130 of the consultation paper, but overall we still consider it more desirable for all members of the public to be provided with the information they need to make well-rounded and informed choices about their legal services providers. Restricting the disclaimer system to only sophisticated or openly-inquisitive clients, and at the discretion of the barrister themselves, seems counter-intuitive to this.

24.

On a further point, we note the commitment at paragraph 131 of the consultation paper to extend the Barristers' Register so that it explains why those that are not authorised to practise are not shown, and then at footnote 26 to consider developing a register for barristers who are not permitted to practise. We endorse this approach, and believe it essential that members of the public are able to access information about all individuals and organisations falling under the BSB's regulatory reach.

Q21. If you consider that the disclaimer should be given in all cases when a barrister without practising rights provides legal services to the public, is there a risk that this would undermine the prohibition on holding out as a barrister and if so how could this risk be mitigated?

25.

We do not agree that clients should be provided with information regarding a non-practising barristers' status based on that barristers' perception of the client's knowledge. The scenarios described at paragraph 119(c), which lists other titles that may be used besides 'barrister', seem logical and we do not agree it follows that non-practising barristers would then have to



mislead a client about their regulated status or qualifications, as paragraph 119(c) suggests. The various approved regulators are responsible for regulating a broad range of lawyers and organisations across England and Wales, all of which use different titles to describe their business and will have different regulatory responsibilities; we do not see that non-practising barristers are in essence in a significantly different position when compared to lawyers from other regulated communities, in having to describe themselves and what they do in a particular way to their clients.

Q22. Do you agree with the above proposals for revised arrangements for barristers registered under paragraph 206 or 808 of the Code? If not, why not and what alternative proposals would you suggest?

26.

We have no comments on the proposed revisions.

Q23. Do you agree that the arrangements described in paragraph 137 are an adequate safeguard to the public? If not, please explain why and give alternative suggestions.

27.

We agree that the arrangements seem appropriate, given the client protections that apply to non-practising barristers working for regulated organisations. We would argue again, however, that all those using legal services have a right to be informed about the status and remit of their legal services provider, not just those that may choose to enquire; full transparency of this information is essential to support people to make informed choices about their legal services providers, and it should not be restricted simply to circumstances where "...it becomes known that the individual is a barrister" (paragraph 137).

Q24. Do you agree that a barrister who are not permitted to practise should be allowed to describe themselves as a "barrister who is not permitted to practise" to their employer or potential employer only?

28.

We have no comments on this proposal.

Q25. Are any of the proposals likely to have a greater positive or negative effect on some groups compared to others? If so, how could this be mitigated?

29.

The proposal to allow non-practising barristers providing legal services to the public to judge whether or not a particular client needs to sign a disclaimer may have some potential to create negative impact for some groups. Different people will communicate and interact with their legal services provider in different ways, and while some people may not directly demonstrate behaviour to suggest they were inquisitive about their provider's regulated status / qualifications, this should not mean they are assumed to not warrant being provided with such information.