

# **Enabling innovation: A new approach to waivers and developing the SRA Innovation Space**

## **Consultation response**

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March 2018

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## Background

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1. In December 2016, we consulted on proposals to change the way in which we consider solicitors' and firms' requests to waive some of our regulations. We also published criteria and guidance for firms that wished to offer services in our Innovation Space. This is a safe space that allows firms to test new and innovative legal services. Through it, we are also able to assess the impacts of the innovations and observe where our current rules could be restricting innovation.
2. We are committed to helping existing legal service providers develop their businesses in new ways, and to supporting new organisations that are thinking of delivering legal services for the first time. We want to allow greater flexibility for solicitors and freedom for firms to innovate, compete and grow. We believe this will help to improve access to quality legal services at affordable prices.

## Consultation responses

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3. We received seven formal responses from a limited range of stakeholders. These included the Law Society, other solicitor representative bodies, firms and other organisations. Replies were received from existing law firms as well as newer entrants to the legal services market with more pioneering business models.
4. Overall, respondents were supportive of the policy's aim and the Innovation Space proposals. Many said the potential benefits of innovation, particularly for groups of people who do not currently access legal services, outweighed any potential risks. However, many respondents said that any significant consumer protection risks needed to be adequately addressed.
5. There were areas where some respondents had concerns and asked for assurances about how these could be mitigated. These were:
  - the potential for consumer detriment
  - the broader decision-making criteria in the new waiver policy, leading to uncertainty and inconsistent outcomes.
6. Some respondents asked for further detail on some areas of the proposals to help them fully understand the implications and effects of the proposed changes, if implemented.
7. One respondent thought that implementing the proposals could be perceived as deregulation "through the backdoor". Consistency in decision making was, therefore, of paramount importance.
8. Most respondents saw advantages in publishing the types of waivers we approved, but they urged caution in the level of detail we made public. There was a suggestion that new ideas should be protected as they would be

commercially sensitive. Publishing too much detail could inhibit some providers from applying for a waiver, as their novel approach would be made available to all.

9. On formalising the Innovation Space, respondents strongly felt our proposals to apply consistent assessment criteria, decision-making and monitoring processes should be simple, clear and transparent. Several respondents thought more information was required on how we would apply the Innovation Space criteria. This could then provide more evidence to potential innovators and to help prevent inconsistent outcomes for firms and users of legal services. It was generally recognised that it would be necessary to balance:
  - the potential benefits of allowing genuinely important and different approaches to delivering legal services
  - the need to protect people
  - the requirement to treat applications fairly and consistently.

## Our comments and next steps

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10. We plan to proceed with the new waivers policy. Our guidance on granting a waiver can be found at annex 1. We will aim to launch the new policy in late spring and will update our decision-making guidance on waivers when we launch the policy. We also plan to introduce our proposals for formalising the Innovation Space. The assessment criteria for the Innovation Space can be found at annex 2.
11. We will provide information that supports the introduction of the new waiver policy and formalisation of the Innovation Space. This is to help those applying to understand what sort of information they need to provide in support of their applicants.
12. Unless it is determined that it is inappropriate or unnecessary to do so, we will also publish all waiver decisions. Our proposed approach to publication can be found at paragraph 4 of annex 1.
13. We know care must be taken when publishing new and innovative ways of delivering legal services to help others. We do not want to make people reluctant to apply for a waiver or to use the Innovation Space if they think commercially sensitive aspects of their proposals could be shared with others. We will be sensitive to the needs of the applicant and will discuss with them:
  - what should be published
  - in what detail
  - when it will be made available.
14. To make sure we apply the new waivers policy fairly and correctly, we will build in a set of consistency checks. Our approach to publication will mean waiver decisions are visible and open to external scrutiny. Our General Counsel team will also carry out a first review of waiver decisions using the new policy three months after it is launched. We will publish an annual

evaluation report of the impact of SRA Innovate more broadly and this will report on the outcome of the General Counsel reviews. This report should provide useful information for those thinking of applying to the Innovation Space.

## Question by question feedback, analysis and response

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### **Question 1: Is the proposed set of criteria appropriate for granting a waiver?**

#### **Responses from groups representing lawyers**

15. Most respondents thought that assessing waiver applications based on compatibility with our regulatory objectives was a sensible approach. However, the Law Society did not consider the criteria were appropriate for professional indemnity insurance (PII) waivers. It thought they should be stricter for PII regulations because they give users of legal services an explicit right to seek redress. One respondent suggested the proposals presented a risk that could lead to “deregulation by the backdoor”.
16. These respondents also suggested that we should offer more guidance, particularly case studies, on how the criteria might be applied, including for different areas of practice.
17. Respondents also thought a formal review and evaluation of waiver decision outcomes was important. This was to make sure there was a consistent approach in the decisions we took.

#### **Responses from firms**

18. Riverview Law, which uses fixed priced solutions to help organisations assess and buy legal services, supported the initiative and thought it would promote a more competitive market. It argued that consumer protection still needed to be maintained. It stressed the importance of waiver decisions being fair, consistent and appropriate, and for the profession to have faith in a process that was properly scrutinised.
19. One law firm suggested that there could be a conflict in the case studies, used in the draft waivers policy appendix to the consultation, between consumer interest and competition and innovation. This is because the proposed criteria are very broad and there is a risk of inconsistency. It questioned how consistency could be maintained. Other law firms said that the waiver criteria were appropriate for the moment, but would need to be kept under review.

#### **Our response to concerns raised**

20. The approval criteria will have a strong focus on consumer protection. We believe the publication of waiver decisions, alongside a clear set of criteria, will drive consistency. The inclusion of a review by the General Counsel team built into the new policy will add further validation on whether the policy has been consistently applied. This is intended to be an independent review that assesses whether the rules have been fairly and impartially used, both for successful and unsuccessful applicants.
21. We will provide more information and guidance about how we will apply the new waiver policy and assess waiver applications.

## **Question 2: Will a single set of criteria make it more straightforward to make an application for a waiver?**

### **Responses from groups representing lawyers**

22. The Law Society welcomed the simplification of the waivers process. However, it sought further clarity on how the criteria would be applied. It wanted to make sure that consumer protections would be maintained at the same time as applying clear and coherent rules. Other respondents within this group said the criteria must be straightforward and consistently applied. They also questioned whether the original rationale for establishing a higher threshold for indemnity insurance waivers had been sufficiently discussed in the consultation paper.

### **Responses from firms**

23. Shentons Solicitors and Mediators commented that a single set of criteria would offer a simpler and more straightforward approach, particularly alongside published waiver decisions. DAS Law said this type of application process should provide clarity and promote innovation, making the process more efficient and appealing. DAS Law also commented on the need for greater consistency, fairness and transparency in decision making to achieve the objectives stated in the Legal Services Act.

### **Our response to the concerns raised**

24. We believe a new, single set of simplified criteria for granting waivers will offer much-needed clarity for all applications. Removing the exceptional circumstances requirement should increase the flexibility in dealing with applications. The criteria also reflect those relevant strategic aims that form part of our corporate strategy<sup>1</sup> :
  - We will set and apply consistently high professional standards for the individual and firms we regulate and make sure they are appropriate to meet the challenges of today and the future.
  - We will make sure our regulatory requirements are proportionate, providing solicitors and firms with the flexibility to innovate and better meet the needs of members of the public and businesses, while maintaining appropriate levels of public protection.

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<sup>1</sup> <https://www.sra.org.uk/sra/strategy-2017-2020.page>

- We will increase the availability of relevant and timely information to help people make informed choices in the legal services market.
  - We will work better together, and with others, to improve our overall effectiveness, our responsiveness and the delivery of our regulatory functions.
25. In each waiver application, we will ask how the firm's proposals make sure people will be adequately protected. We will not grant the waiver if the evidence suggests that this is not the case.
26. Our aim is to make it more straightforward and a more transparent process, for firms applying for waivers. Under our proposals to introduce a new, streamlined and flexible Handbook, we expect the future need for waivers will be limited.

**Question 3: Do you agree that we should publish all waiver decisions, anonymising where appropriate, both when we grant and refuse them?**

**Responses from groups representing lawyers**

27. Respondents agreed that information on all waiver decisions should be publicly available. They said this was in the interests of transparency and a greater understanding of our decision making. Respondents also commented that a waiver policy review would be a good opportunity for us to assess how information on all waivers, including those for alternative business structures, is presented. The Liverpool Law Society believed that publication would lead to accountability. It highlighted the possibility that publication might act as a barrier to innovation if the proposal was commercially sensitive. This could be mitigated if the applicant could ask for the idea or concept to remain confidential.

**Responses from firms**

28. Riverview Law favoured publishing waiver decisions that offered actual examples, both where they have been granted and where they are refused. A series of clear examples will offer applicants an insight into how realistic their proposal is, and whether we would be likely to approve it. It would also assist us, by reducing the number of potential applications that we would then reject. Firms may also be able to identify innovative trends from those who have already been granted a waiver. The firm commented that this benefit would have to be balanced against the need to keep commercially sensitive information confidential.
29. Shentons Solicitors and Mediators agreed with the principle of publishing waiver decisions, although the firm questioned what "anonymising when appropriate" means. It suggested that publishing approved and declined applications could offer useful guidance to firms.
30. DAS Law also questioned the idea of "anonymising where appropriate". It supported the publication of past applications, both those successful and unsuccessful, as a way of offering guidance. However, it felt it was important to balance the need to publish information against the wishes of applicants. It

suggested that this approach could discourage innovation. DAS Law pointed out that “anonymising doesn’t help matters if key details of a particularly innovative and potentially lucrative case study are made public.”

31. Craig Jones, a sole practitioner, commented that there was the risk of loss of “early mover advantage” in publishing decisions. He stressed the need to protect the applicant’s intellectual property rights and proposed a possible way of handling this could be to delay publishing the decision, or limit the detail of what is published.

### **Our response to the concerns raised**

32. Unless it is determined that it is inappropriate or unnecessary to do so, we will publish all waiver decisions. We know we need to take care when making the details of these decisions public.
33. We will be sensitive to the applicant’s needs and will discuss with them what should be published, in what detail and when we will publish the decision. We do not want to make applicants reluctant to using the Innovation Space out of concern that commercially sensitive aspects of their proposals could be shared with others.
34. Our General Counsel team will review the overall approach to waiver decisions, rather than individual decisions. Once we have launched the new approach, we will carry out quarterly reviews for the first six months. We will then decide whether biannual or annual reviews are appropriate. We will report annually to our Board whether the waiver policy had been correctly and fairly applied and include analysis on who has made applications.

### **Question 4: Are the proposed criteria to be permitted into the Innovation Space appropriate?**

#### **Responses from groups representing lawyers**

35. The Law Society said we had not provided enough information to determine whether a proposal was “sufficiently different” and, in particular, whether users of legal services were protected. The Sole Practitioners Group (SPG) said clients of a legal service offered as part of the Innovation Space should be made aware of this, and the changes this status created. The Law Society said it hoped no additional cost would be created by this process. Liverpool Law Society said there was a need to clarify the criteria, as the consultation had not made it clear what the distinction was between “sufficiently different” and “significantly different”. It said it should be “sufficiently different”.

#### **Responses from firms**

36. Riverview Law was strongly in favour of the first requirement (“Is the application in scope?”), and said the threshold for criteria should be “sufficiently different” rather than “significantly different”. This would make sure that incremental change is encouraged, rather than an idea that is completely unique. It also suggested lowering the “Is the proposal developed enough to start?” threshold. It said a more reasonable test would be asking if the applicant could simply demonstrate that they had a viable plan.

37. Shentons Solicitors and Mediators was not convinced about the introduction of waiver assessment criteria. It based this on the small number of applications we have received at this stage, and a lack of evidence on the benefits that firms which have already started to use the Innovation Space have gained. DAS Law felt it was difficult to set boundaries around identifying what was truly innovative and defining the term “differentiate”. Craig Jones said there should be no unnecessary barriers to innovation, seeing it as the essential core to survival for firms.

### **Our response to the concerns raised**

38. We recognise that using two terms, “sufficiently different” and “significantly different”, has caused some confusion. Responding to the views of respondents, we agree that the threshold criteria should be “sufficiently different”, rather than “significantly”. Our intention is to encourage innovation and differentiation, not to make applying to use the Innovation Space difficult. It also allows for the development of small but significant changes, rather than advocating that they must be completely new.

### **Question 5: Do you think that limited use of the proposed no enforcement action tool for firms in the Innovation Space is appropriate?**

#### **Responses from groups representing lawyers**

39. The Law Society was positive about the no enforcement action tool concept. However, it wanted to understand the parameters of the Innovation Space and the way firms would be supervised. It also questioned whether there would be any cost or charging attached to the tool for those applying.

40. The SPG agreed it should be limited and saw a potentially adverse impact on the public because of the proposed no enforcement action. Liverpool Law Society agreed with a limited use of enforcement action for firms in the Innovation Space. But, it wanted to make sure there were adequate safeguards and guidelines and appropriate monitoring in place.

#### **Responses from firms**

41. Riverview Law supported the no enforcement tool, believing it to be an appropriate mechanism for creating an innovative environment.

42. DAS Law and Craig Jones also agreed that it was a suitable and appropriate solution, neutralising some of the regulatory risk.

### **Our response to the concerns raised**

43. Most respondents supported the use of the no enforcement tool. We will make sure it is appropriately used.

### **Question 6: Do you think the proposals to formalise the use of our Innovation Space is appropriate?**

#### **Responses from groups representing lawyers**

44. The Law Society referred to the need for more information on the Innovation Space and the role our General Counsel team would play. The SPG and the Liverpool Law Society thought it was, however the SPG expressed concern at the impact, although it did not elaborate what it meant by this.

### **Responses from firms**

45. Riverview Law said that the existence of the Innovation Space should encourage more firms to pilot new ideas. This should help to counter the current situation in the legal services market where "many firms are too conservative". The existence of a safe environment would encourage those who want to try something new.
46. Shentons Solicitors and Mediators was not convinced that the Innovation Space would create opportunities for innovation. Other respondents commented that the proposals could be a barrier to those who did not meet the full criteria and could be an obstacle to innovation.

### **Our response to the concerns raised**

47. Based on our work so far, we remain convinced that the Innovation Space can be useful in encouraging innovative developments in the legal services market. While we wish to make sure there is a robust assessment of eligibility to access it, we do not want the process to become a barrier to innovation itself. It should be accessible for all sizes and types of individuals and firms.

### **Question 7: Are there any benefits or disadvantages for consumers from these proposals?**

#### **Responses from groups representing lawyers**

48. The Law Society commented that the proposals could potentially lead to a weakening of overall consumer protection. It was also concerned that people might be unaware that the firm is subject to a waiver or operating in the Innovation Space. It said the greatest overall harm could come from a reduction in consumer protection, resulting in people losing trust in legal service providers.
49. The SPG said it did not think there would be a benefit to the public, and it was concerned that they might lead to a reduction in standards
50. Liverpool Law Society said there would be a great benefit to people, although it said there could be potential disadvantages if adequate safeguards were not in place.

#### **Responses from firms**

51. Riverview Law believed that the more innovative firms became, the more competition there was likely to be. This would lead to better outcomes for people, who would receive enhanced services and lower costs.
52. DAS Law said the proposals would benefit users of legal services, provided they did not lead to an increased risk of an adverse effect on the service people receive. It did, however, acknowledge that innovation will always be

accompanied by either the perception of increased risk, or the emergence of different risks.

53. Craig Jones felt that as risk could not be eliminated, particularly when something new was being tried, this could affect people. He said that to attempt to eliminate risk was to halt progress and a loss of opportunity to some groups of users of legal services, who could benefit from the innovation.

### **Our response to the concerns raised**

54. We recognise respondents' views that innovation does bring with it a degree of risk. Our proposals make sure that the risk is understood at the outset and can be managed and understood appropriately. This would allow the market to develop and bring in new approaches. We stress to Innovation Space applicants that they need to inform their clients that they are operating within a specific working environment and explain what this means.

### **Question 8: Do you think there are sufficient safeguards to make sure they (the consumers) are adequately protected when firms are providing services in our Innovation Space?**

#### **Responses from groups representing lawyers**

55. These respondents said they did not think so or could not respond without further detail being provided.

#### **Responses from firms**

56. Riverview Law said it would have liked to have seen greater detail about the safeguards for people. It commented that the use of the no enforcement tool might also raise some doubt as to consumer protection while protecting the applicant from enforcement action.
57. Shentons Solicitors and Mediators said the Innovation Space would not offer consumers sufficient safeguards. It said there could be confusion for consumers and the profession about the status of the organisation providing the service and the insurance protection available. It was also keen to understand what would happen if a pilot was considered to have failed and how a waiver decision might then be revoked. It suggested such steps might lead to calls for compensation by the firm who had been in the Innovation Space.
58. DAS Law supported the view that there were sufficient safeguards, although it depended on what sort of innovations were granted a waiver.
59. Craig Jones said he was not clear what safeguards might be provided in the Innovation Space. However, he supported the shared monitoring and application of conditions provided sufficient resources were available to do this.

### **Our response to the concerns raised**

60. We acknowledge the need for safeguards and will provide further information as the work continues. We recently received an application to our Innovation

Space by an organisation who wanted to offer a more comprehensive legal service than it was currently able to offer to people using it. In this application, we reviewed the consumer protections. We placed several conditions when granting the waiver:

- that employed solicitors did not carry out reserved activities
- there was indemnity insurance reasonably equivalent to the SRA indemnity insurance rules
- the users of the service were made aware of how the services the solicitors provided were regulated and the protections available to them. We asked to see the information they planned to send out to clients and publish on their website.

61. If, when monitoring the conditions we place on firms, we see users of legal services are put at an undue risk, as a last resort we can revoke the permissions. We would also want to work with the firm to implement an exit strategy that protects the firm's existing clients.

**Question 9: We propose to publish waiver decisions and an annual evaluation of the impact of the Innovation Space. Is there any other information that we can publish to encourage greater innovation?**

**Responses from groups representing lawyers**

62. The Law Society favoured publishing detailed reasons for decisions to make sure there was consistency in our decision making and transparency in our work. It questioned the role the General Counsel team would play in reviewing and publishing decisions, particularly whether they could be overturned or appealed. It sought more information on this. The SPG and the Liverpool Law Society both said they would like to know the details of what we intended to publish.

**Responses from firms**

63. Riverview Law supported publishing information on granted waiver decisions. It expressed a concern on innovations being copied, and how to protect innovation. It also suggested that, at least in the first year, we should publish an interim report, giving some initial indications on numbers of applications received and granted.

64. Shentons Solicitors and Mediators supported the idea of a space for innovation, but was uncertain how this concept by itself would achieve the desired aims. It suggested that we consider publishing information on areas in the legal market where we would like to see growth. Along with DAS Law and Craig Jones, Shentons thought annual evaluations could be useful, and the market could be encouraged by providing details of the number of applications approved. Greater consistency would also be achieved when developing models for others to emulate.

**Our response to the concerns raised**

65. We propose to publish waivers on our website to support fairness and transparency. This would be both when we granted and refused a waiver application. As stated in our response to question 3, the General Counsel

team will not examine any individual decisions. Its purpose is to review the overall approach taken and to provide feedback through quarterly reports. We will publish an annual report that will evaluate the impact of SRA Innovate. As we publish further case studies and waiver decisions, this will increase the information about the Innovation Space and how it is working.

**Question 10: Are there any positive or negative impacts, including Equality, Diversity and Inclusion impacts, on the firms and users of legal services that are likely to arise from the proposed changes?**

**Responses from groups representing lawyers**

66. The Law Society and the SPG suggested that the proposals could lead to a potentially detrimental impact if they led to unfair competition, or small firms subsidising the regulation of large firms that use the Innovation Space. Costs should not be imposed disproportionately on smaller firms, which may be unaware of the opportunities offered by the Innovation Space that are taken up by larger firms.

**Responses from firms**

67. Riverview Law suggested that those who are likely not to wish to innovate are high street firms, which it said are used to traditional working methods and do not have either the clients or the funding to invest in innovation. DAS Law said innovation was likely to be encouraged, but it remained concerned on how much of the information would be made public.

**Our response to the concerns raised**

68. Evidence we have received from the early stages of this work suggests we will attract interest from individual solicitors as well as all types and sizes of firm. The few waiver applications we have received so far indicate that the opportunities offered by the Innovation Space are attractive to a range of solicitors and firms, offering varying types of legal services and for different consumer groups. There is little to indicate that only large firms will disproportionately benefit.

**Question 11: Are there any other matters relating to the issues covered in this consultation that you would like to raise?**

**Responses from all groups**

69. There were limited additional comments. There were some questions about implementation and the safeguards and guidelines we would adopt, and whether there would be a cost for using it. There was a general call for more information, both to help firms understand the assessment process and a commitment to evaluate its eventual impacts.

**Our response to the concerns raised**

70. There is no obvious, substantive gap in the information we have so far provided, although we will monitor this as the work continues and provide updated guidance and case studies as needed. We can confirm that there is

no intention to levy any charge on waiver applications for those wishing to use the Innovation Space.