

# Consultation responses

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

April 2018

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### Responses

Das Law

Liverpool Law Society

Riverview Law Limited

Shentons Solicitors and Mediators

The Law Society

# Consultation questionnaire

Response ID:30 Data

## Your identity

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**Surname**

Taylor

**Forename(s)**

Alexander

**Your SRA ID number (if applicable)**

**Name of the firm or organisation where you work**

DAS Law

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**on behalf of my firm.**

Please enter your firm's name:: DAS Law

## Question 1

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**Is the proposed set of criteria appropriate for granting a waiver? Please explain your answer.**

**Comments:** Yes, seems to be. The criteria would appear to uphold the key rules and requirements.

## Question 2

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**Will a single set of criteria make it more straightforward to make an application for a waiver? Please explain your answer.**

Yes

**Comments:** Yes, it provides a simplified, clearer means to make such applications. That increased clarity should promote innovation, and make the process more efficient/appealing.

## Question 3

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**Do you agree that we should publish all waiver decisions, anonymising where appropriate, both when we grant or refuse them? Please explain your answer**

Yes

**Comments:** Yes, in theory. Depends what 'anonymising where appropriate' means. Published info of past applications - declined as well as approved - will provide firms with useful guidance. Balance needs to be struck though and much depends on the nature of the innovation/waiver in question. Clearly some applicants would prefer that certain details were not made public. May discourage innovation if too much info is made available. Sensitivity of some innovations/requests may be great. Anonymising doesn't help matters if key details of a particularly innovative and potentially lucrative case study are made public.

#### Question 4

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**Are the proposed criteria to be permitted into the Innovation Space appropriate? Please explain your answer.**

Yes

**Comments:** Yes, for those initiatives which do not fall within the current scheme. Tricky to set boundaries around how something is truly innovative though. How to define 'innovation'? How to define 'different'? Otherwise the criteria do seem suitable.

#### Question 5

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**Do you think that limited use of the proposed no enforcement action tool for firms in the Innovation Space is appropriate? Please explain your answer.**

Yes

**Comments:** Yes. Assume that non-enforcement is a more practical way of dealing than putting appropriate waiver provisions in place. In which case, it's a suitable and appropriate solution.

#### Question 6

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**Do you think the proposals to formalise the use of our Innovation Space will create greater opportunities for innovation? Please provide examples if possible.**

Yes

**Comments:** Yes, although I wonder whether in the same breath it will be a barrier to those who do not meet the full criteria for support/concessions. Perhaps a less formal innovate hotline/contact/service, as is already in place for ethics could be provided to assist those.

#### Question 7

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**Are there any benefits or disadvantages for consumers from these proposals? Please explain your answer.**

Yes

**Comments:** This should bring about benefits to the consumer. Evidently a great deal of care will be taken to only allow innovations which are not perceived to carry increased risk of inferior client outcomes. Then again some people will argue that any moderation here is a negative development in consumer protection terms. But innovation will always come with either the perception of increased risk, or the emergence of different risks. But consumers are best served by the legal profession modernising and innovating.

#### Question 8

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**Do you think there are sufficient safeguards to make sure they are adequately protected when firms are providing services in our Innovation Space? Please explain your answer, with examples if possible.**

Yes

**Comments:** Yes - in theory. Depends very much on what is being waived though.

### Question 9

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**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? Please explain your answer.**

Yes

**Comments:** Thoughts here mirror the answer given in response to question 3 in terms of publishing waiver decisions. Annual evaluation could be useful too, but usefulness will depend upon contents. Encouraging innovation is such a tricky challenge. Could be achieved through a combination of A. promoting and celebrating innovation, and B. drawing attention to how a lack of innovation can lead to poor commercial outcomes. Certainly number of applications made, and numbers of innovations approved would be encouraging (unless that success percentage is extremely low!).

### Question 10

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**Are there any positive or negative impacts, including EDI impacts, on the firms and users of legal services that are likely to arise from the proposed changes? Please explain your answer.**

Yes

**Comments:** Impacts are that innovation is likely to be encouraged, but concerns remain around how much info will be made public.

### Question 11

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**Are there any other matters relating to the issues covered in this consultation that you would like to raise? Please explain your answer.**

No

**Comments:** No, thank you.

# Consultation questionnaire

Response ID:28 Data

## Your identity

### Surname

Murphy

### Forename(s)

Ann

### Your SRA ID number (if applicable)

### Name of the firm or organisation where you work

Liverpool Law Society

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**on behalf of a local law society**

Please enter the name of the society.: Liverpool Law Society

## Question 1

**Is the proposed set of criteria appropriate for granting a waiver? Please explain your answer.**

No

**Comments:** LSS welcomes the consultation as a first step towards promoting innovation and proportionate regulation for the profession. However, there was a mixed response to the proposed set of criteria for granting a waiver. The majority of committee members were concerned that the proposed criteria gave the SRA a very broad discretion and could lead to deregulation by the back door. On a related note, the committee felt that the case study set out in the consultation, dealing as they did with obvious examples, were not particularly insightful. The SRA clearly have access to many real life applications for waivers under the current system that could have assisted our understanding of how the proposed new waiver policy will be utilised by the profession and in what ways the new criteria could alter the SRA's approach to waiver applications. LSS noted that that the proposed criteria steps away from waivers being granted in exceptional circumstances to waivers being permitted in any case (save those that are legislative requirements) where the request is compatible with the regulatory objectives set out in the Legal Services Act. In some instances this must surely call into question the requirement of the particular rule across the board. In that event, it would clearly be preferable for the rule in question to be revised (following proper consultation with the profession and interested bodies) rather than being disapplied on an ad hoc basis through the use of waivers. Also, there was a real concern that such a wide criteria would lead to an inconsistent approach. LSS are interested to know whether there would be a committee set up to consider all waiver applications, which would then build up a body of knowledge about the space into which the profession was moving. Some comfort was derived from the fact that all waiver decisions will be published as LSS thought that this would lead to a level of accountability.

## Question 2

**Will a single set of criteria make it more straightforward to make an application for a waiver? Please explain your answer.**

Yes

**Comments:** Please see answer to question 1 above. Also, there was clearly a rationale for setting a separate policy with a higher threshold for indemnity insurance waivers. There is little discussion about this in the consultation paper. LSS asked whether the SRA's position is that the rationale no longer exists.

## Question 3

**Do you agree that we should publish all waiver decisions, anonymising where appropriate, both when we grant or refuse them? Please explain your answer**

Yes

**Comments:** LSS's answer reflects the feelings of the majority of its Regulatory Committee members who believe that publication would lead to accountability. However, LSS also saw merit in the argument that publication could be a barrier to innovation, where the particular idea was commercially sensitive. LSS recognised that the incentive to innovate could be lost if the idea immediately became public knowledge enabling competitive businesses to copy it and putting it out to market at a lower price (not having had to invest the time and money developing the idea). LSS therefore considered that there ought to be scope as part of the application process for an applicant to ask for the idea/concept to remain confidential. LSS believed that the applicant would need to demonstrate its case for confidentiality and that publication should be the norm.

## Question 4

**Are the proposed criteria to be permitted into the Innovation Space appropriate? Please explain your answer.**

No

**Comments:** There is a need to clarify the criteria. The consultation refers interchangeably to the need for the proposal to be "sufficiently different" and "significantly different". LSS considered that the test ought to be sufficiently different. There does not appear to be any criteria that applies to the characteristics of the applicant. LSS query whether access to the SRA's innovation space would be open to applicants who are currently not regulated but were considering operating as a regulated entity. This needs to be clarified. On a related note, it is not clear whether an applicant would be required to pay a fee to access the innovation space and if so whether that would be a fixed fee or a fee calculated by reference to the complexity of the application/the level of resource required. If the innovation space is to be open to non-regulated applicants then there is clearly an argument that supports payment by them of a fee to access SRA resources.

## Question 5

**Do you think that limited use of the proposed no enforcement action tool for firms in the Innovation Space is appropriate? Please explain your answer.**

Yes

**Comments:** LSS agrees with limited use of enforcement action for firms in the innovation space but only if there are adequate safeguards and guidelines to ensure firms operating in the space are properly monitored. LSS does not consider that a quarterly review of all applicants by the SRA's General Counsel is sufficient. LSS has noted that the consultation refers to conditions and monitoring arrangements that might be required as part of a decision to admit the proposal and will operate during the period the services are provided in the innovation space. LSS agree that there is a need for flexibility/that what is appropriate by way of safeguards and monitoring would need to be considered on a case by case basis. In its view, applications for use of the innovation space should be considered and monitored by an independent review panel and

conditions and monitoring arrangements should be proportionate to the impact of the application on the consumers of legal services and the profession as a whole.

### Question 6

**Do you think the proposals to formalise the use of our Innovation Space will create greater opportunities for innovation? Please provide examples if possible.**

Yes

**Comments:**

### Question 7

**Are there any benefits or disadvantages for consumers from these proposals? Please explain your answer.**

Yes

**Comments:** There could be great benefit to consumers. Equally, there could be disadvantages if adequate safeguards are not put into place. See LLS's answer to question 5 above.

### Question 8

**Do you think there are sufficient safeguards to make sure they are adequately protected when firms are providing services in our Innovation Space? Please explain your answer, with examples if possible.**

No

**Comments:** See above.

### 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? Please explain your answer.**

No

**Comments:** None that we can currently think of. We would like to know the detail the SRA intends to publish.

### Question 10

**Are there any positive or negative impacts, including EDI impacts, on the firms and users of legal services that are likely to arise from the proposed changes? Please explain your answer.**

No

**Comments:**

### Question 11

**Are there any other matters relating to the issues covered in this consultation that you would like to raise? Please explain your answer.**

No

**Comments:**

# Consultation questionnaire

Response ID:31 Data

## Your identity

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**Surname**

Zdolynny

**Forename(s)**

Steven

**Your SRA ID number (if applicable)**

151630

**Name of the firm or organisation where you work**

Riverview Law Limited

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**on behalf of my firm.**

Please enter your firm's name:: Riverview Law

## Question 1

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**Is the proposed set of criteria appropriate for granting a waiver? Please explain your answer.**

Yes

**Comments:** As a general comment, we support proportionate, risk based regulation. The legal profession in England & Wales is still highly regulated, with high costs of practice (such as PII insurance). We support this initiative by the SRA, as part of a wider process of considered deregulation to make the market more competitive, whilst still ensuring proper protection for our customers. The initial hurdle of satisfying the regulatory objects in Section 1 of the Legal Services Act 2007, will set a high bar for all who wish to be granted a waiver. The consideration of the public interest purpose where not all of the regulatory objectives may be met, reflects the aims of flexibility and removing barriers to innovation very well. The proposed set of criteria intends to increase innovation within the legal services market, whilst still protecting those who require legal services. As it is important for the SRA waiver decisions to be fair, consistent and appropriate and for the profession to have confidence there is a level playing field (bearing in mind the decisions are likely to be carefully scrutinised by certain sections of the profession) we recommend that the SRA consider appointing a panel of internal decision makers.

## Question 2

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**Will a single set of criteria make it more straightforward to make an application for a waiver? Please explain your answer.**

Yes

**Comments:** A single set of criteria is simpler, alongside viewing published waiver decisions will make it more straight forward for an applicant, although the proposal needs to incorporate some of what is in the consultation information. The draft criteria is also more detailed than the current policy, so applications may be tailored more effectively. The proposed criteria is heavily based on rather obvious case studies which doesn't necessarily make the application process/criteria as clear as the suggestions in the consultation.

### Question 3

**Do you agree that we should publish all waiver decisions, anonymising where appropriate, both when we grant or refuse them? Please explain your answer**

Yes

**Comments:** Allowing future applicants of waivers to view actual examples of decisions granted and refused on the SRA's website will allow for transparency and may give applicants a realistic view on whether their application may be successful or not, allowing them to identify a justification for using resources on the waiver application or not. This will not only help the SRA to reduce time wasted on looking into waivers that will be rejected, but may help firms to compete and innovate within the legal services market as they will be able to identify innovative trends from those who have been granted waivers, and act upon the trend to incorporate innovation into their own firms. The only concern would be to consider/respect commercial confidentiality, especially where there may be reference to commercially sensitive information e.g. that may be subject to IPR protection, such as trade secrets, or detail that should not be published as a patent application may be pending.

### Question 4

**Are the proposed criteria to be permitted into the Innovation Space appropriate? Please explain your answer.**

Yes

**Comments:** The first requirement for scope is vital and should be adhered too as a core focus in the legal services market. The requirement that the application results in a sufficiently different way of delivering legal services will mean that the Innovation Space is not overcrowded with similar innovative ideas, although in such a large and dynamic industry it can be quite hard to realise what ways of delivering legal services are already on the market or not. The need for access will make sure that the applicant understands the regulations and how important innovation is to the industry. With the introduction of more innovation into the industry, it is important to remember that consumers must be protected at all times, having this criteria will identify whether the applicant has really thought of the benefits and negatives of the innovation and make sure that the applicant keeps consumers and the rule of law and administration of justice in mind. Having a case-by-case basis is also appropriate as applicants will have tailored safeguards, hopefully taking into account the size and structure of the applicant when assessing the application to provide services on the Innovation Space, eg, an ABS may have more access to funding than a high street firm. Just 2 specific comments on the criteria: - Reference is made to both 'Is it sufficiently different' and 'Does the proposal result in a significantly different way of delivering legal services?' We consider that 'sufficiently different' should be the test rather than 'significantly different' as often innovation is through incremental change rather than a completely unique idea distinct from anything currently in existence. Also, there is a risk of challenge from current practitioners that a particular decision was flawed because it was not significantly different to their offering (which may not have been known to the SRA or the applicant). - 'Is the proposal developed enough to start?' - we consider this to be too high a test and a more reasonable standard would be a the applicant demonstrating a viable plan.

### Question 5

**Do you think that limited use of the proposed no enforcement action tool for firms in the Innovation Space is appropriate? Please explain your answer.**

Yes

**Comments:** The no enforcement action tool is itself a creative, measured and appropriate mechanism aimed at creating the environment for innovation.

### Question 6

**Do you think the proposals to formalise the use of our Innovation Space will create greater opportunities for innovation? Please provide examples if possible.**

Yes

**Comments:** Innovation breeds innovation. More firms may make use of the Innovation Space in order to pilot their idea without repercussions once they see this working in practice. Although there are currently a lot of opportunities for innovation present in the legal services market, many firms are too conservative and the Innovation Space is a fresh approach that may attract those who have a desire or interest in innovating but wish to do so in a 'safe' environment. Their firm which may result in more applicants wishing to use the Innovation Space. Publishing the decisions is likely to attract further interest in the profession, especially if these get picked up and reported in the legal press.

### Question 7

**Are there any benefits or disadvantages for consumers from these proposals? Please explain your answer.**

Yes

**Comments:** The more innovative firms become, the more competition there is likely to be and the better the deal for customers. Consumers will benefit from receiving enhanced services and lower costs due to the innovation that firms can achieve, benefited from the likelihood that more firms will apply for waivers to innovate due to a straightforward and transparent approach. The number of litigants in person may fall as consumers have access to more affordable legal services, which may also help to improve the public's trust in the legal services market. On the downside, although not all innovation may be technology based, those firms that do rely on technology may be open to threats with cyber security and confidentiality, resulting in harm to consumers if the correct procedures are not in place to tackle data breaches/hacking etc. Some consumers may also be sceptical to use such innovative practices, for example, the older generation may not rely on technology on the internet, for example, Canada's introduction of an online Small Claims Court.

### Question 8

**Do you think there are sufficient safeguards to make sure they are adequately protected when firms are providing services in our Innovation Space? Please explain your answer, with examples if possible.**

Yes

**Comments:** Although we have answered 'yes', we would have liked to have seen the consultation paper going into more depth about the safeguards for consumers when firms are providing services in the Innovation Space. It is noted that the SRA will work with the applicants to ensure appropriate consumer protection safeguards are built, but the consultation would have reassured the profession with more detail as to what this will entail, especially as applications will be considered on a case by case basis, some guidelines need to be in place. The use of the "no enforcement action tool" also raises some doubt for consumer protection, although it protects the applicant from enforcement, if consumers are using the service via the Innovation Space, if something was to go wrong, what protection would be in place for the consumer and how will the SRA deal with the issue?

### 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? Please explain your answer.**

Yes

**Comments:** Publishing results from firms that have been granted waivers for the purpose of innovation may help to encourage further innovation within the industry. For example, results relating to an increase in interest in the innovation/firm, increase in number of cases/client interaction due to the innovation and perhaps results concerning a rise in revenue if it can be linked to innovation eg x% rise in revenue due to the firm's innovative solutions bought by clients. On the other hand, for those who have the innovative model, will they be protected in any sort of way from others copying the innovation? This may be a deterrent for firms using the Innovation Space. Also, as this new measure will be under the spotlight, the SRA may at the beginning consider an interim report e.g. with simple data at half year point such as number of applications received/granted, with an independent review (perhaps jointly commissioned with The Law Society) after the first year.

### Question 10

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**Are there any positive or negative impacts, including EDI impacts, on the firms and users of legal services that are likely to arise from the proposed changes? Please explain your answer.**

Yes

**Comments:** Not necessarily a negative of using the Innovation Space but high street firms with Partners who have worked in the legal industry for years may not wish to innovate as they are used to traditional methods or do not have the clientele or funding to invest in innovative methods. Are there alternative ways to view the Innovation Space ie braille? On the other hand, new entrants to the legal services market that wish to rely on innovative solutions may gain a better presence in the market if they have been identified as working in the Innovation Space.

### Question 11

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**Are there any other matters relating to the issues covered in this consultation that you would like to raise? Please explain your answer.**

Yes

**Comments:** We suggest that safeguards and guidelines should be put in place where applicants are using the Innovation Space with the no enforcement action tool. Who will be able to access the Innovation Space? Will it only be open to those that are regulated by the SRA? For those who use the Innovation Space, will there be a fee? And if so, how will fees be structured? If the Innovation Space is to be open to applications from non SRA regulated entities, would it be appropriate to charge them a fee, with no fee for regulated entities (on the basis that SRA regulated entities have already paid generally for this initiative/SRA costs through their annual firm renewal fee?) As the Innovation Space is intended to encourage innovation and thus lead to an increase in waiver applications, for those that are published, will there be a searchable function for ease of use and to find innovations relevant to a future applicant?

# Consultation questionnaire

Response ID:35 Data

## Your identity

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**Surname**

Edgerley Harris

**Forename(s)**

Adrienne

**Your SRA ID number (if applicable)**

119290

**Name of the firm or organisation where you work**

Shentons Solicitors and Mediators

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Attribute my/our response and publish my/our name.

**Please identify the capacity in which you are submitting a response. I am submitting a response...**

**on behalf of a local law society**

Please enter the name of the society.: Hampshire Incorporated Law Society

## Question 1

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**Is the proposed set of criteria appropriate for granting a waiver? Please explain your answer.**

No

**Comments:** The Criteria: there is a conflict in the case studies between consumer interest and competition/ innovation. The proposed criteria are very broad & despite decisions being a "pilot" and being reviewed by in house SRA Counsel, it is difficult to see how consistency will be maintained. Decisions also appear to be subject to what other regulators allow.

## Question 2

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**Will a single set of criteria make it more straightforward to make an application for a waiver? Please explain your answer.**

Yes

**Comments:** IN principle, one set of criteria would appear to make the process more straightforward, but please see previous comment and comments on the case studies below: 1. A partnership of 4 corporate partners- waiver to enable them to operate with only one COLP & one COFA rather than four. Comment: logical but it could cloud ownership & dilute or lead to evasion by the other corporates of responsibility. For example, a disgruntled client might only be able to pursue a claim against one

entity (the one having the COLP/ COFA). 2. Small licensed body with low volume of client account transactions cannot replace their COFA-waiver would be refused if there is another reasonable way for the applicant to achieve its objective; the LSA 2007 makes having one a requirement; or it may give a competitive advantage. Comment: This at least maintains the same obligations for all legal practices but the SRA could argue that their objectives are to improve access and promote the public interest. The SRA states it may grant a waiver to resolve a conflict between its rules and those of another body regulating the entity. This seems a dangerous precedent. 3. Scottish firm wants to open English office using its Scottish Master Insurance policy (SMIP)- waiver would be granted as the terms are broadly the same. The SRA notes that the Policy has no minimum T's and C's (MTC), has no separate policy for individual firms & is not with participating insurers. Comment: this may dilute the MTC's in England and Wales & thus client protection. It provides no clarity for the public and allows PII shopping- could firms in England and Wales join the SMIP? The result may well be confusion for firms here and an unfair advantage for Scottish firms. It seems contrary to the reason for refusal given in Case Study 4.

### Question 3

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**Do you agree that we should publish all waiver decisions, anonymising where appropriate, both when we grant or refuse them? Please explain your answer**

Yes

**Comments:** We agree with the principle of publishing waiver decision.

### Question 4

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**Are the proposed criteria to be permitted into the Innovation Space appropriate? Please explain your answer.**

No

**Comments:** We have not been convinced of the need to allow adoption of waiver criteria bearing in mind the small number of applications and lack of evidence of the benefit conferred by those already granted.

### Question 5

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**Do you think that limited use of the proposed no enforcement action tool for firms in the Innovation Space is appropriate? Please explain your answer.**

Yes

**Comments:** We agree with the principle that if a waiver is granted the SRA should not then be able to take enforcement action against that entity for breach of that rule/ regulation.

### Question 6

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**Do you think the proposals to formalise the use of our Innovation Space will create greater opportunities for innovation? Please provide examples if possible.**

No

**Comments:** We are not convinced that the Innovation Space will create opportunities for innovation particularly based on waiver policy alone.

### Question 7

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**Are there any benefits or disadvantages for consumers from these proposals? Please explain your answer.**

No

**Comments:** See earlier comments re concerns for consumers from the proposal.

### Question 8

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**Do you think there are sufficient safeguards to make sure they are adequately protected when firms are providing services in our Innovation Space? Please explain your answer, with examples if possible.**

No

**Comments:** We do not consider that the Innovation Space will necessarily offer consumers sufficient safeguards, particularly if decisions are not published. Overall it is likely to cause confusion both in the minds of consumers and the profession as to whether for example, it is a law firm or other discipline (depending on what is allowed) and what insurance protection there is. Whilst the proposal is to have a safe exit strategy for the pilots, it is difficult to comment on these, or the safeguards required, without knowing what the waiver/s will permit. How will waiver decisions be reversed/ revoked if the SRA considers the pilot has failed and what are the criteria for making these decisions? The SRA will be mindful that entities in the pilot will have invested financially in the process and monetary compensation may be sought if a waiver is revoked and the profession should not be asked or expected to pay for this.

### Question 9

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**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? Please explain your answer.**

Yes

**Comments:** Whilst the Innovation Space is an idea for encouraging innovation, it is unclear how it alone will do this. The SRA might consider publishing information as to the areas in which it would like to see growth. In this way, some consistency might be achieved in developing models.

### Question 10

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**Are there any positive or negative impacts, including EDI impacts, on the firms and users of legal services that are likely to arise from the proposed changes? Please explain your answer.**

**Comments:** We are not able to comment on any equality or diversity impacts of innovative models: each must be considered on its own merits. Again, the SRA might identify any areas of concern which it is seeking to address.

### Question 11

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**Are there any other matters relating to the issues covered in this consultation that you would like to raise? Please explain your answer.**

Yes

**Comments:** Please see our comments on the case studies. Overall, we would have welcomed information on how the FCA and CAA have progressed with their innovation pilots so we could consider the impact made.



The Law Society

# **Enabling innovation: consultation on a new approach to waivers and developing the SRA Innovation Space**

The Law Society's response

March 2017



## **Introduction**

1. The Law Society (the Society) is the representative body for solicitors in England and Wales, representing more than 170,000 solicitors.
2. The SRA is consulting on proposals to change its approach to assessing and granting waivers. The SRA proposes to replace two existing waiver policies - a general policy and a policy specific to the SRA Indemnity Insurance Rules 2013 - with a single policy. The SRA has also proposed introducing a 'no enforcement rule' in specific circumstances where waivers are not possible.
3. The Law Society is not opposed to simplification of the waivers process as long as certain key principles are met:
  - a. any changes to the process must not be at the expense of consumer protections;
  - b. there should be clarity over how rules will be applied, with a level playing field for all providers;
  - c. the decision making process for granting waivers should be completely transparent.

## **Consumer Protection**

4. Consumer protection is critical as it not only benefits individual consumers but also helps to ensure public confidence in the legal market. There is therefore some logic in distinguishing regulatory requirements like professional indemnity insurance (PII), which is a right that consumers can directly rely on to seek redress, from other regulatory requirements. Because PII is a direct protection for consumers, it is logical that stricter criteria are required before these rules can be waived.
5. The SRA proposes to change the criteria used to assess waiver applications. Instead of granting applications in 'exceptional circumstances', under the new criteria, they will be granted if a) they are compatible with the regulatory objectives of the Legal Services Act 2007 and b) the waiver is in the public interest. The second criterion will only be used in the event of two competing regulatory objectives.
6. The SRA defines its public interest purpose as: "*providing consumers with appropriate protection and supporting the rule of law and administration of justice*". The use of the word 'appropriate' in the context of consumer protection is insufficient. The profession's view of what is appropriate is likely to be very different from the SRA's view and this has been evident through recent consultations on rule changes; most notably, the SRA's proposals for a revised Handbook last year. Moreover, the use of such imprecise language would leave the policy open to differing interpretations and is likely to lead to inconsistent decision making.
7. The proposal to introduce a no enforcement rule for firms wishing to trial innovative practices, where waivers are not possible, is interesting. The SRA has stated that it proposes to be able to grant waivers to all rules that do not have a legislative basis. This implies that the no enforcement rule would only apply where there are legislative requirements. It would be helpful to have more information on the types of rules that this would apply to and how the SRA will

ensure that it is fulfilling its duties as a regulator where it knows the legislative requirements are not being met.

### Clarity

8. The consultation paper is relatively light on detail and it is difficult to answer some of the questions posed, or to determine whether the principles outlined in paragraph 3 have been met, without further information. It would be helpful to have more information on:
  - a. how the criteria would be implemented;
  - b. what information would be published and how easy it will be to access;
  - c. any research that has been undertaken;
  - d. any alternative options that have been considered; and
  - e. any work investigating the impact of the proposals - both from an economic perspective and an equality and diversity perspective.
9. The Society is, in principle, supportive of the intention to simplify the general waivers process and to make the decision-making process transparent and consistent. The Society may be able to support the revised criteria in relation to the general policy if provided with sufficient information to make an informed decision. However, until further information is provided, we cannot support a change in the general policy. **The Society believes that a detailed explanation of how the tests would be applied must be published and consulted on before any new policy is implemented.**

### Transparency

10. Transparency is one of the key principles of better regulation. While the SRA has addressed the question of transparency, to some extent, the Society would like to see more detail on what information would become available under any revised procedure. It is essential that all decisions to grant waivers are published along with explanations for the waiver decisions in an easily accessible format. Such a transparent approach will ensure that firms and clients are able to scrutinise the decisions made and reassure themselves that the rules are being applied consistently across the profession.
11. Transparency is essential in order to minimise any competitive disadvantage for firms that have not applied for rule waivers. In particular, this is likely to affect small firms who may be unaware of the opportunities being taken advantage of by larger firms. For this reason, we call on the SRA to provide a detailed impact assessment to accompany any proposals.

### Response to specific questions

**Question 1. Is the proposed set of criteria appropriate for granting a waiver?  
Yes/No Please explain your answer.**

12. The proposed set of criteria is not suitable for granting waivers to the PII rules for the consumer protection reasons discussed in the introduction to this response. In regard to the rules currently covered by the general waivers policy, the Society would need further clarification on the following issues before it could answer the question:

- a. how the criteria would be implemented;
- b. what information would be published and how easy it will be to access;
- c. any research that has been undertaken;
- d. any alternative options that have been considered; and
- e. any work investigating the impact of the proposals - both from an economic perspective and an equality and diversity perspective.

13. The SRA proposes to assess waiver applications on the basis of compatibility with the regulatory objectives. Referring to the regulatory objectives is appropriate; although it would be helpful if the SRA could provide further detail on how these decisions will be made. In particular, it would be helpful to see information on how the criteria will be used within discrete areas of practice and how they will be applied to distinct sections of the rules.

14. It is important to ensure that the waivers process is not just applied consistently to firms of all shapes and sizes, but that it is also seen to be applied consistently.

**Question 2. Will a single set of criteria make it more straightforward to make an application for a waiver? Yes/No Please explain your answer.**

15. A simplification of the general waivers process is to be welcomed in principle, subject to the caveats already mentioned in this paper. The clarity of the criteria and how they will be applied is the key test as to whether they will be more straightforward in practice. The Society does not agree that the criteria for granting waivers to the PII rules should be weakened.

**Question 3. Do you agree that we should publish all waiver decisions, anonymising where appropriate, both when we grant or refuse them? Yes/No Please explain your answer**

16. The Society agrees that information on all waiver decisions should be publicly available. It would be helpful if the SRA could provide more detail on how this information would be presented. Research published by the LSB in 2014 suggested that the quantity of waivers granted to ABS firms by the SRA could be putting existing law firms at a competitive disadvantage.<sup>1</sup> Reviewing the waiver policy provides a good opportunity for the SRA to review how information on all waivers, including ABS waivers, is presented.

17. Information on the rationale for individual waiver decisions should be available to ensure transparency and show how the SRA is interpreting its criteria. The information should be easily accessible to solicitors so that they are aware of possible waivers that they may also be able to access. This may help to guard against unfair competitive disadvantage. The current system of publishing waivers searchable only against the name of the firm, rather than by waiver type is unhelpful.

**Question 4. Are the proposed criteria to be permitted into the Innovation Space appropriate? Yes/No Please explain your answer.**

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[http://www.legalservicesboard.org.uk/news\\_publications/LSB\\_news/PDF/2014/20141009\\_LSB\\_Publications\\_Report\\_On\\_Regulatory\\_Restrictions\\_On\\_Business\\_Ownership\\_In\\_The\\_Legal\\_Sector.html](http://www.legalservicesboard.org.uk/news_publications/LSB_news/PDF/2014/20141009_LSB_Publications_Report_On_Regulatory_Restrictions_On_Business_Ownership_In_The_Legal_Sector.html)

18. The SRA has not provided enough information on how these criteria would be used. For example, how will the SRA judge whether a proposal is 'sufficiently different' or whether consumers are 'adequately protected'? The Society is particularly concerned about the latter. The SRA has recently made several proposals that have led the Society to question the SRA's position in relation to what constitutes adequate protection for consumers. For example, the SRA's proposals relating to the accounts rules in 2016 would, in the Society's opinion, subject clients to unacceptable risk.

**Question 5. Do you think that limited use of the proposed no enforcement action tool for firms in the Innovation Space is appropriate? Yes/No Please explain your answer.**

19. On the face of it, the no enforcement tool sounds positive but we would ask the SRA to provide more information on the parameters of the Innovation Space and the way in which firms would be supervised. For example, would firms in the Innovation Space be required to tell customers that they were subject to fewer regulatory requirements? Or would that defeat the 'live testing' and mean the trial was no longer blind? If the no enforcement rule applies to legislative requirements, as suggested, it would be helpful if the SRA could provide information on how it will be able to meet its statutory duties if it knows that requirements are not being met.

20. The no enforcement rule has already been developed and trialed in other sectors and there may be further lessons to learn from those sectors. We would recommend that the SRA examines and provides information on how it intends to learn from the experience gained by these schemes.

21. It would also be useful to understand how much the SRA anticipates charging for supervision of those firms the rule applies to. An expensive scheme that only benefits larger firms could impact disproportionately on smaller firms. It appears unfair for small firms to be subsidising larger firms operating out of the Innovation Space.

**Question 6. Do you think the proposals to formalise the use of our Innovation Space will create greater opportunities for innovation? Yes/No Please provide examples if possible.**

22. As mentioned above, it is difficult to judge the impact when relatively little is known about how the innovation space will operate. Further information on the Innovation Space and the role of the SRA's General Counsel should be provided and the topic should be subject to further consultation.

**Question 7. Are there any benefits or disadvantages for consumers from these proposals? Yes/No Please explain your answer.**

23. There would be disadvantages for consumers if these proposals ultimately weaken consumer protections. This consumer disadvantage will be compounded if consumers are unaware that their solicitor is subject to a waiver or is operating out of the Innovation Space. The regulatory framework is not well understood by consumers so any proposals which further complicate this carry significant risk. Individual consumers could be harmed. The ultimate risk, from a public interest

perspective, is if a reduction in consumer protection results in consumers losing trust in legal services providers.

24. It is not possible for the SRA, or any other third parties scrutinising these proposals, to come to a decision about whether the costs outweigh the benefits without publishing an impact assessment which quantifies the costs and benefits. This is best practice for all regulators.
25. The Society would be very concerned if the SRA was to use waivers or the Innovation Space as a way of habitually circumventing rules. If the SRA believes that rules are unnecessary, rule changes should be subject to a full consultation process.

**Question 8. Do you think there are sufficient safeguards to make sure they are adequately protected when firms are providing services in our Innovation Space? Yes/No Please explain your answer with examples if possible.**

26. Without further detail it would be very difficult to answer this question.

**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? Yes/No Please explain your answer.**

27. In line with previous suggestions, publishing detailed reasons for decisions will also be important in ensuring maximum transparency and consistency.
28. The SRA is proposing that the General Counsel will review and publish data on waiver decisions. It is not clear from the consultation whether this will enable decisions to be overturned or appealed. It would be helpful to be provided with more information on this ahead of a further public consultation exercise.

**Question 10. Are there any positive or negative impacts, including EDI impacts, on the firms and users of legal services that are likely to arise from the proposed changes? Yes/No Please explain your answer.**

29. The SRA suggests that its proposals may be beneficial to small firms as they could reduce unnecessary barriers. The SRA has not mentioned the potential detriment that the proposals could have on these firms if they lead to uncompetitive practices or small firms subsidising the regulation of large firms making use of the innovation space. This must be addressed in impact assessments, prior to the implementation of any proposals, as BAME groups are disproportionately represented amongst small firms. Without greater transparency, it may be difficult for smaller firms to be aware of the options available, which underlines the importance of transparency.
30. From a client perspective, there is a greater risk to clients who have a less sophisticated understanding of their regulatory protections and are unlikely to appreciate the need for such protections until harm arises.

**Question 11. Are there any other matters relating to the issues covered in this consultation that you would like to raise? Yes/No Please explain your answer**

31. No comments at this time.