

Closed Consultation

Enabling innovation: Consultation on a new approach to waivers and developing the SRA Innovation Space

12 April 2018

- Download the consultation paper below [#download]
- The deadline for submission of responses was **8 March 2017**.

Next steps

- Download analysis of responses [#download]
- Download all consultation responses [#download]
- Please read SRA Innovate [<https://www.sra.org.uk/solicitors/innovate/sra-innovate>]

Introduction

We are the regulator of solicitors and law firms in England and Wales, protecting consumers and supporting the rule of law and the administration of justice. We do this by:

- overseeing all education and training requirements necessary to practise as a solicitor
- licensing individuals and firms to practise
- setting the standards of the profession
- regulating and enforcing compliance against these standards.

We are consulting on proposed changes to applications for waivers and the introduction of criteria and guidance to develop further our Innovation Space. This is an evolving initiative that aims to support firms of all types to deliver products and services in new ways, creating a legal services market more responsive to customer needs. These changes will remove barriers that could be preventing solicitors and firms innovate, while making sure the public and business users of legal services remain protected.

Why are we proposing these changes?

We are committed to regulation that upholds standards while providing flexibility, allowing businesses to deliver services in a way that works for them, their clients and prospective clients. Supporting innovation is essential to a competitive legal services market that delivers good quality, accessible and affordable services.

We are already able to waive certain requirements in the Handbook in accordance with our current waiver policies. We receive between 100 and 150 such applications each year. Overall, there is an increasing trend for approving new arrangements. Last year, we granted six out of every ten applications received.

We also launched SRA Innovate earlier this year¹ [#note1]. SRA Innovate provides resources for existing firms and new entrants, alternative business structures and traditional law firms which want to explore new thinking and new ways of providing services.

We want to do more to allow greater flexibility for solicitors and freedom for firms to innovate, compete and grow. In this consultation we are:

- proposing new criteria for allowing waivers of our regulatory requirements, which would give us greater flexibility to grant waivers where it is appropriate to do so
- proposing to formalise and publish criteria and guidance for firms that want to provide services in our Innovation Space. This is a safe space for existing firms, as well as new entrants to the legal market, to pilot new ideas that are likely to benefit members of the public and business users of legal services in a controlled way.

The current waivers approach

Currently, our Handbook sets out which rules or regulations can be waived. Some, like the Practising Regulations, make no provision for a waiver. Others, such as the Authorisation Rules, allow us to waive any rule (subject to legislative requirements). In some rules we can allow waivers, but only to specific rules. An illustration of this is the Accounts Rules which have two express waiver provisions relating to accountants' reports and practice as a Registered European Lawyer from an Exempt European Practice. This means we do not have power to waive any of the rules that deal with the substantive requirements around holding client money. The rules and regulations that allow waivers do not use consistent language or criteria.

The circumstances where we are permitted to waive rules are governed by our current waiver policies. There are currently two waiver policies: one general and one relating specifically to waivers in the SRA Indemnity Insurance Rules 2013. The former includes an "exceptional circumstances" test and the latter has even stricter requirements.

This inconsistency makes the process hard to navigate and is a burden for those considering applying for a waiver. This position is further compounded by having a separate policy with a higher threshold for indemnity insurance waivers.

A proposed new waivers policy

We propose to introduce a new, single set of simplified criteria for granting waivers, which will mean that a waiver may be granted if:

- in an applicant's specific circumstances a waiver is compatible with the regulatory objectives in section 1 of the Legal Services Act.
- in the event of a competing objective, that a waiver best serves our public interest purpose: namely providing consumers with appropriate protection and supporting the rule of law and administration of justice.

The proposed policy reflects our reform aims, which are to move away from prescriptive regulation that could act as a barrier to innovation and growth in the legal services market. It gives us greater flexibility to grant waivers where it is appropriate to do so. Our aim is also that the policy is more transparent and makes it more straightforward for firms to apply for waivers.

A copy of the draft proposed policy is attached as annex A [annexa] .

As part of our proposed reforms to the Handbook we want to be able to waive any requirements that are not a legislative requirement. In the interim, we propose to apply the new criteria to applications for waivers if this is consistent with the wording of the current rule.

Our expectation is that, in the longer term, if a new, streamlined, flexible and future-proofed Handbook is approved and introduced, the need for waivers will be limited. However, ahead of this (particularly once the profile of the Innovation Space is raised), it is possible that applications might increase.

We intend to publish waivers on our website to ensure fairness and transparency. This may be because, for example, the waiver permits an innovative approach to doing business which others could benefit from. We think we should publish all decisions on waivers both when we grant or refuse them. We may however anonymise some of these for example if the information would allow an individual to be identified.

SRA Innovate: Innovation Space

We have already used waivers and other regulatory tools to permit innovation in the legal services market. They have helped us bring in multi-disciplinary partnerships (MDPs). More recently, we have applied conditions on licenses to permit the use, in appropriate cases, of third-party managed accounts. Other waivers have been granted that reduce an unnecessary regulatory burden on firms.

We want to do more to encourage new services and service delivery approaches that will benefit the public. We are proposing to publish criteria

and guidance for firms that want to provide services in our Innovation Space.

This is a safe space for existing firms, as well as new entrants to the legal services market, to pilot, in a controlled way, new ideas that are likely to benefit the public. It will also create an environment where we can work collaboratively with innovators to make sure appropriate consumer protection safeguards are built into new products and services. We think this will permit greater innovation.

How we will make our decision

The criteria we propose are designed to differentiate the truly innovative from applications which could be handled under the existing waiver and authorisation application processes.

These are:

- **Is the application in scope?**

We would expect any application to be consistent with the aims of our policy reforms, our regulatory objectives and in the interest of the public and consumers² [note2]. It will be necessary to make sure the innovation does not breach legislative requirements.

- **Is it sufficiently different?**

Does the proposal result in a significantly different way of delivering legal services?

- **Is there a need for access to the Innovation Space?**

Does the applicant have a genuine need to access the Innovation Space? Has the applicant identified and established the need, including which regulatory tool or tools will be required?

- **Are consumers adequately protected?**

Are there sufficient safeguards to protect consumers, including where access to appropriate redress is required? These would be developed on a case-by-case basis to make sure that protections are sufficient, but at the same time not unnecessarily burdensome on the business.

- **Is the proposal developed enough to start?**



Is the applicant ready to start providing the innovative service? Has the application clearly identified measurable success criteria? Does the application show that research has been carried out on the benefits of the innovation, including how risks will be addressed?

Proposed 'no enforcement tool'

Some innovations may meet the criteria but bring the firm into technical breach of our current rules in circumstances where there are currently no waiver provisions. We expect this to happen on a rare few occasions in relatively limited situations. However, where this occurs, to guarantee to the firm that we will take no enforcement action, we propose using a 'no enforcement action' tool.

This approach is already an option within the Financial Conduct Authority's Regulatory Sandbox. Similarly, the Civil Aviation Authority has allowed Amazon to test using drones for parcel delivery, despite this breaching its current rules. We would only use this tool for cases where we believed it was justified in light of the particular circumstances and characteristics of the innovation, but where we were not able to issue waivers. It would only apply to our regulatory action, and is not intended to limit any other liabilities, including to consumers.

Process for firms wishing to make use of Innovation Space

We will provide support for firms wishing to explore use of Innovation Space, such as publication of case studies and guidance on our Innovate web pages. This will help firms understand the research and information we need to decide whether or not to permit the innovation.

This support will also coordinate with our response to applicants where the decision needed to permit the innovation was required from different teams in the SRA. We will also advise on the conditions and monitoring arrangements that we may require as part of a decision to permit the proposals, and which will operate during the period the services are provided in the Innovation Space. We will also need the application to have a clear exit strategy, which protects the public if the outcome of the monitoring suggests the provision of services within the Innovation Space should be stopped.

Evaluation of the impact of the Innovation Space and of waiver decisions

A quarterly review of all applications for use of the Innovation Space and application for waivers, both successful and unsuccessful, will be conducted by our General Counsel. This is to make sure the process is

conducted in a fair way and that the application of the criteria is applied correctly and consistently.

We will also publish an annual review. This will include detail of waivers we have granted for firms in the Innovation Space and any that we think are not appropriate. It will highlight themes and trends, including where our current rules appear to be inhibiting innovation.

What are the likely impacts of the proposed changes?

We aim to strike the right balance between reducing regulatory burdens and making sure the public are protected. Overall, we expect our proposals to contribute towards a more competitive market, which is better placed to innovate and respond to the needs of different groups of users – including vulnerable consumers.

The new waiver policy and criteria for the Innovation Space will allow us to treat businesses more fairly and consistently when they develop new ways of delivering legal services. The criteria should improve the process and reduce the time taken for new initiatives to reach the market.

We have not identified any adverse Equality, Diversity and Inclusion (EDI) impacts resulting from our proposals. We have, though, included a consultation question asking for views on any positive or negative EDI impacts.

The increased flexibility to waive regulatory arrangements may lead to a reduction in unnecessary barriers, which may benefit small firms. Small firms can suffer a disproportionate impact from the cost of complying with prescriptive rules, which may be subject to regular revision. Because they are overrepresented in small firms and sole practices, the proposals could reduce a regulatory burden on some Black, Asian and Minority Ethnic (BAME), as well as older solicitors.

Consultation questions

Question 1

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

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.

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

Question 4

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

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.

Question 6

Do you think the proposals to formalise the use of our Innovation Space will create greater opportunities for innovation? Yes/No Please explain your answer, with examples if possible.

Question 7

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

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.

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.

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.

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.

Notes

1. <https://www.sra.org.uk/solicitors/innovate/sra-innovate.page>

[<https://www.sra.org.uk/solicitors/innovate/sra-innovate>]

2. <https://www.sra.org.uk/solicitors/innovate/sra-innovate.page>

[<https://www.sra.org.uk/solicitors/innovate/sra-innovate>]

Appendix A – Draft waivers policy

Introduction

Purpose

This document provides guidance for those making decisions about when we will grant a waiver of our regulatory arrangements – that is, of our rules and regulations. While we are under no obligation to grant a waiver, this guidance sets out the circumstances in which we will consider doing so.

This document should be read in the context of our decision-making framework. It is a living document and will be reviewed and updated as appropriate. It reflects our approach to our regulatory role, and any departure must be capable of justification on the individual facts of the case.

What is a waiver?

An individual or firm regulated by us, or affected by our rules or regulations, does not have to comply with a specified rule or regulation that forms part of our regulatory arrangements in specific circumstances or subject to specific conditions.

Types of matters that may be suitable for a waiver

Many of our rules and regulations may be waived in appropriate circumstances. However, we cannot waive rules or regulations:

- a. that impose obligations required by statute, or other legislation such as EU Directives or Regulations
- b. unless our regulatory arrangements (including this policy) give us the power to do so.

Case study one: a waiver of the SRA's Authorisation Rules

We regulate a firm, which is a partnership made up of four corporate partners, all of whom we also regulate.

Our rules require all authorised bodies to have their own compliance officers (Compliance Officer for Legal Practice (COLP) and Compliance Officer for Finance and Administration (COFA)). The former must report to us any serious breach of our rules or regulations in relation to the management and delivery of legal services. The latter's duties relate primarily to compliance with our rules regarding holding client money.

The corporate partners ask us for a waiver of the requirement to have their own, separate COLPs and COFAs. We grant the waiver on the basis that the requirement to have a COLP and COFA in these circumstances would serve no purpose as the corporate partners are not themselves providing legal services in their own right – only through the partnership, which has its own COLP and COFA. Therefore, the compliance officers would have no duties to fulfil and the granting of a waiver would have no adverse effect on the public interest.

Case study two: a refusal to waive the Authorisation Rules

The COFA of a small licensed body we regulate leaves the firm. The firm asks us for a waiver of the requirement in rule 8.5 of the Authorisation Rules to replace the COFA on the basis that they do not have a suitable candidate, and the volume of client account transactions is small. In this case, even if the factual circumstances led us to believe that a waiver was appropriate, we do not have the power to grant a waiver of rule 8.5 because the requirement derives from statute (in this case paragraph 13 of Schedule 11 to the Legal Services Act 2007, which states that our rules must state that a licensed body must, at all times, have a Head of Finance and Administration fulfilling this role).

In what circumstances will a waiver be granted?

Before granting an application for a waiver we will need to be satisfied that, in the applicant's specific circumstances, a waiver is compatible with the regulatory objectives in section 1 of the Legal Services Act 2007, which are:

- protecting and promoting the public interest;
- supporting the constitutional principle of the rule of law
- improving access to justice
- protecting and promoting the interests of consumers
- promoting competition in the provision of legal services
- encouraging an independent, strong, diverse and effective legal profession



- increasing public understanding of the citizen's legal rights and duties
- promoting and maintaining adherence to the professional principles.

The waiver sought may, in the particular circumstances, advance some of the regulatory objectives but have an adverse impact on others. For example, a waiver of some of our current practising restrictions may promote access to legal services by enabling services to be provided by a new business in a novel way, but arguably give the applicant a competitive advantage by removing restrictions that are generally applied. We expect applicants, insofar as they are able to do so, to identify the impact of the waiver, with reference to the regulatory objectives.

We will then consider any competing objectives and reach the decision that best serves our public interest purpose: namely providing consumers with appropriate protection and supporting the rule of law and administration of justice.

We may grant a waiver to resolve a regulatory conflict between our rules and regulations and those of another body that regulates the applicant, or to avoid unnecessary duplication of regulatory requirements.

In what circumstances will a waiver not be granted?

A waiver will not be granted if it would undermine our public interest purpose as set out above.

If the applicant's circumstances are common to others in the market, it is unlikely that a waiver will be appropriate unless it is evident that the underlying provision itself needs review in accordance with developing our policy in this area.

Further, we will not grant a waiver if there is another way for the applicant to achieve their objective and which is reasonable to pursue.

Case study three: a waiver of the SRA Indemnity Insurance Rules (SIIR)

A Scottish firm of solicitors wants to open a branch office in England at which dual-qualified solicitors will be based. That English office is required, under rule 4 of the SIIR, to have its own policy of indemnity insurance that meets our requirements. The firm wants a waiver because the English office is covered by the firm's Scottish Master Policy, which includes "foreign work/foreign advice extension" cover for practice conducted outside the jurisdiction of Scotland. However, the master policy does not comply with the SIIR, because the insurers under the Scottish Master Policy are not participating insurers, the master policy is not a "policy" (as no separate

policies are issued to individual firms), nor is its qualifying insurance written on our minimum terms and conditions.

Although the Scottish master policy does differ in some respects to that required by our rules, the key scope is broadly the same. There does not appear to be any significant risk to clients of the English office. We therefore grant the waiver of rule 4 of the SIIR as we consider that to do so meets the regulatory objectives.

Case Study four: a refusal to grant a waiver of the SIIR

A firm of solicitors wants to open an office in England. They apply for a waiver of the obligation to have a separate policy of indemnity insurance on the basis that the type of work they will do is "low risk" and the premiums they have been quoted are unaffordable. We refuse the waiver as the purpose of the present requirement to have insurance in place is to provide a clear and consistent level of protection for consumers of legal services provided by firms regulated by us.

Publication

If necessary, we may decide to publish a waiver on our website to ensure fairness and transparency. This may be because, for example, the waiver permits an innovative approach to doing business which others could benefit from.

Checklist for decision maker

- **What is the applicant seeking?**

Is it a waiver of our rules and regulations and, if so, is such a waiver necessary for the applicant to achieve their objective?

- **Can we grant a waiver?**

Do we have the power to waive the particular rule? Does the rule or regulation to which the application relates reflect a legislative requirement?

- **On balance, would the waiver promote or be compatible with the regulatory objectives?**

- **Overall, is the waiver in the public interest?**

- **Should the decision be published to ensure fairness for other firms or individuals who face similar circumstances?**

Downloadable document(s)

- Our response to consultation: Enabling innovation (PDF 14 pages, 191KB)
[<https://www.sra.org.uk/globalassets/documents/sra/consultations/waivers-response.pdf?version=49ffe1>]
- Our response to consultation: Annex 1 - Guidance on granting a waiver (PDF 4 pages, 164KB)
[<https://www.sra.org.uk/globalassets/documents/sra/consultations/waivers-response-annex-1.pdf?version=49da05>]
- Our response to consultation: Annex 2 - Innovation Space assessment criteria (PDF 1 pages, 50KB)
[<https://www.sra.org.uk/globalassets/documents/sra/consultations/waiver-response-annex-2.pdf?version=4a1ac2>]
- Consultation responses (PDF 22 pages, 403KB)
[<https://www.sra.org.uk/globalassets/documents/sra/consultations/waivers-consultation-responses.pdf?version=49fff2>]
- Closed consultation - Enabling innovation (PDF 8 pages, 116K)
[<https://www.sra.org.uk/globalassets/documents/sra/consultations/waivers-innovation.pdf?version=49fff9>]
- Appendix A - Draft waivers policy (PDF 4 pages, 99K)
[<https://www.sra.org.uk/globalassets/documents/sra/consultations/waivers-appendix-a.pdf?version=4a0010>]