



LawWorks Policy Consultation Response

Response to the Solicitors Regulation Authority. Enabling innovation: Consultation on a new approach to waivers and developing the SRA Innovation Space

Introduction

This is LawWorks' response to the Solicitors Regulation Authority (SRA)'s proposals to change the criteria used to assess waiver applications. The SRA intends that instead of a default position whereby waivers applications are granted in "exceptional circumstances", under new criteria, waivers will be granted if a) they are compatible with the regulatory objectives of the Legal Services Act 2007 and b) in the public interest. In this response we comment on the policy and practical issues raised, especially from a pro bono perspective.

As the SRA will be aware, there is significant need for free legal advice services. For example, 84 per cent of registered clinics in the LawWorks clinics network have seen an increase in demand for free legal advice since the introduction of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). Similarly, the economic climate of recent years has contributed to a growing need for free legal advice and support among disadvantaged members of the community, and by the not-for-profit organisations that support them. We are therefore interested in achieving a regulatory system that facilitates and encourages innovative pro bono work.

About LawWorks

LawWorks is the operating name of the Solicitors Pro Bono Group, an independent charity which offers a range of consultancy and brokerage services to bring together lawyers and law students who are prepared to give their time without charge and

individuals and community groups in need of legal advice and support. We develop and support a number of pro bono programmes, including:

- The LawWorks Clinic Network (consisting of independently run clinics) provides free initial advice to individuals
- The Not-For-Profits Programme connecting small not-for-profit organisations in need of legal support with the skills and expertise of volunteer lawyers
- A Secondary Specialisation programme which trains and supports lawyers to provide in-depth advice and representation in under-resourced areas of social welfare law.

LawWorks also work with the Law Society on pro bono practice and policy issues, and have been closely involved in the production of the Pro bono Manual and the Pro Bono Charter.

LawWorks' view on waivers

We welcome this consultation and proposals to adopt a more flexible approach to waivers to enable innovation, and in principle we therefore support the intention to simplify the general waivers process and to make the decision-making process transparent and consistent.

However, our starting point is that waivers may not always be the best approach to regulatory exceptionality issues and overcoming barriers to innovation, as the rules should be actively enabling innovation to thrive and should be sufficiently flexible to avoid the need for waiver applications arising. Waivers can therefore be an indication that something may be remiss with the design and practicality of specific regulatory and practice rules. Too often waivers can be used as a way of





habitually circumventing inappropriate rules, rather than addressing the problems with those rules in the first place.

This is especially important in the pro bono context; sometimes specific regulatory rules can have a negative impact on pro bono supply and practice, and can therefore potentially come into conflict with the over-riding regulatory objectives in the Legal Services Act of improving access to justice, encouraging a diverse and effective legal profession; and promoting the public interest.

Although there is no regulatory requirement on the legal profession to undertake pro bono work or deliver a set number of pro bono hour targets, pro bono is now commonly seen as an essential part of being a lawyer. It is an opportunity to use professional skills, experience and knowledge to support the most vulnerable in our communities to access justice. As the Pro Bono Charter says *"a commitment to access to justice is at the heart of the legal profession and that pro bono work, as one method of achieving this, is an integral part of the working lives of solicitors."*

Therefore unjustified burdens that may prevent some lawyers (for example in-house counsel) from participating in pro bono projects may be in contradiction to the overarching objectives of the Legal Service Act. **The response to overcoming these challenges should not be to have to rely on the waivers process, but rather to develop a set of more bespoke rules to facilitate and encourage pro bono.**

Issues for LawWorks

Solicitors working with LawWorks projects are often volunteers rather than employees; and therefore do not fall within the scope of Rule 13 of the Solicitors' Code of Conduct 2009 and 2011 as superseded and codified in Rule 4 of the SRA Handbook and do not hold the status of employees nor fall within any of the exempt categories. This can cause

issues with insurance requirements. It is also often too onerous and unfeasible for solicitor volunteers to be recognised as 'sole practitioners' given that they are not being paid.

LawWorks has applied for waivers on behalf of the pro bono clinics in our network to allow for 'reasonably equivalent' cover as opposed to the 'qualifying insurance' otherwise needed. In line with our message about getting regulation right first time rather than using waivers, it would be more efficient for regulations to make this the default in the context of pro bono services. Clarification is needed on what 'reasonably equivalent' cover means. A lack of clarity can delay the development of new pro bono advice services because legal volunteers, and their firms or employers, are nervous to sign up to new services where 'reasonably equivalent' is not clearly defined and they are therefore unsure that they are adequately covered to meet regulatory requirements.

Moreover, the scope and design of rules concerning employed in-house lawyers can also have a negative impact on pro bono. Part of the problem is with the overall statutory framework. As currently drafted the effect of section 15 of the Legal Services Act is that restrictions arise for in-house solicitors providing legal services in connection with "reserved legal activities" to anyone other than their employer. Although in-house solicitors are free to provide pro bono advice in all other legal areas, the restriction in relation to reserved activities can pose problems for in-house solicitors who want to undertake particular areas of pro bono work such as tribunal representation which is a key area of work for some pro bono law clinics. When the LSB consulted in 2015 on regulatory restrictions in practising rules for in-house lawyers, it did not specifically address issues concerning pro bono, despite significant representations from LawWorks and others.

Through our LawWork's brokerage role, there are sometimes ways around these restrictions without having to apply for waivers. For example, it is





possible for an in-house team to volunteer at a clinic in the LawWorks network, working in partnership with a law firm. In this arrangement, the law firm covers reserved matters and the pro bono work of the in-house team can be covered by LawWorks' insurance, provided the team itself is a LawWorks member. **It is our contention that the legislation and accompanying regulatory guidelines need to be reviewed and amended so that in-house lawyers can provide advice to pro bono clients, irrespective of the connections with their employer, in reserved legal areas without having to apply for waivers.**

Our concerns about the lack of clear bespoke arrangements and guidance by regulators for pro bono and are longstanding. Work is ongoing by the SRA to review its regulatory model and the Handbook, and as we understand the SRA, as part of this process are intent on removing provisions in the current P FRs that place restrictions for those providing pro bono legal services, especially where it is considered that such rules go beyond the requirements of the LSA, or where they may be confusing and difficult to understand. LawWorks considers that there should be specific case studies and guidance on the Code and how it applies in various pro bono scenarios, and that there is need for clarification around pro bono work, for example a specific section within the Code on pro bono and the SRA's regulatory approach to genuine pro bono activity delivered by volunteers in good faith. **We would welcome further discussion with the SRA about the issues concerning pro bono.**

Finally the rules about "special bodies" and the licensing of non-profit organisations as Alternative Business Structures (ABS) have yet to come into effect due the extension of transitional protection under section 23. However, if licensing of the Legal Services Act were to be robustly applied subject to the conditions of section 101, it is likely that many issues would arise for the free legal advice sector. There are many charities and community advice organisations involved in providing their beneficiaries with legal advice and representation

that may struggle with compliance around an ABS regime that is primarily designed for the commercial sector. It is likely that the SRA might issue waivers as an approach to dealing with these issues, but again the question arises of whether a better or more bespoke system for pro bono work could be put in place to begin with.

We encourage the SRA to give full consideration to this issue in relation to situations where Special Bodies come under the full regulation of the SRA if and when the transitional protection period is brought to an end. For many non-profit set ups, where there is no financial element to the client relationship and no money is held or transferred, so many of the ABS requirements would place a heavy burden on already stretched volunteer-run entities. Any increase in the regulatory or reporting burdens on many pro bono clinics could result in a significant number of services closing. **Falling back onto the waivers process would not be appropriate as many clinics could struggle with the waiver application process.**

Use of Waivers by LawWorks

Our experience of the Waiver applications process is that it has sometimes been cumbersome and unwieldy. Recently LawWorks sought a waiver in respect of Rule 10.1 and Rule 4.16 PFR and Rule 4 of the Indemnity Insurance Rules in order to enable solicitors who are members of LawWorks in an individual capacity to participate as volunteers for LawWorks' pro bono programmes and advise members of the public

LawWorks has developed projects through individual solicitors, rather than through member firms, including an early project to set up a scheme to provide pro bono opportunities to lawyers not in current employment – eg for retired solicitors and those on career breaks. This project became the LawWorks Choices Scheme for which a waiver was needed for the volunteers from the qualifying insurance requirements (as per guidance note 25





to Rule 13). Furthermore, as volunteers did not hold the status of employees nor fall within any of the exempt categories of Rule 20.03(2), a waiver was also needed for the volunteers from the sole practitioner endorsement requirements of Rule 13.09 of the Solicitors' Code of Conduct.

LawWorks was originally granted a waiver in 2009 for the Choices project, and then renewed in December 2012, and again in 2016 in of Rules 4.16 and 10.1 of the SRA practice Framework Rules 2011 and SRA Code of Conduct – Outcomes 1.9,1.10,1.11 &1.13.

In 2016 it was decided that the LawWorks Choices project would be amalgamated into a LawWorks individual membership scheme. We therefore contacted the SRA in March 2016 requesting an extension of the waiver granted to the LawWorks Choices project to cover this transition. A long period of correspondence then took place, before the SRA finally recommended an extension of the waiver in January 2017. Following this experience, we believe that the application process could be simplified and ensure that the same information does not need to be repeated.

Issues raised in the consultation

The SRA is proposing to replace two existing waiver policies - a general policy and a policy specific to the SRA Indemnity Insurance Rules 2013 - with a single policy. It has proposed the introduction of a 'no enforcement rule' in specific circumstances where waivers may not be possible. Whilst we support what the SRA is trying to do, we think that this consultation process would benefit from greater explanation of the policy and market context.

We also suggest that the two criteria could be supplemented by third one concerning the overriding interest of delivering access to justice. Our starting point in responding to this consultation is that different models of pro bono work can provide

innovative approaches for improving the delivery of legal services and access to justice. Unbundled services, greater use of digital technologies, developing the skills of law students and secondary specialisation in pro bono casework are all part of the mix and have regulatory implications. Pro bono legal advice is now delivered through a wide variety of models, with new innovations emerging as the profession responds to the needs of the community. **LawWorks would be interested in working with the SRA to identify particular pro bono issues and concerns that can necessitate waivers, for example around supervision, conflict of interest policies, and insurance.**

In this context it is notable that the consultation does not specifically address concerns about restrictions affecting pro bono and when waivers might be appropriate. A no enforcement rule alone is somewhat vague as an assurance that pro bono innovation will not be squeezed out of the market by prescriptive regulation. **We recommend that the SRA consider the issues we have raised in this response in developing their final proposals.**

Finally, in developing this new approach to waivers there is an important challenge on transparency that needs to be addressed to ensure that it is perceived that the SRA is acting in the public interest, and that there is clarity over how the SRA will apply the new rules and principles on the basis of a level playing field for providers. The decision making, data and intelligence should also be used to inform future policy and regulation as this develops. **We therefore recommend that the SRA publish an annual report on waivers, as basis for learning and insight.**

James Sandbach
Director of Policy and External Affairs

