

**LawWorks response to the SRA Consultation:
*Looking to the future - flexibility and public protection***



Introduction

About LawWorks

LawWorks (the operating name for the Solicitors Pro Bono Group) is pleased to respond to the Solicitors Regulatory Authority (SRA) consultation.

LawWorks is a charity which encourages, supports and celebrates pro bono by solicitors, law schools and law students across England and Wales. We are generously supported by the Law Society and by over 100 members (financially and in-kind), including international and City firms, regional, medium and small firms, and in-house solicitors and organisations.

The focus of our work is on supporting and developing local independently run pro bono advice clinics and connecting smaller charities and not-for-profit organisations in need of free legal advice with volunteers from amongst our membership. This year we have been piloting more in-depth pro bono advice, casework and representation ('secondary specialisation') including supporting solicitors to represent at 1st-tier social security appeal tribunals and, with the charity Together for Short Lives, establishing clinics in hospices for children with life-limiting conditions (and associated casework on social care and housing issues).

We support our members and clinic volunteers with training, information, networking opportunities and a range of online resources and materials. Our Annual Pro Bono and Student Awards recognise and celebrate the pro bono commitment of our members and law students.

The SRA consultation and pro bono

The SRA consultation provides an opportunity for LawWorks and others to highlight the importance of pro bono in enabling access to justice, and to identify some of the relevant regulatory and related issues.

A theme to our response is that current regulations and regulatory approaches more often inhibit than enable pro bono and the provision of free legal advice. We believe that recipients of legal pro bono should be treated as equally as 'consumers' as those who pay for legal services (or where legal services are indirectly paid for – e.g. through legal insurance or no-win no-fee arrangements). However, we believe it is possible to provide appropriate protections for pro bono customers (beneficiaries) while also applying more flexible and 'light-touch' (and enabling) regulation. Given the overarching policy objectives in the Legal Services Act (SLA) 2007, we believe that regulatory barriers to pro bono are

most often an ‘unintended consequence’ or a result of confusion, lack of clarity or of too narrow an interpretation.

Context is relevant and important – the key point being that solicitors provide pro bono voluntarily, in good faith and without financial remuneration, most often for vulnerable individuals (or charities and not-for-profit organisations supporting them) not eligible for legal aid and otherwise unable to pay. Whilst there can be a ‘business case’ for pro bono (which LawWorks supports and promotes), with appropriate safeguards (including applying the Joint Pro Bono Protocol – see below) we see this as a virtuous circle, no different from many factors and motivations for ethical corporate social responsibility policies.

Our response is restricted to matters relating specifically to pro bono and we do not address or comment on many important issues and proposals included in the consultation. The power and contribution of pro bono reflects the profession’s integrity, values and robustness. In seeking a regulatory framework which enables pro bono, our response should not be taken as endorsing proposals described or intended as promoting more affordable or innovative legal services. In this regard, we note in particular the Law Society’s response to the consultation and the broader issues and concerns it identifies.

There are ‘barriers’ to pro bono which are either outside of the direct authority of the SRA (e.g. Financial Conduct Authority requirements for pro bono consumer debt advice), or which the SRA alone may not be able to change (particularly restrictions on in-house pro bono related to the LSA 2007). However, we hope the SRA in championing access to justice (and under the auspices of the policy objectives in the 2007 Act), will support - and join forces with – broader efforts to enable and maximise the profession’s pro bono commitment and contribution.

We have responded to the following Questions in the consultation document:

Question 4

Are there any other Principles that you think we should include, either from the current Principles or which arise from the newly revised ones?

LawWorks believes that current Principle 5 (‘Provide a proper standard of service to your clients’) should be retained.

While recipients of pro bono legal work do not pay for the legal services they receive, they are nevertheless ‘clients’ and ‘consumers’ whose interests should be protected and promoted. The Principles should apply equally to all consumers - e.g. regardless of whether they pay or are beneficiaries of voluntary free legal services) – this is reinforced by new Principle 6 (a slight change in wording from current Principle 4): ‘Act in the best interest of each client’. For the avoidance of doubt, we would welcome explicit reference being made to this, in the context of pro bono legal work, in guidance.

The Joint Pro Bono Protocol for Legal Work ('the Protocol') was developed to promote and support consistently high standards of pro bono work, seeking to build upon (and not replace) professional codes of conduct. The Protocol was developed under the auspices of the Attorney General's Pro Bono Coordinating Committee and has been endorsed by the Law Society of England and Wales, the Bar Council of England and Wales and the Chartered Institute of Legal Executives (CILEx). The Protocol uses the title 'lawyer'.

The Protocol states that pro bono legal work 'should always be done to a high standard', and includes (for example):

- *When a lawyer is requested to agree to undertake a piece of pro bono legal work the lawyer should give his/her decision within a reasonable time;*
- *The terms on which the legal pro bono work is undertaken, including the circumstances in which the relationship may be terminated, should be made clear at the outset;*
- *The pro bono legal work should only be undertaken by a lawyer who is adequately trained, has appropriate knowledge, skills and experience and, where necessary, adequately supervised for the work in question;*
- *The lawyer undertaking a piece of pro bono legal work (and where appropriate his or her supervisor) should have no less than the minimum level of legal expertise and experience as would be required if the particular work in question was paid work;*
- *Once a lawyer has agreed to undertake a piece of pro bono legal work the lawyer (and if appropriate his or her firm) **must give that work the same priority, attention and care as would apply to paid work...** [emphasis added].*

We hope pro bono will be referenced in the guidance (supported by case studies), both providing a positive steer and recognition by the SRA of its importance, and to address matters raised in our consultation response (see below).

Question 5

Are there any specific areas or scenarios where you think that guidance and/or case studies will be of particular benefit in supporting compliance with the Codes?

LawWorks believes that it would be helpful to have case studies and guidance on pro bono and pro bono scenarios. 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.

At a time of high demand for pro bono services, it is vital that the new Code does not create any unnecessary barriers to the delivery of such services, while providing proportionate protections for consumers of pro bono legal advice. As seen with the regulation of in-house solicitors, the SRA Practice Framework Rules 2011 (PFRs) created uncertainty and ambiguity around what can and cannot be delivered by pro bono in-house lawyers.

Nervous about breaching the PFRs, in-house solicitors and their organisations have sometimes taken an overly cautious approach and interpretation, creating avoidable barriers for pro bono volunteering. Rule 4.10 of the PFRs and the interpretation of the phrase "...part of your employer's business" given in Guidance Note (X) is an example of where unclear and ambiguous wording has restricted the delivery of pro bono advice.

It is important that the SRA consider the full implications on the delivery of pro bono advice when formulating the new Code, and spell out clearly and unambiguously what can and cannot be delivered.

Pro bono legal advice is delivered in a wide variety of models, with new innovations emerging as the profession responds to the free advice legal needs of individuals and communities. LawWorks would be happy to work with the SRA to identify particular pro bono case studies to reflect the broad range of service delivery models. The guidance should reflect common issues that currently arise in the development of new pro bono services and cause particular concerns, for example around supervision, conflict of interest policies, and insurance.

Question 6

Have we achieved our aim of developing a short, focused Code for all solicitors, wherever they work which is clear and easy to understand?

There is need for clarification around pro bono work, for example a specific section within the guidance on pro bono and the SRA's regulatory approach to pro bono activity delivered by regulated volunteers.

We would welcome a general statement by the SRA that it is supportive of pro bono legal activity and will apply the regulations proportionately where pro bono legal work is being delivered in good faith. This would give potential volunteers and their firms or employers the confidence to engage in pro bono work where they may previously have been deterred, for example for fear of accidentally breaching the regulations while trying to provide much needed, free legal advice.

Ensuring a high quality of legal work provided on a pro bono basis could still be guaranteed through regulations setting out the professional standards solicitors must meet when giving advice.

We agree that the proper handling of conflicts of interests is a critical public protection. However, the current conflict of interest rules can be disproportionate in certain pro bono advice settings, e.g., in the context of a 30 minute, one-off initial advice clinic session where no ongoing relationship is formed, there is less need to undergo a formal conflict of interest check with the volunteer's firm. This can be contrasted to a situation where a firm takes on a pro bono client on an ongoing basis and where the firm's internal conflict of interest checks would be appropriate. A presumption that there will be no conflict of interest in certain pro bono settings unless the individual solicitor is personally conflicted would be more appropriate and proportionate.

Question 8

Do you think that there is anything specific missing from the Code for all solicitors that we should consider adding?

See our response to Question 4.

Question 9

What are your views on the two options for handling conflicts of interests and how they will work in practice?

As detailed in our response to Question 6, we believe there should be a more straightforward conflict of interest regime in certain one-off, initial pro bono advice settings which would be more appropriate and proportionate in practice.

Question 12

Do you think that there is anything specific missing from the Code for SRA regulated firms that we should consider adding?

As we propose in response to Question 5, we would welcome specific clarity in the guidance on the application of principles and of rules in the context of consumers of pro bono legal activity.

Question 14

Do you agree with our intention to retain the COLP and COFA roles for recognised bodies and recognised sole practices?

In responding to this question, please set out the ways in which the roles either assist or do not assist with compliance.

We encourage the SRA to give consideration to this issue in situations where Special Bodies come under the full regulation of the SRA at the end of the transitional period. For many not-for-profit bodies, where there is no financial element to the solicitor-client relationship

and either no money is held or transferred, or the amounts involved are small (e.g. meeting the cost of a GP letter in support of a social security benefit appeal), these requirements would place a heavy burden on already stretched volunteer-run entities. For bodies providing free legal services, the regulatory or reporting obligations should be proportionate and minimised.

We would also highlight to the SRA the wide variety of governance structures which exist in the charity and non-profit sector (including the obligations and responsibilities of charities and charity trustees) and hope that consideration of the compatibility of the proposals is explored to avoid any unintended consequences of the changes.

Question 16

What is your view of the opportunities and threats presented by the proposal to allow solicitors [to] deliver non-reserved legal services to the public through alternative legal services providers?

In the context of pro bono we echo the SRA's acknowledgement that the Practice Framework Rules (PFRs) go beyond the requirements of LSA 2007, and are confusing and difficult to understand. LawWorks would like to use the opportunity of this consultation to highlight the impact of the regulatory restrictions on in-house lawyers in the context of pro bono, and highlight a need for the SRA to change the PFRs to allow in-house solicitors to provide pro bono advice in reserved legal activities.

Section 15 of the LSA prevents the delivery of six categories of reserved legal activities by in-house counsel to anyone other than their employer, where such activities are carried out as part of their employer's business. Although in-house lawyers are free to provide pro bono advice in other areas, the current regulatory landscape restricts in-house lawyers who want to do areas of pro bono work that fall within the definition of 'reserved legal activities' and can be seen to be connected to their employer's business.

LawWorks believes that the current restrictions on pro bono work are an unintended consequence of the LSA and that section 15 of the LSA be amended to permit the undertaking of pro bono by in-house counsel for reserved legal activities. We would welcome the SRA's support for this change.

The PFRs have a specific provision for pro bono work: rule 4.10 states that in-house lawyers can provide services in connection with reserved legal activities to the public on a pro bono basis provided that it is not done as part of their employer's business. However, the SRA has given a broad interpretation to the phrase '...part of your employer's business', as detailed in Guidance Note (X) of the PFRs.

We believe that the SRA interpretation of the LSA is too restrictive. The wide definition of employer's business creates a deterrent for in-house teams doing pro bono work. In-house

lawyers are unlikely to take on any reserved legal matters for pro bono clients because they feel that the work will be in some way connected to their employer and therefore be caught by the legislation. We are therefore pleased to see that the SRA are considering removing provisions in the current PFRs that place restrictions on in-house solicitors, and we would encourage the SRA to support removing entirely the restriction on in-house solicitors providing pro bono advice in reserved legal activities.

As a minimum, we encourage the SRA to narrow the scope of Guidance Note (X). LawWorks would argue that the situations outlined in this Guidance Note should not be classified as part of an employer's business - such as: where the employer requires an in-house lawyer to undertake pro bono legal work; where the employer provides management, training, supervision or professional indemnity insurance in relation to such work; or where an employer publicises the pro bono work or rewards the employee in any way in relation to such work. Through our engagement in this field we see that a growing number of companies have strong Corporate Social Responsibility (CSR) programmes, and volunteering is seen as something the organisation supports. This is not necessarily core business, but it is something that the company facilitates staff involvement in and therefore would constitute part of the employer's business in the SRA's wide interpretation of the LSA.

Allowing in-house teams to provide advice to pro bono clients in reserved legal areas would enable an increase in the provision of pro bono legal advice and assistance to charities and individuals unable to afford to pay and not eligible for legal aid.

The SRA states that it would like to put in-house solicitors on an equal footing with other solicitors; amending the regulatory framework so that in-house solicitors can provide advice to pro bono clients in reserved legal areas is relevant to achieving this. In supporting changes to the regulatory framework, we are not proposing that beneficiaries of legal pro bono should have less protection than other consumers of legal services. However, there should be an appropriate balance between regulations which protect the interests of consumers and those which unreasonably or unintentionally deny or inhibit access to free legal services.

Question 18

What are your views about our proposal to maintain the position whereby a sole solicitor (or REL) can only provide reserved legal services for the public (or a section of the public) as an entity authorised by the SRA (or another approved regulator)?

LawWorks supports individuals unconnected to an entity authorised by the SRA being able to provide pro bono. This can include solicitors on career breaks looking to maintain their skills and experience by volunteering between employment. Currently, LawWorks is required to apply for waivers from the sole practitioners' rules to allow for this pro bono work to be delivered. Having this specifically allowed in the regulations (in pro bono

contexts) would be more efficient and give individuals on career breaks the appropriate reassurances that their volunteering is not breaching the rules. This is a further example where a lack of clarity, or unintended consequences, creates barriers to the delivery of pro bono advice.

Question 20

Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?

We would encourage the SRA to consider the implication of these requirements for special bodies providing free legal services and for other pro bono settings, particularly where advice is being delivered through a variety of models. For example, how would these requirements apply in telephone or 'Skype' pro bono advice clinic settings?

Where volunteers are trying to support particularly vulnerable clients where potentially they have low literacy levels or English is not the client's first language, it's unclear how this additional requirement would offer any added reassurance or support to the client.

Question 21

Do you agree with the analysis in our initial Impact Assessment?

We would ask that particular consideration be given to how change may impact on the provision (directly or indirectly) of pro bono legal services.

Question 28

Do you think that we should retain a requirement for Special Bodies to have PII when providing reserved legal activities to the public or a section of the public?

It should be a requirement for Special Bodies to have PII to ensure protection for their clients. However, current requirements could be clearer and practice more efficient.

LawWorks has to regularly apply 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. It would be more efficient for the new 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 are therefore unsure that they are adequately covered to meet regulatory requirements.

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