

Are regulatory restrictions in practising rules for in- house lawyers justified?

**Summary of responses received to a discussion paper and
the LSB's response to them**

July 2015

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Introduction

1. In February 2015 we published a discussion paper¹ in which we presented our initial analysis of how the current practising rules for in-house lawyers² align with the minimum restrictions set out in section 15 of the Legal Services Act 2007 (the Act).
2. Section 15 of the Act sets out the arrangements for carrying on reserved legal activities when working as an employee of a non-authorised body (see **Annex A** for the full text of section 15). Our paper highlighted the arrangements of the three regulators which have specific rules in place for the practice of in-house lawyers, which, in our view, go beyond the requirements of section 15 of the Act: Bar Standards Board (BSB), Intellectual Property Regulation Board (IPReg) and Solicitors Regulation Authority (SRA).
3. We invited all legal services regulators to explain their approach to regulating in-house lawyers and, for those regulators whose arrangements appeared to go beyond section 15 requirements, we asked how they had assured themselves that there is evidence for any restrictions they imposed on in-house lawyers. We also sought views from those who have experience of the current regulatory approaches.
4. We provided 12 weeks for responses to the discussion paper. We also sought feedback from all interested parties about the potential impact of current approaches to help to identify possible areas for improvement.
5. This paper summarises the responses received to the discussion paper. It sets out the views of those who regulate in-house lawyers as well as those who have experience of, or represent those who have experience of, being regulated. The responses highlight the wide range of issues that emerge when examining rules for in-house lawyers.
6. Responses we received to the discussion paper, along with reflections on the extent to which work planned by regulators has progressed, will inform our final recommendations for this area of work, which will be published in autumn 2015.

¹ *Are regulatory restrictions in practising rules for in-house lawyers justified? A discussion paper*, is available at: [http://www.legalservicesboard.org.uk/Projects/thematic_review/pdf/S15_\(In_House_Lawyers\)_Discussion_Paper_\(Feb_2015\).pdf](http://www.legalservicesboard.org.uk/Projects/thematic_review/pdf/S15_(In_House_Lawyers)_Discussion_Paper_(Feb_2015).pdf)

² By in-house lawyers we mean those authorised persons who work for employers that do not provide reserved legal services to the public (ie. non-authorised employers).

The issue we examined

7. Section 15(4) effectively splits lawyers' employers into two groups by virtue of whether they are carrying on reserved legal activity as part of services provided to the public, as part of their employer's business or not. Our discussion paper looked at the impact this distinction has on regulatory arrangements that authorised individuals may be obliged to meet.
8. The discussion paper summarised a review across eight legal services regulators to examine where the non-authorisation of an employer is reflected in the practising rules for authorised individuals. Currently, regulators broadly fall into one of three categories:
 - Those who do not need to make arrangements because of exemptions under the Act's transitional arrangements: the Costs Lawyer Standards Board (CLSB) and the Master of the Faculties.
 - Those who do not make specific arrangements for individual lawyers working for a non-authorised employer: the Council for Licensed Conveyancers (CLC), CILEx Regulation, and the Institute of Chartered Accountants in England and Wales (ICAEW).
 - Those who make specific, but varying, arrangements for in-house lawyers: BSB, IPReg, and SRA. The main effect of these arrangements is that if a lawyer is an employee of a non-authorised employer, they cannot provide legal services to those not connected to their employer (bar in a few limited circumstances).

The responses

9. We received a total of 18 responses to the discussion paper, including five from legal services regulators. We also received responses from approved regulators, groups representing in-house lawyers and organisations employing in-house lawyers. A full list of respondents is set out at **Annex B**.
10. The responses to the discussion paper broadly reflected the two themes on which we had sought views – regulators explaining their approach to regulating in-house lawyers and interested parties explaining the impact of those approaches.
11. We received responses from BSB and SRA, both of which set out plans for proposed changes to in-house rules. We also received responses from other legal services regulators who do not currently impose restrictions beyond those in the Act: CLC, CILEx Regulation (who responded jointly with CILEx), and ICAEW.
12. The range of responses which we received from non-regulators highlighted some of the practical issues that exist when operating under the current arrangements. Many of the responses noted the desirability to review current arrangements for in-house lawyers that seem to go beyond those required by section 15 of the Act.
13. We are grateful for each organisation that took time to consider our paper and provide a response. In particular, we have found it useful to receive responses from a broad range of organisations upon which the current regulatory arrangements for in-house lawyers either impact directly upon, or directly affect their membership.
14. This paper sets out our response to the feedback we received on the questions in our discussion paper and next steps for this work. The final section also includes our response to views we received about several issues related to legal services regulators' rules for in-house lawyers, which were not specifically covered by the discussion document questions, but which will nonetheless help to inform our thinking about this work.

Question for regulators

1. What is the rationale to support your current approach to regulating in-house practice?

15. In their responses to the discussion document, both BSB and SRA committed to reviewing their current approach to regulating in-house practice. BSB stated that its current rules for in-house lawyers pre-date the Act and had not yet been brought up to date. It recognised that this work was an ongoing area of development for it and it has now commenced activity in this area (see paragraph 23 below).
16. SRA's response did not address this question nor any of the others in the discussion paper specifically, as it considered that the questions related to its existing approach to regulating in-house lawyers, which it had already acknowledged a need to review in its business plan for 2014/2015. In its response, it noted that it would be undertaking a fundamental review of its approach to the regulation of solicitors in non-authorised entities.
17. None of the other regulators who responded to the discussion paper (ICAEW, CILEx Regulation and CLC) impose requirements beyond those set out in section 15 for in-house lawyers. All three commented that they considered this approach appropriate for their regulation of in-house lawyers. CILEx Regulation and CLC in particular considered that their approaches were informed by their assessment of risk.

2. If you have specific regulatory arrangements, how have you assured yourself that there is compelling evidence to support those arrangements?

18. Only BSB responded to this question. It stated that it had not assured itself of the evidence to support its current arrangements and that it would consider granting waivers from the current rules should they impact negatively on the availability of legal services in the market.
19. While not responding to the question specifically, in its response, SRA stated that its new approach to rules for the regulation of solicitors in non-authorised entities would be based on an analysis of the risks posed by solicitors delivering certain types of services and the development of regulatory controls appropriate to those risks.

3. Having reflected on your specific regulatory arrangements, are there any areas that you intend to remove or review?

20. Again only BSB responded to the specific question. It noted that it had identified that its rules restricting the scope of practice of employed barristers need to be reviewed. The review will seek to remove any rules that go beyond the requirements of section 15 of the Act, unless specific risks are identified that justify retaining them.
21. In its more general response, SRA set out its plans for reviewing its rules for solicitors in non-authorised entities. It intends to consult on its plans in autumn 2015 and to implement its new regulatory approach from April 2016.

LSB response to questions for regulators

22. We welcome the commitment from BSB to review its rules for employed barristers as a matter of priority and SRA's commitment to progress their review of rules for in-house lawyers.
23. We would encourage BSB to ensure that it has built sufficient time in to its plans to ensure that it is able to collect and assess the relevant evidence it needs to inform any change in its approach. Since receiving its written response to the discussion paper, we have had further discussions with BSB about its work in this area. BSB has now identified a number of issues that emerge in the operation of some of its other regulatory rules, which mean a review of its rules for employed barristers will be more extensive than it had previously thought.
24. We also welcome the progress SRA is making with its planned review. It has been communicating its intentions to review this area for some time and there is an expectation of reform in this area, as part of its wider regulatory reform programme. However, the timetable proposed in its response to our discussion document appears tight for such wide-reaching plans.
25. As BSB and SRA develop their proposals, we would remind them of our expectations set out in the discussion paper that any proposals must be proportionate to the risk posed, consistent, transparent, targeted and that any restrictions that go beyond section 15 of the Act can be justified.
26. One way of SRA and BSB achieving consistency in particular is to ensure that they keep each other updated on their work as plans progress. Many of the respondents to the discussion paper commented more generally on the desirability of consistency in arrangements (see paragraph 33 below).
27. We note the rationale for the current approach taken by ICAEW, CLC and CILEx Regulation. When regulators opt not to apply additional restrictions, we expect that this is an active decision taken in light of an appropriate assessment of any need for action. We would therefore urge all regulators to consider what evidence they need to undertake appropriate assessments of risks as the markets in which those in-house lawyers they regulate evolve.

Questions for all interested parties

4. What is your experience of current arrangements for in-house lawyers?

28. Of those who responded to this question, there were several positive or neutral views on the current arrangements. For example, the body representing Government Legal Service (GLS) barristers stated that current arrangements did not cause GLS barristers any known difficulty³. GC100's view was that the current restrictions on in-house lawyers reflect the reality of being employed by a client and that a removal of current restrictions may not necessarily change current practice of in-house lawyers. Similarly, ICAEW stated that many in-house lawyers employed by ICAEW members would be reluctant to see current restrictions removed.
29. However, the Law Centres Network listed several areas where current rules had caused it concern. For example, the oversight of and requirements for regulated lawyers who, in their personal capacity, are Law Centre company trustees.
30. North London Waste Authority (NLWA) considered there to be both practical and governance issues as a result of the BSB and SRA practice rules' restrictions on in-house lawyers. It considered these restrictions a barrier to achieving innovative and cost effective service delivery. It did not identify any risks to the regulatory objectives if BSB and SRA were to make their respective practice rules less restrictive to match section 15 of the Act.

5. What, in your view, could be improved?

31. Views about what could be improved tended to reflect the type of respondent and the issue that was most pressing for the group they represented. Specific suggestions included:
- There should not be an absolute bar on the provision of non-reserved services to the general public. (IP Federation).
 - The sections of the SRA Practice Framework Rules which define "related bodies" could be simplified and harmonised (GC100).
 - Employed and self-employed barristers' regulation should be as similar as possible, particularly given that it is now possible for a barrister to be both employed and self-employed (BACFI).
 - SRA and BSB practice rules should be scaled back to better reflect the restrictions in section 15 of the Act on the provision of reserved legal activities and at the very least rules in relation to local government should expressly

³ Post-publication note – this sentence was amended on 16/9/15 to remove reference to a comment summarising the IP Federation's response, which suggested that it supported rules that went beyond section 15. IP Federation only supports the rules to the extent that they exempt in-house lawyers from certain complaints handling and insurance requirements.

allow for the provision of unreserved activities to companies controlled by other public bodies (NLWA).

- Access to justice would be better served by SRA rules better reflecting section 15(4) in particular (Essex Legal Services (ELS)).
32. More generally, The Bar Council noted the importance of consumers having adequate protection for redress if they receive unreserved advice and understanding what recourse is available to them. The Legal Services Consumer Panel also stressed the risk of consumer confusion where in-house lawyers are allowed to deliver unreserved legal services to consumers. It thought that information remedies might help, although cautioned that such an approach would have to be carefully tested to manage the risk of information overload.
33. The Law Society, CILEx/CILEx Regulation, The Bar Council, BACFI, ICAEW and ELS all commented on the desirability of consistency in approach between the regulators. CILEx/CILEx Regulation's response considered that the disparity in approach for different regulators was unfavourable for growth and had the potential to cause consumer confusion. The risk of consumer confusion due to inconsistent approach was also picked up by BACFI in its response. The Bar Council also commented on the varying interpretations between regulators of what being "connected to" means. However, ELS thought that the different approach taken by regulators was not significant for it on a day-to-day basis.
34. The desirability of consistency of arrangements between lawyers that work in-house and those who do not, was covered in The Law Society and BACFI's responses. In particular, BACFI noted that there are instances of barristers working in a self-employed capacity for one part of the week and in-house for the rest of the week.
35. Responses from The Law Society and LawWorks noted that if changes to the rules for in-house lawyers are to be made, such changes should not restrict or deter pro bono services. This reflected concern expressed by several respondents that regulatory rules had a negative impact on in-house lawyers undertaking pro bono work. This theme ran throughout LawWorks' response, which noted that the current arrangements are so unclear that they act as a deterrent for in-house lawyers. GC100 also commented that it would welcome a review of section 15 to ensure that in-house lawyers are able to fully advise members of the public on a pro bono basis. Lawyers in Charities stated that it thought that there should be a relaxation in the rules governing the provision of pro bono advice, specifically for its provision of advice to other charities.
36. Peninsula Business Services Limited (Peninsula) argued that lawyers it employs should be able to offer unregulated services direct to the public (just as the non-lawyers it employs can do) without it needing to apply for ABS status. Conversely, The Law Society expressed concern about what it viewed as a suggestion in our

discussion paper that in-house lawyers need not be regulated for unreserved activities. It considered the changes brought about by the Act to allow for alternative business structures (ABS) were intended to deal with cases where entities which were not owned or managed by lawyers were offering services directly to clients. Therefore, in its view, entities that want to enable their lawyers to offer legal services to clients should use the ABS regime.

LSB response to questions for all interested parties

37. The responses to these questions have made a helpful contribution to developing our thinking about this area of work. In particular, we noted three key themes, which were highlighted by the responses. These themes are clearly linked to the regulatory objectives and better regulation principles set out in the Act, which are binding upon both LSB and the legal services regulators. We therefore consider that these are areas for those regulators reviewing their arrangements for in-house lawyers to consider as they progress their work in this area.
38. First, the responses we received and the discussions we have had with interested parties about the regulatory rules for in-house lawyers highlighted how much the regulation of in-house lawyers impacts more widely than can be addressed with a simple, isolated change to a definition or rule. For example, the regulatory arrangements for in-house lawyers wishing to provide services directly to the public pro bono and the practicalities of individual lawyers being subject to rules for in-house lawyers for some days of the week and not for others. It is therefore likely that any review of the rules for in-house lawyers undertaken by regulators will need to be far reaching.
39. Secondly, there was a clear commitment from respondents that any changes to the current approach to regulating in-house lawyers would need to carefully consider the impact such changes might have on consumers. The removal of regulatory restrictions for in-house lawyers could provide greater access to justice for consumers. One particular example of how current rules manifest for consumers in practice was highlighted by Peninsula, who noted in its response that its employees who are not authorised persons may provide unreserved services direct to the public, when its solicitor and barrister employees cannot. However, regulators must balance access to justice against managing risks around potential consumer detriment caused by inadequate protection for when things go wrong. For example, only complaints about unreserved advice provided by authorised persons are eligible for consideration by the Legal Ombudsman. An important area of consideration will be how legal services regulators demonstrate their understanding of the potential impact of any changes they make to their rules on consumers and how they ensure consumers are kept informed about the consequences of different regulatory approaches.

40. Finally, consistency was a clear theme – either across legal services regulators or across lawyers working in-house and those who are not. Consistency in approach is likely to be a key means of ensuring consumer understanding about recourse and is in line with better regulation principles. There may be instances where it may be appropriate for different regulators to take a different approach to regulating in-house lawyers to reflect the differing risks posed by their sector, or even take a different approach to regulating those lawyers they regulate who work in-house and those who do not. However, such an approach would need to be an informed one that carefully balances the need to ensure that risks to consumers are managed while at the same time recognising that differences in rules will influence consumers' access to legal services.

Next steps

41. The themes identified in responses to the discussion paper have provided us with clear areas for consideration when developing our approach to this area. We will work with SRA and BSB to ensure that where appropriate, the views that we received in response to our discussion paper are reflected in their work on in-house lawyers. We will report to our Board in the autumn on our final recommendations for this work and then publish our conclusions.

Annex A: Section 15, Legal Services Act 2007

Carrying on of a reserved legal activity: employers and employees etc

(1) This section applies for the interpretation of references in this Act to a person carrying on an activity which is a reserved legal activity.

(2) References to a person carrying on an activity which is a reserved legal activity include a person (“E”) who—

- (a) is an employee of a person (“P”), and
- (b) carries on the activity in E's capacity as such an employee.

(3) For the purposes of subsection (2), it is irrelevant whether P is entitled to carry on the activity.

(4) P does not carry on an activity (“the relevant activity”) which is a reserved legal activity by virtue of E carrying it on in E's capacity as an employee of P, unless the provision of relevant services to the public or a section of the public (with or without a view to profit) is part of P's business.

(5) Relevant services are services which consist of or include the carrying on of the relevant activity by employees of P in their capacity as employees of P.

(6) Where P is an independent trade union, persons provided with relevant services do not constitute the public or a section of the public where—

- (a) the persons are provided with the relevant services by virtue of their membership or former membership of P or of another person's membership or former membership of P, and
- (b) the services are excepted membership services.

(7) Subject to subsection (8), “excepted membership services” means relevant services which relate to or have a connection with—

- (a) relevant activities of a member, or former member, of the independent trade union;
- (b) any other activities carried on for the purposes of or in connection with, or arising from, such relevant activities;
- (c) any event which has occurred (or is alleged to have occurred) in the course of or in connection with such relevant activities or activities within paragraph (b);
- (d) activities carried on by a person for the purposes of or in connection with, or arising from, the person's membership of the independent trade union; and such other relevant services as the Lord Chancellor may by order specify.

(8) The Lord Chancellor may by order make provision about the circumstances in which relevant services do or do not relate to, or have a connection with, the matters mentioned in paragraphs (a) to (d) of subsection (7).

(9) Subject to that, the Lord Chancellor may by order make provision about—

(a) what does or does not constitute a section of the public;

(b) the circumstances in which the provision of relevant services to the public or a section of the public does or does not form part of P's business.

(10) The Lord Chancellor may make an order under subsection (7), (8) or (9) only on the recommendation of the Board.

(11) If P is a body, references to an employee of P include references to a manager of P.

(12) In subsection (7), “relevant activities”, in relation to a person who is or was a member of an independent trade union, means any employment (including self-employment), trade, occupation or other activity to which the person's membership of the trade union relates or related.

Annex B: List of respondents

(in alphabetical order)

Bar Association for Commerce, Finance and Industry (BACFI)

The Bar Council

Bar Standards Board (BSB)

CILEx/CILEx Regulation

Council for Licensed Conveyancers (CLC)

Essex Legal Services (ELS)

General Counsel 100 (GC100)

Government Legal Service (GLS) Bar Network

Institute for Chartered Accountants in England and Wales (ICAEW)

Intellectual Property (IP) Federation

Law Centres Network (LCN)

Lawyers in Charities

The Law Society

Legal Services Consumer Panel

LawWorks

North London Waste Authority (NLWA)

Peninsula Business Services Limited (Peninsula)

Solicitors Regulation Authority (SRA)