

SRA response to Legal Services Board re: application to approve SRA Indemnity Insurance and Compensation Fund Rules

1. In this note we include our response to the questions received from the Legal Services Board (LSB) on 21 March 2019. There are overlaps with some of the points raised by the Law Society (TLS) in its letter to the LSB dated 1 April 2019. We cross reference to the paragraph numbers in TLS letter where we think this is the case.
2. We also include separate responses where we think TLS and the Legal Services Consumer Panel (the Panel), in its letter dated 11 April 2019, have raised additional points that have not been covered by our response to the specific questions received from the LSB or in previous applications to the LSB (all of which have been approved).
3. This response is therefore in three parts.

Part 1 - Background

4. As set out in paragraph 2 of our current application to the LSB, the new rules primarily implement decisions made on our Looking to the Future (LttF) programme (which are reflected in the alterations to our regulatory arrangements that the LSB approved on 5 November 2018). These include two main liberalising changes to the way a solicitor may practise, allowing:
 - a. solicitors to provide unreserved legal services to the public otherwise than from businesses that are authorised by the SRA or regulated by another legal services regulator
 - b. individual self- employed solicitors to provide reserved legal services to the public, subject to certain restrictions.
5. We do not use the term “freelancers” in any of our rules and regulations that the LSB approved in November 2018¹.
6. The SRA Authorisation of Individuals Regulations (approved by the LSB on 5 November 2018) allow individual solicitors and registered European lawyers (REs) to provide both reserved and unreserved legal services to the public under their individual authorisation. They would not be required to have their practice authorised as a recognised sole practice.
7. Self-employed solicitors practising on their own and whose practice consists entirely of unreserved activities can practise through a wider range of business models than if they also carry on reserved legal activities. For example, they might trade through a company or have employees working for them, or they might choose to practise on their own. This is because of the now agreed position initially set out as a proposal in our original LttF consultation – namely, to lift the restriction on solicitors delivering unreserved legal services to the public outside businesses that are authorised by the SRA or another legal services provider.
8. The obligations on an individual solicitor only delivering unreserved legal services are largely the same as those approved for solicitors delivering unreserved legal services to the public in an unregulated business.

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https://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/2018/FINAL_Revised_LttF_Decision_with_Full_Annex_.pdf

9. However, we have for the reasons set out at paragraphs 16-19 of our current application to the LSB, proposed in the application to extend access to the Compensation Fund for clients of individual solicitors in certain circumstances. Namely that they:
- are self-employed and practising in their own name, and not through a trading name or service company
 - do not employ anyone in connection with the services they provide
 - are engaged directly by their clients with their fees payable directly to them.
10. Following our second LttF consultation, we also allow individual self-employed solicitors to provide reserved legal services to the public under their individual authorisation subject to certain conditions and safeguards set out in regulation 10.2(b) of the SRA Authorisation of Individuals Regulations. This means that they must:
- have practised as a solicitor or an REL for a minimum of three years since admission or registration
 - have a practising address in the UK
 - take out and maintain professional indemnity insurance (PII) that provides adequate and appropriate cover in respect of the services that they provide, whether or not they comprise reserved legal activities
 - not hold client money (except for payments on account of costs and disbursements for which the individual solicitor is responsible).

The conditions set out in paragraph 9 above also apply.

11. As stated above, these solicitors will be required to have “adequate and appropriate” PII cover. We explain our position on “adequate and appropriate” PII cover in more detail below.
12. Regardless of how individual solicitors practise and the services they provide, they will be subject to the SRA Principles and the SRA Code of Conduct for Solicitors, RELs and RFLs.
13. From a consumer perspective, their understanding of the position with respect to solicitors practising in these different ways will, primarily derive from the information they are provided by the solicitor/solicitor’s website and materials, and our new digital register. There are a number of new requirements that will apply to all individual solicitors who are providing services to the public from outside authorised firms. These include requirements to:
- explain whether and how the services they provide are regulated, as set out in the SRA Code of Conduct for Solicitors, RELs and RFLs
 - explain their PII position to clients
 - reflect their practising status on our digital register (including whether they are providing any services on their own as self-employed solicitors and if so whether reserved or unreserved)
 - comply with the SRA Transparency Rules.
14. This means that any solicitor² who is providing legal services to the public or a section of the public, other than through a firm that is regulated by the SRA, will need

² Reference to solicitor include a REL

to inform consumers of the fact that they are not required to have PII that meets our minimum terms and conditions (MTCs) and that alternative insurance arrangements are in place if that is the case. If requested by the client, the solicitor must also provide information about the cover this provides.

15. Their clients will also have access to the Legal Ombudsman and the Compensation Fund. The transparency rules that apply to these solicitors were approved as part of our LttF application in November 2018.
16. Access to the Compensation Fund is explained in more detail in response to the specific questions and, in particular, in the response to question 1.A below.
17. We want to create, with appropriate restrictions and protections, options to allow solicitors to work more flexibly, to be more accessible and to provide services potentially at lower costs.
18. We feel that, when taken together, these arrangements comprise a proportionate and targeted approach which allows greater flexibility and diversity in solicitors' working arrangements, and more choice to clients, whilst continuing to provide adequate protection for consumers.
19. We are also supporting our requirements for solicitors to provide information to consumers with an extensive consumer information strategy. This includes our work in three key areas:

- **Information and guidance we are producing for consumers**

We are producing a piece of consumer guidance. The aim for this piece of guidance is to set out for consumers in a clear and succinct way, the choices they will have when employing a solicitor. The guide, which we plan to primarily take the form of web content, will compare the protections available to the public depending on which solicitor they choose to employ. We want to keep the messaging short and sharp as we are aware that if it is too long, many consumers will just not engage with it.

This information will form just one part of a much larger communication piece that we are developing for consumers, primarily through the consumer pages on our website. For example, we will provide more detailed explanation of what it means to be regulated, what the SRA does, what professional indemnity insurance is etc. Within these pages we will also display further content including a short video promoting our new digital badge and explaining what protections are available when the public employ a regulated solicitor.

We will be updating our legal jargon buster already published on our website (<https://www.sra.org.uk/consumers/using-solicitor/legal-jargon-explained.page>) to ensure that terms on financial protections are well explained to members of the public.

We have good relations with many consumer representative bodies, such as Citizens Advice and we do ongoing work with them to inform the frontline advice sector about the protections in place for different solicitors. This enables them to raise awareness amongst the consumers they work with.

- **Legal Choices website**

Legal Choices is a website and social media presence operated by eight legal services sector regulators. Through a unique content offering, Legal Choices aims to empower consumers and help them to better engage in the legal market by making informed choices. The joint regulators are investing in developing the website. We have already recently published one new article, to raise awareness of the fact that not all law firms are regulated (<https://www.legalchoices.org.uk/whats-new/all-law-firms-are-regulated-arent-they>). We will look to publish more relevant articles in the future and there is scope to introduce information on professional indemnity insurance and other protections.

- **Our digital register**

Consumers accessing our new digital register, will be able to see easily whether or not a solicitor is practising in a firm that we regulate, in a firm regulated by another Legal Service Act regulator, in a firm not authorised by us or another Legal Services Act regulated, or as an individual solicitor. Links from the register will take consumers to the other information set out above, which will explain the difference in protections that apply depending on which solicitor they choose to employ.

20. Turning to the questions you have asked, we set out our response below.

Part 2 - SRA response to questions from the LSB:

SRA Compensation Fund Rules

Q 1.A:

Does r3.2 (b) mean that if a freelancer handles money they are not permitted to hold, that there is no access to the compensation fund in the event of a loss? Are you able to explain the policy rationale for this reduced access to the compensation fund for clients of freelancers?

SRA response:

21. No, rule 3.2(b) does not necessarily mean that if an individual self-employed solicitor handles money they are not permitted to hold, that there is no access to the Compensation Fund in the event of a loss.
22. As well as being able to make a claim for failure to account for money that the solicitor was permitted to receive and hold, a client of an individual self-employed solicitor would be able to make a claim for loss of money which has arisen because of that solicitor's dishonesty.
23. An individual self-employed solicitor who handled or received money that they were not permitted to hold, may well have done so as a result of, or in circumstances in which they acted with, dishonesty. For example, this might be where the individual self-employed solicitor led the client to believe they were entitled to receive funds relating to a transaction or claim. Or where the solicitor, for example, has access to the client's personal bank account (e.g. when acting under a power of attorney or appointed as a deputy) and steals that money. In both circumstances, the client will have access to the Compensation Fund on grounds of dishonesty.

Q1.B and paragraphs 77-79 of TLS letter

Proposed r3.5 excludes clients of freelancers from accessing the compensation fund for losses resulting from the civil liability of a freelancer. This was not something set out in the recent Looking to the Future application. Are you able to explain the policy rationale behind this reduced access to the compensation fund for clients of freelancers?

SRA response:

24. This is consistent with our current rules. Our current Compensation Fund rules provide access to the Compensation Fund for civil liability losses where SRA authorised firms should have insurance to cover that loss under our MTCs, but do not. There have been very few claims in this area. This may be because we undertake intensive supervision to make sure that SRA authorised firms have insurance that meets our MTCs. The rule does not provide access to the Compensation Fund where solicitors are not required to have cover under our MTCs (for example, practising outside an authorised firm - in accordance with one of the exceptions in Rule 4 of the SRA Practice Framework Rules).
25. These provisions in the SRA Compensation Fund Rules will therefore not apply to individual self-employed solicitors (providing reserved legal services) as they are not required to have insurance that meets our MTCs. In addition, we do not impose any insurance requirements on solicitors practising on their own and whose practice consists entirely of carrying on activities which are not reserved legal activities.

26. Our application to the LSB seeking approval of the SRA Authorisation of Individuals Regulations (and other Standards and Regulations), sets out that we decided that it is not proportionate to require solicitors who work as individual solicitors providing either reserved or unreserved services to have a policy of qualifying insurance that complies with our MTCs. Regulation 10.2(b)(vi) of the SRA Authorisation of Individuals Regulations provides that an individual solicitor who is carrying on reserved legal activities must instead hold adequate and appropriate insurance for all services provided having regard to the nature of the work that they do. This also ensures that – as with other solicitors practising outside authorised firms - we do not unnecessarily reduce the availability of lower cost services for people who need such services. As stated above, clients who use a solicitor in these different scenarios will also receive a range of consumer and regulatory protections.
27. Therefore, rule 3.5 does not apply to individual self-employed solicitors as they are not required to have insurance that meets our MTCs. There will not be access to the Compensation Fund for civil liability losses where individual self-employed solicitors fail to have in place PII.
28. However, we will keep this issue under close review under the new arrangements.

Q1.C

Please explain why existing rule 2.4 has been removed from the proposed rules?

SRA response:

29. The effect of current rule 2.4 of the SRA Compensation Fund Rules 2011 is that a solicitor, REL or RFL who is a Crown Prosecutor will not be required to make contributions to the Fund. This rule duplicates section 36A(4) of the Solicitors Act 1974 – which does not require rules to be made in order to put it into effect - and we have removed it as we no longer unnecessarily duplicate legislation in our rules. However, section 36A (4) remains operative and therefore the position will remain the same and Crown Prosecutors will not be required to make contributions to the Fund.

SRA Indemnity Insurance Rules

Q2.A and paragraphs 50-57 of TLS letter

Existing r3.1 sets out that authorised bodies must not exclude or attempt to exclude liability below the minimum levels of PII required. Please explain why you are not proposing a similar rule for freelancers or solicitors in non-commercial firms?

SRA response:

30. The specific requirement relates to the exclusion of liability below the mandatory minimum level of cover. This therefore only applies to those (authorised firms and those working within them) in relation to whom we prescribe a minimum level of cover through our MTCs.
31. Taking all this into account, our rules require the individual self-employed solicitor to take out and maintain an insurance policy (and for a solicitor in a non-commercial body, to make sure that the body has insurance) that is adequate and appropriate and takes into account any other arrangements they make with the client.

32. The 'other arrangements' may influence the scope of the policy that needs to be taken out. Any exclusion or limitation of liability for work carried out is a matter for individual agreement between the individual self-employed solicitor or solicitor in a non-commercial body/firm and their individual client(s) through the terms of engagement.
33. Regardless of our insurance requirements, the client will be protected by general consumer law which focuses on making sure that the terms of any contract for service are not unfair. We would expect any terms of engagement to reflect the balance of power/knowledge between the client and the individual self-employed solicitor or solicitor in a non-commercial body.
34. Further, we would expect the individual self-employed solicitor or solicitor in a non-commercial body to consider their regulatory obligations and make sure that they act in the best interests of the client and have not taken unfair advantage of the client. We would also expect them to make sure that their clients are properly informed and understand the impact of the exclusion or limitation and that terms of engagement are not unfair and comply with consumer law.
35. Guidance that we are producing on 'adequate and appropriate insurance will set out these points for consideration in any instance when an individual self-employed solicitor might seek to cap their liability to a client.

SRA Regulatory Arrangements (Indemnity Insurance) (Amendment) Rules 2018

Q3A

Are the dates for making the Rules and coming into force - 5 December 2018 – correct/intended to be retrospective (as well as the year in the title of these Rules)? If yes, why?

SRA response:

36. The dates in the SRA Regulatory Arrangements (Indemnity Insurance) (Amendment) Rules 2018 (amendment rules) are correct.
37. First, the SRA Board made these amendment rules on 5 December 2018 and the date in the title is meant to be 2018. This reflects common practice, as subordinate legislation is usually dated when it is made, rather than when it comes into force.
38. The date on which the amendment rules come into force is also correct as they amended the SRA Code of Conduct for Solicitors, RELs and RFLs (Code for Individuals) and the SRA Authorisation of Individuals Regulations on 5 December 2018. However, the Code for Individuals and the AIRs are not in force until 25 November 2019; so, the new provisions will not actually take effect until that date. Consequently, the amendment rules are not intended to be retrospective. Of course, if the LSB does not approve our current application, the SRA Board would revoke the amendment rules and ensure that the wording of the relevant provisions reverted to the wording that the LSB approved in November 2018.

Part 3 - Additional issues TLS and the Panel have raised

We are not reversing a previous policy position

39. We think that it is important to respond to the view TLS and the Panel have expressed that we have reversed a previous policy position in the rule change application currently under consideration.
40. TLS and the Panel have suggested that we have changed the position set out in our post-consultation response on the second LttF consultation, by not requiring adequate and appropriate PII cover for “freelance solicitors” who only provide unreserved legal services to the public.
41. We have not changed our policy position since the post-consultation response published in June 2018.
42. As set out in Part 1 of this response, the term “freelancer” is not used in any of our rules and regulations and the context of its use in the June 2018 response document³ is clear. The relevant paragraphs of our post-consultation response are 79-94. These paragraphs refer to our proposal to allow “individual solicitors and RELs to provide reserved legal services to the public” without having their practice authorised as a recognised sole practice. Our response document confirmed that this proposal would go ahead and be subject to restrictions and requirements including insurance requirements. This is provided for at 10.2(b) of the SRA Authorisation of Individual Regulations.
43. We originally consulted on individual self-employed solicitors providing reserved legal services to the public being required to take out adequate and appropriate insurance to cover only their reserved legal activities. We changed this position as explained at paragraph 87 of the June 2018 post-consultation paper, referred to in paragraph 14 of the TLS letter and at the beginning of page two of the Panel’s letter. Where an individual solicitor is providing reserved legal services, we intend to apply the PII requirement to both the reserved and unreserved services they provide and not just to the reserved legal services as originally proposed. This is to reduce potential for consumer confusion and remove gaps in coverage where individual solicitors are providing both reserved and unreserved services, potentially in some cases for the same client.
44. At no point have we suggested or proposed that solicitors delivering only unreserved legal services (either practising on their own or in an unregulated business) would be required to have adequate and appropriate insurance. The reasons given for the change in paragraph 87 of the responses document and set out in TLS and Panel letters would make no sense in the context of an individual solicitor who only provides unreserved legal services. In our response to the first LTTF consultation, we made clear the position of solicitors providing unreserved legal services outside an authorised firm (i.e. there was to be no PII requirement). That response had already dealt with the issue about the insurance requirements for such solicitors. The LSB has of course already approved the SRA Authorisation of Individual Regulations which give effect to this policy position.

³ <https://www.sra.org.uk/documents/SRA/consultations/lttf-position-paper.pdf>

PII issues

45. As part of its decision about our LttF application, the LSB has approved the position where individual solicitors and solicitors working outside of regulated businesses will not be required to have a policy of insurance that complies with our MTCs.
46. Regulation 10.2(b)(vi) of the SRA Authorisation of Individuals Regulations provides that an individual self-employed solicitor who is carrying on reserved legal activities must hold adequate and appropriate insurance for all of the work that they do.
47. In these circumstances, the solicitor will need to inform consumers of the fact that they are not required to have PII that meets our MTCs and that alternative insurance arrangements are in place if that is the case. They must provide information about the cover this provides if requested.
48. Solicitors - like other businesses - purchase insurance to protect themselves, as well as their clients, and we require an individual solicitor providing reserved legal services to make appropriate arrangements on that basis.
49. TLS has expressed concern that providers need further guidance on what adequate and appropriate insurance is. The guidance that we are producing will set out factors that an individual self-employed solicitor should consider in determining the minimum level of insurance cover that they need. This will be based, for example, on the risks in the work that they do and the clients they serve. If we have information which suggests that the individual self-employed solicitor's assessment was not realistic because, for example, they had insurance which did not at least cover the value of transactions they were advising on, we would consider whether regulatory action was necessary, on a case by case basis.
50. TLS is concerned that insurers will not be willing to provide insurance to 'freelance' solicitors. Obtaining adequate and appropriate insurance is a requirement to deliver reserved legal services as an individual self-employed solicitor and therefore to realise the benefits that this change may bring, we will see how the market responds. An important factor to note is that individual self-employed solicitors will have the opportunity to secure adequate and appropriate insurance with providers other than the SRA's participating insurers and on terms that will be different to the MTCs. This could therefore lead to more choice in terms of insurers who are willing to provide adequate and appropriate insurance on this basis.
51. TLS is concerned that those we will regulate under Regulation 10.2(b) of the SRA Authorisation of Individuals Regulations will not have specific run-off cover requirements. Since we are not requiring them to have PII in accordance with the MTCs, we do not mandate the run-off obligations which apply to SRA-authorised firms.
52. However, as part of the consideration regarding what comprises adequate and appropriate insurance the solicitor will need to consider whether and how they will make provision for claims that may be made once they cease to practice.
53. This is because the services cannot be adequately and appropriately insured if the solicitor knows that they will be unable to meet the potential claims arising from their practice. Our draft guidance on adequate and appropriate insurance will make this point clear.

Compensation Fund issues

54. TLS has suggested that we review the way in which Compensation Fund contributions work in light of new practising models.
55. For the first year, the position will largely mirror the existing position. This is because when our Standards and Regulations come into force on 25 November 2019, contributions payable by individual solicitors and firms will have already been set up to October 2020.
56. Individual solicitors who do not provide reserved legal services will not be allowed to hold client money so will be contributing to the Fund in the same way as an authorised firm that does not hold or receive client money (i.e. individual contributions only).
57. We are reviewing the methodology of how contributions are set in future years as part of our broader Compensation Fund reforms. In our consultation “Protecting the users of legal services: balancing cost and access to legal services”, we acknowledged that the way solicitors could practise was changing. Accordingly, we sought views on whether the existing methodology remained the fairest and most appropriate way to calculate contributions to the Compensation Fund.
58. We will use the responses received in relation to that consultation question and details of any claims received, to help inform any changes to the methodology for collecting contributions for future years, in accordance with the Standards and Regulations. Any changes would, of course, need to be consulted on, agreed and made by our Board and approved by the LSB.

-End-