

SRA arrangements for regulating non- authorised CILEX members – Law Society response

15 May 2024

The Law Society's response to the SRA consultation on arrangements for regulating non-authorised CILEX members

- 1) The Law Society is the independent professional body for solicitors in England and Wales. We are run by and for our members.

Our role is to be the voice of solicitors, to drive excellence in the profession and to safeguard the rule of law.

The Law Society is also the approved regulator for the solicitor profession under the Legal Services Act 2007.

It has delegated its regulatory function to the Solicitors Regulation Authority Limited (SRA), whose remit is limited to the regulation of the solicitor profession under its constitutional delegation from the Law Society and its articles of association.

Introduction

- 2) The following is a summary of our key points, which are expanded on fully in the body of this response:

- the SRA should withdraw this and previous proposals around the regulation of CILEX members to focus on its current core regulatory responsibilities
- in relation to these specific proposals, it is unnecessary to regulate non-authorised persons on an individual basis, given the types of work undertaken and the supervision arrangements and existing regulatory oversight already in place
- the adequacy of this consultation is questionable; there is once again a lack of detail in the proposals, no evidenced case for change and key questions are not addressed
- these proposals, if implemented, would have a significant and negative impact on stakeholders, consumers, the wider public interest and the regulatory objectives, causing further confusion around the regulation and authorisation of providers of legal services and consumer choice
- CRL remains perfectly capable of the bespoke regulation of CILEX members in whatever way it sees fit

- 3) When responding to this SRA consultation, we have had in mind the key points made by the Chartered Institute of Legal Executives (CILEX) and the SRA in their 2023 consultations on the regulatory arrangements proposed for authorised CILEX members.

Whilst we recognise that the SRA does not wish to revisit these proposals in this consultation, there is nevertheless significant overlap.

Once again, this consultation is premised on the basis that the SRA is seeking views on proposed changes to its regulatory arrangements to enable it to regulate CILEX members should CILEX decide to proceed with redelegation, thus removing from scope the question of whether this is something the SRA should be doing.

This is despite, or perhaps because of, the SRA's recognition that most responses to the first CILEX consultation from 2023 "expressed opposition to the overall idea of the SRA regulating CILEX members and entities".¹

- 4) Given the lack of support for the proposals in the earlier consultation, it is particularly disappointing that the SRA are once again declaring this important point of discussion out of scope, ignoring the genuine concerns of stakeholders.

Adding non-authorized CILEX members, who themselves will not contribute to the costs of their own regulation and are not authorized, so do not require individual regulation, regardless of CILEX Regulation Ltd's (CRL) current role, further exacerbates key issues raised in the previous consultation.

- 5) The proposal to expand regulatory scope even further is a departure from the SRA's current role regulating solicitors, who are authorized to engage in all reserved areas of practice and exacerbates the issue of costs for authorized CILEX members, who will have to bear the additional costs of this additional regulation, when it is far from certain whether this is a financially sustainable approach.
- 6) The SRA's insistence that it will regulate all CILEX members or none means these proposals must be looked at in conjunction.

The 'risk' identified of having CILEX members split between two regulators is invalid. It is no more a risk than those individuals working in solicitor firms who then go on to qualify as solicitors, who the SRA only regulate on an individual basis once they qualify.

It is also not necessary to have non-authorized CILEX members regulated at all. CILEX can deal with them as a membership issue.

Meanwhile, the risk to the quality of regulation and reputation of the solicitor profession from the further dilution of the current bespoke regulatory arrangements is very real, despite the SRA's refusal to acknowledge it.

With ongoing issues related to Axiom Ince, the SSB Group and the Solicitors Qualifying Examination (SQE), this is not the time to expand its regulatory remit.

The risk of increased consumer confusion is also very likely in our view, negatively impacting the regulatory objective to protect and promote the interests of consumers, which the SRA has a duty to uphold.

- 7) CRL's current regulation of these individuals relates to their membership of CILEX. This could equally well be managed by CILEX as a membership role if they wish to do so.

The SRA already oversees many of these individuals who are employed in SRA-regulated entities and can use existing levers to remove their ability to work at SRA-regulated entities, as well as reporting these individuals to CILEX, which can take its own actions in relation to membership.

¹ <https://www.sra.org.uk/globalassets/documents/sra/consultations/arrangements-sra-regulation-cilex-members-consultation-response.pdf?version=4953b1> page 7

There is no case presented in the consultation for why individual regulation of non-authorized CILEX members is required in the way the SRA is proposing.

If these individuals were to present a genuine regulatory risk that must be addressed, then this would raise questions about all the non-authorized, non-CILEX members who work in SRA-regulated firms, who no one is proposing to regulate but who may undertake similar, if not identical, responsibilities.

- 8) This gives the strong impression that this, as with the previous consultations, is being treated as a formality and that the proposals are a foregone conclusion.

Particularly since the proposals amount largely to intentions to adapt previous, widely opposed, proposals to fit the intended new regulatory community.

The original proposals lacked necessary detail, and this exacerbates this situation further.

There is, in addition to previous concerns, no clear regulatory rationale for the proposed changes in this case.

We question the adequacy of this approach, which ignores the wider question of whether the SRA should be doing this and ignores previous opposition and criticism to reproduce a very similar lack of detail in proposals, thus ensuring that respondents are unable to fully engage.

- 9) We criticised the previous, parallel CILEX and SRA consultations as failing to provide adequate information, leading to significant gaps in the detail that is necessary to make an informed response to the proposals.

This is relevant here, since some of the proposals are simply to apply the same proposals as were made in the SRA's previous consultation.

We do not consider the intention to work out details at a later date to be an acceptable or sufficiently diligent approach to proposals that signal significant and unprecedented changes to the regulatory landscape introduced by the Legal Services Act and impact on all members of both the legal executive and solicitor professions, as well as now other CILEX members.

- 10) A strong, evidence-based case would need to be made to justify such a change in the regulation of the legal profession, which has not been presented either here or in previous consultations.

This was criticised by the Justice Select Committee in recent hearings, and in the letter published following the conclusion of the committee's work, in which the committee stated it was "sceptical of the argument that re-delegation and the proposed change to the titles of CILEX lawyer, from chartered legal executive to chartered lawyer, would represent a simplification that would help consumers".²

² <https://committees.parliament.uk/publications/44017/documents/218057/default/>

We remain of the view, as expressed in our previous responses,³ that there is a significant risk of increased consumer confusion should these proposals proceed.

- 11) In addition, the significant impact of these proposals on stakeholders, consumers and the wider public interest is once again ignored.

We remain concerned that these proposals for the redelegation of CILEX's regulatory functions to the SRA could adversely affect the SRA's ability to meet its duty to regulate the solicitor profession in a way that supports and promotes the regulatory objectives.

The impact assessments conducted by the SRA are insufficient to offer any reassurance.

- 12) Given the lack of any clear, evidence-based case for change being articulated, it is concerning that CILEX, the SRA and the Legal Services Board (LSG) are continuing to pursue the proposed redelegation of CILEX's regulatory function.

CRL remains perfectly capable of the bespoke regulation of CILEX members.

CRL vehemently opposes the proposed redelegation, noting that there have been no regulatory failings on its part, as evidenced by the LSB's most recent regulatory performance review of CRL,⁴ which notes no areas of insufficiency.

The LSB's report notes that CRL's 'partial' assessment rating is somewhat influenced by the dispute between CILEX and CRL, which found failings on both sides, including their technical governance, but nevertheless noted that CRL has maintained effective regulation and continues to progress towards meeting the standards in full.

In contrast, the SRA is marked as 'sufficient' but the assessment does not take into account the response to the Axiom Ince event, nor the newer announcement of the SSB Group events, which may alter this assessment.

- 13) CRL has stated that it believes the legal advice the LSB's decision is based on, that says CILEX has the ability to redelegate regulatory function, is flawed and has stated that it will seek to clarify this in the courts.

This chimes with the Justice Select Committee's views that, "it is difficult to see how the 2007 Act can provide a stable and efficient model for independent regulation when it is possible for an approved regulator to decide to re-delegate regulatory authority to another body."⁵

- 14) The continued pursuit of these changes is in direct opposition to CRL, which risks going against the LSB's initial findings on the CRL/CILEX dispute⁶ which stated that, "the public and the profession is entitled to expect those institutions to co-operate

³ <https://www.lawsociety.org.uk/campaigns/consultation-responses/sra-arrangements-for-regulation-of-cilex-members>

⁴ <https://legalservicesboard.org.uk/our-work/regulatory-performance/current-regulatory-performance-assessments#:~:text=In%20November%202022%2C%20we%20completed,of%20the%20regulatory%20bodies'%20performance>

⁵ <https://committees.parliament.uk/publications/44017/documents/218057/default/>

⁶ <https://legalservicesboard.org.uk/our-work/investigations>

respectfully and constructively in the public interest”.⁷

In addition, this work is coming at a cost to the legal professions more widely, with the LSB noting “it was resource intensive and time sensitive...(putting) not insignificant pressure on, and challenge to, the LSB’s resources alongside other priority work commitments”⁸ and seeking additional resources in its recent business plan to continue to work on this area.

A point noted by the Justice Select Committee, who were “struck by the costs already incurred by CILEX, CLR, the SRA and the LSB, with the likelihood of more to come”.⁹

15) We also note the SRA’s statement that it will work with the Law Society to arrange the necessary changes to the articles of association to enable the SRA to take on the regulation of CILEX members.

The language used in the consultation gives the impression that this is merely an administrative issue to be resolved. Instead, it is the case that the SRA requires the Law Society’s assent, and that assent cannot be assumed.

This is a matter for the Law Society’s Council to discuss and come to a position on at an appropriate time, as and when full information and materials are provided to it by the SRA.

The discussions at Council pertaining to the redelegation of CILEX’s regulatory functions to the SRA so far have indicated that the SRA should be prepared to receive a rejection of any such request if not supported with a far better, well evidenced, case for change than is made in this and previous consultation documents.

Our view on additional regulation

16) In considering the wider scope of additional regulation, we have determined the following criteria, against which any proposals should be evaluated, notwithstanding the points of opposition set out above.

- There should be a solid case for the need for regulation of any additional persons

The SRA must show that the regulatory objectives will be positively affected. Otherwise, it seems likely that increased costs will be passed onto consumers and that there will therefore be a negative impact on access to legal services, and on those able to provide legal service.

- A specific point of regulation at point of qualification must be adopted

Students with no qualifications should not be regulated. There must be a consistent and specific standard against which an individual is regulated, which exists for authorised legal executives and solicitors – and presumably will for

⁷ <https://legalservicesboard.org.uk/wp-content/uploads/2023/04/LSB-Investigation-CILEX-and-CRL-final-report-Publication.pdf>

⁸ <https://legalservicesboard.org.uk/wp-content/uploads/2023/12/LSB-Draft-Business-Plan-2024-2025-Consultation-Document.pdf>

⁹ <https://committees.parliament.uk/publications/44017/documents/218057/default/>

chartered paralegals – but other levels of CILEX members (particularly students) will not have set standards and should not be regulated, just as aspiring solicitors are not regulated or formally overseen until they qualify, which is the point at which this becomes necessary

- Any individual regulated must pay for their own regulation

There should be no cross-subsidy. In this case, either of solicitors to CILEX members or of authorised CILEX members to non-authorised CILEX members. This wider principle ensures that any regulatory model is financially viable and self-supporting.

17) Responses to the consultation questions below are made on the strict basis that we firmly oppose the SRA's proposals.

The SRA should withdraw these, and the previous CILEX proposals, and instead concentrate on its core regulatory responsibilities.

This is especially pertinent given the ongoing Axiom Ince/SSB Group situation and the announcement in April that 175 candidates had been wrongly told they had failed the SQE1 as a result of a failure to implement a change in the way marks were presented.

The questions

Regulatory standards

Q1. Do you have any comments on the draft revised SRA CILEX Code of Conduct and its application to non-authorised CILEX members?

18) We would agree with the principle that maintaining one common code of conduct for all CILEX members, should the SRA be in the position of regulating all of them, is a logical approach.

As noted in the consultation, the breadth and depth of roles undertaken by CILEX members means this will require a flexible, non-standardised approach to enforcement, which will require additional resources for training staff carrying out these roles.

Prior conduct and suitability

Q2. Do you agree with our proposed approach to applying the character and suitability rules to applicants for CILEX membership and non-authorised CILEX members?

19) The proposals to replicate existing requirements around making a prior conduct declaration and an ongoing duty to declare any conduct issues is a logical approach.

However, this is currently a condition on membership of CILEX, and as such could be managed and maintained by CILEX, with any issues found passed on to the SRA for those who work in SRA regulated entities, or other.

The requirement to make declarations to both the SRA and CILEX is an unnecessary duplication.

20) It is logical that the SRA would wish to apply its own character and suitability rules to the required declarations.

Investigation and enforcement

Q3. Do you have any comments on any aspects of our approach to investigation and enforcement of non-authorised CILEX members?

21) As noted, the approach to enforcement would need to be carefully balanced against the roles and responsibilities undertaken by the individuals concerned.

This would likely require regular training for SRA staff and additional resources to support this work, which must, as the consultation sets out, be funded by authorised CILEX members.

This is an additional burden on authorised CILEX members, which is being imposed by CILEX and the SRA, since the costs of transition and additional training must be borne as well as the ongoing regulatory costs.

We disagreed with the SRA's assessment in the last consultation that these proposed regulatory changes would not result in greater regulatory costs and these additional proposals exacerbate this risk in our view.

22) The inability of the SRA to refer CILEX members to the Solicitors Disciplinary Tribunal (SDT), except using existing powers relating to non-solicitors in SRA firms, remains an issue where individuals are concerned.

The SRA must be clear about whether it would seek to replicate the approach of the SDT within its own processes for CILEX members.

There seems a risk of the SRA being able to make decisions in a vacuum, without the opportunity for an outside appeal.

This is not a system that can be remedied by the proposed internal appeals process.

23) By retaining the application of existing rules, enabling the SRA to bar unauthorised employees from working in SRA regulated firms, on CILEX members, as well as applying the proposed new code of conduct, the SRA is creating a 'dual jurisdiction' within its own systems.

Where it applies, an individual could be subject to parallel proceedings under both sets of regulation, which seems unduly onerous, unnecessary, and liable to incur additional costs.

24) The SRA should be able to deal with CILEX members under one or the other provision, particularly since where the individual is not employed by an SRA-regulated firm, or that provision does not apply, it is proposed that the individual regulation only would apply.

This suggests that the new code should, for CILEX members, replace the existing provisions in all instances.

Q4. Do you have any comments on the draft changes to the SRA Standards and Regulations?

25) We have no additional comments to those previously set out in response to the SRA's consultation on the proposed regulation of authorised CILEX members.

Costs and fees

Q5. Do you agree with our proposed approach to the costs of regulating non-authorised CILEX members?

26) We would reiterate here the points made above about the costs already incurred and note the lack of detail in the proposals to enable a meaningful analysis of the future, ongoing costs of these proposals.

It can be assumed though that further costs would result from the work required to put detail onto the skeleton proposals put out by the SRA so far.

There is also no clear information on expected costs as a result of transitional arrangements, which are likely to be significant.

Without having any of this clarified the SRA is merely stating its beliefs, which is not a sufficient basis on which to determine the scale of expected ongoing costs.

We would have expected to see the SRA produce a full, current financial disclosure of CRL's accounts alongside a three-year financial plan and projection of costs as evidence.

Since this was raised in response to the previous CILEX consultation, and has not been addressed here by the SRA, we remain concerned about the lack of information and robust appraisal of CRL's financial position.

27) The SRA has previously acknowledged that it is not able to forecast future costs with confidence since it has not had access to information held by CRL.

Therefore, any assertion that costs will not be higher cannot be relied upon, and it seems obvious that whatever previous assessment was made, is put under additional strain by these new proposals to increase regulatory reach, without any additional financial resources.

28) Whilst we recognise the intention to keep membership fees low in the 'earlier levels' of CILEX's membership, by retaining CRL's current funding model, this could be managed by forgoing the unnecessary individual regulation of these members, leaving CILEX to manage them as a membership concern.

29) Before any change can be discussed, it is essential that the SRA can assure stakeholders that ongoing regulatory costs will be at a manageable scale for itself and those individuals who would be funding it.

This remains the case for both these arrangements and the previous proposals.

We reiterate our concerns that the proposals involve potentially serious financial risks for the SRA, and by extension the Law Society and the solicitor profession.

The SRA could be left regulating a small number of authorised CILEX members potentially unable to bear their own regulatory costs, let alone those of the non-authorised CILEX membership putting a strain on SRA resources overall.

Education

Q6. Do you agree with our proposed overall approach to issues relating to the education and continuing competence of non-authorised members?

30) It is appropriate that the setting of non-authorised level standards and management of these members remains with CILEX.

We support the SRA's intention not to authorise or otherwise be involved in the standards for individuals to become CILEX paralegals or students.

However, CILEX can also manage any character and suitability requirements and enforcement actions for these members, as set out above, as a membership concern.

31) Since any requirements around continuing competence for non-authorised members are purely for membership purposes, it is appropriate that CILEX manages this aspect as part of its membership function, retaining the responsibility to pass any relevant regulatory issues on to the SRA.

32) The SRA's proposal to have a future role in oversight of education providers, in recognition that the qualifications allow members to become authorised in the future, is entirely at odds with its approach to the education and training of solicitors.

Given that the SRA adopted this approach against the wishes of many in the solicitor's profession and continues to maintain that regulatory oversight of education and training providers is not necessary, it seems odd to suggest a contrary proposal in relation to CILEX members.

33) The consultation does not provide adequate detail about how these processes would be managed or provide any assurance that the SRA would address this inequality in the way that it proposes to regulate CILEX members compared to solicitors.

As such, it is not possible to comment further at this time.

Draft regulatory impact assessment

Q7. Do you have any comments on our draft regulatory impact assessment?

34) Disappointingly, despite concerns expressed by the Law Society in response to the previous consultation on CILEX,¹⁰ the SRA continues to deny the potential for negative impacts on the solicitor profession, instead reasserting that it believes the changes will be "broadly neutral".

Being unable to acknowledge the potential for any negative impacts is unhelpful as well, since it means the SRA cannot prepare to address them.

¹⁰ <https://www.lawsociety.org.uk/contact-or-visit-us/press-office/press-releases/sra-regulation-of-cilex-could-risk-consumer-confusion>

35) The SRA's response to the previous CILEX consultation noted that, "many respondents did voice opinions about CILEX's proposal to redelegate regulatory oversight of authorised CILEX members to us".

"Most respondents, including most law firms and individual solicitors, the Law Society, local law societies and the CLSA expressed opposition to the overall idea of the SRA regulating CILEX members and entities".¹¹

We do not stand alone in having serious concerns about the SRA's proposals and the SRA's dismissal of these concerns as 'out of scope' is unacceptable.

The refusal of the SRA to engage on the question of whether or not this is something it should be doing is a considerable concern in itself.

36) Even more so than before we would highlight that, given that the majority of CILEX members, both authorised and especially non-authorised, already work within SRA regulated entities and are therefore subject to SRA regulation in that way, this is a disproportionate amount of upheaval and cost for any limited gains that CILEX or the SRA may expect to achieve.

37) Our comments below are limited by the information provided, which is inadequate, lacking in detail and evidence.

The SRA has failed to demonstrate how the proposals meet the bar of positively influencing or promoting the regulatory objectives and to assure the affected regulated communities that the proposals will not have a negative effect.

The proposals may well adversely affect these regulatory objectives. We will give further consideration once further detail emerges.

38) We have considered the proposals against the regulatory objectives and set out where there is the potential for negative impacts from the implementation of these proposals, in conjunction with those previously consulted on by the SRA.

Protecting and promoting the interests of consumers and enhancing consumer protection

39) The proposed regulation of non-authorised CILEX members by the SRA increases the potential for consumer confusion.

Far from simplifying the regulatory landscape, as the SRA suggests, this would be a further exacerbation of the issues we raised in response to the previous consultation, regarding CILEX's proposals for title change, which our research has shown would cause consumer confusion, and the potential for a false equivalence in the eyes of consumers with the regulation of these individuals by the *Solicitors Regulation Authority*.

40) Whilst the SRA notes that its proposed approach to investigation and enforcement would reduce differences in the treatment of non-authorised persons, this is not

¹¹ <https://www.sra.org.uk/globalassets/documents/sra/consultations/arrangements-sra-regulation-cilex-members-consultation-response.pdf?version=4953b1>

necessary or proportionate and implies a false equivalence.

Non-authorized persons undertake a very different level and type of work, usually under the supervision of an authorised person.

This should be recognised in the way they are overseen, which would most suitably be managed at a firm level by the SRA, as it does currently, and by CILEX as a membership concern on an individual level.

- 41) We maintain that both sets of SRA proposals would negatively impact on the ability of consumers to clearly understand the choice of legal services available to them and to choose the appropriate provider to meet their needs - especially for more vulnerable service users.

Promoting and maintaining adherence to the professional principles

- 42) By applying the same high standards to all CILEX members the SRA is not only blurring the lines between the qualifications and responsibilities of solicitors and authorised legal executives, but between those two legal professions and the mass of non-authorized CILEX members, who range in role from students to paralegals and others.

Encouraging an independent, strong, diverse, and effective legal profession

- 43) Requiring CILEX members to treat colleagues fairly and with respect, including conduct outside the workplace is something that is required of most CILEX members already since they work in SRA regulated firms. These proposals add no further value.

- 44) Further views are expressed in response to question 8, below.

Protecting and promoting the public interest

- 45) The SRA notes states that these proposals will ensure that the regulation of unauthorised CILEX members is sustainable, by adopting the CRL funding model of having authorised CILEX members pay for their regulation and the regulation of non-authorized CILEX members.

There are a number of issues with this.

First and foremost is that these non-authorized members of CILEX do not require regulation and are in fact already largely overseen by SRA firm regulation, or supervision of regulatory individuals, as acknowledged by the SRA.

Second is the assumption that authorised CILEX members would continue to be able to bear the burden of their own regulatory costs and, in addition, the costs of non-authorized CILEX members.

Given the small number of authorised CILEX members, we have concerns about this, particularly since the number of non-authorized CILEX members has grown disproportionately to the number of authorised CILEX members, with the purchase of

CILEX of the paralegal register and its plans to expand this area with the chartered paralegal qualification.

- 46) The proposals expose the current regulatory arrangements for solicitors to unnecessary risk and take the SRA further away from its core purpose of regulating the solicitor profession, on which the SRA should focus, particularly in light of recent events around Axiom Ince, the SSB Group and the failure to correctly implement new SQE assessment policies.

The public interest is, after all, best served by having a well-regulated legal profession.

Improving access to justice

- 47) The LSB's stated position is that improved access to justice will only come through the lowering of regulatory barriers, thus enabling completely new entrants.

This is in complete contrast to the SRA's proposals to impose unnecessary individual regulation, in addition to firm regulation, on the non-authorized members of CILEX, never mind the intention to peg that regulation to the same level expected from an authorized legal executive, which the SRA has acknowledged is akin to that expected of solicitors.

Draft equality impact assessment

Q8. Do you have any comments on our draft equality impact assessment?

- 48) Since the SRA has acknowledged that it has limited access to data on unauthorised CILEX members and has instead referenced all CILEX members in this section, this cannot be considered an accurate equality impact assessment.

- 49) We acknowledge that the SRA continues to assert that proposed changes are not expected to result in new barriers or burdens, since costs would, as now, be met by authorised CILEX members and other proposals broadly mirror current requirements.

However, any change in regulation is likely to have an impact and, in this case, the SRA has no evidence either way.

- 50) The SRA must promote the regulatory objective to encourage an independent, strong, diverse, and effective legal profession.

As explained in response to the SRA's previous consultation,¹² we demonstrated those proposals have the potential to result in higher and possibly unnecessary regulatory standards, regulatory burdens, and cost for legal executives.

- 51) Making it harder and more expensive to qualify and operate a business would do the opposite of encouraging an independent, strong, diverse, and effective legal profession. The additional burden of funding the regulation of non-authorized CILEX members would exacerbate this risk.

¹² <https://www.lawsociety.org.uk/contact-or-visit-us/press-office/press-releases/sra-regulation-of-cilex-could-risk-consumer-confusion>

52) We would expect further analysis and a thorough impact assessment, based on full information, which considers the potential for any adverse effects from these proposals, particularly focusing on solicitors as the profession regulated by the SRA.

The analysis should include the potential adverse impact of joining together the regulation of the two professions, as well as the additional non-authorized CILEX members.

We would also expect to see the SRA clearly express how the effects of changes would be monitored, what data would be collected and how this would be analysed, as well as how the SRA could stretch

1 to accommodate the regulation of not only an additional profession, but also these non-authorized CILEX members.