

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

A discussion paper.

This exercise will close on 24 April 2015

This Discussion Paper will be of interest to:

Approved regulators

Providers of legal services

Legal representative bodies

Legal advisory organisations

Other third sector organisations

Non departmental public bodies (NDPBs)

Consumer groups

Law schools/universities

Legal academics

Members of the legal profession, including those working in-house

Accountancy bodies

Think tanks

Government departments

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Executive Summary

1. There are currently over 25,000 in-house lawyers in England and Wales. The Legal Services Board (LSB) is concerned that any unnecessary restrictions on in-house lawyers may have the potential to impose costs and red tape, frustrate innovation and adversely affect access to justice. It is therefore important that any restrictions can be clearly justified.
2. This discussion paper presents initial analysis to establish how current practising rules for in-house lawyers align with the minimum restrictions that are contained in section 15 of Legal Services Act 2007 (the Act). 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).
3. The front line regulators take contrasting approaches:
 - The Costs Lawyer Standards Board and the Master of the Faculties do not need to have such arrangements due to transitional protections in the Act.
 - Three regulators do not make specific provisions for those working in-house: Council for Licensed Conveyancers, ILEX Professional Standards and the Institute for Chartered Accountants in England and Wales.
 - The remaining three regulators have specific rules in place: the Bar Standards Board, the Intellectual Property Regulation Board and the Solicitors Regulation Authority. While there are similarities between the arrangements established by these three regulators, there are also some differences. Our initial analysis shows that these rules appear to go broader than the minimum restrictions required to give effect to the Act.
4. Where a regulator places restrictions on in-house practice over and above the minimum required by the Act, we expect it to be able to demonstrate this is necessary with compelling evidence in terms of risk to the regulatory objectives. We also expect that the absence of specific restrictions on in-house lawyers should be an active decision taken in light of an appropriate risk assessment.
5. We note that the Solicitors Regulation Authority has said in its 2014/15 Business Plan that its approach “requires re-examination and amendment to remain relevant” and we support such a re-examination.
6. This document invites regulators to explain their approaches and the evidence for any restrictions on in-house lawyers. We are also seeking feedback from all interested parties on the impact of current approaches to help identify possible areas for improvement.

7. **The closing date for responses is 24 April 2015.** Responses will inform our final report in Autumn 2015 and, if appropriate, any recommendations for future action. In addition to the regulatory powers that the Act gives to the LSB, section 15 includes provisions that give the LSB the opportunity to make recommendations to the Lord Chancellor in this area.

1. Introduction

1. The purpose of this discussion paper is to present our initial analysis of variation in regulatory arrangements for in-house practice and invite comment on these findings, the impact of current arrangements, and on possible areas for improvement. It forms part of a wider ongoing review by the LSB to understand the rationale for specific restrictions on in-house lawyers and to identify whether improvements to current regulatory arrangements may be needed.
2. This paper is structured as follows:
 - Section 2 describes the minimum restrictions in the Act for in-house lawyers.
 - Section 3 compares the approach taken by each of the regulators with the minimum restrictions in the Act.
 - Section 4 asks five key discussion questions.
 - Section 5 sets out how to respond to this discussion document by the closing date, 24 April 2015.

2. The Act's implication for in-house lawyers

3. Section 15 of the Act makes provision for the carrying on of a reserved legal activity by employers and employees.¹ The full text of section 15 is provided in Annex B. It has three broad effects:
 - It details when an employer needs to be authorised. The requirement for an employer to be authorised is triggered by its provision of services that include reserved legal activities to the public, or a section of the public as part of its business.
 - It exempts independent trade unions (as defined in section 207 of the Act) from the need to be authorised for providing “excepted membership services” (as defined by section 15(7)) to their members.
 - It gives the Lord Chancellor the power to make orders in respect of provisions in this section, on the recommendation of the Legal Services Board.
4. This paper concerns restrictions placed on in-house lawyers of non-authorised employers.
5. The starting point for our assessment of the impact of section 15 on the provision of legal services is section 15(4). This states that an employer (person “P”) who employs an employee (person “E”) who is carrying on reserved legal activities, does not itself carry on a reserved legal activity unless part of its business is to provide reserved legal activities to the public, or a section of the public. When these criteria are met the employer must be authorised. Whether or not the employer provides these services with a view to profit is irrelevant.
6. This has the effect of dividing employers into two groups: those carrying on and those not “carrying on reserved legal activity as part of services provided to the public, or a section of the public, as part of their business”. The Act does not define “the public”, and there has been no test of this provision in the Courts.² However, the Act’s explanatory notes explain that the employee may carry on reserved legal activities for those who are “connected to” their employer as they would not be regarded as “the public or a section of the public”:

Section 15(4), together with section 15(5), provides that where an individual employee carries out a service for an employer which would ordinarily be a reserved legal activity (for example, litigation services), the employer will not be treated as carrying out a reserved legal activity if the service is not provided to

¹ Section 14 of the Act makes it an offence for a person (A person can be a “body of persons” under section 207) to carry on reserved legal activities if they are not entitled to do so. Under section 13, a person can be entitled either by being authorised or by being exempt. A person can be authorised under section 18. A person can be exempt if they fall under sections 19, 22 or 23.

² The Act does allow for this to be defined by the Lord Chancellor, on advice from the Legal Services Board (s15(9)(a) and s15(10)). This has not happened to date.

*the public or a section of the public in the course of or as an aspect of the employer's business. The effect of this is, for example, that where **a body employs lawyers to provide in-house legal services to that body or to certain persons connected to the body, but not to the public or a section of the public, the body in question will not need to be an authorised person**³ (emphasis added)*

7. Table 1, below, is a high-level representation of what legal services an authorised individual working as an employee (“in-house”) may provide. The table has been adapted from a model of the legal services market developed by Oxera.⁴ It assumes the authorised individual is an employee (denoted by “E”) of a non-authorised employer (denoted by “P”). Examples of P could be large businesses, small and medium enterprises (SMEs), charities, local authorities and government departments.
8. E can provide reserved and unreserved legal activities to P as their employer or to a person connected to P (denoted by “C”). E cannot provide reserved legal activities to persons not connected to P (denoted by “not C”). E can, however, provide unreserved legal activities to persons not connected to P. Whether a specific person is connected to P will depend on the particular employer.
9. When we map regulators’ arrangements in a similar manner, it will show the extent to which they are aligned with these provisions of section 15(4).

³ Paragraph 71, Legal Services Act 2007. Explanatory notes

⁴ For background and detail on the Oxera framework Oxera. 2011. *A framework to monitor the legal services sector*. <https://research.legalservicesboard.org.uk/wp-content/media/A-framework-to-monitor-the-legal-services-sector.pdf>

LSB. 2012. *Measuring change in the legal services – the Oxera segmentation framework summary*. <https://research.legalservicesboard.org.uk/wp-content/media/Summary-Oxera-June-12.pdf>

Table 1: implications of section 15(4) on the employee (E)

Type of legal activities E can provide:		Type of consumer E can provide legal services to:		
		E's Employer (P)	Persons connected to P (C)	Persons not connected to P (not C)
Research, advice on transactional matters and document preparation	<i>Unreserved activity: eg, will writing</i>	✓	✓	✓
	<i>Reserved activity: probate, reserved instruments, administration of oaths</i>	✓	✓	✗
Notarial activities	<i>Reserved activity: notarial practice</i>	✓	✓	✗
Advice on (potentially) litigious matters and work required to prepare such advice	<i>Unreserved activity: eg, advice on proceedings</i>	✓	✓	✓
	<i>Reserved activity: conduct of litigation</i>	✓	✓	✗
Representation (in person)	<i>Unreserved activity: eg, mediation, representation in lower courts</i>	✓	✓	✓
	<i>Reserved activity: rights of audience</i>	✓	✓	✗

3. Current regulatory arrangements for in-house lawyers

10. 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 the employer's business or not. Our interest is in the impact this distinction has on regulatory arrangements that authorised individuals may be obliged to meet.
11. Under section 21 of the Act, each regulator establishes its own arrangements to regulate the provision of legal services by those individuals and organisations it authorises. These arrangements may cover conduct standards, practising rules, indemnity insurance arrangements, qualifications criteria, disciplinary processes, and anything else the regulator considers essential. Regulators may opt to make regulatory arrangements that apply only to individual lawyers working for non-authorised employers but there is no obligation in the Act to do so.
12. A regulator may restrict practice to meet its statutory obligations, for example under section 28 of the Act or other legislation. Under section 28, a regulator must act, as far as is reasonably practicable, in a way which is both compatible with the eight regulatory objectives and most appropriate for meeting them. It must also have regard to the principles of good regulation and best regulatory practice.
13. This section summarises a review across eight regulators to examine where the non-authorisation of an employer is reflected in the practising rules for authorised individuals.⁵ 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 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, ILEX Professional Standards, and the Institute of Chartered Accountants in England and Wales.
 - Those who make specific, but varying, arrangements for in-house lawyers: the Bar Standards Board, the Intellectual Property Regulation Board, and the Solicitors Regulation Authority.

⁵ Note: we have not looked at arrangements relating to immigration advice and services and the review does not include ACCA or ICAS, despite their designation in the Act as approved regulators for probate activities, as they do not currently authorise individuals or entities nor do they have plans to do so. Further, there are other regulatory arrangements where the distinction between working for an authorised or a non-authorised employer is a factor, such as practising fees that are not reported here.

14. The regulators are discussed below in alphabetical order and the analysis reflects the LSB’s interpretation of regulators’ arrangements.

Bar Standards Board (BSB)

15. The 2013 Working Lives survey carried out by the Bar Council and BSB, indicated 15 per cent of barristers currently authorised by the Bar Standards Board work in the employed Bar (over 2,250 barristers).⁶

16. The BSB Handbook defines employees of non-authorized bodies as a practising barrister who is employed other than by an authorised body, either under an employment contract or a written contract for services for a determinate period, or by virtue of an office under the Crown or in the institutions of the European Union and supplies legal services as a barrister in the course of their employment.⁷

17. The BSB Handbook outlines specific rules for practising barristers working as employees of non-authorized bodies, detailing where, when, and to whom, the barrister may supply legal services.⁸ The BSB define legal services as “includes legal advice, representation and drafting or settling any statement of case witness statement affidavit or other legal document” with some exclusions.⁹

18. The specific rules for practising barristers working as employees of non-authorized bodies means they may supply legal services to their employer and to any employee, director or company secretary of their employer in a matter arising out of or relating to that person’s employment, plus an employed barrister is permitted to work as follows:

If the employer is	Then legal services may be supplied to...
... a public authority (including the Crown or a Government department or agency or a local authority)	another public authority on behalf of which the employer has made arrangements under statute or otherwise to supply any legal services or to perform any of that other public authority’s functions as agent or otherwise

⁶ Bar Council and Bar Standards Board. 2013. *Barristers’ working lives*. Available at: http://live.barcouncil.netextra.net/media/294152/biennial_survey_report_2013.pdf Footnote 6

⁷ *BSB Handbook* January 2014. Page 263. Available at: https://www.barstandardsboard.org.uk/media/1553795/bsb_handbook_jan_2014.pdf

⁸ Section B7. *BSB Handbook* January 2014. Available at: https://www.barstandardsboard.org.uk/media/1553795/bsb_handbook_jan_2014.pdf

⁹ The BSB definition of legal services excludes the following: a) sitting as a judge or arbitrator or acting as a mediator; b) lecturing in or teaching law or writing or editing law books articles or reports; c) examining newspapers, periodicals, books, scripts and other publications for libel, breach of copyright, contempt of court and the like; d) communicating to or in the press or other media; e) giving advice on legal matters free to a friend or relative or acting as unpaid or honorary legal adviser to any charitable benevolent or philanthropic institution; f) in relation to a barrister who is a non-executive director of a company or a trustee or governor of a charitable benevolent or philanthropic institution or a trustee of any private trust, giving to the other directors trustees or governors the benefit of his learning and experience on matters of general legal principle applicable to the affairs of the company institution or trust; g) early neutral evaluation, expert determination and adjudications

a Government department or agency	any Minister or Officer of the Crown
a trade association	any individual member of the association
the Legal Aid Agency	members of the public
is a foreign lawyer and the legal services consist of foreign work	any client of the employer
If the barrister ...	Then legal services may be supplied to...
supplies legal services free of charge	members of the public
is employed by or at a Legal Advice Centre	clients of the Legal Advice Centre
is, or is performing the functions of, a Justices' clerk	the Justices whom they serve

19. For those working as employed barristers, there is no mandatory requirement to hold indemnity insurance, but if legal services are supplied to clients as described in the rules, the BSB advises that barristers “should consider whether you need insurance yourself having regard to the arrangements made by your employer for insuring against claims made in respect of your services. If your employer already has adequate insurance for this purpose, you need not take out any insurance of your own. You should ensure that your employer’s policy covers you, for example, for any pro-bono work you may do”.¹⁰

20. Table 2 below, maps the impact of the BSB rules on the provision of legal services by “E”, the employee. The table does not reflect the details of the particular circumstances in which a consumer may be classified as “C” with respect to “E” and “P”, but examples of “C” based on BSB rules include:

- if the employer is a local authority, C could be another local authority
- if the employer is the Legal Aid Agency, C could be a member of the public
- if the employer is a Legal Advice Centre, C could be clients of the centre
- if the employer is a trade association, C could be a member of that trade association.

21. The areas shaded grey in Table 2 identify those services that the BSB rules appear to prohibit E from providing that go beyond the minimum required by the Act. These concern the provision of unreserved legal services to consumers unconnected to the employer.

¹⁰ gC116 *BSB Handbook* January 2014. Available at: https://www.barstandardsboard.org.uk/media/1553795/bsb_handbook_jan_2014.pdf

Table 2: Bar Standards Board: Under BSB rules, if the barrister is an employee of a non-authorized employer they can provide legal services to their employer P and to others (C) in specified circumstances (segments with ✓). They cannot provide services in the segments marked ✗. The grey-shaded areas represent those segments that do not appear to be aligned with provisions of section 15(4).

Type of legal activities E can provide:		Type of consumer E can provide legal services to:		
		E's Employer (P)	Persons connected to P (C)	Persons not connected to P (not C)
Research, advice on transactional matters and document preparation	<i>Unreserved activity: eg, will writing</i>	✓	✓	✗
	<i>Reserved activity: probate, reserved instruments, administration of oaths</i>	✓	✓	✗
Notarial activities	<i>Reserved activity: notarial practice</i>			
Advice on (potentially) litigious matters and work required to prepare such advice	<i>Unreserved activity: eg, advice on proceedings</i>	✓	✓	✗
	<i>Reserved activity: conduct of litigation</i>	✓	✓	✗
Representation (in person)	<i>Unreserved activity: eg, mediation, representation in lower courts</i>	✓	✓	✗
	<i>Reserved activity: rights of audience</i>	✓	✓	✗

Costs Lawyer Standards Board (CLSB)

22. CLSB operates under transitional arrangements in Schedule 5 of the Act. This means that an employer of a costs lawyer is currently an exempt person in relation to the carrying on of reserved legal activities. Consequently, section 15(4) does not apply as costs lawyers will not find themselves working for non-authorized employers while transitional protections are in place.

Council for Licensed Conveyancers (CLC)

23. Regulatory arrangements for licensed conveyancers are outlined in the CLC Handbook and Licensing Frameworks. There is nothing specific that relates to section 15(4) in the code and practice rules and there are no particular restrictions on authorised individuals who may be working for a non-authorised employer.
24. The CLC Licensed Conveyancer Licensing Framework¹¹ only allows carrying on of reserved legal activities in particular circumstances: as a manager of a CLC body; as a manager of a body recognised by another approved regulator or licensing authority; or as an employee of these bodies. The CLC relies on the statutory provisions, rather than its Code and practice provisions to permit an authorised individual to carry on reserved legal activities while working for a non-authorised employer. The CLC's 2016 regulatory arrangements review is likely to include a proposal to include this explicit provision.

ILEx Professional Standards (IPS)

25. IPS is designated for five reserved legal activities (all but notarial practice). Regulatory arrangements for Chartered legal executives and other individuals authorised by IPS are outlined in the CILEx Code of Conduct and activity-specific practising standards and IPS provide guidance across all the reserved legal activities they regulate. There are no particular restrictions in the Code on authorised individuals who may be working for a non-authorised employer. IPS guidance on the administration of oaths highlights the conflicts of interest for all employees in carrying on this reserved activity, whether or not their employer is authorised. This reflects the provisions of section 183 of the Act.

Institute of Chartered Accountants in England and Wales (ICAEW)

26. ICAEW is designated as an approved regulator and licensing authority for probate activities. The regulatory arrangements established by ICAEW limit activity to non-contentious probate and do not allow for authorised individuals to carry on probate activities as an in-house member of staff for a non-authorised employer, therefore, the particular details of section 15(4) are not relevant to the ICAEW regulatory arrangements.

¹¹ CLC. Licensed Conveyancer Licensing Framework. Available at: http://www.conveyancer.org.uk/CLCSite/media/PDFs/4_Licensed_Conveyancer_Licensing_Framework.pdf

Intellectual Property Regulation Board (IPReg)

27. The IPReg Rules of Conduct¹² define professional work as any services provided by a regulated person in the course of business providing legal services. Professional work is split into “corporate work” and “private practice”. IPReg’s rules on indemnity insurance do not apply to those doing corporate work (Rule 17) and neither do rules on Complaint handling (Rule 12). Corporate work is defined as professional work undertaken by an employed regulated person acting solely as an agent on behalf of:

- a. their employer
- b. a company or organisation controlled by their employer or in which their employer has a substantial measure of control
- c. a company in the same group as their employer
- d. a company which controls their employer
- e. an employee (including a director or a company secretary) of a company or organisation under (a) to (d) above, where the matter relates or arises out of the work of that company or organisation
- f. another person with whom a person under (a) to (e) above has a common interest.

28. The patent attorney or trade mark attorney can act for their employer, companies associated with their employer, employees in those companies and third parties where there is a common interest. The Code of Conduct indicates that this could include:

‘maintaining or enforcing patents on behalf of third parties where the patents are licensed to an employer; prosecuting patent applications owned jointly by an employer and a third party; the appointment of an attorney as a joint representative on behalf of an employer and others in revocation or opposition proceedings; and time limited activities arising due to the transfer of assets to or from an employer such as the on-going maintenance of a portfolio of rights whilst a formal transfer was being finalised.’¹³

29. IPReg has established rules for those conducting litigation or exercising a right of audience before the Courts.¹⁴ These rules define the employed litigation practitioner as someone who is employed by a non-authorized employer. The rules limit who the litigation practitioner can advise and act for, as follows:

¹² IPReg. 2015. *Rules of conduct for patent attorneys, trade mark attorneys and other regulated persons*. Available at: http://ipreg.org.uk/wp-content/files/2014/12/IPReg_Code_of_Conduct_2015.pdf

¹³ IPReg. 2015. Rule 2, *IPReg Code of Conduct 2015*. Available at: http://ipreg.org.uk/wp-content/files/2014/12/IPReg_Code_of_Conduct_2015.pdf

¹⁴ IPReg. *Special Rules of Professional Conduct applicable to Regulated Persons conducting litigation or exercising a right of audience before the Courts*. Available at: http://ipreg.org.uk/wp-content/files/2012/07/Litigators_Code_website1.pdf

The employer and the following related bodies	
a holding, associated or subsidiary company	
a partnership, syndicate or company by way of joint venture in which the employer and others have an interest	
a trade association of which the employer is a member	
a club, association, pension fund or other scheme operating for the benefit of employees of the employer	
... and...	Providing that...
a person with whom the employer has a joint interest in the outcome of any proceedings, such as any licensee or licensor of the employer, or any joint owner of any intellectual property rights the subject of the relevant litigation work...	such joint interest is bona fide for the employer's benefit and is not formed directly or indirectly for securing assistance in legal proceedings
...and the following ...	Providing that...
a fellow employee	(a) the matter related to or arises out of the work of such person for the employer; (b) the employed litigation practitioner is satisfied that such person does not wish to instruct some other representative; and (c) no charge is made to such person, in relation to the employed litigation practitioner's costs, unless such costs are recoverable from any other source.
a director, company secretary or board member of the employed litigation practitioner's employer	
an employee, director, company secretary, board member or trustee of the employer or of a related body	
If the employer is	Then services may be supplied to...
a public body	for another public body or statutory officer to which the employer is statutorily empowered to provide legal services

30. Management of current and emerging conflicts of interest when employed litigation practitioners work for persons other than their employer is covered by rule 4.3. There are other provisions that set conditions when acting for persons other than the employer with respect to employer's liability, indemnity insurance and confidentiality.

31. Table 3 below, maps the impact of the IPReg rules on corporate work undertaken by E, the employee. The table does not reflect the details of the particular circumstances in which a consumer may be classified as "C" with respect to "E" and "P", but examples of "C" based on IPReg's rules include:

- if the employer is a private consumer, C could be another person with a common interest
- if the employer is a partnership, C could be a syndicate or company by way of joint venture in which P and others have an interest
- if the employer is business, C could be its holding company.

32. The areas shaded grey in Table 3 identify those services that the IPReg rules appear to prohibit E from providing that go beyond the minimum required by the Act. These concern the provision of unreserved legal services to consumers unconnected to the employer.

		Type of consumer E can provide legal services to:		
		E's Employer (P)	Persons connected to P (C)	Persons not connected to P (not C)
Type of legal activities E can provide:				
Research, advice on transactional matters and document preparation	<i>Unreserved activity: eg, will writing</i>	✓	✓	✗
	<i>Reserved activity: probate, reserved instruments, administration of oaths</i>	✓	✓	✗
Notarial activities	<i>Reserved activity: notarial practice</i>			
Advice on (potentially) litigious matters and work required to prepare such advice	<i>Unreserved activity: eg, advice on proceedings</i>	✓	✓	✗
	<i>Reserved activity: conduct of litigation</i>	✓	✓	✗
Representation (in person)	<i>Unreserved activity: eg, mediation, representation in lower courts</i>	✓	✓	✗
	<i>Reserved activity: rights of audience</i>	✓	✓	✗

The Master of the Faculties

33. The Master of the Faculties authorises notarial activities (the only regulator of this reserved legal activity), probate activities, reserved instrument activities and the administration of oaths. At present, employers of notaries are exempt persons for the purposes of notarial practice, under transitional arrangements in Schedule 5 of the Act. Therefore, while these arrangements persist, there would be no instance of a notary being employed in a situation as described by section 15(4).
34. Practising restrictions in Rule 11 of the Notaries Practice Rules 2014¹⁵ apply to employed notaries, irrespective of whether the employer is authorised or not. Employed notaries are prevented from performing “any notarial act as part of his employment” and must not “perform any notarial act for his employer or his employer’s holding, associated or subsidiary company” (Rule 11.1). Further, the employed notary may act for the employer’s client but in doing so ‘he shall take all proper and reasonable steps in the exercise of his notarial practice to maintain his independence of his employer’ (Rule 11.2). Independent status for employed notaries is confirmed through an annual Statement of Professional Independence¹⁶ sent to the employer by the notary.

Solicitors Regulation Authority (SRA)

35. Research commissioned and published by the SRA in February 2014 indicated that in 2012 there were 25,600 in-house solicitors (18 per cent of all solicitors).¹⁷ The SRA Practice Framework Rules provide detailed rules about in-house practice, supplemented by guidance notes.¹⁸
36. The SRA rules follow a similar approach to those of the BSB and IPReg, identifying particular clients that an authorised individual working for a non-authorised employer can legitimately work for. The restrictions outlined in the rules may be generic, for example applying to work colleagues and related bodies, or may be specific, applying to particular types of employer. The SRA rules cover a broader range of employers than that provided for in rules from BSB or IPReg, The rules also make provision for indemnity insurance arrangements across these interactions, fee charging, and discuss when pro bono services may be offered. A summary of some of the provisions is below:

¹⁵ *Notaries Practice Rules 2014*. Available at: <http://www.facultyoffice.org.uk/wp-content/uploads/2014/09/Notaries-Practice-Rules-2014.pdf>

¹⁶ <http://www.facultyoffice.org.uk/wp-content/uploads/2013/12/StatementOfProfessionalIndependence.pdf>

¹⁷ Oxera. 2014. *The role of in-house solicitors: prepared for the Solicitors Regulation Authority*. Available at: <http://www.sra.org.uk/documents/SRA/research/role-in-house-solicitors.pdf>

¹⁸ SRA. 2014. *Practice Framework Rules*. Available at: <http://www.sra.org.uk/solicitors/handbook/practising/content.page>

Work colleagues	Only if....
<p>Current or former employee, manager, company secretary, board member or trustee of employer or related body</p> <p>Contributor to periodical publication, broadcast or published by employer or related body</p>	<ul style="list-style-type: none"> • Matter relates to and arises out of work • Matter does not relate to claim for personal injury to individual • Satisfied that the individual does not want to instruct another lawyer • No charge is made
Related bodies	But...
<ul style="list-style-type: none"> • Employer's holding, associated or subsidiary company • Partnership syndicate, LLP, company by way of joint venture in which employer has an interest 	<p>Not if employed by local government</p>
<ul style="list-style-type: none"> • Trade association where employer is a member • Club, association, pension fund or scheme operated for benefit of employees of employer 	
Association	Provided that...
<p>A member of that association</p>	<ul style="list-style-type: none"> • the membership of the association is limited to persons engaged or concerned in a particular trade, occupation or specialist activity or otherwise having a community of interest, such interest being a specialist interest; • the association is one formed bona fide for the benefit of its members and not formed directly or indirectly for benefit or primarily for securing assistance in legal proceedings; • there is no charge to the member in non-contentious matters, and in contentious matters the association indemnifies the member in relation to costs and disbursements insofar as they are not recoverable from any other source; • and act only in matters that relate to or arise out of the particular trade, occupation or specialist activity of the association or otherwise relate to

	the specialist community of interest, for which the association is formed.
Insurer	
on behalf of the insurer in relation to that matter in the name of the insured	
Commercial legal advice services	
persons making enquiries of that organisation	Provided that...
	<ul style="list-style-type: none"> • the advice comprises telephone advice only, together with a follow up letter to the enquirer when necessary; • satisfied that there is indemnity cover reasonably equivalent to that required under the SRA Indemnity Insurance Rules; and • do not undertake any reserved legal activities.
Local government	
for another organisation or person to which or to whom the employer is statutorily empowered to provide legal services as below	Provided that
for a member or former member of the local authority	<ul style="list-style-type: none"> • the matter relates to or arises out of the work of the member in that capacity • the matter does not relate to a claim arising as a result of a personal injury to the member • satisfied that the member does not wish to instruct some other lawyer • and, no charge is made for work unless those costs are recoverable from some other source
for a company limited by shares or guarantee of which: (i) the employer or nominee of the employer is a shareholder or guarantor; or (ii) solicitor is, or an officer of the employer is, appointed by the employer as an officer of the company	<ul style="list-style-type: none"> • the employer is acting in pursuance of its statutory powers
for lenders in connection with new mortgages arising from the redemption of mortgages to the local authority	<ul style="list-style-type: none"> • neither solicitor nor any other employee acts on behalf of the borrowers

	<p>and</p> <ul style="list-style-type: none"> the borrowers are given the opportunity to be independently advised by a qualified conveyancer of their choice
for a charity or voluntary organisation whose objects relate wholly or partly to the employer's area	
for a patient who is the subject of a Court of Protection Order where acting for a work colleague who is appointed as deputy for the patient	
for a child or young person subject to a Care Order in favour of the employer on an application to the Criminal Injuries Compensation Authority	
Law Centres, charities, other non-commercial advice services	Provided that....
members of the public (NB - this does not apply to an association formed for the benefit of its members)	<ul style="list-style-type: none"> no funding agent has majority representation on the body responsible for the management of the service, and that body remains independent of central and local government all fees earned and costs recovered are paid to the organisation for furthering the provision of the organisation's services the organisation is not described as a law centre unless it is a member of the Law Centres Federation <p>and</p> <ul style="list-style-type: none"> the organisation has indemnity cover in relation to the legal activities carried out by employees, reasonably equivalent to that required under the SRA Indemnity Insurance Rules.
The Crown, non-departmental public bodies, the Legal Aid Agency	Provided that
give legal advice to, and act for, persons other than employer	carrying out the lawful functions of employer if doing so

Foreign law firms	Provided that
<p>provide legal services to employer's clients</p>	<p>employer is</p> <ul style="list-style-type: none"> • a practising lawyer of another jurisdiction who is not struck off or suspended from the register of foreign lawyers or the register of European lawyers; and is not practising in that context as a solicitor or as a registered European lawyer <p>or</p> <ul style="list-style-type: none"> • a business whose managers and interest holders are all practising through that business as lawyers of jurisdictions other than England and Wales, and do not include any person who is struck off or suspended from the register of foreign lawyers or the register of European lawyers <p>or</p> <ul style="list-style-type: none"> • is practising through or in the context of that business as a solicitor or as a registered European lawyer. <p>solicitor does not carry on, or supervise or assume responsibility for doing any of the following:</p> <ul style="list-style-type: none"> • draw or prepare any instrument or papers comprising reserved legal activities under section 12(1)(c) or (d) of the LSA <p>or</p> <ul style="list-style-type: none"> • exercise any right of audience, or right to conduct litigation before a court or immigration tribunal <p>or</p> <ul style="list-style-type: none"> • provide any immigration advice or immigration services, unless the employer, or a senior fellow employee, is registered with the Immigration Services Commissioner. <p>and</p>

	<ul style="list-style-type: none"> the work is covered by professional indemnity insurance reasonably equivalent to that required under the SRA Indemnity Insurance Rules. <p>and</p> <ul style="list-style-type: none"> client is informed that the employer is not regulated by the SRA and that the SRA's compulsory insurance scheme does not apply <p>and</p> <ul style="list-style-type: none"> ensure that if identified on the notepaper as a solicitor (or as an English or Welsh lawyer) the notepaper also states that the employer is not regulated by the SRA.
Regulatory bodies	Provided that
may give legal advice to other persons	carrying out the function of the employer
may act generally for such other persons	carrying out the statutory functions of the employer

37. SRA rule 4.1(b) places the obligation on the individual solicitor to satisfy themselves that their employer is not required to be authorised under the Act, and guidance notes to this rule specifically mention section 15(4).

38. As well as work for a non-authorised employer, rule 4 applies to all types of 'in-house practice' which includes the work that an SRA authorised individual may undertake for their authorised employer, if this is beyond the employer's authorisation (with the SRA or another regulator).

39. The SRA Practice Framework Rules support the SRA Code of Conduct¹⁹, which describes the outcomes that solicitors should achieve to aid compliance with the 10 overarching principles. There are almost 100 outcomes in the Code of Conduct, but each chapter of the Code sets out which outcomes apply to in-house practice and in some cases specify different outcomes. For example, ten of the outcomes only apply if the solicitor has management responsibilities. Practice Framework Rule 4.2 describes where and when indemnity insurance must be available, instead of the Code of Conduct outcome that obliges solicitors to hold professional indemnity insurance.

¹⁹ SRA Code of Conduct. Available at: <http://www.sra.org.uk/solicitors/handbook/code/content.page>

40. In its 2014/2015 Business Plan, the SRA announced a review of its current approach to in-house practice rules: “We believe that these requirements require re-examination and amendment to remain relevant to the way that in-house practice has developed in recent years.”²⁰ We support such a re-examination.

41. Table 4 below, maps the impact of the SRA rules on the provision of legal services by “E”, the employee. The table does not reflect the details of the particular circumstances in which a consumer may be classified as “C” with respect to “E” and “P”, but examples of “C” based on SRA’s rules include:

- if the employer is the Legal Aid Agency, C could be a member of the public if practice relates to a lawful function of the Agency
- if the employer is a trade association, C could be a member of that association
- if the employer is a local authority P, C could be a charity whose objects relate to P’s area.

42. The areas shaded grey in Table 4 identify those services that the SRA’s rules appear to prohibit E from providing that go beyond the minimum required by the Act. These concern the provision of unreserved legal services to consumers unconnected to the employer.

²⁰ SRA Business Plan 2014/2015. Available at: <http://www.sra.org.uk/sra/strategy/business-plan/sra-business-plan-2014-2015.page>

Table 4: Solicitors Regulation Authority: If they are an employee of a non-authorized employer under SRA rules a solicitor can provide services to their employer P, and to others, C in specified circumstances (segments with ✓). They cannot provide services in the segments marked ✗. The areas shaded grey represent those segments that do not appear to align with provisions in section 15(4).

Type of legal activities E can provide:		Type of consumer E can provide legal services to:		
		E's Employer (P)	Persons connected to P (C)	Persons not connected to P (not C)
Research, advice on transactional matters and document preparation	<i>Unreserved activity: eg, will writing</i>	✓	✓	✗
	<i>Reserved activity: probate, reserved instruments, administration of oaths</i>	✓	✓	✗
Notarial activities	<i>Reserved activity: notarial practice</i>			
Advice on (potentially) litigious matters and work required to prepare such advice	<i>Unreserved activity: eg, advice on proceedings</i>	✓	✓	✗
	<i>Reserved activity: conduct of litigation</i>	✓	✓	✗
Representation (in person)	<i>Unreserved activity: eg, mediation, representation in lower courts</i>	✓	✓	✗
	<i>Reserved activity: rights of audience</i>	✓	✓	✗

4. Areas for discussion

Justification for current approach

43. One of the drivers behind the introduction of the Act was a desire to open up the legal services market to meet consumers' needs more effectively. Concerns have been expressed about in-house practising restrictions limiting innovation in the market by employers and restricting choice for consumers. For example, in 2013 when the LSB considered the Solicitors Regulation Authority (SRA) rule change for solicitors working for local authorities, we were given examples of how its in-house rules may be stifling innovation by local authority legal teams. Removing unjustified burdens is therefore consistent with the regulatory objectives, including the objective aimed at enhancing the strength, diversity and effectiveness of the legal profession.
44. Where regulators adopt specific in-house practice rules, the impact appears to be broader than the minimum restrictions required to give effect to the Act. When Tables 1–4 are compared, the variation between current regulatory arrangements and the provisions of section 15(4) reveals a lack of alignment in terms of the type of activity that the in-house lawyer may carry on around unreserved legal activity. This is particular the case for the provision of unreserved legal services to consumers unconnected to the employer which then raises a question about a regulator's definition of legal services.
45. When specific rules that apply to particular employers are compared, for example local government, there is further variation. Different rules apply to barristers and solicitors working in-house for the same employer with respect to the nature of the "connected person" they may provide services to. This will influence consumers' access to legal services. This may have implications for innovation in the market, cost and red tape, as well as an impact on access to justice and the interests of consumers.
46. Our primary focus in this review is the nature of any regulatory restrictions on individual lawyers that may arise as a result of their employer not being authorised to provide reserved legal services. The onus is on the regulators to justify any restrictions in addition to the minimum required by the Act. When regulators choose to apply additional regulatory restrictions, we expect to see arrangements that are proportionate to the risk posed, consistent, transparent, and targeted, and that a regulator can account for its decision to act. 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.
47. We look to the regulators to justify these additional and particular regulatory restrictions with reference to compelling evidence against the regulatory objectives or commit to removing them if they cannot assure themselves such a

case can be made. Conversely those regulators with no additional restrictions should be able to demonstrate that this decision was taken in the light of an appropriate assessment of any need for action.

Questions for regulators:

1. What is the rationale to support your current approach to regulating in-house practice?
2. If you have specific regulatory arrangements, how have you assured yourself that there is compelling evidence to support those arrangements?
3. Having reflected on your specific regulatory arrangements, are there any areas you intend to remove or review?

Can current approaches be improved?

48. To help identify whether any improvements are needed to current approaches, we are interested in the front-line experiences and perspectives of consumers, providers, employers and regulators, for example:

- the impact on consumers of current arrangements
- the impact on non-authorized employers who employ in-house lawyers working to different sets of rules
- the compliance issues faced by in-house lawyers
- the issues regulators face when monitoring and enforcing their arrangements.

Questions for all interested parties:

4. What is your experience of current arrangements for in-house lawyers?
5. What, in your view, could be improved?

5. Next steps and how to respond

49. Responses to all five discussion questions will inform the review's final conclusions, which will reflect on the broader context of in-house practising restrictions. In particular responses will help to identify whether improvements to current arrangements are needed, and whether action is necessary to meet the requirements of the Act more effectively. We also hope that this work will support projects planned by regulators to review and update their regulatory arrangements in this area.

50. The closing date for responses is 24 April 2015.

51. We would prefer to receive responses electronically (in MS Word format), but hard copy response by post or fax are also welcome.

52. Responses should be sent to:

Email: consultations@legalservicesboard.org.uk

Post – Section 15 discussion paper

Legal Services Board

One Kemble Street

London

WC2B 4AN

Fax: 020 7271 0051

53. We intend to publish all responses on our website unless a respondent explicitly requests that a specific part of the response, or its entirety, should be kept confidential. We will record the identity of the respondent and the fact that they have submitted a confidential response in our summary of responses.

54. If you wish to discuss any aspect of this paper, or need advice on how to respond, please contact the LSB by telephone (020 7271 0050) or by one of the methods described above.

55. We will consider all responses to this paper and will publish our final findings and recommendations in Autumn 2015.

56. Any complaints or queries about this process should be directed to the Consultation Co-ordinator, Jenny Hart, at the following address:

Jenny Hart

Consultation Co-ordinator

Legal Services Board

One Kemble Street

London WC2D 4AN

Email: consultations@legalservicesboard.org.uk

Annex A: Glossary of Terms

ACCA	Association of Chartered Certified Accountants: approved regulator in relation to reserved probate activities
AR or approved regulator	A body which is designated as an approved regulator by Parts 1 or 2 of schedule 4, and whose regulatory arrangements are approved for the purposes of the LSA and which may authorise persons to carry on any activity which is a reserved legal activity in respect of which it is a relevant AR
Authorised Person	A person authorised to carry on a reserved legal activity
BSB	Bar Standards Board – the independent regulatory arm of the Bar Council
CILEx	Chartered Institute of Legal Executives – representative body for Legal Executives
CLC	Council for Licensed Conveyancers – the regulator of Licensed Conveyancers
ICAEW	Institute of Chartered Accountants of England and Wales – the representative body for Chartered Accountants in England and Wales and approved regulator for probate activities
ICAS	Institute of Chartered Accountants of Scotland – approved regulator in relation to reserved probate activities
IPS	ILEX Professional Standards Ltd – the independent regulatory arm of CILEx
LSB or the Board	Legal Services Board – the independent body responsible for overseeing the regulation of lawyers in England and Wales
LSA or the Act	Legal Services Act 2007
Principles of good regulation	The five principles of good regulation, being proportionate, accountable, consistent, transparent and targeted
Regulatory Objectives	There are eight regulatory objectives for the LSB that are set out in the Legal Services Act (2007): <ul style="list-style-type: none"> • protecting and promoting the public interest • supporting the constitutional principle of the rule of law • improving access to justice • protecting and promoting the interests of consumers • promoting competition in the provision of services in the legal sector • encouraging an independent, strong, diverse and effective legal profession • increasing public understanding of citizens’ legal rights and duties • promoting and maintaining adherence to the professional principles of independence and integrity; proper standards of work; observing the best interests of the client and the duty to the court; and maintaining client confidentiality.
Reserved Legal Activity	Legal services defined by section 12 of the Legal Services Act <ul style="list-style-type: none"> • The exercise of right of audience

	<ul style="list-style-type: none">• The conduct of litigation• Reserved instrument activities• Probate activities• Notarial activities• The administration of oaths
SRA	Solicitors Regulation Authority - independent regulatory body of the Law Society

Annex B: Section 15, Legal Services Act 2007

Section 15 - 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.