



Bar Council response to CILEX's consultation on Enhancing Consumer Trust and Confidence, consultation on reforms to our governance, membership structure and regulatory delegation

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to CILEX's consultation on Enhancing Consumer Trust and Confidence, consultation on reforms to our governance, membership structure and regulatory delegation.¹
2. The Bar Council represents over 17,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society.
4. The Bar makes a vital contribution to the efficient operation of criminal and civil courts and tribunals. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Question 1: Do you support the extension of voting rights and representation on the Professional Board to all grades of member within the Chartered Institute?

5. No comment.

Question 2: Do you agree that the CILEX President be appointed from an eligible pool comprising of Chartered members?

6. No comment.

¹<https://www.cilex.org.uk/wp-content/uploads/CILEX-Consultation-Enhancing-Public-Trust-and-Confidence-Aug-2023.pdf>

Question 3: Do you have any comments regarding equality issues that may arise from our proposals to amend our governance and constitution?

7. No comment.

Question 4: Do you agree the proposed new membership structure is simpler and provides a clear progression route to Chartered status?

8. It is unclear from the consultation paper, CILEX's own website, or CILEX Regulation's website, the extent to which the proposal differs from the current system (and those sources could do with improvement in this regard). It would appear though from the proposals later in the consultation that part of this proposal is to combine 'legal executives' and 'CILEX practitioners' in one category, that of 'chartered lawyer' (if that has not already occurred). As to the undesirability of that, see below Q7.

9. The progression ladder with nine distinct grades and associated titles and six post-nominals is in any event likely to be very confusing to the consumer and may undermine public trust and confidence in the delivery of legal services. By contrast, the training pathway for Barristers has only four stages in total. They are unregistered barrister, non-practising pupil, practising pupil and barrister. Unregistered barristers cannot use their title in connection with the supply or offer to supply legal services, to avoid being mistaken for a barrister.

10. If simplicity is required, as stated below, it would be preferable for CILEX Practitioners to become described within the concept of '(chartered) legal executives', rather than using an umbrella term such as 'lawyer' not explicitly currently granted by the Act or Royal Charter, particularly if members of CILEX may in future be regulated by the Solicitors Regulation Authority (SRA).

Question 5: Do you agree the addition of a distinct progression ladder for paralegals leading to Chartered Paralegal status will enhance public trust and confidence in the delivery of legal services?

11. Subject to our views below, if paralegals are to be regulated in the way proposed, then we agree that paralegals should have a distinct progression ladder to differentiate them from those who provide full legal services as lawyers (whether as legal executives, barristers, solicitors or otherwise). We have no comment on the proposed progression pathway for such paralegals itself.

Question 6: Do you have any additional observations on the proposal to introduce a new Chartered Paralegal standard and professional status?

12. Whilst it is desirable for consumers of legal services to have recourse to the consumer protections that come with regulation, this has to be balanced against the fact that unregulated services may be at lower cost. This is because regulation carries a cost that often results in higher fees for clients. Some clients may wish to access lower cost services with the associated

trade-off of fewer consumer protections in place. Indeed, our understanding is that the popularity of paralegals in the legal services market, and a useful selling point distinguishing paralegals from legal executives and solicitors, is for this reason. What is important is that clients can obtain information about the extent of regulatory protections in place for a legal services provider and can make an informed choice in their selection of them. This is a consideration when determining whether and how to bring paralegals within the regulated sector.

13. The consultation document states that, “*Chartered Paralegals will be subject to regulation with a Code of Conduct, practice standards and a requirement to undertake CPD.*”² In addition to these forms of regulation, barristers must carry insurance that covers all of the legal services they provide to the public, are subject to disciplinary action by the BSB and many of their clients will be able to access the Legal Ombudsman (LeO) for service complaints. It is not clear whether there are plans to extend these additional regulations to paralegals and their clients. It is vital that any increase in LeO running costs resulting from an expansion of their remit must not push up costs borne by existing funders of it (e.g. barristers and solicitors).

14. The extent to which the form of paralegals’ regulation will be advertised to clients, in order to facilitate their making an informed decision about their provider is unclear. If there is no access to LeO, no insurance requirement and no form of disciplinary process then it is important that this is clearly communicated to potential consumers.

15. We note plans to include paralegals on a register. Whilst registers potentially impart useful information for consumers, our experience is that they are not widely referred to by consumers, and without a clear explanation of the different types of paralegal and their varying levels of qualification, experience and regulation, its utility will be limited. Care must be taken to ensure that the difference between this register and that of authorised persons are made clear, to avoid consumer confusion. This is particularly pertinent if the SRA takes on the regulation of legal executives and paralegals in addition to solicitors, whom they already regulate. Were this to happen, there is a risk that the three distinct groups are conflated into one in the eyes of the consumer.

Question 7: Do you agree the use of the Chartered Lawyer titles will assist legal professionals, employers and the public to better understand the status and specialist nature of CILEX lawyers?

16. We agree with the Competition and Markets Authority’s conclusion that, “*Professional titles are an important factor in consumer decision-making and can be a useful way for consumers to identify high quality or the availability of regulatory protection.*”³ Any change to the title of legal executives runs the risk of a considerable period of consumer uncertainty over what those with the new title are entitled to do and the extent to which they are regulated. An education campaign may help mitigate this risk, but it is likely to be challenging to alleviate it entirely. With twelve new titles planned, we have concerns about the sheer number of new titles being

² <https://www.cilex.org.uk/wp-content/uploads/CILEX-Consultation-Enhancing-Public-Trust-and-Confidence-Aug-2023.pdf> 2023: 7

³ [CMA Legal Services Market Study final report](#) 2016: 153

proposed. This appears to complicate the picture for consumers considerably. Whilst it is appreciated that there is an attempt to use plain language readily understood by a consumer, which is desirable, there will be many consumers who do not understand terms such as “litigator” or “probate”.

17. If barristers were to change their title in a way that described every authorisation they had and activity they undertook, their titles would be long and unwieldy and subject to change over time as they move in and out of different specialist practice areas. Consideration could be given to the approach taken by the Bar Standards Board which is to list on the Barristers’ Register barristers’ various authorisations, for example the right to conduct litigation or to accept public access instructions.

18. We have very serious concerns about the proposed use of the titles of “lawyer” and “advocate”. As you will no doubt be aware, the term “lawyer” is not restricted, nor does it carry any regulatory meaning. Currently, anybody can call themselves a lawyer. The Competition and Markets Authority found in their 2016 market study of legal services that, *“unauthorised providers advertise themselves using terms such as ‘lawyer’, ‘legal adviser’ or ‘legal consultant’”*⁴. ‘Lawyer’ can also cover a multitude of qualified persons providing legal services including barristers and solicitors – see for example the list in section 190 of the Legal Services Act 2007 (in relation to legal professional privilege – as well as costs lawyers and so on). There is consequently scope for significant confusion with both the regulated and the unregulated sector if CILEX uses the term “lawyer” in any of its titles. We question how a member of the public will be able to discern where a lawyer is subject to CILEX regulation or is unregulated, and understand the lack of consumer protections afforded by the latter category. Use of the term “lawyer” by legal executives will lead to a blurring of the lines between regulated and unregulated providers and create confusion about the regulatory status of the provider being instructed.

19. The relevant power granted to CILEX under the Act and the Royal Charter is to grant a certificate authorising the person to act as a ‘legal executive’, and that status should continue to be prominently used by relevant CILEX members in the interests of clarity and protection of the public. We would encourage the retention of (chartered) legal executive (or, although we consider this a less familiar term, CILEX practitioner). If ‘lawyer’ or ‘chartered lawyer’ is ever to be used, it should mandatorily include ‘CILEX’ in formal usage.

20. If simplicity is required, it would be preferable for CILEX Practitioners to become described within the concept of ‘(chartered) legal executives’, rather than using an umbrella term such as “lawyer” not explicitly currently granted or controlled by the Act or CILEX’s Royal Charter, particularly if members of CILEX may in future be regulated by the SRA. Although members of CILEX may not often use the term Chartered Legal Executive themselves, that is an issue that can be dealt with by better public education and awareness about legal executives, not by the adoption of a wholly confusing and vague term such as “lawyer”.

⁴ [CMA Legal Services Market Study final report](#) 2016: C12

21. Although use of the term “advocate” is not reserved or restricted in any way in England and Wales, it is a term that can be commonly used to describe barristers and solicitors that have obtained higher rights of audience, known as “solicitor advocates”. Over the border in Scotland, Advocates are the equivalent of our barristers. Advocates also exist in many European Union jurisdictions, doing work similar to that of barristers. The proposal for legal executives to use the word “advocate” in their title therefore has potential to cause confusion amongst clients of legal executives, solicitor advocates and barristers. It runs the risk of blurring distinctions between professions operating within England and Wales as well as with neighbouring jurisdictions.

22. “Litigator” has a similar issue in that it is an activity carried out by other legal professionals such as barristers and solicitors.

23. The Competition and Markets Authority noted that, “consumers appear to rely to some extent on regulatory titles to navigate the market”.⁵ Significantly altering titles in the way proposed by CILEX will make it significantly harder for consumers to navigate the legal services market.

Question 8: Are there any other specialism(s) that should be included in the list of Chartered titles?

24. No, as already mentioned, we think that the proposal to create twelve new titles is likely to be confusing for consumers. Retention of the existing titles or a significant reduction in the number of titles being proposed should be considered.

Question 9: Are there any other considerations CILEX should take into account when considering the impact of these changes?

25. As outlined above in the response to question 7, CILEX must take into account the risk of confusion with other professions and determine if the benefits outweigh these risks, and what mitigation steps would be necessary were they to proceed. We consider that the potential risks to the public greatly outweigh the potential rewards.

Question 10: Do you agree that increasing the independence of our regulatory model through delegation to a body that is structurally, financially and operationally independent from CILEX will enhance public trust and confidence in regulation?

26. We are not aware of evidence that the current form of regulation necessarily undermines public trust and confidence in regulation. What is paramount is that regulation is independent and is demonstrably independent. That is possible through the present system.

27. The Bar Council is a strong advocate for regulation that is independent of government and the profession. The Bar Council set up the Bar Standards Board as an independent operation in advance of the statutory requirement to do so. Our view is that, for the public,

⁵ [CMA Legal Services Market Study final report](#) 2016: 179

and for the Bar and its clients, the arrangements for securing regulatory independence are working well. The same should be possible for CILEX.

28. That said, we recognise the importance of the Approved Regulator being able to highlight issues with their regulators' operation and performance and to have the power to make changes, including to the delegation itself, that will benefit the consumer interest as well as the interests of its members.

Question 11: Do you agree that the SRA offers a sufficient scale and reach to be able to deliver efficient and effective regulation at a cost that is affordable for the consumers and the profession?

29. No comment.

Question 12: Do you agree that regulation by the SRA provides opportunity to establish and maintain consumer confidence that lawyers regardless of whether through the CILEX route or the solicitor route, enter the profession through robust processes and are required to meet and maintain high standards of competence?

30. No comment.

Question 13: Do you agree that regulation by the SRA provides opportunity to deliver a consistency of approach and therefore an increased confidence amongst consumers, that CILEX Lawyers and solicitors delivering the same services are required to operate to the same high standards of conduct and practice?

31. There are examples of successful regulation by different regulators of legal professionals that engage in similar or the same activities. For example, solicitor advocates and barristers both engage in advocacy in the higher courts but are regulated by the SRA and BSB respectively. Other aspects of their practice, for example differences in the rules on handling client money or the predominantly self-employed nature of barristers, warrant different systems of regulation. Just because legal professionals engage in similar or the same activities does not mean that regulation by the same regulator is the best solution. In any event, we are unclear as to whether CILEX in fact proposes that its members are required to operate to the same standards of conduct and practice. See, for example, paragraph 13 above.

Question 14: Do you agree that regulation by the SRA provides opportunity to establish a consistency of approach and therefore an increased confidence amongst consumers, that firms whether solicitor-led or CILEX Lawyer-led, who deliver the same services are required to operate to the same high standards?

32. We do not consider that the use of one regulatory body for firms led by different professions necessarily means an increase in confidence amongst the public that the professions are required to operate to the same high standards. That could not be said of those that separately regulate doctors and dentists practices which offer the same services, or barristers entities and solicitors firms, for example.

Question 15: Do you agree that SRA regulation of CILEX and ACCA probate entities alongside solicitor-led firms, will deliver enhanced consumer protection through consistent levels of PII, Compensation Fund scope and transparency obligations?

33. No comment.

Question 16: Do you consider there to be any risk or detrimental effect arising from the proposed transfer of CILEX and ACCA probate firms to the SRA?

34. No comment.

Question 17: Do you agree that regulation by the SRA provides opportunity to better empower consumers to make informed choices as to which regulated provider (individual lawyer or firm) can best meet their need?

35. Not necessarily. As long as there is sufficient information about a provider's regulatory status, qualifications and areas of specialism readily available to a consumer, it is inconsequential who their regulator is.

Question 18: Are there any barriers to increased competition, quality and innovation in legal services that arise from regulation by the SRA?

36. This depends on the ability of the SRA to tailor its regulation to a different group of legal professionals. The experience of the Bar Council is that it is beneficial to have a bespoke regulator where the work and mode of operation by the regulated community and mode of operation is significantly different. Barristers' delivery of advocacy and specialist legal advice and main mode of practice from chambers means they need a bespoke regulator that understands them and can take a risk-based approach based on consent. This is conducive to proportionate and effective regulation at reasonable cost as unnecessary interventions and rules are avoided.

37. It follows that a regulator that understands its regulated community will also be better placed to understand the opportunities and risks presented by innovative practices and technologies and work with the regulated community to test them out.

Question 19: Do you agree that regulation by the SRA will support the equal treatment and recognition of legal professionals regardless of route to qualification and provide equality of opportunity for individual practitioners and entities?

38. We do not agree that regulation by the SRA should by itself make any difference to equality of opportunity – that laudable aim should be possible regardless of which body is delegated with the task of regulation.

Question 20: Do you agree that through the SRA's publication of the Register of Authorised Persons for both solicitors and CILEX Lawyers, there is opportunity to explain the equivalence and distinction of these two professions, therefore assisting consumers to better understand and compare the choice of lawyer able to service their legal need?

39. Arguably this aim is already met through a combination of the information already present on existing registers and websites. In any event, the use by consumers and, therefore, usefulness of registers is very limited. It is not a substantial reason warranting change.

Question 21: Do you consider there to be any adverse impact of our proposals on:

Consumers

Vulnerable groups

Legal professionals

Providers of legal services

40. We consider that the proposals in relation to altering the nomenclature structure of those regulated by means of CILEX membership will or may have an adverse impact on consumers, vulnerable groups, legal professionals and providers of legal services for the reasons we have identified above. We have identified no such similar issues with the proposals in relation to regulation by the SRA.

**The Bar Council
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For further information please contact

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