

Country Report

ENGLAND AND WALES

The Law Society of England and Wales



Introduction

The Law Society of England and Wales undertook a series of steps to adapt to the changing legal market and economic landscape in 2012, including:

1. Legal Aid
2. Civil Litigation Reform
3. Alternative Business Structures
4. Outcomes Focused Regulation
5. Education and Training
6. Professional Indemnity Insurance
7. Will writing
8. QASA

1. Legal Aid

The Law Society's Position

The Law Society has serious concerns about the legal aid cuts due to be implemented in April 2013 under the Legal Aid Sentencing and Punishment of Offenders Act (LASPO). We believe these cuts run counter to the interests of social justice and the rule of law and we are developing a strategy to try to mitigate the effects of the cuts for our members and the clients they serve.

Current Issues

The LASPO Act makes substantial cuts to the legal aid system, covering the following areas:

- Significant areas of law being taken out of scope, including most private law family disputes (except where there is domestic abuse), welfare benefits, some housing and debt, employment, non asylum immigration and most clinical negligence.
Help limited to telephone advice lines for debt, special educational needs and discrimination law.
- Increased financial contributions from clients.

What is the Law Society doing to assist the profession?

(a) Campaigning against the LASPO Bill:

- The Law Society set up the 'Sound Off For Justice' (SOFJ) campaign to challenge the LASPO Bill during its progress through Parliament. This was a high profile campaign run with the assistance of professional consultants.
- The SOFJ campaign brought in a number of non legal agency partners, such as charities who assist people who stand to lose entitlement to legal aid as a result of the cuts.
- As well as opposing the cuts, SOFJ also put forward positive proposals for reducing legal aid expenditure without reducing legal aid scope and eligibility.

Country Report

ENGLAND AND WALES

The Law Society of England and Wales



- These included greater efficiencies in the justice system and improving decision making by Government bodies such as the Department for Work and Pensions (DWP) and UK Border Agency (UKBA).
- SOFJ also argued that any costs savings are likely to be offset by greater expenditure for other Government departments as a result of the adverse social consequences of not being able to obtain legal representation.
- The campaign achieved some significant concessions, such as:
 - the broadening of the definition of domestic violence and the evidence required to support it
 - the reduction of the number of categories of law only accessible through the 'Telephone Gateway', and
 - the scrapping of the Supplementary Legal Aid Scheme proposal which would have recouped 25 percent of client damages for the Ministry of Justice (MoJ) finances.

(b) Adapting to the post- LASPO environment:

- During the Autumn of 2012 we ran a series of nationwide roadshows to inform legal aid practitioners about LASPO and its likely consequences.
- We are seeking to set up a pilot Family Court Duty Solicitor Scheme.
- We are supporting the development of 'CourtNav', an online case management tool, which enables self represented litigants to navigate their way through the legal process.
- We are producing a Practice Note on 'unbundling' legal services; i.e. providing discrete pieces of advice on specific elements of a case rather than the traditional full retainer.
- We are informing firms of the possibilities offered by new technology for the delivery of legal services, both in terms of new ways of service delivery such as video links or legal apps, and for streamlining of administration by sharing back office functions with other firms.

Whilst these initiatives will go some way to mitigate the effects of the cuts we recognise that they are not a substitute for legal aid for the poorest and most vulnerable clients.

2. Civil Litigation Reform

Issue

Lord Justice Jackson published his final report into reducing the costs of civil litigation in January 2010, making 109 recommendations. In November 2010 the MoJ published a consultation on the report's recommendations, to which the Law Society responded.

On 29 March 2011 the Lord Chancellor issued a statement in Parliament confirming the Government's intentions to:

- abolish the recoverability of conditional fee agreement (CFA) success fees
- abolish the general recoverability of after the event (ATE) insurance premiums
- introduce a new test of proportionality in costs assessment

Country Report

ENGLAND AND WALES

The Law Society of England and Wales



- permit damages-based agreements (DBAs) in contentious business.
- allow an increase of 10 percent in non-pecuniary general damages for negligence such as pain, suffering and loss of amenity for all claimants, and
- introduce a regime of Qualified One Way Costs Shifting for personal injury cases, including clinical negligence.

The first four of these proposals were subsequently pursued by Government in Part 2 of the LASPO Act 2012. The remaining reforms are being dealt with by the Civil Procedure Rules Committee.

Law Society Position

The Law Society supports the current costs regime because it ensures access to justice for all. While we agree that costs can be too high and disproportionate, especially in lower value claims, we believe this is a result of the process, and therefore it is that process which should be changed. We believe the reforms proposed will cripple the use of CFAs, and so deny access to justice for middle income earners, including victims of medical negligence and small businesses.

We are therefore strongly opposed the reforms. However, as the legislation has now been enacted we are now assisting the Government in implementation, which will happen on 1 April 2013. We are, however, extremely concerned at the timing and rigidity of this deadline and have real fears that the reforms will not be ready or properly fit for purpose at that date. For example, many of the reforms will require firms to adjust and change their internal systems and business models. Given that some Regulations were only published and available in the last few weeks this will be difficult to achieve.

What is the Law Society doing to help the profession?

Due to the amount of reforms to civil litigation and funding it will be necessary to issue guidance in the form of Practice Notes on a number of topics. The following are those which have been identified as priorities but this list may be subject to additions:

- Damages based agreements (“DBAs”)
- Conditional Fee Agreements (CFAs)
- Part 36 Offers to Settle
- Qualified One Way Costs Shifting (“QOCS”)
- Referral Fees
- Costs Management and Budgeting
- Fixed Recoverable Costs

Planning is also underway for a series of 16 Regional CPD events, which will inform the profession of the changes and assist them to cope with implementing the costs reforms.

Country Report

ENGLAND AND WALES

The Law Society of England and Wales



3. Alternative Business Structures

2013 will be the year we begin to understand what impact the introduction of Alternative Business Structures (ABS) will have on the English and Welsh legal services market.

The Law Society's independent regulatory arm, The Solicitors Regulation Authority (SRA), has created a structure within which these new business models will operate. It has currently licensed ~ 75 ABS. The Law Society has used its 'key stakeholder' status to ensure that appropriate client protections are maintained and that professional standards continue to operate fully.

ABS and traditional law firms

It has long been understood that ABS will work well only if they are simply another variety of law firm, rather than an entirely separate breed, exempt from the requirements on other law firms. That is one reason why the Legal Services Act 2007 requires that only approved regulators can become licensing authorities. It has long been the Law Society's view that it is imperative that the public protections – in terms of indemnity insurance and compensation fund cover – enjoyed by consumers who choose ABS firms are the same as those provided by other law firms.

The key safeguards were:

- Strict requirements concerning the fitness to own of potential external owners, and the fitness to manage of potential non-lawyer managers.
- A requirement that ABS would be regulated by the same regulators as existing law firms.
- Arrangements to ensure that ABS could be subject to the same conduct of business rules, and the same public and consumer protections, as other law firms.
- Arrangements to ensure that the potential impact on access to justice was taken into account in licensing decisions.

Both lawyers and non-lawyers will need to be clear about the new regulatory framework and their responsibilities within the framework. There are special responsibilities for the Head of Legal Practice and Head of Finance and Administration. The people fulfilling these roles will need to be trained on their duties under the Act and how to fulfil them.

Possible ABS models

There are three broad models which ABS can take:

- firms that are in essence like traditional law firms, but with the involvement of one or more non-lawyer manager, without external ownership, and providing solicitor type services only.
- complete or partial external ownership with the legal services being operated through a separate entity. For example, if a supermarket were to set up a legal services division, it is likely to set up a separate subsidiary, distinct from the rest of its activities, so that only the entity providing reserved legal activities will be regulated as an ABS.
- combinations of different services within one entity—this is the multidisciplinary practice (MDP) model.

Country Report

ENGLAND AND WALES

The Law Society of England and Wales



Market information

There is roughly a three-way split of opinions within the profession between those who view ABS as a threat; those who believe ABS will offer new opportunities for well-run firms; and those who think ABS will not make much difference. No one knows exactly what type of business models will gain most prominence but as long as the legal sector is regulated fairly one would expect entities to seek out the most efficient and advantageous structure. The first question law firms should ask themselves is "how can I best go about running my business?" The liberalisation of the legal market means that there will be many more potential answers for firms to choose from than there used to be.

Previous surveys found that some 45 percent of firms have changed their plan/strategy as a result of the Legal Services Act, while a further 25 percent expect to do so. There is a "wait and see" approach amongst many firms. Many are not ruling out becoming an ABS but do not have plans as yet to take advantage of these new possibility. A recent survey found 6 percent of firms were definitely considering having outside investors but only 1.5 percent had taken any action as yet. Those most likely to consider outside investment are medium size firms, and those involved in personal injury work.

4. Outcomes Focused Regulation (OFR)

The Law Society has been closely monitoring developments since the implementation of the SRA's new outcomes-focused approach (OFR) to regulation in October 2011. This moved away from a rules-based approach and instead focuses on high level outcomes governing practice and quality of outcomes for clients.

The Law Society has been offering clarity on the new regulatory regime and identifying issues of ongoing concern to the profession, which includes lobbying for change. The SRA is currently undertaking a 'red tape' exercise and we are encouraged by the SRA's commitment to regularly reviewing its regulatory processes and procedures. We have consulted with a wide range of stakeholders and will be making suggestions to the SRA, on behalf of the profession, to remove unnecessary regulatory processes. The Society will also be responding to the SRA's consultation on the regulation of international practice on behalf of the profession. These are just two examples of the lobbying activity we are currently engaged in.

Support and guidance has also been provided to the profession, both in preparation to OFR and since implementation. Law Society guidance and support includes practice notes to the profession, including on 'Conflicts of interest', 'Compliance Officers' and 'Outsourcing' and information on the website. In addition, services are provided via the Law Society's Practice Advice Service, the Risk & Compliance Service, e-learning packages, seminars, conferences and training courses.

Compliance Officers

The Law Society has provided support to those who have taken on the new roles of Compliance Officers for Legal Practice (COLP) and Compliance Officer for Finance and Administration (COFA) including guidance and events. Practical support has also been offered in the form of 'Compliance reference groups'. These groups are aimed at different sized firms and consider specific questions around compliance and the COLP/COFA roles.

Country Report

ENGLAND AND WALES

The Law Society of England and Wales



The SRA has now approved the vast majority of nominations for COLPs and COFAs with those approved taking up their post on 1 January. The impact of these new roles will be monitored over the next year.

5. Education and Training

Issue

The Legal Education and Training Review (LETR), commissioned by the three legal regulators (SRA, BSB and IPS) is due to report soon. This follows a year of research, including a number of consultations and engagement with the legal professions. It is unclear as yet what form the recommendations will take. It is expected that they will address all stages of the education and training process as well as the role of unregulated providers of legal services ('paralegals') and possible regulatory models.

Law Society Position

The Law Society has responded to the consultations and engaged with the profession in order to form our views. The key elements have been:

- Support for alternative routes into the profession so long as they meet the current high standards.
- Lobbying for the inclusion of ethics training in the undergraduate degree and throughout the other stages as appropriate.
- Maintaining the current 'fast track' route into the profession as other routes are developed.
- Noting that the current system is very flexible and that many varied routes can be accommodated within this to suit all those who would wish to enter the profession, for example part-time studying, work-based learning as a modular form of the training contract or the new two year undergraduate degree.
- Support for measures that will improve access to the profession, including around social mobility, such as apprenticeships being developed as a possible route to qualification by Skills for Justice.

What is the Law Society doing to help the profession?

- The Law Society has engaged with the profession to represent their views to the research team and the regulators – our online survey had nearly 500 responses.
- We are continuing to meet with the regulators regarding the way in which education and training is evolving, for instance around changes being made as part of the red tape initiative that may have an impact.
- Once the LETR's report is published we will then engage once again with the profession and move forwards with lobbying the SRA on the basis of the professions opinion.

Country Report

ENGLAND AND WALES

The Law Society of England and Wales



6. Professional Indemnity Insurance (PII)

Overview

- The 2012–13 renewal season went relatively smoothly. The Law Society is currently conducting its annual survey of the profession's experiences which should be available in early April. This will provide empirical evidence of the PII market and data for benchmarking. We encourage all solicitors to participate if contacted by our external research providers.
- There are only 20 firms in the assigned risks pool (ARP). This is the final year of the ARP and the profession is liable for funding some of the claims. For more information see: <http://www.lawsociety.org.uk/advice/articles/assigned-risks-pool/>
- Qualifying insurers reported just under £240m in declared premium income. 12.5 percent of this income is with unrated insurers.

Financial security of insurers

- The Law Society is becoming increasingly concerned about the number of solicitors relying on unrated insurers, particularly this renewal, where there was increased availability of rated insurers within the market. This suggests both that, in some fundamental respects, the market in its current form is not working for a segment of the profession and that a proportion of firms continue to make a purchasing decision based purely on price. We are currently developing our response to this issue prior to the next renewal.
- Our concerns about unrated insurers have been shaped by the recent insolvency of **Lemma**. Solicitors with outstanding claims on Lemma policies or that may need to make a claim on a Lemma run-off policy in the future should contact the liquidator: <http://www.lawsociety.org.uk/representation/articles/firms-claims-outstanding-lemma/>

The Law Society also continues to closely monitor the **Quinn** administration and payment of claims. We are concerned given that the shortfall in Quinn has doubled to €1.65bn; however, the Irish Central Bank has confirmed that the Irish government will continue to support the Irish Compensation Fund. For more information about the Law Society's campaign see: <http://www.lawsociety.org.uk/news/stories/quinn-law-society-raises-concerns-in-irish-high-court-for-more-than-500-solicitors/>

Right to buy litigation

The Law Society is concerned about an increasing trend of aggressive but essentially weak negligence claims being brought against solicitors after marketing campaigns by claims management companies. Solicitors' firms make attractive targets because they are well insured. This trend may not just involve right to buy cases but also ancillary relief settlement cases.

PII reforms that will take effect in 2013

The Law Society supports:

- **Removal of the single renewal date** from 1 October 2013.

Country Report

ENGLAND AND WALES

The Law Society of England and Wales



- The **removal of the assigned risks pool (ARP)** and introduction of a 90 day period that comprises of an extended indemnity period (EIP) and cessation period. If a firm is unable to obtain a policy of insurance at the end of the 90 days, it must close. This is consistent with the proposal put forward by the Law Society. We maintain that the EIP requires efficient enforcement action by the SRA to avoid firms operating without insurance.

Other changes:

- **Post six years run-off cover** provided by the Solicitors Indemnity Fund (SIF) extended until 2020. We will be considering the position with respect to the period beyond 2020 as part of our work this year.
- **2012 ARP funding** will be 'shared' by the profession and the insurers in tranches of £10m – with the profession's liability being capped at £30m and funds, initially, to be provided from SIF.

7. Regulation of will-writers

The issue

In England and Wales, there is no restriction on individuals who can write wills for reward. This has led to significant concerns about poorly drafted wills, wills being lost and, frequently, dishonesty and poor advice by unregulated will-writers. The Law Society has campaigned for the regulation of will-writers for some years.

Following a number of consultations, the Legal Services Board (LSB) has provisionally proposed to recommend that will writing and estate administration activities should become reserved legal activities and that those undertaking this work should be regulated by an approved regulator.

The Law Society's position

The Law Society welcomes the fact that the LSB has provisionally agreed with its campaign that will-writers should be regulated, but is concerned that the approach by the Board might still lead to problems for consumers and may risk a diminution of standards.

The Law Society is urging the LSB to ensure that universal minimum protections apply to all those who undertake reserved activities to ensure that consumers are fully protected. The Law Society has also raised concerns that, if the LSB's proposals were to require significant changes by the existing regulators of will writing and estate administration activities, this would cause unnecessary delay and confusion.

It is anticipated that the LSB will publish its final report in February 2013 setting out its decision as to whether it will recommend to the Government that will writing and estate administration activities become reserved activities.

What the Law Society is doing

The Law Society's aims are to ensure that:

- any proposed rules governing all will-writers, whether or not they are solicitors should enable a level playing field and ensure consistent standards for the public

Country Report

ENGLAND AND WALES

The Law Society of England and Wales



- solicitors are properly trained and supported in writing wills – we are exploring the development of an accreditation scheme for solicitors doing this work.

8. Quality Assurance Scheme for Advocacy (Crime) – QASA

The Law Society's Position

The Law Society accepts that there are good and poor advocates, irrespective of their profession, and is committed to improving advocacy. However, it regards the scheme, which has been devised by the Joint Advocacy Group (the SRA, Bar Standards Board and ILEX Professional Standards Board – the regulator for members of the Chartered Institute of Legal Executives), as disproportionate to the nature of the problem, bureaucratic and burdensome. The actual cost to the advocate has yet to be determined. Within the solicitors' profession there is a real fear that the reliance upon judicial evaluation for all those advocates undertaking trial work in the Crown Court will prove unfavourable to solicitor advocates as compared to barristers.

Current Issues

The decision of the Joint Advisory Group to postpone implementation was announced immediately prior to Christmas and in the light of the responses to the fourth and final consultation. The Law Society is still in the process of liaising with the SRA to establish the details of the agreement between the three regulators. As far as the Law Society is concerned the key points are:

- The scheme must be open to non trial advocates in the Crown Court and they must be able to enter the scheme via assessment and not judicial evaluation – both points admitted by the JAG.
- The period in which Crown Court advocates have to obtain the requisite number of judicial evaluations must be lengthened as there are simply not enough trials for all the advocates to qualify – the JAG has shifted to evaluations at two successive effective trials within a two year period instead of 12 months.
- Youth Court work must be treated as level 1, equivalent to appearing before the Magistrates' Court.
- QCs must be included in the scheme even if those obtaining silk since 2010 are passported into the scheme for up to five years before they need to be reaccredited.
- Consistency between the rules applied by the three regulators to their respective members.

What is the Law Society doing to assist the profession?

The Law Society continues to make robust representations about QASA to the SRA. In 2012 it established the Advocacy Section and introduced training courses for solicitor advocates. Once the detail of QASA have been clarified and the new timetable for its implementation announced, the Law Society will be considering what it needs to do to inform solicitors of the scheme and to help them gain accreditation under it.

Law Society of England and Wales