

Country Report

ENGLAND AND WALES

The Law Society of England and Wales

The Law Society of England and Wales undertook a series of steps to adapt to the changing legal market and economic landscape in 2016. The issues identified are the following:

1. Regulation
2. The Investigatory Powers Act 2016
3. Anti-money Laundering
4. 'Legal aid deserts' campaign
5. Business and Human Rights
6. Brexit and the legal sector

1. Regulation

Overview

The Competition and Markets Authority published the final report of its legal services market study and the Solicitors Regulation Authority (SRA) is pressing ahead with the programme of regulatory reform.

Competition and Markets Authority

In late 2016 the Competition and Markets Authority, whose role is to promote competition for the benefit of consumers, released its long awaited report into competition in the legal services market. The study examined the affordability and standard of legal services, and investigated how regulation and the regulatory framework impact on competition.

The report concludes that a more intensive market study of the legal services sector is not necessary but says more transparency on price is needed in the market so that 'consumers' can make informed decisions. The CMA itself expresses concern that individuals and small and medium-sized enterprises have limited understanding of the different types of legal service providers, the differences between regulated and unregulated providers and the significant differences in client protections. Improved Public Legal Education is therefore an important part of the response to the report.

Solicitors Regulation Authority

The SRA launched three major consultations last year, which could fundamentally change the manner in which solicitors in the UK are regulated.

The first was a consultation to [review the SRA Handbook](#), results of which will shortly be published. This includes proposals to allow solicitors to deliver unreserved legal services directly to the public while working at an unregulated legal entity, without the regulatory protections that the title of solicitor usually carries. We remain very concerned about the serious implications for the profession and clients if the proposals come to fruition. The proposals risk creating a two-tier profession which may result in the lowering of standards and high levels of consumer confusion.

The SRA also consulted on amending the Solicitors Accounts Rules, including proposing an amended definition of client money. The Law Society, based on the views of its members, argued for strong client protections to ensure that trust in the profession remains high.

Lastly, the SRA published a consultation document on the Solicitors Qualifying Examination (SQE), the second consultation on this topic. Although we welcome the fact that the SRA has substantially re-worked its proposals to address many of the issues the Law Society and others raised, we remain very concerned by the availability of funding to cover the SQE preparatory courses and assessments and the use of multiple choice to test legal skills.

2. The Investigatory Powers Act 2016

Overview

The draft Investigatory Powers Bill was published at the beginning of November 2015 for pre-legislative scrutiny and became law in December 2016. The Investigatory Powers Act is a substantial revision and modernisation of our previous investigatory powers legislation, the Regulation of Investigatory Powers Act 2000 or RIPA.

The Law Society had been seeking to influence the law making process since the Bill started its parliamentary journey as draft legislation in November. At that stage, the Law Society expressed concern that it contained no protection for legal professional privilege (LPP).

The former legislative position

The Law Society has longstanding concerns about the rise of a surveillance society and the human rights implications for solicitors and their clients. The Law Society was particularly concerned by the lack of statutory protection for legally privileged communications in the Regulation of Investigatory Powers Act 2000 (RIPA).

RIPA allowed the authorities to intercept legally privileged communications where it is necessary and proportionate in the interests of national security, for the purpose of preventing or detecting serious crime, or for the purpose of safeguarding the economic well-being of the UK. The latest code of practice qualified this by saying that where the intention is to target legally privileged communications there have to be 'exceptional and compelling' circumstances to make the authorisation necessary.

RIPA was a complex piece of legislation that had been heavily criticised in a number of official reports. The Law Society had repeatedly called for review and revision of RIPA.

The Investigatory Powers Act

The current position under the Act is that where the authorities wish to target legally privileged communications in addition to meeting the general requirements for intercepting a communication they must additionally satisfy the Secretary of State that (a) there are exceptional and compelling circumstances that make it necessary to authorise or require the interception, (b) the public interest in obtaining the information that would be obtained by the warrant outweighs the public interest in the confidentiality of items subject to legal privilege and (c) there are no other means by which the information may reasonably be obtained. As with any interception warrant, the decision to grant an interception warrant relating to privileged material will be subject to review by a judicial commissioner.

This is not ideal – we had been seeking a complete bar on targeting legally privileged communications – but it represents a substantial improvement on the original Bill.

Legal Professional Privilege

The Law Society's general position is that legal professional privilege (LPP) is a vital principle of the administration of justice. It is a cornerstone of society governed by the rule of law that people can consult a legal adviser in absolute confidence, knowing there is no risk that information exchanged between lawyer and client will become known to third parties without a client's clear authority. The "iniquity exception" prevents abuse of the privilege by removing it from communications made in furtherance of a criminal purpose.

Regulatory bodies such as the Serious Fraud Office (SFO) and the Financial Conduct Authority (FCA) have raised concerns that LPP may be used to prevent fully informed investigations from taking place on the basis that clients may advance spurious claims to their entitlement to LPP on the advice of their lawyer.

The Law Society believes that there is little evidence that lawyers are exploiting LPP on behalf of their clients. It would be a dereliction of duty if lawyers failed to advise clients when proper grounds for asserting their privilege exist.

If clients wish, upon advice, to waive privilege and, for example, be seen to be co-operating with regulators, it is their right to do so. However, in those cases where clients are advised to justifiably assert their privilege, in accordance with long-standing common law principles, they should not in any way be criticised or penalised for doing so, and nor should their lawyers for advising them accordingly.

The Law Society is looking to produce a guidance to advise solicitors on their duty towards clients. The aim of the guidance is to:

- Remind practitioners of the essential elements of legal advice privilege and litigation privilege including reminding practitioners of frequently encountered situations in which it is appropriate for them to advise their clients when they can and cannot assert LPP
- Help solicitors navigate some of the particular challenges that tend to arise in certain types of investigations where pressures to waive LPP are more frequently encountered.

We hope to publish this guidance shortly.

3. Anti-money laundering (AML)

Effective AML measures are essential to maintain the legal profession's global reputation. Throughout 2016, the Law Society has continued to play a leading role in tackling anti-money laundering, providing guidance, training and support to solicitors in England and Wales which is respected and imitated in other jurisdictions.

The Law Society is the supervisory authority for solicitors obligations under anti-money laundering (AML) legislation. Any firm which by way of business provides legal or notarial services in the regulated sector including:

- buying and selling of real property or business entities
- managing of client money, securities or other assets
- opening or management of bank, savings or securities accounts
- organisation of contributions necessary for the creation, operation or management of companies
- creation, operation or management of trusts, companies or similar structure

is supervised by the Law Society.

The Law Society provides comprehensive guidance and resources for solicitors to help them understand and comply with their AML obligations, including an extensive practice note and regular updates and information, which are available on our website. We also operate an AML Task Force of experienced solicitors who assist in developing both the Law Society's policy work on AML issues and specific guidance

for solicitors. In November we held our annual AML and financial crime conference, which was very well attended.

The value and impact of our work was acknowledged by a report into AML practice from the regulator, the Solicitors Regulation Authority, which concluded that the profession had a good grasp of its obligations and the regulatory requirements.

This conclusion reflects the Law Society's work in promoting AML awareness and compliance across the profession. In August 2016, the AML pages on the Society's website were viewed externally 315,468 times; the AML Practice Note received 199 000 unique page views. A quarter of the phone calls to our Practice Advice Service relate to AML queries.

On a broader stage, when the UK Prime Minister hosted an international anti-corruption summit in May 2016, the Law Society facilitated a statement by a group of professional bodies spanning law and accountancy, which pledged to continue their work to tackle bribery, corruption, tax-evasion, money laundering and the financing of international terrorism.

That statement reiterated that for many years, professional bodies have worked alongside government, regulators, law enforcement and international bodies and supported their members to combat bribery, corruption, tax-evasion, money laundering and terrorist financing. The statement pledged that this work would continue and that professional bodies would carry on providing support to facilitate national and international co-operation and to improve monitoring and enforcement systems. Several City law and accountancy firms issued a similar joint statement on their own behalf.

Our current work includes the UK's Implementation of the EU 4th Money Laundering Directive (and the recent Amending Directive) and preparations for the UK's forthcoming FATF Mutual Evaluation Review.

Unfortunately, despite all this work and the fact that the UK has one of the world's most rigorous AML regimes, the public policy environment in the UK is hostile. Government agencies routinely portray professional advisers not as gatekeepers but as 'professional enablers' of money-laundering. The absence of evidence to back up the assertion that professionals and professional bodies cannot be trusted makes this narrative all the more pernicious and regrettable..

4. 'Legal aid deserts' campaign

As part of our access to justice work, the Law Society has launched a new campaign to tackle housing 'legal aid deserts' - areas with insufficient provision of housing legal aid advice.

Evidence shows that almost one third of legal aid areas in England and Wales have one, or no, housing provider. One provider per area is not enough - legal aid areas are often large, such as Cornwall or Somerset, and people often cannot afford to see the one provider which may be located many miles from where they live. We have developed a legal aid deserts heat map which highlights the areas of England and Wales experiencing the greatest shortages.

We are calling for the government to urgently address this situation. We want them to:

- commission an independent review of legal aid contracting arrangements
- commission a second provider in areas that currently only have one.

So far the campaign has received press coverage in over 40 media outlets in England and Wales, wide social media support, and support from the Shadow Lord Chancellor. We will continue to run the campaign over the coming months.

5. Business and Human Rights

Overview

The Law Society of England is one of the first bar associations in the world to look at how to practically address issues for its members in the business and human rights space.

In 2015 the Law Society initiated a process of engagement and consultation with its membership which identified three key areas in which developments in the area of business and human rights are likely to have implications for lawyers and law firms in the UK. These include:

Advisory and other legal services provided by lawyers and law firms to clients: Clients' awareness of their human rights responsibilities may drive an increase in requests for legal advice as part of their efforts to manage these risks. Where clients are not driving the increase in requests for legal advice, there may be a role for lawyers to play in raising awareness among clients of such risk exposure. Law firms can also provide support to clients seeking to proactively manage human rights issues.

Management of law firms as business enterprises: As business enterprises, law firms also have a responsibility to respect human rights. Accordingly, they should take steps to avoid adversely impacting human rights through their operations and business (including client) relationships, and to address impacts with which they are involved.

The professional responsibilities of lawyers and law firms: It is critical that lawyers and law firms working to meet their responsibility to respect human rights do so in a manner that complies with all applicable codes of professional conduct for the legal profession in the UK and in any other jurisdiction in which they practice.

The Law Society's Business and Human Rights programme ran a series of events and activities throughout 2015/2016 across England & Wales including:

One-to-one consultations: The Law Society would like to talk to members and the public about business and how human rights can be impacting on their firm or clients. The Business and Human Rights programme team travelled around England & Wales to meet and talk to members in person to discuss their business needs and how we can support them in developing effective policies and procedures within their practices.

Business and Human Rights seminars and consultative forums in London, Cambridge, Manchester, Birmingham, Bristol and Cardiff

Opportunities for members to become more familiar with recent developments in the area of business and human rights and the implications of these for their practices

International activities

The President raised awareness on the importance on business and human rights across Europe, Asia and Africa, including in countries where the rule of law faces particular challenges.

Some of the activities include:

- In October 2015, Law Society President attended the Law Asia Conference representing 20 nations, including Laos, Cambodia, Vietnam, Thailand, Sri Lanka, Hong Kong, Singapore, Japan, Australia and Malaysia, and chaired a panel session on business and human rights to highlight the role of law societies and bar association in helping their members tackle human right abuses in supply chains.
- At the Eurolawyer Conference, the President delivered a presentation on 'Business and Human Rights: the case for action by the legal profession' and called on lawyers across Europe to support the Society's efforts.

- Law Society President delivered a number of keynote speeches on business and human rights in several conferences hosted by the French National Bar Council and the American Bar Association in New York and in Geneva.
- The Law Society hosted a dinner discussion at Carey Street with representatives from HSBC, Unilever, Clifford Chance and Berwin Leighton Paisner on their latest initiatives to ensure no human trafficking is part of their supply chains and comply with the reporting requirements of the Modern Slavery Act.

As a result of this work, Law Asia, an organisation representing over 20 law societies in the region, signed up to The Law Society/American Bar Association accord on business and human rights.

In December 2016, the Law Society launched its **"Business and Human Rights Guide"** as a useful resource for all practitioners and firms, including those working in specific practice areas of law such as:

- corporate governance;
- enterprise risk management;
- reporting and disclosure, and
- disputes.

In their role as legal advisers, solicitors - both in-house counsel and external advisers - are increasingly asked by clients to help them understand their responsibilities with respect to human rights and how it may impact their business activities. This guide builds on existing resources, such as the IBA's Business and Human Rights Guidance for Bar Associations and the IBA's Practical Guide on Business and Human Rights for Business Lawyers and its reference annex launched in 2016.

In addition, also in December 2016, the Society launched a **"New practice note supports solicitors in the fight against modern slavery"**. The role of solicitors, in ensuring they and their clients play their part in fighting modern slavery, is reinforced by this new guidance. The practice note brings together legal requirements contained in the Modern Slavery Act, Bribery Acts and other legislation. It also gives solicitors specific advice and examples of best practice for acting as trusted advisers assisting their clients in meeting their anti-slavery obligations and managing their supply chains, as well as in their own firms.

Both the "Business and Human Rights Guide" and the "New Practice Note on Modern Day Slavery" have been published on the [Law Society's website](#).

6. Brexit and the legal sector

Overview

Since the EU Referendum, held on 23 June 2016, The Law Society has actively been engaging with UK decision makers, members, European counterparts and the wider international legal community on the potential implications of 'Brexit'.

England and Wales is one of the leading global centres for legal services. The strength and stability of English law, the independent courts and the excellence of our legal services providers have resulted in England and Wales being the global governing law for contracts and the jurisdiction of choice for dispute resolution.

In 2015, UK legal services contributed £25.7bn to the economy, of which £3.6bn was the net export value which contributed to a reduction in the balance of payments. The legal sector also employs over 370,000 people and we know that for every 1% of growth, £379m and 8,000 jobs are contributed to the economy.

From the Law Society's research and engagement work the below priorities for law and business 'post-Brexit' have emerged. These look to safeguard the legal sector's economic contribution and to maintain an

effective legal framework in any future arrangement with the EU, which will support the continued effective operation of cross-border UK business.

Priorities for the EU negotiations

England and Wales to remain an open jurisdiction for European lawyers and law firms, and for them to continue to practise and establish in the UK

The Law Society will lobby the UK government to ensure that England and Wales remains an open jurisdiction for foreign/European lawyers and law firms, and to maintain the rights currently enjoyed under the Directives:

- *Lawyers' Services and Lawyers' Establishment Directives:* This legislation gives EU/EEA and Swiss lawyers the ability to: practise home state law; practise host state law (with some conditions); to set up a branch (or office) and to re-qualify without equivalence examination after three years' practice of host state law.
- *Professional Qualifications Directive:* This provides the ability to recognise EU/EEA and Swiss lawyers' qualifications and re-qualify into any EU/EEA legal profession through an equivalence examination.

Continue access for solicitors and UK law firms to practise and establish in EU member states

In 2014, English and Welsh law firms operated a total of 219 offices in EU countries, and a total of 1,349 PC holders reported their main practising office to be in an EU country. The UK is the largest market for legal services in Europe with 20.3% of the total of the global market for legal services.

To ensure that the solicitor profession can maintain its access to the EU market and be seen as the gateway to Europe for legal services, the UK Government should seek to maintain the current level of access to practise and establishment in EU member states, and to represent clients before the courts and ensure that advice from solicitors continues to be subject to legal professional privilege. This can be achieved by maintaining, or introducing, arrangements equivalent to the Directives.

Maintain judicial co-operation in civil justice

Currently the UK benefits from participation in the EU's legal framework for civil justice (including for commercial matters) which deals with matters such as choice of law, jurisdiction and mutual recognition and enforcement of judgments. These mechanisms increase certainty and speed for businesses and individuals, which in turn reduce legal costs and encourage cross border trade. These mechanisms make the use of English laws and our courts more appealing to both EU and non-EU litigants. The Society emphasises the importance of maintaining mechanisms such as those set out in:

- Rome I Regulation: This deals with choice of law in contractual matters. This is not necessarily threatened at the moment, since the regulation provides for universal recognition of the choice of law.
- Brussels I Regulation: This sets out understandable and predictable rules for determining jurisdiction, and creates a system for mutual recognition and enforcement of judgments in civil and commercial matters throughout the EU area. We wish to see this maintained following UK withdrawal.

Co-operate with European partners to tackle issues of international importance

As emphasised by the UK Government, whilst the UK may be withdrawing from the EU, it will not be withdrawing from Europe. It is vital that the UK continues to co-operate with its European partners on criminal justice, policing and the fight against terrorism. There are two strands to this which should be considered in the context of withdrawal:

- Maintaining a system for cross-border co-operation of courts in the context of criminal cases, including participation in bodies such as Eurojust.
- Co-operation in criminal justice, policing and the fight against terrorism by sharing of information and co-operation in policing to joint security operations (Europol) and facilitating the criminal justice process. Specific measures which assist in facilitating swift and collaborative action to tackle cross border issues include:
 - the European Arrest Warrant
 - the European Investigation Order
 - the Schengen Information System II (SISII)
 - 2000 Convention on Mutual Assistance in Criminal Matters.

The Law Society of England and Wales has published the following reports:

- [The EU and the legal sector](#) - October 2015;
- [The UK legal services sector and the EU: economic analysis](#) - September 2015;
- [Brexit and the law](#) - January 2017
- Furthermore, the Law Society has dedicated a [webpage](#) to provide regularly updated information, advice and insight into its activities related to Brexit.

Perceptions, shortcomings and possible areas for improvement in equalities legislation in the jurisdiction of England & Wales

Equality Act 2010

On 1 October 2010, a new Equality Act came into force. The Equality Act 2010 ("The Act") brought together over 116 separate pieces of legislation into one single Act. This single Act provides the main legal framework to protect the rights of individuals and advance equality of opportunity in England & Wales. The Act was broadly welcomed as it made equality law easier to understand.

The aim of the Act was to simplify, strengthen and harmonise the disparate equalities legislation and provided Britain with a new discrimination law to protect individuals from unfair treatment and promote a fair and more equal society.

The nine main pieces of legislation merged were:

- the Equal Pay Act 1970
- the Sex Discrimination Act 1975
- the Race Relations Act 1976
- the Disability Discrimination Act 1995
- the Employment Equality (Religion or Belief) Regulations 2003
- the Employment Equality (Sexual Orientation) Regulations 2003
- the Employment Equality (Age) Regulations 2006
- the Equality Act 2006, Part 2
- the Equality Act (Sexual Orientation) Regulations 2007

Who is protected?

The Act gives people in Britain protection from discrimination on grounds of:

- race
- sex
- sexual orientation (whether being lesbian, gay, bisexual or heterosexual)
- disability (or because of something connected with their disability)
- religion or belief
- being a transsexual person (transsexuality is where someone has changed, is changing or has proposed changing their sex – called 'gender reassignment' in law)
- having just had a baby or being pregnant
- being married or in a civil partnership (this applies only at work or if someone is being trained for work), and
- age (this applies only at work or if someone is being trained for work).



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Positive action

The new law makes it easier for employers and service providers to take positive action¹. One form of positive action is encouraging or training people to apply for jobs or take part in an activity in which people with that characteristic are under-represented. However, taking any form of positive action is entirely voluntary and people do not have to consider doing it if they do not want to.

The Public Sector Equality Duty

The public sector equality duty (the equality duty) came into force 5 April 2011. The broad purpose of the equality duty is to integrate consideration of equality and good relations into the day-to-day business of public authorities. Those subject to the equality duty must, in the exercise of their functions, have due regard to the need to:

- Eliminate unlawful discrimination, harassment and victimisation, and other conduct prohibited by the Act.
- Advance equality of opportunity between people who share a protected characteristic and those who do not.
- Foster good relations between people who share a protected characteristic and those who do not.

The Equality and Human Rights Commission

The Equality and Human Rights Commission ("The Commission") is Great Britain's national equality body. Their purpose is to help make Britain fairer, and they try to achieve this by safeguarding and enforcing the laws that protect people's rights to fairness, dignity and respect. They use their powers to challenge discrimination, promote equality of opportunity and protect human rights. The Commission works with other organisations and individuals to achieve their aims, but are also ready to take tough action against those who abuse the rights of others.

The Commission is a statutory non-departmental public body, thus operates independently of government. It has been in operation since 2007.

Shortcomings and possible areas for improvement

Lord Bingham said about the rule of law that:

'First, the law must be accessible and so far as possible intelligible, clear and predictable. This seems obvious: if everyone is bound by the law they must be able without undue difficulty to find out what it is, even if that means taking advice (as it usually will), and the answer when given should be sufficiently clear that a course of action can be based on it.'

¹ When something is done specifically to help someone who has a protected characteristic.

The Act undoubtedly makes anti-discrimination law more intelligible, clearer and more predictable than the array of legislation which preceded it. However, in the last few years this improvement has been attacked by government policies which have made it harder for vulnerable people to enforce the law. In England & Wales there can no longer be any assumption that legal advice will be available for those who need it.

The two main practical obstacles now presented to those seeking to enforce their rights under the Act are:

- steep rises in court and tribunal fees, and
- cuts in legal aid.

These barriers to the enforcement of rights are important not only for the individual: discrimination cases often have an impact beyond providing a remedy for the claimant. If a service provider or employer is forced to make reasonable adjustments for one person, there could well be a potential benefit for a wider group of service users or employees.

The greatest way that equal rights in England & Wales could be advanced is if the philosophy behind the Legal Aid and Advice Act 1949, that nobody should be unable to enforce or defend a right for the advice and representation, once again became government policy. The rule of law cannot be maintained if some people, especially the most vulnerable, cannot enforce their rights.

Since the Act, the awareness and understanding of equality rights among employers, service providers and the public has improved vastly, but public education is still important.