

# Country Report

## ENGLAND AND WALES

### The Law Society of England and Wales

The report provides a summary of key developments in the regulatory landscape of the legal services market in England & Wales in 2017 as set out below:

1. Regulation
2. Civil Justice
3. Brexit
4. Business and Human Rights
5. Anti-Money Laundering
6. Access to Justice

#### 1. Regulation

##### **Solicitors' Handbook Reform**

The Solicitors Regulation Authority (SRA) continues its programme of the '*Looking to the Future*' - handbook reform which will potentially impact the long-term framework for legal services regulation in England & Wales. The reform aims to offer solicitors more flexibility and freedom in the way they practise.

In June 2017 the SRA published decisions on the outcome of the phase one handbook consultation. Key changes include a new set of principles, and two separate codes of conduct for solicitors and firms.

In September 2017 the SRA consulted on further proposals which include allowing for new modes of practice. We understand changes are unlikely to come into force before Autumn 2018.

The Law Society responded to the consultation and continued to emphasise the need for high standards, and strong client protections.

##### **Information transparency**

In September 2017 the SRA consulted on proposals to improve the information available in the legal services market for individual customers and small businesses. The proposals implement the recommendations made by the Competition and Markets Authority in its legal services market study in 2016.

The SRA proposes to require firms to publish more information on their websites regarding price, service and regulatory protections. It argues that providing more pre-engagement information allows consumers to better understand the services available without having to formally contact a firm.

The Law Society maintains its position that while informed choices are important, regulation is not the best way to achieve this. Solicitors know their clients and their needs, and are in the best position to ensure clients receive the right information at the right time.

## **Education and training**

The SRA published a set of proposals on the future qualification framework - the Solicitors Qualifying Exam (SQE) – due to be launched in 2020. The SQE will consist of two parts that will have to be passed by prospective solicitors, backed up by approved sign-off of relevant work experience. SQE1 will consist of a written exam to test legal knowledge, while SQE2 will be an exam of practical skills (e.g. client interviewing) likely to be taken around the time two years of practical experience have been gained.

In May 2017 the SRA consulted on draft regulations on the eligibility to take an assessment to become a solicitor, and draft principles for the recognition of already qualified lawyers (mainly relating to existing solicitors from overseas).

The Law Society supports the SQE in principle but we continue to stress that any new system must maintain consistently rigorous standards for those entering the profession as well as promoting diversity.

## **2. Civil Justice**

The Law Society is taking a close interest in the current wave of Government civil justice reforms, particularly their workability, impact on solicitors and the profession as a whole, and access to justice.

### **Fixed recoverable costs (FRCs)**

Lord Justice Jackson released his latest report concerning fixed recoverable costs in civil claims on 31 July. He scaled back his original plan to fix recoverable costs for all civil claims up to the value of £250,000. The Law Society argued at the time that this 'one-size-fits-all' approach would not work, and any change would require careful adjustments in order to balance court costs with access to justice. In his report, he recommended that fixed recoverable costs should apply to claims in the fast-track valued up to £25,000, with a further fixed recoverable costs regime for some cases of modest complexity up to £100,000 in a new 'intermediate track'.

The Law Society does not oppose fixed recoverable costs in principle, but believes that it is essential for justice that a successful litigant is able to recover reasonable legal costs, instead of a pre-determined fixed sum that may fall short of what they have spent. If the latter happens, they would have to meet the costs out of their own pockets, or out of their compensation, or the solicitor would have to do the work for the recoverable costs only. This could have significant impacts on access to justice. Fixed recoverable costs require a fixed process to be workable, as fixed costs do not reduce the work done by solicitors; therefore, there is concern that the costs could be unworkable.

The Law Society welcomes Jackson's recommendation that clinical negligence cases are unique and require a bespoke process for claims up to £25,000. It has now been confirmed that the Government has accepted Lord Justice Jackson's recommendation to form a Civil Justice Council working group to lay out what a fixed costs process may look like for clinical negligence claims up to £25,000.

The Government has also recently announced plans to limit the legal costs that travel firms have to pay out for holiday sickness claims by including them in the fixed costs regime. There has been a reported increase in these

claims over recent years, and the Law Society welcomes the move to stamp down on fraudulent claims. However, this proposal should not penalise people with genuine or more complex claims.

The Law Society has been holding a series of Roundtable events (London, Cardiff, Manchester, Swindon, Cambridge) to discuss the proposals made by Lord Justice Jackson with our members and to highlight any specific areas of concern/priority. The expected Ministry of Justice consultation on the proposals made is currently awaited.

### **Small claims/whiplash**

The Civil Liability Bill was announced in the Queen's Speech on 21 June 2017. It has not yet been published, but the Law Society expects it to include proposals to ban offers to settle claims without the support of medical evidence, and introduce a new fixed tariff of compensation for whiplash injuries within a duration of up to 2 years. The previous Government also announced measures to increase the small claims limit for all Road Traffic Accident claims up to £5000 and for all other types of personal injury claims up to £2000.

The Law Society supports the proposal to ban pre-medical offers in road traffic accident claims, as we believe this could reduce fraud and give claimants some protection against under-settlement of claims. However, the Law Society does not accept that the Government has made the case that consumers will benefit as a result of reduced insurance premiums, and we do not support the proposed tariff rates put forward in the consultation, which seem too low.

The Law Society raises serious concerns about the proposal to increase the small claims limit for personal injury claims. This would include more serious road traffic injuries as well as employers' and public liability claims and lower value clinical negligence and industrial disease claims. These claims often include complex issues of liability and the need for expert evidence such as medical reports.

The Justice Select Committee are currently conducting an inquiry into the Government's proposed reforms in this area. The Law Society has made a submission to the inquiry opposing the reforms and await the conclusions of the committee.

### **Discount Rate**

The Government announced their plans for a new methodology to set the discount rate and published draft legislation on 7<sup>th</sup> September 2017. The Law Society believes that catastrophically injured people, who need lifelong care, need to be properly compensated for their injuries. The longstanding legal principle of 100% compensation should not be undermined by any change to the methodology for setting the discount rate.

On 15<sup>th</sup> September the Justice Select Committee announced an inquiry into the proposed changes. The Law Society submitted to this inquiry setting out views that claimants should not be undercompensated and the Government needed to undertake further research before taking steps to reform this area. The Justice Select Committee published its findings on 30<sup>th</sup> November 2017 urging the government to safeguard the vulnerable from under-compensation and to gather more evidence on how claimants invest their compensation before making changes to the law.

## **3. Brexit**

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

In January 2017 we published a report [Brexit and the Law](#) which set out the Law Society and its members priorities in the EU negotiations such as:

- Continued mutual access for lawyers to practise law and base themselves in the UK and EU member states, rights of audience in EU courts, institutions and the Unified Patent Court (when it opens) and for their clients to have legal professional privilege.
- Maintain mutual recognition and enforcement of judgments and respect for choice of jurisdiction clauses across the EU.
- Maintain collaboration in policing, security and criminal justice.
- Ensure that legal certainty is maintained throughout the process of withdrawal, including transitional arrangements.
- Ensure that the government works with the legal services sector to continue to promote England and Wales as the governing law of contracts, the jurisdiction of choice and London as the preferred seat of arbitration.

In February 2017 the government published a Brexit white paper which included commitments on civil and criminal justice that had been suggested by the Law Society. We have engaged with a number of influential stakeholders to discuss the legal sector priorities for the EU negotiations, and participated in a number of government industry/sector groups.

All of the Law Society's major asks on civil justice co-operation were adopted and a significant amount of our messaging was reflected in the [Government's paper](#) on cross border civil judicial cooperation that was published in mid-August. The Government stated that it will seek to maintain as close and comprehensive cross-border civil judicial cooperation as possible, on a reciprocal basis. The paper also contained a clear statement of intention to remain in the Hague Conventions and Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Further the paper commits to the enactment of the Rome I and II instruments on choice of law and applicable law. This is a significant reflection of the Society's intensive work in this area since the referendum.

In September the Government also published its paper on [security, law enforcement and criminal justice](#) which incorporate a number of our key priorities.

The Law Society has been briefing UK parliamentarians on a number of Bills relating to the UK's withdrawal from the EU to outline concerns for legal certainty and the legal profession. These include:

- EU (Withdrawal) Bill
- Anti-Money Laundering and Sanctions Bill
- Taxation (Cross border trade) Bill

Since the EU referendum, a number of UK parliamentary committees have been undertaking inquiries on a number of issues on the UK's withdrawal.

We have submitted written evidence to several Committees including:

- Exiting the EU Select Committee on [the UK's negotiating objectives for withdrawal from the EU](#)
- International Trade Select Committee on [the UK's trade priorities beyond 2019](#)
- Justice Select Committee on [the impact of Brexit on the justice system](#)
- EU Lords Internal Market Sub Committee on [UK-EU trade in services](#)
- EU Lords Justice Sub Committee on [civil justice cooperation and the CJEU](#)
- Home Affairs Select Committee on [Immigration](#)
- Culture, Media and Sport Select Committee on the [impact of Brexit on the creative industries and the digital single market](#)
- EU Lords Internal Market Committee on [competition](#)
- EU Lords Committee on [Brexit: deal or no deal](#)

In addition, we were invited to give oral evidence to four committees:

- Justice Select Committee - [1 February 2017](#)
- International Trade Select Committee - [24 January 2017](#)
- EU Lords Justice Sub-Committee - 10 January 2017
- EU Lords Internal Market Sub-Committee - 27 October 2016

The Law Society has developed a [webpage](#) to provide regularly updated information, advice and insight into its activities related to Brexit.

#### **4. Business and Human Rights**

The Law Society was one of the first bar associations in the world to engage with the issues linked to business and human rights, and specifically with regards to the Modern Slavery Act. In the past year the Law Society has worked with its membership, government and NGOs to facilitate its implementation.

The Law Society has produced:

- **A Practice Note** on drafting modern slavery statements, intended to help solicitors comply with section 54 of the Modern Slavery Act 2015 by providing practical advice and highlighting examples of good practice. Commercial organisations covered by the Act are required to produce a slavery and human trafficking statement for each financial year, setting out what steps they have taken to ensure that slavery and human trafficking is not taking place in their business and supply chains.
- **Podcasts:** One on Business and Human Rights in general, and one on how law firms should produce their own Section 54 statements.

In addition, the Law Society organised events for solicitors around the lessons learnt from the first years of the Modern Slavery Act, in partnership with the Business & Human Rights Resource Centre.

Finally, the Law Society has been working with the Home Office on improving compliance with, and enforcement of the Modern Slavery Act. The Law Society recommended creating a registry of firms captured by the Modern Slavery requirements, as well as:

- Providing clear incentives for corporate action: bids for public contracts should be dependent on companies demonstrating due diligence in their operations and their modern slavery statements.
- Working with European partners and governments to ensure early and bold transposing of the Non-Financial Reporting Directive into national law to provide the highest levels of accountability regarding human rights due diligence.
- Strengthening the supply chain reporting requirements of the Modern Slavery Act by including clearer requirements for disclosure and stronger enforcement provisions.
- Utilising the existing legislation (Criminal Law Act 1977) to hold companies accountable for abuses committed abroad and explore using the Bribery Act as a model to further extend extraterritorial criminal liability for human rights abuses

The international programmes manager intends to begin scoping for the future direction of the business and human rights programmes, which is one of 5 international rule of law programmes implemented by the Law Society to support the legal profession and the judiciary abroad. The first business and human rights consultation roundtable, with a reference group of Law Society members, will take place in March 2018.

## **5. Anti-money laundering (AML)**

It is inevitable that a financial and professional services hub as large and vibrant as the UK's will attract the attention of highly resourceful criminal gangs. The Law Society entirely supports the UK government's aim to provide a hostile environment for criminal financing, while minimising the burden on legitimate businesses. The Society continues to play a leading role in supporting the legal sector in tackling money laundering by providing guidance and training.

The biggest policy change in 2017 came in the summer when new money laundering and terrorist financing regulations required to implement the EU's Fourth Money Laundering Directive were finally introduced – unfortunately, at very short notice. The new regulations, the first in a decade, require significant changes to the way that law firms operate. Firms are required to conduct practice-wide risk assessments and put in place documented policies, controls and procedures for dealing with those risks. Although the regulations are intended to implement a 'risk based approach' to prevent money laundering, they are in some ways more prescriptive than the legislation they replaced. Getting to grips with the requirements of the new Regulations with almost no lead-in time presented quite a challenge for the legal and other professional services sectors, and for the professional supervisory bodies.

The UK government's National Risk Assessment (NRA) published towards the end of 2017 recognised that the legal sector invests significant resources in the fight against money laundering, and acknowledged the improvements made across the legal sector since the previous NRA in 2015. The 2017 report makes it clear that the rating of the legal sector as 'high risk' does not mean that those involved in the sector are likely to be criminally complicit or negligent when it comes to money laundering. Rather, the message is that those in higher risk sectors need to remain vigilant towards the persistent efforts of criminals to exploit any vulnerabilities. There is no room for complacency.

A significant event in early 2018 will be the Financial Action Task Force's Mutual Evaluation Review of the UK's AML regime. We are supporting the UK government's preparations for assisting the FATF assessors.

A further important development is the creation of the Office for Professional Body Anti-Money Laundering Supervision (OPBAS) that will sit within the Financial Conduct Authority and be fully operational by the start of 2018. OPBAS will have powers to monitor the activities of the 23 professional body supervisors for the accountancy and legal sectors to ensure that they meet their obligations under the money laundering regulations. It is in effect a 'supervisor of supervisors'. The cost of OPBAS will be borne by the professional bodies.

For its part, the Law Society continues to work closely with the government (HM Treasury, HMRC, the Home Office, the National Crime Agency and others); with the other UK legal bodies, including the Solicitors Regulation Authority; and with our counterparts in the accountancy and banking sectors in the development of AML policy and guidance.

Specific examples of the Law Society's support for the profession in 2017 include:

- Money laundering reporting officers from 441 firms attended our 17 annual regional networking groups.
- Hosting 15 annual AML training events across England and Wales attended by representatives of 306 firms.
- Our Practice Advice Service responded to over 2,700 AML related enquiries.
- 400 delegates attended our annual AML Conference.

## **6. Access to Justice**

### **LASPO four years on review**

The Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO) introduced severe cuts to the scope of civil legal aid with the aim of cutting legal aid expenditure by £450 million per annum. In June 2017 The Law Society published a review of the LASPO legal aid cuts and their impact 'Access Denied? LASPO four years on'. It was intended that this review would form the basis of the Law Society's input to the government's post LASPO legislative review which was supposed to take place within three to five years of the implementation of LASPO in April 2013. The government review was announced in the spring of 2017 but then put on hold pending the general election and the appointment of new ministers. Although the government's review has now been formally announced it has not yet commenced.

The main points of the Law Society's review are that:

- LASPO has undermined access to justice - large numbers of people including children and those on low incomes are now excluded from whole areas of free or subsidised legal advice.
- Changes to the means test have been counterintuitive, meaning some of those on welfare benefits are deemed able to pay for their own advice.
- For those still eligible, availability of legal aid is drying up, resulting in legal aid deserts where advice is either non-existent or minimal.
- LASPO has created a strain on the wider justice system - resulting in a dramatic increase in the number of litigants in person, not only creating poor outcomes for litigants but creating a huge burden on the court finances and resources - and ultimately the public purse.
- LASPO is resulting in knock on costs elsewhere in the state - without legal advice which is free and accessible, individuals are more likely to wait until a problem has escalated before seeking or accessing help. This means that relatively minor issues can end up becoming much worse putting a greater burden on other areas of the state such as the public health system and local authorities.
- The Law Society's LASPO review priorities are focussed on the restoration of a sustainable civil legal aid system. This includes reinstating legal aid for early advice in family and housing law; improving the Exceptional Case Funding scheme, ensuring provision of legal aid is available for those who are eligible, and reviewing the financial eligibility criteria.

### **Early advice campaign**

A key theme of the Society's LASPO review is the restoration of early legal advice. In November 2017 the Society launched a new campaign on early advice as part of its overarching campaigning work on access to justice. The campaign focusses on early advice for housing and family law issues. As part of the campaign, the Society launched a report it commissioned from Ipsos Mori, which shows a clear statistical link between receiving professional legal advice early and resolving a problem sooner.

The campaign has received press coverage across a range of outlets including BBC national radio and in the national press. It has also been widely discussed in Parliament, with 17 positive mentions in a Westminster Hall debate on legal aid, and a number of times in Justice oral questions. In addition, as a result of this campaign, the Labour Party has announced that it is committed to one of our policy calls – that early advice should be re-introduced for all cases dealt with by the family courts. The campaign will continue over the coming months.