

Country Report

ENGLAND AND WALES

The Law Society of England and Wales

This report provides a summary of key developments in the regulatory landscape of the legal services market in England & Wales in 2020 as set out below:

1. Brexit
2. Legal Professional Privilege
3. LawTech
4. Courts during the pandemic
5. Diversity & Inclusion

1. **Brexit**

The end of the transition period and the EU-UK Trade and Cooperation Agreement

The UK left the European Union (EU) on 31st January 2020 and the EU's single market and customs union at the end of the transition period on 31st December 2020.

Throughout 2020 the Law Society of England and Wales provided guidance to our members on how to prepare for the end of the transition period, while also impressing on the UK Government the importance of prioritising legal services and being ambitious in negotiations.

We have continued to work alongside our European counterparts to ensure the European legal community continues to work together and share expertise for the benefit of clients, citizens and society.

We are pleased that a full section of the EU-UK Trade and Cooperation Agreement, announced on 24th December 2020, is devoted to legal services. Subject to national reservations, it sets out the general principle of market access for UK lawyers in the EU and EU lawyers in the UK under their home title practice, including advice on home country and public international law, as well as arbitration, conciliation and mediation.

We are keen to continue to work with our European counterparts to make the most of our new relationship.

England and Wales as an open jurisdiction after Brexit

England and Wales is and will remain an open and welcoming jurisdiction for European and all foreign lawyers looking to practise and establish here.

Apart from a small number of legal activities which are reserved to legal service providers regulated in the UK, you do not need to be a qualified solicitor of England and Wales to provide legal services and/or draft contracts under English law.

London is home to legal professionals from 100 jurisdictions and 200 foreign law firms, and they are an integral and valued part of our legal sector.

EU lawyers in England and Wales

The practising rights enjoyed by EU lawyers in England and Wales go above and beyond the baseline commitments that the United Kingdom has taken under the EU-UK Trade and Cooperation Agreement.

The UK left the single market and customs union on 31st December 2020, meaning EU laws, regulations and directives no longer apply to the country. These include the Lawyers' Services Directive of 1977, the Lawyers' Establishment Directive of 1998 and the Recognition of professional qualifications Directive of 2005.

However, EU lawyers in England and Wales have retained all their key practising rights:

- They can practise under their home country professional title and provide legal services in their home-country law, European Union law and public international law. These rights are now guaranteed in international law under the EU-UK Trade and Cooperation Agreement;
- They can provide legal services in English, Welsh, Scottish and Northern Irish law (including drafting contracts), with the only exception of the 'reserved legal activities';
- They can practise arbitration, conciliation, mediation and other forms of alternative dispute resolution;
- They can employ, be employed and partner with English and Welsh solicitors;
- Their communications with clients are protected by legal professional privilege;
- They have a clear, transparent and proportionate path to requalification as solicitors, currently through the Qualified Lawyers Transfer Scheme and, from September 2021, through the new Solicitors Qualifying Examination.

2. Legal Professional Privilege

Legal professional privilege (LPP) plays a crucial role in ensuring the proper administration of the justice system. The Law Society engages with government and public sector actors to seek to protect the boundaries and principles of privilege. We also make practical interventions in the courts to inform the development of the common law on LPP. We raise public and member understanding of LPP through the media and our own publications, including our practice note on the subject. Where LPP concerns arise in relation to specific pieces of law, we consult with members and seek to represent their views to government and identify practical solutions that protect people's rights.

3. LawTech

Our recent highlights from December to January in relation to member engagement include:

- We've been working to update and promote our advice to members regarding the implications for their data flows into and out of the UK in light of the four / six month 'grace period' set out in the EU-UK Trade and Cooperation Agreement. This has included:
 - Comprehensive guidance material on the website
 - Webinars: Data flows in a Brexit transition landscape
 - Podcasts: Data flows and the end of transition
- Explaining the implications of Schrems II on members' use of standard contractual clauses and binding corporate rules, and working with the Technology and Law Committee and the City of London Law Society to engage on the European Commission's review of SCCs, and the European Data Protection Board's recommendations on transfers
- Responding to two Parliamentary enquires regarding digital trade in free trade agreements
- Beginning engagement with the Law Commission on its Call for Evidence on smart contracts

Our Key asks on promoting LawTech following our recent submission to the Treasury ahead of the Budget in March:

Our top LawTech ask is for the Government to:

- Fund a grant scheme similar to that in place in Singapore to help small and medium-sized law firms cover the costs of adopting LawTech solutions that can unlock significant productivity gains. The Law Society can work with the Government to help design such a scheme.

Our other LawTech related-asks are for the Government to:

- Widen the eligibility criteria for the Future Fund to cover LawTech start-ups in England by extending the application window until the end of the financial year (instead of 31 January) and relaxing the minimum level of third party equity investment required to £250,000 raised in the past five years (instead of three).
- Fund the establishment of a legal data trust as part of the National Data Strategy to improve accessibility of data for those seeking to innovate in the legal services sector.
- Invest in upskilling the judiciary to ensure the business and property courts are able to deal efficiently with intellectual property claims arising from LawTech.
- Continue to prioritise the rollout of broadband and 5G across those regions of England which currently have very limited coverage, to ensure firms and consumers in all parts of the country are able to take advantage of the technology that will help businesses to thrive in the current environment.

4. Courts during the pandemic

Court Operations During Covid-19

COVID-19 has necessitated a radical and fast transition to the widespread use of online courts, and the use of remote hearings to support hearings to take place when the attendance of all participants in the court and tribunal buildings is not possible or practicable.

To date, we have responded to the development of online courts and remote hearings on a piecemeal basis. During the pandemic, there have been measures that we have tolerated or even supported that, were routine face to face hearings possible, we would not support.

Anecdotally we have been receiving feedback that remote hearings (either phone or video) can work well in certain cases e.g. simple procedural hearings involving only judges and advocates. Cases in the English and Welsh commercial courts seem to be functioning well and “there appears to have been no fall off in court business”. Such accomplishments is likely due to the already advanced use of technology within the High Court and Court of Appeal such as e-filing, and parties with the means to be represented by experienced and well-equipped legal teams.

Issues with remote hearings seem to be more apparent in the tribunals and criminal, county and family courts where parties are more likely to be from a low socio-economic background and where the implementation of technology before the pandemic hadn’t been as advanced as the commercial courts.

Before decisions are made to use remote hearings more permanently for particular cases or categories of cases, the experience prior to and during the pandemic must be thoroughly evaluated; and consistent well-functioning platforms, policies and procedures must be in place.

One of our concerns is that there is a risk that we can slip into digital as the norm without establishing whether there is an impact on outcomes. It is vitally important that this ‘new normal’ is not accepted as a permanent way of accessing and upholding justice in the future unless careful monitoring, due process and robust evaluation is carried out.

Court modernisation

HM Courts & Tribunals Service (HMCTS) is halfway through a reform programme to modernise the courts and tribunals system by creating services that are digital by default and design. In March 2019 they announced a one-year extension to the programme and anticipate completion in December 2023. The extension takes into account our concerns about the risk that the fast pace of this ambitious reform programme would not allow sufficient time for testing, evaluation and evidence that technology works.

We welcome modernisation of the courts provided the proposals are not driven by austerity measures (access to justice must remain at the heart of the programme) and technology is not implemented unless it has been tested, evaluated and proven to work. We are engaging regularly at all levels to put forward the views of our members. We have been consulted on prototypes of the online processes.

Some of the reforms will have a positive impact on access to justice where digitisation will make processes simpler and faster. However, there will be times when only face-to-face physical hearings will deliver justice.

5. Diversity and Inclusion (D&I)

Race/ethnicity

Race for Inclusion research, recommendations and updated good practice guidance were published in December 2020. We also published a summary of the Achieving Change Together roundtables held in 2020 on the experiences of black solicitors and recommendations for action to address lower levels of representation in the profession. We have signed up to the 10000blackinterns campaign, we have committed to taking an intern ourselves in summer 2022, and we are working with the campaign to encourage the biggest 50 firms/biggest in-house legal departments to sign up, if they haven't already. We are publishing a podcast for Race Equality Week this week (1-7 Feb) on mental health and well-being for BAME solicitors – the well-being gap was something highlighted by our Race for Inclusion research.

LGBT+ survey

We have just launched a survey for LGBT+ solicitors and allies on their experiences within the profession. Any help with promoting it to ensure we get a good response rate would be welcome. We also have a range of content and a networking event happening during this LGBT+ History Month (February).

Disability

We are continuing to work with the Legally Disabled project. We have just published two 'Easy Wins' documents – one for large firms and one for small firms – which provides a checklist of actions to begin work on disability inclusion.

Social mobility

Stephanie Boyce has been appointed to the HM Treasury and BEIS-commissioned City of London Taskforce on socio-economic diversity and inclusion in the professional services. We will be contributing to the supporting working group as well. Our new cohort of Social Mobility Ambassadors have begun work. They come from across England and Wales and have a mix of experience and perspectives. Most of them are already helping with mentoring, outreach events, and responding to 'ask an ambassador' email queries from individuals trying to access the profession. Applications for the Diversity Access Scheme 2021 will open at the start of March. We have amended this year to open it up to those taking SQE as well as LPC.

Diversity & Inclusion Data

The research/D&I teams of TLS and SRA met in January to begin collaborating on improving data collection and ensuring more consistent messaging. We agreed to use same set of monitoring questions when doing research (SRA shared their refreshed monitoring questions with us). We've agreed to support the SRA's campaign asking individual solicitors to complete their monitoring data on MySRA when it is launched shortly, by raising awareness within the profession about how important good D&I data is.