



The Law Society

Legal Compliance Bulletin

Issue 50 July 2017



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About this newsletter

Legal Compliance Bulletin is published six times per year. The aim of the publication is to provide up-to-date, very practical information on all those issues covering legal compliance and regulation for solicitors, barristers and practice managers.

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News in brief

Law Society practice notes

The Law Society has issued a number of new and updated practice notes, available at www.lawsociety.org.uk/support-services/advice. Note that since 1 June 2017 the majority of practice notes are accessible only to those with a My Law Society profile. Signing up is free and simple to do.

Acting in the absence of a children's guardian

This new practice note contains guidance for solicitors appointed by the court to represent children in proceedings where there are delays between the order appointing a children's guardian and the allocation of a guardian.

Rejecting unremunerative publicly funded criminal work

This new practice note reminds solicitors undertaking criminal legal aid work that they can exercise discretion when accepting cases if the work threatens their firm's viability.

Representing clients at section 2 Criminal Justice Act 1987 interviews

Following a move by the Serious Fraud Office to limit the role of legal advisers to witnesses in fraud, the Law Society has published a new practice note to help solicitors understand the changes.

Money laundering

The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 were laid before Parliament on 22 June 2017 and came into force on 26 June 2017. The regulations implement the Fourth EU Money Laundering Directive. The Law Society's Money Laundering Task Force is working with representatives from across the legal sector to update its practice note to take into account the changes that apply as a result of these regulations. The Society will be seeking HM Treasury approval of the new legal sector anti-money laundering (AML) guidance which will apply not only to solicitors, but to all independent legal professionals. The government's decision that there is to be only one

HM Treasury-approved piece of AML guidance per sector going forward has meant the sign-off process now requires the agreement of 11 legal sector regulatory and representative bodies across the UK.

Updated commercial property forms published

The third edition of the Standard Commercial Property Conditions includes a number of important updates and reflects better modern drafting practices for commercial contracts. For details, see www.lawsociety.org.uk/news/press-releases/updated-commercial-property-forms-will-assist-conveyancing-solicitors.

Malicious email targeting CQS member firms

Some Conveyancing Quality Scheme (CQS) member firms have been targeted with malicious emails. If you think you have received one of these emails the Law Society recommends you delete it immediately. For more details, see www.lawsociety.org.uk/News/Stories/malicious-email-targeting-cqs-member-firms.

Would you know if your client was being abused?

Solicitors who work with vulnerable clients or their families should be on the look-out for the warning signs of abuse. The Private Client Section explains what to look out for and the steps to take if you have to raise the alarm. For more details, see <http://communities.lawsociety.org.uk/private-client/ps-magazine/may-2017/read-the-signs/5061553.article>.

Mortgage fraud: how to spot the warning signs

It is easy to identify the marks of mortgage fraud after the event, but they may not be quite so obvious at the time. The Property Section has identified six warning signs to help you ensure you don't get caught out. Find out more at <http://communities.lawsociety.org.uk/property/news-and-updates/property-commentary/mortgage-fraud-spotting-the-warning-signs/5061621.article>.

Practice Advice Service Q&As

The Law Society regularly issues practice advice in the form of questions and answers available at www.lawsociety.org.uk/Support-services/Help-for-solicitors/Practice-Advice-Service/Q-and-As. The latest are referred to below.

Property: where can I find information on the events that trigger compulsory registration?

In this Q&A a solicitor wants to know more about the events leading to compulsory registration.

Costs: what is the current judgment debt rate?

In this Q&A a solicitor wants to know more about the current interest payable on judgment debts.

Cyber security: your firm has been hacked – what should you do next?

Finding out your firm has been hacked can be highly traumatic. We break down the steps you should take and what you should consider following an attack.

Conveyancing: do the Consumer Contract Regulations 2013 apply to conveyancing retainers?

In this Q&A a solicitor wants to know more about the Consumer Contract Regulations in relation to conveyancing retainers.

Wills: what should I do if I can't trace the executor of a will?

In this Q&A a solicitor acting for a residuary beneficiary in the administration of an estate cannot find the executor of a will and wants to know how she should proceed.

Clients: my client has asked me to send bills to him by email. Can I do this?

In this Q&A a solicitor wants to know more about the rules around billing clients by email.

Legal professional privilege

The Law Society has issued a policy article on legal professional privilege. For more details, see www.lawsociety.org.uk/policy-campaigns/articles/what-should-you-know-about-legal-professional-privilege.

4 per cent cut to practising fee proposed

The Law Society and the Solicitors Regulation Authority (SRA) are proposing an individual rate of £278 per solicitor for 2017–2018 – a 4 per cent decrease and a 28 per cent drop since 2014.

Compensation Fund grants more than £10m to public and business

Financial statements published by the SRA show that during the period November 2015 to October 2016, it granted around £10.3m from the Compensation Fund. The amount is lower than the £17.9m granted in the period November 2014 to October 2015, reflecting the number and types of claims.

SRA consults on SQE regulations

The SRA has published its consultation on the regulations which would see the new Solicitors Qualifying Examination (SQE) come into effect. The consultation will run until 26 July 2017. It can be found at www.sra.org.uk/sra/consultations/new-regulations.page.

■ **Brexit: what will it mean for the legal profession?**

Law Society International Policy Team

Over the next two years, the government will be negotiating the UK's exit from the European Union (EU). But what are the implications for the legal profession and legal services sector in England and Wales? The Law Society team has some answers

Overview: the current state of play

In March 2017, the Prime Minister, Theresa May, gave notice under Article 50 of the UK's intention to leave the EU, thereby starting the formal negotiation process.

Initially, we expected formal negotiations to begin following a special summit of the EU on 29 April 2017. However, due to the snap General Election on 8 June we saw them officially begin on Monday 19 June, just short of a year after the referendum on EU membership took place.

Despite the delay, the negotiation process must still be concluded within a two-year period from notification. If a deal cannot be reached in that time, or at least some agreement over transitional measures, the UK will leave the EU without

certainty on its new relationship with its closest neighbours and trade partners and we will most likely have to rely on World Trade Organization (WTO) rules.

Brexit and the legal profession

What does Brexit mean for the legal profession?

Global legal community

It is important to stress that the UK is part of an international legal community.

Solicitors in England and Wales do not operate in isolation. With the help of overseas colleagues, firms and bar associations they work together and underwrite the infrastructure of the provision of justice at home and abroad.

They are part of an international community of solicitors, attorneys and firms which resolves the vast majority of disputes outside of the courts and sets out the transactions and agreements that underpin the largest corporate and institutional deals of our countries, enabling economic prosperity.

Brexit and legal services

The UK legal services sector

The UK is a global legal centre. It is the second largest legal services market in the world behind the US and the largest legal services market within the EU. The UK, and specifically London, is the European hub for legal services, in part due to the ability to practise and establish across the EU.

There are more than 200 foreign firms in London – including 100 US firms – representing over 40 jurisdictions. There are more than a thousand registered European lawyers from 27 (out of 31) EU and European Free Trade Association (EFTA) countries established in England and Wales and more than 60 European firms from 13 EU and EFTA member states are established in London. The legal sector in London employs over 107,000 people from different jurisdictions.

The latest statistics show that in 2015 the UK legal services sector was worth £32 billion to the UK economy (1.5% of gross domestic product (GDP)); employed and trained in excess of 380,000 people (220,000 in solicitors' firms) and exported over £4 billion-worth of legal services (55% of the UK's export of business services go to the EU, of which legal services are one of the main components).

The UK accounts for 10 per cent of global legal services fee revenue and 20 per cent of all European legal services fee revenue. In 2014, it was noted that the total value of the UK legal sector is almost three times the size of the German legal market and six times the size of the French market.

UK legal services across the world

Similarly, solicitors of England and Wales are part of the legal profession in other jurisdictions. For example, there are nearly 37 English law firms with a presence in Dubai and many others are working in the US, Germany, France, BRIC countries (Brazil, Russia, India, China and South Africa) and more recently Korea. The local bars in these countries also welcome our solicitors in their organisations, such as the American Bar Association.

It is important to stress that the UK is part of an international legal community

In 2015, 1,623 practising solicitors reported their main practising office to be in a European country (this is more than 1% of all practising solicitors). Germany, France and Switzerland are home to more than half of the practising solicitors established in Europe. UK law firms are present in 26 out of 31 EU, European Economic Area (EEA) and EFTA member states, and operate a total of 285 branches in Europe (1.9% of the total number of offices opened).

Supporting wider business, including financial services¹

The concentration of legal and financial services in the City is a key factor of the UK's prosperity. Financial services generate more than 10 per cent of the UK's total GDP and the sector is a key purchaser of legal services, accounting for the largest percentage (17%) of total demand. For the top 50 law firms, 44 per cent of their transactions were from financial services clients. The UK, and particularly London, can be seen as a 'one-

stop shop' for the services required to support financial organisations.

More broadly, legal services provide vital support in developing new export markets and supporting UK companies' international operations. For every £1 extra turnover in legal services, it creates £1.39 in the wider economy.

Priorities for the EU–UK negotiations

Since the EU referendum the Law Society has been speaking to members on the impact Brexit could have on their firms and clients. Through this engagement we have identified five priorities. These are:

- continued mutual access for lawyers to practise law and base themselves in the UK and EU member states, and for their clients to have legal professional privilege (LLP);
- the maintenance of mutual recognition and enforcement of judgments and respect for choice of jurisdictions clauses across the EU;
- the maintenance of collaboration in policing, security and criminal justice;
- ensuring that legal certainty is maintained throughout the process of withdrawal; and
- ensuring that the government works effectively 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.

Alongside this, it will be important that the government shows its support for the international success of the legal sector by ensuring law firms can continue to recruit skilled individuals from outside the UK through a proportionate and efficient sponsorship and visa process.

Our *Brexit and the Law* report was published in January 2017. This goes into more detail about our priorities and was submitted to the UK government. See www.lawsociety.org.uk/support-services/research-trends/brexit-and-the-law-report.

We also launched a global legal centre campaign to promote the strengths of English and Welsh law as the governing law of international contracts, England and Wales as the jurisdiction of choice for dispute resolution and London as the preferred seat of arbitration – read more at www.lawsociety.org.uk/policy-campaigns/campaigns/global-legal-centre.

Practice rights and mutual market access

The single market in legal services is a European success story. Through a series of European directives – in particular the Lawyers' Services Directive 1977, the Lawyers' Establishment Directive 1998, the Professional Qualifications Directive 2005 and the Framework Services Directive 2006 – lawyers across the EU have the right to give advice on home state law, host state law and EU and international law. Additionally, these directives allow law firms to establish in any member states and for UK solicitors to requalify within three years of effective and regular practice of host state law (including EU law) in the host state.

Since this liberalisation, the UK legal services sector has become a major exporter to the EU – 36 of the top 50 UK law firms have at least one office in another EU/EFTA/EEA state and UK law firms have a presence in 26 of the 31 countries.

The current EU framework allows lawyers to provide legal services and establish law firms with few restrictions. Lawyers

within the EU (and EFTA) benefit from a simple, predictable and uniform system of commercial and personal presence in other member states, with little scope for national variation. These rights allow UK lawyers to service the cross-border needs of businesses and individuals both from satellite offices in the EU and through 'fly-in, fly-out' (FIFO) services from their London office (a daily business practice for many firms).

The potential impact of the loss of mutual market access in legal services

If law firms are not able to maintain equivalent level of mutual market access in legal services, the following impacts may come about.

Law firms may have to reconsider how they are structured for the provision of international legal services. Operating as a branch of an English and Welsh Limited Liability Partnership may not be recognised anymore; partnership between local lawyers and third-country (non-EU/EFTA) lawyers may be prohibited or subject to complex ownership rules; commercial presence and establishment may be severely restricted in some jurisdictions.

Individual lawyers may need to consider requalification in the host state profession or another EU/EFTA qualification (e.g. as an Irish solicitor). Issues such as gaining EU/EFTA citizenship may arise. Conditions for solicitors to remain part of a local partnership or for European lawyers to be part of a partnership involving UK solicitors may be severely constrained depending on the jurisdiction of origin and/or establishment.

Law firms may need to consider transferring people and practice areas to different offices, in either direction, e.g. away from London as the hub for European work or back to London if the provision of English and Welsh law advice is becoming more restricted in some EU/EFTA jurisdictions.

The concentration of legal and financial services in the City is a key factor of the UK's prosperity

The UK could be less attractive to third-country businesses and law firms which often look to set up an office in the UK as a means of gaining access to the EU market.

Consumers will face more difficulties in obtaining legal advice from an English or Welsh lawyer on a matter that relates, even if only in part, to English and Welsh law (family, property, investment etc.).

International law firms have the ability to relocate their resources to other hubs, whether in Europe or in wider international competitors such as Singapore and New York. However, this relocation could reduce the contribution of legal services to the UK economy – through jobs, trade and tax revenue. Also, smaller firms, or those who do most of their work through their UK offices, may see a decline in their international work as they may not be able to work to service some European clients in the same ways as previously – again impacting on the sector's contribution to the UK economy.

It is also important to mention that common law is highly influential in the making of EU law. Brexit is likely to decrease

the common law influence and there is a worry that this will reduce the value of EU law in common law jurisdictions such as the US. This in turn may have an economic impact on the EU. Others have also suggested that Europe may not necessarily gain from any work lost from London – again, it may transfer to financial centres such as Singapore and New York.

Legal services provide vital support in developing new export markets and supporting UK companies' international operations

The impact of falling back on WTO rules

If the UK and EU are not able to agree to mutual market access, law firms and lawyers would most likely have to rely on the WTO General Agreement on Trade in Services (GATS) and national regulations in each EU/EFTA country. This would mean moving from a system where there are few restrictions on them operating in other member states to the position of third-country states where there are a number of significant restrictions. The most important of these restrictions include the following.

- 1. Restrictions on practice areas** – in most EU member states it is not possible to practise local state law as a third-country lawyer without holding local qualifications. The WTO/GATS schedules of commitments under legal services include only home country and public international law. Crucially, EU law is not treated as a type of public international law and so is excluded from the scope of the schedules, therefore UK lawyers would not be able to advise on areas such as competition, internal market and trade. In most member states, it would not be possible, save for a few exceptions, for a third-country lawyer to represent a client in domestic courts.
- 2. Restrictions on modes of practice** – some EU member states do not permit FIFO services by third-country lawyers and, if this facility is lost, the profession's ability to continue to advise European clients, represent those with cases involving more than one EU member state, and continue to play a leading role in global investigations will be jeopardised. Each EU member state is able to impose its own national restrictions on FIFO such as:
 - compulsory membership of professional bodies in relation to commercial presence, e.g. France, Germany and Luxembourg;
 - strict rules prohibiting local lawyers from partnering with non-EU lawyers, e.g. Spain and Sweden;
 - restrictions on company structure or commercial presence, such as restrictions on foreign investment in law firms or an imposition of a certain legal form on third-country law firms, e.g. France, Spain, Portugal or Poland.
- 3. Nationality requirements** – most member states do not allow third-country nationals to requalify into the national legal profession, this being only available to the EU/EFTA nationals.

The Law Society completed a country-by-country analysis of the most important restrictions and requirements imposed by EU and EFTA countries on third-country lawyers and law firms. You can read more about it at <http://communities.lawsociety.org.uk/international/regions/europe/third-country-lawyers-practice-rights-and-conditions-for-setting-up-a-third-country-law-firm-in-the-eu-and-efta-countries/5060997.article>.

Access to the EU courts and LLP

Importantly, EU membership allows UK solicitors to represent their clients before EU courts – i.e. the General Court of the EU and the Court of Justice of the EU (CJEU) – and specialised tribunals, for example, the EU Intellectual Property Office. However, this right only applies to lawyers who are authorised to practise before a court of a member state or an EEA state. This means that once the UK leaves the EU, English and Welsh solicitors will lose their rights of audience in these two courts.

It will be important that the government shows its support for the international success of the legal sector

EU membership also allows lawyers' clients to benefit from legal professional privilege (LPP). The case law of the CJEU currently does not recognise the privileged nature of communications between a client and a lawyer who is not qualified in the EU/EEA and registered with a relevant professional body in an EU/EEA country. This means that, once the UK leaves the EU, UK lawyers' advice to clients will no longer automatically attract LPP in the context of EU cases, such as competition proceedings, and would need to be disclosed to the European Commission. Without this protection, lawyers cannot advise their clients properly and the loss of LPP would put UK lawyers and law firms at a serious competitive disadvantage compared to their EU/EEA/Swiss counterparts.

This will be particularly detrimental to two areas of law where the UK has significant expertise – competition law and intellectual property law.

The need for an implementation period

Lawyers and law firms will need time to adapt to the new arrangements between the EU and the 27 individual EU states (with or without a new EU-UK agreement) on practice rights. An implementation period would give law firms and their clients the time to prepare for the changes and plan their long-term strategy.

These changes could include restructuring their businesses, transferring data, splitting audit books, sorting taxation issues and revising any human resources policies dependent on new immigration rules. In some cases, this will be possible only through setting up a subsidiary regulated by the law of one of the member states and this process will take time. This will affect not only English firms, but also US firms which use their offices in London as headquarters for their EU operations. Providing time to adapt to the new arrangements would

improve legal certainty and give firms a better chance to retain their current clients.

The Law Society's work since the EU referendum home and abroad

Since the EU referendum result on 24 June 2016, the Law Society has provided information and advice to our members on the implications for the legal profession. We have also been working with members to identify what the sector needs in the EU negotiations and speaking to stakeholders in England and Wales, the EU and globally about these priorities.

We have met with a number of influential stakeholders to discuss the legal sector priorities for the EU negotiations. These include ministers, civil servants, parliamentarians, other legal and business groups, EU institutions and our counterparts in bar associations and law societies across Europe.

We have submitted evidence to a number of parliamentary committees, including the influential Justice Select Committee. A number of these committees published their reports on Brexit before Parliament was dissolved and in many cases our key requests and priorities for the negotiations were represented. More information on our work can be found at www.lawsociety.org.uk/support-services/brexit-and-the-legal-sector/?topic=brexit&p=2.

We have also begun engaging with key stakeholders in the EU Commission, EU Parliament, the Council of the EU and the UK permanent representation to the EU (UKRep).

We have been speaking to our European counterparts, through existing opportunities such as Opening of the Legal Year, via the Council of European Bar and Law Societies and through scheduled visits across Europe. These events and meetings have been an opportunity to speak to both bar associations and law societies in these countries, as well as to our members based there.

These meetings and events have also been an excellent opportunity for the Law Society to communicate that England and Wales want to continue to be part of the European legal community.

We have organised roundtable discussions with European and non-EU bar representatives (for instance, from the US and South Korea) and with EU firms and European lawyers based in London to discuss the impacts of Brexit on their firms and their clients.

Promoting England and Wales as a global legal centre

England and Wales will continue to provide an open environment, a dynamic common law jurisdiction that encourages practitioners from a range of jurisdictions, and will remain a leading global centre for legal services. It is in the interests of both ourselves and our European partners that we recognise mutual advantage to working together to secure the best deal possible for legal services.

This article was written jointly by the members of the Law Society's International Policy Team.

1. Data from the Law Society report *Economic Value of the Legal Sector* (March 2016) at www.lawsociety.org.uk/news/press-releases/a-25-billion-legal-sector-supports-a-healthy-economy and its *EU and the Legal Sector* report (October 2015) at www.lawsociety.org.uk/news/stories/the-uk-legal-services-sector-and-the-eu.

■ Professional indemnity insurance premiums after Brexit

Brian Balkin

Brexit has implications across all aspects of British life. The professional indemnity insurance (PII) sector is no exception

The London insurance market is taking a risk-based approach to plan and act for a 'hard' exit from the European Union (EU) in April 2019. Specific plans are unlikely to evolve until the outcomes from the recent election and political negotiations become clear. However, some insurers are actively reviewing their options for future operating models, in some cases considering expanding their presence in continental Europe. Materially, however, not much has changed since the vote to leave in June 2016. The cost of PII cover is not expected to be directly affected, in either the short or medium term, by the EU referendum result.

In general – how could UK insurance be affected?

Concerns for insurers and brokers are focused around client administration and service-provider regulation, including:

- 'passporting' of services into and out of the UK (allowing services to be provided across the UK/EU by a regulated entity in one UK/EU territory without having to have separate permissions in each territory);
- freedom of services for pan-European policies;
- Financial Conduct Authority/Prudential Regulation Authority regulatory changes;
- European regulatory compliance, including Solvency II and potential equivalence;
- data protection regulation and compliance; and
- law and jurisdiction of insurance contracts and claims settlement.

The insurance industry is lobbying the UK government, both directly and through trade groups. Common interests include:

- securing a regulatory environment that is appropriate for the UK insurance market;
- retaining the ability to passport out of and into the UK;
- mirroring the EU data protection regime; and
- securing protection for EU employees in the insurance market.

There is some uncertainty here, particularly in respect of the loss of passporting rights which have provided unfettered access to European markets and, reciprocally, unfettered access to European insurers to the UK market, enabling greater competition.

Despite some challenges, the UK insurance market has the time and opportunity to work collaboratively to ensure that UK insurers continue to provide law firms with the most suitable, cost-effective protection. UK insurers are fully engaged in addressing the risks posed by the possible removal of their unfettered access to EU markets and vice versa, which is important for competition.

Looking ahead

No one likes uncertainty or any possible reduction in competition, both of which could mean higher PII premiums. However, it is generally believed that these difficulties will be overcome as insurers begin to establish entities within and without the EU. For example, Lloyd's is currently establishing an EU base in Brussels.

Lockton Solicitors has formed a Brexit Committee which will identify and explore the issues that could affect clients during the period leading up to the UK's withdrawal. Lockton is also taking the following actions to support clients:

1. conducting risk assessments of what our clients' insurance needs are and how this will be delivered post-exit; and
2. tracking insurer responses and ratings agency action and updating our clients on these where relevant.

Lockton's Brexit Committee will monitor the actions taken by the UK government and the European Council and consider any issues affecting clients.

Below are a few of the most frequently asked questions about Brexit and Lockton's answers.

FAQS

Q. Will the UK government's triggering of Article 50 affect our current PII arrangements?

A. The triggering of Article 50 itself should have no direct effect on your PII arrangements in the short term. The two-year period that we are now in following the triggering of Article 50 will involve the trade negotiations, but during that time there will be no change to the UK's membership of the EU. Therefore matters such as the passporting, regulatory requirements or choice of law should not change during this period.

However, along with many other issues that may arise during the process of the UK leaving the EU, the process itself will remain fluid and the eventual outcome may often appear unclear.

Q. Will the UK's departure from the EU and the use of World Trade Organization rules or other trade agreements affect PII arrangements?

A. It would be prudent to expect that there will be changes imposed upon the UK insurance market in general after the UK has left the EU and forged new trade agreements. However, we expect that capacity and appetite for insuring law firms will remain unchanged. Lockton is part of various lobbying efforts (along with other insurance brokers, insurance markets and financial services companies) to reduce the potential impact of any changes on both the availability and cost of insurance.

Q. What should my firm do to manage risks relating to the UK's EU departure?

A. Firms should seek to identify, understand and manage risks relating to the UK's departure from the EU in exactly the same

way they would with any other risk, for example: conducting assessments of what their clients' needs are and how they will deliver them post-exit; and reviewing their operating model to ensure seamless service for European and UK clients' European subsidiaries.

Q. *As a risk manager, what should I do to help my firm prepare?*

A. Risk managers should manage the risks relating to the UK exiting the EU in exactly the same way they would manage other risks. This would include the identification, quantification and management of the risks (including control and mitigation

actions), as well as apportioning ownership of the risks and relevant control and mitigation actions within the firm. The uncertainty of the last year has clearly presented a challenge for the risk management community. As with any other risks that are indeterminate in outcome and timing, the risks associated with Brexit need to be kept alive by the risk management function.

Brian Balkin is a solicitor practice group manager at Lockton Solicitors.

■ Brexit, Convention rights and disciplinary proceedings

Nigel West

This article dispels any concern that the Human Rights Act 1998 (HRA 1998) might be abolished by Brexit and looks at the effect which the Act has on disciplinary proceedings

The European Convention on Human Rights

There is no direct connection between the European Convention on Human Rights (the Convention) and the European Union (EU).

The Convention was created by the Council of Europe, a group of European nations formed in May 1949 in order to promote international protection for human rights following the atrocities committed during the Second World War. The ten founder members included the UK and it now has 47 member states.

The Convention was signed in Rome on 4 November 1950 and came into force on 3 September 1953. The European Court of Human Rights (ECHR) was set up in 1959 as an international court to rule on individual and state applications alleging violation of the Convention rights. The ECHR delivered its first judgment on 14 November 1960 and, since then, has delivered more than 10,000 judgments.

The HRA 1998 came into force on 2 October 2000. It does not incorporate the Convention in its entirety. The Convention rights which have effect under the Act are set out in Schedule 1. They are Articles 2 to 12, 14, and 16 to 18 of the Convention, as well as Articles 1 to 3 of the First Protocol and Articles 1 and 2 of the Sixth Protocol.

The main omissions are Articles 1 and 13. Article 1 places an obligation on member states to secure to everyone within their jurisdiction the rights and freedoms found in the Convention. As such, it was otiose when enacting the Act. Article 13 states that everyone whose rights are violated should have an effective remedy before a national authority. Inclusion of Article 13 would arguably have infringed on parliamentary sovereignty, as it would have triggered a right to compensation if a statute was deliberately enacted in disregard of Convention rights.

The main purpose of the Act is to require public authorities to respect Convention rights and by s.6 it is unlawful for a public

authority to act in a way which is incompatible with a Convention right. Section 6(3) defines 'public authority' to include a court or tribunal and 'any person certain whose functions are functions of a public nature'. The Solicitors Regulation Authority (SRA) and the Solicitors Disciplinary Tribunal (SDT) are both public authorities within the meaning of the Act.

The overlap between the ECHR and the EU

Although there is no direct link between the EU and the ECHR, there is significant overlap. All the members of the EU are members of the Council of Europe and the EU has given formal recognition to Convention rights by Article 6.2 of the Treaty on European Union and by the EU Charter of Fundamental Rights.

Article 6.2 of the Treaty on European Union provides that the EU shall respect the rights guaranteed by the Convention as general principles of community law.

The EU Charter of Fundamental Rights is a codifying document which brings together in a single document the fundamental rights protected in the EU. It includes the Convention rights as well as rights derived from the case law of the Court of Justice of the EU and other rights arising from the common constitutional traditions of EU countries.

The Charter became legally binding on EU institutions and on national governments on 1 December 2009. Article 51 of the Charter states that the provisions of the Charter are addressed to the member states only when they are implementing EU law and that member states 'should respect the rights, observe the principles and promote the application thereof in accordance with their respective powers'.

The White Paper on exiting the EU

In March 2017 the UK government published a White Paper on 'Legislating for the UK's withdrawal from the EU'.

The White Paper provides that a Great Repeal Bill will convert EU law into domestic law on the day the UK leaves the EU. The rationale for that conversion is set out in the White Paper as follows:

‘... this approach will provide maximum certainty as we leave the EU. The same rules and laws will apply on the day after exit as on the day before. It will then be for ... the UK to decide on any changes to that law, after full scrutiny and proper debate’ (pp.5 and 7).

The Charter of Fundamental Rights will have a different status when the UK leaves the EU. That is because:

‘The Charter only applies to Member States when acting within the scope of EU laws, so its relevance is removed by our withdrawal from the EU’ (para.2.23).

However, the White Paper expressly states that there are no plans to withdraw from the ECHR:

‘The UK’s withdrawal from the EU will not change the UK’s participation in the ECHR and there are no plans to withdraw from the ECHR’ (para.2.22).

There is no direct connection between the European Convention on Human Rights and the European Union

The future of the HRA 1998

Although Brexit and the Great Repeal Bill will not affect the HRA 1998, there are periodically reports in the press that the Conservative Government might abolish the HRA 1998 and replace it with a British Bill of Rights, so that UK citizens can only obtain protection for their rights from Parliament and the UK courts. That was reflected in the Conservative Party manifesto of May 2017 in the following way:

‘We will not repeal or replace the Human Rights Act while the process of Brexit is underway but we will consider our human rights legal framework when the process of leaving the EU concludes’ (p.37).

That is not a goal shared by everyone. Liberty, for example, (‘Human rights in the UK after Brexit’) pledges:

‘... after Brexit, the European Convention, and the Human Rights Act which enshrines it in UK law, will be more important than ever. They will remain the most fundamental safeguard against abuses of human rights in the UK. We will keep campaigning to ensure that these vital tools are not taken away ...’

Liberty may not have had the rights of solicitors in mind when making that pledge, but Convention rights affect the outcome of some disciplinary proceedings and the following sections of this article highlight some of the main developments in solicitors’ disciplinary law which have been affected by Convention rights.

The main Articles affecting disciplinary law

The two main Articles affecting disciplinary law are Article 6 (the right to a fair trial) and Article 8 (the right to respect for private and family life).

Article 6

Article 6 has three sections. The first relates to civil and criminal proceedings, the second and third to criminal proceedings:

‘1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair

and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3 Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.’

Historically, English legal proceedings have been divided into criminal and civil proceedings. Disciplinary law does not fall neatly into either category. The cases are heard in a civil tribunal, but they involve a prosecutor laying charges against a defendant who faces the prospect of a fine or the loss of the ability to earn a living as a solicitor. The hybrid nature of the disciplinary proceedings has been considered by the ECHR.

Delays are often very stressful and can also paralyse careers and business development

In *Brown v UK* (38644/97), the ECHR had to consider whether a complaint made by an English solicitor relating to tribunal proceedings should to be treated as a civil or criminal complaint. The ECHR stated that the court should adopt a threefold test by having regard to: (1) the classification in domestic law; (2) the nature of the offence itself; and (3) the nature and severity of the sentence. In the circumstances of the case, the ECHR decided that the solicitor’s complaint was a civil complaint. The charges were classified under domestic law as disciplinary offences and were examined in a tribunal without any involvement by the police. The offences were of a disciplinary nature which applied only to persons of a specific professional group rather than the general public. The severity of the penalty, which was a £10,000 fine, was not of itself such as to render the charges criminal in nature.

In *Albert and Le Compte v Belgium* (7299/75 and 7496/76), the ECHR again decided that disciplinary proceedings against two Belgian doctors could not be characterised as criminal, but

recognised the hybrid nature of disciplinary proceedings. The ECHR said that it may not hold good for all disciplinary cases to not be characterised as ‘criminal’ and, on the facts of the case, the court decided that subparas.(a), (b) and (d) of Article 6 (which relate to criminal proceedings) should be taken into account in deciding whether the disciplinary proceedings constituted a fair trial.

Article 8

Article 8 states:

‘1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’

Although Article 8 relates to ‘private and family life’, it often has a direct bearing on regulatory proceedings because the ECHR recognises that the right to earn a living has an impact on private and family life.

In *Mateescu v Romania* (11944/10), a Romanian doctor trained to become a lawyer, but was not permitted to practise simultaneously as a lawyer and a doctor. Each profession required 100 per cent dedication on the part of the person practising it. The ECHR said there had been a violation of his Article 8 rights and set out the link between Article 8 and the right to carry on a profession as follows:

Publication can adversely affect a solicitor’s practice because the SRA website has a high Google rating

‘The Court recalls that Article 8 of the Convention protects a right to personal development and the right to establish and develop relationships with other human beings in the outside world ... and that the notion of “private life” does not in principle exclude activities of a professional or business nature ... It is after all in the course of their working lives that the majority of people have a significant opportunity to develop relationships with the outside world.’

On the basis of that principle, the ECHR has held that measures which impair the right of access to the profession of a lawyer, or impair the applicant’s ability to carry on the profession, or place restrictions on registration as a member of the profession, all fall within Article 8.

Examples of the effect of Articles 6 and 8 on SDT decisions are set out below.

Delay

It is common for solicitors facing SRA investigations to suffer lengthy delays. The delays are often very stressful and can also paralyse careers and business development.

In *Aaron v Law Society* [2003] EWHC 2271, Auld J said that the reasonable time requirement in Article 6(1) applies to professional disciplinary proceedings and that the uncertainty that springs from and festers with unnecessary and unreasonable delay can, in itself, cause great injustice to practising solicitors whose livelihood and professional reputations are at stake.

The SRA has offered to pay a travel fare to London for a solicitor living in England and the travel, accommodation and subsistence expenses of a solicitor living in India

Although the courts recognise that delay can be debilitating, the burden of establishing an unreasonable period of delay is often onerous. In *SRA v Davis* (SDT 9017-2004), the SDT said that, when assessing periods of delay, time will normally start to run from the date on which the respondent received notice that his or her case was being referred to the SDT. As most periods of delay arise during the SRA’s investigation stage, and before the decision to refer the respondent to the SDT, many solicitors facing lengthy investigations would consider that decision to be harsh. The SDT did, however, recognise in *Davis* that there may be cases where time should start to run from the moment that the solicitor knows that the SRA is actively investigating misconduct.

In *Langford v Law Society* [2002] EWHC 2802, the High Court said that a relatively high threshold has to be crossed before it can be said in any particular case that a period of delay is unreasonable so as to give grounds for real concern that a Convention right has been violated. When deciding whether a period of delay is unreasonable, the court should have regard to the complexity of the case, the conduct of the SRA and the respondent’s own conduct.

In practice, the SDT has found that a respondent’s Article 6 rights have been breached by delays during the period from the date of the decision to refer the respondent to the SDT to the date of issue of the rule 5 statement of 11 months (*SRA v Shelton* (SDT 9465-2006)), but typical examples of unreasonable delay range from 24 months (in *SRA v Rutherford* (SDT 9074-2004)) to 42 months (in *SRA v Fallon* (SDT 9154-2004)).

Unlike common law cases of delay, there is no need to show prejudice under Article 6 (although prejudice does have a bearing on remedy). The SDT will consider whether a fair hearing is still possible and whether there are any other compelling reasons why it would be unfair to try the case or any part of it. If it is possible for a fair trial to take place, the delay could be reflected in a reduced sanction or a more favourable order for costs. If a fair trial cannot take place, the case will be struck out. The SDT has struck out cases where there have been unexplained delays of 30 months, 33 months and 40 months (*SRA v Judge* (SDT 9028-2004); *SRA v Sancheti* (SDT 9795-2007); *SRA v Fallon*).

Publicity

In practice, the SRA publishes decisions to bring proceedings before the SDT on its website once the SDT proceedings have been issued and the SDT has certified that there is a *prima facie* case. The publication can adversely affect a solicitor's practice because the SRA website has a high Google rating and potential clients receive notice of the SDT proceedings. Many solicitors consider that to be unfair in circumstances where the SDT hearing has not taken place and there are no disciplinary findings against them.

The SRA's decision to publish is made on the basis of SRA guidance headed 'Publishing Regulatory and Disciplinary Decisions'. By the guidance, factors which support a decision to publish include the importance of transparency in the SRA's decision-making process and the need to maintain public confidence in the provision of legal services by demonstrating that regulatory action is being taken. Factors which support a decision not to publish include a significant risk of breaching someone's Article 8 rights. In practice, the SRA almost invariably decides to publish.

In *Andersons v SRA* [2012] EWHC 3659, the High Court stated that an earlier edition of the SRA's publication policy was compatible with Article 8 because it envisaged individual decisions on individual facts and that the decision made to publish in that case did not infringe the applicant's Article 8 rights.

Representation at the tribunal hearing

The Court of Appeal has considered the question of whether the absence of financial assistance for advice and representation in disciplinary proceedings breaches an individual's Article 6 rights.

In *Pine v Law Society* [2001] EWCA 1574, the Court of Appeal said that the solicitor would only be able to show that he was entitled to legal aid for representation in disciplinary proceedings in exceptional circumstances where the withholding of legal aid would make the assertion of a civil claim, or the defence to the allegations, practically impossible or where it would lead to obvious unfairness of the proceedings. Neither the severity of the possible consequences of the SRA's allegations, nor the inhibiting effect of the solicitor's emotional involvement gave rise to unfairness. Two years later, in *Awan v Law Society* [2003] EWCA 1969, the Court of Appeal reached a similar submission after saying that the allegations against the solicitor were of such stark simplicity that he did not require legal representation to answer them. In both cases the court cited with approval the ECHR decision in *X v UK* (1984) 6 EHRR 136 that only in exceptional circumstances, where the

withholding of legal aid would make assertion of a civil claim practically impossible, or where it would lead to an obvious unfairness in the proceedings, could such a right be invoked by virtue of Article 6(1). The Court of Appeal did, however, say in *Pine* that, if a solicitor could not attend the tribunal because he could not afford the travel fare to London, there could be a breach of his Article 6 rights. In later cases the SRA has offered to pay a travel fare to London for a solicitor living in England (*SRA v Tiplady* (SDT 10026-2008)) and the travel, accommodation and subsistence expenses of a solicitor living in India (*SRA v Sancheti*).

The courts pay considerable respect to the sentencing decisions of the SDT

Striking off

In *Bolton v Law Society* [1994] 1 WLR 512, Sir Thomas Bingham MR explained the fundamental reason why the SDT should strike solicitors off the roll as follows:

'In most cases the Order of the Tribunal will be primarily directed to one or other or both of two other purposes. One is to be sure that the offender does not have the opportunity to repeat the offence ...

... the second purpose is the most fundamental of all: to maintain the reputation that the Solicitors' profession is one in which every member, of whatever standing, may be trusted to the ends of the earth. To maintain this reputation and sustain public confidence in the integrity of the profession, it is often necessary that those guilty of serious lapses are not only expelled but denied readmission.'

Bolton was decided six years before the HRA 1998 came into force and did not consider the solicitor's Article 8 rights. In 2003, in *Nahal v Law Society* [2003] All ER (D) 417, the appellant submitted that a strike-off was disproportionately severe in a case which did not involve a finding of dishonesty. When dismissing the appeal, the High Court said that the HRA 1998 did not disturb the principle in *Bolton* that the reputation of a profession is more important than the fortunes of any individual member. In 2008, in *Salsbury v Law Society* [2008] EWCA 1285, the Court of Appeal affirmed the decision in *Nahal* and said that the principle remains good law despite Article 8.

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Appeals against sentence

It is difficult to appeal against a tribunal sentence because the courts pay considerable respect to the sentencing decisions of the SDT. That is because the SDT is an expert and informed tribunal best able to assess what is needed to uphold the standards of the profession. In 1956, in *Re a Solicitor* [1956] 3 All ER 516, Lord Goddard said that it would require 'a very strong case' to interfere with a tribunal decision on sentence. That was reiterated in 1994 by Sir Thomas Bingham MR in *Bolton* who said 'there is no controversy about the correctness of that principle which, for the last 30 years at least, has been clearly understood and very regularly applied'.

There may be an argument for saying that a relatively minor incident of misconduct which occurred many years ago should not be disclosed

The interface between the requirement for 'a very strong case' and the Article 6 requirement for a fair hearing (which includes a fair appeal) was considered after the introduction of the HRA 1998 by the Court of Appeal in *Salsbury*. In *Salsbury*, Jackson LJ said:

'I conclude that the statements of principles set out by Sir Thomas Bingham in Bolton remain in good law, subject to this qualification. In applying the Bolton principles the Solicitors Disciplinary Tribunal must also take into account the rights of the solicitor under Article 6 and 8 of the Convention. It is now an overstatement to say that a very strong case is required before the Court will interfere with the sentence imposed by the Solicitors Disciplinary Tribunal. The correct analysis is that ... absent any error of law, the High Court must pay considerable respect for sentencing decisions of the Tribunal. Nevertheless, if the High Court, despite paying such respect, is satisfied that the sentencing decision was clearly inappropriate, then the Court will interfere.'

Further developments

The Convention rights continue to effect changes in disciplinary law. Potential future changes might relate to the use of antecedents in the tribunal and the test for appeals.

As regards antecedents, the tribunal rules require the tribunal to take account of any previous occasions on which a respondent has appeared before the tribunal when considering what sentence to impose. In *R(T) v Chief Constable of Greater Manchester Police* [2014] UKSC 35, the Supreme Court said, in relation to a career involving work with children, that, as a conviction imposed in public recedes into the past, it becomes part of a person's private life and that a law requiring a person to disclose all previous convictions that affects the ability of a person to pursue a chosen career constitutes an interference with that person's Article 8 rights which would only be lawful if the interference is necessary. There may be an argument for saying that a relatively minor incident of misconduct which occurred many years ago should not be disclosed to the tribunal when determining sentence.

As regards appeals, the High Court regularly states that an appellant must show that the tribunal decision was 'clearly inappropriate' and not simply 'wrong'. In 2013, in *Re B (a Child)* [2013] UKSC 33, the Supreme Court said, in relation to care proceedings, that the word 'plainly' within the phrase 'plainly wrong' should be abandoned as it either causes confusion or means that an appellate court cannot vary or reverse a judge's conclusion if it considers it to have been 'merely' wrong. Lord Neuberger stated: '... whatever view the Strasbourg Court may take of such a notion, I cannot accept it, as it appears to me to undermine the role of Judges in the field of Human Rights'. In 2013, in *Obi v SRA* [2013] EWHC 3578, Mostyn J said the test in *Re B* should not be confined to adoption proceedings and that the court should decide an appeal against sentence in disciplinary proceedings by asking itself whether the tribunal's decision was 'wrong' and not 'clearly inappropriate'. Despite those decisions, the High Court continues to say in many cases that the tribunal decision will stand unless it is shown to be 'clearly inappropriate'.

Although court decisions on Convention rights are sometimes slow to filter down to tribunal decisions, it is difficult to see a good reason for abandoning the Convention rights. They provide solicitors with protection on decisions which can affect their ability to pursue their careers while preserving public confidence in the profession.

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The Law Society

■ More flexible regulation of solicitors: opportunity or threat?

Iain Miller

The Solicitors Regulation Authority (SRA) has published its long-awaited response to its consultation on the future framework of the regulation of solicitors: ‘Looking to the future: flexibility and public protection’

This consultation is part of a trilogy and sits alongside the SRA’s already published plans to shake up the qualification process by the introduction of the Solicitors Qualifying Examination (SQE). Yet to be published is the third element which is a new set of detailed rules dealing with authorisation and enforcement. A consultation paper on these will be published in the autumn. The other issues that are under review by the SRA are insurance arrangements and how to implement the Competition and Market Authority’s recommendation that there be more transparency in law firm pricing to allow consumers to compare prices through online price comparison sites.

The most controversial part of the ‘Looking to the future: flexibility and public protection’ consultation is the proposal to relax the restrictions on the ways in which solicitors can practise. This was strongly opposed by the Law Society in its consultation response and it has greeted the SRA’s announcement that it plans to press ahead with the changes with ‘dismay’. However, there seems little chance that the SRA will reconsider its approach and therefore firms need to begin thinking about how these changes, which are likely to come into force at the end of 2018, are likely to affect them. This is for two reasons. First, firms may wish to take advantage of the changes. Second, the changes are likely to introduce further competition into the market. Firms will need to understand how that might affect their business. The purpose of this article is to assess the likely impact of these changes. However, it might be helpful to start with a short summary of why the current restrictions exist.

Origin of the restrictions on the way solicitors can practise

Prior to the Legal Services Act 2007 (LSA 2007) there were long-standing restrictions on solicitors sharing their fees with non-solicitors. These restrictions were first enacted by the Law Society before any thought of separating the regulatory and representative function. It may be fairly observed that these restrictions were more about protecting the profession than public protection. An example is rule 4 of the Solicitors’ Practice Rules 1936 which provided:

‘A solicitor shall not agree to share with any person not being a solicitor ... his profit costs in respect of any business either contentious or non-contentious.’

A complete restriction on fee-sharing created a practical difficulty in relation to in-house practice. There are legitimate reasons why a solicitor employee might want to recover costs

on behalf of his or her employer. While this was technically fee-sharing, that was not the purpose of the activity. In *Galloway v Corporation of London* [1867] LR Eq 90, 36 LJ Ch 978, the High Court found it was acceptable for the Corporation to recover its costs of litigation when acting through its employed solicitor even though the fees would benefit the Corporation of London. Over the years, a number of exceptions to the general rule against fee-sharing developed for those involved in in-house practice. These are now contained in rule 4 of the SRA Practice Framework Rules. These read like a haphazard by-product of special pleading by in-house solicitors working in different sectors. There is certainly no common public interest thread. The rule 4 exceptions were just that and the general rule remained that a solicitor who was employed by a non-solicitor could not act for anyone but their employer because that would lead to fee-sharing.

This structural dividing line was an important feature of the regulatory framework prior to the LSA 2007 and created a bright line between private practice solicitors and those that worked in-house. The pre-2007 restrictions placed greater emphasis on where solicitors worked than what they actually did.

The effect of the SRA’s reforms is to blur further the distinction between in-house and private practice.

The position changed radically with the regulatory settlement contained in the LSA 2007 which permitted alternative business structures (ABSs). These are, of course, entities that avowedly enable lawyers to share profits with others. There could therefore be no place for an arrangement based around fee-sharing and a new boundary was needed. As part of its statutory framework, the LSA 2007 defined the boundary around regulated legal services in sections 15 and 16. This boundary makes it an offence for authorised persons (which includes solicitors) to provide reserved legal activities through an unauthorised entity to the public or a section of the public. In brief the reserved legal activities are: (1) advocacy in a court; (2) litigation in a court; (3) reserved instrument activities which includes contracts for the sale of land; (4) taking out a grant of probate; (5) administering an oath; and (6) notarial activities. Notably, providing legal advice, tribunal litigation and advocacy, drafting a will and most commercial contracts not involving land are not reserved legal activities. There is nothing in the LSA 2007 that prevents solicitors who are not working within an authorised entity from providing non-reserved legal activities to the public. While the LSA 2007 created this new framework in 2007, the old rules around fee-sharing remained. When the SRA revised its rules in 2011 it simply re-adopted the old framework. Thus, the SRA’s rules remained more restrictive than the LSA 2007.

It is this gap between what the LSA 2007 allows and what the SRA’s current rules allow that the SRA is seeking to address in

its rules. In essence, the SRA is seeking to align its rules with the framework of the LSA 2007. The argument put forward by the Law Society is that these restrictions provide a level of protection to clients which would be lost if solicitors could offer services to the public outside a regulated law firm. In effect, while the origin of the rules is protectionist, it now serves the public interest. It looks like the SRA will have its way and this somewhat technical issue may lead to quite radical change.

The three existing models

As matters stand, there are three allowable models within the SRA regulatory framework. The first is the traditional law firm. Both the entity and the solicitors within it are regulated. The firm is authorised to provide reserved legal activities to the public and is also regulated by the SRA in relation to the non-authorised legal services it provides. With this level of regulation come a number of added benefits to clients. The firm is required to carry insurance on the SRA minimum terms which has a greater level of client benefit. For example, the insurer cannot avoid for material non-disclosure by the insured. Where insurance is not available, the Compensation Fund acts as an extra layer of client protection. Advice given to clients is covered by legal professional privilege (LPP) where that applies.

The second model is the in-house legal team. As already observed, the current restriction, subject to exceptions, is that in-house legal advisers can only provide legal services to their employer. As such, there is no need for insurance protection and the Compensation Fund as the only person likely to suffer loss is the employer. LPP remains available.

The effect of the SRA's reforms is to blur further the distinction between in-house and private practice

In recent years there has been a blurring around the edges of the in-house model. This is most notable in local government. The current SRA Practice Framework Rules allow local authority solicitors to provide legal services to anyone to whom their client is statutorily able to provide services. Arguably, this is wider than the LSA 2007 provisions. This has enabled local authority legal teams to share and sell services more widely. However, so far this has had a limited impact on the overall market.

The third model is the ABS. This can have some similarities to an in-house model in that the solicitors do not need to own the business. However, there is a regulatory wrapper around the entity in the form of a licence and, as such, the clients enjoy the same insurance, Compensation Fund and LPP as a traditional law firm. The distinction is that the firm can be owned or managed by persons who are not authorised legal professionals.

The new model

The effect of the SRA's reforms is to blur further the distinction between in-house and private practice by creating the possibility of a fourth model. Solicitors will be allowed to

offer legal services to the public when working in an organisation that is not regulated by the SRA as long as they do not provide reserved legal activities. The individual solicitors will continue to be regulated by the SRA. This new, mezzanine, model sits between private practice and in-house teams and has features of both.

The starting point is that an unregulated organisation will be able to take advantage of the solicitor brand to provide a level of assurance to the legal advice they are selling. As ever with regulatory change, it is difficult to be certain about the likely uptake of this new model but the following are possible:

1. in-house legal teams selling their services to other in-house legal teams or the wider public to offset operational costs;
2. brands and other providers add legal advice by solicitors as a natural extension to their existing services without the need for the regulatory cost of becoming an ABS;
3. existing unregulated legal services providers can now overtly provide a solicitor-led service; and
4. new businesses can provide a wider range of services using solicitors without the need to become an ABS.

Any of the above models could partner with a regulated law firm or ABS to effectively sub-contract out the reserved legal activities where necessary during the course of the overall transaction. Given the narrow nature of the reserved legal activities, this may be a small part of the work.

However, these new organisations will not offer the same level of client protection as regulated law firms or ABSs. In particular, they will not be required to have SRA minimum terms cover; they will not be able to hold client money; and will also not have access to the Compensation Fund. Of course, this also means that the overheads of these new law firms will be lower. They are also unlikely to have LPP because the contract for the services is with the non-authorised organisation rather than the individual solicitor.

There is also a further cultural issue. Academic research has suggested that in-house lawyers face particular issues in maintaining an ethical framework in a corporate environment (see, for example, 'Mapping the Moral Compass', a report by the UCL Centre for Ethics and Law www.ucl.ac.uk/laws/law-ethics/cel-news/2016/mapping-the-moral-compass-report). There is therefore a greater risk that solicitors providing legal services to the public in a non-regulated entity may face different pressures. There is a greater potential for a conflict between professional rules binding on the solicitor, such as in relation to conflicts and confidentiality, and the obligations on the entity.

Existing law firms will need to consider whether these changes will affect them. For those where reserved legal activities are a small part of their business, this may be an attractive alternative, although lower overheads need to be balanced by the potential loss of LPP. These changes will also enable non-regulated businesses to bring themselves closer to solicitors' practices in that they can market the fact that they are employing solicitors. This will make the market more competitive.

For most, this will seem like an additional complication in a market that is already changing. It is easy to see why the old Chinese proverb, 'May you live in interesting times', is indeed a curse.

Iain Miller is a partner in Kingsley Napley LLP and general editor of *Cordery on Legal Services*.

BREXIT SPECIAL

Frequently asked questions

After Brexit, will I, as a UK lawyer, still be able to appear in European courts?

There are a number of factors influencing this – in particular access to the Single Market. The right to appear before the European courts and to legal professional privilege (LPP) within the European Union (EU) only accrues to lawyers holding qualifications from the European Economic Area (EEA). The inability of UK lawyers to maintain LPP in the EU would mean that UK lawyers would almost certainly no longer be instructed.

If access to the Single Market is not an option, limited rights may be protected by solicitors requalifying as lawyers in other EU member states (as over 800 English solicitors have already done in Ireland). However, this increases costs in the form of the requirement to pay dual registration fees and possibly maintain dual insurance cover. In addition, it may only be possible to circumvent some establishment rights by setting up subsidiary businesses in other EU countries regulated under the law of another member state.

Will my firm still have to adhere to the upcoming General Data Protection Regulation (GDPR)?

The GDPR was formally adopted on 4 May 2016 and comes into force in the UK on 25 May 2018. As the UK will still be a member of the EU at that point, all organisations will be bound by it.

Current law and the GDPR place a barrier on transferring personal data outside the EEA without adequate protections. If, as seems likely, the UK leaves the EEA, then it will be treated as a third country by the EU for the purposes of data transfers. For companies that work across the EU, or have partners and supply chains across the EU that rely on the free flow of data, this could be a problem.

However, the UK government has made it clear that it intends to implement the GDPR in full and will keep the GDPR after Britain leaves the EU. In addition, the White Paper on Brexit states that a

key aim is to ‘protect the stability of data transfers between EU Member States and the UK’.

What happens to the recognition and enforcement of judgments?

Within the EU there is an almost complete legal framework for the choice of law, jurisdiction and recognition and enforcement of judgments in civil and commercial matters. The primary goal of this legal framework is the facilitation of the recognition and enforcement of judgments reached by member states’ courts to achieve the so-called free movement of judgments. This is achieved by the Brussels I Regulation (Brussels I), which provides for almost automatic recognition and enforcement of judgments.

There are a few alternative approaches that could provide for continued recognition and enforcement of judgments in civil and commercial matters. These are:

- maintaining the Brussels I framework as part of the EU–UK agreement on the new relationship;
- accession to the Lugano Convention on civil and commercial matters; and
- the various conventions agreed at the Hague Conference on Private International Law.

Ideally, solicitors would benefit most by maintaining the application of Brussels I as part of the new EU–UK relationship. Compared with any of the alternatives, Brussels I contains the widest variety of judgments and orders, modernised rules on jurisdiction and the speediest and most efficient enforcement of those judgments.

What are the Law Society’s priorities in the wake of Brexit?

The Law Society has been working with the government to put forward the priorities of the legal services sector for the negotiations. These include:

- continued mutual access for lawyers to practise law and base themselves in the UK and EU member states, and for their clients to have LPP;
- maintaining mutual recognition and enforcement of judgments and respect for choice of jurisdictions clauses across the EU;
- maintaining collaboration in policing, security and criminal justice;

- ensuring legal certainty is maintained throughout the process of withdrawal; and
- ensuring the government works effectively 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.

It’s not yet clear what the future relationship between the EU and UK will be. At the time of writing, negotiations had begun. We may see more concrete positions on big issues, such as an implementation period, the influence of the Court of Justice of the European Union and immigration, over the coming months.

The Law Society has published a report, *Brexit and the Law* (see www.lawsociety.org.uk/support-services/research-trends/brexit-and-the-law-report) and continues to publish useful information on the Law Society website.

While every effort has been made to ensure the accuracy of the information in this article, it does not constitute legal advice and cannot be relied upon as such. The Law Society does not accept any responsibility for liabilities arising as a result of reliance upon the information given.

Any comments relating to the questions featured in this article should be sent to Mrs Anjali Mouelhi, Solicitor Technical Lead, The Law Society, 113 Chancery Lane, London WCA 1PL.

Lawyerline

Lawyerline is the Law Society’s dedicated helpline for client care and complaints handling issues. If you have any questions about complaints handling please telephone Lawyerline on weekdays between 9 am and 5 pm on **0870 606 2588**.

Events

Compliance support forum for in-house lawyers

Dates: 8 August and 25 September 2017, 1.30–5 pm

Venue: The Law Society, 113 Chancery Lane, London WC2A 1PL

Cost: from £125

SRA competency: A2

This forum provides an update on the in-house lawyer's current compliance position with discussions about common conduct and practising conundrums and suggestions for an appropriate and proportionate response. It also includes a review of changes of significance which have been suggested in the SRA's recent 'Looking to the future' consultation.

Risk and compliance autumn conference: a one-stop shop for your compliance needs

Date: 13 September 2017, 9:30 am–5 pm

Venue: Hyatt Regency Birmingham, 2 Bridge Street, Birmingham B1 2JZ

Cost: From £250

SRA competence: A2

The first ever risk and compliance regional conference will examine the current compliance issues affecting firms and legal departments and features a mix of plenary sessions and a choice of concurrent workshops that will help you achieve best practice in compliance.

Aimed at compliance professionals, the sessions will examine all the hot topics of the day including SRA Handbook changes, new AML and data protection regulations, the introduction

of the Solicitors Qualifying Examination, as well as discussions on ethics and cyber security.

Early bird booking fees are available until 15 August 2017.

Anti-money laundering and financial crime conference: AML under the microscope

Date: 22 November 2017, 8:30 am–5.30 pm

Venue: Etc Venues 155 Bishopsgate, Liverpool Street, London EC2M 3YD

Cost: From £250

SRA competence: A2

Last year's sell-out attendance proves the Law Society's anti-money laundering (AML) and financial crime conference is an event not to be missed.

Speakers from the profession, government, supervisory and law enforcement agencies will explain the current areas of high risk and the latest criminal methodologies they are aiming to tackle. Interactive breakout sessions

will give delegates the opportunity to find out about the implications of topical issues for their businesses.

2017 conference themes will focus on:

- amendments to the Fourth Money Laundering Directive;
- Brexit and what it means for AML;
- the latest on financial sanctions, presented by the Office of Financial Sanctions Implementation; and
- aspects of the new regulations that have presented challenges for firms.

This conference brings together policy-makers, representatives of law enforcement agencies, regulators, academics and industry experts to look at the changes ahead, current policy development approaches and other hot topics in financial crime.

For more information about all these events, call 020 7316 5700 or email events@lawsociety.org.uk.

Next issue

The next issue will be published in September. Some of the topics covered will include:

- SRA Handbook: what key changes are coming?
- Education and training: SQE update
- The new money laundering regulations: are you prepared?
- Ethics and regulation
- Article 14.5 of the Accounts Rules: what does it all mean?
- Back to basics: risk registers

Have your say

From time to time we include a section on Frequently Asked Questions and we would like to encourage questions from readers for consideration by the editorial board. We also look forward to publishing readers' letters on appropriate and relevant topics.

Letters and FAQs can be sent by post to The Editor, *Legal Compliance Bulletin*, 113 Chancery Lane, London WC2A 1PL or by email to lcbeditor@lawsociety.org.uk.

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The Law Society