News round-up

(Covers the period 17 November 2021 to 12 January 2022)

The top five

Sir Christopher Bellamy's Criminal Legal Aid Independent Review called for a 15% increase in funding for criminal defence services but concluded the market does not need "radical reform". The review highlighted new possible ways of working", such as through not-for-profit community interest companies and firms specialising in particular kinds of work, supported by block grants from the government. Sir Christopher recommended that the regulators introduce an accreditation scheme for youth advocacy work. More generally, he said the quality of advocacy should be pursued through ongoing work by regulators to be reviewed after publication of LSB's ongoing competence statement of policy. The government said that it would respond to the recommendations by the end of March 2022.

The SRA is consulting on ending the provision of post six-year run-off cover. This would effectively close the Solicitors Indemnity Fund (SIF), which provides the additional cover for closed firms, and hand the money remaining in the fund to the Law Society. Ending run-off insurance would effectively leave the profession with a decision: either ask solicitors to pay more for cover or leave retired practitioners to face any claims themselves. The SRA's forecasts show that, based on the past 10 years, an average of 31 clients are likely to benefit from the SIF every year, with an average £34,600 paid out, including defence costs. The requirement for ongoing funding from the profession is estimated at up to £2.4m a year. The Law Society and Sole Practitioners Group both voiced opposition to the proposals.

Absolute Barrister went into liquidation, with media reports suggesting that clients were left to represent themselves in court. Absolute Barrister was an online direct access barrister service founded in 2013. Its website offered members of the public fixed fee services to deal with unbundled, or discrete parts of their claim, promising to 'save half, sometimes two thirds and even more with longer engagements' on fees. There were media reports that clients had paid thousands in fees with no warning that the firm was in financial difficulties and were suddenly left to represent themselves. The BSB does not regulate the business, but encouraged any clients and barristers affected to contact them.

The BSB's annual report on its regulatory decision-making said there was a 29% increase in reports relating to potential misconduct in the year to 31 March 2021. The reason for this was not clear but was likely a combination of introducing an online reporting form and improving communication about how to report concerns, alongside an increase in multiple reports about the same conduct by a barrister and more reports arising from barristers' conduct on social media. The proportion of cases relating to a barrister's conduct outside their professional life more than doubled to 16.9%. The BSB failed to meet targets for how quickly it dealt with cases, due to the impact of the pandemic and complex matters.

HM Treasury considers 12% of professionals supervised by anti-money laundering authorities are 'at risk' and that efforts should continue to address 'significant deficiencies' in supervision by the 22 legal and accountancy sector supervisors. In its annual report on the topic, HM Treasury commended the SRA for having a stronger understanding of the risks than other supervisory bodies in the legal sector where 'weaknesses in supervision are a significant issue'. The report notes OPBAS has powers to publicly censure a supervisory body or recommend that HM Treasury remove their supervisory powers.

Political developments affecting the justice sector

Steve Reed was appointed Labour's shadow justice secretary following a reshuffle. Emily Thornberry replaced Lord Falconer as shadow attorney general.

The government is consulting on changes to the Human Rights Act, proposing to replace it with a Bill of Rights which it says will provide a proper balance between individuals' rights, personal responsibility and the wider public interest. The plans will give the Supreme Court more ability to interpret human rights law in a UK context while remaining a party to the ECHR. Proposals also include measures to introduce a permission stage, which the government says "will intercept frivolous claims that sap the energy and resource of courts".

The government responded to the justice select committee's report on legal aid. The response included plans for a pilot to test the impact of early legal advice in social welfare law – specifically focusing on housing, debt and welfare benefit issues – on resolving people's problems earlier and the impact this may have on longer-term housing problems.

The government is consulting on proposals for Victims' Law. A Bill is intended to build on the foundations provided by the Victims' Code to substantially improve victims' experiences of the criminal justice system. The consultation asks questions across five key issues: what victims should expect, performance and accountability, the Victim Surcharge, community-based support services and improved advocacy support.

The first global trade deal covering the services sector in nearly 25 years was agreed. The World Trade Organisation's Joint Initiative on Services Domestic Regulation, agreed by 67 WTO members, including the UK and US, aims to create a 'more transparent operating environment for service providers hoping to do business in foreign markets'. It commits parties to common standards for their domestic licensing and qualification procedures, including in the legal profession.

The Law Commission recommended a new first-tier tribunal be introduced in Wales to replace a 'complex and outdated' system. The commission said that the tribunal system in England and Wales evolved haphazardly, with tribunals being created whenever an individual government department thought it was necessary. This has resulted in gaps and inconsistencies in legislation. The proposed first-tier tribunal would be divided into chambers, including property, education, mental health and Welsh language.

MPs called for an inquiry into the "mis-selling scandal" of housing developers pointing buyers to preferred conveyancers, who then did not advise on escalating ground rents. This issue was raised during the second reading of the Ground Rents (Leasehold Properties) Bill, which will reduce the ground rent on new residential long leases where a premium is paid to a peppercorn.

Covid-19

SRA data showed that law firm closures and interventions fell during the pandemic. While the pandemic had produced positive side-effects, such as law firms making use of the flexibility in the Standards & Regulations, and greater adoption of technology, there was also misconduct. This included firms using staff pension contributions to keep themselves afloat, reports of abuse of the furlough scheme and bounce back loans, firms not maintaining their client accounting records because they were offsite, breakdowns in effective supervision because of remote working, and "far more opportunities for cybercrime".

Face-to-face hearings are continuing despite 'Plan B' restrictions, with decisions on remote attendance left to the discretion of judges. A spokesperson for the judiciary said there was not likely to be any change in the operation of the courts, pointing out that lawyers and court staff considered essential to the running of the justice system had been classed as key workers at the height of the pandemic.

MOJ and DCMS issued a report on the impact of the £5.4 million funding to not-for-profit providers of specialist legal advice, through the COVID-19 Specialist Advice Services Scheme (CSASS) grant. 72 organisations received funding and remained operational despite the challenges created by the pandemic. The average size of the grants made was £71,000. Grantees reported increased activity in areas of social welfare.

The Government decided to renew the temporary legislation allowing for the remote witnessing of wills for another two years until 31 January 2024. The extension gives the Law Commission more time to report on potential reforms to the law of wills, including whether to make this change permanent.

Regulatory and wider policy developments

Gerry Walsh became interim CEO at the Law Society following the departure of Paul Tennant at the end of the year. His background is in procurement.

Fiona Rutherford was appointed the new chief executive of legal thinktank Justice. She is currently director of access to justice policy at the Ministry of Justice, and succeeds Andrea Coomber, who has moved to the Howard League for Penal Reform.

John Edwards is the new Information Commissioner. He was previously New Zealand's Privacy Commissioner.

The Law Society of Scotland was authorised to regulate licensed legal services providers (LPs). LPs are like ABSs but must be 51% owned by 'regulated professionals' – this list includes accountants, architects, surveyors, licensed conveyancers and barristers – although this restriction is currently under review. The Scottish Legal Complaints Commission (SLCC) can accept complaints about LPs, but also about the Law Society in its role as approved regulator. Complaints should relate to an action, or failure to act, by the approved regulator which has had an adverse impact on the observance of their regulatory objectives, or allege that the approved regulator has failed to comply with a requirement imposed on it under the 2010 Act, or has failed to adhere to its internal governance arrangements. The function of investigating and determining these complaints has been delegated to the SLCC by Scottish Ministers. The SLCC will share its decision with Scottish Ministers, who, where a complaint is upheld, will decide on any sanctions to be applied.

The SRA consulted on a revised approach to financial penalties for law firms and solicitors. The initial proposals are to increase the maximum fine it can issue to £25,000, take account of the turnover or income of firms and individuals when setting fines, and introduce a schedule of 'fixed penalties' of up to £1,500 to enable lesser issues to be dealt with more easily for all concerned. Unlike for ABS, where SRA has unlimited fining powers, it can only currently issue fines to traditional law firms, or individual solicitors, of up to £2,000. Increasing its fining threshold to £25,000, would mean a broader range of disciplinary matters could be dealt with by the SRA directly, without referral to the SDT. The SRA also considers that financial penalties are now 'unsuitable' for cases involving sexual misconduct.

The SRA said it had no plans to reform the indemnity insurance market despite rising premiums. Speaking at a conference, Paul Philip acknowledged that costs had increased, but said this had not translated into firms collapsing. The SRA would intervene and think about changing the minimum terms and conditions only when it sees market failure and an impact on regulatory objectives like access to justice. He suggested that insurers would argue that solicitors were paying well below market rates for several years and told delegates that firms would 'have to take the rough with the smooth'.

A freedom of information request found the SDT has awarded the SRA a declining amount in costs in recent years. In the past two years the tribunal granted the regulator £3.9m in costs following a prosecution compared with £6m costs awarded in the previous two years. While this could be for a range of reasons, the tribunal awarded the exact amount claimed by the SRA in just two of the last 20 contested hearings. Lawyers representing the SRA claimed for £717,341 in costs in relation to those cases; the SDT approved only £512,000. In some of these cases, costs have been reduced to take account of the personal means of those required to pay them, while there have also been occasions where hearings have concluded much more quickly than had been estimated. But in almost half of the same 20 claims, the tribunal criticised elements of the SRA's costs in its final ruling.

The SRA paid a record £228,000 in costs to a solicitor whose prosecution the SDT found was "improperly brought and pursued". The general starting point is that the SRA is not liable for costs even if a prosecution fails, as it is exercising its functions in the public interest. This can be departed from for good reason, which the SDT said was the case here given the "series of grave errors" made by the regulator. It rejected the SRA's contention that an order would have a 'chilling effect' on its work. In a separate case, sports lawyer Liz Ellen was left to pay her own £534,000 defence costs despite the SDT ruling in her favour.

The SDT found that a trainee solicitor who gave a colleague a Christmas card with sexual references was wrongly rebuked by an SRA adjudicator. It said the conduct as described had been 'reprehensible' but ruled the adjudicator had not considered the relevant issue of whether it realistically touched upon the standing of the profession, as set out in *Beckwith*. It found the rebuke decision had not satisfied this test and should be revoked.

BTAS finalised new sanctions guidance for barristers found to have been involved in sexual misconduct and discrimination. Following consultation, the lower end of the range for "Misconduct of a sexual nature" and for "Discrimination, non-sexual harassment and bullying" was increased to 12 months suspension.

Just under half of new QCs are female, but 62% of female applicants were appointed. This compared to 28% of male applicants. The gap has grown from last year, when 56% of female applicants and 36% of men were appointed. 39 applicants (14% of the total) declared an ethnic origin other than White and 15 were appointed, meaning 38% of applicants from a minority ethnic background were successful, compared with 36% of White applicants. Five of the 101 new QCs appointed were solicitors.

Law firms accounted for a quarter of the Social Mobility Foundation's 2021 employer index. Full-service firm Browne Jacobson was in first place. Several City firms featured in the top-75 list, which also included the Ministry of Justice and Crown Prosecution Service.

There were a series of developments relating to the cyber-attack on Simplify. Group action law firm Keller Lenkner UK is planning a group claim as clients continued to complain about stalled transactions and poor communication from their lawyers. A licensed conveyancer launched a petition calling for a ban on referral fees in conveyancing.

The think tank Chatham House published a report arguing an overhaul of anti-money laundering (AML) legislation – including targeting professional enablers like lawyers – is needed if the UK is to create a "hostile environment for the world's kleptocrats". It said "capable and expensive lawyers (hired by members of transnational elites or their advisers)" defeated or deterred regulators' "often weak and under-resourced attempts" to prosecute politically exposed persons. The authors said that many top-tier law firms are not merely responding to a legitimate demand for legal services but generating that demand through their participation in a vibrant commercial market servicing the proceeds of kleptocracy. Further, "This situation is materially and reputationally damaging for the UK's rule of law and to the UK's professed role as an opponent of international corruption".

The Law Commission concluded there is no need for new legislation on smart contracts because the existing laws of England and Wales can accommodate them. The commission said current principles of contractual interpretation could apply to smart contracts, with only "incremental development" required to the existing test by asking what a term in code would mean to a "reasonable coder".

The Master of the Rolls signalled his intention to revolutionise civil costs and asked the Civil Justice Council to lead a wide-ranging review. He said there is an "immediate need for a holistic consideration of a number of interconnected issues". These include the move from mainly face-to-face hearings to a mixture that also included remote hearings, the move to an entirely digital online justice system for civil, family and tribunal cases, and expansion of the fixed costs regime. He also plans to take another look at cost budgeting given experience of the system and growth of 'money no object litigation'.

The FCA confirmed it will introduce a new Consumer Duty to drive a fundamental shift in industry mindset and is consulting on detailed proposals. The new rules intend to raise industry standards by putting the emphasis on firms to get products and services right in the first place. The rules will require firms to focus on supporting and empowering their customers to make good financial decisions and avoiding foreseeable harm at every stage of the customer relationship. Firms will have to provide consumers with information they can understand, offer products and service that are fit for purpose and provide helpful customer service. The FCA says it will use assertive supervision and its new data led approach to intervene quickly when it identifies practices which do not deliver for consumers.

The OECD published a new framework for people-centred justice. Such a system puts people at the centre and has as its purpose and design the goal of equally meeting the needs of all people of that jurisdiction, by enabling their effective participation and engagement in the process. The framework outlines elements for a government-wide strategy for people-centred justice, inter-agency cooperation and communication, as well as mechanisms to ensure accountability and sustainability. It provides a basis for assessing countries' approaches and processes and aims to support them in implementing access to justice commitments and to facilitate people-centred justice transformation with a view to strengthening the responsiveness of justice systems and the resilience of democracies.

BEIS is consulting on reforms to the regulation of insolvency practitioners and firms. Proposals include establishing a single independent regulator to sit within the Insolvency Service, replacing the current four Recognised Professional Bodies; extending regulation to firms that offer insolvency services, as the current regime only covers individual Insolvency Practitioners; creating a public register of all individuals and firms that offer insolvency services; and creating a system of compensation and redress.

Market developments

Listed law firms performed well in 2021 with four of them seeing their share prices increase by at least 40%. Other listed businesses that either own law firms or are involved in the legal market – such as litigation funders – performed well too, but not to the same extent. The 2021 findings come against the background of a good year for the main market – the FTSE 100 rose 14% – although the AIM 100 only rose marginally (by 2%).

Litigation funder Novitas is exiting the legal services market. The company said it had evaluated its businesses to ensure they will continue to generate long-term value, and the overall profile of Novitas was 'no longer compatible with our long-term strategy and risk appetite, particularly given the recent credit performance of the business'.

Affiniti Finance – a litigation loans company – went into administration after a breakdown in the relationship with its ultimate backer, which is now owed £43m. It lent money to clients via Consumer Credit Act agreements to fund their disbursements in personal injury and financial mis-selling claims.

Market intelligence and research

The SRA published a report on the impact of its Standards and Regulations (STaRs) changes. The number of freelance solicitors has risen by more than a third since April to 413. Freelance solicitors were more likely to be male but less likely to be White than other solicitors. The research found freelance solicitors struggled to find indemnity insurance, with a few being forced to operate without it, having informed their clients. Elsewhere, more than half (54%) of the 3000 solicitors surveyed for the report believed the STaRs changes had given them greater flexibility in the way they worked.

Law Society analysis found that women in the largest law firms earn a fifth less than men on average, and the gender pay gap is 50% wider than for businesses nationally. All businesses with 250 staff or more have to publish gender pay gap information and the Law Society scrutinised the 41 largest law firms submitting data for the April 2020 pay period. It found the discrepancy between salaried women and men based on hourly pay was 20% on average (the highest was 39%), slightly less than in 2017 but still far more than the national pay gap of 14%. The median gap was even higher, at 32%. The report found that those law firms which narrowed the pay gap the most in recent years had certain common features, notably greater transparency and accountability than required by law.

The SRA commissioned the University of Exeter to look at what causes different levels of attainment for ethnic groups in professional assessments. The SRA's annual education and training monitoring reports shows a widely acknowledged and persistent difference in legal qualification outcomes by ethnicity in the UK and other countries. This is often known as an 'attainment gap'. The research, led by Professor Greta Bosch, should help to increase understanding about the factors that are driving this picture and to identify steps that could be taken to make a difference and help to close the attainment gap.

The Criminal Bar Association published findings of a survey of issues experienced by criminal barristers in the Crown Court in 2021. Only one in six criminal barristers said the judiciary make adequate allowance for professionals' caring or childcare responsibilities, with many arguing that the interests of parties and counsel are the Crown Court's lowest priorities. Some also expressed concern that too many judges continued to be inconsiderate in their general approach.

A report by Resolution – which represents family lawyers – laid out a future where lawyers act for both sides of divorces as a matter of course and others exit regulation to offer a new kind of service. The report said it was likely that the family legal market would “segment” to provide different levels of service provided by “a more stratified range of professionals”. It identified a range of drivers reshaping the market, including changed behaviour in consumers, commercial imperatives, changes in the courts system and to legislation and procedures, and advances in technology.

59% of the public trust lawyers to tell the truth, according to the latest IPSOS Mori Veracity Index – an annual survey run since 1983. Trust in lawyers fell by two percentage points since last year. The data suggests that women are more trusting of lawyers than men, as are people with a degree level qualification. The top five most trusted professions are nurses, librarians, doctors, teachers and museum curators.

A report by University of Oxford suggested that AI will have a profound effect on the profession - but in a way that creates new types of roles for human lawyers. It saw a clear division of expertise emerging between lawyers who are involved in the development of AI lawtech as producers, and those who mainly use the technology as consumers. It calls for action by the government to enable access to data for training machine-learning systems.