

News round-up

(Covers the period 5 July to 7 September 2021)

The top five

The Justice Committee called for a complete overhaul of civil and criminal legal aid.

Recommendations included extending the court duty solicitor scheme for housing possession cases to other areas of civil justice where there are significant numbers of litigants in person. The committee also called for significant reform to avoid the “real chance” of a shortage of criminal defence lawyers in the coming years. It also called for an “ambitious and economically viable early advice scheme” and backed a suggestion by JUSTICE that an online platform for legal advice should be created, directing people to legal aid providers.

A 'state of nation' style report by LawtechUK found a high growth rate for investment in UK lawtech companies but that law firms lagged behind other sectors in the amount they invested in research and development, and there was “still a critical lack of digital skills”. Over the past three years the investment growth rate hit 101%, much higher than in sectors such as finance or health. Around 200 UK lawtech companies attracted £674m of private investment to the end of 2020 and employed 7,100 people. The report estimated the “market opportunity” for lawtech at up to £22bn annually, including £11.4bn in unmet demand. The report also called for improvements in data collection and access in the legal sector.

CILEx Regulation and IPReg are having to self-finance their compensation funds.

Historically these arrangements have been provided by an insurance policy underwritten by Royal Sun Alliance, but the company has pulled out of the market, and it has not been possible to find alternative insurers. Both regulators are consulting on the changes to their arrangements. As an interim measure, CILEx Regulation plans to maintain the individual claim cap at £500k but reduce the aggregate claims cap from £2m to £500k. The total annual fund value will be capped at £500k instead of the current £6m. As an interim measure until the end of 2023, IPReg plans to maintain the existing £25k cap per individual claim limit but reduce the aggregate claims cap from £225k per practitioner to £100k per firm. The total fund value will also be capped at £100k instead of the current £2.5m.

BSB analysis showed that minority ethnic barristers are more likely to be subject to internal complaints that it raises. It also found that men were more likely than women to face regulatory action. The work covers complaints about barristers' conduct received between January 2015 and October 2019, when the way in which they were dealt with changed; later this year the BSB will carry out another analysis to cover the last two years. The finding for ethnicity mirrored the findings of the last analysis the BSB carried out in 2016, covering 2012-14, but the gender finding was a new one. The analysis suggests that more years spent as an employed barrister, as a QC and since call are all associated with a decrease in the likelihood of being subject to an internal complaint.

The LSCP published the findings of its annual tracker survey. Consumer satisfaction with the service received was 83% this year, compared to 79% in 2012, and satisfaction with the outcome was up from 84% to 89%. The use of online services more than doubled from 21% in 2012 to 44% in 2021, and during the Covid-19 pandemic more than half of consumers (54%) have accessed online services. Despite the largely positive feedback, the LSCP said it was ‘disappointing’ that consumers still rely on ‘gut feeling’ and subjective recommendations as indicators of quality when choosing a lawyer.

Political developments affecting the justice sector

The UK government formally began negotiations to join the Comprehensive and Progressive Agreement for Trans-Pacific Partnership. The current members are Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam. The agreement has a professional services annex with clauses designed to facilitate the provision of cross-border legal services. While regulators are not bound by the annex, it is expected to address some of the behind-border barriers that currently prevent UK solicitors practising abroad. Specifically, it encourages member countries to allow foreign lawyers to operate on a fly-in, fly-out basis and be integrated fully with domestic lawyers.

The European Commission formally rejected the UK's application to join the Lugano Convention. The Lugano Convention is an international agreement setting out which country's courts may hear cross-border disputes and which decisions can be enforced. Losing the framework means reverting to the national laws of each country to decide which court has jurisdiction over an issue and whether a judgment will be recognised. The ultimate decision on the UK's application to Lugano rests with the European Council, but the Commission must first make a formal proposal to be voted on by the Council.

The Judicial Review and Courts Bill began its passage through Parliament. Original plans to increase use of ouster clauses were dropped, but the Law Society suggested the Bill could effectively spawning a new breed of ouster clause. The Bill ends the practice where parties in immigration and asylum cases refused permission to appeal by both the first-tier and upper tribunal can bring a judicial review case in the high court. Judges will be able to modify quashing orders to delay when a government action is overturned or to determine the government's action unlawful without invalidating any prior actions.

The Nationality and Borders Bill began its passage through Parliament. The Bill empowers tribunals to impose a 'charge' on legal representatives who have 'acted improperly, unreasonably or negligently', resulting in wasted resources. The Law Society said it would drive a wedge between solicitors and their clients by creating a conflict of interest if solicitors are held personally liable for costs for reasons outside of their control.

The Ministry of Justice issued a call for evidence on the best ways to settle family, business and other civil disputes away from the court room. The department is examining whether new technologies, as well as services such as mediation and conciliation, could provide smarter and less adversarial routes for finding resolutions. The evidence gathered will provide the basis for future reforms later in this parliament.

The Ministry of Justice is consulting on plans to overhaul the process for creating lasting powers of attorney (LPA). It examines how technology can be used to reform the process of witnessing, improve access and speed up the service. The consultation also proposes widening the Office of the Public Guardian's legal powers to check identities and stop or delay any registrations that raise concern. It will also look at making the process for objecting to the registration of an LPA simpler to help stop potentially abusive LPAs.

The Ministry of Justice consulted on increasing probate fees. Fees to apply for a grant of probate will increase from £155 and £215 – for probate professionals and individuals respectively – to a flat fee of £273 for all applicants regardless of the size of the estate. The department said that the current system operates at a loss of £85m and places an unfair burden on the taxpayer. It stressed that the proposals will not generate any profit for the government and are 'significantly different' from the fee hike that was scrapped in 2019, which would have seen bereaved families paying up to £6,000 for grants of probate.

The Ministry of Justice confirmed that it will implement Sir Rupert Jackson's blueprint for fixed recoverable costs (FRC) across the fast-track and in most money cases worth up to £100,000. No implementation date has been specified. Lord Wolfson said the current lack of certainty about costs in claims for "relatively low" damages made it difficult for either side to take an informed decision on the appropriate way forward.

BEIS issued a consultation on Reforming Competition and Consumer Policy. Among wide-ranging proposals, it will automatically become unlawful to pay someone to write, or host, a fake review. The CMA will have new powers to enforce consumer law without going to court and fine companies up to 10% global turnover. Other proposals include improving consumer awareness and signposting of ADR, improving the quality and oversight of ADR services and improving take-up of ADR by unregulated businesses.

Government is consulting on changes to the better regulation framework. This includes reviewing the scope for bringing forward a less codified, more common law focused approach to regulation and reviewing the role of regulators. The consultation also considers proposals to change the processes and requirements for new regulations, the scrutiny of regulation, and how the impact of regulation is measured.

DCMS is consulting on digital identity and the governing body which will oversee the rules on digital identity. Online authentication, identity and eligibility solutions could make it easier for people to prove their identity, for example as part of conveyancing. Digital identities will be provided through an ecosystem of private services with powers to check details against official databases such as passport and driving licence records. The providers will be accredited and monitored by a regulatory body with statutory powers.

BEIS published an innovation strategy. Although the focus is on R&D in the sciences, plans include commissioning the Regulatory Horizons Council to consider how best to support innovation through regulation, including looking at whether a set of high-level guiding principles for regulation could apply broadly to any sector of innovation.

Covid-19

The Ministry of Justice announced an extra £2m to help legal advice agencies support people who have fallen on hard times during the pandemic. The money will be invested in the Community Justice Fund, which supports not-for-profit organisations which provide legal help to those who have lost their job, been caught up in rent arrears or build up debt. The funding is to help specialist organisations further invest in technology to allow remote access to services, hire more staff and ensure services remain available.

The Employment Lawyers Association claimed that employment tribunals were reaching 'breaking point'. It suggested that workers are being pressured into settling claims as the number of outstanding single claims in England, Wales and Scotland reached a record high of 45,000 in January 2021, surpassing the previous high of about 36,000 in 2009-10, in the aftermath of the financial crisis. Covid caused a three-month pause of most hearings in spring 2020 as well as a higher volume of disputes.

A report by IRN Research highlighted that the value of the medico-legal market fell by 18% to £650m last year because of Covid reducing the number of new personal injury cases and slowing down those already in progress. It predicted that it would fall by a further 10% in 2021 before recovering next year, although less so for the lower end of the market affected by the new whiplash regime, which would have a "net negative impact" on them.

The Ministry of Justice announced that **judges will have the option to open courtrooms for longer under new ‘temporary operating hours’**, proposing two models that would run alongside normal operating hours in the other courtrooms. The announcement provoked calls for legal and strike action amid concerns of the impact on health and well-being and risks of discrimination against lawyers with caring responsibilities.

Regulatory and wider policy developments

Nick Emmerson was elected as deputy vice president of the Law Society. He takes office on 14 October 2021 – becoming vice president in 2022 and president in 2023. He is a partner and head of capital markets at city law firm Lewis Mathys Emmerson LLP.

BSB figures showed that **ethnic minority Bar professional training course (BPTC) graduates were less significantly likely to secure pupillages** than White graduates with the same BPTC and degree grades. Of students enrolled between 2015 and 2019, just under 77% of White students with an outstanding BPTC grade and first-class university degree found pupillages compared to 64.5% of similarly qualified ethnic minority students. Further, only 10% of students who successfully completed the BPTC last year had started a pupillage by the end of March 2021. This compared to 23% of the 2018/19 cohort who had found a pupillage by the end of March 2020. The BSB said this reflected a fall of more than a third (35%) in pupillage places offered in the 2020 calendar year following Covid-19.

The High Court criticised the BSB following an appeal against decisions it made by an aspiring barrister. Ryan Eve was forced to leave the BPTC because of an administrative error and was denied a waiver by the BSB. The High Court found that the BSB provided ‘no reasoning at all’ when it refused to grant a graduate exemption from the vocational element of his barrister training, describing the decision as ‘unjust and unsustainable’.

The BSB is consulting on the future of the Bar Course Aptitude Test (BCAT). BCAT was introduced in 2013 because the number of students failing the bar training course was deemed too high. Aspiring barristers must pass the test before enrolling on a bar training course. However, just 89 out of the 12,663 candidates (0.7%) who took – or retook – the assessment between 2013 and 2019 have not yet passed leading the BSB to conclude that it is ‘not operating as an effective filter’. The BSB is proposing three options: retaining BCAT in its current form, making the assessment more difficult to pass, or abolishing the test.

BTAS rejected calls to soften sanctions for ‘low level’ sexual misconduct. Some responses to the consultation on new sanctions guidance suggested a year’s suspension would be “disproportionate” for misconduct such as telling a crude joke, wolf-whistling, or sending a message of a sexual nature on social media. BTAS is now working on a final draft of the new guidance that will go out for a further consultation in early September.

ICAEW is consulting on compulsory rules on publishing price and service information after concluding that a voluntary approach had not worked. A page on its website was devoted to transparency and letters to probate firms stressed the need for improvement. ICAEW described the uptake by its members of voluntary guidance as “disappointing”.

The SRA wrote to 8,000 law firms to demand a declaration that their websites are compliant with the transparency rules and display its clickable logo. There continues to be a steady stream of enforcement action against non-compliant firms.

Total payments from the SRA compensation fund rose nearly 40% in value in 2019/20, to £10.4m. However, there was the fewest number of claims in the last six years – just 367 – pointing to the average value of claims rising. A separate annual upholding standards review disclosed there were 130 open investigations into sexual misconduct in the profession, while solicitors under investigation were increasingly citing workplace bullying as a reason for their misconduct. In all, the SRA received 9,642 reports of possible misconduct in 2019/20, 9% lower than the year before and a 16% decrease from 2017/18. The figures showed that men and solicitors from ethnic minority backgrounds continued to feature disproportionately in the SRA's enforcement work, with the numbers largely in line with those from last year.

An academic team led by Professor Richard Moorhead published a working paper on the Post Office Horizon case. It called for further investigations to assess whether lawyers may have committed professional misconduct. The team examined judgments by Mr Justice Fraser in the so-called Bates litigation that pleadings, disclosure, witness statements and submissions may have been handled by lawyers either below expected standards or 'with an eye on disruption and non-cooperation'. Concerns include that the judgments suggest lawyers making inappropriate arguments, evidence was mismanaged or misrepresented, and the use of aggressive tactics which were contrary to civil justice rules with the apparent intention of exhausting the resilience and resources of the claimants.

LawtechUK published a feasibility study and proof of concept for an 'SME online dispute resolution' platform. It would offer a 'one-stop shop' for the various ADR and ODR providers to offer debt recovery and dispute resolution services to SMEs. It would involve a three-tier system, starting with advice and triage, followed by facilitated negotiation – with “suitable computer-assisted support” – and then, if necessary, access to an ADR marketplace to find an appropriate way to conclude the dispute.

The Law Society published a set of ethics principles aimed at developers to guide the development and use of lawtech: compliance, lawfulness, capability, transparency and accountability. Meanwhile, the SRA is considering setting accreditation standards for lawtech products to build confidence among traditional high street firms. It will also consider whether initiatives similar to the FCA's product governance approach could be introduced.

The CityUK published an international strategy for the UK-based financial and related professional services industry aiming to make the UK the leading global financial centre. It said the UK's position as the world's second largest legal market is under threat from key rivals such as Singapore. Key planks of the strategy include liberalising trade with developed and emerging markets, concluding regulatory agreements that support services trade, securing recognition overseas for UK qualifications, making the UK a global hub for financial and professional services data and technology, and investing in the courts and judiciary.

A Civil Justice Council report opened the door to compulsory ADR in civil disputes. The authors concluded that compulsory ADR which is “not disproportionately onerous and does not foreclose the parties' effective access to the court” is lawful. This represents a change from the Court of Appeal's 2004 Halsey ruling that compulsory mediation was not compatible with article 6 of the European Convention on Human Rights. The Master of the Rolls, who commissioned the report, said that the report “opens the door to a significant shift towards earlier resolution”. The report called for more 'systematic' regulation of mediators than is currently provided by the scheme run by the Civil Mediation Council.

NHS Resolution reported the proportion of clinical negligence claims resolved without formal proceedings reached a record high amid greater co-operation between parties. Partly as a result, the amount the NHS paid out in claimant costs fell by 10%. Its annual

report said very few claims associated with the pandemic were lodged in the year to 31 March 2021, although it has made provision for £900m worth eventually arising.

HM Land Registry will test a ‘lawyer certification’ scheme to ensure it can trust application information submitted by conveyancers as part of plans to automate as much casework as possible. The certification pilot appears in its 2021-2024 business plan. Trusting application information is one of four elements identified by Land Registry to enable end-to-end automation of land registration. The other three are digital applications, machine-readable register data and automatable application processing.

HM Land Registry is to pilot the use of qualified electronic signatures (QESs) that do not need to be witnessed, which it said could be a “gamechanger” for conveyancing. The move comes just over a year after it allowed deeds signed electronically to be registered.

Estate agents have called for the introduction of digital property logbooks.

Propertymark, which represents over 17,500 estate and letting agents, said that if the use of logbooks was to become “industry-wide” rather than optional, regulation was essential.

A UN Commission on International Trade Law (UNCITRAL) is considering restrictions on third party litigation funding for treaty-based investor-state arbitrations. Three options have been proposed: prohibition; restricting certain types of litigation funding, e.g. only allowed it when it is necessary to bring a claim; and a regime based around disclosure. The International Legal Finance Association – a new body representing litigation funders – opposes restrictions on funding of these cases claiming that it would weaken the rule of law.

Market developments

A rising number of divorcing couples are choosing private hearings to avoid the delays and uncertainty of the family courts. Experienced lawyers and retired judges are paid to act as private judges and arbitrate disputes over money and children, outside the court system. It has been possible to choose arbitration since 2012, but take-up has been slow. With delays in the family court, demand has soared. According to the Institute of Family Law Arbitrators there were 301 family law arbitrations in eight years up to January 2020 but by June this year the number had risen to 428.

A pioneering ABS owned by four councils declared its intention to become “a national leader for local government law”. LGSS Law has rebranded as Pathfinder Legal Services as it starts “on a new journey”. LGSS Law, which became an ABS in April 2015, brings together the joint legal services departments of councils in North Northamptonshire, West Northamptonshire, Cambridgeshire and Central Bedfordshire.

Leading ‘dispersed’ law firm Setfords set itself the target of having more than 1,000 consultant lawyers on its platform in the next five years. It has around 350 and the firm described itself in its recently published annual results as “the largest, national, full-service, ‘dispersed’ law firm, with consultants in almost every county in England and Wales”.

A virtual legal business based in the UK has launched what it believes to be the first global trade mark search, registration and watching service entirely run by lawyers. 360 Trademarks is part of The 360 Law Group. Businesses can search the database of 360 Trademarks powered by artificial intelligence to identify any competitor trade marks worldwide and then register their trade mark online. The watching service identifies if anyone else is trying to register a customer’s trade mark.

Mishcon de Reya gained 'B Corporation' certification to show it balances purpose with profit. B Corporations, with B standing for 'Benefit', are for-profit businesses that meet "the highest standards of verified social and environmental performance, public transparency, and legal accountability to balance profit and purpose". Bates Wells was the first UK law firm to become a B Corp, in 2015, followed last year by Radiant Law.

Market intelligence and research

A study by Oxford University commissioned by the SRA found **the past year has seen a "step change" in the adoption of legal technology and innovation**, in part as a result of Covid-19. 55% of firms surveyed had improved or increased their use of existing technology, while 48% made changes in ways to deliver services, and 35% introduced new technology. Technology types where planned use exceeded current use focused on client self-service: online portals for matter status updates, interactive websites to generate legal documents and chatbots or virtual assistants. ABSs were significantly more innovative and more likely to adopt legal technology than non-ABSs. Regulatory uncertainty was highlighted as one of the most significant barriers to adopting technology. Specific regulatory barriers included client confidentiality and data protection requirements, and professional indemnity insurance. The authors identified a need to build greater user trust, which they said could be done by a register of providers of unregulated services and technology or greater use of sandboxes. They also called for greater support and co-ordination among government, regulators and tech developers, and for increasing skills and knowledge bases within the sector.

The BSB published new research on consumers' expectations and experience of working with barristers. Clients who are referred by a solicitor to their barrister were generally referred to just one barrister and had little or no involvement in this decision. While most felt this did not impact on the usefulness of the advice given, the research indicated that there are opportunities to involve clients more in this early decision to select a barrister. Most clients were satisfied with the way their barrister dealt with the legal process, but the research also indicated that stress of the legal process itself can reduce dissatisfied clients' motivation and willingness to complain – even if they were aware of how to complain.

The Judicial Diversity Forum published new diversity statistics for the judiciary. Over the three years to 1 April 2021, BAME lawyers were over-represented in applications for judicial appointment but – except mixed ethnicity candidates – had significantly lower recommendation rates than White people. Proportions of ethnic minorities remain lower in senior court roles – 4% for High Court and above – compared to others. The proportion of women on the bench continues to increase – 34% of court judges and half of tribunal judges – but remains lower from the High Court and above (29%). Representation of solicitors fell throughout the judicial selection process, accounting for 28% of applications but only 15% of recommendations for appointment. The research looked at intersectionality finding female solicitors were the largest gender-profession group to apply but the smallest to succeed.

BSB analysis showed the proportion of barristers aged over 50 has tripled over the past 30 years, while the number of pupils has shrunk by almost 30%. While the proportion of female barristers rose to just over 38% from less than 22% over the same period, the BSB said it was concerned that they were "far more likely to leave" than men after the early stages of their career. The proportion of practising barristers from minority ethnic backgrounds almost doubled from 7.8% to 14.8%, with the biggest increases among

barristers from Asian or mixed backgrounds. The number of practising barristers has grown every year, from 9,500 in 1990 to 17,300 in 2020.

An academic analysis of solicitors' disciplinary processes between 1994 and 2015, found that **men were four times more likely than women to appear before the SDT** despite rough gender parity in the profession. It also found that the proportion of solicitors aged over 60 at the tribunal grew sharply from 2008 to 2015, from just under 17% to 29%. The authors suggest that the age profile of respondents is likely to explain in part the gender disparity but said a