

<i>Meeting</i>	OLC Board	<i>Agenda Item No.</i>	7
		<i>Paper No:</i>	103.6
<i>Date of meeting</i>	26/03/20	<i>Time required</i>	10 Minutes

<i>Title</i>	Horizon Scanning – March 2020
<i>Sponsor</i>	Sarah Ritzenthaler – Parliamentary and Policy Officer
<i>Status</i>	OFFICIAL
<i>To be communicated to:</i>	Members and those in attendance

Executive summary
<p>Over the past two months there have been a number of significant changes within key areas of law for the Legal Ombudsman – including residential conveyancing, personal injury and immigration services – as well as developments in the regulatory framework for legal service providers. Of course much of this has been overshadowed by the current COVID-19 pandemic, which is leading to many short-term significant changes in the way legal services are being delivered.</p> <p>In reviewing this horizon scan, it is worth noting the wider trend that lies behind the issues listed. Increasingly, change in the sector is coming from much greater parliamentary and government interest in justice and related matters. If access to justice does become a more prominent element of policy considerations, we are likely to see regulatory attentions shift from promoting competition in the market to serving the needs of the vulnerable and disenfranchised.</p> <p>The OLC Board should consider the extent to which LeO can be an active participant in these conversations at an early stage, and the impact that this could have on its ability to steer its own course in the months and years to come.</p>
Recommendation/action required
Board is asked to NOTE the update and analysis provided.

Impact categories

High – this issue has the potential to alter our day-to-day operations within the next year and may require a direct response.

Medium – this issue could necessitate policy development on an issue; it may affect the environment in which we operate and/or is likely to affect us directly within the next three years.

Horizon Scan – March 2020

Low – this issue may have an effect on our stakeholders but is unlikely to require any action from us and/or the issue is unlikely to develop for five years or more.

Horizon Scan – March 2020

Overview

Likelihood score refers to how probable it is that this impact will hit us (at the level identified). Demand is effect on complaint volumes.

Issue	Impact	This will affect...	Likelihood (1-5)	Demand
COVID-19 coronavirus affecting operation of legal services sector	High	Service levels in legal sector, timeliness of our investigations	5	↑
CMA publishes update on its investigation into leasehold housing	High	Complaint volumes, how we determine poor service	3	↑
SRA begins consultation on immigration advice	Medium	Our jurisdiction and engagement with OISC/SRA	4	→
New whiplash system criticised for reducing access to justice	Medium	Ability to progress claims, access to justice	4	Uncertain
Freelance solicitors encountering challenges to practice	Medium	Composition of legal services sector	3	→
First stage of criminal legal aid review could result in £32-£50 million increase in funding	Medium	Availability of legal advice, access to justice	2	Uncertain
Committee of National Assembly for Wales launches inquiry into the justice system	Low	Potential for separate legal jurisdiction in Wales	3	n/a
CLC moves closer to approving third-party managed accounts	Low	Levels of risk in conveyancing transactions	2	n/a
LSB places even more emphasis on regulatory independence in new consultation	Low	Regulatory landscape in legal services sector	4	n/a
Speakers at PLE event call for more rounded services to increase legal capability	Low	Public understanding of legal rights; access to justice	1	→
Financial services regulatory framework to be refreshed	Low	Government perspective on regulatory frameworks	2	n/a

Details

➤ *High impact*

COVID-19 coronavirus affecting operation of legal services sector

The current pandemic of coronavirus (COVID-19) is having huge impacts on every area of our lives in the UK and beyond – and the legal sector is no different. The Law Society has now issued updated guidance on conveyancing, as many issues have arisen that are complicating and delaying transactions. These include requests for properties to be decontaminated; refusal to vacate on completion because the seller is in self-isolation; banking system disruption; removal companies being reluctant to enter properties; and difficulties obtaining witnesses or physical survey valuations.

Moreover, while HMCTS has confirmed that courts and tribunals are operating as normal, the Lord Chief Justice has stated that it is ‘not realistic’ to expect business as usual. Although anyone due to attend court who is experiencing symptoms has been asked to stay away, the current HMCTS stance has been met with resistance from concerned lawyers and court staff. In some circumstances audio and video links are being considered, but especially in the family court, where both parties are required to attend hearing in person even if they live abroad, it remains to be seen how cases will proceed. It is likely that legislation will shortly be brought forward to deal with some of these uncertainties.

There is also a more general potential for meetings between lawyers and clients to be cancelled or delayed, especially as more and more firms encourage their staff to work from home. Increases in sickness absence may mean that firms are less able to meet deadlines, respond to complaints, or progress files quickly. There may be issues with obtaining files from storage, meaning that firms are not able to meet LeO’s deadlines either. Overall, coronavirus could potentially seriously affect the service lawyers can provide to their clients at this time, as well as slowing down our own processes.

It is worth also noting that several other ombudsman schemes have started considering how they might begin altering expectations of providers in their respective jurisdictions in light of the obstacles coronavirus is likely to bring.

CMA publishes update on its investigation into leasehold housing

Following the launch of its investigation into the leasehold housing market in June 2019, the CMA has now produced an [interim ‘update report’](#) on its findings so far. This states that it has found ‘areas of significant concern’ including evidence of potential mis-selling and unfair contract terms, regarding ground rents, freehold costs, and unreasonable other fees. The CMA is now set to launch enforcement action against any companies it believes have broken consumer protection law. It will also support changes to the law in this area.

The report says only a little specifically regarding legal service providers, noting that to a limited extent, legal advice should act as a kind of check and balance. The CMA is ‘still considering the way in which legal advice was provided’ but notes that it is not the role of a solicitor (or conveyancer) to advise on the merits of a purchase. There is some concern expressed regarding the relationship between developers and panel solicitors, and where this might have affected the advice given to clients about the nature of leasehold purchases. This echoes one of the major issues raised before the Housing, Communities and Local Government Select Committee last year, and may have implications for us regarding misconduct referrals.

The final outcome of the investigation is likely to have an effect on LeO, both in that it may mean an upswing in demand, and also that it may affect the decisions we make on these cases. The update has been reported on in several national newspapers, including the *Daily Mail*, making it more likely that members of the public will be aware of these developments.

➤ *Medium impact*

SRA begins consultation on immigration advice

On 11 March, the Solicitors Regulation Authority (SRA) published a new [consultation](#) on the rules governing solicitors offering immigration services under the new Standards and Regulations (StaRs). This follows several months of discussion with the Office of the Immigration Services Commissioner (OISC), during which time immigration solicitors have been working under transitional arrangements. A problem arose at the eleventh hour regarding regulation of solicitors who could choose to work in entities not authorised by the SRA from November 2019. These proposals seek to address this issue by requiring solicitors seeking to work in OISC entities to register with the organisation as well as being authorised by the SRA. This will mean that OISC takes precedence as their lead regulator when they are doing immigration advice work.

As part of the new rules pertain to which complaints schemes will apply in different circumstances, this will affect our jurisdiction and the approach we take to investigating complaints made about solicitors who choose to work in this way. The consultation closes on 22 April and we will be submitting a short response.

New whiplash system criticised for reducing access to justice

After passing the Civil Liability Act 2018, the government set an implementation deadline of April 2020 for the reforms within it to come into effect. This has now been adjusted to August 2020, to allow more time to ensure that work is done 'right rather than hastily'. Reforms include creating an online portal for low-level personal injury claims (up to £5000) while removing the opportunity to recover legal costs in the event of a successful claim.

Concerns have been raised by many stakeholders over the lifetime of this legislation. Most recently, personal injury lawyers have indicated that the new online process will only allow claimants to accept or reject an insurer's account of events and its offer, rather than being able to question its findings. While the government has allowed for contested claims to be directed to the small claims court, it is argued that this is expensive and difficult to navigate for members of the public, and with no financial support for legal representation, access to justice could be limited.

The impact of the reforms on LeO remains unclear. Wherever access to legal representation becomes more expensive, we can expect fewer people to use lawyers (or at least, regulated lawyers) which would mean our demand levels would drop. However, if there is no opportunity to contest claims via the free online portal, we may see more complaints about costs if people are driven to using legal representatives in order to navigate the small claims court.

At the same time, MoJ has launched a new paperless system for personal injury claims involving one claimant and one defendant. This follows similar moves in allowing divorce and probate applications to be submitted online, and could result in a smoother experience for claimants – and potentially fewer complaints in these cases.

Freelance solicitors encountering challenges to practice

After the launch of the SRA's Standards and Regulations in November 2019, solicitors have been able to choose to work on a freelance-style basis – but so far it has been less than straightforward for them to begin doing so. Initially there were no insurers willing to take on freelancers, on the basis of the lack of clarity around 'adequate and appropriate' insurance. Although one insurance intermediary has now launched a product that offers indemnity cover, this has not entirely removed the risk for freelancers. In fact, only of the 71 solicitors who have been authorised to work on a freelance basis, on 18 have been able to secure indemnity insurance for reserved activities. SRA representatives have acknowledged that the trajectory for this new model is likely to be slow, as the market works to understand its full implications.

One of the major barriers identified has been the restriction on employing staff to support operations, as many potential freelancers would ideally like to retain an administrative function. This may end up being resolved through the proliferation of chambers-style setups, in which clerks are contracted rather than employed; an opportunity previously endorsed by the SRA when the new rules were first introduced.

For LeO, all of this means that any impact we might have seen of solicitors working in new ways is likely to be further delayed. It is still unclear whether this will have a positive or negative effect on complaints, and so we will continue to monitor the situation as it develops.

First stage of criminal legal aid review could result in £32-£50 million increase in funding

The Ministry of Justice (MoJ) has launched a [consultation](#) proposing a variety of changes to the way legal aid fees are paid to criminal advocates and solicitors, with the aim of making criminal legal aid work more sustainable for the future. This follows in-depth engagement with many members of the profession, and the proposals focus on five key areas that were identified as needing rapid action. This is the first in a series of steps to deliver the aims of the criminal legal aid review that was announced in December 2018.

In response to the announcement, the Law Society has publicly decried the measures as 'woefully inadequate', saying that they must be overhauled to have any real impact on the 'deepening crisis' in the criminal justice sector. It points out that there are increasingly large areas of the country where there are no criminal defence solicitors available, as this is no longer a sustainable career choice for newly qualified solicitors.

The consultation closes on 27 March 2020, after which the government will respond with final plans.

➤ *Low impact*

Committee of National Assembly for Wales launches inquiry into the justice system

Following the publication of the final report of the Commission on Justice in Wales, the Legislation, Justice and Constitution Committee of the National Assembly for Wales has announced that it will be [conducting an inquiry](#) into the division of justice responsibilities between Westminster and Cardiff. It will also consider how the justice process can be simplified and made more accessible to all, and will seek best practice from how things work in Scotland and Northern Ireland.

The Chair of the Committee previously held the post of Counsel General for Wales in the Welsh Government, and met with representatives from LeO in late 2017.

CLC likely to begin approving third-party managed accounts

The CLC is currently consulting on changes to its accounts rules which include allowing certain firms to use a third party managed account (TPMA) to hold client money, when authorised to do so by the CLC. Many of the frontline regulators allow this to happen already, or have no specific rules prohibiting firms from using a TPMA. Of course in the CLC's case, the sums of client money that firms receive would be (on average) much higher, due to the nature of conveyancing services. The CLC has advocated for this as a way of reducing the risk of holding client money, although it does not absolve firms of any responsibility. The draft guidance highlights that TPMAs should be used only where it is appropriate in the circumstances of each case, and that firms must ensure their client understands the protections available to them when using a TPMA.

While this is unlikely to have a direct impact on demand at LeO, it may well factor into our decision-making where a complaint is made about a CLC firm using a TPMA. The consultation closes on 25 March 2020.

LSB places even more emphasis on regulatory independence in new consultation

Following several years of consulting on and altering the Internal Governance Rules for the Approved Regulators, the LSB has now announced that it will engage in ongoing monitoring of regulatory independence as part of its wider monitoring of regulators' performance. This could mean that the representative bodies would meet regularly with the LSB throughout the year as well as frontline regulators, in order to ensure the relationships are managed effectively. Although the LSB has launched a [consultation](#) on this new approach, it is only seeking views on the clarity of these measures, rather than whether independence should be monitored at all.

In a recent article appearing in *The Times*, Helen Phillips, Chair of the LSB, suggested that the LSB would need to be 'a bit wise' in reviewing any reform of funding arrangements. She cites the importance of the 'public interest function' of representative bodies' work, which may help to explain why the LSB is interested in reviewing spending on 'permitted purposes' at the moment.

This comes in the context of much wider discussion of reform of the Legal Services Act 2007 and focus on reducing the number of legal service regulators. At a meeting of the Westminster Legal Policy Forum on 25 February, several stakeholders (including a member of the House of Lords) indicated that the time had now come to simplify the legal regulatory regime. With Professor Mayson's final report due this month and the CMA's confirmation that it will review progress on the recommendations in its 2016 legal service market study, this year looks set to be an important one in defining the future of the legal services sector.

Speakers at PLE event call for more rounded services to increase legal capability

The [complete findings](#) of the LSB and Law Society's largest ever legal needs survey have now been published, and were discussed by major stakeholders at an event held in London at the start of Justice Week 2020. The focus of this was whether public legal education (PLE) really is the answer to the challenge of poor access to justice, and how this might work in practice. While the conversations were broad and it was acknowledged that a holistic approach to those in need of support, few answers were given as to how the legal services sector should move forward on these issues, and who should spearhead these efforts. It will be important to see how the LSB drives its PLE policy objectives forwards in the next few years, and whether LeO can contribute to addressing what will necessarily be a vast challenge for the future.

Financial services regulatory framework to be refreshed

Following a call for evidence that ended late last year, HM Treasury have now published a [response and forward plan](#) for the regulation of financial services in the UK. This is interesting because it specifically considers how coordination amongst a range of regulators should be improved, stating that ‘the division of responsibilities between several regulatory bodies risks creating challenges for regulated firms’. It cites burdensome costs among the difficulties experienced by firms in the financial services market, as well as duplication and inconsistency of regulatory obligations.

Although of course the comparison is not exact, it is useful to understand the thinking behind regulatory structures in other sectors, especially where the challenges are some we might recognise in legal services. This government response could well give some indication of the priorities and issues for consideration if reform of the legal services sector is pursued in the next five years.

Appointments, departures and awards

Cafcass: Sally Cheshire CBE appointed as Interim Chair *until 30 June 2020 while a recruitment campaign is carried out to fill the position on a permanent basis. Sally Cheshire has been a member of Cafcass since May 2018, and was appointed as Deputy Chair in February 2019. She is also Chair of the Human Fertilisation and Embryology Authority (HFEA), and of Health Education England (North). Sally was a Board Member of the regional adoption agency ‘Adoption Counts’, and an independent member of adoption panels in the North West. She previously worked for Deloitte for some years.*