

<i>Meeting</i>	OLC Board	<i>Agenda Item No.</i>	10
		<i>Paper No.</i>	93.9
<i>Date of meeting</i>	28 January 2019	<i>Time required</i>	10 Minutes

<i>Title</i>	<b>Horizon Scanning</b>
<i>Sponsor</i>	Rob Powell – Chief Executive Officer
<i>Status</i>	OFFICIAL
<i>To be communicated to:</i>	Members and those in attendance

<b>Executive summary</b>
<p>January's horizon scan digs a little deeper into a number of big issues that arose in late 2018. While many of these have been featured in previous horizon scanning papers, they have been included again here due to important developments that have occurred in the last couple of months. These items include transparency requirements, Brexit, independence of regulators, and the Civil Liability Act.</p> <p>Many of the items below go into greater detail about a number of small changes/matters of note under a broad heading, to demonstrate the cumulative impact that might otherwise be missed if looking at any one development in isolation.</p> <p>Please note that a high impact rating for a given issue may represent a positive opportunity rather than (or as well as) a threat to the Legal Ombudsman.</p>
<b>Recommendation/action required</b>
Board is asked to <b>NOTE</b> 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.

**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.

## 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...	Timeframe	Likelihood (1-5)	Demand
Transparency requirements: monitoring, compliance and risk scoring	High	Numbers of complaints signposted; cooperation of providers with our process	Dec 18 onwards	5	↑
NDA's continue to dominate headlines about legal profession	High	Misconduct referrals; trust in legal professionals	Nov 18 onwards	2	n/a
Concern from sector about Civil Liability Act and LiP portal	Medium	Numbers of personal injury claims; access to justice	Dec 2018 – Apr 2020	3	↓
Regulation shakeup and changes in the operating models of legal providers	Medium	Numbers of legal providers; complaint volumes; availability of legal advice	Dec 18 onwards	3	↑
Brexit, legal services and consumer rights	Medium	Our jurisdiction; confidence in UK legal sector	Uncertain	2	Uncertain
SRA publishes report into use of AI in legal services	Medium	How we consider complaints	Dec 2018	5	↑
Debates continue over the independence of regulators	Low	Public confidence in legal regulation and the rule of law	Jan 2019	2	→
Developments in housing/property <sup>(1)</sup> and wills/probate <sup>(2)</sup>	Low	Conveyancing and probate complaints; our jurisdiction	2018-19	4	(1) ↓ (2) ↑
UN Special Rapporteur presents report on the role of bar associations	Low	International perception of the UK legal profession	Oct 2018	1	→

## Details

➤ *High impact*

### **Transparency requirements: monitoring, compliance and risk scoring**

With the new price and service transparency rules now in force for both the Solicitors Regulation Authority (SRA) and the Council for Licensed Conveyancers (CLC), we are slowly beginning to see commentary emerging on how compliance will be enforced for those who continue to resist the changes. The SRA has reported that it will update its risk score system to take account of breaches of compliance, including not appropriately signposting to LeO, and not cooperating with our scheme. In the short term, regulators are committed to working collaboratively with firms, but the new scoring system makes it clear that in the long run, failure to comply will trigger serious sanctions.

Meanwhile other regulators are moving along in establishing their own rules. The Bar Standards Board (BSB) and the Intellectual Property Regulation Board (IPReg) are in the process of consulting on the final version of transparency rules for their section of the profession. However, the BSB has come in for some criticism by the Legal Services Consumer Panel (LSCP) which suggests that these new rules are 'unlikely to go far enough'. The LSCP wishes to see greater emphasis placed on improving the communication skills of barristers when they are interacting with consumers. At the same time, the Legal Services Board (LSB) has indicated that it will be closely watching the outcomes of voluntary approaches which some smaller regulators have chosen to adopt.

While there are a number of articles emerging in the legal press urging service providers to take advantage of the new transparency requirements, there is still marked resistance amongst the profession. In particular, objections relate to the perceived disparity between the standards placed on providers and those adhered to by the SRA.

### **NDA's continue to dominate headlines about legal profession**

One of the major stories of 2018 shows no signs of disappearing as we enter the New Year. In November, the parliamentary Women and Equalities Committee [launched an inquiry](#) into the use of non-disclosure agreements (NDAs) and the government subsequently 'strongly' encouraged legal regulators to take action over lawyers who advise on potentially unenforceable provisions within them. The Law Society has very recently issued a practice note on the issue, indicating that where two or more mandatory principles come into conflict, the public interest should always prevail.

It is crucial that LeO is mindful of this issue as we play a key role in referring cases where misconduct has potentially occurred, including where we see evidence that might point to the inappropriate drafting of an NDA. Also, it is pertinent to the levels of public trust in the legal profession, and could result in an increase in initial contacts at the front end of our business process as the public becomes more aware of the issue.

*There was considerable debate about the appropriate impact score for this item. While it is unlikely to have a significant impact on operational delivery/demand, there is considerable reputational risk for LeO in respect of our role in referring cases of potential misconduct.*

➤ *Medium impact*

## **Concern from sector about Civil Liability Act and LiP portal**

Following Royal Assent of the Civil Liability Act on 20 December 2018, concerns are already being voiced about the readiness of the government's online Litigant-in-Person portal. This solution is intended to address the potential for increased costs for claimants in personal injury cases – a consequence of the Act's provisions to reduce costs for insurers.

The original plans for the portal set out a deadline of April 2020 for full implementation, with a six-month testing period preceding this. Latest reports suggest that the project 'has not moved' and that civil servants are still waiting on answers from ministers about how they can progress. This has major implications for the ability of those falling under the new, higher small claims limit to bring matters before a court, and could reduce access to justice.

## **Regulation shakeup and changes in the operating models of legal providers**

A [recent report](#) in the mainstream press looked at the numbers of lawyers seeking to move to in-house employment, rather than working in traditional law firms. The impact of this on our operations might be quite subtle at first, but if employment in the private legal advice sector begins to shrink due to the attractiveness of in-house commercial work, we might also see our complaint levels drop. However, it could instead have the reverse effect: as more commercial legal advice goes in-house, private companies may have to look at boosting earnings through increased investment in consumer advice to keep turnover steady. Greater pressure on a relatively smaller number of fee-earners could then produce an increase in complaints.

At the same time, the Civil Justice Council has declared that the pro bono/voluntary advice sector may not be viable soon due to legal aid cuts, such that it may collapse altogether. This comes in the context of the delayed publication of the findings of MoJ's LASPO review, placing pressure on the department to find more funding for legal aid. If the sector is not able to meet increased demand, we may see a rise in consumers going to unregulated providers who fall outside of our jurisdiction.

Meanwhile the [Lord Chancellor has heralded the shakeup](#) caused by the last of the Big Four accountancy firms entering the legal services market, suggesting that it means 'additional choice for consumers'. This is hailed as a success of the Legal Services Act in promoting innovation and competition, although the LSB has recently reported that innovation is in fact stagnating in the legal services market, which is consistent with falling levels of innovation for all businesses across the UK at the moment.

It will be important for LeO to remain abreast of these changes as they develop, ensuring that our model is flexible enough to deal with new relationships and technologies that will continue to emerge, even if this continues to happen at a slower rate.

## **Brexit, legal services and consumer rights**

Brexit is of course never far from newspaper headlines. In context of a parliamentary debate on the European Withdrawal Act on 9 January, legal services was discussed by Alberto Costa MP, who was member of the Justice Select Committee until May 2017. There was also a Westminster Hall debate about the impact of leaving the EU on legal services in late November. As one of the most lucrative exports of the UK, professional services are

increasingly attracting attention in the context of the ongoing discussions about Brexit, and it is clearly a crucial time for ensuring that there is national and international confidence in the standing of UK lawyers.

Furthermore, the government have recently issued [guidance on consumer rights after Brexit](#), providing scenarios for an agreed deal and no deal. This mentions that when purchasing goods and services from an EU country, consumers may not be able to rely on ADR services in the event of no deal. At the moment, it is still unclear as to whether our ability to consider complaints about Registered European Lawyers (RELs) might be affected.

The nature of the legal risks involved in Brexit are constantly evolving, and for the time being we are seeing an increase in demand for legal advice because of this. We are also seeing a number of MoJ staff being seconded across to other departments for contingency planning, meaning that any work on updating our Scheme Rules or the Legal Services Act is likely to be delayed still further. This period of uncertainty appears set to continue.

### **SRA publishes report into use of AI in legal services**

On 11 December, the SRA published a report on current use and advantages of advanced technology in legal services, and the ethical and regulatory implications of artificial intelligence (AI). This comes after the announcement late last year that the University of Oxford has been given £1.2million to research the benefits of AI in the legal sector.

The report seeks to educate law firms on opportunities and risks of AI, which the SRA suggests could increase business efficiency, add £630bn to the economy by 2035, and create 14.9m new jobs by 2027. According to the SRA, around 40 of the 100 biggest UK firms are already using AI systems on active files and approximately 30 firms are currently piloting systems. In view of this, it is becoming increasingly crucial for LeO to address the challenges this may bring to our consideration of complaints, and how we can adapt to the changing legal services market.

➤ *Low impact*

### **Debate continues over independence of regulators**

The value of independence is being debated in a number of interesting ways at the moment. Firstly, the SRA is coming under some scrutiny for the contents of correspondence between their organisation and the Ministry of Defence (MoD) regarding disciplinary proceedings against Leigh Day. The *Law Society Gazette* reports that the LSB has called into question the handling of the case, as communications revealed that the SRA was ‘lobbying the MoD to back reform of the disciplinary process, when claims against the same government department lay at the heart of the Leigh Day prosecution’.

Meanwhile, the incoming Chair of the Bar Council has warned against revising the internal governance rules (IGR) in the way the LSB has proposed in its current consultation. He cites an inability to have input on the matter of the practising certificate fee among other things as ‘unhelpful’ and warns that reforms may lead to disputes ‘that simply do not exist at the moment’. This viewpoint is very much aligned with the thinking of the UN Special Rapporteur on the Independence of Judges and Lawyers, who has recently called for more involvement of legal professionals in regulation of the sector (more on this below).

## **Developments in housing/property and wills/probate**

Recent research has found that many people are unhappy about ‘hidden’ property fees when buying a new home. The study has found that homebuyers end up spending more than £8,000 in fees they did not expect when moving house. There should be some improvement following the introduction of mandatory price transparency by the CLC and SRA, although it remains to be seen whether this will translate to fewer cost-related complaints about conveyancing work coming through to LeO.

In the meantime, the role of (chief) Housing Ombudsman is being advertised. The service looks at disputes involving the tenants and leaseholders of social landlords and some private landlords and letting agents. The position is of particular significance at the moment with continuing media focus on the leasehold scandal and the government’s approach to helping leaseholders with burdensome contracts.

There has also been a great deal of growth and change in wills and probate over the last year, and there is likely to be more of this in 2019. The outcome of the Law Commission’s consultation on reforming the laws around will-writing is due to be published by the end of this year, which may bring some radical changes to the law on wills. It is always crucial to watch movement in this sector, as one of the biggest areas of operation for unregulated providers.

Moreover, secondary legislation which will introduce a new structure of probate fees from April has progressed through the Houses of Parliament. The changes will mean that probate fees are variable based on the estate value, with costs ranging from £250 to £6,000. The extra funds will be put towards the national courts and tribunal services, and any estates valued at less than £50,000 will now no longer attract a fee at all. The current proposal has received much criticism, including a ‘motion to regret’ from the House of Lords.

## **UN Special Rapporteur publishes report on the role of bar associations**

Although largely aimed at countries where the legal system is not nearly as developed as our own, the UN Special Rapporteur on the Independence of Judges and Lawyers has published an interesting [report](#) on the essential role that bar associations play in a democratic society. The report actually considers the legal profession in a wider frame, and particularly as the Law Society of England and Wales provided a submission to the report, it is important to look at the recommendations with regard to the reviews of legal regulation that are happening in the various jurisdictions within the UK.

The main recommendations of interest are that (a) the government should have no involvement in appointing members of professional bodies (which still happens here), (b) representative and regulatory functions should be interdependent, and (c) a single professional association for the entire legal profession is preferable. Especially as the UK is actively looking to promote its legal framework even further internationally, it is worth taking note of how our system holds up against standards in other societies.

## **New appointments**

### **Leasehold Advisory Service: Wanda Goldwag appointed as interim Chair (18 months)**

*LEASE is an executive, non-statutory non-departmental public body which provides initial, impartial advice to leaseholders and park homes owners in England and Wales.*