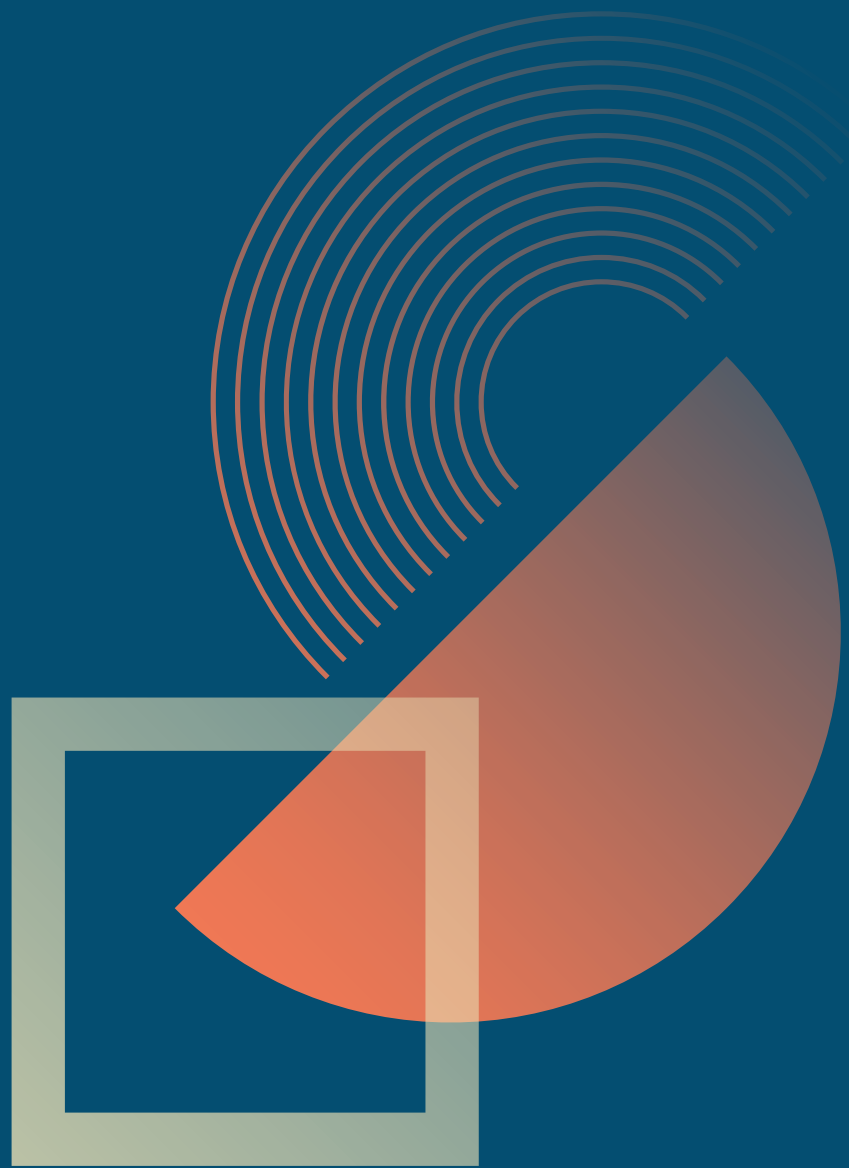




The Law  
Society



# 21st Century Justice Project

Interim report

April 2024

# Foreword

Last year the Law Society launched its 21st Century Justice project with the aim of working in collaboration with our members and stakeholders to develop policy proposals that increase access to justice for small businesses and individuals on low incomes.

It has therefore been heartening to see the wide range of responses received to our Green Paper consultation since its publication in October 2023. Whether listening at workshops with local Law Societies, hearing from organisations representing legal services consumers or meeting with stakeholders, I have been struck by the willingness of our members and the wider justice community to engage in this work and help us shape our thinking. Over the last few months, we have been taking the time to consider their feedback, to continue our engagement, and to commission additional research and analysis to further develop our proposals.

Meanwhile, the wider policy context has continued to evolve. In November 2023, the Ministry of Justice set out its new vision of a digital justice system, which will be driven forward by the new Online Procedure Rules Committee. In February 2024, the government<sup>1</sup> published a response to its AI White Paper, setting out a pro-innovation, cross-sectoral approach to regulation and calling on legal services regulators to publish their own strategic approach to AI in the coming months. And in April our Legal Needs Survey – carried out in collaboration with the Legal Services Board – showed that unmet legal need is rising.

What is clear is that the Covid-19 pandemic, digitalisation and AI have driven a fundamental change in both legal services and the justice system, and in the way consumers connect and engage with them. Through this work we want to support our members to adapt and evolve so that they can continue to provide the legal advice people need. And we want to ensure that

consumers have appropriate levels of protection and redress as they seek to resolve their issues.

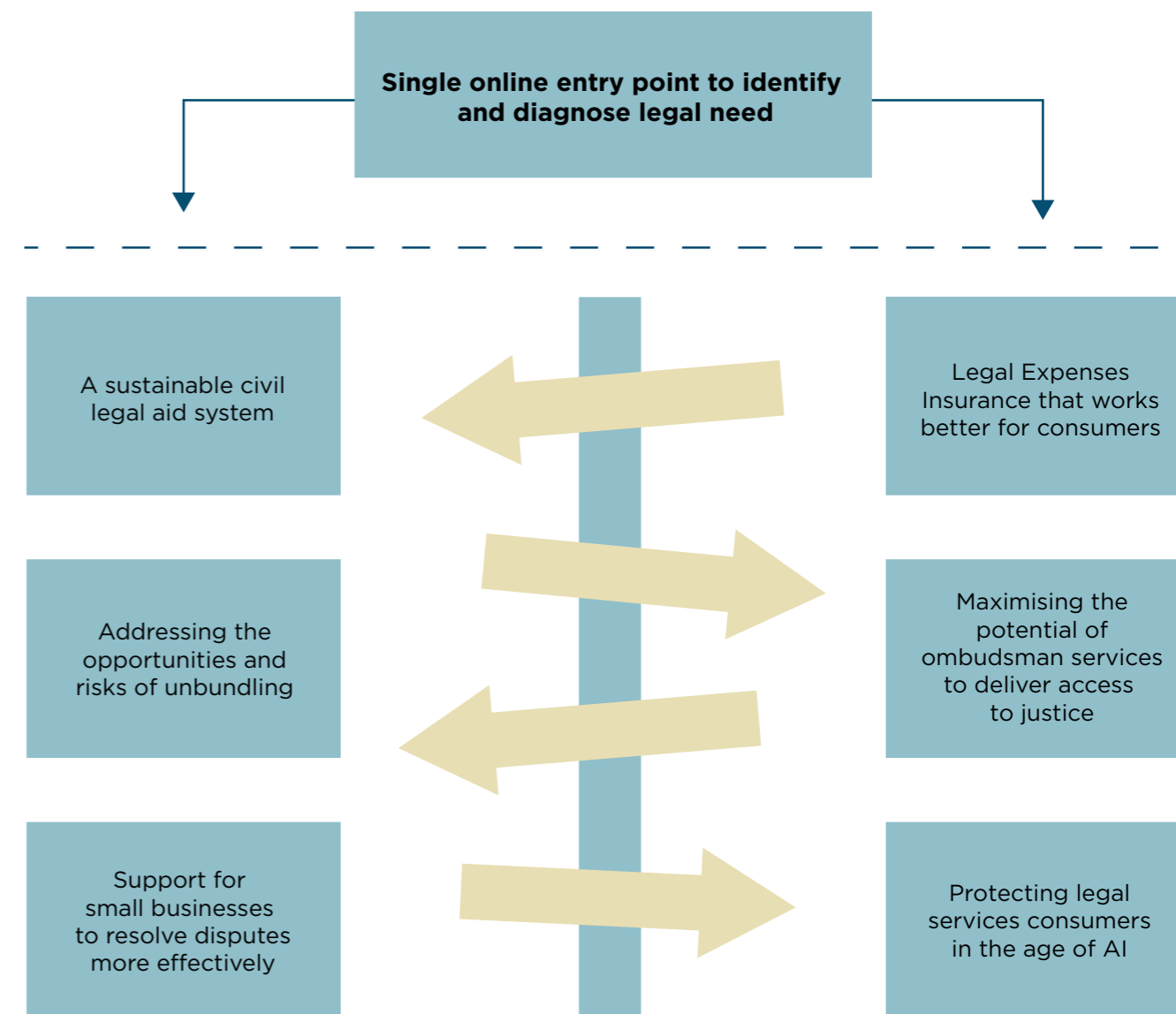
This paper sets out a new iteration of the policy proposals contained in the Green Paper, where the Law Society intends to lead over the coming months, and where we think others need to lead to deliver our vision of a 21st Century Justice system. With a general election expected this year, all political parties must urgently consider what they will do to protect and enhance a civil justice system that is the cornerstone of the rule of law, a healthy economy and fair society. These proposals offer an achievable, affordable set of reforms which could be delivered incrementally to achieve that aim and narrow the justice gap.

With the support of our Advisory Group, we are looking forward to driving forward our vision over the coming year. We hope you will continue with us on the journey.



**Richard Atkinson**  
Chair of the 21st Century Justice Advisory Group

# A plan to narrow the justice gap



<sup>1</sup> References to 'the government' throughout the paper refer to the UK government.

# A plan to narrow the justice gap<sup>2</sup>

One trusted entry point for those with a legal need	A sustainable civil legal aid system	Legal expenses insurance (LEI) that works better for consumers	Addressing the risks and opportunities of unbundling	Maximising the potential of ombudsman schemes to deliver access to justice	Support for small businesses to resolve disputes more effectively	Protecting legal services consumers in the age of AI
<p><b>The Law Society will:</b></p> <ul style="list-style-type: none"> <li>Continue to make the case for a holistic ‘Solutions Explorer’.</li> <li>Convene regulators and consumer organisations to discuss how to safeguard and protect legal services consumers in a growing landscape of unregulated providers in the pre-litigation space.</li> </ul> <p><b>The Ministry of Justice should:</b></p> <ul style="list-style-type: none"> <li>Work with family law solicitors to ensure the online information and guidance tool for family law announced in the Spring budget is co-designed with legal services consumers and the profession and meets the needs of vulnerable users.</li> <li>Pilot and evaluate an additional online information and guidance tool in housing or small money claims.</li> <li>Work with the Law Society to develop criteria to determine when a service or provider should be listed on online information and guidance tools.</li> <li>Consider how data gathered through common data standards being developed by the Online Procedure Rules Committee can be analysed to help identify gaps in the provision of legal services.</li> </ul>	<p><b>The Law Society will:</b></p> <ul style="list-style-type: none"> <li>Commission research looking at how The Netherlands’ ‘High Trust’ model could be applied in England and Wales.</li> <li>Continue to work with the Ministry of Justice on its pilot for health-justice partnerships, with a view to further building the evidence base.</li> <li>Work with civil legal aid providers to consider how early advice for civil legal aid could link in with online information and guidance tools.</li> </ul> <p><b>The Legal Aid Agency should:</b></p> <ul style="list-style-type: none"> <li>Remove the contractual requirements around office space and the percentage of clients that can be assisted remotely.</li> </ul> <p><b>The Ministry of Justice should:</b></p> <ul style="list-style-type: none"> <li>Create training grant schemes that match minimum salary levels and include student debt forgiveness.</li> </ul>	<p><b>The Law Society will:</b></p> <ul style="list-style-type: none"> <li>Convene a cross-industry Working Group to explore ways to improve outcomes for existing LEI policyholders.</li> <li>Work with our members and insurers to develop joint-branded guidance for solicitors and consumers to improve awareness and understanding of LEI.</li> <li>Ensure members are aware of their obligations in relation to discussions with clients around LEI and promote best practice.</li> </ul> <p><b>The Financial Conduct Authority should:</b></p> <ul style="list-style-type: none"> <li>Add data on helpline use and outcomes to its ‘value measures’ to build evidence on how helplines included in legal expenses insurance are delivering for consumers and to better understand gaps in provision.</li> </ul> <p><b>The Solicitors Regulation Authority should:</b></p> <ul style="list-style-type: none"> <li>Provide clarity on solicitors’ obligations regarding discussing LEI with clients.</li> </ul>	<p><b>The Law Society will:</b></p> <ul style="list-style-type: none"> <li>Update its unbundling Practice Note to reflect the benefits of offering unbundled services.</li> <li>Consider what best practice and training it could offer members to deliver unbundled services more safely.</li> <li>Conduct quantitative research with members to understand the appetite for offering unbundled legal services if the risk from litigation or action from the regulator was reduced.</li> <li>Work with the Solicitors Regulation Authority to engage with insurers to explore how to reduce the risk assessment of unbundled legal services, including through the use of emerging technologies.</li> </ul> <p><b>The Solicitors Regulation Authority should:</b></p> <ul style="list-style-type: none"> <li>Develop a clear definition of unbundling to support better conversations between insurers and solicitors about PII cover.</li> </ul>	<p><b>The Law Society will:</b></p> <ul style="list-style-type: none"> <li>Continue to work with the ombudsman sector and other stakeholders to promote ombudsman schemes as a key part of the dispute resolution landscape.</li> </ul> <p><b>A new government should:</b></p> <ul style="list-style-type: none"> <li>Give the Ministry of Justice the lead for ombudsman policy within government to drive forward reform of the sector to provide better access to justice, including: <ul style="list-style-type: none"> <li>One ombudsman scheme per regulated sector</li> <li>Improved collaboration between tribunals and ombudsman schemes</li> <li>The ability for ombudsman schemes to refer points of law to the courts.</li> <li>Powers for ombudsman schemes to set complaints standards in their area</li> <li>Powers for ombudsman schemes to undertake ‘own initiative’ investigations.</li> </ul> </li> </ul>	<p><b>A new government should:</b></p> <ul style="list-style-type: none"> <li>Bring forward legislation to give the Commissioner ‘own initiative’ investigatory powers.</li> <li>Raise awareness of the Small Business Commissioner through improved engagement and communications.</li> </ul> <p><b>The Ministry of Justice should:</b></p> <ul style="list-style-type: none"> <li>Work with business representative organisations and the Law Society to explore whether the free mediation service could be an appropriate tool for further expansion to cover higher-value straightforward cases brought between businesses.</li> <li>Explore the viability of allocating straightforward higher value business-to-business late payment cases to the small claims track, on request of the claimant.</li> </ul>	<p><b>The Law Society will:</b></p> <ul style="list-style-type: none"> <li>Work with the government, the Solicitors Regulation Authority and the Legal Services Board to explore ways to close current regulatory gaps.</li> <li>Assess mechanisms of redress for potential harms resulting from case outcome predictive technologies and generative AI, considering both new regulatory directions in context of genAI used by solicitors as well as the impact of unregulated services on the legal profession and consumers with respect to legal service delivery.</li> <li>Continue to work with civil society and elevate its voice in discussions and policy debates around the use of AI in legal services and the wider justice system.</li> </ul> <p><b>A new government should:</b></p> <ul style="list-style-type: none"> <li>Develop guidance for the courts and legal profession to ensure transparency on the use of AI and data in the justice system in order to maintain public trust and confidence across the legal sector.</li> </ul>

<sup>2</sup> The 21st Century Justice project will not be undertaking any further work related to Green Paper proposals to strengthen employment tribunals or costs reform. Work related to these areas will take place through the Society’s normal policy channels.

# Overview of consultation responses and engagement

On Monday 9th October 2023, the Law Society published its 21st Century Justice Green Paper, which contained a series of consultation questions and called for responses from Law Society members and wider stakeholders by Friday 5th January 2024.

The Law Society received 22 consultation responses from the following individuals and organisations:

- Association of Consumer Support Organisations
- Association of Personal Injury Lawyers
- City of London Law Society
- Civil Court Users Association
- Costs Lawyer Standards Board
- Dispute Resolution Ombudsman
- Disputes E-filing.com
- Dr. Liz Curran, Nottingham Law School
- Forum of Insurance Lawyers
- Independent Betting Adjudication Service (Gambling Dispute Resolution)
- Jonathan Wheeler (Member, Law Society Civil Justice Committee)
- Junior Lawyers Division
- Legal Services Consumer Panel
- Liverpool Law Society (Access to Justice Committee, Civil Litigation Committee and Family Law Committee)
- Manchester Law Society (Civil Litigation Committee)
- Ombudsman Association

- Property Ombudsman
- Richard Owen (Chair, Law Society Access to Justice Committee)
- Sue Bramell (Law Society Leadership and Management Section Committee)
- UNISON
- Valla
- Young Legal Aid Lawyers

In December 2023, the 21st Century Justice project team held a workshop with 38 local Law Societies from across England and Wales to gather feedback on key areas of the Green Paper. In January 2024, the project team conducted a quantitative survey with the Law Society's member insight panel regarding some of the Green Paper proposals.

# 1 One trusted entry point for those with a legal need

Engagement with stakeholders and legal services consumers prior to the publication of the Green Paper identified a clear need for a trusted online source of information and guidance to help individuals and small businesses identify the nature of their legal issue and triage them to appropriate avenues of redress. With an almost infinite amount of information now available online, and no way to discern what is reliable and relevant, this was considered a vital component of proposals to increase access to justice for those in the 'justice gap' – on low incomes but not eligible for civil legal aid.

The 'Solutions Explorer' outlined in the Green Paper would bring together trusted information and guidance on resolving legal issues – currently hosted by a range of organisations including the government (gov.uk), Citizens Advice and Advice Now – into a single, publicly funded online resource which would also include a diagnostic tool to triage users to accredited dispute resolution providers. It proposed that the diagnostic tool could be built using existing 'decision tree' technology already available on gov.uk for housing disrepair issues and work already done by the Ministry of Justice on decision trees for small money claims. Data inputted by users would be stored so that it followed them as they explored different options for redress, removing the need to repeat information. Where these options proved unsuccessful and litigation was needed, use of the 'Solutions Explorer' could potentially demonstrate compliance with any relevant pre-action protocol (PAP).

This vision is similar to that put forward by Lord Justice Briggs in his 2016 review of the civil courts, which proposed a three-stage journey starting with 'Tier 1' – an online triage process where potential litigants could receive information on "alternative forms of resolution, sources of free or affordable advice, and basic commoditised legal guidance".<sup>3</sup> Since 2016, the

Ministry of Justice and Civil Justice Council have been exploring how to deliver 'Tier 1' via the creation of a 'single online funnel' through which all civil, family and tribunal disputes could pass.<sup>4</sup> It was anticipated that the Online Procedure Rule Committee (OPRC) would be the mechanism by which this 'Tier 1' solution would be delivered.

In November 2023, the judiciary indicated that the initial focus of the OPRC had moved away from the creation of a single, publicly funded online resource like the 'Solutions Explorer' because it required building a major IT system all at once and that a 'monolithic' IT system was not considered to reflect the diversity of actors in the information and guidance and dispute resolution space.<sup>5</sup> Its focus is now on linking these diverse actors – be they third sector organisations, advice sites, mediation services or public and private dispute resolution providers (including legal advice providers) – through a single data standard which will allow for client data to be shared between them as individuals navigate their options. When efforts to resolve disputes without litigation have not been successful, client data will then be transferred to the courts, including online court systems such as the Online Civil Money Claims and Damages Claims portals. A specific gap has been identified by the Ministry of Justice in family law for better information, guidance and signposting and the Spring 2024

<sup>3</sup> civil-courts-structure-review-final-report-jul-16-final-1.pdf (judiciary.uk)

<sup>4</sup> Master of the Rolls to create 'online funnel' for civil claims | News | Law Gazette

<sup>5</sup> Speech by Lord Justice Colin Birss: Is a focus on data the way to improve access to justice in a multifaceted world? - Courts and Tribunals Judiciary



budget included £55million of funding to create an information and guidance tool that will help draw together existing provision and help families better navigate the range of options available to resolve their dispute.<sup>6</sup>

## Consultation responses

Responses to the Green Paper consultation supported the need for the 'Solutions Explorer', highlighting that it was a particularly vital resource due to the growth in unlicensed and unregulated legal advice online and the increasing use of tools such as ChatGPT which can return inaccurate information about legal issues. The consultation asked where a resource like the 'Solutions Explorer' should be hosted to foster trust among users and address concerns about data protection and privacy. Most respondents felt that His Majesty's Courts and Tribunal Service (HMCTS) was the best option to reassure users that information and signposting content was independent and impartial, with concerns raised about vested interests if such a resource was developed by private providers. It was suggested that individuals could be referred to or assisted to access the 'Solutions Explorer' by voluntary organisations or trusted intermediaries in local communities, helping to overcome accessibility issues faced by those who don't have access to the internet or the necessary skills to use online services.

Concerns were also raised about the difficulties of developing decision trees across multiple and complex areas of law, and the scale and upfront cost of such a project, despite the potential for longer-term savings of £72 million outlined in the Green Paper. Respondents also warned that consumers using decision trees sometimes 'self-label' issues which can lead to them being incorrectly triaged. The importance of clearly distinguishing between services designed to provide signposting and information, and those designed to deliver legal help and representation was emphasised, with triage being the vital link between the two.

## The need for greater consumer protection

Across the range of responses, a picture emerged of the changing role of unregulated providers in the pre-action landscape over the last 25 years as technology has developed and new approaches to dispute resolution have emerged. Prior to this, the pre-action space largely consisted of a letter before action, with proceedings issued in the absence of a satisfactory response. All subsequent work – including exploration of routes to settlement other than via a contested hearing – fell within the ambit of litigation as defined by the Legal Services Act<sup>7</sup> and was therefore reserved activity to be undertaken by a solicitor – with all the client protections that entails. While it was understood by policymakers and regulators that attempts prior to the issue of proceedings to settle matters were not a reserved activity, there was little market for such work.

Today, pre-issue attempts to resolve disputes have become formalised and extended such that they now represent a vast landscape where unregulated providers conduct work that was previously considered reserved activity. Many of these unregulated providers also now provide services to clients to support them as litigants in person where proceedings must be issued. The line between reserved and non-reserved activity has become increasingly blurred, creating a concerning gap in consumer protection. Legal services consumers unhappy with a service from unregulated providers currently have no means of redress through a regulator or ombudsman. Last year the Competition and Markets Authority announced a new consumer enforcement investigation to protect consumers following complaints about providers offering will-writing, online divorce and pre-paid probate services, and to examine how these companies are complying with their obligations under consumer protection law, but this is only part of what is needed.<sup>8</sup> It is vital that the implications of the growing pre-action space are considered more fully as part of the Ministry of Justice's plans for increased use of alternative dispute resolution in a digital justice system.

## Next steps

The 'Solutions Explorer' remains a vital cornerstone of any reforms to enhance access to justice for individuals and small businesses in the civil justice system. This must be a government-hosted, publicly-funded resource which pulls together existing high-quality information and guidance to help people understand the nature of their issue and triage them to the appropriate accredited dispute resolution provider, including legal services.

Such a resource should also provide guidance on the types of evidence typically needed in the relevant type of dispute and assistance in taking pre-action steps. It would play an important role in raising awareness of funding options including civil legal aid, legal expenses insurance or union membership. It is also essential to ensuring the capture of data on out-of-court settlements that is critical to developing a better understanding of the quality of decision-making and gaps in service provision.

Without such a resource consumers with a legal issue will be left with no guidance to choose between a rising number of unregulated providers in the pre-action space who may offer inadequate consumer protection when things go wrong. This could ultimately place a greater burden on the courts and lead to increased delays where individuals who may have received substandard advice end up as litigants-in-person – particularly vital in areas such as family law where issues like domestic abuse mean that face-to-face, specialist legal support is required.

The government's plans to develop an online information and guidance tool in family law are therefore welcome and could provide a useful proof of concept for the 'Solutions Explorer' if triage is also included. It is vital that this tool is developed with the support of expert family practitioners; that users with vulnerabilities are immediately referred to face-to-face advice from a regulated provider; and that all providers included on the platform offer effective consumer redress. Such a resource will be an important first step towards helping those in the 'justice gap' resolve their legal issues, but it cannot be substitute for the delivery of early legal advice by legal aid providers for those who cannot afford to pay privately. A robust and sustainable civil legal aid provider base must therefore be maintained.

The opportunity also still remains to pilot a 'Solutions Explorer' model for housing issues or small money claims. An evaluation of both resources would help to test whether there is a business case for developing a holistic 'Solutions Explorer' across more of the civil and administrative justice system.

### The Law Society will:

- Continue to make the case for a holistic 'Solutions Explorer'.
- Convene regulators and consumer organisations to discuss how to safeguard and protect legal services consumers in a growing landscape of unregulated providers in the pre-litigation space.

### The Ministry of Justice should:

- Work with family law solicitors to ensure the online information and guidance tool for family law announced in the Spring budget is co-designed with legal services consumers and the profession and meets the needs of vulnerable users.
- Pilot and evaluate an additional online information and guidance tool in housing or small money claims.
- Work with the Law Society to develop criteria to determine when a service or provider should be listed on online information and guidance tools.
- Consider how data gathered through common data standards being developed by the Online Procedure Rules Committee can be analysed to help identify gaps in provision of legal services.

<sup>6</sup> HC 560 – Spring Budget 2024 (publishing.service.gov.uk), page 69

<sup>7</sup> <https://www.legislation.gov.uk/ukpga/2007/29/section/12>

<sup>8</sup> Will-writing and other unregulated legal services – GOV.UK (www.gov.uk)

# 2 A sustainable civil legal aid system

Civil legal aid plays a vital role in providing access to legal advice and representation to those who could not otherwise afford it. Yet cuts to its scope over the last decade have significantly reduced the number of people eligible, leaving rising numbers in the ‘justice gap’. In March 2024 the Law Society submitted its final evidence to the government’s Review of Civil Legal Aid<sup>9</sup> in which it warned that legal aid’s primary objective of delivering access to justice is no longer being met. The factors driving this include low fee levels for civil legal aid work, excessive bureaucracy and problems with recruitment and retention which are driving down legal aid provision and creating legal aid deserts in large swathes of the country where even those eligible for legal aid are unable to access it.

Fees for civil legal aid work have not increased for 28 years, making it financially unviable for many providers. The number of solicitors and not for profit agencies providing civil legal aid has decreased by around 40% in the last 10 years<sup>10</sup> and in certain areas of law the Ministry of Justice is finding it increasingly hard to fill contracts. For this reason, the Law Society has consistently called on the government to prevent the collapse of civil legal aid and make it sustainable for the long-term by increasing fees. It is currently developing a detailed evidence base, built from in-depth analysis of providers’ financial accounts and operating models, to determine the increase that would be required to make civil legal aid provision viable and stop the exodus of civil legal aid providers.

The Green Paper focused on structural changes that could increase the reach of civil legal aid, proposing greater use of co-located services to provide visible in-person access points in every local authority, staffed by a mixture of solicitors, Law Centres, or advice charities to ensure support given is accessible and tailored to the needs of people in local areas. It suggested that this could be supplemented by an expanded national Civil Legal Aid telephone line which included online advice to ensure that multiple

methods of accessing advice are available to those eligible for civil legal aid.

To tackle issues of recruitment and retention, it proposed a new programme to encourage law graduates pursue a career in social welfare law, modelled on the Training Grant Scheme previously operated by the Legal Services Commission but also drawing lessons from schemes to get graduates into areas of need in public services such as Teach First and Police Now.

## Consultation responses

The consultation asked how the current Civil Legal Aid helpline, the national telephone advice service run by the Legal Aid Agency, could be improved to help it better meet need among those eligible for civil legal aid. Responses highlighted significant concerns about the quality and the nature of the helpline, citing research by the Public Law Project (PLP) in 2018<sup>11</sup> that uncovered poor user experience, inconsistent advice from non-legally trained operators and difficulty getting referral to specialists. Whilst it was acknowledged the mandatory telephone gateway had been removed, the number of cases started through the telephone advice line and referrals to face-to-face advice were also found to be very low. There were also concerns

about the limited scope of legal aid and the quality of triage through the present service. Feedback suggested that while a national helpline or online advice provision may work for information and signposting, where legal advice is needed users must be referred to local networks of solicitors’ firms and advice agencies, particularly for complex cases and vulnerable clients. Respondents highlighted that local providers have important knowledge about other services in the community that can be helpful in resolving a client’s case and addressing wider issues. Where cases end up in court, local provision also means the solicitor is more likely to be available to attend. There was strong support from respondents for the co-location of services, which were considered a valuable way of reaching people who otherwise would not realise that their problem could be solved with the help of a legal intervention.

Consultation feedback also included several suggestions for measures to attract young lawyers to civil legal aid practice:

- Incentivising law students to study and practise social welfare law by forgiving student debt for those who practice this type of law.
- A reduction in tuition fees for those who put in sufficient hours working pro bono in a student law clinic.
- A reinstatement of the Minimum Salary for trainee solicitors.
- A provision which mandates a minimum amount of legal aid work being carried out by all trainee solicitors.
- Inclusion of social welfare law in the Solicitors Qualifying Exam (SQE) syllabus to ensure that all trainee solicitors have a basic understanding of social welfare law and that those who do go into legal aid are better equipped from the outset.

## Co-located services

Co-located services have the potential to play a valuable role in enhancing existing civil legal aid provision by ensuring that multiple services are available in a range of places people regularly frequent. Findings from the 2023 Legal Needs Survey show that 10% of people with a legal need used their doctor as a main advisor to handle a contentious or non-contentious legal issue, second only to solicitors. Health-justice

partnerships, in which legal advice is located in or accessible through GP surgeries, are therefore an effective way to meet more legal need. The Ministry of Justice is currently funding co-located advice sessions in the north west operated by Citizens Advice Wirral, and is commissioning a study of several other co-located advice projects.

For these partnerships to be effective, it is vital that specialist legal advice is provided within the local environment, or the co-located service adviser is able to make effective referrals to a specialist local legal advice provision. It can therefore only work where civil legal aid services are sufficiently resourced to be sustainable and reflect the intersectionality of social, welfare and legal issues so that each can be similarly funded. This is why significant investment in the civil legal aid system to ensure that the provider base is sustainable is so important.

## Greater choice for solicitors in how they deliver legal aid

Consultation feedback regarding the expansion of the national Civil Legal Aid helpline to provide telephone and online advice to those eligible for civil legal aid highlighted significant issues in the performance of the helpline. These issues must be urgently addressed. Respondents were also clear that expanding the existing telephone advice line by adding an online aspect would not address the fundamental problem that the service is significantly restricted by the current limited scope of legal aid. A telephone and online service could still offer an additional entry point to help people with information and sign posting where it is an appropriate and accessible service for them, if this is underpinned by a comprehensive and sustainable face-to-face service. However, concerns regarding the quality of the existing service suggest that this is not the best vehicle to expand and that ways to ensure triage is done by experienced providers must be explored.

Allowing existing civil legal aid providers to offer more advice by phone and online where it is appropriate to the issue and for the client could be a way to explore the potential of these channels further as well as opening additional routes to meeting legal need. Access to in person face-to-face advice where needed must remain part of civil legal aid provision, and providers must have the capacity to offer in person face-to-face services where specifically requested, or where it is in the clients’ best interests to do

9 240216The Law Society response to RoCLA call for evidence FINAL MoJ (1).pdf

10 Legal aid statistics quarterly: October to December 2023 – GOV.UK (www.gov.uk)

11 <https://publiclawproject.org.uk/content/uploads/2018/05/The-Civil-Legal-Advice-telephone-Gateway.pdf>



so. But some clients will prefer the convenience of telephone or online services, particularly if they live in remote areas where transport is difficult and expensive. The Legal Aid Agency's current contractual requirement on providers to limit remote advice to 50% of clients restricts providers in making their own decisions about how to deliver services that best meet clients' needs and prevents them from taking full advantage of new and emerging technologies.

It should also be possible for providers to be flexible in where they offer face to face advice if the premises are suitable for enabling confidential conversations. This would significantly reduce overheads for providers and increase the financial viability of civil legal aid work.

### Netherlands High Trust model

The Green Paper reiterated the Law Society's long-standing call for the governance of civil legal aid and how funding is distributed to be urgently reformed. Micromanagement of legal aid contracts by the Legal Aid Agency (LAA) gives rise to huge amounts of unnecessary bureaucracy which, if removed, would deliver significant cost savings that could be reinvested back into the system. The Law Society's evidence gathering exercise for the Review of Civil Legal Aid included research commissioned from Frontier Economics<sup>12</sup> which showed that providers in the housing category spend almost half their time on bureaucracy. Other research has highlighted the perceived 'culture of refusal' at the LAA.<sup>13</sup> The Netherlands experienced similar problems. Many lawyers regarded the application for a certificate as burdensome and time consuming, and the verification as bureaucratic. Alternatives were considered to simplify the verification of applications and expense statements. The Dutch Legal Aid Board (LAB) introduced a 'High Trust' method for dealing with the applications for certificates where the LAB and lawyers work together based on transparency, trust and mutual understanding. This model involved greater compliance on the part of the legal profession with information about legislation, jurisprudence and guidelines for the application of certificates. The LAB developed specific tools for compliance assistance, such as information and instruction

meetings and an online tool which are free of charge for lawyers under High Trust.

The philosophy underlying High Trust is that trust among a larger group of people will more readily lead to positive cooperation and compliance than institutionalised distrust. In 2009, the Legal Aid Board started with its first High Trust pilot. Since 2011, the Board has been implementing High Trust across the country in phases. At the end of 2020, more than three quarters of the certificates are issued to lawyers and mediators who work based on the principles of High Trust.

In March 2024, the Ministry of Justice published a paper looking at international comparators of legal aid provision.<sup>14</sup> The report focused heavily on the Netherlands model and identified the High Trust model for further investigation as part of the Review of Civil Legal Aid.

### Supporting careers in civil legal aid

It is vital that careers in civil legal aid are properly remunerated to incentivise solicitors to undertake this type of work and create a sustainable provider base. Introducing a Minimum Salary for trainees, when legal aid firms are already struggling to offer traineeships, would serve only to further reduce the number of training places available.

The Ministry of Justice has recently set up training grants in the context of the Housing Loss Prevention Advice Scheme (HLPAS) which indicates that there is a willingness on the part of Government to invest in schemes to encourage more lawyers into social welfare law. However, concerns have been raised that the scheme only covers 75% of the Law Society's recommended minimum salary which represents half the cost of training to a provider when considering the additional costs such as national insurance, pension contributions and supervision. Any future model must therefore include a salary level to cover the full costs, as well as student debt forgiveness.

## Next steps

### The Law Society will:

- Commission research looking at how the 'High Trust' model could be applied in England and Wales to feed into the Review of Civil Legal Aid.
- Continue to work with the Ministry of Justice on its pilot for health justice partnerships, with a view to further building the evidence base.
- Work with civil legal aid providers to consider how early advice for civil legal aid should link in with an online information and signposting tools.

### The Legal Aid Agency should:

- Remove the contractual requirements around office space and the percentage of clients that can be assisted remotely.

### The Ministry of Justice should:

- Develop proposals to make civil legal aid sustainable in accordance with the evidence and policy ideas emerging through its Review of Civil Legal Aid.
- Create training grant schemes that match minimum salary levels and include student debt forgiveness.



<sup>12</sup> Housing legal aid: sustainability research | The Law Society

<sup>13</sup> <https://lapg.co.uk/wp-content/uploads/Justice-Committee-Inquiry-LAPG-submission-02.11.20.pdf>

<sup>14</sup> Review of civil legal aid: Comparative analysis of legal aid systems report – GOV.UK ([www.gov.uk](http://www.gov.uk))

# 3 Legal expenses insurance that works better for consumers

**Legal Expenses Insurance (LEI) is available as both Before the Event (BTE) and After the Event (ATE) cover. Each type of policy provide cover for legal costs, with BTE policies generally going further in actively providing an indemnity for the policyholders' incurred legal costs and adverse costs.**

Around 13 million (approx. 29%) of UK adults have some form of legal expenses insurance (LEI)<sup>15</sup>, often as an add on to their primary home or motor insurance policies. Yet these policies are rarely claimed on, with latest data from the Financial Conduct Authority showing an overall claims frequency of just 0.27% for before the event LEI purchased with home insurance, and of 0.95% when purchased with motor insurance.<sup>16</sup> The Green Paper committed the Law Society to bring together stakeholders including the insurance industry, trade unions, other professional organisations and trade bodies to explore ways to promote awareness and use of legal expenses insurance as a means to address unmet legal need and ensure consumers get the full benefit of the products they are paying for.

## Consultation responses

The Green Paper consultation asked how legal and insurance industries could raise greater awareness among LEI policyholders of the existence and scope of the coverage of their policy. Responses supported the idea of the Solutions Explorer playing an important role in prompting users to check whether they held LEI and providing guidance on how to understand their policy. Another suggestion was for existing online court systems such as the Online Civil Money Claims and Damages Claims service to offer similar prompts. Responses from members

highlighted some of the difficulties solicitors have faced in making claims to cover costs via existing LEI policies, such as adhering to specific hourly rates or requiring pre-approval before incurring expenses, and the time it takes to submit and process a claim. The issue of freedom of choice was raised by members, with some citing current restrictions some insurers place on choice of solicitor as being detrimental to consumers. It was highlighted that solicitors have a professional obligation to check whether clients have legal expenses insurance as part of a discussion about costs.

The consultation also asked whether a subscription-based service offering early legal advice to those not eligible for legal aid had potential to help meet unmet legal need. Responses highlighted that this was unlikely to be attractive to those on low incomes and to small businesses. However, responses pointed to the importance of raising awareness of the legal services provided by union membership, which mainly cover personal injury and employment law and can be more comprehensive than legal expenses insurance in terms of the range of claims covered, a higher limit on legal fees, no exclusions and no excess.

<sup>15</sup> [fca.org.uk/publication/research/financial-lives-survey-2020.pdf](https://www.fca.org.uk/publication/research/financial-lives-survey-2020.pdf) - looking for more up to date figure

<sup>16</sup> Dental insurance has a claims rate of 6%, pet insurance 47%, vehicle breakdown 34%.

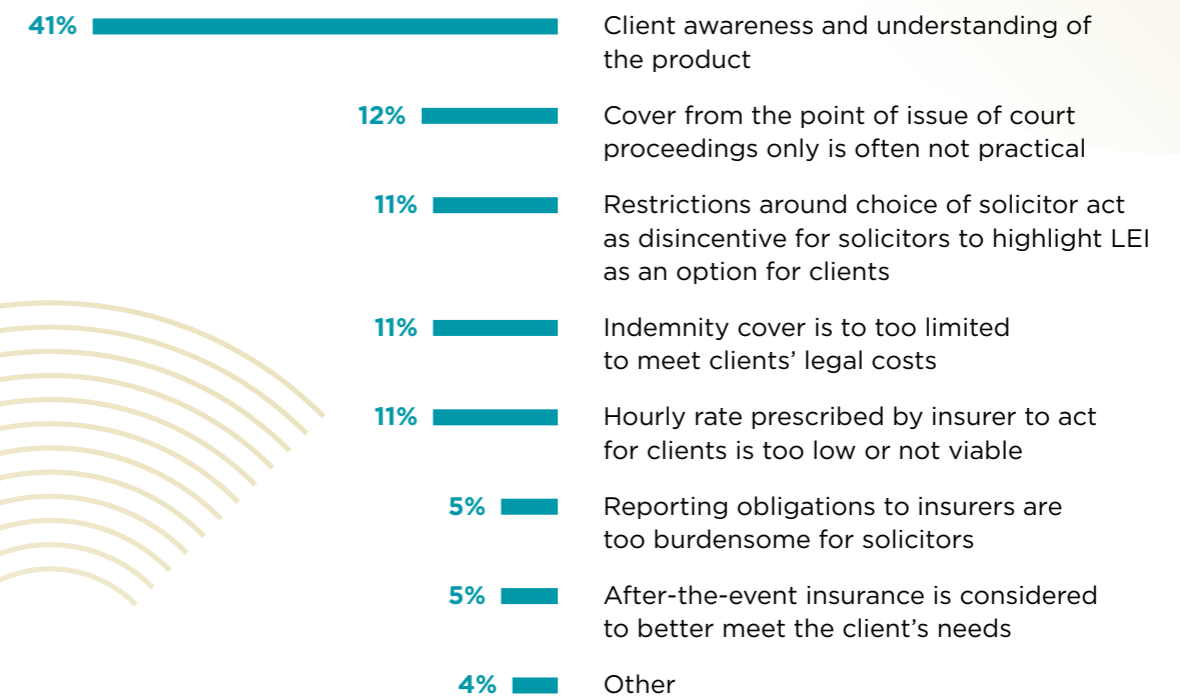
## Solicitors as a route to raising awareness of LEI

Because of their direct interaction with clients, solicitors are well-placed to raise awareness about legal expenses insurance among existing policyholders. Legal Services Ombudsman guidance on case funding arrangements states that solicitors should discuss legal expenses insurance with clients in case they may be covered by an existing policy. Failure to ask if a client has LEI is also a potential breach of Section 8.6 of the Code for Individuals and (7.1(c) of the Code for Firms published by the Solicitors Regulation Authority which states that solicitors must “ensure they [the client] are in a position to make informed decisions about the services they need, how their matter will be handled and the options available to them”.<sup>17</sup>

Solicitors therefore have a clear obligation to discuss legal expenses insurance with their clients, but current guidance is unclear as to how these conversations take should place and what level of information should be provided.

The Law Society conducted research with its members in January 2024 which found that 41% believed that better client awareness and understanding of LEI was the biggest barrier to better use of legal expenses insurance to meet legal need.<sup>18</sup> Yet when asked about how they communicated with clients about LEI, only 25% said that this was done verbally, whilst for 57%, information was provided in writing which could include client care letters. Concerningly,, 15% admitted they did not communicate with clients about LEI unless asked. This suggests that solicitors could be doing more to communicate with clients about legal expenses insurance and how it works.

**Figure 1: Main barrier to better use of before the event LEI**

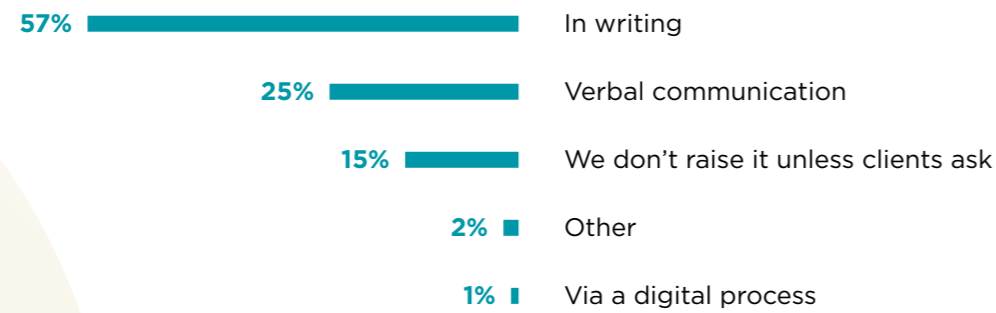


<sup>17</sup> SRA | SRA Standards and Regulations | Solicitors Regulation Authority

<sup>18</sup> In January 2024, the Law Society invited members of its Insights Community to take part in a short survey with the aim of providing feedback on some of the ideas set out in the 21st Century Justice Green Paper. Between mid-January and early February 2024, the survey received a total of 145 responses.



Figure 2: How solicitors communicate potential availability of LEI to clients



## The new Consumer Duty

The Financial Conduct Authority's Consumer Duty, which came into force in July 2023, is an important development which could play a key role in raising awareness of among consumers of existing LEI policies and their coverage. The Duty sets a higher standard of consumer protection in financial services and requires companies to regularly review the products they offer, assess whether the products are providing fair value and take appropriate action if they do not.<sup>19</sup> Part of this is ensuring that consumers understand the product they have purchased.

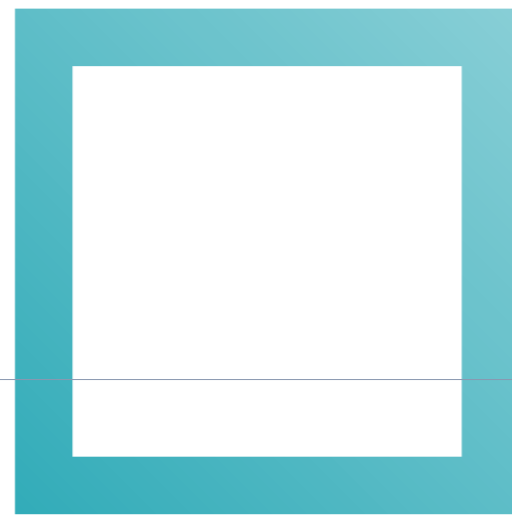
Data from the Financial Ombudsman about consumer complaints regarding LEI reveals the main areas of consumer dissatisfaction with the product:

- disagreements between legal professionals about the prospect of a successful outcome
- policyholders choosing to use their own solicitors and the insurer refusing to cover the claim
- an insurer's solicitor handling a claim badly
- insurers deciding not to meet the expenses of proposed legal action
- insurers rejecting a claim because the policyholder didn't notify them about an event that gave rise to legal proceedings

A Freedom of Information response shared with the Law Society states that 78% of complaints about LEI are decided in favour of insurers. One purported reason for this is that consumers often don't understand some of the key aspects of the policy, such as the need to evidence a 51% chance of a successful outcome.

Better information about and understanding of legal expenses insurance among policyholders could both reduce complaints and increase customer satisfaction with the product, as well as increasing use of the benefits of LEI – not only the cover of legal costs, but access to information and guidance and, through helplines, early legal advice.

Legal helplines delivered by panel solicitors manage tens of thousands of advice calls per year on behalf of insurers. Helplines focus on providing clear practical advice to help policyholders come to a resolution without the need for litigation, but with the support and confidence of a legal solution if the matter can't be resolved. This advice includes options for alternative dispute resolution since where this is used effectively it can help insurers manage claim costs.



<sup>19</sup> PS22/9: A new Consumer Duty | FCA



## Next steps

Whilst the cost of legal expenses insurance remains out of reach for many individuals on low incomes and for small businesses, ensuring those who already have policies are maximising what cover they provide could play an important role in enhancing access to justice at little to no cost to the public purse. In particular, the legal advice helpline and online advice documents included with legal expenses insurance provide an important and currently under-utilised route to giving people early legal advice that can help them understand and resolve legal issues without the need for further action. Supporting solicitors to have better conversations about legal expenses insurance with clients can play an important role in raising awareness.

The new Consumer Duty provides an opportunity for the insurance industry, solicitors, the Financial Ombudsman and consumer organisations to work together to review legal expenses insurance, understand how it is delivering for consumers and identify areas where action could be taken to improve outcomes. This should include looking at how restrictions on limitations of choice of solicitor affect consumers and how the freedom of choice option is best exercised.

### The Law Society will:

- Convene a cross-industry Working Group to share data and insight and explore ways to improve outcomes for existing LEI policyholders.
- Work with our members and insurers to develop joint-branded guidance for solicitors and consumers to improve awareness and understanding of LEI.
- Ensure members are aware of their obligations in relation to discussions with clients around LEI and promote best practice.

### The Financial Conduct Authority should:

- Add data on helpline use and outcomes to its 'value measures' to build evidence on how helplines included in legal expenses insurance are delivering for consumers and to better understand gaps in provision.

### The Solicitors Regulation Authority should:

- Provide clarity on solicitors' obligations regarding discussing LEI with clients.

# 4 Addressing the risks and opportunities of unbundling<sup>20</sup>

Figures published by the Legal Services Consumer Panel in 2023 show that one in five (19%) legal services consumers now receive at least part of their services through unbundling<sup>21</sup>, while research by the SRA<sup>22</sup> and the Affordable Advice Service<sup>23</sup> into unbundled legal services in family law suggests that these services enable consumers to access legal advice where it would have otherwise been unaffordable to them.

Findings from the 2023 Legal Needs Survey show that among people who had a legal issue over the last four years but did not get help, 13% stated that the reason for not getting help was that they assumed it would be too expensive. Combined with a cost-of-living crisis, cuts to legal aid and the price of legal services are driving up the number of people who represent themselves in court as litigants in person.

This has created a gap in the market for online platforms offering unbundled, fixed fee services in areas of law including family, employment and probate to meet the demand from consumers that need legal advice but cannot afford a full solicitor service.

In this context, it is vital to explore how the increased availability of unbundled legal services by the solicitor profession could do more to meet legal need. The Green Paper highlighted that a key barrier to solicitors offering unbundled legal services is the ability to obtain professional indemnity insurance (PII) for potential negligence claims where unbundled services go wrong. Recent cases where clients have sued suggest that the courts are finding against solicitors' firms in these circumstances, which is in turn feeding

into insurers' risk assessments and a reluctance of practitioners to expose themselves to high levels of risk.

## Consultation feedback

Responses from the Law Society's membership confirmed that many solicitors are wary of offering unbundled services. They highlighted the difficulty of developing a retainer precise enough to adequately delineate work of the solicitor and the client such that the solicitor is protected from any negligence claims when an issue arises from errors or mistakes in the 'unbundled' work. They also emphasised the risks of clients not providing all the information necessary for the solicitor to be able to advise, and of clients unable to competently carry out the agreed tasks. There were additional concerns raised around 'scope creep' where clients ask additional questions that are outside the scope of the retainer. This not only means solicitors are providing advice they are not getting paid for, but also adds to the risk that the courts will interpret the retainer more broadly in the event of a negligence claim. Members pointed out the lack of clarity regarding whether PII covers unbundled work and called

for a more joined-up approach from the judiciary, insurers and regulators if unbundling is to be made safer for solicitors through a vehicle such as the Civil Procedure Rules.

Some members highlighted the benefits of offering unbundled legal services to their businesses, such as improved cash flow through faster payments, and expanding their client base.

Consultation responses from outside the profession highlighted the consumer benefits of unbundling, such as ensuring that people can participate in the legal system even if they cannot afford a full-service solicitor by providing them with some means of advice. This was felt to be particularly important at a time when there are rising numbers of litigants in person.

## Hearing from those who deliver unbundled legal services

Our consultation highlighted that some solicitors feel that the risk of delivering unbundled legal services is no greater than any other business risk, and that unbundling benefits both their business and legal services consumers. To hear more from these voices, particularly how they manage the risks associated with unbundling, the project team commissioned qualitative research with ten solicitor firms delivering unbundled legal services.

The research, published alongside this paper, shows that those offering unbundled services see a rising demand for these services as a result of the cost-of-living crisis and cuts to legal aid, as well as changing consumer trends such as increased consumer self-confidence to handle legal issues, and increased awareness of 'self-service' options.

In this context, they believe there is both a moral and a business case to offer unbundled legal services. Unbundling ensures that people who cannot afford a full service from a solicitor still get some support, which these members felt was important, not least because they would otherwise be either not getting any help or presenting as litigants in person and potentially adding to delays in the courts. From a business point of view, unbundling was seen to bring in additional revenue – with one member stating that it accounted for a quarter of their monthly

billing. It also meant better cash flow where they did not have to wait to invoice for the full amount.

Members who were offering unbundled legal services were aware of the risks from a liability perspective but felt that these could be managed by senior oversight of the work so that experienced solicitors determine competency of clients to deliver tasks themselves and to ensure work remains within the agreed retainer. Clearly defined retainers which are regularly reviewed to prevent 'scope creep' were also felt to manage risk.

Members who took part in the research wanted to feel more supported in delivering unbundled legal services through better guidance and examples of best practice, and greater recognition from the profession of the benefits of unbundling both to legal services consumers and to solicitors.

The research also highlighted the need for a commonly-agreed definition of unbundling that is consistent across the legal profession and the insurance industry.

In addition to qualitative research, the Law Society also surveyed members to ask them what support and assurance they wanted to deliver unbundled legal services. The responses highlighted the need for more insurance cover for unbundled work and clearer support and assurance from the courts and the Solicitors Regulation Authority.

<sup>20</sup> For the purposes of this paper and supporting research undertaken with members, the term 'unbundling' is defined as a practice which allows solicitors and client to agree that some tasks traditionally undertaken by a solicitor, such as drafting letters or attending court hearings, will be completed by the client themselves, thereby reducing the overall cost of the service but enabling access to expert advice at critical stages.

<sup>21</sup> Dip in proportion of consumers shopping around for legal services – Legal Futures

<sup>22</sup> SRA | Unbundled services pilot: final report | Solicitors Regulation Authority

<sup>23</sup> Research Briefing: Affordable Advice service (advicenow.org.uk)



## Selection of free text responses to the Green Paper consultation question: “What support and assurance do solicitors need to feel confident offering unbundled services?”

### Insurance cover

“Solicitors need to be assured that their indemnity still covers them in the event the client sends a letter in a matter, or other correspondence, which is detrimental to the outcome.

*[The assurance] that their insurance allows for this. That the courts will not penalise the solicitor.*

“Most PII insurers ask specifically about unbundled services and often apply a premium where they are offered. That’s a significant barrier to firms offering these sorts of services.

*Insurance available to cover slips made by unqualified client.*

“The assurance that unbundling will not lead to liability or claim for negligence down the road as they have not had overall responsibility throughout the legal process.

### Support from the courts

“This approach is not supported by Court decisions where judges are keen to put all responsibility on the solicitors despite there being a clear demarcation of responsibilities in the retainer. Until the Courts take a more pragmatic view, unbundling will not be a realistic option for solicitors.

*There is no clear legal and regulatory protection for law firms to offer unbundled services.*

“*[We would need] guidance approved by senior judges on how this can be done without risking liability to the client for failure to advise.*

*I generally feel confident offering unbundled services. It does though need the understanding of the judiciary who deal with professional negligence claims, so that there is not a creep of responsibilities that solicitors take on, which would make this more unattractive for solicitors, and which would increase the risk of negligence claims.*

“*[We would need] support from courts and the judiciary.*

### Assurances from the regulator

“Reassurance that the solicitor will be protected from negligence claims/complaints to The Law Society, SRA, etc., if the client later decides that they weren’t able to fulfil the agreed unbundled services themselves and seeks redress when they don’t get the desired outcome!

“We require some authority or authoritative guidance that providing so-called ‘unbundled’ services and limited retainers are compatible with our professional responsibilities (and how this compatibility works).

*The SRA should support [firms offering unbundled services] by not allowing complaints or claims where the solicitor has carried out what was required by the agreement with the client. Suggested wording should be agreed by SRA, Courts, and Legal Ombudsmen, so it is clear to everyone what is covered*

### Better guidance

The support of the profession and SRA with clear and concise guidance as to unbundled services can be delivered to limit liability for subsequent issues.

“Well-defined regulations and ethical guidance from governing bodies like the SRA.

*Guidance on the appropriate approach to unbundling so as to maximise benefit to client and reduce risk that the solicitor is thought to be negligent.*

“The assurance that our regulatory body will provide unequivocal guidance to limit solicitors’ liability.

*Support with practice guidance on how to effectively offer unbundled services.*

## Case law as a barrier to the safe delivery of unbundled legal services

The past 15 years have seen a series of decisions by the courts where solicitors have been found to be liable for work that was outside of the scope of the retainer agreement with the client.

In *Padden v Bevan Ashford Solicitors* [2011] a client asked the firm to facilitate a financial transaction but was advised against it in a brief interview. The client proceeded with the transaction and subsequently incurred substantial loss. The Court of Appeal held that the firm had been negligent because they had advised the client without taking full instructions about the circumstances and without providing detailed advice about the consequences of agreeing to the transaction. This established a precedent that a firm's duty of care may be implied in matters beyond the client's specific instructions.

This principle was followed and arguably taken further in the case of *Sequence Properties Limited v Kunal Balwantbhal Patel* [2016] EWHC 1434. In that case the claimant, a litigant in person appealed a costs order imposed for late submission of an appeal bundle. The claimant's solicitor in that matter had been instructed only to assist with the preparation of the bundle of documents but not to file it. The judge refused the appeal and noted that the appellant should not be entitled to any leeway as a litigant in person as he had instructed a solicitor to assist with preparation of the bundle, even though he had not instructed them to file it. Although the solicitor's liability was not an issue in the

case, the implication is that a solicitor could be liable for the consequences for clients beyond the immediate remit of their instructions.

This line continued to be followed in the 2023 case of *Lewis v Cunningtons Solicitors* EWHC 822 (KB) The defendant solicitor was instructed by the wife solely to prepare a draft consent order on the basis of an agreement she had reached with her husband without legal advice. The agreement did not include any sharing provision regarding the husband's valuable pension. The wife had signed a disclaimer acknowledging that she had not been given advice about the agreement as there had not been financial disclosure. The court found that this 'one-size-fits-all' disclaimer was inappropriate, and the wife succeeded in her negligence claim against her solicitor.

This approach by the courts makes it problematic to promote unbundling as a viable alternative to traditional retainers. Even where firms might be prepared to accept the risks and could put in place reasonable procedures to mitigate them, some professional indemnity insurers are unwilling to cover unbundled services. As long as the courts follow this line, it is unlikely that insurers will adopt a more favourable stance towards unbundling.



### Next steps

Recognising the demand for unbundled legal services, the Law Society needs to support its members that wish to offer this service to do so in a way that minimizes risks to themselves and consumers. In the context of a rising number of litigants in person, unbundling can mean the difference between people getting some legal advice or none. This is not only good for the individuals concerned, but for the courts where litigants in person are better prepared.

However, the limited availability of insurance cover, driven in part by recent decisions from the courts, remains the key barrier to solicitors feeling confident in offering unbundled legal services. This needs to be overcome if the potential in these services is to be realised. In the longer-term, new technology may be able to significantly play a role in reducing risk and liability by providing consistency across firms in the case management of unbundled legal services in a way that is fully auditable and where the delineation of tasks is made simple and clear to all parties. It is important that insurers and regulators work with innovators to explore this potential.

#### The Law Society will:

- Update its Practice Note to reflect the benefits of offering unbundled services.
- Consider what best practice and training it could offer members to deliver unbundled services more safely.
- Conduct quantitative research with members to understand the appetite for offering unbundled legal services if the risk from litigation or action from the regulator was reduced.
- Work with the Solicitors Regulation Authority to engage with insurers to explore how to reduce the risk assessment of unbundled legal services, including through the use of emerging technologies.

#### The Solicitors Regulation Authority should:

- Develop a clear definition of unbundling to support better conversations between insurers and solicitors about PII cover.



# 5 Maximising the potential of ombudsman schemes to deliver access to justice

Ombudsman schemes are a low-cost way to enable access to justice across a wide range of sectors. They must therefore be considered as part of the civil justice system and included as a key building block for reform going forward.

Findings from the 2023 Legal Needs Survey show that of the contentious legal disputes experienced by individuals, 46% related to a defective good or service by a professional, yet only 7% of individuals sought to use or make a claim to an ombudsman or regulator. Many people with a dispute don't consider ombudsman schemes and if they do, are confused as to which one to turn to. In this context, some will go to court for issues that could have been resolved by an ombudsman.

Low awareness and the complexity and fragmentation of the current ombudsman landscape are therefore two key barriers that need to be overcome to drive greater use of ombudsman schemes to meet legal need. As well as helping individuals resolve legal issues outside of the courts, ombudsman schemes also have the benefit of tackling systemic issues with sectors.

The Green Paper proposed that the Solutions Explorer would play a key role in raising awareness of ombud schemes as an option to resolve disputes and would signpost individuals to the relevant ombudsman for their issue.

It also called for rationalisation of the ombudsman landscape to reduce overlap and make it simpler for consumers to understand and to navigate. There are currently around 22 ombudsman schemes in the UK covering private disputes and maladministration in public services or bodies and in some cases, and in some cases, there is considerable overlap in their remit. Strengthened powers such as 'own initiative' powers of investigation could also make ombudsman schemes more effective at managing complaints.

The consultation asked for views on what shape ombudsman reform could take, cautioning that any reorganisation and strengthening of the sector needed to be underpinned by a rigorous analysis of the gaps and overlaps in the current landscape to avoid further duplication or lack of clarity regarding the remit of different ombudsman schemes.

## Consultation responses

Consultation responses highlighted the unique value of ombudsman schemes in providing low-cost dispute resolution for individuals as well as front-end enquiry and sector feedback services in addition to resolution service itself. This helps secure redress not just for the individual but for others in a similar situation by improving future service delivery and complaints management. In turn this was considered to play an important role in rebuilding trust and consumer confidence.

The Solutions Explorer was seen as an important mechanism to drive awareness of ombudsman schemes and signpost those with a dispute to the one most relevant. Other respondents noted that ombudsman schemes would need additional resource to manage the increased demand that would come with an increased role in the access to justice landscape, and that there were transparency, governance and accountability issues within the sector that need to be addressed.

The Green Paper asked what could be done to make ombudsman schemes a more effective remedy for consumers and which ones could be combined to make the landscape less complex.

The strong consensus among ombudsman schemes that responded to the consultation was for one ombudsman per sector to provide a more effective and clearer route to justice for consumers than offered by the current landscape where there are multiple schemes present. There was support for the need for a detailed review of gaps in redress in the sector to underpin any calls for new ombudsman schemes

One response raised the issue of consumers being signposted to ombudsman schemes in conjunction with chargeable legal representation, arguing that it is contrary to the intentions of the pre-action protocol for consumers to be charged a fee by their legal representative to access an otherwise free service, particularly where issues are not considered to be legally complex.

Respondents argued for a central point for ombudsman policy within government, and the removal of barriers to greater use of ombudsman schemes, including the requirement to make a complaint in writing. It was also suggested that more could be done to improve access to ombudsman schemes for small businesses, particularly those covering financial services, telecoms and energy.

## Stronger enforcement powers

The Green Paper highlighted previous calls from some ombudsman schemes for stronger enforcement powers to ensure that decisions made by ombudsman are implemented.

In the current landscape, compliance with ombudsman decisions varies significantly and therefore outcomes for consumers are also inconsistent. Some ombudsman decisions are binding on the organisation that is the subject of the complaint. In other ombudsman schemes, decisions are *de facto* enforceable because those operating in the sector are required to be members of an ombudsman or dispute resolution scheme in order to operate. In these schemes, enforcement then depends on the relevant licensing body or regulator to take appropriate action following a failure to comply. In other areas, there is no formal enforcement mechanism but for commercial and reputational reasons, compliance is high.

Ensuring better and more consistent compliance with ombudsman decisions across the sector is therefore vital. Whilst strengthening enforcement powers could be one potential mechanism for

achieving this, the impact on the overall ethos of ombudsman schemes must be considered. Ombudsman schemes exist to explore in a collaborative way what has gone wrong, and to make recommendations to prevent a repeat of the failings. If the ombudsman became enforcer, this ethos would be undermined. There is also a risk that if ombudsman decisions become binding, there could be a swathe of legal challenges to ombudsman findings, which would undermine their role as a quicker and cheaper alternative to the courts for resolving disputes. Better compliance with ombudsman decisions may therefore be more effectively resolved by regulators, trading standards, or by ensuring that disputes can be resolved more swiftly if they do proceed to court.

In recognition of poor compliance with decisions made by the Housing Ombudsman, the government recently granted this scheme expanded powers to monitor compliance. It will be important to evaluate and consider the impact of these changes both for consumers and for the ombudsman sector to inform what further changes are needed to improve the rate of compliance across the sector as a whole, or on a sector-by-sector basis. Better data collection regarding levels of compliance and consumer redress across all schemes will also be important in informing policy to improve overall compliance levels, but must be appropriately resourced.

## Improving links between ombudsman schemes and the courts

There have been calls from the ombudsman sector for improved collaboration between tribunals and ombudsman schemes to tackle maladministration, including giving administrative courts and tribunals the ability to refer potential maladministration matters to an ombudsman who could then consider them using 'own initiative' powers.

Many of our members who work on matters that end up before tribunals or sit as Tribunal Judges have told us that cases which end up in the tribunals often contain elements of maladministration. Tribunals seeing significant numbers of such cases can detect patterns of systemic maladministration that are not necessarily apparent from individual cases.



Giving tribunals the power to refer evidence of systemic maladministration to the relevant ombudsman would provide justice to those who have been affected by the maladministration but have not pursued an appeal. It would also tackle the underlying cause of a flow of cases into the tribunal system, reducing the number of future cases and delivering direct savings to the justice system.



One option is to give a formal power to listed designated bodies to refer complaints to an ombudsman. This would enable a proper consideration of the concerns raised, which the tribunal sector lacks the resources to undertake. This power could also enable the judiciary to request that ombudsman schemes follow-up on the way rulings that could have a systemic impact are being implemented.

### Next steps

#### The Law Society will:

- Continue to work with the ombudsman sector and other stakeholders to develop its proposals further

#### A new government should:

- Give the Ministry of Justice the lead for ombudsman policy within government to drive forward reform of the sector to provide better access to justice including:
  - One ombudsman scheme per regulated sector
  - Improved collaboration between tribunals and ombudsman schemes
  - The ability for ombudsman schemes to refer points of law to the courts
  - Powers for ombudsman schemes to set complaints standards in their area
  - Powers for ombudsman schemes to undertake 'own initiative' investigations

# 6 Support for small businesses to resolve disputes more effectively

## Increased awareness and use of non-court dispute resolution

Research by the Federation of Small Businesses in 2016, highlighted in the Green Paper, showed that just 3% of small businesses used mediation to resolve their most recent dispute, while 8% had used any form of non-court dispute resolution, despite it being less likely to damage commercial relationships than using the courts.<sup>24</sup>

Other studies show that just over a quarter (27%) of businesses going to civil court do so because of a lack of awareness of non-court dispute resolution mechanisms.<sup>25</sup>

Increasing awareness among small businesses of options to resolve disputes without going to court, and supporting them to do so, is therefore an important part of increasing access to justice for this group, also supporting economic growth. The 'Solutions Explorer' is one channel to provide information and guidance to small businesses with legal issues. The Green Paper also proposed that the Small Business Commissioner (SBC) - established in 2016 to support small businesses resolve disputes around late and unfair payment issues - could play a bigger role if there was greater awareness of its existence and it were given enhanced powers. To date the SBC has secured the return of £8 million worth of unpaid invoices for small businesses.

A consultation undertaken by the Department for Business and Trade and Department for Business, Energy and Industrial Strategy in 2020<sup>26</sup> found agreement that the Small Business Commissioner's powers were insufficiently strong. In February 2023, the Department for Business and Trade launched a statutory review

of the Small Business Commissioner, stating that it was aware that "every complaint the Commissioner deals with represents support given to a business in a challenging situation - potentially enabling their long-term survival and growth". In November 2023, the review concluded that low awareness of the SBC and insufficient resources and power were key factors limiting its impact. The review announced the government's intention to raise awareness of the role of the SBC through ministerial activity and through its business support programmes, and to introduce primary legislation that would make the role of the SBC clearer and broaden its power to enable it to investigate issues on its own initiative, such as potential instances of poor payment.<sup>27</sup> This is important because the 2020 consultation unearthed evidence that the SBC was prevented from acting on evidence of poor payment practices because some small businesses have wanted to avoid conflict with significant and influential customers.

Analysis undertaken by Social Finance for the Law Society, published alongside this paper, shows that increased awareness among small businesses of non-court dispute resolution, driven by an enhanced role of the Small Business Commissioner, could result in as many as

<sup>24</sup> Tied Up | FSB, The Federation of Small Businesses

<sup>25</sup> <https://europa.eu/eurobarometer/surveys/detail/1061>

<sup>26</sup> Increasing the scope and powers of the Small Business Commissioner - GOV.UK ([www.gov.uk](http://www.gov.uk))

<sup>27</sup> Statutory review of the Small Business Commissioner response to views and evidence - GOV.UK ([www.gov.uk](http://www.gov.uk))



25% of businesses who previously had not used non court dispute resolution as a result of lack of awareness now doing so.

Assuming businesses who report a dispute have an average of one per year, this could deliver a saving of £70m in business time and court costs in one year. Even if just 10% who previously had not used non-court dispute resolution due to a lack of awareness did so, it could deliver a saving of £29m.

## More effective resolution through the civil courts

In addition to strengthening the powers of the SBC, there is scope for the civil court system to better support small businesses in resolving their late payment disputes in a fair, fast, and effective manner. The small claims track is quicker and less costly than other claims tracks, and litigants can also avail themselves of a free mediation service via this track – which should be of particular appeal to businesses seeking to maintain commercial relations. However, the general limit of claims up to £10,000 means that many small businesses with simple late payment claims can be excluded from this track as the monetary value exceeds the limit.

The expansion of the Online Civil Money Claims portal to allow claims up to £25,000 could be one tool to help to mitigate this issue, although the risks involved would need to be carefully balanced and monitored. Following a thorough evaluation of the expansions, and strong collaborative working between users and stakeholders, HMCTS could consider expanding the service further to even higher value straight forward claims.

It has also been suggested that the overall limit for small claims should be increased. While it is important that track limits are reviewed regularly to take account of inflation, it is equally important that where businesses need legal advice in resolving higher value disputes, they are able to recover the costs of doing so, which is not possible within the small claims track. If a business cannot recover legal costs it has to incur to recover a debt, that places a burden on that business just as being unable to recover the debt does. There is therefore a balance to be struck between making the process as quick and cost-effective as possible and ensuring

that businesses can recover legal costs they are obliged to incur when appropriate.

In trying to strike this balance, consideration should be given to allowing flexibility to the Courts, on the request of the claimant, to allocate some higher value business-to-business late payment cases to the small claims track. While businesses would need to be fully aware of the risks of small claims allocation, particularly around not being able to recover legal costs, it is envisaged that most late payment cases would be simple enough to not require legal advice/representation.

Furthermore, in order to promote the benefits of early resolution to as many businesses as possible, the Civil Procedure Rule Committee, Ministry of Justice and other relevant departments should work with the Federation of Small Businesses and the Law Society to explore whether the free mediation service could be an appropriate tool for further expansion to cover higher-value straightforward cases brought between businesses.

## Next steps

### The new government should:

- Bring forward legislation as promised in its Statutory Review of the Small Business Commissioner to give the Commissioner 'own initiative' investigatory powers.
- Raise awareness of the Small Business Commissioner through improved engagement and communications.

### The Ministry of Justice should:

- Work with business representative organisations and the Law Society to explore whether the free mediation service could be an appropriate tool for further expansion to cover higher-value straightforward cases brought between businesses.
- Explore the viability of allocating straightforward higher value business-to-business late payment cases to the small claims track, on request of the claimant.

# 7 Protecting legal services consumers in the age of AI

The use of AI in legal and justice contexts is expanding rapidly. It is already having a transformative role in larger solicitor firms as well as legal and business functions within organisations, enabling them to reduce administrative tasks and support their legal service delivery.

Integrity is an important part of the legal profession and the Law Society is considering how AI can be used responsibly and ethically to support the rule of law and access to justice in addition to increasing efficiencies and reducing costs for all sizes of firms and their clients. Alongside this work, the 21st Century Justice project has been exploring the use of AI in two specific contexts where it has identified potential harm to access to justice and to legal services consumers: the use of case outcome predictive tools by large law firms and the insurance industry to gauge the success of a case, and the use of generative AI such as OpenAI's ChatGPT, Microsoft's Copilot, Google's Gemini and Anthropic's Claude by individuals for legal advice. An analysis of the policy and regulatory landscape related to these contexts is published alongside this report.

Case outcome predictive tools provide litigation analytics focussed on the High Court in England and Wales. Using published historic court judgments, they detect patterns in past litigation and use these to predict future outcomes. Such tools are predominantly purchased by large firms to identify successful cases and inform their litigation strategy. The most recent research, by the Legal Services Board, found that in 2018 only 5% of providers in England and Wales were using case outcome predictive analytics.<sup>28</sup> Whilst this number is likely to have increased since, these tools currently remain accessible only to large firms due to cost. Although they have the potential to allow litigants to estimate their own chances of success, they are not currently being used directly by legal services consumers –

again due to the cost and inaccessibility of such technology.

One of the risks posed by these tools comes from the accuracy of the data used to train them. For example, judgments in the county courts and decisions from the employment tribunal are not routinely published. In the higher courts, the volume of judgments available varies considerably between publishers. Data on the contents of settlement agreements is scarcer still. In addition, as case outcome predictive technologies make predictions based on historic cases, they can entrench existing biases within the court system and risk being used to dissuade certain types of legal services consumers – such as those on low incomes – from taking claims forward. Over time, this could significantly alter the nature of the justice system and undermine access to justice.

Generative AI tools offer the potential to augment or entirely replace the information and advice services that are currently provided by legal professionals, at a fraction of the cost. By inputting basic information about a legal issue into the tool, consumers can receive free, instantaneous, understandable and seemingly authoritative legal advice. In a cost-of-living crisis where the cost of regulated legal advice from a solicitor is beyond the means of many, these tools are becoming increasingly attractive.

This is supported by findings from the 2023 Legal Needs Survey which show that 54% of people with a legal need looked online for information to help manage the issue, up by 4% since 2019. Of these, over a quarter (29%) stated they looked online to see whether the service

<sup>28</sup> Innovation survey 2018 report FINAL (legalservicesboard.org.uk)





could be accessed quickly. Other findings from the survey reveal that 59% of people believe lawyers take too long to deal with issues.

Studies from the United States have identified that consumer appetite for using generative AI tools to give legal advice only increases once people have tried them. Yet research also shows that information returned by generative AI tools is often inaccurate where they have not been trained specifically on legal data from the jurisdiction in question. In England and Wales there have been cases<sup>29</sup> where parties who are unable to access legal advice representation have relied on information provided by generative AI applications in litigating their case- information that has proven to be inaccurate and false. As more cases emerge in the future, the use of generative AI tools may have negative consequences for cases represented by litigants in person.

Training AI on accurate legal documents like judgments and court decisions can dramatically improve accuracy, yet in England and Wales access to this data is currently held privately with significant fees for access. This means that the most accurate and most powerful AI tools are more likely to be developed by and for those who can afford access such as insurance companies and bulk litigants, whilst legal services

<sup>29</sup> AI hallucinates nine 'helpful' case authorities (lawgazette.co.uk)

consumers are left with models which give inaccurate advice, with no redress available.

## Gaps in consumer protection

Although existing legislation in areas such as data protection, intellectual property, and equalities are applicable, currently there is no AI or generative AI-specific regulation in the UK, leading to uncertainty regarding the design, development, deployment, and use of AI in the legal sector. Most tools are being developed outside existing regulatory frameworks, such as the Legal Services Act 2007, that are intended to support access to justice and protect consumers regarding legal advice. There is also currently no consideration of redress for consumers who are directly or indirectly impacted using case outcome predictive technologies and generative AI tools for direct provision of legal services.

So far, the government has prioritised taking a pro-innovation, light touch approach to AI regulation, giving regulators an opportunity to interpret, apply, and enforce existing rules. In its recent response to the AI White Paper consultation, the government called for regulators, including the Legal Services Board, to outline their strategic approach to AI and the steps they are taking to regulate its use in a legal services

context. However, it is currently unclear to what extent the Legal Services Board or the Solicitors Regulation Authority (SRA) will be providing guidance, statutory requirements for AI providers of legal services, or proposing regulation for the direct provision of legal advice to citizens in the use cases outlined above. Alternative technology providers can often represent a grey area within lawtech regulation, as they are not carrying out reserved activities regulated by the SRA. As a result, it is unclear where the responsibility may lie for regulating these providers, and therefore the means of redress available to consumers. In this context, technology platforms – especially those in non-reserved areas or compliance-related areas where the law leaves greater scope for interpretation – may leave the

consumer vulnerable to inadvertent errors or omissions and potentially significant harms, if there is a lack of expert, regulated advice.

## Hearing the concerns of civil society

Findings from the 2023 Legal Needs Survey suggest that legal services consumers are wary of the use of AI in a legal services context. Half (51%) said they do not trust AI, with 49% concerned about the lack of human oversight and 42% concerned about data security. Almost four in ten (37%) mentioned not being confident using AI.

To identify ways to protect access to justice and legal services consumers from some of the risks of these tools, and where the Law Society could act, the project team convened a workshop in February 2024 with expert voices in digital rights, lawtech, access to justice and civil law to explore four potential scenarios of action and what they would entail:

- Do nothing – maintain the status quo and adopt a “wait and see” approach
- Put in place monitoring mechanisms to gather more information on the risks and benefits
- Develop optional quality standards to support engineers and innovators to understand what

“good” looks like in the legal information and advice space.

- Regulate – extend existing regulatory frameworks or create new ones

There was agreement from attendees that action is urgently needed to protect consumers and access to justice. The experts felt that doing nothing was not an option, suggesting that now is a good time to act to protect consumers while the AI legal services market is still relatively immature and before tools develop further and inequalities become further entrenched. Although beneficial, quality standards and monitoring were felt to be difficult to develop and enforce. As such, introducing new regulation was seen as the best option to protect consumers. The attendees felt that the Law Society could play an important role in elevating the voices of civil society which are currently under-represented in conversations about the use of AI in the justice and legal services space.

## Next steps

### The Law Society will:

- Work with the government, the Solicitors Regulation Authority and the Legal Services Board to explore ways to close current regulatory gaps.
- Assess mechanisms of redress for potential harms resulting from case outcome predictive technologies and AI, considering both new regulatory directions in context of AI used by solicitors as well as the impact of unregulated services on the legal profession and consumers with respect to legal service delivery
- Continue to work with civil society and elevate its voice in discussions and policy debates around the use of AI in legal services and the wider justice system

### A new government should:

- Develop guidance for the courts and legal profession to ensure transparency on the use of AI and data in the justice system in order to maintain public trust and confidence across the legal sector.





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