



## Regulatory and Compliance Update (Legal)

February 2020



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## Administration

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- ◊ Questions – lodge these via the question facility and they will be answered at the end
- ◊ Competency (solicitors) – A2
- ◊ Webinar recording – this will be uploaded to your LMS account or made available
- ◊ Polls – none this month

## Forthcoming webinar series

- ◊ Risk management
  - ◊ Held on 5 February 2020
- ◊ Risk-based file reviews
  - ◊ 12 February 2020 (1pm – 2pm)
- ◊ Complaints management
  - ◊ 19 February 2020 (1pm – 2pm)
- ◊ Breach management
  - ◊ 26 February 2020 (1pm – 2pm)

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# Regulation



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## 5AMLD now in force

- ◊ Came into force on 10 January 2020
- ◊ SRA will look at the short time between laying before Parliament and implementation when looking at enforcement
- ◊ Legal Sector Guidance not due out for another few months

[Read our blog](#)



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## Reporting to the SRA – non-solicitor employees

Check with the SRA the position relating to non-solicitor employees reporting via COLP/COFAs; it appears that this may now be acceptable as long as the compliance officer agrees a report should be made.



## Council for Licensed Conveyancers Scam Alert

Fake text messages being sent claiming to be from CLC Enforcement and requiring payments to be made within 7 days.

[Further information](#)



Regulating  
Property  
And  
Probate  
Lawyers

## Continuing Competence

The LSB is calling for evidence as part of its review into solicitors continuing competence, which could lead to regular revalidation.

[Further information](#)



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## Solicitors' Compensation Fund

The SRA is pressing on with plans to cut the upper limit for Compensation Fund awards from £2m to £500,000, while modifying other proposals to reduce the cost of the scheme.

[Further information](#)



## DAC6 reporting

DAC6 imposes mandatory reporting of cross-border deals bearing the hallmarks of aggressive tax planning.



Many questions remain about what transactions will have to be reported, the timetable of reporting and who will be liable for penalties. Solicitors have also raised concern that compliance could put them in breach of legal professional privilege.

Regulations implementing the directive, the International Tax Enforcement (Disclosable Arrangements) Regulations 2020, were laid in parliament on 13 January. Final guidance on compliance will not be ready until June following consultation on a draft expected for April or May.

## ICO statement on data protection post-Brexit

The UK will leave the European Union on 31 January and enter a Brexit transition period.

During this period, which runs until the end of December 2020, it will be business as usual for data protection.

### Further information



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The UK will leave the European Union on 31 January and enter a Brexit transition period.

During this period, which runs until the end of December 2020, it will be business as usual for data protection.

The GDPR will continue to apply. Businesses and organisations that process personal data should continue to follow our existing guidance for advice on their data protection obligations.

During the transition period, companies and organisations that offer goods or services to people in the EU do not need to appoint a European representative. We have updated our Brexit FAQs to reflect this advice. The ICO will continue to act as the lead supervisory authority for businesses and organisations operating in the UK.

It is not yet known what the data protection landscape will look like at the end of the transition period and we recognise that businesses and organisations will have concerns about the flow of personal data in future.

We will continue to monitor the situation and update our external guidance accordingly. Our full suite of Brexit guidance and materials, to enable you to prepare for all scenarios, is available here.

## Don't take clients on face value!

An experienced solicitor has been fined £20,000 for misconduct after being duped into accepting that a woman was who she said she was because he did not require documentary proof.

It meant that he unwittingly helped a man fraudulently borrow against a property owned jointly with his ex-wife.

[Read our blog](#)



## Notable disciplinary cases (solicitors)

- A solicitor who was duped into employing a bogus solicitor, who then facilitated a £1.2m conveyancing fraud, has been struck off. The bogus fee-earner stole the identity of a genuine solicitor, and while the SDT said he had been a victim to some extent, his failures had allowed her to perpetrate the frauds.
- A solicitor who acted where there was a real conflict of interest and paid out almost £6m from buyer clients before they had obtained any security in the flats they were hoping to buy, has been fined for misconduct.
- A “disgraceful” solicitor who disappeared with over £415,000 of client money and apparently went travelling to Malaysia has been struck off. The SDT said that, in a farewell email he warned his trainee solicitor that “there are going to be some angry clients”.

## The Solicitors Disciplinary Tribunal

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# Operational

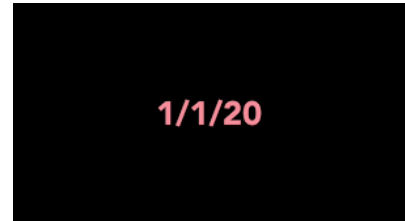


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## Date Warning

When you date documents do not use the format '1/1/20' for 1 January 2020, as it could be amended to say '1/1/2019'



## Windows 7 Support

Windows 7 users need to upgrade their PCs to avoid possible cyber attacks as support for the software ends.

[Read our Cyber Threats 1 blog](#)

[Read our Cyber Threats 2 blog](#)



Operating system will no longer receive critical updates, meaning Microsoft will stop patching any weaknesses that appear.

PCs will ultimately become vulnerable to hacker attacks.

Windows 7 is still one of the most popular Windows operating systems with a 32.74% global share, according to NetMarketShare estimations.

It is second only to Microsoft's most recent version, Windows 10, at 47.65%.

Firms can choose to pay Microsoft for extended security updates through to January 2023. However it is sold on a per-device basis and the price will increase each year in a bid to encourage businesses to upgrade.



## Who will pay your SRA costs?

Your professional indemnity insurance does not cover you if you are investigated or prosecuted by the Solicitors Regulation Authority (SRA).

Directors and Officers (D&O) cover will normally do this, but have you got it?



## SRA AML Declaration

Did you give any thought to what you were declaring?

[Read our blog](#)



1. Why is the SRA sending the request to me and not the MLRO/MLCO?
2. Have I read all relevant information published by the SRA and others on this topic, for example, guidance on preparing a firm-wide risk assessment, sectoral risk assessment, warning notices, legal sector guidance?
3. Have I contacted the SRA Ethics Helpline for advice (if appropriate) on AML and complying with the regulations?
4. Am I happy to take the word of the MLRO that everything is as it should be from an AML perspective or should I be investigating further and seeking evidence in support?

## Bullying within law firms

Over 900 people contacted LawCare 2019 – an annual rise of 8%:

- Stress - 26%
- Depression - 12%
- Bullying - 80 reports (47 in 2018) and comprising 12% of all contacts.

About two-thirds of reports were from women, while just over half were trainees or pupils, or had under five years' PQE, and a further 5% were law students.



## Data Breaches

- ◊ 48% of top 150 law firms reported data breaches
- ◊ 212 data breaches reported
- ◊ 71% of ICO recommendations are to improve training
- ◊ 41% breaches involved emailing the wrong recipient
- ◊ 12 firms reported 5 or more breaches
- ◊ 15 breaches reported by one firm

*Legal 150 Data Breach Report (20TWENTY4 Consulting)*



## Conveyancing referral fees could be banned

A report on referral fees will be published next month and will go to ministers 'to decide whether this particular aspect of the market should be regulated or not'.



## MedCo

Lawyers commissioning medical experts for whiplash claims may have to pay a membership fee to plug a major funding gap in the accreditation body.



MedCo, which facilitates the sourcing of medical reports for soft tissue injury, faces a £2.2m loss this year after a dramatic downturn in its income,

## Legal advice privilege

Legal advice privilege (LAP) only applies where documents were created with the “dominant purpose” of seeking or providing legal advice, appeal judges have ruled.

[Further information](#)



Lord Justice Hickinbottom said that although the authorities “do not speak with a single, clear voice” on the issue, he agreed with the approach taken by the High Court.

The Civil Aviation Authority (CAA) challenged a ruling by Mr Justice Morris that documents it was asked to disclose in a dispute with the airline Jet2 were not covered by LAP.

Jet2 launched judicial review proceedings against the CAA in April 2018 after the authority issued a press release in February that year criticising the airline for failing to take part in an alternative dispute resolution scheme.

Delivering judgment in *The CAA v Jet2.Com* [2020] EWCA Civ 35 – with the Law Society intervening – Lord Justice Hickinbottom said he did not consider there was “any good ground” for not following the “preponderance of authority” which supported the inclusion of a dominant purpose test.

He said that although they had some “different characteristics”, litigation privilege and LAP were “limbs of the same privilege”, legal professional privilege. It was “uncontroversial” that the dominant purpose test applied to litigation privilege.

While accepting the “position is not uniform”, Hickinbottom LJ said the dominant purpose test was generally a feature of privilege in other common law jurisdictions, particularly Australia where the test in litigation privilege originated.

“For those reasons, whilst I readily accept that the jurisprudence is far from straightforward and the authorities do not speak with a single, clear voice, I consider Morris J was correct to proceed on the basis that, for LAP to apply to a particular communication or document, the proponent of the privilege must show that the dominant purpose of that communication or document was to obtain or give legal advice.”

The CAA argued that Morris J had also erred in his approach to “multi-addressee communications”, particularly

emails to and from lawyers and non-lawyers, and whether they were protected by LAP.

Hickinbottom LJ said that “to a large extent” the dominant purpose test resolved this issue, because the CAA accepted that the main purpose of most of the emails was not to seek legal advice.

The lord justice said multi-addressee communications should be considered as separate communications between the sender and each recipient.

“Where there is a multi-addressee email seeking both legal advice and non-legal (e.g. commercial) advice or input, if regarded as separate communications, those to and from the lawyer will be privileged: otherwise, they will not be privileged, unless the real (dominant) purpose of a specific email to/from non-lawyers is that of instructing the lawyer.”

Hickinbottom LJ said he agreed with Morris J that, where a communication “might realistically disclose legal advice”, it would “in any event” be privileged.

He rejected a further argument from the CAA that the High Court erred in requiring the separate consideration of emails and attachments for the purpose of identifying documents covered by LAP.

“Whilst an email and attachment can be regarded as a single communication, separate consideration will need to be given to the attachment, given that it will have been received or created by the sender, and therefore may require discrete consideration.”

Hickinbottom LJ dismissed the CAA’s appeal. Lord Justices Peter Jackson and Patten agreed.



## Conveyancing Revolution

The role of the conveyancer is undoubtedly going to change as much of the administrative side of the role becomes automated over the coming years, a new report from the Council for Licensed Conveyancers (CLC) has predicted.

It said conveyancers would bank both time and cost savings, to be reinvested in improving the quality of service, upgrading technology and ensuring cyber security.

[Further information](#)



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The paper *Conveyancing 2030: A Discussion Paper*, foresees property lawyers focusing on advisory work where the quality of service – as rated by external comparison or feedback websites – will be decisive in where instructions go.

“Technology will radically improve transparency for consumers about what they are buying and the progress of their transaction. Because of the Internet of Things, properties will maintain up-to-date logbooks with little human intervention,” it says.

Upfront information about a property at the point of marketing – rather than waiting until later in the process for it – will be key to this.

The Home Buying and Selling Group, a cross-industry stakeholder body advising the government, is currently working on the Buying and Selling Property Information, which it hopes will contain all the information about a property before it goes on the market.

The report said: “As the role changes, conveyancers will need to invest in training and skills acquisition for themselves and their staff. Soft skills such as communication skills, listening skills, and empathy will become ever more important as the ability to build relationships becomes even more central.”

The paper highlighted a range of questions that everyone involved – regulators, lawyers, estate agents, lenders, technologists and others – would have to grapple with to ensure that consumers benefit from the changes, such as whether government should mandate the move to electronic conveyancing, rather than wait for incremental change; whether the law firm model needs to evolve to survive; and the extent to which regulators might need to regulate technology in addition to lawyers.

Conveyancing 2030 stressed how central data would become, delivering a ‘single source of truth’ on a property.

“But what needs to change to ensure all parties can trust the data? Who will validate the information and who becomes responsible if that data is incorrect or something goes wrong?” it asked.

When it came to the shape of the legal market, the paper said a major question was whether conveyancing would survive as a service delivered by separate providers or become part of what an estate agent offered.

Though there were reasons why estate agents have not generally moved into offering legal services directly to date, the report said: “As the conveyancer’s role becomes more focused on the advisory, consolidation will occur – and the figures on active firms in the market indicates that it already is – and estate agencies will find it easier to provide legal services using alternative business structures.”

It quoted leading practitioner Eddie Goldsmith, a founder of the Conveyancing Association, saying: “If we don’t think our world is changing, then we’re deluded”.

He continued: “If you’re an optimist here, it gives you the opportunity to be that person that you actually qualified to be – which is giving advice. We didn’t qualify to push paper around and if you look at a standard transaction, 80% of it is admin.

“The greatest threat to all conveyancers is a third-party disruptor coming in and saying we can offer something better than that – digital conveyancing is where they will see the opportunity.”

Mr Goldsmith envisaged several potential futures for conveyancing firms, from the consolidator and aggregator, to the niche firm specialising in “non-standard” matters and face-to-face advice, as well as dedicated lender firms.

Longer term, he could see the rise of what he called the ‘iConveyancer’ – software programmes that allow the client to control the process with little or no involvement of a lawyer.

CLC chair Dame Janet Paraskeva said: “I think many lawyers will be heartened by the prediction that there will be a greater focus on advisory work as the market changes and that it can be used to create a point of differentiation.

“However, while we can predict certain shifts in the market with confidence – in particular the inevitable move to electronic conveyancing – how they play out over the next decade remains uncertain.

“With so much work going on to improve and reform the process, we think now is the right time to take a wider view on what this all means in the long term and how we can ensure that the home buying and selling process works best for consumers, service providers and ultimately the UK economy.

“We do not claim to have all the answers but with change coming it is vital that we as a regulator and the community we regulate are thinking about how we make sure we are ready for what future developments may bring.

“I hope this report will fuel a discussion across the property industry and that conveyancers themselves will grasp the opportunity to shape their future.”

## Beware when recruiting!

An experienced property solicitor was rejected for a job at a law firm despite being the only person interviewed because of age discrimination.

The judge said: “We were satisfied that the reason why the claimant was not offered the position was that he was considered ‘expensive’ and that this was indeed synonymous with his being an experienced and older solicitor.”



The tribunal heard that Raymond Levy, aged 57, made “what he saw as a joke” about being poisoned before the start of his interview with a Russian solicitor, but that was not the reason why he was rejected.

In a ruling from last July only just published, Employment Judge Langridge in Manchester said that, having “carefully considered” the explanations of at Cheshire-based McHale Legal for not offering Mr Levy a job, she found them “seriously wanting”.

The judge went on: “We were satisfied that the reason why the claimant was not offered the position was that he was considered ‘expensive’ and that this was indeed synonymous with his being an experienced and older solicitor.”

The judge said the law firm began by attempting to recruit a solicitor with five or more years’ post-qualification experience (PQE), but after not offering the job to Mr Levy, reduced this to three-five years before eventually covering the vacancy with “junior or unqualified members of staff, undoubtedly also at much lower salaries”.

In his rejection email, Mr Levy was told that the firm was looking for a solicitor with three-five years PQE and it would keep him in mind if it should have a need for a “senior lawyer” in the future.

Judge Langridge said the tribunal felt the law firm had “little understanding and awareness of discrimination” despite a “clumsily worded commitment” in its staff handbook.

“The lack of formal training in diversity and equality issues was apparent from the respondent’s complacency and its aggressive defence of its claim was wholly at odds with its self-imposed commitment in its handbook to take such complaints seriously.”

The judge said “continued threats” during the proceedings to report Mr Levy to the Solicitors Regulation Authority for bringing the claim if he was not successful were “revealing of an employer which is impervious to

the possibility that it may have discriminated”.

The employment tribunal heard that, before the job interview started, Mr Levy was in the law firm’s reception area, where a television was showing the news and a report about the Novichok poisoning in Salisbury.

The judge said Mr Levy, who did not know that the solicitor greeting him was Russian, “made a comment to the effect of ‘I hope you aren’t going to poison me.’”

Judge Langridge said Mr Levy did not refer to Maria Udalova-Surkova’s Russian nationality, and the remark was not “directed to her personally”, but he was “prompted to make what he saw as a joke by the news report”.

Ms Udalova-Surkova – whose departing associate created the vacancy – was “taken aback by the comment but said nothing in response, and the interview went ahead without further reference to it”.

Mr Levy said he was aware that the salary would be less than the £60,000 he might get in London. He offered to work on a salary of around £50,000 and they discussed a potential start date. Ms Udalova-Surkova said the decision was subject to a ‘board meeting’.

In her notes for that meeting, she said Mr Levy was the only person to apply. The note included the words: “Expensive. Doesn’t cover our needs.”

The tribunal concluded that the latter was not the principal reason for not appointing Mr Levy. “There had been no discussion at interview about his ability or willingness to cover other areas of work, such as residential property.

“The tribunal’s conclusion is that the claimant’s capabilities and experience were not in fact in issue, and he would have been a suitable replacement for the experienced associate solicitor who had until recently been assisting Ms Udalova-Surkova.

“The redistribution of the property work within the firm, utilising staff who were either inexperienced in commercial property work or even unqualified, did not in our view fill the gap for which the respondent advertised.

“The fact that the respondent chose to embark on this course was equally consistent with it taking steps to manage the consequences of not appointing the claimant. The need for assistance with commercial property work had not disappeared, but the respondent made up its mind that the claimant would not be the person to provide it.”

Judge Langridge concluded that the firm’s decision not to employ Mr Levy could not be considered a “proportionate means of achieving any legitimate claim” because Mr Levy was flexible about salary and duration of the job, offering to work on a self-employed basis.

However, no effort was made to negotiate with him: “Rather than keep an open mind and negotiate terms with the claimant, the respondent instead deprived him of an opportunity to obtain work at a time when he was unemployed and receptive to discussing the salary level.”

There was no “credible, coherent and consistent explanation” for the firm’s decision.

Mr Levy sought compensation for loss of earnings, based on continuing losses even after finding alternative work, and requested an award for injur

## HIP-style questionnaires

The Home Buying and Selling Group has created what it calls a 'Buying and Selling Property Information' (BASPI) as 'one source of truth' about a property.

The Conveyancing Association told the Council for Licensed Conveyancers' annual conference that a questionnaire would be completed by the seller at the point the property is put on the market.



Rudolf said: 'We can now have augmented intelligence so [the seller] does not have to see the questions that do not apply to her. We can look to how we can import the existing data, such as what the remaining term of the lease is.' Data from property log books could also be imported.

Further details about the form can be found in the CLC's Conveyancing 2030 discussion paper, published yesterday. The form will be accessible to the buyer prior to the offer and lenders, and sent to all parties with the memorandum of sale. This will include the valuer, reducing or eliminating the need for post-valuation enquiries.

In the discussion paper, Rudolf suggests lenders should have access to the property information to identify whether the property is suitable for their lending policies.

She says in the report: 'Because we would like to see it available in digital format, it could be signed digitally and supported by biometric identity verification for the seller to establish that they own that identity and that it is the identity of the registered proprietor. How far would this go in terms of eradicating seller impersonation fraud and reducing claims, which in turn would reduce conveyancers' insurance premiums that have currently reached an eye-watering high this year thanks to several big claims?'

BASPI has received approval from several organisations including the Law Society and Solicitors Regulation Authority, Rudolf said. Lawtech firms are looking at digitising BASPI and how it can be integrated into their systems.

Rudolf told the conference: 'We're going to pilot it. We're hoping to have 500 transactions go through the pilot using large chains of estate agents - half with the BASPI and half without. We're looking for pilot participants... We hope it will create a cheaper, quicker, less stressful home moving process for all. And when I say "cheaper", you're not going to have to drop your fees. It's getting rid of waste from the process.'

## Mandatory use of comparison websites

Law firms, chambers and other legal services providers could be forced to sign up to comparison websites so that clients can let others know about the quality of service they received.

[Further information](#)



Internal complaints records could also be made public under ideas floated by the Legal Services Board (LSB).

The oversight regulator is gearing up for the Competition and Markets Authority's (CMA) expected review later this year of the progress made on its December 2016 report on the legal market.

Transparency was a core part of the CMA's recommendations, one of which called for regulators to promote the use of independent feedback platforms to help consumers to understand the quality of service offered by competing providers.

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# Market News



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## Conveyancing on the up!

The number of mortgages approved last year was the highest in a decade.

982,286 mortgages were approved by the main high street banks during 2019 - 7.4% more than in 2018.





## NAHL in turbulent waters

NAHL announced on 3 February that underlying earnings for 2019 are likely to be between 7.5% and 10% lower than board expectations.

The company said that 2019 had been a 'challenging year', with the property market contracting and the group's residential property division making a small loss.

The outlook for 2020 performance is significantly lower than previous expectations.



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## 1,200% surge in profits!

An alternative business structure (ABS) owned equally by two law firms and an accountancy practice has recorded a 1,200% surge in post-tax profits.

  
MANAGING COMMERCIAL DISPUTES

  
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Escalate, aimed mainly at SME clients, combines the offer of mediation led by corporate recovery specialists with a guarantee that firms will keep at least 70% of any money recovered in court or through settlement.

Any questions?



## Products & Services

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## Online resources

- ◉ [Digital Learning & Compliance website](#)
- ◉ [LinkedIn page](#)

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◊ Legal Futures

◊ Law Society Gazette

## Acknowledgements



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