

# **Law Society of England and Wales – Written Evidence (AUT0001)**

## **Summary**

1. It is vital for our trade negotiators to put legal and other professional services at the forefront of forthcoming trade discussions due to the economic importance of the sector, both in its own right and in its role as a facilitator of all international business transactions.
2. Generally regarding UK trade negotiations, the Law Society of England and Wales (LSEW) recommends:
  - That legal and other professional services be at the forefront of the Australia – and all other forthcoming – trade discussions, in order to ensure that the UK is negotiating on its areas of strength and securing ambitious deals for its leading sectors.
  - That trade negotiations on legal services should seek the ability for UK legal professionals to do the following:
    - Advise clients on UK laws (England and Wales, Scotland, Northern Ireland) under home state title (solicitor, barrister/advocate) and public and private international law to the extent that they are entitled to practise in their home jurisdiction;
    - Provide advice through commercial presence for firms, temporary practice (fly-in fly-out), establishment rights for individuals, as well as digital provision;
    - Have a clear, transparent and proportionate path to requalification into the host state profession;
    - Represent their clients in arbitration, conciliation and mediation in international proceedings; and
    - Partner with, employ and be employed by local lawyers.
  - That all negotiations should be complemented with market access discussions. Trade negotiations may provide a catalyst for change outside of the text of a free trade agreement (FTA), particularly if both governments give impetus to relevant authorities to progress these.

- That the UK Government continue to recognise that trade goes hand in hand with respect for the rule of law and so consider human rights clauses in line with previously negotiated FTAs.
3. The legal professions in Australia and the UK would benefit from closer trade in legal services. Generally, UK firms are able to establish and practise reasonably well, although not in the same Limited Liability Partnership (LLP) structure available in their UK operations (see further information at paras30 -34). However, remaining practical barriers prevent realisation of the full benefit of trade in legal services between our countries. These difficulties increase costs for clients in Australia; limit international opportunities for local lawyers; and reduce the skills transfer and contribution to the local market, particularly for those without the support of larger organisations.
  4. If these challenges were addressed, UK-headquartered international firms in Australia would be able to:
    - expand recruitment opportunities and address the current international skills shortage in Australia;
    - attract talent from the UK and globally;
    - contribute to the development and growth of a culturally diverse, dynamic, experienced and capable Australian legal profession; and
    - increase the attractiveness of doing business in Australia.
  5. Difficulties lie in the fact that admission to the Australian legal profession is an exercise of the inherent jurisdiction of each of the state and territory, rather than the federal body. As there are no uniform rules regulating the practice of law across all Australian states and territories, addressing the remaining barriers requires coordination with several local stakeholders.
  6. In this respect, the LSEW supports the wider adoption of the *Legal Profession Uniform Law* (Uniform Law). The Uniform Law and Uniform Rules provide the regulatory framework for the legal profession in NSW and Victoria, creating a common market for legal services across these jurisdictions that harmonises regulation of the legal profession and creates a single system to govern legal practice. Greater uniformity in regulation would benefit local and foreign firms alike.
  7. Ideal outcomes in trade negotiations are:

- Greater recognition of professional qualifications of England & Wales, regardless of route to qualification and without need for additional study;
  - Increased mobility options to facilitate short term secondments.
8. Alongside these discussions, key asks of the sector include:
- Clearer guidelines for admission with prior experience and conditional admission (through the Uniform Law);
  - Greater uniformity of regulation across States/Territories;
  - Greater availability of business structures, including the UK LLP.
9. The LSEW therefore sees FTA discussions with Australia as an opportunity to deepen discussions on market access and a simpler system of requalification with key counterparts, including the Law Council of Australia.
10. The LSEW supports the creation of a clear framework for implementation of an Mutual Recognition Agreement (MRA) under the proposed FTA with Australia to facilitate these discussions.

## **Introduction**

11. The Law Society of England and Wales (LSEW) is the independent professional body that works globally to support and represent 200,000 solicitors, promoting the highest professional standards and the rule of law.
12. Services, and in particular legal services, play an important role in facilitating the globalised market, both directly and indirectly. Nearly all international commercial transactions require the services of lawyers from two or more jurisdictions and this can be done most effectively where foreign and local firms can work together.
13. According to an analysis by KPMG, legal services contributed £60bn to the economy in 2018 and supports around 552,000 full time employees in the UK. The legal services sector also has a significant impact on wider economic growth in the UK through the enabling role it plays.
14. In addition, the legal sector contributes to the effective interpretation and implementation of the rule of law, creating certainty and further facilitating investment and economic growth.

**Does the Department for International Trade (DIT)'s strategic approach, published on 17 June 2020, set out the right objectives for negotiations? How effectively does that strategic approach represent the interests of different groups and regions across the country, including the devolved nations, businesses, civil society, and individuals?**

15. The DIT's strategic approach recognises the unique opportunity that an FTA with Australia can bring, given our shared heritage and cultural links. The LSEW agrees that there are few other opportunities to negotiate such an advanced FTA in the areas that matter to the UK.
16. The strategic approach correctly notes that an FTA with Australia could enhance the ability of professionals in key areas of UK strength, such as legal services. It seeks to secure ambitious commitments from Australia on market access and fair competition for UK services exporters.
17. The LSEW reiterates the importance of including the legal services sector in these debates, in addition to professional services. An FTA can expand opportunities for UK legal services to ease frictions to cross-border trade and investment, complementing co-operation on legal regulatory issues.
18. The LSEW's key asks are greater recognition of professional qualifications and increased mobility options.
19. The government's response recognises the importance of facilitating temporary movement of business people and supporting further mutual recognition of professional qualifications (MRPQ). The strategic approach also notes the concerns on business mobility.
20. Alongside these points, the LSEW also calls for consideration of measures to increase clarity and predictability in the guidelines for admission with prior experience as well as conditional admission (under the Uniform Law), as well as encourage the greater availability of business structures, including the UK LLP, and closer coordination of regulation across States/Territories.

*Legal services in trade discussions*

21. The UK should ensure that it is negotiating on its areas of strength and so secure ambitious deals for its leading sectors. The UK is the second largest legal services market globally. English and Welsh

legal services have an international reputation for excellence and some of the world's most renowned law firms originate in the UK.

22. There are over 600 practising solicitors from England and Wales currently in Australia.<sup>1</sup> The first UK- headquartered law firms entered the Australian market in 2009-10. There are now a number of firms of UK origin in Australia, many of which undertook significant mergers with top or boutique local firms. Most of these firms have multiple offices across Australia.
23. The LSEW recommends that trade negotiations on legal services seek the ability for UK legal professionals to do the following:
  - a. Advise clients on UK laws (England and Wales, Scotland, Northern Ireland) under home state title (solicitor, barrister/advocate) and public and private international law to the extent that they are entitled to practise in their home jurisdiction;
  - b. Provide advice through commercial presence for firms, temporary practice (fly-in fly-out), establishment rights for individuals, as well as digital provision;
  - c. Have a clear, transparent and proportionate path to requalification into the host state profession;
  - d. Represent their clients in arbitration, conciliation and mediation in international proceedings; and
  - e. Partner with, employ and be employed by local lawyers.
24. The LSEW also supports a visa regime that facilitates the field of activities of short-term business visitors as well as the provision of services by contractual services suppliers and independent professionals.

### *Practising in Australia*

25. There is a strong and long-standing relationship between Australian and the UK legal regulators, representative bodies and professionals. This draws on the historically close relations between our two countries, the strong similarities in justice systems and culture, and the cross-border flow of legal services.

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<sup>1</sup> Who are publicly listed.

26. Generally, UK firms are able to establish and practise well, although not in the same LLP structure available in their UK operations.
27. However, remaining practical barriers in recognition of qualifications, movement of persons, and regulatory difficulties prevent realisation of the full benefit of trade in legal services. These benefits include greater recruitment opportunities; increasing the attractiveness of doing business; and lowering costs for clients.
28. Ideal outcomes in trade negotiations are:
- a. Greater recognition of professional qualifications for similar jurisdictions, such as England & Wales, regardless of route to qualification and without need for additional study;
  - b. Increased mobility options to facilitate short term secondments.
29. These are discussed in detail below (from paragraph [47]).

### *Business Structures*

30. Although UK firms may establish offices relatively easily, there is no equivalent structure in Australia to the UK LLP. The LSEW understand that the current avenue for limiting liability through professional standards boards is used inconsistently and many large firms do not use the professional standards schemes.
31. Australian law does recognise a form of limited liability partnerships. However, these do not generally constitute themselves in the same way as in the UK and do not provide the same structural advantages as the UK model. These are therefore not commonly used as structures for a legal business.<sup>2</sup>
32. The UK LLP structure has become a common and preferred business structure in many countries including in England and Wales. These structures combine the benefits of limited liability with the flexibility of partnerships and are widely regarded as supporting growth and investment. Its unavailability in Australia makes joining in the market for both small and larger firms less attractive.
33. Further, international UK-headquartered firms carry global professional indemnity insurance cover (£100m+ per claim) and can

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<sup>2</sup> See, eg, <https://www.consumer.vic.gov.au/licensing-and-registration/limited-partnerships/what-is-a-limited-partnership>; see also <https://www.qld.gov.au/law/laws-regulated-industries-and-accountability/queensland-laws-and-regulations/associations-charities-and-non-for-profits/limited-partnerships/limited-liability-partnership>

take out additional “top-up” cover for any work with a value exceeding their minimum indemnity limit, implying that there is no real risk with allowing them to operate in this structure.

34. Permitting these structures would greatly increase the attractiveness of doing legal business in Australia and would equally benefit local lawyers. The UK Government should continue to promote the benefits and encourage the adoption of a structure similar to the UK LLP in Australia, as in other markets.

**How reliable do you find the DIT’s assessment of the potential impacts of the proposed agreement with Australia, either as set out in the strategic approach or here?**

*Market access in legal services*

35. The DIT have provided a comprehensive assessment of the potential impacts of the proposed FTA. However, they must also consider not only the additional benefits that come from these discussions but also its limitations.
36. A challenge for trade in legal services is that many of the barriers are “behind the border”. In this respect, an FTA can sometimes be a blunt instrument in achieving liberalisation, as dealing with domestic regulations is not as simple as seeking to lower tariffs on goods. The extent that an FTA will impact on private market activities in this respect is ultimately dependent on its interaction with government regulation.
37. As such, the LSEW notes that all key asks in these negotiations should be complemented by continued market access discussions.
38. An FTA would undoubtedly bring benefits to both countries. Open dialogue between LSEW, the UK Government and Australian counterparts is required to raise awareness of the practicalities of doing international business and facilitate both government to government and profession to profession commitments.
39. The LSEW does not see an FTA as an end in itself, but as a platform for future discussions and negotiations to further enhance the relationship between the Australia and the UK.
40. Certainly, the LSEW seeks to use these discussions as an opportunity to deepen discussions on market access with key Australian stakeholders. It also welcomes any mechanism that may be included for the LSEW and the Law Council of Australia to engage with the view to addressing these barriers and promoting

two-way professional mobility of lawyers and greater recognition of professional qualifications between Australia and the UK.

### *Mutual Recognition*

41. The legal professions of both Australia and the UK share a common history and similar legal systems. Our reciprocal strength in the quality and standards of legal education and governance provides a solid foundation for discussions of recognition. One avenue for this is via a MRA.
42. The *Australian Government Response to Industry's Action Plan to Boost Australian Services Exports* (Export Services Action Plan) highlights the importance of collaboration with professional bodies and "is promoting Mutual Recognition Agreements (MRAs) on licensing and registration including through Australia's FTAs."<sup>3</sup> Industry or issue specific agreements are also the preferred approach of Australian stakeholders.<sup>4</sup>
43. However, while trade agreements can play a role in facilitating MRAs, they do not guarantee an arrangement will be implemented.
44. Difficulties lie in the fact that admission to the Australian legal profession is an exercise of the inherent jurisdiction of each state and territory, rather than the federal body. As there are no uniform rules regulating the practice of law across all Australian states and territories, this would require coordination of several local bodies and regulators.
45. Given the interaction with domestic regulation, addressing issues of mutual recognition will involve both government to government and profession to profession commitments. Open dialogue between LSEW, the UK Government and Australian counterparts is required to raise awareness of the practicalities of doing international business and facilitate this type of engagement.
46. The LSEW supports the inclusion of a framework for progressing MRAs in an UK-Australia trade agreement with clear actions and timeframes for an implementation. The Australian Government Productivity Commission further notes that "any implementation working group should be adequately resourced and involve

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<sup>3</sup> *Australian Government Response to Industry's Action Plan to Boost Australian Services Exports* (Export Services Action Plan) available at: <https://www.dfat.gov.au/about-us/publications/Pages/action-plan-to-boost-australian-services-exports#government-response>

<sup>4</sup> See, eg, Law Council of Australia. Submission to Productivity Commission, Review of Bilateral and Regional Trade Agreements. March, 2010, Canberra.

representatives from the relevant regulators as well as the government agency responsible for policy matters in the specific service sector.”<sup>5</sup>

**The UK Government has expressed interest in increasing opportunities for the UK professional services industry by supporting Mutual Recognition of Professional Qualifications and facilitating the temporary movement of business people between the UK and Australia. What provisions do you think the UK should seek to agree with Australia on the movement of people in professional services and what impacts might there be for UK workers and businesses? What provisions will Australia be seeking?**

### *Recognition of Professional Qualifications*

47. The major barrier to trade in legal services between Australia and the UK is recognition of qualifications.

48. Many solicitors of England & Wales seek dual-qualification when working in Australia as a legal professional in order to continue to progress their careers while in Australia and provide the most seamless services to clients .

49. Admission to the Australian legal profession requires an applicant to have met three prerequisites:

- Approved academic qualifications from an approved institution, involving the equivalent of at least three years’ full-time study of law and successful completion of 11 compulsory areas of legal knowledge.
- Completion of an accredited or approved course of practical legal education at an accredited institution, or an approved provider, or under an approved training programme.
- Being a fit and proper person to be admitted to the legal profession.

50. Foreign lawyers can apply for admission based on qualifications obtained outside of Australia. This requires an assessment of whether the applicant’s academic qualifications and practical legal training are substantially equivalent to Australia’s admission requirements. Foreign lawyers can, in some cases, prove that

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<sup>5</sup> Productivity Commission, Barriers to Growth in Service Exports Research Report, Nov 2015, 28.

extensive experience should be considered as a substitute for formal qualifications.

51. However, the route to requalification can be administratively heavy, costly, and time-consuming. There is a lack of clear guidelines for the decision to exempt a foreign lawyer from requalification due to sufficient skill and relevant expertise.
52. In order to requalify, some solicitors of England & Wales have been required to sit up to 11 additional subjects (the equivalent of a full university course) in addition to a practical legal education course. The practical course covers a broad range of practice areas arguably not relevant to foreign lawyers.
53. University courses and practical legal education courses are both time intensive and run at set times during the academic year. Further, the LSEW understands that it is not possible to begin the process from outside of Australia. As such, the process usually takes a minimum of two years to complete.
54. Once admitted, a lawyer must then spend two years post-admission under supervision. This can be waived on application for foreign lawyers.
55. The lack of clear guidelines for the decision to exempt a foreign lawyer due to sufficient skill and relevant expertise has also led to some applicants spending significant time on the application and, if required, an appeal of the decision. Proof of practical legal training requires written evidence from previous employers, which can be difficult to obtain, and there are added issues for lawyers who operate in-house.
56. While the *Legal Profession Uniform Law* (Uniform Law) allows for conditional admission in NSW and Victoria, the requirements and application route are not clear and therefore underutilised. Greater clarity in conditional admission and guidelines for exemption, such as where the applicant has worked as a practising lawyer in a similar foreign jurisdiction, such as in England and Wales, for at least five years (including the period under a training contract) would greatly benefit foreign lawyers practising in these jurisdictions.
57. The LSEW supports a regime that provides for greater recognition of professional qualifications with similar jurisdictions, such as England & Wales, regardless of route to qualification and without need for

additional study. This could be further addressed by clearer guidelines under the relevant legislation, including the *Uniform Law*.

### *Practising in England & Wales*

58. Conversely, the Qualified Lawyers Transfer Scheme (QLTS) is the route for foreign qualified lawyers to dual-qualify as solicitors of England and Wales. The QLTS is a clear, fair and professional way to becoming a solicitor of E&W. There is no requirement for experience in E&W nor any additional academic study. This process seeks to test foreign lawyers to see if they have the same standards of knowledge and skill as a local solicitor.
59. The process involves two tests: the Multiple Choice Test (MCT) and the Objective Structured Clinical Examination. These are run at multiple times throughout the year and the MCT can be taken from overseas locations (although not currently Australia).
60. While the process is changing with the forecast introduction of the new Solicitors Qualification Exam (SQE) in the autumn of 2021, the general structure and the ease of sitting these tests will not change for international lawyers.
61. At the same time, many Australian lawyers choose not to dual-qualify in England & Wales as the current regime for foreign lawyers permits them to carry on their business without the qualification. Lawyers from all jurisdictions are able to practise here under their home title, advising on the law of their home country without additional regulation or licensing requirements. We strongly believe that this approach has made England & Wales the global hub for legal services that it is today. There are still significant differences within the UK that require taking an equivalence test if working in other UK jurisdictions.

### *Movement of persons*

62. Visa uncertainty is a disincentive to trade in legal services. The LSEW understands that the time taken to dual-qualify does not accord with the visa structure. For example, foreign lawyers may rely on the Short-Term Specialist Visa if they do not hold an Australian legal qualification but gaining this qualification may take longer than the visa duration.
63. There is added uncertainty about whether the solicitor profession will continue to be considered a listed occupation for the Temporary Skill Shortage visa (subclass 482 visa).

64. Short to mid-term secondments are also difficult under the current visa regime. High costs, distance, and onerous visa processes mean that many solicitors prefer to move for an extended period. At the same time, there are tax complications to staying beyond six months. These difficulties limit skills transfer and opportunities for young lawyers.
65. Further, while new business investments or working rurally can provide more immigration options, the LSEW notes that these may not be applicable to members of the legal profession, particularly those arriving with specialist knowledge.
66. The LSEW urges a greater consideration of the qualitative values that a solicitor can bring to the market, such as client relationships in addition to experience. It also asks that the nature of legal services and the interaction between visa policies and the provision of legal services in practice be a consideration in any trade discussion.

#### *Benefits of greater cooperation<sup>6</sup>*

67. The current restrictions are to the detriment of both legal professions. Firms operating in Australia note that greater certainty in these areas would allow them to rapidly expand recruitment opportunities, both regionally and nationally, with confidence that these applicants could be trained and move internationally. This would increase opportunities for Australian graduates and allow them to benefit from secondments, meeting the current demand of Australian graduates for jobs offering international experience.
68. The LSEW understands that firms are struggling to find the right expertise locally, partly as the experience is not available in Australia nor is there any way to gain this in the current Australian legal market. Facilitating the skills transfer between Australia and the UK would address this current skills shortage in international transactions and cross-border work in Australia.
69. Greater ease of doing legal business would also allow solicitors of England & Wales to contribute to the development and growth of a culturally diverse, dynamic, experienced and capable Australian legal profession, equipped to assist and serve local and international

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<sup>6</sup> For more information on the benefits of liberalisation, see David Collins, *The Public International Law of Trade in Legal Services* (CUP, 2018) and Carolyn Thurston Smith and Nankunda Katangaza, "Lawyers Without Borders" (*International Trade Law and Regulation Journal*) 2014.

clients by providing them with legal services in Australia, rather than having clients seek that advice overseas.

70. The establishment of foreign law firms in Australia provides opportunities for young legal professionals to develop globally competitive skills without needing to leave their country for another international hub. Additionally, the ability to work for a foreign firm and progress their legal career in an international firm creates greater choices for lawyers while remaining in Australia.
71. Both Australian and UK lawyers are eager to dual-qualify to further their skillset and employability. Young Australian lawyers can dual-qualify as a solicitor of England & Wales before gaining work experience in the jurisdiction (usually two years under the youth-mobility visa). However, the process is not as straightforward for solicitors seeking short term work in Australia given the lengthy dual-qualification process and visa requirements. As a result, many see working in Australia as a permanent or long-term commitment given the requirement to study on top of working full-time.

**3 September 2020**