

**Written evidence by the Law Society of England and Wales to International Trade
Select Committee inquiry on the UK-Australia free trade agreement (AUKFTA)**

Key points:

- I. The UK and Australia have similar legal systems, based on common law. This is a strong foundation for international trade in legal services, coupled with our strong and long-standing relationship both as countries and as legal services markets.
- II. Key asks from the legal sector ahead of the trade negotiations with Australia, consistent with the rights currently afforded to Australian lawyers in England & Wales, were:
 - a. Greater recognition of professional qualifications of England & Wales, regardless of route to qualification and without need for additional study;
 - b. Increased mobility options to facilitate short term secondments.
- III. The sector further called for:
 - a. Clearer guidelines for admission with prior experience and conditional admission (through the Uniform Law)¹;
 - b. Greater uniformity of regulation across States/Territories;
 - c. Greater availability of business structures, including the UK LLP.
- IV. However, trade agreements can be limited in what they achieve in practice, particularly on recognition of business structures and qualifications, as dealing with domestic regulations is not as simple as seeking to lower tariffs on goods. As a result, the AUKFTA must be complemented by further cooperative discussions to help foreign and domestic lawyers work together and benefit both the Australian and UK market.
- V. The negotiation foreshadowed in the Legal Services Regulatory Dialogue could further assist in these matters and raise awareness of the practicalities of doing international business. However, further engagement is important in ensuring that these potential benefits accrue in reality.

1. The Law Society of England and Wales 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.
2. 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 domestic firms can work together.

¹ It is noted that the Australian Legal Services Council's (LSC) Admissions Committee has since been reviewing rules governing admission of foreign lawyers under the Uniform Law

3. We believe that 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. The UK should ensure that it is negotiating on its areas of strength and so secure ambitious deals for its leading sectors.
4. 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.
5. England and Wales and Australia have similar legal systems, based on common law. This is a strong foundation for international trade in legal services, coupled with our strong and long-standing relationship both as countries and as legal services markets.
6. The Department for International Trade (DIT)'s strategic approach recognised the unique opportunity that an agreement with Australia could bring, given our shared heritage and cultural links.

Opportunities for the Australian and UK Legal Professions

Legal Services in Free Trade Agreements (FTAs)

7. The UK should ensure that it is negotiating on its areas of strength and 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.
8. In general, the Law Society 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 and advise their clients in arbitration, conciliation and mediation in international proceedings; and act as arbitrators, mediators and conciliators; and
 - e. Partner with, employ and be employed by local lawyers.
9. The Law Society 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.
10. 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.

11. As such, the Law Society notes that all key asks in these negotiations should be complemented by continued market access discussions. The Legal Services Regulatory Dialogue proposed in the AUKFTA should create a mechanism for such discussions, and the UK Government should pursue this.

Current levels of Market Access

12. There are over 700 practising solicitors (who are publicly listed) from England and Wales currently in Australia. 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.
13. The Australian and the UK legal regulators, representative bodies and professionals share a strong and long-standing relationship. 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.
14. Generally, UK firms have been able to establish and practise well, although not in the same limited liability partnership (LLP) structure available in their UK operations. 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.
15. Key asks from the legal sector ahead of the Australia negotiations, consistent with the rights currently afforded to Australian lawyers in England & Wales, were:
 - a. Greater recognition of professional qualifications of England & Wales, regardless of route to qualification and without need for additional study;
 - b. Increased mobility options.
16. A number of these have been realised in the final text, alongside provisions that support the legal profession in digital and data.
17. Alongside these discussions, key asks of the sector outside of the text itself include:
 - c. Clearer guidelines for admission with prior experience and conditional admission (through the Uniform Law);
 - d. Greater uniformity of regulation across States/Territories;
 - e. Greater availability of business structures, including the UK LLP.

Mobility

18. Lawyers around the world rely on the ability to enter another country to provide services, whether through short term visits (fly in-fly out) or through commercial presence, long-term establishment and digital provision. Visa uncertainty in Australia was a significant difficulty to trade in legal services.

19. The Law Society supports mobility measures that facilitate the provision of legal services under an FTA. In general, the Law Society believes that the UK should seek to negotiate agreements which
 - a. Provide greater transparency and clarity on the mobility provisions, their application to the legal sector in particular as well as their translation/implementation into the domestic immigration regime of the host country.
 - b. Allow for the provision of legal services as a permitted activity under the short-term business visitor (STBV) category.
 - c. Contain mobility provisions that facilitate the provision of legal services rather than being a condition for it (such as explicitly referring to a specific category of business visitor)
 - d. Consider options to facilitate the international intra-corporate transfer of lawyers between law firm offices and the secondment of lawyers to offices of those partner or alliance law firms.
 - e. Ensure that processing times are kept to a minimum and that eligibility criteria are straightforward and no more burdensome than necessary.
 - f. Do not consider economic needs tests or labour market tests in relation to provisions on home title practice.
20. The negotiating objectives for the Australia agreement noted the opportunity to enhance the ability of professionals in key areas of UK strength, such as legal services, to move more easily and support the facilitation of recognition of professional qualifications in priority industries such as these.
21. The AUKFTA removes the requirement for an economics needs tests for bringing senior British employees into Australia, adding the UK to a small group of Australian trade agreement signatories with this benefit.
22. The agreement also proposes changes to the Youth Mobility Visa, removing the need for specified regional work in Australia. Legal professionals may also be interested in the pilot visa schemes proposed under the agreement for early workplace career exchanges noted in the side letter to the agreement. Until further detail on this pilot is released, it is difficult to comment on its potential impact.
23. Guaranteed access to temporary skills visas for legal service providers as intercorporate transferees, contractual service suppliers and independent professionals is captured in a side letter to the agreement. However, a detailed analysis of its implications in light of the current Australian visa scheme is required to comment on whether this is a material difference for the legal sector.
24. Prior to the negotiations, the Law Society raised concern 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. 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). It is unclear whether either of these concerns are addressed in the trade agreement.

Digital trade

25. Digitisation is considered one of the most important factors in the evolution of the legal profession and legal services. We strongly believe that the UK Government should play a leadership role in digital trade and employ a broad range of levers to facilitate its development.
26. Provisions which provide greater clarity and certainty for businesses operating internationally in the digital sector are a welcome development. Lawyers and law firms operating internationally are required to deal with a regulatory patchwork when dealing with data and digital delivery. These lead to higher compliance costs, uncertainty for businesses and often conflicting positions and protections for individuals (e.g. with respect to data protection and privacy rights).
27. As such, provisions that specifically encourage publication of processes and greater transparency in areas such as electronic contracts as well as other trust services (such as electronic seals, electronic time stamps, electronic registered delivery services, or electronic trust services) may benefit the legal sector.
28. For the legal sector specifically, mechanisms that protect personal data processed by law firms are of crucial importance as they safeguard the principles of client confidentiality and Legal Professional Privilege (LPP).
29. The right to consult a lawyer in confidence is a cornerstone of professional obligations of lawyers and LPP provides certain confidential communications with enhanced protection from disclosure. LPP is treated under English and Welsh law as a fundamental common law right and as a human right given its crucial role in ensuring the proper administration of justice and rule of law. Access to legal advice in confidence is especially important in complex legal systems where both individuals and corporations need to understand their rights, obligations and duties in a society underpinned by the rule of law.
30. The agreement promises to increase opportunities for digital trade across all sectors of the economy, while also ensuring world-leading standards for personal data protection and for legitimate public policy objectives. This is particularly important for the legal sector and reflected in the negotiating objectives and agreement in principle. The Law Society continues to emphasise the unique professional obligations of lawyers in any data discussions.

Legal services provisions

31. Recognition agreements apply differently to the legal services sector due to the distinction between domestic and foreign law. Unlike other professional service sectors that may face different regulations, legal services also face different legal systems and knowledge of certain areas of law that are specific to each country and may not be directly transferable.
32. As such, the Law Society considers the recognition of professional qualifications as the *“recognition of existing home country qualifications and experience for the purposes of requalification into a host state profession.”*

33. Article 10.7 of the AUKFTA provides for this recognition. Its inclusion is an important feature of the new agreement as reflects its importance of the section, both in itself and as an enabler of cross-border trade in other sectors.
34. The agreement confirms this existing right for UK and Australian lawyers to advise clients and prepare documents relevant to arbitration, mediation and conciliation in the other country's territory using their original qualifications and title. It also prohibits disproportionately complex or burdensome administrative or regulatory conditions on, or for, the supply of these services.
35. Notably, this article does not create any new rights for lawyers in either jurisdiction, as both Australia and the UK already recognised the ability to practice and advise on home title law. However, it is welcomed both as precedent and for the certainty it provides to legal service suppliers.
36. Ahead of the negotiations, the Law Society also noted its support for the inclusion of a framework for progressing further discussion in a trade agreement with clear actions and timeframes for an implementation. This is reflected in the creation of a legal services regulatory dialogue proposed in Article 10.8. The discussion points for the dialogue specifically notes some of these issues including LLPs.
37. It is noted that agreements between relevant bodies can facilitate the recognition of solicitors' qualifications and experience (academic and in practice) for the purposes of dual-qualification; create a forum to discuss relevant issues such as access to host country courts, conflict between host and home state rules of professional conduct and recognition of business structure; as well as encourage greater cooperation between domestic regulatory and representative bodies.
38. However, the resourcing and support provided to this arrangement will be critical to its success. The Australian Government Productivity Commission further notes that "any implementation working group should be adequately resourced and involve representatives from the relevant regulators as well as the government agency responsible for policy matters in the specific service sector."² The Law Society notes this specifically in relation to the reporting guidelines proposed in the agreement to meet annually for the first three years from the date of entry into force and the encouragement to report on the progress of objectives no later than 20 months after the date of entry into force.
39. The negotiating objectives stated that an FTA with Australia offers a golden opportunity to further cement the UK's existing relationship. There are few countries with which the UK could negotiate as advanced an FTA as with Australia in the areas that matter to the UK. The Law Society agrees that this FTA goes further in addressing behind the border barriers for the legal sector than has taken place in other agreements through the specific legal services article and proposed regulatory dialogue – as noted in the negotiating objectives and the agreement in principle. However, it should be noted that these benefits do not accrue upon entry into force and reiterates that this will require further resource, discussion and developments from the relevant sector regulators.

² Productivity Commission, Barriers to Growth in Service Exports Research Report, Nov 2015, 28.

40. Finally, the agreement also guarantees the right for UK law firms to access government contracts for services in Australia, although on where these are covered by the agreement.

Stakeholder Engagement

41. The Law Society has been consulted throughout the FTA process and this engagement is reflected in the relevant provisions for legal services specifically that seek to address behind the border barriers.
42. As noted above, a critical success factor will be the continued support in the implementation of the agreement, both to the participants of the Legal Services Regulatory Dialogue and also in assisting firms and lawyers from both jurisdictions to understand the changes and what these mean in practice.