

## **Written evidence submitted by the Law Society of England and Wales to International Trade Select Committee inquiry on UK trade negotiations**

### **Summary**

1. The Law Society of England and Wales (The Law Society) 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. Latest figures show that legal services contributed £60bn to the economy in 2018 and represents the highest balance of trade among professional services in the UK. The concentration of legal and financial services in the City is a key factor to the UK's economic prosperity.
  3. Regarding UK trade negotiations, the Law Society recommends:
    - That legal and other professional services be at the forefront of 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.
    - 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 and temporary practice (both fly-in, fly-out and 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
      - Establish firms and to partner with and employ local lawyers.
    - That the UK Government utilise the mechanisms available, including regulatory cooperation and domestic regulation provisions, to secure these rights and support frameworks that encourage ongoing development in legal services within its free trade agreements (FTAs).
    - That all negotiations should be complemented with market access discussions. Trade negotiations may provide a catalyst for change outside of the text of a FTAs, particularly if both governments give impetus to relevant authorities to progress these.
    - That the UK Government continue its strong relationship with stakeholders and open
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onversations with the private sector, with a view to working collaboratively.

- That the UK Government continue to recognise that trade goes hand in hand with respect for the rule of law and consider human rights clauses in line with previously negotiated FTAs.

**Does the Department for International Trade (DIT) have the right objectives in respect of each Free Trade Agreement (FTA) negotiation?**

4. Services, and in particular legal services, play an important role in facilitating the globalised market. 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.
5. 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.<sup>1</sup> Based on latest available data,<sup>2</sup> there were approximately 9,500 law firms contributing to the UK's legal services sector. This is in addition to services provided outside of the law firm setting (such as through in-house teams in corporates, third sector and government).
6. In 2017, legal services provided a positive net contribution of £4.29bn to UK balance of trade, the greatest contribution among professional services sectors in the UK.
7. The concentration of legal and financial services in the City is a key factor to the UK's economic prosperity. England & Wales is home to legal professionals from nearly 40 jurisdictions and is a base for over 200 foreign law firms. We strongly believe that this open market has helped to turn the jurisdiction into a global leader.
8. The legal services sector also has a significant impact on wider economic growth in the UK through the enabling role it plays. This includes through: establishing and protecting property rights; facilitating transactions; and permitting economic cooperation and organisation.<sup>3</sup> The legal sector also contributes to the effective interpretation and implementation of the rule of law, creating certainty and further facilitating investment and economic growth.
9. This demonstrates the value of our sector to the UK. The Law Society believes that it is vital for our trade negotiators to put legal and other professional services at the forefront of forthcoming trade discussions. The UK should ensure that it is negotiating on its areas of strength and so secure ambitious deals for its leading sectors.

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<sup>1</sup> The Law Society, *Contribution of the UK legal services sector to the UK economy*, 23 January 2020 (available at <https://www.lawsociety.org.uk/support-services/research-trends/documents/contributions-of-uk-legal-services-sector-report-2020/>)

<sup>2</sup> From 2017, see *Contribution of the UK legal services sector to the UK economy*, above n 1.

<sup>3</sup> Ibid.

*Human rights and the rule of law*

10. The Law Society believes that respect for the rule of law is a precondition to economic stability and prosperity. Trade and both direct and indirect investment benefit from the existence of adequate accountability mechanisms, the separation of powers, and an independent legal profession (including an independent judiciary).
11. Rule of law and human rights are therefore important to any trading relationship and should be considerations for existing and future negotiations. Human rights challenges do not necessarily mean that the UK should not trade with a certain country or that unreasonable restrictions should be placed on such trade, although that may be the case in situations of grave and systemic violations of human rights. Regardless, as has been the UK Government's previous approach, it is best practice for any trade agreement to include a clause on the rule of law.<sup>4</sup>
12. While human rights or rule of law clauses in trade and investment agreements do not constitute third party clauses, in the sense that third parties (such as victims of human rights violations) can directly derive enforceable rights from such clauses, they do create an obligation on the parties to the agreement. A rule of law clause therefore gives the parties the legal basis to address human rights issues with its partners in a constructive way. By affirming the parties' commitment to the rule of law and human rights, the clause encourages political dialogue, consultations and a range of cooperation measures in the field of human rights and democracy, such as the implementation of international human rights instruments. Their aim is therefore to create incentives for improving respect for and protection of human rights and enhance the rule of law.
13. The Law Society supports the UK Government continuing its policy that trade goes hand in hand with respect for the rule of law. Any trade agreement negotiated and signed should consider a rule of law clause that is similar in substance to the clauses included in previously concluded FTAs.
14. It is noted that separating human rights and legal access discussions is sometimes required for constructive dialogue on this issue. However, this should not mean that human rights and rule of law issues are excluded from trade negotiations altogether.

*International trade agreements*

15. 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

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<sup>4</sup> See, eg EU-Central American Agreement, Title I (Nature and Scope of Institutions), Art. 1 Principles: "The parties reaffirm their attachment to good governance and the rule of law, which entails, in particular, the primacy of law, the separation of powers, the independence of the judiciary, clear decision making procedures at the level of the public authorities, transparent management of public affairs at local, regional and national levels, and the implementation of measures aiming at preventing and combating corruption". See also Art. 33 and Art. 29

international law to the extent that they are entitled to practise in their home jurisdiction;

- b. Provide advice through commercial presence and temporary practice (both fly-in, fly-out and 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. Establish firms and to partner with and employ local lawyers.

16. More specifically, in case of providing services via commercial presence<sup>5</sup> this includes the ability to:

- a. Set up a law firm under host or home state rules and forms. The former implies arguing for greater recognition of legal structures available in the UK;
- b. Employ local lawyers;
- c. Be employed by local lawyers;
- d. Form partnerships with local lawyers on an equal footing; and
- e. Enable law firms to continue using the name of their choice, subject to host country customs.

17. 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.

#### *Market access in legal services*

18. 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.

19. However, several provisions within an FTA can facilitate further trade in services, especially in contrast to multilateral General Agreement on Trade in Services (GATS)<sup>6</sup>; commitments. These include:

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<sup>5</sup> Also referred to as GATS Mode 3 or Investment.

<sup>6</sup> General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S

- a. domestic regulation or good regulatory practices provisions relating to licensing requirements, licensing procedures, qualification requirements, or qualification procedures;
- b. regulatory cooperation provisions that set out the objectives and mechanisms for cooperation between parties on selected areas covered by the agreement;<sup>7</sup>
- c. transparency provisions that encourage parties to keep each other updated on with regulatory and legislative developments and for relevant laws and regulations to be publicly accessible;
- d. digital trade, including provisions on electronic contracts, electronic authentication, data flows that may have an impact on practice rights;
- e. public procurement, allowing UK law firms to bid for public procurement contracts;
- f. governance; and
- g. visa facilitation / immigration.

#### **What are the potential opportunities and risks of each proposed FTA?**

20. With direct control over domestic trade policy, the UK Government now has increased opportunity to positively influence the future direction and content of trade in legal services commitments. We have outlined some of the challenges and potential opportunities for the UK Government's priority markets for FTAs that highlights this.

21. However, FTAs will not always result in new market openings, and we recognise that current UK trade policy centres around FTAs. All key asks in these negotiations should be complemented by continued market access discussions. As noted by the Australian Government Productivity Commission:

Realising benefits from trade depends on governments committing to further reducing barriers *at and behind* the border. No one mechanism will be sufficient to address international barriers to services trade.<sup>8</sup>

22. Often it is domestic regulations that create barriers to access a foreign legal market. These are the jurisdiction of the local regulatory body, such as the bar association and law society.

23. While an FTA may not be a suitable vehicle to address the outstanding issues, as with the other trade negotiations, the discussions around any potential free trade agreement provide a catalyst for change, particularly if both governments give impetus to competent

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<sup>7</sup> For example, the Australian FTAs with Korea and Chile, as well as the recent Canada US Mexico Agreement (CUSMA) invites the parties to cooperate in various ways regarding recognition, licensing and certification.

<sup>8</sup> Productivity Commission 2010, *Bilateral and Regional Trade Agreements*, Research Report, Canberra, 26.

authorities to make progress. Certainly, as the UK seeks agreements with other countries, the Law Society views this as an opportunity to deepen discussions on market access with key counterparts in that country.

24. At the minimum, international trade agreements secure the current level of access for legal services and provide a guarantee that these will remain. This is an acceptable outcome if more ambitious negotiations are not possible.

#### *Trade with the USA*

25. The ability of foreign lawyers to practise in the USA is regulated by each individual state. Currently under the EU directives, it is easier for an English and Welsh lawyer to practise in another EU member state than it is for a US lawyer to practise in a different US state to the one they qualified in (although this is likely to change post Brexit).

26. The current situation in the USA presents certain barriers:

- a. 17 states do not have rules permitting foreign legal consultant (FLC) status, meaning non-US lawyers are not able to practise either home law, the US state law or international law.
- b. Only six states have rules explicitly permitting temporary provision, also known as 'fly in-fly out (FIFO)' services (including California, Illinois, Massachusetts, Texas and Washington State).
- c. Most states have either a minimum age requirement and/or a minimum length of post-qualification practice experience to be eligible for FLC status.

27. As well as registering as an FLC with the relevant state bodies, some state rules require candidates to apply for a character report from the National Conference of Bar Examiners at a cost of \$850.

28. As legal services regulation is not a federal matter in the US, the US Federal Government negotiator cannot bind the state judiciaries to any deal. Any negotiations need to include the state level authorities and judiciaries, which are represented at federal level by the Conference of Chief Justices (CCJ), for any US commitments on legal services to be binding.

29. This is likely to create further challenges when using a free trade agreement, particularly because US lawyers cannot freely and automatically practise across state borders. However, it would be useful to have a mechanism for including legal services, such as an addendum which outlines commitments made by/between the UK and US legal regulators (CCJ) on liberalisation.

30. To liberalise the US legal services markets, the Law Society believes the UK should seek:

- a. Explicit rules allow to English and Welsh solicitors to be able to provide advice in their home law, third country law and international law through establishment and

temporary practice (both fly-in, fly-out and, of increasing importance, digital provision) in all US states and territories.

- b. Full recognition of the solicitor qualification and for our members to be able to apply for foreign legal consultant status, regardless of their route to qualification (e.g. if it includes a law conversion course instead of a full law degree), their age or the number of years of prior practice.
- c. Proportionate and fair ways to deal with the issue of alternative business structures (ABS) and non-lawyer ownership (these structures allow investors without a legal qualification to hold a financial stake in a law firm) as well as shareholders' requirements.<sup>9</sup>

### *Trade with Japan*

31. The current regulatory requirements in Japan place foreign law firms on an unfair playing field compared to local law firms. Procedural burdens and the application of these rules in practice are barriers for firms and lawyers wishing to enter the Japanese legal market. The two major issues affecting foreign lawyers in Japan are:
  - a. experience requirements and significant procedural burdens for registration as a foreign lawyer;
  - b. limited availability of permitted law firm structures.
32. In addition, the requirement for international foreign companies and lawyers to be resident in Japan for 180 days per year and high annual registration costs for foreign lawyers are further difficulties to operating in the market.
33. The Law Society understands that legislation recently passed in the Japanese Parliament will address issues previously mentioned on opening subsequent branch offices and international arbitration, although this will need to be reviewed once the legislation comes into effect later this year.
34. The current difficulties increase costs for clients in Japan, limit international opportunities for local lawyers and deter international talent from entering and contributing to the local market, particularly those without the support of larger organisations.
35. Further, these barriers discourage lawyers from settling and contributing to the market by encouraging fly-in fly-out services that circumvent these restrictions.
36. In the context of FTA discussions, ideal outcomes are:
  - a. reciprocal recognition of legal qualifications;
  - b. streamlined registration processes for foreign lawyers (such as on a firm basis);  
and

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<sup>9</sup> ABSs were introduced by the Legal Services Act 2007, which came into force between 2008 and 2011. Few other jurisdictions have equivalent ownership structures available for law firms.

- c. mutual acceptance of a wider variety of business structures through which lawyers can operate, in particular the UK limited liability partnership (LLP) structure.
37. Addressing these concerns would achieve the objectives noted in the Department for International Trade's (DIT) public bundle<sup>10</sup> and secures additional benefits for UK businesses.
  38. Ambitious commitments on market access and national treatment would provide certainty for UK services suppliers in their access to the Japanese market. This would also allow foreign firms to employ lawyers who are appropriately qualified in relevant home jurisdictions and create opportunities for Japanese lawyers wishing to dual-qualify without imposing additional requirements.
  39. The public bundle also noted that "[a]n FTA with Japan could allow professionals to move more easily and support recognition of professional qualifications." The Law Society strongly supports these aspirations.

#### *Trade with Australia and New Zealand*

40. Generally, UK firms do not face any difficulties with their operations in Australia and are able to establish and practise reasonably well, although not in the same LLP structure available in their UK operations.
41. However, remaining practical barriers prevent realisation of the full benefit of trade in legal services between our countries. Difficulties in the process of dual-qualification increase costs and act as a deterrent to foreign lawyers entering the market. Further barriers also exist in visa uncertainty and regulatory complexity.
42. 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.
43. In the context of FTA discussions, ideal outcomes are:
  - a. Greater recognition of professional qualifications regardless of route to qualification and without need for additional study; and
  - b. Increased mobility options to facilitate short-term secondments.
44. Alongside these discussions, key asks of the sector include:
  - a. Clearer guidelines for admission with prior experience and conditional admission under the *Legal Profession Uniform Law*;
  - b. Greater uniformity of regulation across States/Territories; and

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<sup>10</sup> DIT, *UK-Japan free trade agreement: the UK's strategic approach*, Policy paper (13 May 2020) available at: <https://www.gov.uk/government/publications/uks-approach-to-negotiating-a-free-trade-agreement-with-japan/uk-japan-free-trade-agreement-the-uks-strategic-approach>

c. Greater availability of business structures, including the UK LLP.

45. Addressing these challenges would provide certainty and additional access to markets by building on the similarities between our economies, rules and systems.
46. The Law Society supports the wider adoption of the Legal Profession Uniform Law (LPUL), consistent with calls from the *Australian Government Response to Industry's Action Plan to Boost Australian Services Exports*.<sup>11</sup> Greater uniformity in regulation would benefit local and foreign firms alike. However, we recognise these decisions are the remit of State and Territory governments and professional associations.
47. The Law Society also supports the Legal Services Council's (NSW and Vic) review of guidelines for registration of foreign lawyers begun in 2019. Greater transparency in these regulations would assist foreign lawyers who wish to contribute in certain areas of practice.
48. Many of these issues are common to trade in legal services with New Zealand. We similarly support discussions that provide a framework for greater recognition of qualifications, transparency in dual-qualification processes and support for services trade with New Zealand.

#### *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)*

49. Improved market access for UK lawyers to follow their clients into the Asia-Pacific region is an important objective. Many of our members have substantial operations in the CPTPP member countries.
50. While some countries, such as Brunei, explicitly provide for a greater market opening for legal services in the CPTPP than its commitments under GATS, the CPTPP does not increase market access for legal services for the UK in all member countries.
51. However, paragraphs 9 and 10 of Annex 10-A on Professional Services Annex in the CPTPP provides a mechanism to address these barriers going forward. These provisions set out a principles-based framework that supports ongoing development in legal services that could go beyond currently scheduled market access commitments.
52. UK law firms rely on the temporary entry of business persons in order to provide the temporary provision of services to countries across the CPTPP network. The ease of FIFO relies on a liberal immigration regime. Frequently, UK law firms with offices in CPTPP member states will employ local lawyers that are nationals of that country, who will in turn use FIFO to service clients and may need to travel to the UK, for example for training or meetings. It is therefore of benefit to the UK to allow freer movement of businesspersons between UK and CPTPP member states.

**In respect of each negotiation, how effectively is the Government representing the interests of, and communicating with, devolved nations, local government, businesses, consumers and civil society groups?**

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<sup>11</sup> <https://www.dfat.gov.au/trade/services-and-digital-trade/Pages/services-export-action-plan>

53. The Law Society has a strong relationship with UK Government colleagues. The Law Society, DIT and Ministry of Justice (MoJ) have cooperated for many years on market access issues, the promotion of English and Welsh legal services and international rule of law issues.
54. The Law Society supports open conversations with government officials, with a view to working collaboratively where possible. Both DIT and MOJ have engaged with us extensively, and we have also facilitated direct discussions with our members and member firms. The issues we have raised are well known by Government and are reflected in the respective negotiating mandates/strategies.