



# **Law Commission Consultation:**

*Generating ideas for the 14th  
Programme of law reform*

A Response by  
CILEX (The Chartered Institute of Legal Executives)

[July 2021]

<b>Contents</b>	<b>Page</b>
<b>1. Introduction</b>	<b>3</b>
<b>2. Theme 1: Emerging Technology</b>	<b>4</b>
<b>3. Theme 2: Leaving the EU</b>	<b>4</b>
Lawyer Recognition	5
International Justice: Models of Delivery	6
<b>4. NEW Theme: Diversity</b>	<b>6</b>
<b>5. Theme 3: Legal Resilience</b>	<b>7</b>
Criminal Justice System	8
Certifying copies of Powers of Attorney	10
<b>6. Theme 4: Simplification</b>	<b>11</b>
Conveyancing	12
Legal Services Regulation	13
<b>7. Annex 1</b>	<b>15</b>
<i>CILEX observations on the growth of Legal Tech: Discussion Paper</i>	

## **Introduction**

CILEX (The Chartered Institute of Legal Executives) is one of the three main professional bodies covering the legal profession in England and Wales. The 20,000-strong membership is made up of CILEX Lawyers, paralegals and other legal professionals.

Within its role, CILEX acts as an educational provider, Awarding Body, professional association and governing body. By virtue of the Legal Services Act 2007 (LSA 2007) Schedule 4, CILEX further occupies the role of Approved Regulator for the legal profession and has delegated these regulatory powers to the independent regulator CILEx Regulation Ltd.

By virtue of this multitude of roles, CILEX is able to capture and comment on a wide array of matters that impact and influence the legal profession, delivery of legal services and the law itself. Drawing from this unique perspective, CILEX welcomes the opportunity to feed into the Law Commission's 14<sup>th</sup> Programme of Law Reform, endeavouring to ensure relevant regard is given to equality and human rights, and the need to ensure justice is accessible for those who seek it.

## **Possible Themes for the Reform Agenda**

The themes of 'Emerging Technology,' 'Leaving the EU,' 'The Environment,' 'Legal Resilience' and 'Simplification' have all been endorsed for inclusion by the Law Commission in their reform agenda.

In helping to further explore and reiterate some of the pressing concerns, common themes and areas of focus that would be prudent for inclusion under these headings, especially in the given COVID-19 climate, CILEX has sought to expand on key issues under each.<sup>1</sup> In line with the Law Commission's criteria for assessment these have been selected with impact, suitability, opinion, urgency and balance in mind.

In addition, we propose a further possible theme for exploration by the Law Commission on the topic of 'Diversity'.

---

<sup>1</sup> This is with the exception of 'The Environment', about which CILEX has little of substance to contribute.

## Theme 1: Emerging Technology

*The impact of CILEX's proposals centre around modernisation (facilitating technological and digital development), economic potential (reducing costs) and improving access to justice (reducing complexity and cost and increasing availability).*

### 1. Context

- 1.1. Recent years have cultivated a rising interest in the growth of legaltech and the opportunities that digital solutions can provide for addressing the access to justice gap. Investments have been witnessed both in the private sector for increased automation (creating greater efficiencies within firms, such as strengthening case management systems and supporting digital service delivery); and the public sector (with efforts dedicated towards identifying new innovative models to help streamline legal processes, manage the integrity of public datasets and improve access to public services such as the courts and tribunals).
- 1.2. As such, the pre-COVID-19 landscape saw significant investments in digital solutions dispensed by public bodies such as HMCTS and HM Land Registry (respectively the £1bn Court Modernisation Programme and Digital Street initiative) as well as within private investment into UK legaltech solutions (an emerging sector valuing £61m as of 2018)<sup>2</sup>.
- 1.3. In fully exploring the potential of these emerging technologies, please refer to CILEX's earlier paper submitted to the Law Commission and annexed to this response, which analyses the growth of emerging technology against the backdrop of COVID and beyond. The paper seeks to explore key issues related to the future of legal tech, its influence on the role of lawyers, the profession, the regulatory landscape and the prospects of virtual justice/a digital justice system.

## Theme 2: Leaving the EU

*The impact of CILEX's proposals centre around economic potential (generating funds) and supporting the rule of law.*

### 2. Context

- 2.1. The economic potential of the UK legal services market is not solely restricted to legaltech and innovation. Exported UK Legal Services have been valued at approximately £6.6bn (as of 2018),<sup>3</sup> and remain a significant commodity to the UK plc even post-Brexit. Indeed, leaving the EU has seen new opportunities arise for maximising the value of UK legal services further; with free-trade agreements providing new scope and opportunity for greater recognition, both of UK lawyers and the legal profession, and of the models and legal infrastructure that the domestic legal services market advocates in the interests of greater rule of law.

---

<sup>2</sup> See here: <https://www.thomsonreuters.com/en/press-releases/2019/october/investment-in-uks-legaltech-sector-more-than-doubled-to-61m-in-2018.html>

<sup>3</sup> Office for National Statistics, "International Trade in Services, UK: 2018", (31 January 2020). Available at: <https://www.ons.gov.uk/businessindustryandtrade/internationaltrade/bulletins/internationaltradeinservices/2018>

## Lawyer Recognition

- 2.2. The former framework for lawyer recognition, enshrined within the EU Directive on The Establishment of Lawyers<sup>4</sup> (the 1998 Directive), provided a useful starting point for lawyer recognition internationally. However, it also failed to recognise the full potential of the UK's international legal services offering by virtue of its restrictive approach in defining 'lawyer' status.
- 2.3. Under Article 1 of the 1998 Directive, the definition of 'lawyer' for the UK territory (in order to practice in a member state other than that in which the qualification was obtained), was explicitly stated with reference to 'Advocate (Scotland)/Barrister/Solicitor.' This was by virtue of the 1998 landscape of the UK legal profession at the time of the Directive's passing.
- 2.4. Unfortunately, in turn, the Directive had been unable to evolve alongside the growth of the profession, with its last iteration having passed in 2006; a year before the introduction of the Legal Services Act 2007 (LSA 2007). Subsequently, the overhaul of the UK legal profession and its regulatory framework in 2007 was not reflected within the UK professions' international standing.
- 2.5. Of note, were changes to the national recognition of Chartered Legal Executives (CLEs) as 'authorised persons' and therefore qualified lawyers within the jurisdiction of England and Wales. Due to the resulting disparities between the LSA 2007 and the 1998 Directive, CLEs were since placed in a unique position: recognised as lawyers by the UK Government for domestic purposes, but not recognised by the UK Government for international purposes. The result of this anomaly has been to restrict the ability for the full cohort of UK legal professionals to provide services to other EU countries and has consequently limited the UK's own ability to effectively export legal services overseas.
- 2.6. Nonetheless, as the Law Commission rightly recognises, leaving the EU provides with it both risk and opportunity; seizing on the latter and in the wake of free trade agreements for the exportation of legal services, there is now a renewed ability to ensure that the framework of lawyer recognition recognises all legal professionals that the UK has to offer.<sup>5</sup> The impact of so doing would not only contribute to existing efforts for the furtherance of UK legal services in new and fast-developing markets<sup>6</sup>, but would seize on the current trade gap that has emerged post-Brexit. The support of the Law Commission in this regard would therefore be welcome.

---

<sup>4</sup> Directive (EU) 1998/5/EC.

<sup>5</sup> EU Directive on the Establishment of Lawyers 1998, Article 1 limited the definition of 'lawyer' for the UK territory (in order to practice in a member state other than that in which the qualification was obtained), with reference to 'Advocate (Scotland)/Barrister/Solicitor. This was by virtue of the 1998 landscape of the UK legal profession having predated the parity afforded to CILEX lawyers with their solicitor counterparts.

<sup>6</sup> Such as, for example, the Ministry of Justice's newly established 'Legal Services are GREAT' Campaign (March 2021). Accessible here: [Legal Services are GREAT - GOV.UK \(www.gov.uk\)](https://www.gov.uk/legal-services-are-great)

## International justice: Models of Delivery

- 2.7. In the same vein, it is recognised that export of UK law is not simply confined to the exportation of legal services and legal practitioners, but to the influence and infrastructure that the UK legal system and model provides to many commonwealth countries abroad.
- 2.8. In the interests of furthering international objectives and commitments, such as recognising the UK's role as an advocate for international human rights and in supporting agendas such as the United Nations Sustainable Development Goals, there is a critical role for the legal profession to play. Herein, advocacy for a greater diversity of providers internationally, in creating a more versatile and cosmopolitan international justice landscape, shall be paramount to creating justice frameworks that are representative and accessible to all.
- 2.9. Liberalisation of the traditional legal profession, in which only pockets of society have historically gained entry, has already proved (domestically) to be of benefit. Take for example, the model established in the UK whereby access to the profession is no longer rooted within traditional pathways of university education. As a result of this progression, CILEX, a route of entry which demonstrably enables greater social mobility within the profession, is the most diverse cohort of legal practitioners in the market with 76% of all CILEX professionals identifying as women, and 15% as BAME.<sup>7</sup> The ramifications of this statistic are noteworthy in the interests of effective rule of law: establishing a truly representative and diverse profession for the administration of laws, legal principles and legal services. It is these models and frameworks that the UK is well positioned to export and advocate internationally, paving the way for enhanced justice systems across the globe.

## Newly Proposed Theme: Diversity

*The impact of CILEX's proposals centre around fairness (supporting social and individual justice) and rule of law.*

### 3. Context:

- 3.1. That said, there are ongoing barriers within the domestic context that have undermined the diversity of legal professionals across England and Wales. A novel theme which CILEX thus advocates for as part of the Law Commission's 14<sup>th</sup> Programme of Reform, is the importance of diversity in the implementation and delivery of laws and legal protections.
- 3.2. For example, one particularly apt area where legislative reform can play a role, is with respect to judicial diversity, an area of growing interest amongst Parliamentarians and ministerial departments. This is raised in the context of gender, age, ethnicity and educational background, with latest reports having found that "*although there has been some progress, there is clearly still work to be done...*"<sup>8</sup>

---

<sup>7</sup> Data accurate as of 29<sup>th</sup> July 2021.

<sup>8</sup> Message from the Lord Chief Justice: 2021 Judicial Diversity Statistics (15<sup>th</sup> July 2021), available here: [Message from the Lord Chief Justice: 2021 judicial diversity statistics | Courts and Tribunals Judiciary](#)

3.3. Indeed, the Ministry of Justice notes that:

*“For court and tribunal posts requiring 7 years’ or more experience, applicants have on average around 20 years’ experience. Among those with 20 or more years’ PQE, women constituted 28% of barristers, 38% of solicitors and 68% of Chartered Legal Executives (though Chartered Legal Executives are not eligible to apply for these roles).”<sup>9</sup>*

The findings highlight a glaring omission towards CILEX lawyers; a demographic who clearly possess the diversity that the judiciary desperately needs.

3.4. To rectify this, CILEX believes there is a simple, suitable and easy solution: an amendment to the Tribunals Courts and Enforcement Act 2007 to remove the bar on CILEX practitioners being eligible to *apply* for more senior judicial roles above that of District Judge. This change would not impede existing competency requirements or safeguards for ensuring a fair, impartial and skilled judiciary, but would simply enable an additional cohort of practitioners to apply and compete for legal exercises in a transparent and fair manner; in turn, helping to resolve the longstanding recruitment issues faced amongst our judiciary.

### **Theme 3: Legal Resilience**

*The impact of CILEX’s proposals centre around improving the efficiency of the law and legal services and ensuring access to justice in straitened times.*

#### **4. Context**

- 4.1. Indeed, recruitment issues are not solely pervasive of the judiciary. The UK lawyer base has dwindled from the effects of COVID-19; 75% of firms have furloughed staff and a further 25% have implemented redundancies.<sup>10</sup> At the same time, consumers are ever reliant on legal services to address growing challenges of day-to-day life. In short, the legal landscape is one of heightened demand and insufficient supply.
- 4.2. Legal resilience requires the legal profession and justice system to be appropriately resourced. This does not just mean financially. Proper resourcing requires sufficient financial means, but also a strong supplier base (of firms and practitioners) to administer justice outcomes.
- 4.3. Where legal resilience falters there can be an acute impact on vulnerable users and minority groups as access to justice is impacted. However, it is also important to recognise that this is intensified in situations which test legal resilience most highly (e.g.: the financial crash and COVID-19) as these tend to be situations which generate additional need/demand from vulnerable users of legal services. In the most recent context, CILEX has noted these impacts concentrated in two key areas of legal service provision:

---

<sup>9</sup> Ministry of Justice, *“Diversity of the Judiciary: Legal Professions, New appointments and Current post-holders, 2021 Statistics”*, (July 2021), s.5.1.

<sup>10</sup> IRN Research, *UK Legal Market Trends*, (December 2020) p.6. drawing from: LexisNexis, *The Bellwether Report 2020 – COVID-19: The Next Chapter*, (July 2020).

**The Criminal Justice System:** there has been much attention focused on criminal justice recovery from Ministerial departments including the Ministry of Justice and HMCTS, and Parliamentary attention (including through the launch of the Independent Review of Criminal Legal Aid) as concerns mount around the 58,000+ case backlogs faced in Crown Courts and 397,000+ case backlogs in the Magistrates Courts'.<sup>11</sup>

**Power of Attorney (PoA) Services:** there has been heightened focus on how best to expedite processes around PoAs as the impacts of COVID-19 accentuate the need for many to have their affairs in order, particularly those more vulnerable members of society. This includes the Ministry of Justice's most recent exploration for digitisation and streamlining of processes, in acknowledgement of the substantial rise in demand for these services even pre-COVID: with the volume of PoAs sent for registration having more than doubled from 2014/15 (at 390,000) to 2019/20 (at 920,000).<sup>12</sup>

- 4.4. CILEX is working with partners to change the below areas of historic legislation that are proving increasingly problematic in the wake of COVID-19 in the two aforementioned areas. In these contexts, we believe there is scope for the Law Commission's support and input in removing anomalous legislative restrictions for accessing legal service providers in the interests of the consumer and in strengthening our law's resilience to account for unprecedented circumstances now and into the future.

### **Criminal Justice System**

- 4.5. There are number of barriers that restrict entry and progression of legal practitioners within the criminal justice system, hampering the resources available to adequately support and staff the system.
- 4.6. In addition to non-legislative barriers facing criminal defence practitioners by virtue of the Criminal Litigation Accreditation Scheme for progression to Duty Lawyer status; there are ongoing legislative anomalies that have restricted the pipeline of providers within the Crown Prosecution Service (CPS).
- 4.7. With a continuing shortage of Crown Prosecutors, recruiting to fill the gap is a huge challenge, however, CILEX believes that a simple change in the law could, over a relatively short period, have a noteworthy impact in improving access to justice and overall efficiency of the criminal justice system; producing over 197 additional prosecutors: a significant immediate contribution to lessening the resources challenge as well as a longer term enabler for future lawyers to attain these appointments.
- 4.8. The challenge arises in line with Section 1(3) Prosecution of Offences Act 1985 which holds that only those who possess a '*general qualification*' (within the meaning of Section 71 Courts and Legal Services Act 1990) may be appointed as Crown

---

<sup>11</sup> HMCTS Management Information (May 2021), Available here: <https://www.gov.uk/government/statistical-data-sets/hmcts-management-information-may-2021>

<sup>12</sup> Ministry of Justice Consultation: "*Modernising Lasting Powers of Attorney*", (20<sup>th</sup> July 2021), p.5.



Prosecutors.<sup>13</sup> In turn, the '*general qualification*' is defined as where a person has a right of audience in relation to any class of proceedings in any part of the Senior Courts, or all proceedings in county courts or magistrates' courts.

- 4.9. Given the specialist function of Crown Prosecutors within the criminal justice system alone, the application of these requirements imposes excessive eligibility requirements that preclude alternative routes to qualification, restricting the pool of talented practitioners capable of resourcing the system.
- 4.10. For example, the training of CILEX lawyers as specialists in their area of expertise; whereby rights of audience are obtained for specific types of proceedings to ensure direct and proportionate regulation, fall outside the scope of the section 71 requirements.
- 4.11. Consequently, CILEX Lawyers who have demonstrated specific competency in their relevant field of specialism (in this instance criminal law) and are authorised by CILEX Regulation to that effect, are denied the opportunity to become Crown Prosecutors despite their capabilities. This is particularly frustrating as, in practice, the role of Crown Prosecutor rarely, if ever, involves advocacy in multiple areas of specialism.
- 4.12. The provision not only hampers entry to the profession, but also acts as a blocker to progression: preventing internal promotions from Associate Prosecutor to Crown Prosecutor for CILEX Lawyers and giving rise to a notable inconsistency: that CILEX Lawyers are permitted to act as public defenders<sup>14</sup> but not as public prosecutors.
- 4.13. CILEX has spoken to the Ministry of Justice on this matter. The Lord Chancellor agreed<sup>15</sup> that the situation was increasingly anomalous and that it was no longer a question of *if* this should be changed, but *when*. Notwithstanding, CILEX were warned that the COVID-19 pandemic could exacerbate the difficulties in finding the right time to enact these reforms in the immediate future, due to a busy legislative programme. In the meantime, the Lord Chancellor's Private Office is assisting CILEX in facilitating a conversation with the Attorney General and the Crown Prosecution Service at official level to attempt to resolve the issue.
- 4.14. CILEX believes that the Prosecution of Offences Act 1985 needs revision to remove the outdated insistence that Crown Prosecutors hold a 'general qualification'. To CILEX this change is now pressing, particularly in the wake of mounting court backlogs and the access to justice impacts this is generating for victims, defendants, witnesses and others. Indeed, we would encourage the Law Commission to consider broader legislative change by amending s.71 of the Courts & Legal Services Act 1990 more widely, so that this anomaly would not impede access to other legal roles such as working in legal services for the Armed Forces.

---

<sup>13</sup> Similarly, any person sub-contracted by the Crown Prosecution Service to undertake criminal proceedings

<sup>14</sup> Funded by legal aid to act as a defender.

<sup>15</sup> Meeting between CILEX and the Lord Chancellor on 25<sup>th</sup> January 2021

- 4.15. CILEX contends that, as a non-politically partisan, technically complex issue which, if reformed, could aid the justice system in clearing its Crown Court backlog, the Law Commission should consider this 'general qualification' topic for inclusion within its 14<sup>th</sup> Programme. Doing so would be consistent with the Law Commission's aims of ensuring that the law is:

**Fair** - the current situation fragments the legal supply base, discriminating against CILEX Lawyers, despite the Legal Services Board and Legal Services Act 2007 giving them equality with solicitors and barristers. Of those CILEX Lawyers who would most immediately be impacted from these reform (i.e.: those currently working in the Crown Prosecution Service) over 60% are female.

**Modern** - the operative legislation dates from 1985 and 1990 hence does not reflect the reality of contemporary legal practice nor of the changes introduced by the Legal Services Act 2007.

**Cost-effective** - reform in this area would prevent public funds being wasted by the Crown Prosecution Service on retraining experienced CILEX Lawyers as solicitors merely to satisfy the unjustifiable requirements of outdated legislation.

### **Certifying copies of Powers of Attorney (PoA)**

- 3.3. A further anomaly which if resolved would provide significant impact to the benefit of the public, particularly now, at a time where demand for services have been heightened, is with respect to the Power of Attorney Act 1971.
- 3.4. Section 3 Powers of Attorney Act 1971 mandates that copies of lasting PoAs and general PoAs in the United Kingdom may only be validly certified as a true copy if they are signed by the donor or a solicitor or a notary public or a stockbroker.
- 3.5. This has the effect of preventing CILEX Lawyers from certifying these documents, notwithstanding their authority to act as administrators for oaths; a particularly confusing circumstance when the 1971 Act allows Stockbrokers, not even members of the legal profession, to certify PoAs.
- 3.6. Surveys of CILEX Lawyers<sup>16</sup> reveal that, on average, they are requested to certify PoA copies (and therefore encounter this issue) by nearly two clients per week. The impact of the above anomaly, due to the need for referral to solicitors/notaries/third parties for certification, was noted in 58% of instances to increase cost of service to clients (particularly in instances where the firm was unable to absorb the additional costs of certification), and in 75% of instances, to have slowed the service provided; a situation made worse by social distancing and remote working.
- 3.7. As demand has risen, with the clinically extremely vulnerable (circa 2.2 million in England alone<sup>17</sup>), becoming more reliant on attorneys running errands such as visiting the bank on their behalf, an increase in requests for copies of PoAs has been noted.

---

<sup>16</sup> Conducted March 2020 - May 2020

<sup>17</sup> As per Office of National Statistics, see [here](#)

Notwithstanding this rise, the pool of legal professionals permitted to certify copies has not.

- 3.8. However, with more than 3,000 CILEX Lawyers working in the private client sector, there is a clear untapped potential which could be maximised where the anomaly contained within Section 3 Powers of Attorney Act 1971 was resolved.
- 3.9. As well as the practical impacts this would have on improving efficiency and access to services, this would additionally resolve the ongoing failure to recognise the parity attributed to CILEX Lawyers and their solicitor counterparts within the Legal Services Act 2007 (LSA 2007). The anomaly is simply owing to the clause in the 1971 Act having predated the LSA 2007 by nearly 36 years; it is no longer fit for purpose, nor reflective of the reality of legal practice, in which CILEX Lawyers serve clients almost identically to solicitors.
- 3.10. That this is anomalous is accepted by the Lord Chancellor<sup>18</sup> and the Legal Services Board<sup>19</sup>; to date however, no opportunity has unfortunately been found or made to remedy it. However, it is worth noting that the anomalous implications of this legislation and practical barriers posed to the provision of legal services have been noted by others. Her Majesty's Land Registry have, in light of the COVID-19 pandemic, decided to accept copies of PoA certified by CILEX Lawyers at this time. This decision was made in recognition of CILEX lawyer competencies and has not caused any problems, evidencing those competencies to certify.
- 3.11. CILEX would therefore argue that the case for amending Section 3 Powers of Attorney Act to include CILEX Lawyers amongst those empowered to certify copies of PoAs is overwhelming.
- 3.12. Accordingly, CILEX urges the Law Commission to incorporate this non-controversial topic into its 14<sup>th</sup> Programme; a specialist area of law that is not an immediate priority for the Government, but which would nevertheless improve the lives of a large number of vulnerable people during COVID-19, by making the process of certifying a copy of a PoA eminently simpler and more cost-effective.

#### **Theme 4: Simplification**

*The impact of CILEX's proposals centre around improving the efficiency and simplicity of the law and legal services and ensuring access to justice in straitened times.*

#### **5. Context:**

- 5.1. Finally, notwithstanding the above 'quick wins' to resolve outstanding lawyer supply issues; a longer-term solution for embedding greater efficiency and resilience in legal services looks to the power of simplification in the law, legal process and the legal services market.

---

<sup>18</sup> Meeting between CILEX and the Lord Chancellor on 25<sup>th</sup> January 2021

<sup>19</sup> Meeting between CILEX and the Aisling O'Connell, Regulatory Policy Manager, Legal Services Board on 8<sup>th</sup> April 2021

- 5.2. In particular, CILEX would like to draw attention to the potential and appetite for increased simplicity in two primary areas: the private sector (using conveyancing as a notable example), and the public sector (looking to regulation and the role it may play in simplifying legal services in a safe and measured way).
- 5.3. These points touch upon considerations made in relation to Paragraph 1 on 'Emerging Technology', as the need to simplify underlying process and infrastructure is necessary to allow mapping against technological solutions, allowing for digital transformation of legal service provision for which there is a growing urgency.

### **Conveyancing**

- 5.4. Industries such as conveyancing are hotspots for excessive confusion and complexity as has been explored by the Law Commission already, in part, within their 13<sup>th</sup> Programme of Reform.
- 5.5. This continuing complexity is twofold and must be recognised as such, borne of –

**The Law:** complexity arises from the fragmented nature of land law and land rights in England and Wales. A web of provisions that are, in and of themselves, a by-product of centuries of amendments and additions.

AND

**Delivery of legal services:** complexity arises from the framework for legal service provision whereby services delivered require huge amounts of data and exchange between multiple stakeholders to the home buying and selling process.

- 5.6. Addressing these difficulties shall therefore warrant, in turn, a two-fold approach –

**The Law:** working in the parameters of the existing framework to resolve legislative anomaly and implement reform that may resolve current friction points.

- 5.7. It is hoped that much of the ground-breaking work conducted by the Law Commission on topics including leasehold enfranchisement, commonhold and other outstanding issues will see fruition in simplifying the legal principles, processes and protections for land right owners in this regard.
- 5.8. For example, CILEX advocates for some quick fixes that would help simplify the home buying and selling process, namely: 1). Abolish onerous ground rents for all leaseholders (existing and future, including leaseholders of both houses and flats), and 2). Address the longstanding issues relating to Ground 8 Possession Claims under the Housing Act 1988.<sup>20</sup>

---

<sup>20</sup> Ground 8 Possession Claims entitle a landlord to repossess a property (where that property is an Assured Shorthold Tenancy) if ground rent payments fall in arrears for three months or more. See more here: [https://www.cilex.org.uk/membership/specialist\\_reference\\_groups/conveyancing/laws\\_with\\_unintended\\_consequences](https://www.cilex.org.uk/membership/specialist_reference_groups/conveyancing/laws_with_unintended_consequences)

**Delivery of legal services:** looking at renewed ways to open up the market in a way that embeds greater efficiency and assurance of quality between stakeholders to the process.

- 5.9. Transformation of the sector through data structuring and the imposition of legaltech solutions for the sharing, processing and communication between various property professionals, can help to reformat the very baseline processes that underpin conveyancing transactions.<sup>21</sup>
- 5.10. Some of these collaborations have already given rise to changes in legal practice. For example, HM Land Registry have not only begun accepting witnessed electronic signatures in place of 'wet ink' signatures for standard deeds in conveyancing but are even looking to qualified electronic signatures as a replacement to the very concept of deeds altogether. The Law Commission's input and expertise in helping to drive these practical solutions would be greatly welcomed, including, for example, the need for a review on the law on deeds which may be well timed against this backdrop.

### **Legal services regulation**

- 5.11. Another area in which consolidation may help to achieve greater access to justice outcomes, lies in reform of the Legal Services Act 2007 and its approach to regulation on a negative list principle.
- 5.12. The current regulatory landscape of the legal profession in England and Wales, as explored by stakeholders such as Professor Stephen Mayson<sup>22</sup>, adopts an 'all or nothing' model; denoting those activities that cannot be pursued without relevant authorisation (i.e.: the reserved legal activities). The effects of this approach have in turn been noted to generate a regulatory gap, whereby all activities that are not expressly referenced within this restrictive list, can be pursued by anyone and everyone.
- 5.13. On the one hand, this flexibility in legal services regulation has been noted to have created a conducive environment for innovation, as it permits partnerships between lawyers and third parties to establish ventures and invest in new technological solutions.<sup>23</sup> However, from CILEX's own observations, a barrier is created by the uncertainty fostered within this framework, whereby a lack of oversight, direction and parameters often creates a minefield of uncertainties for consumers and legal professionals to navigate, creating hesitancy amongst most to embrace new ways of working. In the wake of legaltech solutions, digital transformation and new innovations, this uncertainty is magnified and can often prevent uptake of technological solutions by legal practitioners and firms who, by their nature, tend to be more risk adverse, trained in the art of managing liability.

---

<sup>21</sup> See Annex 1 on CILEX's legaltech observations and the need for 'transformation' not 'automation' to achieve real growth.

<sup>22</sup> UCL Centre for Ethics and Law, Professor Stephen Mayson, *Independent Review of Legal Services Regulation: Final Report*, June 2020.

<sup>23</sup> Legal Services Board Podcasts and Papers: Tech and Regulation, Part 6, Professor Lisa Webley "Ethics, Technology and Regulation", (2020), Research Paper: p.2.

- 5.14. If, however, legal services regulation was to adopt a *prescriptive* list, capturing all types of service activity and prescribing what they each entail in terms of licensing and authorisation (i.e.: activity-based regulation), there would be greater assurances and parameters for the profession to operate in, and reduced costs associated with the consumption of legal services.
- 5.15. For CILEX, the activity-based regulatory model (i.e.: regulating professionals for the work they undertake as opposed to providing a generalised license to operate), establishes a healthy middle-ground: providing the assurance needed to maintain quality of standard and service, whilst also providing flexibility and proportionality to maintain a friendly environment for innovation. Indeed, this approach has long been advocated by CILEX and CILEX Regulation; with CILEX practitioners subject to voluntary regulation for all the activities they conduct but acquiring subsequent authorisation for only those specific activities that they engage with. As such, the regulatory framework for CILEX members ensures minimum standards of compliance for all activities, providing greater assurances to the consumer, whilst maintaining proportionate compliance costs and eliminating barriers of entry for alternative providers of legal services to legal sector regulation.
- 5.16. These novel approaches to regulation, are for CILEX, inevitable. As the platforms, expectations and channels of service delivery grow and evolve within legal services, it is only right that the regulatory framework does so to. Looking at the laws and provisions around these regulatory models would therefore be a useful project for the Law Commission to pursue as a longer-term objective; ensuring that the laws of England and Wales remain fit for the future and sustainable post-COVID.

#### **For further details**

Should you  
require any  
further  
information,  
please contact;

Chandni Patel  
Head of Policy  
[chandni.patel@cilex.org.uk](mailto:chandni.patel@cilex.org.uk)

# ANNEX 1: CILEX Observations on the Growth of Legal Tech Discussion Paper

Submitted to the Law Commission in April 2021.<sup>24</sup>

## 1. **Contextual backdrop: COVID-19 as an accelerator for growth**

Recent years have cultivated a rising interest in the growth of legaltech and the opportunities that digital solutions can provide for addressing the access to justice gap. Investments have been witnessed both in the private sector for increased automation (creating greater efficiencies within firms, such as strengthening case management systems and supporting digital service delivery); and the public sector (with efforts dedicated towards identifying new innovative models to help streamline legal processes, manage the integrity of public datasets and improve access to public services such as the courts and tribunals).

As such, the pre-COVID-19 landscape saw significant investments in digital solutions dispensed by public bodies such as HMCTS and HM Land Registry (respectively the £1bn Court Modernisation Programme and Digital Street initiative) as well as within private investment into UK legaltech solutions (an emerging sector valuing £61m as of 2018)<sup>25</sup>.

Nevertheless, it is clear, as highlighted by notable figures such as Lord Timothy Clement-Jones<sup>26</sup> and Sir Terrence Etherton<sup>27</sup>, that the impacts of COVID-19 in increasing necessity for socially distanced consumption of goods and services, and subsequently increased demand for the remote supply of service provision, has necessarily progressed these conversations at pace. As such, growth and use of legaltech in the jurisdiction of England and Wales is no longer a matter for 'tomorrow', but a matter for 'today'.

Indeed, the benefits of these investments are acknowledged in offering potential solutions to address wider systemic issues underpinning the legal sector (many of which have been exacerbated by the pandemic). These include:

- Underlying recruitment and retention issues within certain pockets of the profession (as legaltech seeks to reimagine the composition of the lawyers of tomorrow, whilst also embedding greater efficiencies to improve resource distribution across the justice system),
- Enhanced regulatory oversight and compliance (particularly with respect to rising risks in AML and fraud for sectors most concerned with asset management, whereby legaltech solutions offer great scrutiny and oversight of legal transactions and in tracing source of funds), and
- Overall decreased spend across the entire landscape of public infrastructure that supports the legal services market and justice system (as legaltech embeds greater automation, reducing overheads such as upkeep of physical buildings/estates).

---

<sup>24</sup> All data and references in the discussion paper are accurate as of April 2021 only.

<sup>25</sup> See here: <https://www.thomsonreuters.com/en/press-releases/2019/october/investment-in-uks-legaltech-sector-more-than-doubled-to-61m-in-2018.html>

<sup>26</sup> Tech UK event, *Artificial Intelligence and its Applications*, 12<sup>th</sup> May 2020, Lord Timothy Clement-Jones, Key Speaker.

<sup>27</sup> Civil Justice Council National Forum 2020, 11<sup>th</sup> December 2020, Sir Terence Etherton, Opening Speech.

The below sets out key observations from the Chartered Institute of Legal Executives (CILEX) on this topic of rising importance; facilitating discourse and innovation on how legaltech might transform:

1. Lawyers and the legal profession,
2. The legal regulatory framework, and
3. Virtual justice and the digital justice system.

## **2. Lawyers and the Legal Profession**

### **2.1. Post COVID Recovery**

The impacts of COVID on the justice system have witnessed huge instability in supply and demand, with case backlogs worsening and recruitment shortages exacerbated. As of January 2021, the landscape presents:

- Over 56,000 case backlogs in Crown Courts,<sup>28</sup>
- Over 380,000 case backlogs in the magistrates',<sup>29</sup>
- Over 42,000 outstanding open Cafcass cases in family law,<sup>30</sup>
- Over 51,000 outstanding employment claims.<sup>31</sup>

At the same time, concerns have been voiced from across the profession around the long-term financial health and sustainability of firms, as income streams are directly impacted, and case management becomes more and more volatile and difficult to predict.

Data collated from CILEX practitioners as early as the first lockdown period in April 2020,<sup>32</sup> and subsequently collected on a week-by-week basis until September 2020, highlighted the following overall impacts on firm caseload and income across 5 key practice areas:

---

<sup>28</sup> See HMCTS Case Management Data (January 2021), Available here: <https://www.gov.uk/government/statistical-data-sets/hmcts-management-information-january-2021>

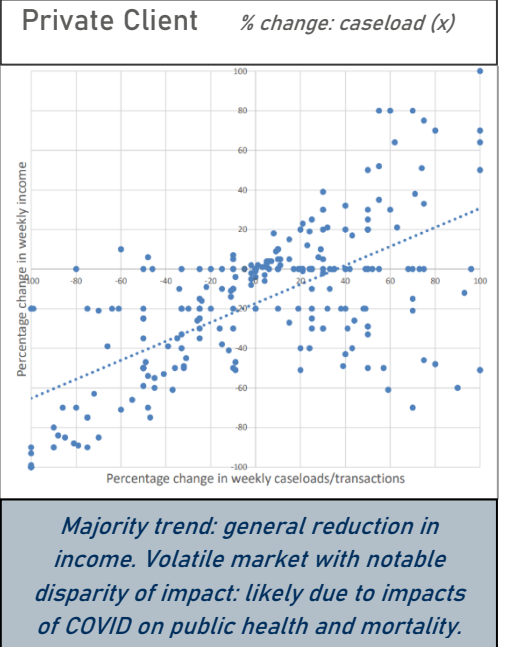
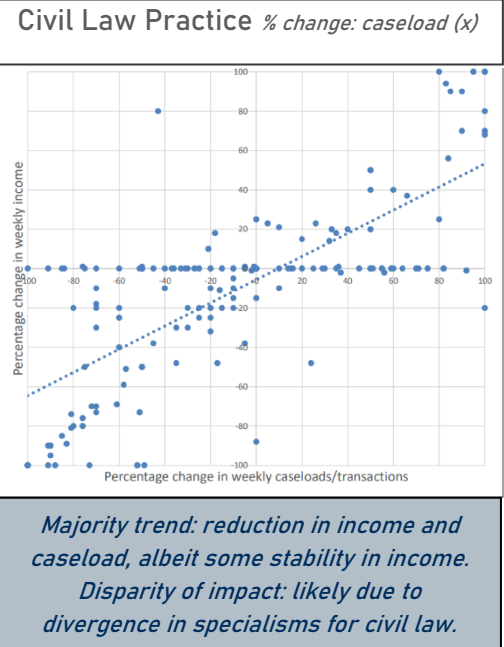
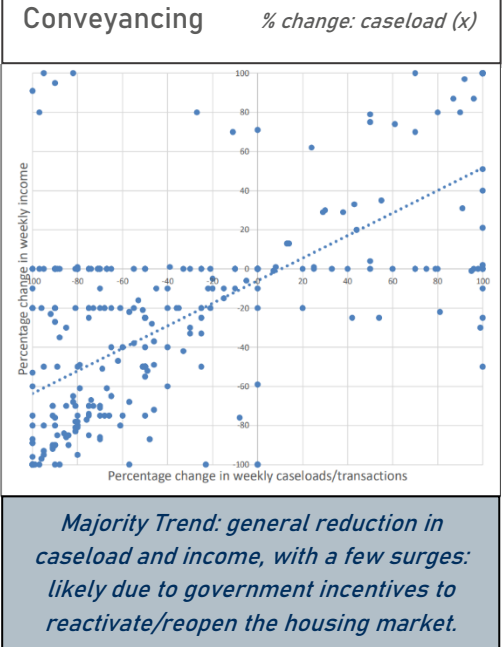
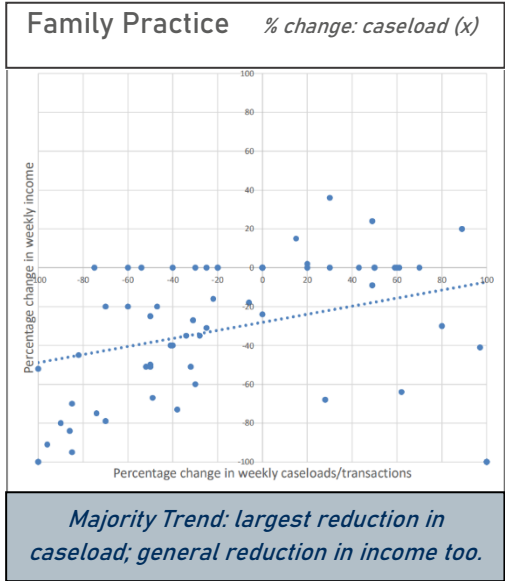
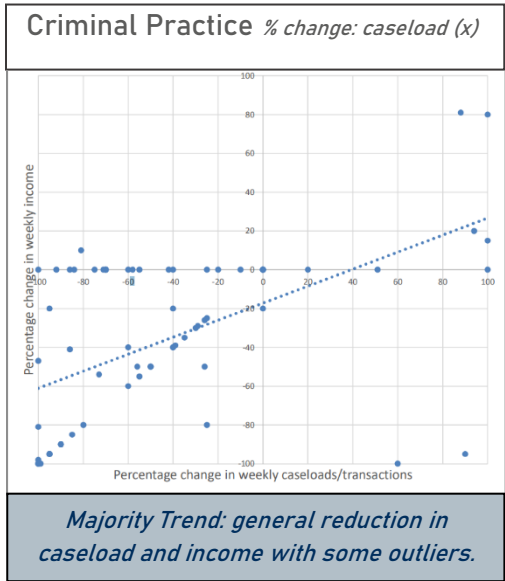
<sup>29</sup> See footnote 28.

<sup>30</sup> See here: <https://www.communitycare.co.uk/2021/02/04/cafcass-case-numbers-hit-new-record-staffing-boost-keeps-practitioner-workloads-check/>

<sup>31</sup> See footnote 28.

<sup>32</sup> These findings were obtained through quantitative data capture as part of the weekly CILEX COVID-19 Impact Survey.





The data highlights trends across the board of reduced caseload and income; with the exception of certain sectors (such as civil law and private client practice) where notable disparities in impact point to heightened market volatility.

The combined effect of the above observations, points to a post-COVID landscape that will necessarily need to resolve two critical factors: **resourcing** and **efficiency**; creating what some are terming the “*more for less challenge*” as pressure mounts amongst lawyers and the legal profession to reduce expenditure within business models, whilst facing an increase in workload and demand for legal services.<sup>33</sup> It is in this space that CILEX sees legaltech solutions capable of offering great potential as the outsourcing model migrates from seeking *cheaper* workforces to seeking out **technologically-enabled** workforces as part of the COVID-19 recovery phase.

<sup>33</sup> Legal Geek: The Uncertain Decade Series (Webinar Conference), “General Counsel and In-House following COVID-19”, (28<sup>th</sup> May 2020), Richard Susskind Commentary.

## 2.2. Legal Competency Building: A new type of lawyer

---

*"Law is no longer about pedigree...it's about competency."*<sup>34</sup>

- Dr Adam Wyner, Associate Professor in Law and Computer Science (Swansea University)

---

With this in mind, and alone amongst professional bodies in the sector, CILEX has reformed its own qualifications (the CILEX Professional Qualification)<sup>35</sup> to upgrade and enhance them with explicit reference to developing competencies in legaltech; and is further developing standalone qualifications for individuals operating in this domain. These developments are intended to help equip the profession in its own transformation and evolution into the digital age; recognising that the ever-growing role of technology in legal services shall warrant those involved in the provision and/or delivery of tech-enabled services to be objectively qualified.

In so doing, CILEX is sensitive to the manner in which integration of these new skillsets within the legal workforce may alter the role and expectations of the profession, and makes the following observations:

### **The role of future lawyers:**

As greater automation is embedded within the delivery of legal services, CILEX foresees the role of lawyers gravitating away from the back end, more process driven and administrative functions, towards a greater emphasis in developing softer skills with respect to client care, taking on front-facing and emotionally supportive functions in assisting their client base. With this transition a responsibility ensues to ensure that the education of lawyers is not solely limited to developing the more traditional learning based on legal competencies and knowledge, but to cultivating legaltech competencies alongside wider skills in professional ethics and commercial awareness.<sup>36</sup>

These observations have been shared by others, with suggestions made that the business of lawyers in delivering legal expertise and holding asymmetric access to that expertise, is now shifting as competencies such as business acumen, technological aptitude and process expertise (the knowledge of how and in what ways lawyers can enable better service to clients) take precedence. Herein legal service providers will need to transform to become more dynamic, data-driven and customer-centric; necessitating that legal education and training becomes more multidisciplinary, with a focus on composition of faculty and how to make students well-rounded and marketable.<sup>37</sup>

---

*"Legal professionals will still need a solid knowledge of law, practice and its application, well developed critical analytical skills in order to do this, and an appreciation of the basis of data science... but many clients may still need interaction with and support from human lawyers at a challenging point in their lives and if so, soft skills may become even more important than ever."*

- Professor Lisa Webley, Head of Birmingham Law School (University of Birmingham)<sup>38</sup>

---

---

<sup>34</sup> Legal Geek: The Uncertain Decade Series (Webinar Conference), "The Courts and the Legal Profession Following COVID-19", (30<sup>th</sup> April 2020), Mark Cohen.

<sup>35</sup> [https://www.cilex.org.uk/cilex\\_lawyer/about\\_cpq](https://www.cilex.org.uk/cilex_lawyer/about_cpq)

<sup>36</sup> Factors that CILEX has further considered and entrenched within the framework of the new CPQ.

<sup>37</sup> See footnote 33, Mark Cohen Commentary.

<sup>38</sup> See footnote 23, p.15.

### **Expectations facing future lawyers:**

Of equal note, is the challenge of bridging the existing behavioural and problem-solving models of today's lawyers, tasked with risk-aversion and taught to operate within the strict parameters of existing processes, with that of the legaltech lawyers of tomorrow, where intrinsic to innovation is the assumption of greater risk and the need to challenge existing processes and protocols.

As noted by Dr Adam Wyner<sup>39</sup> there is a schism between the two cultural approaches used in the fields of law and computer science which may have, to date, prevented this field of expertise from growing: whilst the legal sector looks to compliance and regulatory frameworks in guiding it towards legaltech, the computer science sector looks to unbounded discovery and exploration. To help develop legaltech solutions and legaltech education, a confluence of these different approaches shall be essential<sup>40</sup> and it is for this reason that CILEX has geared its qualification framework to deliver embedded competencies based on legaltech thinking/principles.

## **3. The Legal Regulatory Framework**

### **3.1. Activity-Based Regulation**

Notwithstanding the role of education, one of the other ways in which to achieve this confluence is with respect to new regulatory models. The current regulatory landscape of the legal profession in England and Wales, as explored by stakeholders such as Professor Stephen Mayson<sup>41</sup>, adopts an 'all or nothing' model; utilising a restrictive list that denotes those activities that cannot be pursued without relevant authorisation (i.e.: the reserved legal activities). The ramification of this approach has been noted to generate a regulatory gap, whereby all activities that are not expressly referenced within this restrictive list, can be pursued by anyone and everyone.

On the one hand, this flexibility in legal services regulation has been noted to have created a conducive environment for innovation, as it permits partnerships between lawyers and third parties to establish ventures and invest in new technological solutions.<sup>42</sup> However, from CILEX's own observations, a barrier is created by the uncertainty fostered within this framework, whereby a lack of oversight, direction and parameters often creates a minefield of uncertainties for consumers and legal professionals to navigate, creating hesitancy amongst most to embrace new ways of working. In the wake of legaltech solutions, digital transformation and new innovations, this uncertainty is magnified and can often prevent uptake of technological solutions by legal practitioners and firms who, by their nature, tend to be more risk adverse, trained in the art of managing liability.

If, however, legal services regulation was to adopt a *prescriptive* list, capturing all types of service activity and prescribing what they each entail in terms of licensing and authorisation (i.e.: activity-based regulation), there would be greater assurances and parameters for the legal profession to operate in when looking to innovate and engage with legaltech solutions. Indeed,

---

<sup>39</sup> Associate Professor in Law and Computer Science (Swansea University). Primary background in linguistics and computer science with 20 years specialism focused on AI and Law.

<sup>40</sup> Legal Services Board Podcasts and Papers: Tech and Regulation, Part 5, Dr Adam Wyner "LegalTech Education – Considerations for Regulators", (2020), Podcast Discussion.

<sup>41</sup> UCL Centre for Ethics and Law, Professor Stephen Mayson, *Independent Review of Legal Services Regulation: Final Report*, June 2020.

<sup>42</sup> See footnote 23, p.2.

the ultimate beneficiary of regulation, the consumer, would also be better protected and more likely to engage in these novel solutions, driving demand for legaltech innovations.

For CILEX, the activity-based regulatory model (i.e.: regulating professionals for the work they undertake as opposed to providing a generalised license to operate), establishes a healthy middle-ground: providing the assurance needed for legaltech uptake, whilst also providing flexibility and proportionality to maintain a friendly environment for innovation. Indeed, this approach has long been advocated by CILEX and CILEX Regulation; with CILEX practitioners subject to voluntary regulation for all the activities they conduct but acquiring subsequent authorisation for only those specific activities that they engage with. As such, the regulatory framework for CILEX members ensures minimum standards of compliance for all activities, providing greater assurances to the consumer, whilst maintaining proportionate compliance costs and eliminating barriers of entry for alternative providers of legal services to legal sector regulation.

### 3.2. Calls for Greater Regulation

The need for changes to the regulatory model, as prompted by technological developments (both in legal services and beyond), is something that has gathered increasing attention over the last few years. This has manifested itself in a number of ways, including through:

3.2.1. **Public Perception/Consumer Research:** research published in 2020 found that public attitudes with respect to technology have shifted from concerns around the level of digital competence that members of the public held back in 2018, to concerns of public confidence; with calls now made for greater regulatory oversight of tech providers. As such, the 2020 landscape marked a transition towards heightened public awareness and proficiency in using technology as a result of COVID-19, and in turn gave rise to greater public expectations for increased regulation.<sup>43</sup> As such, 58% of the public felt that the tech sector was regulated too little<sup>44</sup> and exhibited general willingness to accept the trade-offs that increased regulation might bring; 59% were happy to have limited content as a result of regulation and 64% were happy to have a reduction in innovation and consumer choice.

3.2.2. **Government Strategy/Frameworks:** Meanwhile, government initiatives such as the 2019 White Paper on *“Regulation for the Fourth Industrial Revolution”*<sup>45</sup>, the Competition and Markets Authority (CMA) 2020 advice for a new Digital Markets Taskforce<sup>46</sup> and the most recent 2021 findings of the Department for Digital, Culture, Media and Sport (DCMS) with respect to creating a digital identity and attributes trust framework<sup>47</sup>, have all focused on establishing greater regulatory oversight in the field of technological innovation.

---

<sup>43</sup> This has been noted to create a double-edged sword in that there appears to be a negative correlation between public understanding and public trust.

<sup>44</sup> DotEveryone Report, *“People, Power and Technology: The 2020 Digital Attitudes Report”*, (12<sup>th</sup> May 2020).

Anecdotal data (comments): *“If there is regulation we don't know about it. It would be good to have simple clear overarching national regulation for all of it. We need a regulatory system or a department to lay down the ABCs of do's and don'ts.”*

*“In any other industry you'd want a governmental body to take control. The problem is, the way that technology seems to be going is that one or two or three companies seem to be completely dominant and so it's a weird scenario in which these companies almost appear quite trustworthy, just because of the size of them.”*

<sup>45</sup> HM Government, *“Regulation for the Fourth Industrial Revolution”*, White Paper, June 2019 (CP 111).

<sup>46</sup> See here: <https://www.gov.uk/cma-cases/digital-markets-taskforce>

<sup>47</sup> See here: <https://www.gov.uk/government/publications/the-uk-digital-identity-and-attributes-trust-framework/the-uk-digital-identity-and-attributes-trust-framework>

3.2.3. **Recommendations by Public Departments:** Similarly, with specific regard to legal services, recommendations by key stakeholders such as the CMA<sup>48</sup> and the Legal Services Board<sup>49</sup> have articulated express support towards short-term solutions for addressing the regulatory gap in the wake of rising consumer dependency on legaltech solutions and the growth of the legaltech market. This has manifested in short term aims for extending after the event regulation to all providers of legal services, marking a transition towards greater guidance and oversight in the emergence of legaltech.

3.2.4. **Parliamentary Commentary:** Finally, the need for regulatory overhaul in the digital domain has been echoed by figures such as Lord Clement-Jones (spokesman for the digital economy in the House of Lords) with respect to more sophisticated technologies such as Artificial Intelligence: looking ahead to the longer-term market. Recognising the limitations of integrating and evaluating sophisticated tech solutions when the growth of these industries is formed from a probabilistic model (i.e.: not reliant on solid data and facts but on trends), calls have been made for effective compliance frameworks to monitor the safety and ethics of tech use. Herein, it has been suggested that more work is needed to embed trust, transparency and accountability for navigating the growing legaltech market.<sup>50</sup>

### 3.3. Consensus and Collaborative: paving the way for a digital future

In paving the way for this new digital future, CILEX echoes the calls of others for greater consensus and collaboration amongst public, private and regulatory bodies; voiced by significant figures in the field including:

- **The Centre of Data Ethics and Innovation:** Roger Taylor (Chair) stressed the need for the narrative on tech integration to shift from technological solutions simply entering the market and demanding trust, to become truly trustworthy through the application of universal and transparent principles and frameworks.<sup>51</sup>
- **The National Data Strategy** (launched 9 September 2020): stated that the strategy needs to *“consider the roles of the Alan Turing Institute, the National Innovation Centre for Data, the Open Data Institute, the Data Skills Taskforce, the AI Council, the UK Cyber Security Council, the Data Lab, and others in the data skills ecosystem for ways to improve the leadership and facilitation of new and better collaborations between industry, the public sector, universities and institutes.”*<sup>52</sup>
- **The legal regulators:** have been sensitive to the need for collaborative working; dedicating great time, efforts and costs to working alongside the tech sector in finding an appropriate balance between setting parameters to stimulate innovation, without endorsing overly prescriptive behaviour that would subsequently restrict innovation (or risk creating an equality/monopoly problem in legaltech uptake and availability). This has

---

<sup>48</sup> Competition and Markets Authority, *Review of the Legal Services Market Study in England and Wales: An assessment of the implementation and impact of the CMA’s market study recommendations*, (17 December 2020) para 5.91.

<sup>49</sup> Legal Services Board, *Reshaping Legal Service: A Sector Wide Strategy*, (March 2021), Challenge 5.

<sup>50</sup> See footnote 26.

<sup>51</sup> DotEveryone Report, *“People, Power and Technology: Launch”*, Webinar (12<sup>th</sup> May 2020), Roger Taylor Commentary.

<sup>52</sup> Department for Digital, Culture, Media and Sport, *National Data Strategy* (para 5.1.2 in the updated version of 9 December 2020): <https://www.gov.uk/government/publications/uk-national-data-strategy/national-data-strategy>

included initiatives such as the Solicitors Regulation Authority's Innovate project, the LawTechUK project and the Legal Services Board's Talking Tech projects<sup>53</sup>.

From CILEX's own observations, the most fitting and effective principles for endorsing collaborative engagement is witnessed in approaches embodied by bodies such as HM Land Registry (HMLR) with respect to digital ID. This includes a focus on:

1. **Use of phased standards:** models such as the 'safe harbour principles,' that underpin HMLR's new Digital ID Standard, establish an iterative approach to embedding tech within legal services that does not operate on a mandatory basis, but on establishing incentives and consensus for a level playing field. By proxy, sensitivity to over-prescription safeguards that the uptake of digital solutions does not inadvertently create monopolies, that established frameworks do not risk alienating SMEs, and that by playing the role of an enabler within the market, these standards do not quickly become obsolete as technology grows and evolves at pace. The model thus achieves a good balance between underlying tensions in achieving appropriate regulatory oversight whilst still maintaining sufficient flexibility for innovation and the organic growth of market drivers.
2. **Use of design/outcome thinking:** initiatives such as the HMLR Geovation Hub<sup>54</sup> and the launch of various industry working groups, have enabled direct engagement across the industry to innovate at pace, creating new ways of working that seek to transform processes on the basis of principle-based outcomes (rather than simply digitising existing frameworks and limiting transformation to current processes and thinking). In adopting a 'design thinking' methodology, this form of collaborative working has enabled new ideas to emerge, without the constraints/fears of practical and logistical barriers (such as issues of liability). This approach was similarly adopted by CILEX Regulation in their design sprint on legaltech last year,<sup>55</sup> and has been advocated by thought leaders in the field, including Richard Susskind, who promote the need for legal services to start thinking about their 'why' from an emotional standpoint in identifying client wants/needs.<sup>56</sup>

Indeed, from CILEX's own engagement with these initiatives, it is clear that the following principles shall also be pivotal to establishing effective **collaboration** and **consensus** across the industry that is capable of realising proactive legaltech solutions:

3. **Open Data Structure<sup>57</sup>:** a clear need for greater data structure and established principles around data sharing emerges as a constant friction point between

---

<sup>53</sup> See Legal Services Board, *Striking the Balance: How legal services regulation can foster responsible technological innovation*, (April 2021).

<sup>54</sup> See here: <https://geovation.uk/>

<sup>55</sup> See here: <https://cilexregulation.org.uk/2020/09/08/conveyancing-design-sprint/>

<sup>56</sup> See footnote 33: Commentary by Richard Susskind highlighting that the answer to 'What is it that clients want/need' is not always best answered by clients when looking to re-envisage processes and models. Rather, the best way of assessing this, is to engage with clients on the emotional **outcomes** they are seeking, and then look to the relevant expertise on how best to deliver that. As such, the sector needs to start collecting more data on the outcomes that clients are seeking – not specific to their case – but in terms of what they hope to feel following their case (are they looking for security, vindication, assurance, retribution etc?)

<sup>57</sup> See footnote 26: Lord Clement-Jones emphasises that the best way to help mobilise small to medium sized enterprises in driving innovation is to ensure access to data. As such, his own observations noted the need for bodies such as the CMA to be particularly sensitive to the risks around data monopolies and foresaw a market inquiry into data monopolies as a likely next step.

organisations; as concerns arise around privacy of, and ownership of, digital information. Herein, dependent factors include: the role of GDPR legislation; the application and use of public datasets; efficiency of data collection, and the general 'life-span' of accurate data (i.e.: how quickly does data go out of date?)

4. **Creating Open Infrastructure:** There is a practical need for interoperability to ensure that various stakeholder systems and infrastructures are logistically able to data share and coordinate. In the absence of interoperability, the risk of monopolies and a constricted marketplace are exacerbated.

#### 4. Virtual Justice and the Digital Justice System

##### 4.1. Lessons learnt from COVID-19

In fact, is with respect to **consensus, collaboration, data structure** and **interoperability** that the recent attempts to create virtual justice in response to COVID-19 have proven problematic. This is mainly witnessed against the backdrop of remote court/tribunal hearings across HMCTS, and the varying approaches and sentiments with respect to online courts that have emerged from key figures.

Evidence collated from CILEX practitioners as to their personal experiences of virtual justice/remote hearings during COVID-19, highlighted an absence of all 4 of these principles in the integration of legaltech within the justice framework; to varying degrees and outcomes.

##### **Principle 1: Consensus**

*Example from the criminal justice system: inconsistencies flagged in the adoption of audio/visual technologies, such as the Cloud Video Platform roll out across the court estate vs. police stations, have created delays.*

Towards the beginning of lockdown and remote working conditions, CILEX practitioners reported a lack of consistent uptake across police stations in accommodating for Cloud Video Platform (CVP) linkups, compromising the effectiveness of these systems in safeguarding public health. Since then, we have been receiving feedback that whilst the situation has improved in police stations, receptiveness to remote hearings in the courts (especially the magistrates courts where majority of CILEX advocates operate) has declined. This has manifested in a number of ways, including disproportionate expectations placed upon the defence (as compared with the prosecution) for justifying the need for remote attendance before the courts; creating inconsistent standards within the administration of justice and legal processes as applies to both parties.

##### **Principle 2: Collaboration**

*Example from the family justice system: a lack of support, training, information sharing and joint working to embed legaltech solutions, have resulted in the inconsistent adoption of virtual justice at the expense of parties to the proceeding.*

Fluctuations in technological aptitude and confidence around remote hearing technology amongst key stakeholders, saw varying approaches in practice for conducting hearings from one court to another. A primary concern within this was the observation that decisions for remote vs physical hearing attendance were often motivated by arbitrary factors, such as the degree of logistical support available to the judiciary in each instance, as opposed to what

would be in the best interests of the parties.<sup>58</sup> A notable outcome to have resulted included decisions to adjourn proceedings in place of remote attendance, with many cases adjourned for lengthened periods of time, compromising justice and exacerbating tensions caused by COVID-19 for many people in their daily lives.<sup>59</sup>

### **Principle 3: Data Structure**

*Example from the civil justice system: multiple entry points/platforms for sharing relevant information and registering key documents with the court has led to duplication of effort and missed correspondence that can lead to the postponement of proceedings.*

Logistical issues around the preparation and sharing of court case bundles/the execution of court documents were noted to slow down processes, exacerbate miscommunication and add to pre-hearing correspondence. This was also noted in the context of listings for court hearings, and it is still the case that failings in the sharing of scheduling data can often see practitioners discovering when and how their cases will be heard with very little notice to prepare.

### **Principle 4: Interoperability**

*Examples from across the justice system: compatibility issues between different public bodies, between practitioners and their clients, and between various devices and software/platforms has generated inefficiencies in case management and risks detracting attention away from the case at hand.*

Practitioners are currently facing logistical barriers due to compatibility challenges between the CVP systems used within various public bodies (i.e.: between the prison services and those used within the courts). As such, whilst practitioners have indicated general benefits of using remote-hearing technology, it is clear that a more intuitive system with inbuilt interoperability is still required.

The use of different platforms by different courts has also aggravated the situation, necessitating that practitioners and firms download various applications/software platforms to be able to carry out their responsibilities. Herein, an added layer of complexity is born from compatibility issues depending on the device used to access court proceedings (e.g.: an iPhone, iPad, Laptop, PC etc.) which can impact visibility of parties to the proceeding, as well as undermine good audio/visual quality of the connection.<sup>60</sup>

---

<sup>58</sup> One Adviser informed CILEX, that drawing from personal experience/observation, it was more common to see adjournments take place amongst District Judges than High Court/ Circuit Judges. It was suggested that this may well be due to the extra clerk support that High Court/Circuit Judges have access to; helping to set up remote-hearings and provide additional tech-support.

<sup>59</sup> Another CILEX Adviser shared experiences of: "A Judge in a local court [who] simply adjourned a 2 day fact finding hearing (where a father ha[d] not seen his children, aged 4, for a year, for 3 months despite detailed representations from our counsel saying why it could be dealt with remotely. [The Judge] simply adjourned it for 3 months, so instead of the hearing taking place in the last week of April it is now listed for the second week in September, a delay of over 4 months. That [same] Judge, who had previously reserved the case to himself, has [since] released himself from the case and sent the 2-day fact finding hearing to a different court."

<sup>60</sup> One CILEX practitioner recounted their experiences of case proceedings in the Mental Health Tribunal where poor audio/sound quality due to feedback and interference meant that attendees had to hold the receiver close to their mouth whilst trying to juggle writing up notes and referring to relevant documentation. This compromised the ability for the practitioner to dedicate their attention to representing their client effectively.



## 4.2. Transforming the justice system: Scalability and Sustainability

As well as looking to the four principles outlined above, it is key that in developing digital infrastructure for the benefit of access to justice/virtual justice long-term, approaches to digitisation focus on **transformation** and not simply **automation**. Not only shall this enable us to truly leverage the potential of legaltech solutions (by recalibrating our existing processes, protocols and infrastructure), giving rise to true innovation; it will also be essential when looking to the scalability of legaltech solutions across the sector and future-proofing their utility longer term.

CILEX notes the following challenges to transformation that need particular attention in this regard:

- **Transformation into the unknown:** One barrier to transformation is the fear/challenge of innovating in a space where technological capabilities are still being developed, and therefore envisaging a future that is based on predictive trends as opposed to existing data and fact. This is something referenced above (para 3.2.4) by Lord Clement-Jones as the limitations of operating from a probabilistic model. In order to safeguard from the risks inherent in innovating in this new territory, CILEX notes the importance of adopting an iterative process that builds on what we do know, with the flexibility to grow and develop over time, and data collect along the way.

For example, drawing on the feedback collated from CILEX practitioners on virtual justice and the integration of digital solutions to our justice system over 2020 (COVID-19 response), it is clear that inconsistent approaches to physical vs virtual hearings have aggravated court/legal processes and, at times, threatened the proper administration of justice. In resolving these issues, it is CILEX's belief that rather than looking to tech as the answer, what is needed is a clear framework, building on what we do know, that clearly establishes a model for assessing which cases (based on case type and party type) should be heard in which way. Whilst not strictly speaking a development in legaltech, it is these steps that transform our legal processes to enable legaltech solutions (such as audio-visual remote hearing technology) to work to our advantage. In turn, that framework should be expected to evolve over time, as we learn more about (and gain data on) the ramifications of certain case types/party types interacting with court processes in the digital domain.

In fact, it was this key lesson: *to not underestimate the smaller procedural changes (that are often focused on how our systems and processes are organised, as opposed to the tech itself);* that was a common thread in discussions around the international development of digital justice systems across the world (shared as part of the 2018 International Forum on Online Courts – see Annex 2 below).

- **Diversity as a key to unlocking potential:** Another barrier that CILEX sees to truly realising the transformative potential of virtual justice/the digital justice system, is the underlying lack of diversity within pockets of the profession/legal services market. This is not only counterintuitive to realising diversity of opinion and ideas (a fundamental precursor to innovative thinking), but also to realising the benefits of scale. Indeed, scale delivers benefits only in a competitive market that is dynamic, where automation or aggregation of activity into fewer people is able to deliver higher quality of service as opposed to reduce availability of access.

For example, in areas of legal services, such as the legal aid market, the aggregation and automation benefits of legaltech solutions and the digital justice system could well be less than in other parts of the economy. In the current system, the 'market' is fixed through tender, and with an underlying alleged bias towards larger practices that may have a disbenefit on the resilience and resourcefulness of providers. Scale comes with greater overheads and these overheads often drive a requirement for greater margin. As an example, during the pandemic there are reports that many of the larger legal aid firms have had to furlough staff with a consequential impact on representation, whilst smaller more agile practices, whilst utilising the furlough scheme, have managed to stay operational.

In addition to these considerations, it is CILEX's belief that embracing and demonstrating diversity is essential for any public service wishing to remain relevant in the modern world. Attracting and retaining people's trust in key institutions and professions is increasingly reliant on the ability to prove they are for everyone, regardless of background. In the digital justice space, where bias in algorithms and concerns around data privacy are growing, the need for transparency and representative input in building public trust and remaining accountable shall be key.

#### **For further details**

Should you  
require any  
further  
information,  
please contact;

Chandni Patel  
Head of Policy

[chandni.patel@cilex.org.uk](mailto:chandni.patel@cilex.org.uk)