



# The state of the legal profession in England in 2022

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*Developments and controversies that every California attorney should know about*

17 October 2022

# Today is all about providing an overview of the state of the legal profession and a summary of key legal developments in England in 2022

## *First half: Setting the context:*

- ❖ The differences between UK law and English law – and Scots law and Northern Irish law
- ❖ How the legal profession in England is organised

## *Second half: 2022 in review*

- ❖ The strike by criminal barristers and strain on the criminal justice system
- ❖ Noteworthy legal developments in 2022 including:
  - the modernisation of divorce law
  - proposed SLAPP legislation
- ❖ Government rhetoric against lawyers – a worrying trend?

# The United Kingdom and its legal systems

**UK law**– passed by Parliament of the United Kingdom; retains competence to legislate for entirety of UK (*subject to 'Devolution'*).

## England & Wales (English law)

- Common law and statute
- One legal jurisdiction – but a distinct Welsh law is emerging
- Senedd in Cardiff is devolved legislature for Wales
- UK Parliament in London legislates for England

## Scotland (Scots law)

- Hybrid legal system with common and civil law traditions
- The Scottish Parliament in Edinburgh

## Northern Ireland (the law of Northern Ireland)

- Common law traditions deriving from English / Irish common law
- Northern Ireland Assembly (Stormont) in Belfast



## California Civil Code Section 22-22.2

22.2. The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State.

# The hierarchy of the UK's legal systems – and the concept of Devolution

## The UK Parliament is “supreme” or “sovereign”

- No UK court can strike down or invalidate an Act of the UK Parliament

**Devolution** is the **devolution of legislative and executive power by the UK Parliament to Scotland, Northern Ireland and Wales**

- Different from US federalism – UK devolution is top-down

## Legislative frameworks for devolution:

- Scotland Act 1998 (as amended)
- Northern Ireland Act 1998 (as amended) – although NI's history with 'home rule' stretches further back.
- Government of Wales Act 1998, Government of Wales Act 2016, Wales Act 2017 (as amended)
- What about devolution in England?

**The UK Supreme Court is final arbiter of devolution questions**



# Devolution, Scottish independence ... and the late Queen's name

## Recent Scottish devolution case in the Supreme Court: *Reference by the Lord Advocate of devolution issues under para 34 of Schedule 6 to the Scotland Act 1998*

- Heard on 11 October 2022; judgment awaited
- The political question: “*Should Scotland be an independent country?*”
- The devolution and legal question: Can the Scottish Parliament pass a law holding a referendum on independence, or is that reserved to the UK Parliament?

**Not really a devolution case but an interesting one from Scotland brought to memory following the Queen's passing ...**

### ***MacCormick v Lord Advocate* 1953 S.C. 396**

- What is in a (Queen's) name?
  - In history, there was a Queen Elizabeth I of England but not of Scotland
  - Could Her Majesty style herself as “Elizabeth II” *of the United Kingdom?*



# The legal profession in England & Wales

Legal Services Board

## Solicitors

The Law Society

Solicitors Regulation  
Authority

## Barristers

General Council of the  
Bar

Bar Standards Board

Alternative business structures

Also:

- CILEX lawyers
- Costs lawyers
- Patent attorneys
- Trademark attorneys
- Notaries
- Licenced conveyances

**In California:**

Will paraprofessionals  
become a reality?

Will ABS' become a  
reality?



# Court Dress when court is in mourning – as it was following the passing of Queen Elizabeth II



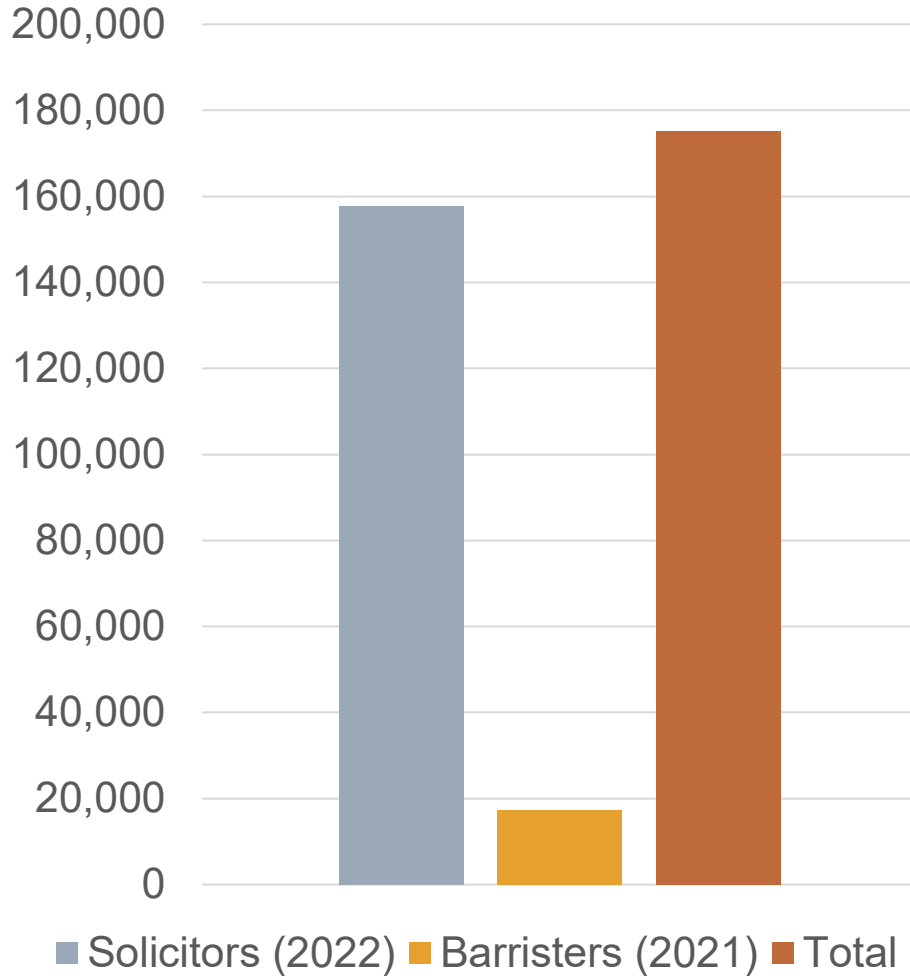
“Mourning bands” around the neck

“Weepers” on the cuffs

Source: Dominic Casciani @BBCDomC

# Solicitors and Barristers in England and Wales – in numbers

## Practising Solicitors and Barristers



**Population of England & Wales, March 2021: 59,597,300**  
(Source: ONS)

**Practising Solicitors (August 2022): 157,744**  
(Source: SRA)

**Practising Barristers (2021): 17,623**  
(Source: Bar Standards Board)

**Total Solicitors and Barristers: 175,367**

### California in comparison

Population of California (January 2022):  
39,200,000  
(Source: Department of Finance)

Active attorneys (September 2022): 195,323  
Source: California Bar

### Snapshot of diversity:

#### Solicitors:

- 61% women
- 17% from ethnic minority background

#### Barristers:

- 39% women
- 14.7% from ethnic minority background



# A short break

**When you come back:**

**What has made news in the legal profession 2022 – and some significant legal developments on the horizon**

- **Divorce law reform** – long-overdue some would say
- **Anti-SLAPP legislation** – the will to legislate is there, but what will it look like and when will it happen?
- **Government rhetoric against lawyers** – a worrying trend?

# The Barristers Strike of 2022 – The News Headlines



***“Criminal barristers have stopped soldiering on through downtrodden criminal courts”***  
- Kirsty Brimelow, Chair of the Criminal Bar Association

***“It tears barristers like me apart to strike, but the government has left us no choice”***  
- The Guardian, 22 August 2022

***“Court ‘chaos’ seeing criminals go free, victims’ commissioner warns, as barristers strike”***  
- The Independent, 29 August 2022

# Criminal legal aid in England & Wales

## How does it work?

- Administered by Legal Aid Agency
- Mainly uses private sector solicitors and barristers (there is a very small Public Defender Service)
- Complex system – based on nature of offence, length of hearing, number of pages of evidence; mixture of fixed fees; solicitors' fees, barristers' fees for advocacy.

# The Barristers Strike of 2022 – and criminal justice on pause



## Who is striking?

- Criminal defence barristers – who provide representation under the criminal legal aid system

## Why are they striking?

- Against what they say is a broken criminal justice system – no future for the profession or junior barristers
- Against low, unfair pay:

Years of practice	Median fee income before expenses	Likely fee income after expenses
0	£12,800	£9,000 – 10,300
1	£23,700	£16,600 – 19,000
2	£42,900	£30,000 – 34,300

- Years of stagnation
- CBA says real earnings fell 28% since 2006
- System for remuneration does not reflect true cost of work undertaken

Source: Table 13.4, *Independent Review of Criminal Legal Aid* by Sir Richard Bellamy, 29 November 2021

# What about solicitors?

## Decline in real earnings for solicitors' firms

- In real terms, fees have fallen:
  - Since 1996, by around 40-45%.
  - Since 2008 fees by 33%;
  - Since 2014 by 15%

(from the Independent Review of Criminal Legal Aid)

## Solicitors are not striking, but they are “voting with their feet”

- Law society says: Many lawyers no longer see a viable career doing this work, and firms are facing a crisis in retention and recruitment.
  - the number of criminal legal aid firms has almost halved in the last 15 years
  - the number of duty solicitors for police station work is increasingly scarce in some parts of the country; some only have one or two duty solicitors
  - there are no duty solicitors under the age of 35 in some counties; crisis of succession planning

# The Barristers Strike of 2022 – A timeline

## Timeline of strike

- **December 2021:** Government publishes Independent Review of Criminal Legal Aid (by Sir Christopher Bellamy).
  - Considers wider reforms of system needed to make it sustainable for the longer term – quite wide-ranging
  - *“My central recommendation is that the funding for criminal legal aid should be increased overall for solicitors and barristers alike as soon as possible to an annual level, in steady state, of at least 15% above present levels, which would in broad terms represent additional annual funding of some £135 million per annum”* (para 1.37)
- **March 2022 – July 2022:** Government consults on changes to system and publishes initial proposals.
  - Central proposal: accepts 15% uplift (9% for solicitors), but only for new cases after 30 September 2022 (*later revised*)
  - Will consult on other longer-term proposals later
- **April 2022:** Criminal Bar Association (CBA) members vote in favour of “no returns”
- **June 2022:** refusing to accept new instructions; intermittent court walkouts
- **August 2022:** week-long strikes on alternate weeks
- **September 2022:** all out strike of a indefinite nature – almost 2,500 barristers are participating



# The Barristers' Strike of 2022 - what is its impact?

## **Trials delayed**

- According to MoJ, 6,235 court hearings were disrupted by strikes between 27 June and 5 August, including 1,415 trials.
- At end of June 2022, courts backlog stood at nearly 60,000 in Crown Court and 364,000 in Magistrates' Court

## **What about victims and witnesses?**

## **What about defendants in custody awaiting trial?**

*The King (oao Director of Public Prosecutions) v Crown Court at Bristol and others* [2022] EWHC 2415 (Admin)

*“We consider that if the situation remains as it is now, the relevant point at which the unavailability of legal representation can properly be described as chronic or routine is likely to be reached by the last week in November 2022 (by which time three months will have elapsed from 22 August 2022). Once this point is reached, the absence of legal representation in the context of the CBA action is unlikely to be capable of supplying a sufficient reason for extending custody time limits”, para 80*

# Divorce law – introduction of “no-fault” divorce in 2022

<b>Before April 2022</b>	<b>After April 2022 (Not retrospective)</b>
<p>Marriage must have “irretrievably broken down” based on one of 5 “facts”:</p> <ul style="list-style-type: none"><li>- Adultery – [but not in same-sex marriages?]</li><li>- Unreasonable behaviour</li><li>- Desertion – for at least 2 years</li><li>- Separation for more than 2 years, if both parties agree</li><li>- Separation for more than 5 years, if one party disagrees</li></ul> <p>See <i>Owens v Owens</i> [2018] UKSC 41, Supreme Court judgment which re-invigorated calls for reform</p>	<p>Complete overhaul by Divorce, Dissolution and Separation Act 2020</p> <p><b>Now more in line with California divorce law</b></p> <p>No-fault divorce – marriage must have “irretrievably broken down” but an attestation by one party that this has happened is sufficient</p> <p>Can be a mutual filing; but even if only one party files, the other cannot contest it</p>

# Strategic Litigation Against Public Participation – England and Wales move to introduce anti-SLAPP legislation

- Form of litigation used to censor and intimidate critics – usually by bringing a defamation / libel claim
- England & Wales have no anti-SLAPP legislation currently – but there are defences to defamation claims which may assist: truth, honest opinion, publication of matters in the “public interest”.

**July 2022:** Government has consulted on introducing anti-SLAPP legislation and intends to legislate—proposals are being developed but there is no Bill in Parliament yet

- What’s driving it?
  - Growing concern in England that jurisprudence is tending to be more “plaintiff friendly” than it ought to be – privacy rights trumping free speech
  - Lord Chancellor when publishing July 2022 proposals:

*“We won’t let those bankrolling Putin exploit the UK’s legal jurisdiction to muzzle their critics. So today, I’m announcing reforms to uphold freedom of speech, end the abuse of our justice system, and defend those who bravely shine a light on corruption”*

# What could the proposals for anti-SLAPP legislation in England and Wales look like?

## To be determined...

Government does not just want to mirror other jurisdictions' rules; wants to be carefully attuned to the nuances of the English law context

**[Note: California's anti-SLAPP legislation at California Civil Procedure Code Sections 425.16 – 425.18]**

Government has not given much away yet apart from sketching out there will probably an early-dismissal / strike-out process for SLAPP claims, analysed under a three-part framework:

- The early dismissal must be in the “public interest” – what will this mean though?
- The claim must have some features of an abuse of process
- Merits test – to ensure that the claim is really not worth further judicial consideration – perhaps similar to California's “probability that plaintiff will prevail” test
- Costs protection scheme – although in our Civil Procedure Rules, the norm anyway is that the successful party can recover their costs and legal fees against the unsuccessful party.

## ➤ **Government rhetoric against lawyers – a worrying trend?**

*“And for those defending the broken system, the traffickers, the do-gooders, the lefty lawyers, the Labour Party, they are defending the indefensible. And that is something I will never do.”*

**Priti Patel, Home Secretary, October 2020**

*“The Bar Council and Law Society of England and Wales together call on the prime minister to stop attacks on legal professionals who are simply doing their jobs.*

*It is misleading and dangerous for the prime minister to suggest lawyers who bring such legal challenges are doing anything other than their job and upholding the law.”*

**Law Society and Bar Council joint statement, June 2022, in response to PM’s comments about lawyers challenging plans to send asylum seekers to Rwanda**

Thank you

Any questions?



# Your speaker

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