ANNEX 2: THE LAW SOCIETY’S RESEARCH ON LAWTECH AND ETHICS

1. THE CURRENT FRAMEWORK

The SRA published its new Standards and Regulations in November 2019. The new rules included changes to the:

- Principles
- Code of Conduct 2011
- Accounts Rules 2011

The SRA states that the introduction of its new Standards and Regulations gives legal services providers greater flexibility as to how they can deliver their services. The principles, identified below, are underpinned by two Codes of Conduct and the SRA’s enforcement strategy. The Codes of Conduct describe the standards and business controls that the SRA, and the public expect of firms (including sole practitioners) authorised to provide legal services.

<table>
<thead>
<tr>
<th>The Solicitors Regulation Authority Principles apply to individuals and firms, who must act:</th>
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<tr>
<td>• in a way that upholds the constitutional principle of the rule of law, and the proper administration of justice</td>
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<tr>
<td>• in a way that upholds public trust and confidence in the solicitors’ profession and in legal services provided by authorised persons</td>
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<td>• with independence</td>
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<td>• with honesty</td>
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<td>• with integrity</td>
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<td>• in a way that encourages equality, diversity and inclusion</td>
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<td>• in the best interests of each client</td>
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The existing framework applies to the providers of legal services and not to those providing technologies to enable the provision of legal services. It is reasonable to assume that these standards and regulations were not designed with the LawTech sector or those using LawTech specifically in mind.

2. METHODOLOGY

We conducted a series of 30 interviews with law firms, sole practitioners and alternative business structures to understand how LawTech solutions are designed, developed, used

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and/or procured and how the existing framework is considered. Respondents included magic circle firms, medium size and small firms in England and Wales. Our research also included organisations offering legal business support.

In the interviews we asked participants the following questions:

- What types of technologies do you currently use and for what?
- What proportion of the technologies you currently use were procured?
- What was the process your firm uses to design or procure LawTech?
- What ethical considerations have you made when procuring and designing LawTech?
- What are the ethical issues your organisation has come across when using these technologies?
- How do you evaluate and manage risk when designing, procuring and using LawTech?

To illustrate the points made by respondents, we have developed some hypothetical scenarios to give examples of the ethical dilemmas faced and some initial solutions that practitioners have adopted.

3. FINDINGS

All participants agreed that the design, development, procurement and use of LawTech raise ethical questions or concerns. Participants expressed views in relation to the following issues:

- The need for common language and approaches
- The ethical issues which arise

3.1 The need for common language and approaches

a. Limited awareness of regulatory rules on legal services

Most the law firms interviewed (that did not have an in-house LawTech incubator) have processes or frameworks to procure LawTech.
Solicitors reported that during the procurement process, LawTech developers were not ‘speaking the same language’ as the lawyers and, therefore, there were concerns that when products are developed the Standards and Regulations are not being considered. In some instances, practitioners were concerned that some of the LawTech developers, for example start-ups or technology companies which did not have lawyers in their teams, did not know of the existence of the regulations or the role of the regulator.

This lack of awareness, particularly for medium and large firms, did not deter them from inviting companies to pitch or present to them. They applied their own expertise and analysis to consider the regulatory and ethical implications of the LawTech Solution.

Equally, the LawTech producers and operators reported difficulty in understanding the procurement processes of medium and large law firms and spent resources on increasing their capability to communicate their offer. ²

To address these concerns:

- Some larger firms have adopted and extended quality standards (e.g. ISO) to their LawTech products or operations. Although these are not specific for the legal services sector, firms believe that they provide a higher level of comfort to discharge their regulatory obligations than operating without them.

- Some firms have put additional due diligence and risk assessments in place, for LawTech products that are developed by companies that are not a legal business, in order to better understand how products are built.

- Some small and mid-size firms prefer not to try new LawTech products because of regulatory or ethical concerns. Although they can see merit in the products, they prefer to avoid risk by using tried and tested products or those used by other firms.

² LawTech Producer: the person(s) or business who designed and developed the product or service, for instance the producer of a case management system. While a LawTech Operator is the person(s) (solicitor) or business(es) (legal services provider), who is has to give due consideration to risk(s) connected with the operation of the technology and who benefits from their operation, for instance the operation and use of a case management system.
One practitioner stated that the existing Standards and Regulations are ‘technology neutral’ which means that legal services providers have different ways of considering the regulations when designing, procuring or using legal technology.

Practitioners have been adaptable and have used peer-to-peer groups or informal networks to identify best practice and answers. Participants advised that the availability of a set of ethical guidelines would be useful in assessing whether LawTech products were compatible with their regulatory obligations, rather than relying on peer recommendations.

b. Joint ventures with non-lawyers to design or build LawTech

Respondents said that digitisation and technology are increasingly bringing sectors closer together as they blur the lines between professional services, clients and jurisdictions.

To maintain their competitive edge, law firms are now more than ever sharing resources and information with non-legal business entities (in some cases, located in different jurisdictions) to build or design LawTech. Our research showed law firms working together in a formal (i.e. joint venture) or informal basis (as a consortium) with technology providers, business groups, academic organisations. Some of these projects have, for example, built LawTech tools for the firm or for a client.

Although the risk and compliance teams are usually involved in setting up these collaborative projects, firms still struggle with diverging standards and the challenges of cross-border data transfer. Several firms have developed standards of their own or adopted ISO 44001:2017 to demonstrate to clients that they take the governance of collaborative business relationship management systems seriously.

The concerns are exacerbated when law firms work together with technology companies that provide legal products or services which are unregulated. For example, organisations that develop LawTech products for in-house teams as consultants (but not legal services), advise on global regulatory issues, emerging markets or international areas and employ developers to build solutions. These collaborations often lead to questions of client protection, confidentiality and legal
professional privilege which, due to their international and multi-disciplinary nature, do not have a straightforward answer.

There are also questions about the scope of supervision duties when a LawTech tool is involved and whether supervision extends to a non-legal team (such as an IT team).

### 3.2 Reliability, accuracy and bias of analysis

Concerns were raised about discharging solicitors’ duties to the court, when using LawTech products related to litigation. In order to act in the best interests of the client, solicitors and firms must be satisfied that any analysis generated by LawTech solutions is accurate and reliable. Reliance on biased or inaccurate data would undermine trust in the profession and legal services.

Solicitors have an obligation to uphold the rule of law, which demands that all should be equal before the law. They must also act in a way that encourages equality, diversity and inclusion. Overall, respondents agreed that equality, diversity and inclusion considerations should inform the development and use of LawTech products. They agreed that these factors are especially important for products with greater autonomous decision-making. Some firms have considered these elements as part of equality assessments being undertaken in procurement of LawTech. Other firms have had a less rigorous approach.

### Hypothetical scenario #1

A LawTech company produces a litigation analytics platform which aggregates publicly available data and firm specific data of litigation proceedings to enable litigators to better estimate outcomes. A law firm purchases this technology to complement the strategic work conducted by the litigation department to increase success rates and drive client satisfaction.

During the procurement phase, the law firm is concerned about the data underpinning the predictive analytics platform, particularly its origin, accuracy and how representative it is (sampling bias). Further questions are raised on the overall bias of the outcome reached by the platform and how fair or reliable it would be to meet the needs of the client. There are further concerns about whether race, age or gender could be factors that would sway the decision tree towards one course of action over another.
On interrogation, the LawTech company informs the firm that it has compiled a list of when the system has been changed, when a bias has been identified in the past and how it conducts equality impact assessments. The LawTech company proposes an ‘equality by design’ approach to the firm, which can be negotiated as part of the contract. This would mean that the firm can determine the parameters of the LawTech Producer and characteristics for the algorithm to take into account during procurement.

Respondents were concerned about potential data bias embedded in the algorithm or code underpinning LawTech solutions, for example for work allocation support tools or chatbots. This was identified by firms of all sizes as an ethical concern. For small and medium size firms, it was also seen as a barrier for adoption.

**Hypothetical scenario #2**

Criminal justice risk assessment tools analyse the relationship between an individual’s characteristics (demographics, record of offences, and so on) and their likelihood of committing a crime or being rehabilitated.

A LawTech company provides risk assessments, and, like many, the methodology is a trade secret. The company estimates the risks of recidivism based on one interview with the offender and an analysis of their criminal history. The estimates of recidivism risk are reported to the court, but the underlying methodology is not.

There are serious and unresolved problems with accuracy, validity, and bias in both the datasets and statistical models that drive this tool. An independent audit of the tool found that BAME offenders were more likely to receive a higher risk of re-offending than their white counterparts. Proposals to address the concerns include:

- Additional information to allow judges and those working in the justice system to interpret results
- Additional training to improve the capability of judges and those working in the justice system to understand and interrogate results
- The use of confidence estimates to allow users to interpret the system and results

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- Establishing best practice to evaluate, monitor and audit AI tools.
- Exclusion of certain demographics

### 3.3 Accessibility

Solicitors must act in a way that encourages equality, diversity and inclusion. Further concerns were raised by firms on the rolling out of LawTech tools across the firms, which may not be accessible for people with particular protected characteristics, for example lawyers with disabilities.

**Hypothetical scenario #3**

A law firm purchases an electronic signature software to use during the COVID lockdown. The firm makes it mandatory for the corporate and commercial real estate teams to use the software in transactional work. Some members of these teams are visually impaired and unable to use the new platform, as it does not integrate with the other systems that have audio description to conduct their work.

Large firms were particularly mindful of the difficulty of LawTech developers (mostly start-ups) meeting diversity requirements for procurement.

### 3.4 Data Privacy

Solicitors and firms must preserve client confidentiality and are subject to data protection legislation.

The Cloud enables people to work together, improve disaster recovery storage capacity and data handling capacity and provide a safer and more secure way of storing data. However, cloud-based tools were identified by participants as a key concern for large firms, small firms and in-house teams. Respondents suggested that they spend a disproportionate amount of time dealing with cloud related issues.
A significant number said that cloud vendor contracts asymmetrically favour the legal and financial position of the provider. Given that law firms and solicitors are subject to the highest ethical obligations, and liable both financially and professionally if they breach these obligations, there is a disincentive to adopt cloud-based systems (even though practitioners acknowledge how valuable this technology is).

There is no agreement on how to ensure obligations are maintained and risks mitigated in the cloud, including meeting national and local regulations and laws or the client's privacy obligations or standards. This problem was prevalent with clients from the financial services or insurance sectors.  

Some jurisdictions have specific legal and financial data regulations preventing legal or financial data to be either uploaded into the cloud or requiring that the data is domiciled in the jurisdiction, preventing fully integrated legal providers. As a result, regulatory responsibilities increase where risk and certain forms of data are dealt with differently. Some feel that a risk-based model of governance would further complicate the regulatory environment, hindering the development of a truly international law firm and decreasing export value into countries with divergent approaches to risk. Although law firms, LawTech producers and individual solicitors do interpret rules differently, just as in other sectors. The legal services sector is starting to see a trend of the adoption of international standards (such as ISO certifications or SOC 2) to inform clients risks related to the cloud are taken seriously, and also to implement globally recognised norms. These tend to be expensive for start-ups to adopt, implement and get certified.

Concerns were raised that some clients’ data may be uploaded into the cloud. Some firms have introduced data breakdowns for their clients to inform them of the data types they consent to. In other cases, clients, namely financial institutions, did not want sensitive information held by a third party. However, as tools are increasingly being embedded in the Cloud, as they rely on constant access to critical information, withholding certain data could undermine the effectiveness of a cloud-based service that assists with case development, legal research, or argument development and drafting.

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4 The Law Society published a practice note on cloud computing (2020) which was updated to reflect changes in practice due to Covid. It is available here: [https://www.lawsociety.org.uk/topics/cybersecurity/cloud-computing](https://www.lawsociety.org.uk/topics/cybersecurity/cloud-computing)

5 SOC 2 is a procedure that ensures service providers securely manage client’s data to protect the interests of the organisation and the privacy of its clients. It is enforced by auditors or auditing processes.
3.5 Additional concerns noted by respondents

All participants agreed that there is an assumption about the degree of competency of the supplier and the LawTech product. Some participants were concerned that these assumptions could potentially affect the level of service provided to the client. Some points of difficulty for firms (which may affect outcomes) include:

- Lack of clarity on the apportionment of liability if a LawTech product causes harm. Some respondents stated they were encouraged to accept complete liability as ‘it is the nature of the beast as it’s a learning system’ and because ‘outcomes are still reviewed by your law firm and solicitors’.

- Inequality of arms – some small firms reported unequal bargaining power and an inability to negotiate bespoke terms underpinning the terms and conditions of the service.

- Higher levels of risk derived from unclear terms, warranties, guarantees and indemnities on the products procured and whether these dilute as the LawTech products integrate with other platforms.

- Concerns about LawTech products being marketed through websites which do not meet privacy and cookie regulation, which can in turn affect trust levels in the product.

Some LawTech developers said that they are unable to provide detailed explanations of how their product works as it would effectively open the ‘backend’ to law firms/clients. This is causing concerns for effective oversight, risk and compliance. In the LawTech sector, there is little space for “black box” AI systems for this reason as users cannot be sure of whether the system is regulatory compliant. Nor can they form an ethical view in relation to issues like built-in bias. To address this issue some firms prefer developing their own LawTech products in their incubators or through joint ventures.
Firms raised concerns as to whether potential LawTech risks would be covered by professional indemnity insurance or public liability insurance. Some firms have developed risk assessments on their LawTech tools which are being monitored closely and shared with developers.

A practitioner said that some LawTech products are not easy to understand and, particularly, liability considerations and redress is not clear. This disproportionately impacts small law firms or advice centres who might not have the resources or capability to interrogate the information underpinning the product or service.

4. QUESTIONS FOR DISCUSSION/ REQUEST FOR RESPONSES

We welcome the views of the LawTech sector, as well as solicitors, regulators, consumers, academic organisations and any other external stakeholder to the questions and discussion areas below.

These points are based on the findings of the research and should only be treated as preliminary suggestions for discussion. We also welcome identification of other areas you, as stakeholders consider, of heightened significance to this debate.

QUESTION ONE: Would the development of LawTech principles provide benefits (such as legal certainty, mutual understanding) to the legal services sector, LawTech developers and the UK jurisdiction? If yes, what should those principles cover?

Respondents agreed that a set of non-binding soft law LawTech principles and/or targeted guidance would be beneficial to address the issues described in section 3. These principles would:

- Help businesses to enhance the quality of their products and the efficiency of their processes and implementation.
- Reduce the variety of goods and services to an optimal level for minimising cost
- Facilitate inter-operability of products, processes and sectors
- Make available technical information to all firms allowing an effective and less costly inter-firm exchange of information
- Promote international trade
• Be a catalyst for innovation by reducing time to market for new products or services, promoting adopting, levelling competition between larger and smaller companies, facilitating the service of multiple sectors

• Provide assurance to developers, users, clients and the public that LawTech products operated to the highest ethical standards.

The principles could identify the regulatory and ethical issues and set out ways how these risks could be mitigated, and compliance achieved. The principles should be co-created by lawyers, LawTech developers and stakeholders and cover the following areas:

1. **Tackling reliability, accuracy and potential bias.** A Human Rights Impact Assessment and Equalities Impact Assessment should be carried out in procurement of LawTech, where relevant, or if the firm has an in-house incubator, then these assessments should be conducted during the development phase process. Equality, diversity and inclusion considerations should inform the development and use of LawTech products. This becomes more important the greater the level of autonomous decision-making stages. The format of these assessments should vary based on organisational needs, the level of autonomy and underlying data curated by a system.⁶

2. **Ensuring data privacy.** A Data Protection Impact Assessment and a Privacy Assessment should be carried out for each LawTech product to ensure appropriate compliance with privacy and security standards in an operational environment.⁷

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⁶ Algorithms in Criminal Justice advocates for a human rights by design orientated approach for the use of LawTech in the public administration of justice.

⁷ This assessment should cover the following operational considerations:

- Data loss, service reliability and stability
- Lack of control over customisation and integration
- Service response time, and enforcing SLAs
- Speed and bandwidth
- Danger of supplier lock-in
- Difficulty of achieving executive buy-in
- Denial of service
- Malicious insider
- Abuse of service
- Insufficient due diligence in supply chain
- Shared technology issues
3. **Verifying LawTech competence and capability.** Law firms should put in place a learning management system that covers the different types of LawTech products, applications and its risks and benefits. There should be a common understanding of what skills lawyers will need to understand how to use, and hold accountable, a LawTech solution.

4. **Standardising procurement frameworks.** The procurement process should be used to determine the competency and capability of the LawTech producer. The procurement process must be viewed as cross-departmental task. This could cover compliance with data privacy, cybersecurity and client confidentiality when a cloud computing or similar online storage platform is used by a firm or a business.

5. **Transparency and information.** Where possible, and where relevant, law firms should inform the client about the use of legal technology - if it is of significance for a particular matter or deal.

6. **Clarity.** There must be a clear understanding of how a system has been designed and developed before it is procured and then used which should cover new functionalities, data capture or updates. The LawTech product should be evaluated on an ongoing basis to ensure it is effective and associated, evolving risks are mitigated.  

These principles should also be in place when entering into an informal or formal partnership with LawTech Producer, Operator or academic organisation.

**QUESTION 2: Are there existing principles or standards: (i) in the UK in other relevant sectors  or (ii) internationally, that the UK should consider adopting?**

Annex 1 sets out the existing LawTech principles that have been mooted by different organisations, including the American Bar Association and the International Bar Association.

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8 The Producer – Example of Accountability Profile
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<th>The Producer – Example of Accountability Profile</th>
<th>The Operator – Example of Accountability Profile</th>
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<tr>
<td>Defective design of development in the product, including future updates and features.</td>
<td>Incorrect use of the tool by a law firm or those under its supervision.</td>
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<tr>
<td>A cyber breach which results in non-provision of service of product.</td>
<td>A breach of confidential information on the server-side which a law firm controls.</td>
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9 Such as FinTech or consumer protection.
Domestically, the Legal Services Consumer Panel’s principles were regarded by respondents as a starting point to develop a foundation for a cross-industry standard on LawTech.

**QUESTION 3: Do the current SRA Standards and Regulations enable effective design and procurement of LawTech?**

All participants said that regulation is not the answer to make LawTech and innovation more accessible.

The majority indicated that the standards and regulations do not hinder the development of new LawTech but that there are a number of grey areas. For example, on what is considered a legal service or a business service and, therefore, which activities or services are regulated or unregulated.

A recurrent concern cited was about LawTech producers complying with common standards that offer transparency and enable users to demonstrate that they will be in compliance with the standards and regulations.

Details on the latest papers on regulation of LawTech can be found on Annex 1.