



By email only

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Dear Maria

Market study into the supply of legal services in England and Wales

1. The Bar Standards Board (BSB) is grateful for the opportunity to comment on the Competition and Market Authority's (CMA) market study notice and looks forward to working with the CMA on this study. In responding to the questions in the scoping document, we have focused on issues that are particularly relevant to the Bar and the segment of the market regulated by the BSB.
2. The BSB regulates barristers and their professional practice, and specialised legal services businesses in England and Wales. We currently authorise around 15,500 practising barristers working in over 700 chambers¹ and a number of other organisations such as law firms, the Crown Prosecution Service or Government Legal Service. We also authorise around 50 businesses providing specialist legal services. We have recently applied to the Legal Services Board (LSB) to be designated as a licensing authority under part five of the Legal Services Act 2007 (LSA). If successful, we expect to be licensing Alternative Business Structures (ABS) by the end of 2016.
3. The BSB authorises individuals and entities to undertake all of the reserved legal activities (apart from notarial activities) and the provision of immigration advice and services in accordance with the Immigration and Asylum Act 1999. Once authorised to provide reserved activities, the BSB regulates individuals or entities in respect of all legal services² that they provide.
4. In addition to regulating the Bar, with its focus on advocacy, litigation and specialist advice, our aim is also to operate as a specialist regulator of entities (whether or not formed by barristers) whose focus is similar, providing a regulatory regime suited to the efficient and cost effective regulation of the risks presented by that type of legal practice. For example,

¹ A chambers is a place from which self-employed barristers practise

² This includes legal advice, representation and drafting or settling any statement of case, witness statement, affidavit or other legal document, subject to some specific exclusions in the BSB Handbook glossary

our regime does not permit the holding of client money, so therefore does not require the detailed regulation of client accounts or a compensation fund. We are keen to ensure that the market in legal services is strong and vibrant, with a variety of business models, which allow the professions to innovate in terms of the structure used to deliver legal services and how those legal services are provided. By operating as a niche regulator, we seek to offer a choice of regulatory regime, which is attractive to certain types of business, which may promote innovation in the sector and increased choice for the consumer. For businesses who do not wish to operate within the constraints of our regime there are other regulators who may be more appropriate for them, such as the Solicitors Regulation Authority. In this context, it will be important for the CMA to understand the different segments within the legal services market, each of which may raise different competition and consumer protection issues.

Case studies

5. The BSB broadly supports the case studies that have been identified. We would stress the need to consider the market for advocacy services and rights of audience in particular, whether as part of a case study or as part of the wider review. This is a segment of the market for which specialist providers are often sought, particularly in the higher courts. The BSB's regulatory regime is aimed particularly at setting standards in relation to this area of work, which we believe is important for the public interest and the maintenance of the rule of law. The present case studies may not generate much insight into advocacy services – if the CMA were minded to add another case study, we would recommend family law advocacy. This is an area that has been affected by cuts in public funding in recent years and for which the client base may be particularly vulnerable. It would therefore be a good example with which to draw out the themes that the CMA has identified for the study.
6. We agree with the proposal to include a case study on commercial law services. We would suggest that limiting this to individuals and small businesses (up to ten employees) may be too restrictive. There will be businesses of more than ten employees who are neither repeat purchasers of legal services nor employers of legally qualified individuals. The impact of the market and regulation on these firms should not be ignored.

Theme 1

7. We support this theme. In relation to regulation of the Bar, it is important to note that the majority of clients access services via a solicitor or other professional client. The relationship with the solicitor will therefore be central to helping clients to understand the quality and value of the services that they provide. All barristers, when accepting instructions, are required to confirm with the client in writing the terms on which they are acting, including the basis of charging. This will normally be at an hourly rate, but barristers may also offer capped or fixed fees.



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8. In addition to referral work, barristers may also take instructions on a 'direct access' basis. There are two forms of direct access:
 - Licensed access enables certain listed professions (such as accountants or engineers) or organisations (such as an Ombudsman) to instruct the Bar direct in their area of expertise. The BSB can also grant licences to enable other organisations or individuals to instruct the Bar direct;
 - Public access enables barristers to take instructions direct from any client. In order to do this, a barrister must complete additional training and be registered with the BSB to accept public access work. They must also comply with additional rules, which specify in more detail the information that must be provided to clients and require the barrister to be satisfied that the client and/or case is suitable for public access (and refuse the case if, for example, it would be in the client's interests to instruct a solicitor). At present, around 5,300 self-employed barristers are entitled to do public access work.
9. To promote competition and enable public access barristers better to meet their clients' needs, the BSB has recently enabled the self-employed Bar to seek authorisation to undertake the reserved activity of litigation³. To date 311 barristers have been authorised under these new rules. This means that public access clients have the option of asking a barrister to do some of the tasks that would traditionally be done by a solicitor (if a barrister is not authorised to conduct litigation then a public access client will have to act as a litigant in person in any court proceedings).
10. The ways in which providers of legal services compete with each other will vary depending on the area of law and the nature of the legal practice. In the referral profession, relationships with solicitors and professional (personal or chambers) reputation will be key in securing new business. The BSB has specific rules (including a prohibition on referral fees) to protect the independence of the advocate in situations where the commercial interests of the lawyers might be in conflict with the consumer or the public interest. Public access practitioners may engage in more direct marketing or use online portals to advertise their services. Public access practitioners may also take on work via non-legally qualified intermediaries. Intermediaries (whether legally qualified "professional clients" or not) therefore play an important role in securing business at the Bar.

Theme 2

11. We support this theme. We believe that current regulations are broadly effective in protecting consumers' interests, but there is more that the regulators can do to understand the needs of consumers and communicate better with them – this is a major focus of the BSB at present. The area where there is unlikely to be adequate redress is in the provision of services by unregulated individuals. The BSB has some regulatory locus over a number of "unregulated" individuals. These are "unregistered barristers": people who have been

³ Prior to 2014, only employed barristers could apply for authorisation to conduct litigation



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called to the Bar but do not have a practising certificate (and in most cases are not entitled to one because they have not completed pupillage). These individuals are prevented by the BSB's rules from using the title "barrister" whilst providing legal services: they are only entitled to provide unreserved legal services, but if they do they must comply with the BSB Handbook's core duties. This provides some additional consumer protection.

12. We believe that general consumer awareness of redress mechanisms is low, but there is a requirement for barristers to inform their clients of their chambers complaints process and the clients' right to complain to the Legal Ombudsman (including how to do so).
13. As noted above, once authorised to undertake reserved legal activities, a person will be regulated by the BSB in relation to all legal services. We believe that this is an important safeguard for consumers, who may not understand the differences between reserved and non-reserved activities. It also ensures that consumers can have confidence in those who use the title "barrister" and have consistent systems of redress whatever their legal problem.

Theme 3

14. We support this theme. The BSB is aware that the requirements of training to become a practising barrister represent a barrier to entry, which must be justified as necessary to protect consumers' interests. The cost of the Bar Professional Training Course and the scarcity of pupillage places have been identified as particular issues. Our "Future Bar Training" programme is currently reviewing these requirements – the aim is to specify more clearly the outcomes required of the training process and provide more flexible (possibly cheaper) routes to qualification. More information is available on our website⁴.
15. The BSB is currently applying to the LSB to become a licensing authority under the LSA. If successful, this will enable us to license ABS entities but we have no experience of regulating ABS to date.
16. As noted above, there have been opportunities for increased competition as a result of certain regulatory reforms, such as the expansion of public access and litigation rights to self-employed barristers. The introduction of (non-ABS) entity regulation has led to some new business models in the sector, including some solicitors setting up entities under BSB regulation because our regulatory approach better suits their business model (primarily because they do not wish to hold client money and have a business that is focused on advocacy, litigation or specialist legal advice). We envisage that the introduction of ABS (if we are designated as a licensing authority) will lead to further innovation in the types of business model that we regulate.

⁴ <https://www.barstandardsboard.org.uk/qualifying-as-a-barrister/future-bar-training/get-involved/>



17. At the end of March we will be publishing an overview of the segment of the market that we regulate alongside the framework for our risk-based approach to regulation and a summary of the key risks that we have observed in the market to date. We will share this with the CMA when it is available.

Next steps

18. The BSB welcomes this study and looks forward to working with the CMA to help however it can. You have already been in contact with our Director of Regulatory Policy, Ewen Macleod. Please continue to liaise with him in the first instance and let us know how we can be of further assistance.

Yours sincerely

Dr Vanessa Davies
Director General, Bar Standards Board