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What Needs To Change

Submissions On Existing & Alternative Recommendations To The Legal Services Market Study, Interim Report

Who are we?

We are the founders and directors of the disruptive award-winning business Absolute Barrister, and practising barristers of over ten years' call. We have been invited by various organisations including the Bar Standards Board and Thomson Reuters as industry thought leaders to discuss the future of the Bar, barrister services and technology. We are focused on the future delivery of legal services using barristers and the latest technology.

Make case law available

Individuals and companies have the right to be able to conduct their own legal research. Whereas clients in the medical profession have access to all recent medical reports and can research and challenge their medical providers, this is not the case in the legal industry. Case law is still largely subject to copyright and unavailable to the consumer. As far as businesses there is no indexable and externally searchable case law record for the case law of England & Wales. This is the equivalent of hiding B-roads from maps so that map readers could not navigate, nor the service providers create satellite navigation, nor therefore in turn could innovative services rely upon satellite navigation. To meet a latent unmet need of an individual trying to navigate the law on their own, and to enable innovative services, case law should become a national asset class subject to the full Open Government licence and all law should be indexable and available to all.

Encourage movement of cases between providers

The CMA order to the banking sector to increase mobile functionality, and to allow the user of those services to move their bank account in one transaction to another bank would be completely irrelevant to the legal sector. It shouldn't be.

In our experience, once a user of legal services has started their case, they quickly become aware of the options available to them within the market, a market from which they have perhaps never purchased services before.

An individual's finances, and therefore the ability to make payment, are often tied up because the original service provider often restricts access to papers to try and keep a dissatisfied

client paying at the existing rate and level of experience, or for want of payment before a final result, a result which will often allow the client to unlock their assets. Keeping a client's papers from a client further prevents them from obtaining bespoke quotes from other service providers.

We find little risk in moving cases quickly from other providers and the time to 'pick-up' a case is nearly always insignificant compared to the cost saving. We can highlight here a recent example which resulted in a saving of over £40,000 for an individual client shortly before the determinative hearing.

Whilst the industry could not comply with an order similar to that of the banking industry, there should be a time limit for the provision of papers between providers at the request of the client. For all service providers over a certain turnover that should be within a short time frame, and for all services providers within a slightly longer time frame. These time limits should be reduced over time and with the introduction of technology.

Clients should have costs certainty

If you crash your car and it was the other driver's fault you know that you will get the costs of your repair back from their insurer. That is not the case in law.

Put another way, a consumer should be allowed to remedy a legal unfairness safe in the knowledge that they will recover their reasonable costs.

Further there should be a large margin of recoverability in any one particular type of case or hearing to give certainty for those with a good case who should be able to enforce their rights.

If a client knew at the outset that they would recover all costs from within, for example, two standard deviations of cost applications received for a particular hearing type if they win, this would encourage clients to bring cases based on merit and to shop around with certainty within those costs limits. The court could easily compile records and send the remaining 5% for costs assessment under a set of fair principles.

With the national average wage at approximately £26,000 suggestions conflated with an on-line court of removing the recoverability of costs for claims up to £25,000 would, in our opinion, prevent individuals seeking expert help for rights which should be enforced. This would be the equivalent in the medical world of expecting an individual to deal with a year-long illness without being able to consult a doctor. This affects not only that individual and his or her family, but also the economy as whole which gains nothing from allowing the individual to enforce their rights swiftly, with expert help.

Costs recovery should be broad

Costs should be recoverable for all types of legal services associated with bringing a case howsoever incurred.

Costs recovery at the moment punishes those consumers who have sought out innovative and often cheaper legal services than the traditional model. If you claim on your insurance

for flood-damaged electrical equipment you do not have to buy the same outdated technology: how you spend the recoverable claim is up to you. It is not in law.

At the moment, a client can pay considerably less for an overall service with an innovative provider of that service but is prevented from recovering those much lower costs because the method by which those costs were incurred is not the traditional hourly rate.

Cost recovery should not be limited to the way in which the cost is incurred. In almost all cases this is limited to hourly rates. A 'Precedent H' form, obligatory in some cases for example, allows no room for fixed fee services, or services that have been made efficient through the application of technology. Cost recovery in most cases should return to set of 'fair' principles rather than dictate type or limit. If anything, costs recovery should in fact encourage those who seek out modern and cheaper methods of offering legal services.

Services should be able to make a profit
Law services providers must be able to make a profit on fees and services.

If a service were to build a product which cost millions to develop, and which reduced the need for legal advice to a transaction cost of a couple of hundred pounds (or even a couple of pounds), they would only currently only be able to recover that transactional cost at court. How is the service provider expected to recover the capital outlay for creating those services in the first place? Without profit, the innovation sought in the legal market cannot attract the investment it needs to create lower cost services.

Referral fees
The ban on referral fees should be lifted for lawyers in all cases, and for all organisations in those restricted areas of law e.g. personal injury. At the moment, this prevents a case ending up with the right lawyer and instead a case tends to end up with the 'first' lawyer whether that lawyer is best for the client or not.

Instead, there should be an obligation to report the referral fee to the consumer at the outset and before the engagement of those services (and if they discontinue the service only a pro-rated amount becomes payable). If the fee is high, then trusting the consumer to interpret the paying of a fee for no service in an open market is better than trying to control the market through cost control which is unknown to the consumer.

A consumer or business can then decide if it is in their interest to pay a fee to make sure they get a lawyer that focuses on their area of law. This is a better way of getting cases to the best lawyer rather than relying on consumer research for a service they have probably never used before and would encourage service providers to seek out the best lawyers rather than keep cases.

If the organisation is not a legal services provider itself e.g. an insurer, it must also be obliged to remind the consumer of their right to choose and promise to make available to a service provider of their choice all case papers within a short time frame. Any conflict of interest should also be highlighted to consumers - for example – majority ownership in ABS's. In years

to come, there should be an obligation to provide documents in electronic form so consumers and business can change their legal supplier at a click, similar to banks (see above)

Price is irrelevant without quality
There is no evidence of consumers being significantly harmed by the quality of different services providers because the consumer will almost always have no way of knowing of the quality of the legal element to the service they are receiving.

A consumer of a legal service who expects 'x' and gets 'x' is often satisfied. If they were actually entitled to' x-plus' they will often never find out.

The tenet of this report focuses on costs, whilst largely ignoring how to gather data on the quality of legal services. That transparency is something that needs to be achieved for a market study such as this. The CMA should make a budget available to address this information shortfall if, which as the interim report tends to suggest, that information in not available elsewhere.

Exclusion of criminal law from the study is a mistake
Some providers of criminal law legal services can do so at a rate which is competitive with or even lower than those provided through the government legal aid scheme.

That the government largely funds and can demand the advance recovery of potential costs in this market means the government has become effectively the dominant provider of legal services for criminal law not necessarily at the lowest cost or of the highest quality. If others can't compete because users of these services are largely unaware that they can go elsewhere (and they largely are), pay less, get more experienced legal assistance and representation for example, then the market for these services is broken.

Further, ignoring this area of law ignores those seeking advice and representation on driving matters for example, which is almost wholly excluded from the government legal aid scheme. That would ignore every individual who drives, and every company who employs drivers – often small businesses – the needs of which the remit of this study is designed to encompass.

The inclusion of this area of law would not only benefit the users of legal services, but in highlighting alternative services would also reduce the burden on government legal aid, and develop or even begin competition in a market where there has been none or very little.

Universal regulation
The question here is that if the report notices that '*most assume that all providers of legal services would be regulated*' what does the market gain from not making this the case?

Universal PII and the right to take any complaint for paid-for Legal Services to the Legal Ombudsman at the very least would protect this position without unnecessarily burdening unregulated service providers.

Appearing to be in support of unregulated providers, the report further notes that regulated providers continue to hold a very large overall share of the market. The breakdown of that analysis within the report makes it clear however, that it is one regulated provider in particular, rather than *regulated providers in general*, that hold a large overall share of the market. In those circumstances it is not to right pitch unregulated services providers as an alternative by necessity when in fact alternative and new regulated providers could provide an alternative to the market dominant regulated provider.

A healthy litigation financing market should be encouraged

No win no fee cases which often take 25% or more from damages should be removed altogether. Instead a healthy litigation financing market should be encouraged.

Whilst legal firms should be allowed to partner with litigation financing firms, this service is one of finance and is better met by the financial institutions. This would enable a case to be funded at say a few percentage points of the interest on the service actually provided rather than a large percentage of the damages meant for the claimant.

This would also prevent a claimant from having to 'lock-in' their case with a single provider and encourage them to switch and monitor costs if they are funding them through what would be a loan for professional services.

Barriers to Innovation imposed by the regulators should be removed by returning to a set of fair principles rather than prescriptive rules

Contrary to the interim report, regulation where it meets innovative models and technology does tend to '*create barriers to consolidation and expansion to develop brands'* and prevent the '*taking advantages of economies of scale'*, which leads to slower innovation, not faster.

This is best highlighted by examples (in our case they will mostly by necessity be the BSB):

- that the BSB has regulated (at the time of its recent annual report, March 2016) 46 ABS's predominately single person bodies, will have almost zero effect on a market looking for brands not one-man-bands
- that the SRA has issued a practice note about what to demand in terms of cloud computing from service providers when in reality nobody can afford to compete with Amazon Web Services, Hewlett-Packard, IBM, Microsoft and similar, such that they don't have to change their terms, is akin to asking your electricity supplier to give you greater security of supply than it does Sheffield;
- that the BSB has issued guidance on subcontracting, including photocopying such that a barrister is on the hook - if they undertake to make copies - against their professional obligations; lawyers should only be on the hook for reserved legal activities and that should apply to subcontracting for want of a client having to pay £600.00 an hour for the barrister to check photocopying when that can and should be outsourced; this prevents innovation
- that restrictions surrounding monetary flow are defined in such solid terms, fees, fixed fees, clerking fees, advertising fees are largely irrelevant to the way in which modern markets incur those fees and should be removed;

- that any regulator should be able to regulate the entire activities of a regulated individual, subject to some sort of suitable character clause; this should be beyond the reach of the regulars otherwise it means they are regulating industries over which they should have no control - terms of remit and prevents competition;
- that any regulator, if investment is permitted, should be have extended control over who invests, or the types of entities that can invest in regulated entities, means that they control *who* can provide the money to invest in the legal market; provided control of a regulated entity is suitable vested in regulated individuals for example, the investment itself should be much more freely available to the entity (for example freely traded shares)

Further the legal industry is unsurprisingly a place where if an individual or business took a step to innovate 'too far' he or it could be out of business, and prevented from furthering his or its life's career forever. This is a barrier to innovation for individuals and small providers of legal services (which are themselves consumers of legal services). The regulators should have a method allowing – encouraging – the rubber stamping of new business structures and operations which have the interest of the consumer at their heart, to encourage innovators in law.

We don't believe the cost of any of these measures to be significant, save perhaps for agreeing the use of copyright materials within case law, but the fairness of that issue overwhelms other considerations.

The measures set out here are low cost, easily implemented and designed to increase confidence in both the individual consumer and the legal innovator.

Thanks for listening.

Yours sincerely

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