BSB response to the CMA Legal Services Market Study: interim report

General comments

The Bar Standards Board (BSB) welcomes the interim report of the Competition and Markets Authority's (CMA) Legal Services Market Study. We agree that the focus should be on issues of transparency within the current regulatory framework and we are keen to collaborate with other bodies in support of this objective. Broadly, the possible remedies suggested seem to address those issues, although in implementing them it will be important to be sensitive to different sectors and avoid introducing compulsory requirements that are not appropriate for all areas of law or types of practice. In the case of the Bar, for example, most consumers do not choose their provider directly – 'professional clients' (usually solicitors) engage barristers on their behalf. It is therefore important that these professionals work together to ensure their clients' interests are met and any relevant information is shared.

We would expect the recommendations to be targeted primarily at the regulators. Many of the recommendations will require collaboration between the regulators. There may also be scope for collaboration with other organisations, such as the representative bodies and consumer-focused bodies.

We have not sought at this stage to estimate the cost of remedies, but have commented where appropriate on proportionality and the risk of unintended consequences.

We look forward to discussing these issues further with the CMA in due course.

Questions on improving price and service transparency:

1. What are the barriers to providers sharing price and service information with consumers and do these vary by legal service?

The CMA notes that the extent to which information can be provided at an early stage will depend on a number of factors, such as the pricing model adopted and complexity of a legal need. Easily repeatable, standardised or commoditised services can be priced transparently or at fixed costs. This is more difficult where the services provided are more bespoke or where the problem is more complex. The CMA notes at 7.25 that certain solicitors indicated particular difficulties in pricing commercial litigation and disputes, and some employment disputes. These issues are likely also to be encountered by providers at the Bar, particularly when providing advocacy services.

Whilst fixed or capped fees are becoming more common at the Bar, the standard practice remains fees based on an hourly rate. This may be appropriate, particularly where the length of engagement or quantity of work cannot be known at the outset, although this may be a barrier to some clients. We support the principle of making the likely total cost to clients as transparent as possible, but it may not be possible for regulators to take a 'one size fits all' approach.

2. Is there a minimum level of information that providers should either (i) publish or (ii) provide to consumers either in advance or on engagement? Should this be mandatory?

As a bare minimum, providers should make available to clients in advance of engagement their fee (whether fixed, capped or an hourly rate) and where possible an estimate of the likely total cost that will be incurred. The implications of the pricing model should also be clear to the client (for example, whether there are limitations on any estimate given and the risk of cost overruns).

We would be willing to consider whether barristers should be required to publish hourly rates or similar information, however we would caution against making this compulsory without considering the impact fully, including possible unintended consequences. As the CMA notes, some providers may offer lower rates for certain clients (perhaps because there was a public interest in representing them, or to distinguish between public or voluntary, and private sector clients). This type of practice may not promote competition at an aggregate level. However, we would want to ensure that any proposals for change did not disproportionately impact on certain groups of clients. For example, if we require the publication of hourly rates, is there a risk of unintended fee inflation (if providers compete, and consumers select, based on perceived quality rather than price, might there be a disincentive for providers to lower their prices, for fear of appearing lower quality?) Competition based on price may be more likely in some segments of the market where affordability is more important to consumers. Otherwise we would support increased guidance (or possible compulsion) in relation to the matters identified at 7.28.

In any event, we agree that there would be value in reviewing our rules and guidance on price transparency and publication of good practice where we find it. This could include guidance on how to price complex cases more transparently and, where relevant, the matters identified at 7.32.

The BSB's recent research with public access barristers suggested that some barristers were not sure when to charge or what to charge in fees and many were unaware of what their peers working in similar practice areas would charge for public access work. Very few respondents said that they consider themselves to be competing on price, and they lack knowledge of the market. A number of barristers interviewed said they knew they were undercharging for their work – in some cases this was a deliberate and benevolent decision, but for most it was because of a lack of understanding of the time the work would take, and lack of understanding of how to price "commercially". It was clear that barristers may welcome additional guidance on how to set fees. There may be a role for the representative bodies in producing this type of guidance for the profession, however, and it may not be necessary to use compulsion.

3. Are there examples of good practice in price and service transparency that could be shared more widely?

We understand that lack of clarity around fees is the most common source of complaints about barristers to the Legal Ombudsman (LeO). As part of our supervision processes we have worked closely with chambers:

- To ensure they are providing the right client care information in accordance with the rules; and
- To explain why the provision of the information is important for their clients but also for their practice.

Examples of good practice include:

- Barristers translating client care letters into different languages where they receive a significant amount of work from clients whose first language is not English;
- Fixed fee arrangements, particularly for public access cases where clients can manage and anticipate the costs of the services provided;
- Where clients are given an hourly fee, estimates of the likely number of hours of work that will be needed; and

- One chambers has a set “price list” which is shared with all their professional clients and adhered to by all barristers.

4. How and when should legal service providers communicate:
    a. Fees and rates to clients; and
    b. Anticipated or actual cost overruns (ie where the fee will exceed an estimate or quote)?

Fees and rates should be communicated to clients in advance of commencing any agreement to provide legal services. This should be done in a way that is accessible to and understood by the client. Any anticipated or actual cost overruns should then be communicated at the earliest practicable moment.

5. Are there any measures of quality that can readily be collected by regulators or government (including HM Courts and Tribunal Service in relation to civil actions and probate) on observable trends in quality of legal services?

One of the things we are working on is improving the way in which chambers/barristers gather feedback and how they make use of that to improve services to clients – we will be monitoring/gathering evidence about this as part of our supervision activity – we could report on our findings in due course.

Questions on addressing barriers to comparison and search:

1. What are the barriers to comparison and search?

The barriers are broadly as identified in paras 7.35 to 7.37.

2. Are those barriers consistent across different legal services (by area of law, activity and the extent to which a service is commoditised)?

No, they are likely not consistent across areas of law or activity. Where a service can be commoditised, price comparison can be more easily facilitated. In other areas, the price may be dependent on complexity of the case and may require more detailed interaction with a client in order to determine likely cost. Alternatively, the duration of a case may be unclear, so providers may be reluctant to engage with digital comparison tools (DCTs). We agree that where more public information can be made available by regulators or professional bodies, this may drive behaviour towards greater use of DCTs.

3. What additional information could be made available by regulators and trade bodies?

A great deal of information could be made available by regulators, but this will largely be driven by what is proportionate to require from a public interest perspective. The BSB currently makes the content of its register publicly available in spreadsheet form – this is updated monthly and available on our website. At present, it includes names, practising status, practising address, date of call and any current disciplinary findings.

Subject to discussion elsewhere about compulsion around fee information etc, we could collect additional information if there was a strong case for making that compulsory and public. This could include things like hourly fee levels, areas of law in which barristers purport to practise etc. We would not want to commit to doing so at present, but would be happy to review the information that we collect and consider whether additional data would be in the public interest.

4. What measures would allow consumers to be better able to compare the non-price attributes of legal services providers (such as quality or consumer protections)?

The development of quality marks may be useful for consumers – although unless there is a specific risk that requires mandatory action, these would normally be a matter for the professional bodies.

5. How can intermediaries and those making recommendations better support consumers in selecting a legal service provider?

Intermediaries are an important element of support for consumers instructing the Bar, as most barristers work predominantly on referral from a 'professional client'. They are themselves regulated professionals with a duty to act in their clients' interests. It is possible that more could be done to ensure that such professionals seek best value for their clients and/or make more information available to enable an informed choice. We would be happy to explore this further with the other regulators.

In public access cases, we provide guidance which includes client care letters tailored to cases where clients are using (unregulated) intermediaries. We are currently reviewing our guidance and standard letters in these areas. We would be prepared to consider whether more detailed guidance to unregulated intermediaries would be helpful.

6. Is there any additional information held by government or regulators that if published would assist the development of the comparison sector or assist consumers directly conducting comparisons?

The BSB does not hold any additional data at present, beyond what is made available via our register, which we consider would be a useful indicator for consumers. But we are open to reviewing the data that we require from the profession. Information in the public domain includes certain disciplinary findings and we can keep our disclosure policy under review in relation to these. We also undertake risk assessments of chambers as part of our supervision activity, which produces risk ratings. We do not make this information public and give assurances to chambers that it will remain confidential, in order to promote co-operation and candour in the supervision process. In its current form, we do not believe that a risk rating would be helpful for consumers, as "high risk" does not necessarily mean "low quality". In the future, we could consider whether our supervision activity might be able to produce an indicator for consumers that would be useful and in the public interest, but we have no plans to do so at present.

Questions on improving consumer information:

1. How and what information should be provided by a central information hub?

We agree that providing clear information to consumers on different types of legal services providers and the considerations to bear in mind when choosing a provider, including differences between regulated and unregulated providers, would help consumers to make more informed decisions. Simply relying on a central website may not be sufficient, and thought should be given to additional ways of reaching out to consumers (perhaps through additional literature or partnerships with consumer-focused organisations). We would be happy to collaborate with the other regulators on this.

2. Should Legal Choices act as the central information hub for legal services in England and Wales or would an alternative website be more appropriate?

We see no value in creating a separate website, although we should seek to publicise the central hub though partnership with other consumer-focused organisations.

3. How should any central information hub be promoted?

a. Should the front line regulators, representative bodies and self-regulatory bodies be asked to promote the information hub?
b. Should legal services providers be obliged to like to an information hub?

We would be happy to promote the central information hub via a prominent location on our website and will consider the extent to which we should encourage or require those providers regulated by us to do the same.

4. Should Legal Choices include information on unregulated and self-regulated providers?

We agree that the focus of the website should be to make clear the differences between the regulated, self-regulated and unregulated sectors so that consumers better understand their options and the levels of redress available.

5. What materials should be developed to aid in comparing and selecting a provider?
    a. Should materials be made available through channels other than a central information hub (such as Citizens Advice)?

We broadly agree with the proposition set out at 7.46(b)(ii). In addition to price, information on common pricing models might be useful. We also agree that such materials should be made available more widely.

Questions on improving client care communication and increasing access to redress:

1. How can client care communication be improved to better protect consumers' interests and are there examples of client care communication that provide succinct and relevant information?

As noted in the interim report, some of the regulators are currently co-operating on a project to review the effectiveness of client care communications. There are concerns that although client care letters may meet the technical requirement for information provision, they may not necessarily be delivering consumer focused outcomes. We are keen to ensure that service providers consider their clients' needs and circumstances when they decide what information to provide, and the manner in which it is provided. Information in writing is helpful, but it is important that clients understand it clearly. Therefore, we want to understand client's information needs/ requirements, expectations, and equally important, the optimal timing and presentation of information.

We anticipate that the research will be complete by the end of September and we will share this with the CMA when it is available.

Examples of good practice include:

- We have been asking barristers and chambers to think differently about how they provide client care information – for example, is a letter really the most appropriate form of delivering the information to that particular client? Could it be delivered in another format?;

- Barristers have given examples of extending their first meetings with clients (for consideration of things like reasonable adjustments) so that the clients don't feel rushed and the barrister can properly understand their issues; and

- One sole practitioner provides his "complaints information" on a business card which, he provides to clients on the day of the hearing.

In addition, we are working on best practice guidance to encourage chambers actively to seek feedback from their clients. The aim of this is to change the perception that seeking feedback is “asking for a complaint”.

2. What would be the consumer protection benefits and impact on competition of restricting the use of the title “lawyer”?

Restricting use of the title would enable increased consumer protection, by requiring minimum qualifications, facilitating regulation or giving access to redress via LeO for anyone using that title. Restricting the title only to those who are already regulated may have a significant impact on the current unregulated sector. It is unclear to us whether that would limit competition, or if unregulated providers would simply use an alternative title. In principle we would support greater consumer protection, however a cost-benefit analysis would need to consider whether restricting use of the title led to a reduction in supply that was not in consumers’ interests. In the absence of that we have no particular view, but the CMA’s interim conclusion that further restriction of title would be disproportionate seems reasonable.

We agree with the position stated at 7.51, that there should be greater transparency about the regulatory status of providers and the differences between legal services providers. Any steps to encourage such transparency on the part of the unregulated sector would be welcome.

3. What are the barriers to using LeO and are there any benefits in amending its scope, jurisdiction or approach?

We would tend to support the suggestion that LeO’s jurisdiction be increased so that it more closely matches that of the Scottish Legal Complaints Commission. If enabling LeO to receive complaints from all businesses would not necessarily have a very significant impact in terms of volume of complaints received, then such an extension may be helpful in avoiding confusion over who is entitled to use LeO. Careful consideration would need to be given to the impact on the current service and on the resources available to address the concerns of more vulnerable consumers.

Similarly there may be value in permitting complaints from third parties about a legal service provider where that third party has clearly been affected but again careful consideration would need to be given to the impact on the current service and funding model. An initial offer of mediation may also be helpful as part of the LeO process.

4. Are the current arrangements for ADR in legal services clear and readily understandable to consumers and is there scope for greater use of ADR?

We do not believe that alternative dispute resolution (ADR) arrangements are clear and readily understood by clients, although we have not sought to gather evidence in support of this. Clearer branding (of the sort that could be provided by LeO) and stronger promotion may assist in increasing use of ADR. We were supportive of LeO becoming certified as an ADR approved body and we would be happy to co-operate with other regulators on standard guidance relating to ADR. We also believe that small non-micro businesses may benefit from greater access to ADR.

5. Should legal services providers be provided with additional guidance on communicating redress options?

We would be happy to consider updating guidance in this area.

6. Do any additional redress mechanisms need to be introduced for unregulated providers?

One potential problem for clients accessing unregulated providers is the absence of LeO as a place to complain about service provision. If LeO's jurisdiction is limited to 'authorised persons' then those accessing legal services from the unregulated market will continue to have less protection in terms of consumer redress.

Questions on the regulatory framework:

1. Are the high level criteria for assessing the regulatory framework that we have identified appropriate?

We agree that the high level criteria for assessing the regulatory framework outlined at Table 1 are appropriate at the aggregate level, for example for determining whether to proceed with any systemic changes to the way the sector is regulated. They also identify some useful principles for Approved Regulators to consider when identifying the impact of any proposed changes to their regulatory arrangements; however a very detailed impact assessment may be disproportionate in many cases, with significant resource implications for Approved Regulators.

2. Does the current regulatory framework prevent, restrict or distort competition?

We are not aware of any evidence that the current framework prevents, restricts or distorts competition to any significant degree. We agree that more work can be done by the Approved Regulators to ensure that regulation is proportionate and risk-based. We also agree that regulatory burdens should be reduced where not justified on the basis of risk and that regulation should focus where consumer protection risk is highest. However, consumer protection risks are not the only risks that regulators are concerned with and it will be important to ensure that other matters such as the public interest and the rule of law continue to be adequately protected.

3. Would the potential changes to the regulatory framework we have identified promote competition?

We broadly support the potential changes identified at paragraph 7.60, which are likely to promote competition. As the CMA notes, the Approved Regulators are already considering the need to remove unnecessary regulatory burdens and focus regulation on areas of high risk. In relation to extending regulation to new areas, we suggest this should only be done subject to a cost-benefit analysis that shows a net benefit to consumers, taking into account any restrictions on access that new regulation might entail.

4. Is a further review of the regulatory framework justified on the basis of competition concerns?

We would not identify a fundamental review of the regulatory framework as a top priority from a competition perspective, in the absence of evidence that the framework is actively restricting competition. There are other actions the existing regulators can take in the meantime that will seek to promote competition. We fully support the principle of regulatory independence.

Bar Standards Board

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