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Dear Maria

### **Legal Services Market Study – Interim Report**

The Legal Services Consumer Panel welcomes the opportunity to respond to the Competition and Markets Authority's interim report into the legal services market.

We agree with the overall finding that competition is not working well in this market because of a chronically weak demand side. Consumers are not empowered with the information they need to shop around or choose the most appropriate legal service provider for their needs. Consequently, their ability to drive competition is hampered.

Worryingly, evidence from our annual tracker survey<sup>1</sup> shows that the pace of change is slow. In 2011, when we first commissioned the tracker survey, incidence of shopping around was low with just 19% of consumers stating they had shopped around. This had improved by 2016, but still only 25% of users of legal services said they had shopped around.

Progress has been made, but it has been slow. Providers of legal services are not responding quickly enough to consumers' need for transparency and predictability, particularly around key choice factors e.g. price and quality. This is increasingly concerning because our evidence shows that in some areas of high consumer vulnerability, for example asylum and immigration law, consumers now consider price to be equally as important as reputation, which has traditionally been the key choice factor .

### **The case for regulatory intervention**

The Consumer Panel has consistently called for improved transparency in the legal sector. In 2014 that call led to Approved Regulators agreeing to make basic information publically available. We are now in a position where name/s, contact details, size, and the regulated status of individuals and firms is available on most Approved Regulators' websites, or provided to intermediaries on request. However, resistance and the length of time it

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<sup>1</sup> For the last six years the Panel has commissioned YouGov to conduct an annual survey in two parts: a nationally representative sample (1,864 adults); and a sample of people who have used legal services in the last two years (1,523 adults).

took to achieve this were significant amongst some regulators even after the need had been identified and recognised. And even now, basic data is not consistently available<sup>2</sup>. Although we are pleased with the progress that has been made with basic data overall, a key weakness remains: the information that is currently provided is scattered and not easily accessible. There is a clear need for all the Approved Regulators to consider how their regulatory information could be pulled together for optimal consumer use. Particularly when evidence shows that the presentation of information is as important as its availability.

In our 2016 report<sup>3</sup>, we recommended that all Approved Regulators should link basic and conduct information in a centralised register, potentially using the Legal Choices Website<sup>4</sup> as a conduit. The Panel drew on the Financial Conduct Authority's Financial Services Register<sup>5</sup> as a good example to emulate. This register was built to make it easier for consumers to find information on regulated firms, including fraudulent ones<sup>6</sup>. The register combines basic information with conduct information, and includes information on whether a firm is covered by the Financial Ombudsman Service and Financial Services Compensation Scheme. It is designed to help consumers make better informed decisions before they procure financial services. The Panel believes that such an approach is feasible in legal services, but we are concerned whether this recommendation will be adequately explored in the absence of intervention. We therefore support the CMA's exploration of the idea of a central hub of information.

The pace of change and the history of inaction (where basic data is concerned) are compelling enough reasons for intervention when considering even more challenging information provision e.g. on price and quality. The response to the Panel's Open Data report has exposed resistance by providers and representative bodies. Any remedies proposed by the CMA must therefore take into account the historical pace of change and the strength of the challenge in the sector. Recommendations must also be targeted and directed at identifiable bodies, with timescales and reviews for publication built in as appropriate.

### **The case for more transparency on price, quality and first tier complaints data.**

The Panel's Open Data report<sup>7</sup> called for improved information in the following areas:

- price;
- quality; and
- first tier complaint data.

We remain convinced that regulatory intervention is needed in these areas to improve competition that delivers good consumer outcomes. We drew

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<sup>2</sup> We note that the Solicitors Regulatory Authority does not yet publish data on the individual it authorises even though it does so at firm level.

<sup>3</sup> Opening up Data in Legal Services, February 2016.

<sup>4</sup> Legal Choice is a consumer focused website jointly run by the Approved Regulators

<sup>5</sup> <https://register.fca.org.uk/>

<sup>6</sup> The register alerts users to scams

<sup>7</sup> Opening up Data in Legal Services, February 2016.

on examples from the wider economy to highlight how the legal services sector is behind comparable markets. The Panel continues to believe that information on price and quality is crucial for consumer engagement and participation. We have therefore focused the rest of our response on these key areas, incorporating the CMA's questions.

## Price transparency

In the Panel's report on Open Data we highlighted three key reasons why consumers need price transparency. First, it empowers their decision making process which in turn drives competition. Second, it can help to reduce unwarranted or unknown price variation. Third, it can help to contain the cost of legal services. Despite these important reasons price transparency is deficient in the sector. We have not heard any compelling arguments against price transparency. That said, some of the arguments that have been put to the Panel are as follows:

**The complex and variable nature of legal work:** Some suggest that it is impossible for legal professionals to cost services because of the variation in the work they do. However, this argument disproportionately shifts the risks on to consumers, who are already disadvantaged by virtue of information asymmetry. Moreover, this is not a credible argument when one considers the experience and knowledge firms have in understanding the different directions cases might go in, along with the likely price implications. Also, there is an arm of the profession, cost lawyers, dedicated to understanding and advising on legal costs. Cost lawyers are a resource for firms to draw on when costing services and they should be used as such.

The Panel accepts that there may be legitimate difficulties with offering fixed fee or absolutely accurate estimates in all cases. For instance, some cases can vary in complexity and there are diversified players in the market that sometimes contract at different rates with different types of consumers (small businesses, government, large corporations and so on). Despite these challenges, the Panel is of the strong opinion that the sector can do more to improve transparency and disclose costs more accurately. That this is achievable is evidenced by the section of the market offering fixed fees. If fixed fees cannot be offered, then providers of services should give clients a range of prices, using previous experience and professional expertise to cost appropriately. This must be possible by estimating cost depending on whether (for example) a litigation case was resolved by early settlement, mediation or at trial, to ensure clients had a "best and worst case scenario".

Fixed fee is the optimum solution especially in areas like family law, where consumers are often at their most vulnerable. In May 2016 the Panel published a report<sup>8</sup> identifying three areas of law for the oversight regulator to prioritise in order to enable the market to best meet the demand for legal services. Family law was identified as one such area. Our report highlighted research carried out for the Ministry of Justice on litigants in person, which found that where reasons for self-representation were known, approximately half were due to cost alone. Also over a quarter of

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<sup>8</sup> Priority areas of law, May 2016.

all the complaints about family law services to the Legal Ombudsman in 2014-15, related to costs being excessive, or cost information being deficient. Consequently the Panel asked Approved Regulators to consider how price transparency could be further encouraged in family law to ensure certainty and ease the burden on potentially vulnerable consumers. This is one area where the Panel advises that Approved Regulators should now consider mandating fixed fees, or at the very least there should be an obligation on providers to display their average prices on their respective websites or make these available on request where they do not have a website.

**Price is not an indication of quality:** We have heard concerns that price transparency without quality information could perpetuate consumers' misconception that price equates or correlates with quality, with some consumers thinking higher-priced services are better. Some have also argued that price transparency has the potential to generate higher prices and anti-competitive provider behaviour. For example, a firm may raise the cost of its services if it knows that a similar firm seems able to charge more without sacrificing volume. However, the legal services market does not appear to display any of the characteristics of a market where this could conceivably happen. Moreover, these patterns and behaviours can and should be monitored by Approved Regulators to ensure that providers do not use data in an anti-competitive way.

We also note that there are intermediaries, such as price comparison websites, who are well placed to present consumers with quality indicators and other features to help them assess value. The Law Superstore, which recently entered the market, offers consumers information on quality; locality; complaints; consumer feedback; and, where available, price (fixed fee).

### **A history of inaction**

The ever-absent price transparency and the continuing handicap this poses to the demand side, compounded by the negative effect it has on competition, warrants regulatory intervention. Without this intervention, we do not believe that providers will be incentivised to be transparent on price. The risk will continue to be borne disproportionately by consumers, and the uncertainties that fuel the perception of high legal costs, even where this is not the case, will deter even more consumers from seeking legal advice.

It is the Panel's strong view that mandatory price information is now necessary to redress the current imbalance and apportion risk between providers and consumers fairly. As noted above, where fixed fees are not feasible, firms should provide on their website (and where they do not have a website, on request) the average cost of the services they provide in each area. Some have argued that average cost is not an indication of real or actual cost. We accept this, we also agree that it may not be useful to all consumers. However, with appropriate caveats, it will be a useful indicator for some consumers, consumer groups or advisory bodies. Moreover, it could be presented in a way that encourages consumers to make more detailed enquiries about cost, thus forestalling the significant number of cases currently referred to the Legal Ombudsman Service on

cost complaints. Approved Regulators and the oversight regulator must therefore be encouraged to be pragmatic.

In arriving at this advice, the Panel looked at comparable markets with similar levels of price complexity and opacity and the actions proposed or taken by regulators, watchdogs or government. It is noteworthy that the CMA as recently as August 2016 found unacceptable levels of opaqueness in retail bank charges which hindered consumers from switching banks. It has proposed a mix of remedies including making banks provide their customers with the right information so that they can easily find out which provider and type of account offers best value for them. In November 2015 the Government announced that it will act to ensure dentistry charges and treatment plans are clearer and easier to understand following a strong campaign by Which? This is in an industry where there are already rules requiring dentists to prominently display price lists in their surgeries and set out treatment costs upfront. Yet the Government deems it appropriate to intervene because research found that 51% of people visiting their dentists did not see a price list and one in five were not clear about costs ahead of their treatment. In comparison, we know that only 17% of legal services providers display prices on their website –in our view this is a compelling reason for intervention.

In a legal services market where competition is failing and the demand side is disempowered, the Panel wants to see robust regulatory intervention. The need for it is particularly pressing at a time when more and more legal services consumers are self-funding and the perception of high cost is a deterrent, fuelling unmet legal needs. A recent study by the Legal Services Board and the Law Society shows that 10% of people with a legal problem choose to deal with it themselves because they feel it would cost too much to seek help from a lawyer.

### Information on service quality in the legal services sector

There is scope for all the Approved Regulators to consider how they might begin to gather and make information on quality openly available to consumers and their representatives. In our report on Open Data, we emphasised that Approved Regulators are in the best position to decide the scope, focus and extent of their primary or secondary investigations into quality, including how they might credibly go about gathering and publishing this information. But the need for this information means it can no longer be put in the ‘too difficult’ box. We recommended that the Solicitors Regulation Authority and Bar Standards Board should lead the way by commissioning mystery shopping research in one or two areas of high risks, and make their findings widely available. There is also scope for smaller regulators to be proactive; e.g. the Council for Licenced Conveyancers could publish quality information on licenced conveyancing work, focussing on speed, accuracy and registration timeliness.

**Complaints data is an indication of quality:** At present none of the legal services regulators publish first tier complaints data, even though the majority collate this data to varying degrees. It is our view that all the Approved Regulators should collate and publish first tier complaints data in line with what is now common practice in other sectors.



The publication of the volume and nature of first tier complaints data has the potential to improve market transparency and to aid consumers in making informed decisions. Complaints data can also provide commentators or intermediaries with more complex information which they are better placed to repackage for consumers. Also, it is well argued that the availability of complaints data acts as a deterrent against poor practice, helps to identify areas of high risk, and can guide decisions around prioritisation for Approved Regulators

The Panel recognises that there are challenges with publishing complaints data. The biggest challenge appears to be how to contextualise it so that it is meaningful for both individual consumers and businesses. This should not impede publication; instead Approved Regulators should draw on learnings from other sectors to find their own way forward. Again this is an area where we would hope to see appropriate remedy by the CMA.

### **Using Legal Choices as the central hub for information dissemination**

In principle we agree with the recommendations being considered around utilising the Legal Choices Website. It is also our view that the Approved Regulators have a duty, under their consumer protection objective, to ensure that consumers understand the differences between regulated and unregulated providers prior to making a choice. The Legal Choices Website could therefore provide the means to explaining these differences, including any implications for consumer protection where relevant.

In our Open Data report, the Panel considered how Legal Choices could be used more effectively. At present, consumers are expected to go to different websites, find the information, piece it together, and then make sense of it. We said Approved Regulators must do more to bring together regulatory information in a meaningful way and that a starting point would be to link basic information with conduct and complaints data on the Legal Choices Website.

Any recommendations proposing to place Legal Choices at the centre of information dissemination to consumers must, however, take into account its current usage. At present the Panel has no evidence to reassure itself that the Legal Choices Website is the first port of call for consumers seeking legal services providers, or how widely used the site is. In fact, it is widely accepted that the website could benefit from more awareness and marketing to consumers. The CMA must therefore consider how issues around consumer awareness might be addressed, as this will impact on the CMA's recommendations considerably.

It is also important to highlight the practical limitations of Legal Choices. Some of this stems from the foundation of its origin, funding and oversight mechanism. For Legal Choices to be effective, there must be a re-evaluation of its resources and governance arrangements.

### **Redress in legal services**

At present, the Legal Ombudsman is unable to investigate complaints when the people losing out are not the lawyer's actual client – these situations are known as third party complaints. Situations when this can happen include:

- Delays or mistakes by the other side's lawyer in a conveyancing transaction
- Lawyers hired by corporate clients harassing people over disputed debts
- Disputes over legal fees when someone agrees to pay the costs of the other side

For a number of years the Panel has argued for the Legal Ombudsman to accept some third party complaints based on defined criteria. In 2012 we published a report arguing that consumers who have suffered detriment should be able to obtain a remedy. We accept that not every type of third party complaint should qualify. Lawyers must act in the best interests of their client and do so robustly. Although a third party may feel uncomfortable or believe an outcome is unfair, the lawyer might not have done anything wrong. However, the rules under which the Legal Ombudsman currently operates are too blunt, preventing even legitimate complaints by third parties from being considered<sup>9</sup>. The Panel advises that, in certain situations, third parties should be able to complain to the Legal Ombudsman and obtain a remedy for the harm they suffer. This is because:

- Ombudsman schemes in lots of other sectors already consider third party complaints (we note the CMA's reference to the Scottish Legal Complaints Commission).
- It would not give consumers new legal rights, but simply mean people could use the Legal Ombudsman to obtain redress instead of going to court.
- The current situation is confusing because sometimes consumers are not treated as the lawyer's client even though the legal work is intended to benefit them. For example, in a re-mortgaging, the lender, not the home owner, is technically the client.
- Without this right, lawyers have a weakened incentive to act fairly towards third parties.
- Lawyers will carry on making the same mistakes because there isn't the opportunity for them or regulators to learn from complaints to raise standards.

### Alternative Dispute Resolution

Under the Alternative Dispute Resolution (ADR) Directive, now embedded into UK law,<sup>10</sup> firms are required to signpost consumers to both LeO and an authorised ADR entity. The Panel has previously indicated that we had hoped LeO would apply to become the main ADR provider in the legal sector. Following LeO's withdrawal of its application in late 2015, consumers are being signposted to multiple providers, leaving room for consumer confusion.

### Regulatory Structure and Independence

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<sup>9</sup> When the Panel published its report in 2012 we showed that LeO had turned away 2,184 third party complaints in 2012-13. There is nothing to suggest to us that this figure has declined.

<sup>10</sup> The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and information) Regulations 2015 No. 542

While the bulk of our response has focused on the need to strengthen the demand side, the Panel recognises that a weak demand side is further handicapped by structural flaws in the regulatory framework which must also be addressed for optimal consumer outcomes.

In 2013, the Panel published a report on simplifying legal services regulation<sup>11</sup>. It noted that the existing regulatory model does not in the long term offer consumers the best system of consumer protection, nor does it support a competitive marketplace:

- Consumers have to find their way around a maze, which has an in-built mechanism to add further twists and turns over time. Even the regulators and ombudsman can be unsure what regulation actually covers.
- The reserved activities are narrowly drawn and not based on a consumer protection rationale.
- The unregulated sector is growing in influence and new markets are emerging, yet consumers are unaware of the limits on protection when using these providers.
- The Legal Ombudsman has to turn away consumers who have suffered detriment at the hands of unregulated providers, including those who seek to hide behind complex business structures exploiting loopholes in the Legal Services Act.
- The wider redress landscape has overlapping responsibilities and does not make sense from a consumer journey perspective.
- A regulatory system based on professional titles frustrates a more risk-based and targeted regulatory regime focused on legal activities and entities.
- There is much duplication of responsibilities and many lawyers are subject to multiple regulatory regimes – adding complexity and cost for consumers.
- Regulatory competition risks a race to the bottom and inhibits effective cooperation between the Approved Regulators.
- Regulation is more independent from the profession on paper than it used to be. However, there still appears to be a lack of cultural independence.

Rather than set out a detailed blueprint for change, the Panel suggested some success criteria to inform options for a future regulatory system:

- Improved access to the Legal Ombudsman for legal services transactions
- Regulation which is fully independent of the profession
- Consumer-focused regulatory objectives
- A simple system that starts from a consumer journey perspective

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<sup>11</sup> Breaking the Maze, Simplifying legal services regulation



- A flexible regime better targeted at the risks facing consumers, one focused on the activity rather than the person doing the work
- Strong and effective consumer representation
- A strong emphasis on evidence-based policy making including direct engagement with consumers and robust datasets
- Transparent working and accountability for performance
- Avoidance of duplication of processes while respecting the diversity of providers
- Sustainable resourcing and delivery of effective regulation with a level of investment that reflects the contribution which the sector makes to GDP and its importance to wider societal objectives

The Panel considers its views to be as pertinent as they were when the original report was drafted three years ago and would like to see a move towards a holistic consideration of the regulatory landscape.

We hope this response is helpful. As always, we would be pleased to meet with CMA colleagues to discuss these issues further. Please contact Lola Bello, Consumer Panel Manager, with any enquiries.

Yours sincerely,

Elisabeth Davies

Chair, Legal Services Consumer Panel