



## **Bar Council response to the Competition and Markets Authority (CMA) Legal Services Market Study Interim Report**

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Competition and Markets Authority report entitled Legal Services Market Study Interim Report.<sup>1</sup>

2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

### **CMA questions**

#### Improving price and service transparency

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

4. This question raises two different issues: first, are barriers preventing adequate service information being provided to clients; and secondly, are there barriers to the provision of pricing information. In both cases the question also asked is whether these vary by legal service. We respond below focusing on barristers and the information provided to consumers.

#### Service information

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<sup>1</sup> Competition and Market Authority, 2016, Legal Services Market Study Interim Report.

5. In terms of service information shared by barristers, a wealth of information is available through chambers' websites including barristers' expertise and experience, memberships of voluntary organisations, voluntary roles, examples of recent work, articles recently published and feedback from previous clients. Chambers generally also publish information about their standard terms of business that apply depending on the type of case e.g. referral or public access. These websites usually also provide information about how barristers are regulated, their professional indemnity insurance as well as information about chambers' complaints procedure.

6. As identified in the Bar Council's response to the CMA's Legal Services Market Study Statement of Scope, The Bar Standards Board (BSB) Barristers Register<sup>2</sup> provides information on every practising barrister including their practising status, their practising address, the reserved legal activities they are authorised to undertake and whether they have been the subject of any disciplinary findings. We do not consider that there are any barriers to providing service information.

#### Pricing information

7. The bulk of the Bar's work remains referral work and professional clients of all types have a sophisticated understanding of the legal services market and they are in strong position to assess the cost and quality of a barrister's services, and to make an informed assessment – and thus a recommendation to the lay client – both about whether the barrister has the requisite experience and expertise to provide the best possible service for the client and whether it is available at a competitive price.

8. With respect to information about pricing, in our initial response to the CMA market study, we said:

'Much of the Bar's work is complex and varied. In general, the Bar does not undertake much bulk or routine work (which is likely to be the case in the areas of conveyancing and wills). For this reason, it is not practical to give a simple list of prices for services. In this regard, barristers' work is more akin to that of consultants, in that it is highly specialist and tailored to the individual client. There are a number of variables involved in determining a barrister's fee, including differences in types and areas of practice, individual experience and expertise, and charging structures. Each legal issue will require a bespoke solution and price. It is important to distinguish between an hourly fee rate and the fee for a given piece of work.'

Chambers' websites generally provide details of the standard terms of business. In some cases they include information about the type of fee agreements that a barrister will enter into. For example, if barristers at the chambers undertake work on a Damages-Based Agreement,

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<sup>2</sup> <https://www.barstandardsboard.org.uk/regulatory-requirements/the-barristers'-register/>

copies of the model agreement may be included on the website. Generally, barristers structure fees along one of the following: hourly rate often with an estimate, set fee for specific activity or activities, conditional fee or capped fee. However, the provision of detailed pricing information upfront or advertised on a website is not practical in most cases given the bespoke nature of much of the work undertaken by barristers. We note that the CMA recognises in its Interim Report that advertising of pricing information is not going to be possible in all cases, ‘especially where the price depends on the facts of the case/are prone to change due to external factors as, for example, in complex litigation.’ It is clear that it is easier to provide more upfront information about standardised and commoditised legal services that are the focus of the CMA market study.

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

#### Information published

9. Currently, the Provision of Service Regulations stipulate the minimum level of information that should be ‘made available’<sup>3</sup> to all recipients of a barrister’s services. The regulations are detailed and oblige barristers to provide information about their contact details, legal status, VAT status, terms and conditions, price if pre-determined for the type of service, information about indemnity insurance, details of their regulator and professional title as well as choice of jurisdiction (if applicable). For further details as to what is currently required by the regulations, please refer to the aforementioned Bar Council guidance document.<sup>4</sup>

10. The BSB publishes disciplinary information about barristers on the Barristers’ Register including information about findings against a barrister for professional misconduct. Only those that are published according to the publishing disciplinary findings policy appear on the register. We think it is appropriate that this information be provided by the regulator and not the service provider.

11. We consider that the Provision of Service Regulations set a sufficient minimum standard.

#### Information provided in advance/on engagement

12. The minimum standards as to what should be provided to clients in advance of, or on engagement, are set out in the Provision of Service Regulations, as well as required by the BSB

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<sup>3</sup> This information needs to be provided by a barrister on their own initiative and be easily accessible to the recipient.

<sup>4</sup> <http://www.barcouncil.org.uk/practice-ethics/professional-practice-and-ethics/provision-of-services-regulations-2009/>

(being set out in the BSB Handbook). The Provision of Service Regulations provide that, in addition to the information mentioned above, a barrister should provide information about the price of the service in question, if it is not pre-determined, or the method of calculating so that the price can be checked by the client on request. We suggest, in our guidance for barristers, that it is up to a barrister whether he or she publishes this information or makes it available on request.

13. There is a regulatory requirement set out at rC22 of the BSB Handbook (the Handbook) to provide information to the client, on engagement, about the terms and basis upon which a barrister will be acting, including the basis for charging.<sup>5</sup> Where a barrister is instructed to attend a court hearing at very late notice, such as less than an hour beforehand, the Handbook requires the barrister to provide this information to the client as soon as reasonably practicable, in accordance with rC24.

14. Barristers are also subject to a regulatory obligation not to mislead clients, in accordance with rC19 of the Handbook. This rule requires barristers not to mislead clients about the scope of the legal services a barrister intends to supply, the terms on which a barrister is acting and the basis for charging, who is legally responsible for the provision of services, information about how a barrister is regulated as well as the extent to which they are covered by professional indemnity insurance.

15. We consider that the combination of the Provision of Service Regulations and conduct rules in the Handbook act as an appropriate safeguard for clients.

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

16. Please see the answer the Question 1 for details of price and service transparency.

**Question 4: How and when should legal service providers communicate:**

**Fees and rates to clients**

17. For commoditised areas of law, legal service providers may be able to increase the information about fees available to clients on their websites especially if there are consistent fixed fees that are charged for specific activities. However, as previously explained, this represents a minor category of work undertaken by the Bar.

18. For more complex bespoke work, clients should be provided with an estimate or quote following a discussion with the client about their requirements and an agreement about the scope of the work undertaken by a barrister. We do not see how barristers who undertake

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<sup>5</sup> [Bar Standards Board Handbook](#)

complex and bespoke work could provide anything other than a detailed estimate to the client in advance of instruction since the price will vary depending on the complexity and extent of the work undertaken. This is already a relevant regulatory and legal requirement; the Provision of Service Regulations oblige legal service providers to provide the client with a 'sufficiently detailed estimate' or with information about the method of calculation so that this can be checked by the client if they request it.

19. Even if clients do not request information about the fee, the Handbook provides that, at a minimum, they should be provided with information about the basis for charging on engagement or as soon as is reasonably practicable following a barrister's acceptance of the instruction in accordance with rule C24. This information is typically set out in the client care letter and/or standard contractual terms.

#### **Anticipated or actual cost overruns (i.e. where the fee will exceed an estimate or quote)?**

20. A fee that is fixed or capped cannot, by its very nature, overrun. If the fee is not fixed then the Bar Council believes that legal service providers should provide written notice to the client as soon as they become aware that the fee is likely to exceed the estimate. It will then be up to the client to decide whether they wish to proceed further. If they decide to proceed further, the provider should provide written confirmation of the change to the estimate and set out the details of the additional work that they agree to perform on the client's behalf.

21. If the scope of the work is unclear at the outset and a barrister is contemplating charging a client a fixed fee in advance, the barrister is encouraged at gC107 of the Handbook, to charge clients in stages instead. This reduces the likelihood of the money paid by the client exceeding the fee charged by the barrister. It also reduces the risk of a barrister holding client money, which constitutes a breach of rC73 of the Handbook.

22. The BSB Public Access Model Client Care letter that applies to direct instructions without a professional client suggests that, where fees are uncertain at the outset of the case, a barrister should give details of their hourly rate and not carry out work beyond a set fee estimate specified in the letter without the client's permission.

#### **Question 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?**

23. In the context of the bulk of the work undertaken by the Bar (i.e. generally complex and varied, not bulk or routine) and the focus of barristers on advocacy in courts and tribunals, together with the impact of client confidentiality, it is difficult to see what observable trends might arise or what measures of quality could be collected. However, we are giving this further consideration.

## Questions on addressing barriers to comparison and search

### **Question 1: What are the barriers to comparison and search?**

24. When barristers are instructed by referral (whether by a fellow legal practitioner, solicitor, or another professional,) as they most commonly are, any perceived barriers to comparison and search are fully mitigated by the role of the professional client who is able to assist the consumer make an informed choice on quality and price.

25. Although awareness of public access work has substantially increased over a relatively short time, and we have undertaken work to promote it, consumers do not always consider going to a barrister directly for legal advice. Consequently, lack of knowledge of this mode of instruction can be seen as a barrier both to search and comparison. We should emphasise that public access work currently constitutes a small proportion of the work undertaken by the Bar as a whole.

26. Until relatively recently, there were a number of regulatory restrictions which have been lifted following the issue of the new BSB Handbook in 2014. For example, there is no longer a prohibition on barristers conducting litigation. As many of these changes are still very recent and in the particular example, only a very small number of barristers are qualified to conduct litigation, there appears to be relatively limited awareness of these changes.

27. Where a professional client is not involved in the instruction of a barrister, there can be a low level of awareness amongst consumers about how to make a comparison. There are a number of guides and information sources that can be used by consumers to compare information about barristers (such as the Legal 500, Chambers & Partners, and Specialist Bar Association websites) but we suspect that they are better known amongst legal professionals than among direct access consumers. In addition we have highlighted, in a previous response, that the Bar Council Direct Access Portal has been designed to help consumers compare providers through its search and filtering facility. The Bar Council also provides links on its website to other useful sources of information such as the Sweet and Maxwell Bar Directory and the Legal Choices website.

28. It might be argued that more could be done through public legal education to raise awareness among consumers and to assist consumers in relation to instructing a lawyer. The Bar Council continues to carry out important work on public legal education, although much of our focus to date (with necessarily limited resources) has been on increasing awareness among school children through schools' outreach programmes. A barrier identified by the CMA is that many consumers do not necessarily know that they have a legal problem and will therefore not approach a legal services provider for advice. Increased public legal education could assist in this respect.

29. We have highlighted some of the challenges surrounding Digital Comparison Tools (DCT) previously. We are concerned that consumers could, on occasion, be influenced by the outcome of the case, rather than on how well their legal services provider has acted for them. There is also a risk that such tools would not provide a 'level playing field' for providers, since there could be constraints on a lawyer from responding to comments because of Legal Professional Privilege or simple client confidentiality.

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

30. From the Bar's perspective, the barriers asked about do not arise in the context of the bulk of the Bar's work. As we have previously outlined, there are likely to be fewer barriers when professional clients instruct the barrister on the lay client's behalf since they are able to use their expertise and experience of the legal services market to assist the client to make an informed choice. There are also fewer barriers where instructions are by licensed access; here the client will generally be a professional person and will instruct on a matter relating to their area of expertise. Accordingly, the mode of instruction is the distinguishing feature.

31. Clients who instruct a barrister via public access are likely to be less well positioned since they may not be informed by an intermediary. However, the Bar Council's Direct Access Portal, together with information readily available on chambers' websites and in directories, can, and does, assist public access clients interested in searching for, and comparing, barristers.

**Question 3: What additional information could be made available by regulators and trade bodies?**

32. We are not aware of any additional information which is likely to be relevant or helpful in relation to the bulk of the Bar's work, as set out above. In relation to public access, we are currently reviewing the supporting information that we provide to the profession. For example, with respect to client care, we are undertaking a review of the model client care letter and associated guidance that we provide to the Bar. We are creating a model letter for small and medium-sized enterprises (SME) and we intend to tailor the information that is provided to the SMEs in the letter. We also intend to add information about processing personal data under the Data Protection Act, information about the application of the Provision of Service regulations, as well as information about the application of the anti-money laundering regulations. These reforms are intended to assist barristers in providing additional information to clients in a way that is tailored to the needs of consumers.

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

33. There may be some value in the development of a central information hub – we would want to give further consideration to this and its accessibility to consumers. We agree that Legal Choices could fill this role (see answer to question 2 below in the ‘Questions on improving consumer information’ section). This website could be developed further to include information about the differences between unregulated and regulated providers to increase consumer awareness of the levels of protections available. The website could include a checklist of issues for consumers to raise with their provider. This could also cover issues such as the regulatory status of the provider and its implications, the provider’s insurance position and whether there are redress mechanisms that would apply to them.

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

34. As previously stated, the majority of instructions given to barristers come through referral by a professional client to a barrister in chambers. This referral model is bolstered by the professional client’s knowledge of the legal services market and their ability to assess the quality of a barrister.

**Question 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?**

35. We agree with the Legal Services Consumer Panel’s suggestion<sup>6</sup> that regulators making available disciplinary and other regulatory information such as barristers’ years of call to the Bar, as well as any additional qualifications the regulated person has (for example, authorisation to conduct litigation) may assist.

Questions on improving consumer information

**Question 1: How and what information should be provided by a central information hub?**

36. The Bar Council considers the following information should be included:

- a. Information about the different types of regulated legal professionals, the types of work that they undertake, and how they are regulated and insured. We understand that the Legal Choices website already includes some information about the different types of regulated providers, but we suggest that this could be expanded to provide more detail.
- b. An explanation of the difference between regulated and unregulated providers. As unregulated providers do not offer the same protections for clients in terms of qualifications, insurance, avenues of redress, quality

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<sup>6</sup> [Legal Services Consumer Panel \(2016\) \*Opening up Data in Legal Services\*.](#)



assurance, regulation and the client's Legal Professional Privilege, we suggest it would be beneficial for the central information hub to include a checklist of recommended questions that the consumer might ask their provider so that they are aware of how much protection they have. We also suggest that there should be a detailed explanation of the implications, for example, of a provider not having any or sufficient professional indemnity insurance.

- c. Guidance about how to complain about the service and conduct of legal professionals and information about the difference between first and second tier complaints and the differences between service complaints, conduct complaints; and complaints of professional negligence.
- d. Guidance for consumers on how to find legal assistance if it is required. This could contain information on eligibility for legal aid and how to seek pro bono legal assistance. Contact details and web links of all relevant organisations should be included.
- e. A checklist of questions that the consumer should ask their legal services provider with respect to fees such as (a) on what basis will the fee be calculated? (b) what is not included in the fee? (c) what happens if the case takes much longer (or much less time) than allowed for?

37. We note that some of this information is already included on the Legal Choices website.

**Question 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?**

38. We agree with the CMA that the Legal Choices website should act as the central information hub given that it is already established and has the buy-in of all of the frontline regulators. However, if the Legal Choices website is to be used as a central information hub it is vital that the website remains neutral and objective in its portrayal of different legal professionals. We agree with the CMA's assessment that this site would need further development if it is to become an established source of consumer information. In addition, it should include the information detailed in response to question 1, above. Improvements could be made to the section on barristers, to describe more fully the range of services they can provide and the practice areas in which they specialise. If this approach was pursued, it would need to be promoted widely in order to become an effective source of information.

**Question 3: How should any central information hub be promoted?  
Should front line regulators, representative bodies and self-regulatory bodies be asked to promote an information hub?**

39. Yes. To guide consumers effectively, the website would need to be promoted. This would increase the likelihood that consumers were both aware of and able to access the website without difficulty.

40. The Bar Council links to the Legal Choices pages on the public-facing pages of our website and that of the Bar's independent regulator, the Bar Standards Board, promotes the website on its pages covering guidance on using a barrister.<sup>7</sup> It would be useful for all other frontline regulators and representative bodies to do the same.

41. Self-regulatory bodies should promote the information hub to educate consumers on the range of legal service providers available, the services they offer and how they are regulated and insured.

#### **Should legal service providers be obliged to link to an information hub?**

42. We consider that legal service providers should be encouraged to link to the information hub but it should not be obligatory to do so. It would be unworkable in practice. It is also unclear who would enforce this requirement considering that not all providers are regulated. Further, in the case of the Bar, as the majority of barristers are instructed by professional clients with detailed knowledge of the market, there is not the same information gap between consumers and barristers as there may be in relation to other legal service providers.

#### **Question 4: Should Legal Choices include information on unregulated and self-regulated providers?**

43. The differences between regulated and unregulated providers should be explained fully on the website. We suggest that consumers ought to be made aware of the risks that are associated with unregulated providers. We consider that there should be no active promotion of the services provided by unregulated providers since it is not in the public interest to do so. In our experience, there are unequal levels of protection available for the consumer amongst the unregulated sector. Unregulated providers are often uninsured and unqualified and can sometimes pose a serious risk to the consumer.

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

44. A range of media could be used and made available through the central information hub (which, if adopted, could mean the Legal Choices website) and Citizens Advice. The latter

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<sup>7</sup> Bar Standards Board website: <https://www.barstandardsboard.org.uk/using-a-barrister/>

is a popular first port of call for people with legal issues so it would be sensible for them to direct consumers with legal issues to the central information hub.

45. Consideration should be given to how vulnerable people and those who cannot access the internet are able to obtain the information. The CMA should consider factors such as the language and the mode of delivery of the information.

#### Questions on improving client care communication and increasing access to redress?

#### **Question 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?**

46. As already described in the Bar Council's response to the CMA's Legal Services Market Study Statement of Scope,<sup>8</sup> barristers have a duty to ensure that clients are not misled about the nature of the services that the barrister is providing to them and the basis for charging. This is clearly outlined in rC19 of the Handbook. A barrister has a duty to ensure that there is clarity about the terms, including clear information about how they are regulated."<sup>9</sup> rC22 makes it clear that a barrister needs to outline these terms in writing upon acceptance of instructions. If the scope of instructions varies, then a barrister is required to set out the new terms of work in writing to the client.

47. The requirement for public access barristers to outline terms for their client is more prescriptive and is set out at rC125 of the Handbook. This reflects the fact that the client is dealing directly with the barrister and does not have the assistance of a professional client. It is designed to assist the client in understanding the service they can expect from a barrister. A model client care letter for barristers to use when engaging in work with a public access client is available on the BSB website. This is compliant with the Handbook requirements.

48. We are currently producing a guidance document for barristers to complement this, which will suggest information that a barrister may wish to include, depending on the nature of the work that they are doing and who the client is. As already outlined, we plan to publish an additional model client care letter for public access work that is aimed at barristers providing services to SMEs. This responds to an information gap that we have identified. The new model letter will also incorporate additional Handbook provisions and elements of the Provision of Services Regulations 2009 and the Consumer Contracts (Information etc.) Regulations 2013. Both the guidance and new model letter will be published in the autumn of 2016.

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<sup>8</sup> Bar Council's response to the CMA Legal Services Market Study 2016:

[http://www.barcouncil.org.uk/media/422489/legal\\_services\\_market\\_study.pdf](http://www.barcouncil.org.uk/media/422489/legal_services_market_study.pdf)

<sup>9</sup> Ibid: p.9.

49. Common to acceptance of all instructions is the Handbook requirement to inform the client in writing of their right to make a complaint, how to do so and the time limits for doing so (rC99).

50. The Bar Council considers that the current Handbook requirements enable barristers to provide succinct and relevant information to the consumer. We consider that these requirements are proportionate and that they represent what is necessary for consumer protection.

**Question 2: What would be the consumer protection benefits and impact on competition of restricting the use of the title ‘lawyer’?**

51. The barrister and solicitor titles are well-known and well-regarded by the public in England and Wales, and indeed are internationally respected. We are not aware of any evidence suggesting that there is a consumer protection issue here which requires to be addressed. It is difficult to assess the impact of a new regulated title on competition and consumer protection without this information. It is unclear who would qualify to use the title of ‘lawyer’ and what their scope of practice would be.

52. Restricting the title ‘lawyer’ would amount to the creation of a new regulated title. The Bar Council considers that this is unnecessary and would potentially go against the prevailing trend towards deregulation. It would add another layer of regulation and a commensurate cost, which may be passed on to the consumer. While the titles of barrister and solicitor are highly regarded, the scope of ‘lawyer’ is unclear and uncharted. The additional title could cause confusion and uncertainty for consumers, since it is unclear as to who would fall into this category. We believe that the public and consumer interest would be better served by the provision of more information about the regulatory status of existing legal service providers, or, in the case of unregulated providers, the lack thereof.

53. The CMA’s interim findings indicate that they have not found evidence of detriment from use of the term, “lawyer” by the unregulated sector.<sup>10</sup> For that reason, we do not see why the term needs to be regulated.

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

54. The Bar Council does not consider that there is sufficient evidence to extend the scope of LeO. The Scottish Legal Complaints Commission receives few complaints from businesses, which we suggest indicates that there may not be much uptake, even if scope were extended to them. Extending the scope of LeO in this way could also increase the cost of legal services since LeO is funded by service providers’ practising certificate fees. There is a risk that any increase in cost could be passed on to the consumer through higher fees. There is arguably

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<sup>10</sup> CMA Legal Services Market Study , Interim Report 2016: 97.

less need for larger small businesses to access LeO since they may be better able to afford to take civil action.

55. We think that there should more clarity on the LeO eligibility criteria within the guidance for small businesses. Businesses should be able to determine easily if they are eligible and then make a choice as to whether they complain to LeO or pursue a different avenue of redress.

**56. Question 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?**

57. We do not have information to suggest that the ADR arrangements are not readily understandable to consumers.

58. ADR can enable a quicker resolution of complaints than referral to LeO and this may benefit both complainant and legal service provider. However, because both parties must be willing to use ADR, it is limited in scope.

**Question 5: Should legal services providers be provided with additional guidance on communicating redress options?**

59. No, we think that the Bar Standards Board Handbook requirements (rC99 to rC109) and recently revised Legal Services Board guidance are sufficient and fit for purpose. The fact that the LSB made only a few minor changes in their recent review of the guidance indicates that they think the existing guidance is adequate, as illustrated by their statement, "The minor nature of these changes reflects that first-tier complaints handling and signposting requirements have become established across authorised persons since 2010."<sup>11</sup>

**Question 6: Do any additional redress mechanisms need to be introduced for unregulated providers?**

60. No. We consider that providers who undertake reserved legal activities should be regulated and insured. We have explained our concerns about McKenzie friends exercising rights of audience in our response<sup>12</sup> to the CMA's follow up questions:

"The Bar Council believes that the legal services designated as reserved legal activities under the Legal Services Act 2007, including 'conducting litigation' and exercising 'rights of audience', are best provided by individuals and organisations that are

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<sup>11</sup>[http://www.legalservicesboard.org.uk/what\\_we\\_do/consultations/closed/pdf/2016/20160715\\_s112\\_Decision\\_Document.pdf](http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/2016/20160715_s112_Decision_Document.pdf)

<sup>12</sup> Paragraph 47

[http://www.barcouncil.org.uk/media/441133/bar\\_council\\_response\\_to\\_cma\\_follow\\_up\\_questions\\_22\\_04\\_16\\_final.pdf](http://www.barcouncil.org.uk/media/441133/bar_council_response_to_cma_follow_up_questions_22_04_16_final.pdf)

qualified, subject to professional regulation and hold professional indemnity insurance.”

### Questions on the regulatory framework

#### **Question 1: Are the high level criteria for assessing the regulatory framework that we have identified appropriate?**

61. We consider the criteria to be broadly appropriate. The criterion, on “the costs of implementing changes to regulation” is particularly useful, since it prompts consideration of the cost implications, which has a bearing on the practicality of any proposed change. We consider, however, that some prioritisation of criteria would be useful. For example, greater importance should be placed on the quality of services provided because this goes to the core of what consumers and a well-functioning justice system require. Similarly, we would like to see more emphasis on the criterion: ‘whether regulation enables access to justice’ as this is crucial to the public interest. At the same time, we recognise that access to justice cannot be achieved by regulation alone. It is also affected by government policies on legal aid and court fees, as well as, consumer knowledge of the existence of a legal problem and how to access legal service providers.

62. We suggest that an additional criterion be added to enable an evaluation of the impact on international consumers and the international standing of the UK legal services market. This would assist with the assessment of the economic impact of regulatory change.

#### **Question 2: Does the current regulatory framework prevent, restrict or distort competition?**

63. We do not consider that the current regulatory framework prevents, restricts or distorts competition and we note that the CMA’s conclusion in its interim report is that “regulation by title does not currently have a substantial impact on competition.”<sup>13</sup>

64. In our response<sup>14</sup> to the Legal Services Board’s Draft Business Plan 2016/17 consultation, we stated:

‘The Bar Council considers that many of the regulatory barriers to competition, innovation and growth have already been removed as a result of a planned and sustained programme of liberalisation by the Approved Regulators, overseen by the LSB. Barristers can now enter into ABSs and entities, conduct litigation and accept instructions directly from the public and from licenced access clients.’

65. We will consider each of the areas of focus of the CMA report in turn:

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<sup>13</sup> Competition and Market Authority, Legal Services Market Study Interim Report, 2016: 81.

<sup>14</sup> Paragraph 5,

[http://www.barcouncil.org.uk/media/420341/lsb\\_draft\\_business\\_plan\\_2016\\_to\\_2017.pdf](http://www.barcouncil.org.uk/media/420341/lsb_draft_business_plan_2016_to_2017.pdf)

### The impact of regulatory costs on competition

66. We do not generally have the same concerns about disproportionate regulatory costs for example, in relation to the cost of PII cover that other CMA stakeholders have mentioned in their submissions. The structure of the Bar and specifically the chambers model together with the prohibition on handling client money enable regulatory costs including the Practising Certificate Fee (PCF) and insurance to be kept proportionately lower because the regulatory risks are lower. The PCF covers the costs of the Bar Council activities under the s51 Legal Services Act permitted purposes, as well as the cost of the BSB, the LSB and Legal Ombudsman.

67. As of 2015, the PCF is charged according to a barrister's average earnings instead of a barrister's number of years Call as it had been. This means the PCF is proportionate to earnings, it is fairer and it is unlikely to act as a regulatory barrier to practice and competition. Further information about the structure of fees can be found in the Authorisation to Practise Process Guidance 2016.<sup>15</sup>

### The impact of reserved activities

68. It is important that the regulatory framework strikes the right balance between consumer protection and the promotion of competition within the market. The reserved activities include some of the most high-risk legal services such as the right of audience and conducting litigation. It is therefore vital that there are sufficient protections in place for this type of work to protect consumers, particularly if anything should go wrong. With regulation comes redress, insurance and also minimum standards of training and conduct. All of these factors reduce the likelihood of detriment to the consumer. Whilst the CMA suggests that the reservation of legal services may partially restrict competition, these restrictions need to be weighed up against the need to protect consumers. Competition should not be considered in isolation.

69. The Bar Council believes that reserved activities are best provided by regulated providers who offer the afore-mentioned protections. We do not consider that the reserved activities have a detrimental impact on competition in the market. There will always be a trade-off between higher levels of consumer protection and competition and we consider that, in the case of the reserved activities, the balance is right. We agree with the CMA that, as the reserved activities are narrowly defined, the potential detrimental impact to the consumer in terms of their restricting competition is limited. As the CMA points out, unregulated providers are able to provide a wide range of activities that are associated with the reserved activities that they themselves are not authorised to provide.

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<sup>15</sup> [Authorisation to Practise \(AtP\) Process Guidance 2016](#)

70. One area about which we have previously expressed concern relates to McKenzie friends. This is an area where it would be helpful if there was more clarity surrounding the reserved activity of rights of audience. The uncertainty can be unhelpful to unregulated and regulated providers who may not have a firm understanding of the scope of the activities that they are permitted to undertake but also to the consumer whose scope of protection is unclear. In our response to the Lord Chief Justice's consultation<sup>16</sup> on McKenzie friends we stated:

'We have highlighted this issue in relation to solicitor's agents, whereby individuals seek to exercise rights of audience not by obtaining permission from the court (as McKenzie friends do), but by relying on the operation of paragraph 1(7) of Schedule 3 of the [Legal Services Act]. There may be many occasions on which rights of audience are exercised pursuant to this exemption perfectly properly. Unfortunately, however, the absence of definitive judicial interpretation of this exemption has left the boundaries of its nature, scope and application uncertain.'

#### The impact of 'regulation by title.'

71. We do not think that any change to regulatory titles would be beneficial to the consumer. Regulated titles such as 'barrister' and 'solicitor' provide the consumer with a clear signal that the professional they are instructing is regulated and of a prescribed standard. We note that the CMA has not proposed any changes to regulatory titles at this stage in its market study and we support this decision. Changes to titles could lead to a blurring of the lines between regulated and unregulated providers and create confusion about the regulatory status of the provider being instructed. This would not be in the public interest. As the CMA acknowledges, "consumers express a preference in principle for using regulated providers because of the higher quality and adherence to minimum standards this might imply."<sup>17</sup>

72. We note that the CMA suggests<sup>18</sup> that regulation by title may result in consumers choosing 'to rely solely on title as an indicator of quality' which could 'distort competition' since unregulated providers cannot access such titles. We are not aware of this being the case, However the CMA also points out that if the issue is a lack of consumer awareness of unregulated providers, as is suggested by the CMA,<sup>19</sup> then a possible remedy may be to increase the amount of information available to consumers about all types of providers, which would address this concern.

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<sup>16</sup> Paragraph 8

[http://www.barcouncil.org.uk/media/472412/bar\\_council\\_response\\_to\\_proposals\\_to\\_reform\\_the\\_courts\\_approach\\_to\\_mckenzie\\_friends.pdf](http://www.barcouncil.org.uk/media/472412/bar_council_response_to_proposals_to_reform_the_courts_approach_to_mckenzie_friends.pdf)

<sup>17</sup> Competition and Market Authority, Legal Services Market Study Interim Report, 2016: 79.

<sup>18</sup> Paragraph 6.18 CMA (2016) Legal Services Market Study Interim Report.

<sup>19</sup> Paragraph 6.19, *Ibid.*



73. Further, we are unclear about what would replace regulation by title. We are aware that the LSB has undertaken some work in this area<sup>20</sup> however there are very significant challenges posed by alternative regulatory models. For instance, it is difficult to see how activity-based regulation could work in practice. The activity of advocacy for example, is not undertaken by all barristers. Many practitioners, particularly those in the employed sector undertake considerable advisory work and most barristers undertake a mixture of different activities. In addition, certain solicitors are qualified to undertake advocacy. This model could lead to practitioners being regulated by multiple regulators and being over-regulated by different and potentially conflicting rules. The LSB has previously suggested that regulation could operate according to 'practice area' but many providers work in multiple practice areas and this could also lead to more tiers of regulation than those to which providers are currently subject.

#### Regulatory barriers on non-traditional business models

74. We recently responded to the Ministry of Justice consultation on 'Legal Services: removing Barriers to Competition'.<sup>21</sup> In that response we were broadly supportive of the removal of elements of the application process that are disproportionately burdensome.

#### **Question 3: Would the potential changes to the regulatory framework we have identified promote competition?**

75. By its own admission, the CMA concedes that the current regulatory framework does not impede competition. We agree. We do not consider that further changes to the regulatory framework should be made, particularly when many of the developments prompted by the Legal Services Act 2007 are still at a relatively early in their development and their impact is not yet known.

76. We intend to comment on each of the CMA proposed changes to regulatory framework in turn:

#### Reducing regulatory burden on regulatory providers

77. We supported the move to a risk-based model of regulation and agree that, as a matter of principle, regulatory burdens should be reduced if they are not justifiable on the basis of consumer protection. The move to a risk-based approach and the new BSB Handbook prompted the BSB to undertake a wholesale review of the regulatory framework as recently as 2014. This, and other reforms to legal regulation, are still in their infancy. They need time to bed in and for their impact be assessed. We consider it premature therefore to undertake further significant regulatory changes at this stage.

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<sup>20</sup> Legal Services Board (2013) Future Legislative Options Beyond the Legal Services Act.

<sup>21</sup> [http://www.barcouncil.org.uk/media/488656/bar\\_council\\_response\\_to\\_abs\\_removing\\_barriers\\_consultation.pdf](http://www.barcouncil.org.uk/media/488656/bar_council_response_to_abs_removing_barriers_consultation.pdf)

### Focusing regulation on activities where consumer protection risk is highest

78. Regulation for barristers is already outcomes-focused so we consider that this objective has already been met. We are aware from the Legal Services Consumer Panel report<sup>22</sup> that there may already be confusion about which providers are regulated, with 36% believing that all providers are regulated for all of the legal services that they provide. We consider that it would be more confusing if regulated providers were regulated for certain activities and not for others, particularly when a barrister may be providing a mix of services to the consumer within one instruction. Furthermore, we are unclear how regulation of activity would work in practice. We will further explain our concerns in our answer to question four.

#### **Question 4: Is a further review of the regulatory framework justified on the basis of competition concerns?**

79. No. The regulatory framework has gone through substantial change in the wake of the Legal Services Act 2007. The Act has been in force for less than 10 years and many of the reforms have yet to become established or, on occasion, have not yet been implemented or implemented in full. For instance, barristers have only been permitted to apply to become authorised to conduct litigation or to set up an authorised body since 2014. In addition, the Bar Standards Board is only due to become a regulator of ABS as of autumn 2016. Given that not all of the regulatory changes proposed have even been implemented yet, we suggest that now is not the appropriate time for a review of the regulatory framework. We consider that it would be more sensible for a review of the Act to be undertaken once it is possible to establish the full impact of all reforms which Parliament approved only relatively recently.

80. We note that the CMA comes to the conclusion that there is no 'clear evidence that [the regulatory framework] significantly impedes competition in the current market.' We agree. We therefore do not consider that a review is justified on the basis of competition concerns.

81. The CMA suggests that there may be 'benefits' to reducing the number of regulators. We have argued in our previous submission in favour of the retention of a specialist regulator for the Bar. We reiterate the points that we made in our previous submission<sup>23</sup> about why this is important:

'Barristers have a distinctive and complex set of responsibilities to the court and to clients which clearly distinguish them from other lawyers, and it is important to have a knowledgeable regulator charged with maintaining the delicate balance here, which underpins the rule of law and the effective operation of our justice system. A specialist

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<sup>22</sup> Page 19,

[http://www.legalservicesconsumerpanel.org.uk/publications/research\\_and\\_reports/documents/LegalServiceBoardReportbyYouGovV4.pdf](http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/LegalServiceBoardReportbyYouGovV4.pdf)

<sup>23</sup> Paragraph 19, Bar Council (2016) response to CMA Market Study.

regulator is also more likely to ensure that the costs of regulation are proportionate to the regulatory risk posed. '

82. The risk would be that as regulation moves further away from the individual practitioner, it would become less specialised, and less proportionate to the level of regulatory risk posed. This could be detrimental in terms of maintaining the buy-in from the profession and could erode the knowledge and experience that a specialist regulator for the Bar has developed. We are also concerned that consolidation of regulators into fewer, larger structures does not always reduce cost. This may result in increased costs as larger structures lose efficiency through increases in the time, complexity and sheer cost of decision-making.

83. We would respond, in full, to any consultation on the structural separation of regulators from their representative bodies and we note that this not the primary focus of the CMA study and our response is therefore at this stage is necessarily succinct and confined to stating our position.

84. On the separate subject of regulatory independence, the Bar Council and the Bar's independent regulator, the BSB have a number of different mechanisms to ensure that the independence of the BSB is upheld. For example, we have a protocol in place to log and review representations that are made by the representative body to the BSB. This protocol is designed with the following principles in mind:

- a. The Bar Council should not ordinarily be involved in the discharge of regulatory actions or obligations;
- b. The Bar Council is entitled to make representations to the Bar Standards Board;
- c. In exceptional circumstances the Bar Standards Board is entitled to seek expert advice from the Bar Council;
- d. In such cases the decision to seek Bar Council advice should take into account the risk of undue influence and there should be an assessment as to whether the Bar Standards Board should develop in-house expertise or use other sources in future;
- e. Such Bar Council involvement should only proceed with the express approval of the Bar Standards Board, under clear terms of reference and governance that are approved by the Bar Standards Board;
- f. The Bar Standards Board should lead all such work, and arrangements and actions should be recorded and transparent;
- g. Individuals providing input to the Bar Standards Board must do so independently of their responsibilities as staff of the Bar Council.

85. This protocol has been in force since 2014, its processes are monitored biannually and the Bar Council's staff receive training in relation to it. There is no evidence that the BSB is unable to stand up to the 'vested interests of particular professional groups'.

**Bar Council**  
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