

Appendix: CILEx response to review of the CMA's 2016 Market Study into legal services

1. Although CILEx is pleased to see the wide-ranging nature of the CMA's ongoing review, we have chosen to only answer those questions where we were able to provide specific comment.
2. A more general point CILEx would like to make pertains to paragraph 45 of CMA's 'Call for Inputs' document (redress gap for unauthorised providers). CILEx would note that the point raised in this paragraph, although broadly correct, potentially overlooks the CILEx model by which CILEx professionals without Practice Rights (who are classed as 'unauthorised providers' under the Legal Services Act 2007) are still subject to regulatory oversight from CILEx Regulation, with redress mechanisms available for consumers.

Question 5 - To what extent are quality indicators needed to drive consumer engagement and competition? Which further indicators are needed and what are the barriers to these indicators being developed?

3. CILEx notes the work being undertaken by both the CMA and Legal Services Board in developing quality indicators. CILEx was pleased to see the CMA's initial recommendation emphasising the need for these quality indicators/feedback platforms be independent of any single legal regulator or professional body.
4. CILEx believes that this impartiality is vital, as if this is lacking then quality indicators can actually be detrimental to competition.
5. Some of the current 'quality hallmarks' in the legal sector are administered by a single legal professional body for the benefit of their membership. These have then been adopted by other stakeholders as minimum thresholds, meaning these hallmarks have, inadvertently, become market barriers to those other legal professionals not covered by the hallmark.
6. Examples of this include the Conveyancing Quality Scheme (CQS), administered by The Law Society with a requirement that CQS member firms are regulated by the Solicitors Regulation Authority. The CQS is recognised by the vast majority of lenders as a mark of quality and membership of the CQS is a requisite for acting on behalf of lenders in conveyancing matters. This means that non-solicitor legal firms are denied the opportunity to undertake the vast majority of conveyancing work even though they are as qualified and competent to undertake the work as any CQS holder. The net result is that it is at least questionable whether such a standard is a true reflection of quality or choice available in the sector.

Question 7 - What impact have ABSs and lawtech had on driving innovation in the legal services sector?

7. There has been a growing interest and investment for legal technologies in the UK legal services market, both by private stakeholders and public institutions. This is as a result of government commitments to the Fourth Industrial Revolution and increased participation by regulators in shaping a digital future.

8. More recently, the impacts of COVID-19 have necessarily warranted remote access of services across the economy and are likely to create a paradigm shift in consumer expectations and consumption of legal services beyond the current pandemic.
9. The development of lawtech brings with it the potential to enhance access to legal services for the consumer. For example, faced with COVID-19 restrictions, industries such as the conveyancing and private client sectors, which continued to see demand amongst consumers, have witnessed changes to statute and processes to enable electronic signatures, electronic witnessing of wills and electronic disposition of relevant documentation to ensure that consumers can continue to access necessary legal services. As these changes have only recently materialised, contributions to their development have been largely steered by the public sector; albeit, the role of the private sector cannot be underestimated, with government bodies such as HM Land Registry, dependent on the private sector to drive these innovations.
10. In the longer term as these changes continue to give rise to new industries and service solutions, and private sector influence in the development of lawtech solutions grows; there is a concern that the current legal regulatory framework will be unable to effectively scrutinise and regulate emerging technologies. This is largely because the narrow gateway of entry for legal services regulation risks excluding digital solution providers, driven by third-party players in the technology sector with input from non-lawyers who are omitted from the remit of legal sector regulation. With the algorithm itself unregulated, and non-regulated persons entrusted with writing it, a disconnect arises even where lawtech has been developed with the advice and guidance of a regulated legal professionals, as inevitably, it is who writes the code and how it is written, that shall drive service outcome.
11. As a result, CILEx foresees a need for greater flexibility within the regulatory framework to allow for alternative methods of delivery which can be included within the fold of regulation. The regulatory framework will need to shift to enable these digital solutions, which are created, coded and maintained by non-legal middlemen, and may even eliminate the role of legal practitioners within certain legal processes, to be effectively regulated, or at the very least moderated, to ensure minimum standards within legal service delivery and healthy competition for the sector.

Question 8 - Are there other developments which have had or will have a significant impact on competition in the sector?

12. As increased demand for legal services in the wake of COVID-19 continues, with an anticipated surge in areas such as debt recovery, employment law, housing security, domestic violence etc the need to remove barriers constricting lawyer supply will become more prevalent than ever.
13. Recruitment and retention issues have long been a drain on the resources available to the sector in certain parts of the profession, such as for those offering legal aid services. Where recruitment drives are unable to secure talent in pockets of the sector where there is consumer need, this may often be as a result of disproportionate entry requirements and financial disincentives for taking on certain roles. For example, whilst not within the scope of the CMA Review, within criminal law practice, CILEx has anecdotal evidence of providers moving away from legal aid work and from defence practitioner work more generally. This is largely motivated by a lack of financial recompense for services provided, disincentivising new entrants from joining the profession; as

well as persistent difficulties for entrants in qualifying to take on certain positions. As these developments see more and more legal service providers gravitating away from certain career paths, there is an overarching worry that healthy competition and consumer choice within legal services is being impeded; and wider concerns arise for the proper administration of justice as competition in the market becomes increasingly imbalanced. This is further complicated in respect of the publicly funded criminal legal sector of course by the fact there is no real market in which competition can happen; prices are set in what is a monopsony.

Question 9 - Are further measures needed to drive consumer engagement and competition in legal services in addition to the areas we have identified above?

14. CILEx agrees with the areas identified by the CMA. Other means of driving consumer engagement in legal services could include measures to overcome consumers' lack of awareness about non-solicitor legal providers, as acknowledged and discussed in the CMA's 2016 Market Study as real barriers to expansion for those who are not solicitors or barristers. CILEx accepts that such measures are partly incumbent on legal regulators and professional bodies themselves, but would also welcome efforts from government to make consumers more aware of the scope of legal services providers (e.g. advertising of the Legal Choices website and/or more readily available descriptions of different types of lawyers).
15. Another area, also touched upon in the CMA's 2016 Market Study, was the role of legislation, which often unjustifiably excludes non-solicitors/barrister legal professionals from undertaking certain tasks. This is because various pieces of relevant legislation have not been updated to reflect the modernisation of legal regulation via the Legal Services Act 2007.
16. For example, Chartered Legal Executives are still unreasonably and illogically excluded from numerous types of work by virtue of legislative anomalies, rather than by CLEs lack of ability or appropriate qualifications. These are too complex to explain in this submission, but, amongst many others, including a bar on certifying copies of a power attorney (despite being able to certify originals) as a result of the Powers of Attorney Act 1971 and limitations on criminal advocacy work deriving from Courts and Legal Services Act 1990. Both have direct adverse effects on consumer awareness and competition.
17. CILEx would expect that other non-traditional legal professional bodies/regulators (i.e. Council of Licensed Conveyancers, Chartered Institute of Patent Attorneys, Association of Costs Lawyers etc) would be able to report similar issues.
18. CILEx understands that the CMA cannot change legislation directly but would merely like to emphasise that outdated legislation can unfairly limit competition in legal services and the CMA needs to be cognisant of this, especially when engaging with government and parliamentarians.