



The Bar Council

**Bar Council response to the Competition and Markets Authority's (CMA)
Review of the legal services market study in England and Wales, an
assessment of the implementation and impact of the CMA's market study,
recommendations: Calls for inputs document**

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the CMA's Review of the legal services market study in England and Wales, an assessment of the implementation and impact of the CMA's market study, recommendations: Calls for inputs document ¹.
2. The Bar Council represents approximately 17,000 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 (BSB).

¹ [CMA Review of the legal services market study in England and Wales, an assessment of the implementation and impact of the CMA's market study, recommendations: Calls for inputs document](#)

Questions regarding information remedies and supply-side developments

Q1. What challenges have legal service providers faced in complying with transparency measures, and how could these be addressed?

4. The new transparency rules that apply to barristers came into effect in July 2019 and compliance was required by the BSB by January 2020. Therefore, the rules are relatively new, and it will take a while for them to be fully adopted by all those to whom they apply and also for their impact on consumers' behaviour to be felt and assessed.

5. The BSB carried out a compliance spot-checking exercise on the Bar early this year and found that, "75% of those assessed during our review were found to be either compliant or partially compliant".² They acknowledge that whilst this is encouraging, more work needs to be done to increase compliance. They have detailed their plans in this regard in their report.

6. The Bar Council has assisted barristers, chambers and "entities" (a term commonly used to describe both BSB authorised bodies and BSB licenced bodies) to comply with the rules by alerting them to the changes and explaining the effect of the new rules. We did this by summarising the changes in a Counsel magazine article³ as well as a BarTalk⁴ blog written by the Chair of the Direct Access Panel. In addition, we signposted barristers to the existence of the rules as well as the BSB's detailed transparency rules guidance documents in relevant Bar Council guidance documents that are located on the Bar Council Ethics Hub.⁵ The Bar Council's Ethics advisers also supported the Bar by responding to queries on the rules from barristers and their support staff.

7. We have heard, anecdotally, that the rules that apply to all barristers, chambers and entities are relatively straightforward to comply with.

² BSB- [Compliance with the price, service and redress transparency rules](#) 2020: 1

³ <https://www.counselmagazine.co.uk/articles/the-new-bar-transparency-rules>

⁴ A fortnightly update email sent to barristers by the Bar Council

⁵ <https://www.barcouncilethics.co.uk/>

8. For those subject to the additional rules that apply to those conducting work in certain defined areas⁶ on a Public Access basis, providing prices can be time-consuming. In response to a questionnaire sent to Chambers asking for input on this question, and particularly from public access barristers, we received largely the same answer that there were not significant challenges in complying with the transparency measures, though it could be time-consuming. It was felt it did not add much to the client experience and the main issue was that it was difficult to give anything other than a range for fees because cases vary so much, and coupled with various hourly rates, it results in a wide estimate. We received a very small number of responses to our questionnaire owing to time constraints, so the responses we received are not statistically significant.

9. Large chambers or entities with numerous members may find it challenging to capture the variance in fees between barristers with little experience and more experienced barristers by using a single fee range. When the fee range is too wide it is of limited use to the consumer. However, the alternative is providing this information for each practitioner in each of the relevant areas of work; a time-consuming task which generates a lot of information for the consumer to analyse.

10. As we said in our response to the CMA's 2016 Market Study Statement of Scope,

“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.”⁷

⁶ Currently; Employment Tribunal cases (advice and representation for employers and employees); Financial disputes arising out of divorce; Immigration appeals (First-tier Tribunal); Inheritance Act advices; Licensing applications in relation to business premises; Personal injury claims; Summary only motoring offences (advice and representation for defendants); and Winding-up petitions.

⁷ [Bar Council response to CMA 'Market Study into the Supply of Legal Services in England and Wales.'](#)

11. Consequently, for work that is not standard or routine, it will always be challenging for barristers to give accurate and meaningful information on price without first speaking to the client to understand their needs.

Q2. Are consumers engaging with the new transparency measures including the availability of price information, e.g. by accessing the pricing information on the provider websites and/or using this information in their interactions with providers? Does this differ between different areas of law?

12. We would reiterate that the mode of practice where consumers are most likely to actively engage with displayed prices is where instructions are received on a public access or licensed access basis by self-employed barristers. On 1 September 2020 there were 6,451 barristers with the public access accreditation, representing 38.6% of the practicing Bar⁸. Some of these barristers will use their accreditation daily and their business model will be based exclusively upon receiving instructions on a public access basis whereas others will take public access instructions seldom, if at all. There will also be many barristers that fall between both extremes. The point we are seeking to make is that the self-employed Bar operates first and foremost as a referral profession, being referred work on behalf of a lay client though professional clients. As we explained in our response⁹ to the CMA's 2016 Market Study Statement of Scope,

“Professional clients of all types have a sophisticated understanding of the legal services market as this is the market within which they themselves operate. It follows that they will be in a strong position to assess the cost and quality of a barrister's services, and to make an informed choice – and thus a recommendation to the lay client – about whether the barrister has the requisite experience and expertise to provide the best possible service for the client at a competitive cost.”

13. Even for public access barristers, we have responses from the questionnaire that indicate there is little evidence that consumers are engaging with the new transparency measures. Barristers and chambers staff have not encountered increased engagement by consumers over fees since the implementation of the transparency rules, and fees estimates are still quoted in the usual way (usually via telephone or

⁸ This aggregated data is derived from data collected by Bar Council and Bar Standards Board

⁹ [Bar Council response to CMA 'Market Study into the Supply of Legal Services in England and Wales.'](#)

email directly to clients). Additionally, there is little indication from the responses received, that clients have been comparing prices or reviewing the fees pages on websites any more than usual.

Q3. How effective have transparency measures been in driving competition? Does this differ across areas of law?

14. It is difficult to assess this early on from the implementation of the transparency rules. We would also suggest that we are not the best placed to address this question. The responses to our questionnaire indicate that it is difficult to assess this as clients usually do not volunteer information on other barristers' fees, even if asked. It is difficult to assess how much competition has been driven in the barrister profession because clients tend to obtain different quotes for different levels of seniority, and those quotes can vary greatly. It should of course be borne in mind that the very nature of the self-employed Bar makes it inherently competitive and the ability of consumers to 'shop around' prior to instructing a barrister only increases this competition.

Q4. To what extent has the Legal Choices website helped consumers to navigate the legal services sector? To what extent has improved content been actively promoted by regulators, consumer/industry bodies and service providers?

15. We have had little involvement in Legal Choices so are not best placed to comment.

16. We would however, to make the point that there is an important role for existing sources of information that are well established and known to consumers, for example the gov.uk website and Citizens Advice. There is a strong argument that those existing sources are the most suitable places to host information intended to help consumers to navigate the legal services sector. Hosting that information on a somewhat unknown website strikes us as both odd and inefficient, and potentially confusing for consumers. That said, some of the government webpages on law omit to mention barristers as source of advice and representation so there is room for improvement here.

Q5. 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?

17. We agree in principle that quality indicators have the potential to serve as a factor in consumers making informed decisions when purchasing legal services. We do not conclude that further quality indicators will drive competition between barristers, as the Bar is already an intensely competitive market.

18. Many quality indicators already exist in relation to the barrister profession and caution is needed before determining that further quality indicators are necessary. We have previously given details in our submission to the CMA study in 2016, of the wide range of information that is readily available to all potential clients to assess the quality of a barrister.¹⁰ This information remains available to all consumers.

19. The Bar remains primarily a referral profession, professional and licensed access clients will generally be sophisticated repeat customers and will have in-depth knowledge of the market for barristers' services. Information about quality, such as that on Chambers' websites or Specialist Bar Association websites are available to all consumers. Whilst potential public access clients, engaging the use of a barristers' services directly through the public access scheme, are likely to have less experience of the legal services market, all the tools that are referred to in our submission are available to them.

20. All consumers also have access to [The Barristers' Register](#) where consumers can "search for barristers who are authorised to practise in England and Wales. It records their practising status and address, the reserved legal activities they are authorised to undertake and whether they have been the subject of any disciplinary findings".¹¹ We also noted in our 2016 response¹², the intense competition that is inherent in the barristers profession, particularly at the self-employed Bar.

21. Part of the response to the second part of the question, in relation to the possible barriers to quality indicators being developed, is dealt with in question 6 as many of the same issues are encountered with DCTs.

¹⁰ [Bar Council response](#) to the Competition and Markets Authority paper 'Market Study into the Supply of Legal Services in England and Wales', paragraph 23

¹¹ As noted by the Bar Standards Board on their [website page](#), The Barristers' Register

¹² [Bar Council response](#), paragraphs 30-33

Q6. To what extent are DCTs currently operating in the legal services market? What are the main barriers to greater use of DCTs in legal services and how can they be overcome?

22. To our knowledge, DCTs are operating to a limited extent in relation to barristers. DCTs are probably of most use to clients of Direct Access Barristers as they do not benefit from having a professional client in place to help them assess cost and quality. The Direct Access Portal is one example, which allows consumers to search for public access qualified barristers for their case needs and compare barristers. The information available to consumers allows comparison between specialist area(s), years qualified, their location and the distance from the barrister to the consumer (and whether they would be willing to travel if further afield).¹³

23. To some degree, there are other smaller websites that also offer comparisons between barristers. For example, Clerksroom is a commercial and virtual Chambers with public access qualified barristers and mediators available to the public. Through this website, the public are provided with a selection of barristers and it is the consumer who chooses the barrister they wish to work with.¹⁴

24. We consider that these types of DCTs where consumers are able to navigate on a website to compare barristers do have a role to play in assisting consumers of legal services to make an informed choice.

25. There are though potential challenges in developing further quality indicators in relation to barristers, and these should be considered carefully before concluding whether new quality indicators are in fact needed.

26. Whilst the idea of customer reviews works well in some other sectors such as the hospitality sector, we question their usefulness in the context of legal services. Consumers purchase legal services infrequently¹⁵, which means that any review provided would not necessarily be a useful indicator for future consumers of that service. There is a possibility that consumers when judging the work of a barrister, could judge the quality of a barrister's work on the outcome of the case as opposed to the quality of the barrister's work. Consumers are not necessarily best placed to make

¹³ [The Direct Access Portal](#)

¹⁴ [Clerksroom](#)

¹⁵ As noted by the LSCP, "Seeking out a legal services provider is a rare and infrequent activity for most consumers", '[Consumers feedback on quality indicators in legal services](#)' 20 July 2020, page 2

a judgement on the quality of the service they received as there are a number of issues that may be dealt with, of which the consumer is unaware. As an example, barristers have to adhere to a Code of Conduct which includes drawing the court's attention to any decision which may be adverse to the interests of their client.¹⁶ The client may judge their barrister negatively in this regard without understanding the barrister's full ethical duty. Quality indicators would not therefore necessarily provide a true picture of the service received, as taking these issues into account is not as simple as being able to provide a review for another service such as a hotel room or use of a hired car.

27. The Legal Services Consumer Panel (LSCP) recognise this limitation in its report titled, 'Consumers feedback on quality indicators in legal services', "Often their experience of customer service at this stage is used as a proxy for quality of service, regardless of the actual quality of legal advice offered."

28. It might also be difficult to develop indicators for barristers as the work undertaken at the Bar is so varied with specialists practising different skills in different areas of law. How, for example, does one meaningfully compare a shipping barrister giving contractual advice with a criminal defence barrister doing advocacy work. We consider, for example, that it would be challenging to have quality indicators for advocacy as different barristers have different approaches, which may suit one client better than another. Overall, as noted in our response to a recent Legal Services Board (LSB) consultation on Ongoing Competence,

"The Bar is a highly competitive referral profession and its core service of advocacy is delivered in public and in front of judges and lay and professional clients. There is little chance of hiding incompetence. Barristers owe duties, sometime conflicting, to their client and to the Court. These distinguishing features of the Bar are important, and we do not think they are shared by any other profession."¹⁷

29. This position has also been set out by the Chair of the LSCP who recently stated at a Legal Services Board summit that it would be very difficult to introduce quality indicators for advocacy, for the reasons set out above.

¹⁶ gC5 of the BSB Handbook

¹⁷ [The Bar Council's Response to the LSB's Call for evidence on Ongoing Competence](#), paragraph 89

30. In noting the difficulties in developing indicators for barristers, we are also concerned that barristers could be disproportionately impacted by negative reviews than other legal services providers. In our Bar Council response to the Legal Ombudsman’s Transparency and Reporting Impact discussion paper, we noted that,

“barristers that practice in certain areas of law¹⁸ or who are instructed in a certain way, can be more vulnerable to complaints being made against them to the Ombudsman. Consequently, the risk of prejudice is greater for such barristers, even where complaints are not upheld. At worst, this could act as a disincentive to practice in certain areas of law or to accept instructions in a certain way and could impede access to justice”.¹⁹

31. Considerations that exist for barristers in terms of vulnerability to complaints may also apply in the context of negative reviews. Self-employed barristers may be more adversely impacted by a bad review than employed legal professions operating from within an authorised body. Barristers, particularly as a referral profession, rely heavily on their reputation. Just as in complaints data held by the Legal Ombudsman, a review may focus on the name of a self-employed barrister, whereas an employed legal professional may to some extent have a complaint focussing on the organisation as opposed to tarnishing the reputation of a particular individual. Any move to develop quality indicators, therefore, should take into account that self-employed barristers are more vulnerable to complaints, and should be approached with caution.

Q7. What impact have ABSs and lawtech had on driving innovation in the legal services sector? Are there any barriers deterring further innovation?

32. In terms of innovative models for practising, the BSB regulates authorised bodies and licenced bodes. Authorised bodies must be wholly owned and managed by authorised persons, whereas licensed bodies, also known as ABS, can be partially owned by non-authorised individuals alongside authorised individuals. There are currently over 100 BSB authorised bodies, a substantial increase since 2016 when we noted the existence of 39 in our response to the CMA Statement of Scope. Most of these are single person entities. There are currently 12 BSB licensed bodies. Licensed bodies

¹⁸ Crime, Litigation, Family Law, Employment and Immigration and asylum were the top areas of law for complaints against barristers, source; email from the Legal Ombudsman in April 2019

¹⁹ <https://www.barcouncil.org.uk/uploads/assets/0ca7c546-9677-423d-9ad862175f75a851/Bar-Council-response-to-LeO-transparency-discussion-paper-Jan-2020.pdf>, paragraphs 31 – 32

allow barristers to form businesses with other professionals and have the potential to be innovative and indeed some are. BSB Licenced bodies have only been permitted since 2017 so it is relatively early days but the low numbers of them indicate that barristers' appetite for them is limited.

33. We stand by the conclusion in our 2016 response, that there has been a limited formation of multi-person entities by barristers and,

“this unquestionably signals the enduring appeal and cost-effectiveness of the chambers model, but also, fundamentally, the problem of conflicts which can arise in partnerships and other corporate entities. Barristers have a regulatory obligation to avoid such conflicts within the entity's own practice and conflicts between the entity's practice and the practice of any individual lawyers who also practise in other ways (e.g. as self-employed practitioners).”²⁰

34. The Legal Services Act 2007 (LSA07) is advantageous in this regard as it has been flexible enough to allow for various entities to develop within the scope of its regulation. The BSB has enabled those barristers that wish to set up and be employed by authorised and licensed bodies do so. It should though be the decision of barristers to decide if ABSs are appropriate for them. We suggest that BSB authorised licenced bodies seem to have had limited impact to date in driving innovation in the legal services sector.

35. Lawtech has been adopted by most parts of the Bar since it can help chambers and barristers to work more efficiently. Increasingly, chambers and entities' sophisticated websites help consumers navigate their way through making an enquiry and using a barrister. Clerksroom have trialled a chatbot using AI to interact with potential clients.²¹ FromCounsel is a business run by barristers that using a digital platform to update legal professionals on particular areas of law, supporting their particular area of practice. Covid19 has resulted in many barristers holding online meetings and conferences with clients and participating in hearings remotely. There is certainly some moderate innovation in the legal services sector and we believe the adoption of lawtech is only likely to increase as the variety of lawtech available increases. It is fair to say that until now much of the development in lawtech has been aimed at solicitors' firms since that market is much larger and more lucrative for

²⁰ [Bar Council response](#)

²¹ <https://www.clerksroom.com/profile?type=services&fl=B&pid=2229>

developers. However, we continue to highlight and engage with opportunities where lawtech can be used to both assist with the smooth running of barristers' practices and to assist with access to justice for clients.

36. We note there are some concerns about lawtech that can be experienced by the consumer without the need for any human interaction in the delivery of the service. Whilst needs surrounding document production, bundling, discovery and the like can be somewhat met by new technology and software, we do not view that the job of presenting a case, of advocacy in the courtroom with often vulnerable clients and of client care can be adequately met by technology. There are also concerns surrounding judicial AI and algorithmic decision making²², which can lead to erroneous results.

Q8. Are there other developments which have had or will have a significant impact on competition in the sector?

37. The BSB's 'Future Bar Training' programme of reform has brought significant changes to the education and training of barristers. These changes include the ability of students to attain the three components of Bar Training through any one of the four approved training pathways.²³ We would assume that once these changes become established, they will make it easier for a greater number of candidates from more diverse backgrounds to join the Bar.²⁴ One key change is the impact of reforms on the price of the vocational component of training: most training providers have reduced their costs by several thousand pounds. This may have an impact on competition.

38. Covid19 has clearly had a far-reaching impact on the barristers' profession, of which we are yet to see the full extent. A lot of criminal work halted at the height of the pandemic whilst we were in lockdown and we have heard reports of a significant reduction in cases being heard by the employment tribunals. Research we have conducted has revealed that the publicly funded Bar has been affected more severely than privately funded barristers. In our recent Bar survey²⁵, publicly funded barristers²⁶ have seen a 69% reduction in fee income. Just as starkly, 29% of publicly

²² <https://www.barcouncil.org.uk/resource/apqc-inaugural-speech-2-12-19.html>

²³ <https://www.barstandardsboard.org.uk/training-qualification/bar-qualification-manual/part-1-overview/b2-approved-pathways.html>

²⁴ Stated intention by the BSB when deciding approach to training, paragraph 2 and 30-31:

<https://www.barstandardsboard.org.uk/uploads/assets/148c471b-6181-473a-9f3dd9466cde475a/fbtpupillageafandcarpolicystatement-may18.pdf>

²⁵ Whole Bar Survey July 2020: Summary of findings

²⁶ Those who receive over 50% of their income from publicly funded work

funded barristers are uncertain whether they will renew their practising certificate next year and 36% of immigration practitioners are also uncertain of this. Of particular concern is that 38% of criminal barristers surveyed are uncertain whether they will still be practising law in 2021.²⁷

39. It is particularly concerning that only 14% of those surveyed that are at the criminal Bar think that they will still be practising from their current chambers in a year. It is difficult to anticipate the effect this may have on competition.

40. We are also concerned about the impact of Covid19 on diversity at the Bar. Women on the whole are more adversely affected than men by the issues caused by the pandemic. As an example, during our survey, many women who are pregnant or on maternity leave or have just returned to work from it, expressed very serious concern about the ability to remain in the profession, due to the downturn in their work and consequent reduction in their income. As is stated in the report, BAME, women and state-educated barristers are triply hit – they are more likely to (i) be in publicly funded work (ii) face greater financial pressures and (iii) be primary carers for young children. It is difficult to anticipate the effect this may have on competition.

41. The pandemic is unlikely to have an effect on the numbers of students seeking to enter the profession.²⁸ However there may be issues with progression beyond the academic stage of training considering that 22% of chambers have delayed the start of pupillages for 2020, 27% of chambers have suspended recruitment of pupils for 2020 or 2021; and a further 26% are keeping their pupillage plans under review, meaning over half of pupillages across all practice areas are at risk.²⁹

42. We are also concerned the potential closure of more Chambers will have an effect on competition. Despite Chambers making considerable savings, other efficiencies and full use of the furlough scheme, 58% of chambers anticipate they will not last 6-12 months. Even with the support of current Government measures, 70% have furloughed clerks, and a further 54% have furloughed other staff.³⁰ With this high take up of the furlough scheme in chambers, we are concerned that there will be

²⁷ Whole Bar Survey July 2020: Summary of Findings

²⁸ The results will not be released until summer 2021 but we understand anecdotally that this is the case

²⁹ Heads of Chambers Survey Summary Findings June 2020

³⁰ Ibid

eventually be redundancies across this sector. If this scenario plays out there will clearly be impacts upon competition.

Q9. Are further measures needed to drive consumer engagement and competition in legal services in addition to the areas we have identified above?

43. Research by the LSB and LSCP has shown that consumers of legal services often don't understand whether or not their legal service provider is regulated and if they are, what that means. We think there is a greater role for Public Legal Education in terms of informing citizens of the role and importance of regulation. This would help them to distinguish between the regulated and unregulated sector and make an informed choice as to what level of protection they would like to their provider to have in place when purchasing legal services.

Q10. Are there any issues specific to the provision of legal services for small businesses that should be considered in order to improve competition for such customers?

44. We can only talk from the perspective of the Bar. We believe that small businesses have a wide range of choice of barrister and ways of instructing them. They can instruct them via a professional client, typically a solicitor, or directly via licenced access, if they are a member of one of the BSB designated professions or hold a license or, also directly, on a public access basis, where the barrister has Public Access accreditation. On 1 September 2020 there were 6,451 barristers with the Public Access accreditation, representing 38.6% of the practicing Bar³¹. There are many sources of information and platforms where barristers' services are advertised that will facilitate competition.

Questions regarding redress and regulation

Q11. What measures can be taken to develop a more flexible and proportionate regulatory framework within the Legal Services Act 2007 without requiring any, or only light touch, further legislative change, for example a review of the reserved activities as being considered by the LSB?

³¹ This aggregated data is derived from data collected by Bar Council and Bar Standards Board

45. The LSA07 has already proven flexible in that fairly significant developments have taken place within it that have opened up the legal market to more competition. For example, barristers can conduct litigation and enter into partnership with other legal professionals and non-authorised persons in BSB authorised and licenced bodies. There is a myriad of ways in which they can practice within the rules; as a member of multiple sets of chambers, as a sole practitioner, as an employed barrister, in a dual capacity where they are simultaneously employed and self-employed and where they take some or all of their instructions directly from the public. Solicitors have experienced Solicitors Regulatory Authority led changes in recent years that have opened up new avenues of practice for them, again, within the LSA07, demonstrating its flexibility.

46. The BSB is risk based in its approach, evident in its review of the legal education and training of barristers, the more flexible continuous professional development (CPD) regime introduced in 2017 and its risk-based supervision of chambers, entities and sole practitioners. They aim to regulate in a proportionate manner. It has done all of this within the LSA07.

47. As mentioned, there has recently been significant overhaul of the education and training and qualification route at the Bar with the introduction of the 'Future Bar Training' programme. We anticipate this will lower barriers to entry and encourage a greater level of diversity at the Bar. We are cautiously optimistic it will also have a positive impact on competition.

48. The legal service sector is under considerable strain right now with the financial resilience of many barristers and the businesses they operate from significantly weakened. At the same time the Bar is trying to deal with a combined court backlog of well over half a million cases³², growing daily under challenging circumstances with remote hearings and socially distanced juries in some instances. We are wary of the potential for regulatory change (whether taking place within the LSA07 or outside it) to cause disruption and damage to the Bar and its ability to meet the needs of consumers of legal services and the administration of justice. For these reasons if any changes are required – and that case is yet to be made, we would much prefer change

³² According to the latest HMCTS management information, the combined magistrates' and Crown court backlog stands at 568, 678 cases. HMCTS (13 August 2020) HMCTS weekly operational management information. March-July 2020" <https://www.gov.uk/government/statistical-data-sets/hmcts-weekly-management-information-during-coronavirus-march-to-july-2020>

within the scope of the Act rather than change by legislative reform. A measure and evidence-based approach to any review of the reserved legal activities is also favoured.

49. We are not convinced there is evidence of a problem with the reserved legal activities that warrants their being changed in any way. We will be interested in the findings of the LSB review of reserved legal activities but would urge that particular caution be exercised when considering those activities which have a public interest role, namely, exercising a right of audience and conducting litigation. Currently, only authorised providers can conduct both of these and that brings with it a high degree of consumer confidence and consumer protection as well as helping support the administration of justice and rule of law.

50. As the CMA acknowledged in its 2016 Legal Services Market Study Final Report,

“Overall we have not found that the scope of the reserved legal activities has a significant negative impact on competition. We note that unauthorised providers, which may be lower cost providers, are restricted from competing to some extent in the legal areas to which the reserved legal activities relate. However, there are a large number of providers in these legal areas and the scope of the reservations tends to be narrow, which allows unauthorised providers to work around them.”³³

51. There does not seem to be a strong case, if any, for their reform when considering their impact on competition within the sector. 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 which has been struck is correct.

52. The Bar Council believes that ‘conducting litigation’ and ‘exercising rights of audience’ are high-risk and vital to the administration of justice. These reserved legal activities have a clear public interest basis for a high level of regulation. It follows that both activities are best provided by individuals who are qualified, subject to professional regulation and hold professional indemnity insurance. With regulation comes assurance of a high level of standards of training and conduct, insurance and

³³ CMA [Legal Services Market Study Final Report](#) 2016: 13

access to means of redress. Membership of the barristers' profession fosters a professional ethos, mutual support and encourages high professional standards. This must be maintained in the public interest.

53. The quality of service would be likely to be reduced if rights of audience were not reserved activities, and anybody could provide advocacy services. Remunerated Mackenzie friends, who can sometimes be given permission by a judge to exercise a right of audience, have been the subject of criticism and their clients may not be aware that they are not afforded the same protections as clients of regulated lawyers such as barristers or solicitors. Other interests and regulatory objectives would also be put at serious risk. It is vital for the proper functioning of our courts and legal system, that those exercising rights of audience and conducting litigation are properly trained, regulated and insured. This runs in tandem with the duty owed by those lawyers to the courts and judges they are appearing before, which is not only in the public interest, but also ensures the proper administration of justice which in turn is essential to the rule of law.

54. On the question of whether the remaining four reserved legal activities, (administration of oaths, probate activities, reserved instrument activities and notarial activities) should remain reserved, in our view it is essential that any review of them contains an assessment of not only the public interest but also the risk of harm to individual consumers. For further views on the reserved legal activities please see our response to question 5 of the CMA's initial questions on the reserved legal activities in 2016.³⁴

55. It is less risky and damaging to the legal services market to evolve slowly and allow for barristers and the business from which they operate to adapt to changes rather than introducing sudden and large-scale change. There must be adequate assessment of the impact of any changes and for any disruption caused by those changes to clearly outweighed by the expected benefits.

Q12. Would such measures above be sufficient to deliver effective change that can promote competition and optimise consumer outcomes in the longer term?

³⁴<https://www.barcouncil.org.uk/uploads/assets/c42bd531-11e0-42d0-a9e0fa9c8f7b0702/barcouncilresponsetocmasinitialquestionsonreservedlegalactivities.pdf>

56. The LSB has already got a busy and ever-growing programme of reform underway with recent changes to the Internal Governance Rules, a project on Ongoing Competence, their reform of the Practising Certificate rules, as well their planned review of the Reserved Legal Activities in 2021. This demonstrates that they can make plenty of regulatory changes within the current regulatory framework.

Q13. To what extent is there merit in extending the regulatory framework to include unauthorised providers? What evidence is there of consumer detriment from unregulated providers, or other rationale, to warrant this?

57. We believe that regulation of legal service providers benefits consumers of legal services as well as the administration of justice. As we stated in our response to the CMA's Market Study statement of scope in 2016,

“Barristers have a number of core duties and a strict Code of Conduct which ensures that they operate to the highest professional and ethical standards. This is vital for ensuring consumer protection and for maintaining the Bar's reputation as a provider of high-quality legal services. For example, barristers are bound by the ‘cab-rank rule,’ which requires them to accept instructions for which they have appropriate experience as a matter of course unless there is a good reason to refuse. This is vital for ensuring access to justice and also serves to widen client choice. Barristers are strictly prohibited from paying or receiving referral fees, which underpins the integrity of the profession and prevents conflicts of interest. In addition, barristers themselves and BSB-regulated entities are prohibited from handling client money, which decreases the regulatory risk associated with the Bar.”³⁵

58. Further, barristers must meet certain academic and vocational standards to qualify, complete annual CPD, hold professional indemnity insurance, are subject to conduct regulation by the Bar Standards Board and fall within the jurisdiction of the Legal Ombudsman.

59. Critical to any decision about whether regulation should be extended to include unauthorised providers of legal services is an understanding of the extent of their activities and the harm they may or may not be causing consumers of legal services

³⁵ [Bar Council response to CMA 'Market Study into the Supply of Legal Services in England and Wales.'](#)

and the administration of justice. The CMA acknowledged a lack of evidence pertaining to the unauthorised part of the legal services sector in its 2016 Final Report.³⁶ In the limited research the CMA conducted as part of the market study, it did not find any evidence of significant issues regarding unauthorised providers in relation to sales practices, quality of legal advice and clarity of information,³⁷ though it admitted it didn't necessarily have the full picture. The LSB noted in their report on unregulated providers in 2016 that, "this study is not a comprehensive analysis of consumer detriment and further work would need to be undertaken for a complete analysis of benefits and risks."³⁸ Clear evidence of widespread and significant harm is lacking. We would agree that there needs to be a robust evidence base before regulation is widened beyond that envisaged by Parliament when they passed the LSA07 to encompass the unauthorised sector.

60. In 2016 the LSB commissioned research on the for-profit provision of legal services by unauthorised service providers and found they only represented a small part of the sector,

"For profit unregulated providers make up a small proportion of the legal services market. In the individual legal needs survey, they represented 4.5-5.5% of cases in which consumers paid for advice or representation."³⁹

61. The LSB concluded it was, "smaller than expected".⁴⁰ It is not clear that the scale of operations of the for profit unauthorised sector is sufficient to justify regulation. In the same 2016 LSB report on for profit provision of legal services by unauthorised service providers it found that,

"More than half of consumers who instruct for profit unregulated providers are aware of their regulatory status. Of those who don't check, a significant proportion do not do so because they assume that they are regulated."⁴¹

62. The LSB concluded that, "Consumers should be encouraged to check whether or not providers are regulated". At that time it favoured a Public Legal Education

³⁶ CMA [Legal Services Market Study Final Report](#) 2016: 12

³⁷ CMA [Legal Services Market Study Final Report](#) 2016: 149

³⁸ LSB research summary [Unregulated Legal Service Providers](#) 2016: 6

³⁹ LSB research summary [Unregulated Legal Service Providers](#) 2016: 1

⁴⁰ Ibid

⁴¹ Ibid

approach to address consumers' lack of understanding of regulatory protection and did not to pursue an extension of consumer protection to unregulated providers. It is not clear what has prompted their change in approach.

63. The LSB's findings in relation to consumer ignorance of regulation were echoed by research commissioned by the CMA in 2016 where they found the majority of consumers of all legal services (from both authorised and non-authorised providers) did not check their providers' regulatory status, assuming they were regulated or not understanding what regulation meant.⁴²

64. The Ipsos Mori research quoted in the 2016 LSB research indicated that only 55% of clients of unregulated providers checked their regulatory status and of those that didn't the three most prevalent reasons for not doing so were that they assumed they would be regulated, they didn't think regulation was important and they didn't know how to find the information.⁴³

65. Consumers need to be aware of the protections, or lack thereof, that are inherent in regulation, particularly when they are using unregulated service providers. Helping them find that information and increasing their understanding of regulation to enable informed choice seems an obvious starting point.

66. There are other ways of extending consumer protections to the unauthorised sector that do not require expansion of the regulated sector. For example, they can purchase professional indemnity insurance or be voluntary members of an association that can process complaints and ascribe to a code of conduct. Indeed, the CMA in its final report recommended that the Ministry of Justice explore the potential of Alternative Dispute Resolution and self-regulation. The CMA noted that, "self-regulation (which covers around half of the unauthorised providers) has had a positive impact on the quality of unauthorised providers."⁴⁴ indicating this is a route worth pursuing.

67. We have expressed our concern about the operation of paid for Mackenzie friends in previous consultation responses. In 2016 in response to a consultation issued

⁴² CMA [Legal Services Market Study Final Report](#) 2016: 111

⁴³ LSB research summary [Unregulated Legal Service Providers](#) 2016: 27

⁴⁴ CMA [Legal Services Market Study Final Report](#) 2016: 149

by the Lord Chief Justice on reforming the courts' approach to Mackenzie friends we said,

“We think it wrong that McKenzie Friends, who typically are neither properly trained, nor regulated, nor insured, should be allowed to hold themselves out to the unsuspecting (and usually vulnerable) public as providing legal services for reward.”⁴⁵

68. These concerns remain and we believe that remunerated Mackenzie friends should not be permitted in the public interest. The scale of the issue is we believe, small, but there is some anecdotal evidence of harm as well as some evidence as reported by the legal press.⁴⁶ We disagree with those that argue that some representation by remunerated Mackenzie friends is better than none at all.

69. A risk of extending regulation acknowledged by the CMA in their final report, is that, “any additional costs that providers incur may be passed onto consumers”.⁴⁷ This is one of the risks of the idea currently being debated of compelling all providers of legal services to be part of a single register and this granting their clients the right to access Legal Ombudsman services.

70. Other challenges to the idea of a single register that we outlined in correspondence with Professor Stephen Mayson are:

- a. We question whether the Legal Ombudsman will have the capacity and expertise to deal with the complaints that will arise from consumers of newly regulated legal services providers. They are currently unable to keep up with their case load and the backlog of cases is growing.
- b. We would want robust reassurance that any cost associated with an expanded remit of the Ombudsman's would be borne by those

⁴⁵ <https://www.barcouncil.org.uk/uploads/assets/0d6d9eb1-8a4b-4cfc-b77d9f4649223867/barcouncilresponsetoproposalstoreformthecourtsapproachtomckenziefriends.pdf> 2016:1/2

⁴⁶ See <https://www.lawgazette.co.uk/news/mckenzie-friends-giving-biased-and-misleading-advice-university-study-finds/5102464.article>, <https://www.lawgazette.co.uk/news/mckenzie-friend-silenced-in-court-as-claimant-able-to-speak-for-herself/5104871.article>, <https://www.lawgazette.co.uk/news/parents-breach-court-order-after-advice-from-mckenzie-friend/5067868.article>

⁴⁷ CMA [Legal Services Market Study Final Report](#) 2016: 16

additional providers and not those legal professionals who are already regulated by the Ombudsman and who pay it an annual fee.

- c. If a public register is utilising information that is already publicly available from legal regulators such as the BSB, there is a risk of causing confusion amongst consumers by duplicating information or by different information on the same provider being available. If there is a difference in information, how will the consumer know which is to be regarded as the most up to date?
- d. Even if the public register used information directly exported from regulators' existing registers, there may be compatibility issues in terms of different categories of information or incompatibility of IT systems. On the former point, the CMA noted that the BSB displayed the widest range of data on its website amongst legal regulators. Would the lack of comparable information available from other regulators mean that for the sake of consistency, a narrower range of categories would be available on the public register? It would not be in the interests of consumers for the information about barristers to be artificially constricted and would mean the public register were an inferior source of information as compared to the individual regulators' websites.
- e. There is also a potential issue with transferring information from each separate regulator to a central public register as this could include information that has been or will be deleted by the regulator according to their publication policies (e.g. for data protection or regulatory reasons). This creates a risk of disparity between a central public register and regulators' own public registers, resulting in a central register that cannot be relied on as being accurate or up to date.
- f. It is conceivable that the public may mistakenly believe that those on the register have legal qualifications and are subject to more extensive regulation than just falling within the ambit of the Legal Ombudsman. The register may create a veneer of respectability for those providers that were previously unregulated with consumers unaware that the only criteria for entry on the register is ability to pay the fee.

- g. We are concerned that barristers are being ‘caught up’ in the efforts of trying to provide further protection to consumers from unregulated providers.
- h. A mandatory register would mark a significant change in approach to regulation of legal services in this jurisdiction which is fairly liberal by comparison to some other jurisdictions such as Germany and some states in the United States of America.

71. There is also an issue of definition. In the event that there was justification to extend regulation of some form to unauthorised providers there is the knotty issue of how you would decide who fell within the scope of regulation. Presumably this would turn on the definition of legal services but it is not clear whether this would be based on the Legal Service Act 2007 definition of “Legal Activity” or whether it would be redrawn as proposed by Professor Stephen Mayson with the inclusion of mediation and alternative dispute resolution (ADR). It is difficult to comment on the merits of extended regulation if we do not know where the boundaries lie and what would be encompassed and excluded.

Q14. We recommended a review of the independence of regulators both from the profession and from government, to the MoJ in the CMA market study. Is that review still merited, taking into account, for example, the work that has been undertaken by the LSB on IGRs and the arguments put forward by the IRLSR?

72. As we stated in our 2016 response to further CMA questions, “An independent legal profession is a vital foundation for the rule of law. The legal system of the UK is widely seen as a model precisely because the legal professions operate independently of government.”⁴⁸ In our view, there has been and should be no change to this position.

73. A significant amount of work has already been undertaken by the LSB in the last few years on the independence of regulators from the profession culminating in the publication of the revised Internal Governance Rules in July 2019 which pushed the interpretation of their powers as described in the LSA07 to the limit. We recently demonstrated to them our compliance with the new rules and we are confident that

⁴⁸ Bar Council response to CMA follow up questions, paragraph 44.

the regulator is able and is perceived to be able to regulate with absolute independence. Compliance with the IGRs will now be monitored continuously through the regulatory performance framework following the transition period. A further review by the MoJ in this area is premature, unnecessary and inappropriate use of resources.

74. We would also like to note, as we did in our response to the LSB Draft Business Plan 2020, that the IGR project spearheaded by the LSB required us to respond to four consultations.⁴⁹ This necessitated significant work by senior office holders at the Bar Council, detracting resources away from other important work we do in relation to fulfilling other regulatory objectives. The fact that the LSB proposed rules that the Bar Council viewed as *ultra vires*, made the process more time-consuming and costly than it might otherwise have been.

Q15. What work has been undertaken by regulators to reduce the regulatory burden on providers of legal services for individual consumers and small businesses? What impact has this had?

75. We view that the regulator is best placed to respond to this question. We would though like to comment on a few recent regulatory changes which will have impacted barristers.

76. The regulatory burden on barristers may in fact have increased or is increasing, rather than the decrease envisaged by the question. As an example, the BSB previously introduced a CPD regime which required barristers to complete 12 hours of accredited CPD points per year. Under the new outcomes-focused approach CPD regime, introduced in January 2017, the “Established Practitioners Programme”, there is no obligation for barristers to attend accredited courses or to complete a set number of CPD hours. Instead, barristers are required to reflect on their practice, implementing a programme of individual learning and development.⁵⁰ In 2019, the BSB commissioned independent research into the effect of the new CPD regime on barristers. We note in the research that “Overall, the evaluation suggests that, although a small minority of barristers would prefer to return to the old system, a majority like the flexibility of the new scheme and the range of CPD choices and

⁴⁹ <https://www.barcouncil.org.uk/uploads/assets/a30cd97b-e819-47d7-ab0ad828a6f3e544/Bar-Council-response-to-LSB-Draft-Business-Plan-2020-21.pdf>

⁵⁰ More information on the CPD regime can be found here: <https://www.barstandardsboard.org.uk/for-barristers/cpd.html>

content that can now be included as CPD. Criticisms of the new scheme are focused on the administrative burden on individual barristers associated with completing the paperwork requirements for the scheme.”⁵¹ Anecdotally, we understand this more risk based approach has placed an increased burden on barristers who are taking the new regime seriously and trying to adapt to its new criteria.

77. Another change on the regulatory landscape is the review of the BSB Handbook currently being undertaken by the BSB. In 2019 the BSB launched a Call for Evidence to help it scope a review of the BSB Handbook. As noted in our response to the Call for Evidence, the superseding of the previous Code of Conduct and Annexes with the BSB Handbook in 2014 was a significant change, to which the profession is to a large extent still adjusting.⁵² At the Bar Council, we have an Ethical Enquiries Service which is a confidential service for the benefit of barristers and staff . It serves to assist them to identify, interpret and comply with their professional obligations under the BSB Handbook. On average, the service receives 6000 calls to the line each year. In the twelve months from April 2019 to March 2020, 683 written queries were received and responded to by the team, an increase from 610 for the same period in 2018/2019 and 576 in 2017/2018. There was a notable uptick in written queries when the Covid19 crisis began in March 2020, with the number of queries almost doubling that month. The phone lines were also very busy during this time. The volume of queries received demonstrates that barristers take their ethical obligations seriously and aspire to high professional standards which in turn provides additional consumer protection. As a result, a potential change towards a principled or outcomes focussed approach to the BSB Handbook is unlikely to decrease the regulatory burden on barristers but may actually have the result of increasing the regulatory burden, as barristers try and adjust to the new rules.

78. Aside from the BSB, we also note that the Bar is still adapting to a plethora of regulatory changes including the General Data Protection Regulations, to which there are at least six guidance documents published on the Bar Council’s library of advice documents, the Ethical Enquiries Hub.⁵³ In addition there are the Money Laundering Regulations, of which it is the duty of every barrister to understand the principles of money laundering and terrorist financing and how to recognise them. The Money

⁵¹ <https://www.barstandardsboard.org.uk/uploads/assets/dd46364c-4904-421b-9686037fd6155e95/IRN-Research-BSB-CPD-Evaluation-Research-Report-Final.pdf> , page 7

⁵² <https://www.barcouncil.org.uk/uploads/assets/14c30381-0723-4d57-b5e55c6d74ea55f3/barcouncilresponsetobsbcallforevidenceonbsbhandbook.pdf>, page 8

⁵³ <https://www.barcouncilethics.co.uk/>

Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 were updated by the new Money Laundering and Terrorist Financing (Amendment) Regulations 2019 on 10 January 2020. The Bar Council Ethical Enquires Hub also has guidance produced to assist barristers with their obligations to these regulatory requirements.⁵⁴

79. With the combination of regulatory changes from legislation and regulator-led changes from the BSB, we cannot conclude that the regulatory burden has decreased for barristers.

Q16. What impact has the removal of restrictions to allow solicitors to practise in unauthorised firms had on the availability of lower cost options in the sector?

80. We are not well placed to respond to this question.

Bar Council

07 October 2020

For further information please contact:

Sarah Richardson, Head of Policy, Regulatory Affairs, Law Reform and Ethics

The General Council of the Bar of England and Wales

289-293 High Holborn, London WC1V 7HZ

Email: SRichardson@BarCouncil.org.uk

⁵⁴ <https://www.barcouncilethics.co.uk/wp-content/uploads/2017/10/Money-Laundering-and-Terrorist-Financing-updated-20182.pdf>