



Bar Council response to the Competition and Markets Authority Legal Services Market Study

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 paper entitled 'Market Study into the Supply of Legal Services in England and Wales.'¹
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 (BSB).

Overview

4. Within the wider context of the legal services market, the Bar is unique in the way that it operates. The self-employed Bar, which constitutes approximately three quarters of the profession² (the remaining quarter being employed), operates first and foremost as a referral profession, being referred work on behalf of a lay client though professional clients. Professional clients are usually solicitors but they could also be in-house counsel, foreign or European lawyers or persons authorised by other approved regulators such as legal executives or notaries, which widens access to the Bar for those seeking high-quality, specialist legal advice.
5. This model has a number of advantages for the consumer; the lay client is referred to a specialist at the point they are required, which keeps costs down as much as possible. Clients

¹ [Competition and Markets Authority \(2016\) Legal Services Market Study](#)

² As of 1 February 2016 there were 12,770 Self-employed barristers, 3,909 employed barristers and 249 who held a dual practice certificate - meaning they can be simultaneously employed and self-employed

have a wide choice of barrister as barristers in chambers are independent (because there are no shared financial incentives) and self-employed, which enables those within the same set to act against one another and to compete against each other for the provision of services to clients. This is particularly important in specialist areas of law where only a handful of barristers have the requisite expertise.

6. The chambers model is very lean with few support staff aside from the clerking team. It has low overheads and, as a result, barristers are able to offer extremely competitive high quality advice and services, resulting in consequent lower costs for clients. 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.

7. 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.

8. There are other avenues of instructing the Bar but it should be stressed that these account for a relatively small volume of work compared with instructions that emanate from a professional client and this context needs to be borne in mind. Licensed access enables sophisticated lay clients (professionals from other sectors, such as actuaries, surveyors and architects), to obtain a licence from the BSB to instruct the Bar directly. Equally, an organisation may derive an automatic right to instruct without need for a professional client if they are listed on the Recognition Regulations.³ Crucially, the instructions have to be on a matter relating to their area of expertise. For instance, an actuary could not instruct a barrister on a personal family matter through licensed access as the instruction would need to relate to his/her work as an actuary. There are thus efficient safety mechanisms in place to protect the client.

9. Any individual can instruct a barrister who is accredited to undertake public access work. Such barristers need to have completed additional training and be registered to accept instructions in this way. There are 5,315 public access accredited barristers.⁴ This is almost half the self-employed Bar. It should be noted, however, that public access tends to be best suited

³ <https://www.barstandardsboard.org.uk/regulatory-requirements/for-barristers/licensed-access-recognition-regulations/>

⁴ This figure is correct as at Wednesday 27 January 2016.

to advice on non-contentious matters and pre-trial advice. Conversely, it is not well suited to transactional work. This requires the additional infrastructure that other types of organisation such as law firms are able to provide such as paralegals, administrative staff and large teams that can take on joint responsibility for pieces of work.

10. As employed barristers are able to instruct self-employed barristers, these barristers sometimes receive instructions from either an SRA or BSB-regulated entity, law firm or private company where they may be in-house counsel.

11. There has been a limited formation of multi-person entities by barristers to date. In our view 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).

12. In relation to SMEs, there are a number of potential access routes to a barrister. As previously outlined, instructions could emanate from solicitors, licensed access or public access. The mode of access will be influenced by the complexity and nature of the legal issue. For example, if the lay client needs legal advice in relation to an ongoing or a business development matter (such as advice on an employment contract or an employment issue, advice on a property matter such as a new leasehold, or advice in relation to a contract which the SME is considering entering into) they could come directly to a barrister via public access. By contrast if the SME is engaged in complex litigation they will probably need to instruct a solicitor, since the case may be unsuitable for public access, although they could come directly to a barrister first for advice on the merits of the case and on the steps which need to be taken.

13. A number of regulatory restrictions have been lifted that facilitate market liberalisation and have enabled the Bar to deploy greater flexibility in the way in which it provides services to clients. These developments include the ability to supply services directly to the public, the possibility of setting up an entity regulated either by the SRA or the BSB, and the potential for accreditation to conduct litigation. We think it likely that this has generated greater competition within the legal services market, though it is perhaps too early to say. A barrister can provide the full range of services to clients up until and including the hearing provided the case is suitable for public access and the barrister is authorised to conduct litigation. This means they are able to compete with other service providers as regards the provision of a comprehensive range of services.

14. All of these developments are welcomed by the Bar Council since they offer greater choice for clients and also for barristers. They allow the Bar to explore new modes of practice and to compete with other legal service providers more effectively in certain areas of work. The Bar Council is of the belief overall that the referral model is still the most efficient business model for the client as it enables targeted access to a wide range of competing specialist legal advice and advocacy services. It is also a model, which provides the consumer with access to the best specialist advocate in any particular field irrespective of whether the consumer goes to a smaller high street solicitor's firm or to a larger national firm in the first instance.

15. We should stress that the necessarily limited scope of the market study neglects other factors that influence consumer choice. For example, certain recent government-led policy changes have had an impact on the market and have made it difficult for individuals and SMEs to gain access to legal services because of cost. The cuts to legal aid that took certain family and civil cases outside the scope of legal aid, came about through the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) in 2012. Among other things, this has removed the ability of claimants and defendants to gain financial assistance for their legal representation in divorce, save for circumstances where there is an allegation of domestic abuse.

16. In addition, recent court and tribunal fee increases have made a court or tribunal case too expensive for some. Court fees for divorce have risen almost four-fold, from £140 to £550.⁵ Employment tribunals have seen a 70% drop in claims in the last year⁶ and it is thought that this is not attributable to spurious claimants being deterred but rather by the substantial increase in tribunal fees making it unaffordable. The consequent reduction in work has impacted the ability of chambers in criminal and mixed criminal/civil sets to take on pupils in recent years given the costs. This has restricted access of aspiring barristers to the profession. The Bar Council suggests that such contextual factors ought to be borne in mind when considering the legal services market at present.

17. With respect to the CMA's third theme of the market study, the Bar Council is concerned that, because the regulatory objectives set out in Section 1 the Legal Services Act 2007 are so broadly drawn, regulators do, on occasion, stray into territory which is more properly for the profession itself. To give an example, we question the BSB's involvement in education policy concerning those who are not yet called to the Bar and are not, therefore, yet regulated by them. Developing strategies to increase the diversity of the legal profession is clearly an area that would be better suited to, and more effectively carried out by, the representative body.

18. It would be better for the public and for the profession if the BSB focused on its core function of regulation, which serves to protect the public interest. We are of the view that regulation should always be risk-based and proportionate, and that the regulators should take more account of the direct costs and regulatory burdens they impose on the profession. We question whether the supervision of chambers is proportionate given chambers' limited role in the provision of legal services. For example, neither chambers nor their individual members are permitted to handle client money and chambers have limited contact with a client's affairs. Unlike lawyer-only entities or ABS, chambers are not regulated organisations as it is the barrister-members that provide the legal services and not chambers. Compliance with the supervision requirements may increase the costs of regulation both for the BSB (with a knock-on impact on barristers' practising certificate fees) and chambers who dedicate time and money to meet the supervision requirements. These costs will inevitably create a knock-on effect for the consumer through higher fees.

⁵ <http://www.independent.co.uk/news/uk/politics/soaring-court-fees-will-discourage-ordinary-people-from-seeking-justice-a6835231.html>

⁶ *Ibid*

19. That said, we are very supportive of a specialist regulator for the Bar. 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 regulator is also more likely to ensure that the costs of regulation are proportionate to the regulatory risk posed.

Case studies

Do you agree with our three proposed case studies?

20. We do not have any concerns about the proposed case study areas. Although the CMA study explicitly excludes criminal law, it should be noted that the effect of cuts to legal aid in both the civil and criminal spheres has an impact on the civil sector of the Bar and to any statistical information that pertains to the entire Bar. This context needs to be borne in mind when considering the legal services market as a whole.

21. The case study areas are of mixed relevance to the Bar. The Bar does not generally undertake work on wills. Employment law, by comparison, is an area where both solicitors and barristers take an active role.

Do you agree with the scope of our case study on commercial law services?

22. Commercial law is an extremely broad area of practice. We understand that the CMA is focusing, in particular, on commercial law issues that concern SMEs and especially, on smaller start-ups of up to ten people. Many barristers undertake commercial law both domestically and internationally but solicitors often undertake most of the work in relation to contract formation, which the CMA indicated may be an area of interest.

Theme 1: The ability of consumers to drive effective competition through making informed purchasing decisions

What information do consumers use to judge the quality of legal services and/or legal services providers? What price information is made available to consumers? Do consumers find it easy or difficult to compare the quality and prices of legal services?

23. Professional and licensed access clients will generally be sophisticated repeat customers and will have in-depth knowledge of the market for barristers' services. They will usually use one or more of the following information sources to assess the quality of a barrister:

- 23.1. Chambers' websites, which have detailed information on barrister members. Each barrister usually has their own webpage setting out a comprehensive CV detailing qualifications, practice areas, notable cases and quotes from clients. The website may also have articles and blogs written by members which demonstrate their expertise and knowledge;

- 23.2. Speaking to the clerking team, who will have a detailed knowledge of their barristers' areas of practice;
- 23.3. Professional Directories, such as *Legal 500* and *Chambers and Partners*;
- 23.4. The Bar Council and Thomson Reuters search engine, "[Bar Directory](#)"
- 23.5. The BSB Barristers Register⁷ which also provides information on any disciplinary action against a barrister;
- 23.6. The Specialist Bar Association websites, where a client is looking for a barrister in a particular area of law. A full list of the Specialist Bar Associations can be found on the [Bar Council website](#).
- 23.7. [The Bar Council website](#);
- 23.8. Articles in the legal press written by barristers which demonstrates their expertise in a particular area;
- 23.9. Previous experience of working with a barrister or on a case on which the barrister was acting for the other side or a recommendation from a colleague;
- 23.10. Whether the barrister has been awarded the QC title (further details on page 7);
- 23.11. The barrister's number of years of experience (known as years' call).

24. Public access clients are less likely to have experience of the legal services market. But they can use all the above-mentioned research methods and can also use a Bar Council search engine that only lists public access qualified barristers. This is called the [public access portal](#).

25. 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 (see below).

26. Clerks (and in public access cases, the barrister themselves) will happily discuss fees with clients and can structure them in a way which meets their specific needs, as well as offering a range of fees depending upon the client's requirements, reflecting the fact that individual barristers within chambers compete with each other for work as well as with barristers from other chambers. This is a very flexible system and clients can also obtain estimates from various chambers to enable them to compare costs. Clerks are always mindful of the need to keep fees at a competitive level, so as to not lose out on business.

⁷ <https://www.barstandardsboard.org.uk/regulatory-requirements/the-barristers'-register/>

27. There are four main ways in which fees are structured: hourly fee, set fee for specific activity or series of activities (sometimes called staged fees), conditional fee agreement and capped fee.

28. Third party funding, where a third party funds the case and takes a percentage of any financial settlement, is also sometimes used such as Legal Cost Finance. This can be useful in instances where an individual is otherwise unable to afford to bring their case.

29. The Bar Council is currently conducting research to establish whether there is sufficient demand to set up a Bar-led quality mark, demonstrating excellence in chambers management. This would cover some areas relevant to the client's experience such as client care (encompassing among other things transparency on fees and a robust complaints procedure), case management and chambers management.

How do providers of legal services compete with each other in seeking to win new business? Do they face any difficulties in winning new business?

30. The key driver of competition for the Bar is expertise. We are not aware of any specific difficulties in winning new business in the areas considered by the CMA market study. By developing expertise in specific practice areas, barristers are able to become specialists in particular areas of law and build up their reputations as experts in their field. They do this in a number of different ways. This can include performing well in high profile cases, writing specialist legal publications, being appointed to key positions such as Treasury Counsel and through involvement in specialist legal organisations (e.g. the Society for Construction Law). This is then communicated to clients through marketing and advertising.

31. The Bar is an inherently competitive profession with intense competition at all stages of training and practice. There is rigorous pre-qualification competition for pupillages and tenancies, and healthy competition continues between members of chambers to build up their respective practice areas. Barristers also compete with barristers in other chambers in order to secure instructions in cases within their practice areas. Rigorous competition helps to maintain high quality standards. The Queen's Counsel (QC) accreditation also drives standards and enables consumers to assess quality. The accreditation is awarded by an independent body, the QC Appointments body, which assesses all applicants by reference to certain pre-set and objective criteria. Only those who demonstrate that they meet these criteria to the necessary standard of excellence become Queen's Counsel (receive 'silk') as a mark of outstanding ability.

32. Members of the self-employed Bar are constantly competing with each another and with other legal professionals (notably solicitors which is where most overlap occurs) and with individuals in the non-regulated sector, for example McKenzie friends. In employment law, competition has become particularly fierce owing to a drastic fall in the number of employment claims being taken to tribunal by claimants. This is largely due to increased tribunal fees.

33. Self-employed barristers have no corporate body to hide behind and so must consistently perform to a high standard to preserve their reputations and continue to gain instructions.

34. Barristers do face barriers with respect to bulk contracting for local authority panel work. The Bar Council understands that certain local authorities require membership of the Law Society as a prerequisite for contracting directly with them. Although this may not be relevant to the CMA focus on provision of legal services to consumers and SMEs, it is still evidence of a wider distortion within the legal services market.

35. On the whole, chambers are not set up to undertake bulk work and do not generally have large teams of paralegals, which would substantially increase chambers' overheads and undermine the efficiency of the chambers business model. This an area of work that is better suited to solicitors' firms or entities. However, because of the potential problems of conflicts within entities as outlined above, the entity may be unable to take on this work. For example, an entity undertaking a bulk contract with a local authority would be conflicted out from acting against the local authority in future unlike a self-employed barrister. This reduces choice for consumers.

Do intermediaries (such as estate agents, insurers and accountants) play a role in helping consumers to choose legal services providers?

36. As outlined above, the Bar is, by nature, primarily a referral profession. The majority of instructions emanate from a professional client, who acts as the intermediary between the lay client and the barrister being instructed. Professional clients operate within the same marketplace as the Bar and, in our experience, are expert at assisting the lay client to instruct a barrister who can provide expert, unbundled legal services according to need. Any professional client, whether from a small high street firm or a large corporate law firm, is able to instruct the best possible advocate for the case, whether a junior barrister or a senior QC, and to obtain competing cost information regarding those barristers available and appropriate for the case prior to doing so.

37. Public access is not suitable for all types of instruction. Transactional work that requires a large infrastructure to support it is not suitable for the (low overheads) chambers model. It may be more advantageous to instruct a solicitor in a firm with the necessary infrastructure. Barristers considering whether to take on a public access instruction have a duty, in rC129 of the BSB Handbook,⁸ to take such steps as are reasonably necessary to ascertain whether it would be in the best interests of the client or in the interests of justice for the public access client to instruct a solicitor or other professional client. Rule C123 makes it clear that this an ongoing duty that persists for the duration of the case; at all times, the barrister must take into consideration the developing circumstances. If a barrister decides a change of representation is necessary, s/he has a duty to inform the lay client and to withdraw from the case unless a solicitor or other professional client is appointed.

⁸ [BSB Handbook \(September 2015\)](#)

38. There is anecdotal evidence of increasing use of intermediaries particularly for public access instructions. Clarity about the role of the intermediary is required in direct access client care letters. In accordance with rC125, the barrister is obliged to set out the work that s/he has agreed to perform and the provisions of the Handbook that apply to them. Specifically, in cases where an intermediary instructs on behalf of a lay client, the barrister must make it clear to the lay client that they are independent of, and have no liability for, the intermediary and the fact that the intermediary is the agent of the lay client and not of the barrister. This reflects the fact that a barrister's core duty is always to act in the best interests of her/his lay client, not to the intermediary.

Theme 2: Whether information failures expose consumers to harm that is not being adequately addressed through existing regulation or redress mechanisms

Are current regulations effective in protecting consumers' interests?

39. Yes, we are of the view that the current regulations concerning the Bar effectively protect clients' interests. The Bar has a strict ethical code, which puts the lay client at its centre. Barristers have a duty to ensure clients are not misled about the nature of the services that the barrister is providing to them or the basis for charging. This is clearly outlined in rC19 of the Handbook. The barrister has a duty to ensure that there is clarity about the terms upon which services are provided including clear information about the basis of charging and how those providing the services are regulated. Barristers are encouraged to take a risk-based approach when deciding how to comply with this duty and all times must consider how matters will appear to the lay client to ensure that they are protected.

40. In accordance with rC81 of the Handbook, barristers need to inform the lay client if they have a material commercial interest in any organisation that the barrister intends to refer them, and to keep records of referrals so that the BSB can inspect them.

41. There is also a duty on all barristers to self-report and report other barristers to the BSB where there are reasonable grounds to suspect that serious misconduct has occurred. This system helps the BSB readily identify misconduct. The range of sanctions from fines to disbarment that can be imposed on barristers that are found to have breached the conduct rules ensures that high standards are maintained.

42. Barristers are prohibited from paying or receiving referral fees in accordance with rule C10 of the BSB Handbook. It is vital that this prohibition be maintained. The incentive to pass a case to someone paying a fee not only serves to restrict consumer choice but can also result in the lay client receiving a substandard service because the work is not referred to the best quality advocate. The Bar Council has been calling for a complete prohibition on referral fees across the legal services sector for this reason for many years.

43. We have no evidence to suggest that the complaints system in chambers is not working. Historically, barristers have had a much lower ratio of complaints per barrister than solicitors. The Handbook dictates that barristers are ethically obliged to act in their clients' best interests, provide a competent standard of work and service, and keep the affairs of each client confidential. Barristers are trained on their ethical obligations during the Bar

Professional Training Course (and must pass an exam on the topic) and must remain mindful of them throughout their career.

Are consumers aware of the existing redress mechanisms? Are they being pointed to redress mechanisms by providers when appropriate

44. Yes. Barristers are required by the Handbook at rC99 to inform clients of how to make a complaint, and to whom, when they are instructed. They are also required to specify their right to complain to the Legal Ombudsman and the time limits for making a complaint. If the barrister is doing referral work then the lay client can complain directly to chambers or to the BSB-authorized body, without the need to go through the professional client. It is our understanding that chambers follow this requirement.

45. The BSB has categorised chambers as either high, medium or low risk depending on the potential impact of the risks posed by chambers to lay clients if things go wrong. Most chambers that were identified as higher impact in the BSB's 2015 report on high impact supervision returns⁹ received fewer than five complaints over the previous 12 months. However, the report also recognises that:

“...a very low complaints rate may not necessarily be a good indicator. The underlying cause could be that lay clients do not know how to make a complaint... This is an area where both the BSB and the Legal Services Board have placed a considerable amount of focus, and we will continue to do so. Whilst we recognise that, for some, the need to rely on solicitors can present difficulties, chambers must take proactive steps to ensure that lay clients know how to make a complaint. This has generated considerable debate in the past, but we were encouraged to hear many chambers have put processes in place to get assurance from their solicitors that they have passed on details of their complaints processes.”

46. The BSB has identified chambers' requests for feedback from clients as an area where they ought to improve along with ensuring that information about time limits for making a complaint and the Legal Ombudsman's contact details are correct.

Are redress mechanisms effective in addressing consumers' complaints?

47. We do not have any evidence to suggest that the current redress mechanisms available to lay clients are not fit for purpose. We are aware from the BSB High Impact Supervision report that “most chambers were able to describe some action taken as a result of feedback or complaints, even where complaints numbers were low.” Good practice examples given by chambers included, but were not limited to, reviewing feedback to identify themes, offering training or further support to a barrister subject to a complaint, making changes in chambers following feedback/complaints.

⁹https://www.barstandardsboard.org.uk/media/1707974/2015_10_supervision_report_high_impact_themes_comms.pdf

48. Clients who have gone through the chambers complaint process and are dissatisfied with the outcome can refer a service complaint to the Legal Ombudsman (LeO). We do not have information to assess the quality of the redress mechanisms offered by LeO.

49. Self-employed barristers are obliged to have at least £500,000 of cover for professional indemnity insurance from the Bar Mutual Indemnity Fund. If they are found to be negligent there is some financial redress available to the client. Employed barristers are required to have professional indemnity which covers the work they undertake.

Theme 3: Impact of regulations and the regulatory framework on competition

Do the current regulations create disproportionate barriers to entry and expansion into the legal services sector? What difficulties have new entrants faced?

50. Pupillage, the vocational stage of a barrister's training can act as a barrier to entry to the profession with more than 1,000 Bar Professional Training Course (BPTC) graduates each year competing for the 400 to 500 pupillages that are advertised each year. The competition is compounded by BPTC graduates from previous years who did not secure pupillage at their first attempt continuing to compete for a pupillage place. There are some necessary regulations in place that restrict access, such as the requirement for chambers to be accredited as a Pupillage Training Organisation by the BSB and meet the minimum funding requirement of £12,000 per year, the latter of these being critical to promoting social mobility in the profession. However we believe that the number of places available is driven mainly by the market. As already mentioned, chambers have to fund each pupillage to a minimum of £12,000 per year and many must offer more to attract the best candidates. This is particularly so for sets that work in privately-funded areas of law with a number of chambers offering upwards of £60,000 per year (this is however, the exception rather than the norm). Chambers must also have the resources available to accommodate and train the pupil and be confident they have enough work to give to a pupil during their pupillage. Most will also want to have sufficient work to be able to offer a tenancy upon successful completion of pupillage. The intense competition for pupillage that results from the over-supply of aspiring pupils results in high standards being maintained. This helps maintain the quality of legal services delivered to the consumer by ensuring that the best succeed.

51. The high numbers of BPTC graduates that have no realistic prospect of securing pupillage is an issue that the Bar Council is actively seeking to address. We are concerned that the recently introduced exam that applicants are required to sit to gain admittance to the Bar Professional Training Course, called the Bar Course Aptitude Test (BCAT), is set at too low a level and that those who do not even meet the current standard are able to retake the exam repeatedly provided they pay the £150 fee each time. The Bar Council responded to a recent BSB consultation in which it stated its support for a review of the current entry requirements for the course.

52. With regard to the structure of the BPTC, the Council of the Inns of Court (COIC) and the Bar Council have recommended a two-part model. A student would have to pass Part 1 of the course (i.e. the knowledge element) before being permitted to progress to Part 2 (the

skills element). The Bar Council supports this proposal and has suggested that Part 1 could be undertaken online. This structure would act as a filter for applicants to the profession who may not possess the requisite skills for a career at the Bar and will help avoid them spending a significant sum of money without any realistic prospect of obtaining pupillage afterwards. The Bar Council wishes to encourage diversity and the brightest students to become barristers irrespective of their background. The profession runs a number of programmes to promote this goal including careers information, a pupillage fair, e-mentoring, Bar placements for school children and national Bar mock trials for students.

53. The junior Bar faces a number of challenges in the volume of work available to it and in recovering unpaid fees. According to a Bar Council-commissioned report,¹⁰ drafted by His Honour Geoffrey Rivlin QC, this is particularly acute for criminal practitioners whose fees have been adversely impacted by sustained cuts to legal aid. Junior barristers in all areas of practice are facing competition from the unregulated sector in the form of remunerated McKenzie friends. Whilst competition is a healthy component in any market, there is no protection for the consumer if unregulated individuals do not perform to an appropriate standard. Unlike the junior Bar, McKenzie friends are not required to have professional indemnity insurance and any complaints against them will not be considered by the Legal Ombudsman.

54. There is inconsistency of regulation between employed and self-employed barristers, which in our view¹¹ restricts access of consumers to the Bar. Under the current regulations, barristers who work for organisations that do not provide legal services as part of their core business (defined as non-authorized bodies with the Legal Services Act 2007) are prohibited from supplying any legal services to the public, save for pro-bono work. This prevents barristers from acting, for example, for clients of their employer or other third parties in the course of their business and unduly restricts access of the consumer to this type of employed barrister. We do not consider that the regulatory risk posed by such an arrangement is sufficient to warrant this restriction. The risk is no higher than, for example, any public access instruction and, in our view, is a barrier that prevents barristers from expanding their practice.

Does the current regulatory framework impose disproportionate costs on legal services providers?

55. As outlined above, we are concerned that there has been a dramatic increase in the type of activities undertaken by the regulators. Whilst we appreciate the need for evidence-based policy-making, we are reminded of the cost and scope of the LSB-commissioned research on the operation of the cab rank rule. This was widely criticised for costing in excess of £21,000 – a cost that is borne by the profession through practising certificate fees. We

¹⁰ http://www.barcouncil.org.uk/media/342215/rivlin_report_final_march_2015_.pdf

¹¹ Our full response to the BSB consultation on this subject can be seen here: http://www.barcouncil.org.uk/media/408204/bar_council_s_response_to_bsb_s_consultation_on_ame_ending_the_definition_of_employed_barrister_non-authorized_body_-_final.pdf

strongly suggest that regulators focus on their core regulatory activities. In our response to the LSB 2015 consultation¹² on their strategic and business plan, we noted,

“The LSB’s plans have an indirect effect on the costs of the BSB and therefore on the cost to each individual barrister”.

56. The cost of regulation from the BSB is considerably greater and more direct. In our response¹³ to the BSB Consultation on “The Development of a Risk-based Approach to Supervision”, we expressed concern that, “the proposed new regulatory regime may significantly increase the costs and burden of compliance. We expressed disappointment that no assessment had been carried out to establish the potential consequences to the profession”. Risk-based supervision is still in its infancy, although anecdotal evidence would suggest that it has led to an increased administrative burden, which in turn leads to higher staff costs for compliance.

57. The CMA suggested that the regulation of the Bar is less onerous than the regulation by the SRA of solicitors. We have suggested that one of the key difference between barristers and other legal professionals is that they are prohibited from handling client money and have lower regulatory risk. Regulation, therefore, needs to be proportionate to the level of risk and should be reflected in the cost of regulation. With respect to entity regulation, the Bar Council argued, in response to a BSB entity consultation¹⁴ that S69 powers of intervention, enabling the regulator to seize client files and take over the conduct of a case in the event of a failing entity, was disproportionate to the regulatory requirement of ensuring protection for consumers. This is because BSB-regulated entities are not permitted to handle client money and these powers, whilst available to the SRA had rarely been used, even though SRA entities are permitted to hold client money. The crucial point is that neither barristers nor barrister-led entities are permitted to hold client money for any purpose at any time and there is no need, therefore, for extra regulatory powers since there is no risk of misuse of client funds.

58. The Bar Council, conscious of this prohibition, set up BARCO, which is signed to be a transparent vehicle for the management of legal costs. BARCO is a third party Escrow account, owned and operated by the Bar Council, which preserves the prohibition on handling client money and consequently protects the consumer. It enables the Bar to offer a wider range of services to consumers.¹⁵

¹² Available on the Bar Council website here:

http://www.barcouncil.org.uk/media/336531/legal_services_board_strategic_plan_2015_18_and_business_plan_2015-16.pdf

¹³ Available on the Bar Council website here:

http://www.barcouncil.org.uk/media/214569/bc_response_to_bsb_consultation_on_regulation_may_2013.pdf

¹⁴ Available on the Bar Council website here:

http://www.barcouncil.org.uk/media/382111/bar_council_response_to_amendment_to_bar_standard_board_powers_consultation.pdf

¹⁵ More information about BARCO can be found here: <http://www.barcouncil.org.uk/supporting-the-bar/barco/>

What has been the impact of ABS entry on competition in the legal services sector, including on innovation, price and quality? Are the rules governing ABSs unnecessarily restrictive such that they have hindered the entry and expansion of ABSs?

59. The Legal Services Act 2007 provided the backdrop for the development of both lawyer-only entities and ABS that include other professionals, lay people and lawyers as owners and managers. The BSB has submitted an application to the Legal Services Board to become authorised to license ABSs and we expect to learn the outcome of that application this year. Currently, barristers are able to set up an SRA-regulated ABS and join ABS as employed barristers. It is our understanding that, relative to setting up chambers or a firm of solicitors, there are high start-up costs and a higher administrative burden associated with setting up an ABS. We assume that the higher cost is associated with the higher level of risk associated with lay members acting as managers and owners of this type of structure. It follows that the fees could be reflective of the cost of regulation. We do not consider that the costs are prohibitively high given that approximately 600 ABSs have so far been formed.

60. With respect to lawyer-only entities, there are currently 39 entities regulated by the BSB and most of these are single person entities. The Bar Council provides practical support and guidance to those who are interested in setting up such a structure. The majority of those we spoke to came to the conclusion that the chambers model was working well and that there was no reason to set up an alternative entity. The problem of conflicts as outlined earlier in this response is another key reason why the chambers model is preferable for the great majority of self-employed barristers. It is our view that entity regulation is not unnecessarily restrictive and that, ultimately, the market will determine how much take up there is of this type of structure.

61. We consider that there is a strong case for a specialist regulator for barristers and entities focused on advocacy and litigation. As neither BSB-regulated entities nor individual barristers hold client money, they present a lower regulatory risk than SRA-regulated entities. It follows that the associated regulation and its cost should be lower. A specialist regulator that is tailored to the activities that barristers undertake has the expertise, buy-in from the profession and is likely to regulate more effectively. This in itself exerts downward pressure on the cost of regulation, a saving that can be passed on to the lay client.

Have there been opportunities for more competition in particular legal service areas as a result of regulatory reform?

62. Licensed access directly to barristers facilitates greater consumer choice and lowers cost by (potentially) removing the need to engage solicitors.

63. Barristers can now apply to become authorised to conduct litigation which could in principle generate greater competition between barristers and solicitors.

64. Public access barristers can provide services directly to clients, thereby increasing the extent of choice available directly to consumers. As outlined above, certain types of work are more suitable for public access than others.

65. As well as acting on either an employed or self-employed basis, barristers can also act in a dual capacity, provided they have a protocol in place to resolve any potential or actual conflicts that could arise as a result of this. This liberalisation which occurred in 2010, has enabled barristers to innovate and develop their practices, increasing competition within the market. For example, a barrister may predominantly practise as a self-employed barrister but, as a result of the removal of regulatory restrictions, could also undertake part-time work as an employed barrister for a law firm or other type of organisation.

Bar Council

Wednesday 3 February 2016

*For further information please contact:
Sarah Richardson, Head of Policy: Regulatory Issues and Law Reform
The General Council of the Bar of England and Wales
289-293 High Holborn, London WC1V 7HZ
Direct line: 0207 611 1311
Email: SRichardson@BarCouncil.org.uk*