



## **Bar Council response to the Competition and Markets Authority follow-up questions on the legal 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 follow-up questions on the legal market study.
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. This paper should be read in conjunction with the Bar Council's response<sup>1</sup> to the Competition and Market Authority's statement of scope<sup>2</sup> for the market study into the legal services sector.

### **Routes to access**

**Question 1: In paragraphs 23 and 24 of the Bar Council's submission, it is stated that professional, licensed and public access clients all usually use one or more of a range of information sources to assess**

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<sup>1</sup> [http://www.barcouncil.org.uk/media/422489/legal\\_services\\_market\\_study.pdf](http://www.barcouncil.org.uk/media/422489/legal_services_market_study.pdf)

<sup>2</sup> [https://assets.digital.cabinet-office.gov.uk/media/56962803e5274a117500000f/Legal\\_services\\_market\\_study\\_statement\\_of\\_scope.pdf](https://assets.digital.cabinet-office.gov.uk/media/56962803e5274a117500000f/Legal_services_market_study_statement_of_scope.pdf)

**the quality of a barrister (listed in those paragraphs). Does the Bar Council hold any particular information/data which might indicate how different types of client may favour the use of certain information sources over others?**

5. No, the Bar Council does not gather data on the information sources used by clients. As stated in our previous response, the majority of instructions that are passed to barristers come through a professional client to a barrister in chambers. We reiterate that the referral model is bolstered by the professional client's knowledge of the legal services market and their ability to assess the quality of a barrister. The professional client is well-placed to assist the lay client make an informed choice.

6. For anecdotal evidence on preferred information sources we suggest approaching the Institute of Barristers Clerks as it is mainly clerks that receive queries from potential clients in the first instance.

7. The CMA may be interested to see the recently published research<sup>3</sup> on Public Access work commissioned by the BSB and LSB which contains information at 2.3 on clients' routes to it.

**Question 2: In paragraph 6 of the Bar Council's submission, it is stated that 'barristers are strictly prohibited from paying or receiving referral fees, which underpins the integrity of the profession and prevents conflicts of interest'.**

a) **We understand that the Bar Council considers that the ban on referral fees is necessary to maintain the integrity of the profession and prevent conflicts of interest. Does the Bar Council consider it possible for safeguards to be put in place that would enable barristers to receive/pay a referral fee without leading to conflicts of interests or compromising the integrity of the profession?**

8. No. Our reasons relate to the very nature and effect of such fees, and also to the limits on what are properly to be regarded as referral fees. We hope it will be helpful if we give a little more explanation of this. Your question relates specifically to the position of barristers, but our objection to referral fees relates to the whole of the legal services sector.

9. We hold to the view expressed in paragraph 42 of our original submission to the CMA:

'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.'

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<sup>3</sup> <https://www.barstandardsboard.org.uk/media/1754315/public-access-final-report.pdf>

10. Referral fees undermine the proper working of a sustainable and ethical legal services market dedicated to serving both client interests and the public interest, and we do not consider that it is possible to mitigate the conflicts of interest that will ensue if referral fees are paid.

11. It may assist for us to draw your attention to our detailed critique of the payment of referral fees by solicitors which can be found in the Bar Council's response to the 'Improving Regulation: Proportionate and Targeted Measures' consultation paper issued by the SRA<sup>4</sup>. Although this relates to a specific proposal with regard to solicitors acting in cases funded by legal aid, most if not all of the points made would apply to others in the market who operate in similar ways.

12. We do not consider that any 'safeguards' can address the fundamental nature and effect of referral fees. In our response to the SRA, we stated:

'It is sometimes suggested that the payment and receipt of referral fees should be permitted by lawyers because they are not seen as impermissible in other fields and markets. The Bar Council rejects this argument. In particular:

, ..Where referral fees are paid by lawyers to others, the paying lawyers are creating and encouraging a market in which referrals are made inherently on purely financial grounds, contrary to clients' best interests.

Referral fees are, thus, inimical to lawyers' duties and their clients' best interests. They also lead to a distortion of the market without any identifiable or sufficient countervailing benefits.

Referral fees have, in any event, led to unethical and undesirable practices in other markets (such as financial services), the effects of which have had to be addressed after they have happened.'

13. We are aware that organisations such as the LSB have objected to the prohibition on referral fees on competition grounds. We do not agree with those objections. Many of our reasons for disagreeing will be clear from our response to the SRA consultation previously mentioned. In addition, demands for referral fees from barristers are likely to reflect and involve an abuse of market power for personal gain by those instructing solicitors. This is inimical to genuine and proper competition on both price and service quality.

14. We would like to draw out our objections in relation to market power and the effect of cost on legal services from our SRA response:

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<sup>4</sup> Our full response can be seen here:

[http://www.barcouncil.org.uk/media/353206/2015.06.11\\_bar\\_council\\_sra\\_regulatory\\_reform\\_programme\\_response\\_-\\_final.....pdf](http://www.barcouncil.org.uk/media/353206/2015.06.11_bar_council_sra_regulatory_reform_programme_response_-_final.....pdf)

“If lawyers are paying referral fees out of fees which are a ‘reasonable’ fee for their services, or less than reasonable, then lawyers will be providing services at unreasonably low rates. That is simply unsustainable. Not only would that be likely to lead to a reduction in client choice and access to legal services in the medium term (particularly through reduced quality, a reduction in the number of providers, and market concentration), but it would also (1) be likely to lead to reduced incentives to act in the client’s best interests, and (2) inevitably lead to the quality of the legal services being driven down to unacceptable levels through a simple inability of solicitors to sustain them at the level needed for the client’s best interests to be protected and advanced.

This is borne out by the experience in the personal injury sector, before referral fees in that sector were banned: see below. The significant effect of referral fees on the quality of services in that field, through a combination of reducing the amount of time spent on a client’s case and reducing the level of fee earned to the minimum (or below), will inevitably be replicated in the areas of work covered by Outcome 9.6. Indeed, this impact is likely to be exacerbated by the low current levels of remuneration in those areas.

Turning to the effect on the cost of legal services, it is very difficult to see how the payment of referral fees could ever lead to a reduction in costs in these markets.

The fee rates paid are at levels which make this work marginal at best<sup>5</sup>, and there is no source of additional payment other than (if and when legally permissible) the vulnerable clients themselves. For those reasons, there is no scope for price competition of a beneficial sort. So why might referral fees be paid?

The only reason for paying referral fees is likely to be to acquire market share and, thus, market power, leading to a reduction in the number of competing providers. A reduction in the number of providers is highly unlikely to lead to lower costs, either for the public purse or for those defendants in criminal proceedings who are required to contribute to and/or can afford to pay for their own representation.

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<sup>5</sup> For example, Otterburn Legal Consulting LLP, in their February 2014 report for the Law Society and Ministry of Justice into the criminal defence market, summarised the situation in this way:

*“On average firms were achieving a 5% net profit margin in crime. Larger firms with 40+ solicitors were achieving lower margins than smaller firms. Previous reductions in fees, specifically for crown court work, may not yet be fully reflected in these figures.”*

On the contrary, it is difficult to see how the ultimate aim in paying referral fees could be to reduce fee levels (while remaining sustainable), to improve access, or to improve the quality of services within these markets. Thus, the main aims which competition would ordinarily be hoped to encourage are absent.

If market power is concentrated in fewer hands, then that will also increase the risk of referral fees being demanded from other lawyers – particularly advocates – who are needed by those firms to perform particular tasks (particularly advocacy). The Bar Council has explained on many previous occasions why this would be unethical and contrary to the regulatory objectives, including being contrary to the best interests of clients. This would also weaken those providing some legal services, at the expense of others, and lead to a reduction in choice as a result of the weakened service providers withdrawing from the market.

The ability to pay referral fees is likely to lead to some service providers deciding to do so. The result can only be detrimental to consumers, and would be beneficial only to referrers. The only sensible solution is to maintain the ban on the payment of such fees.”

15. We would emphasise the point that is made in relation to cost. If referral fees were permitted across the legal services market, we consider that it is entirely possible that they would become commonplace and that the costs of the barrister or other provider could rise to cover the fee, which would be to the benefit of the solicitor but to the detriment to the client. It would be difficult to see how any countervailing reductions in the fees of solicitors would not outstrip the increases in fees by those (barristers or others) paying the referral fees. The Bar Council considers that there is a significant risk of increase of costs overall rather than in a reduction of costs to lay clients.

16. In addition, the Bar Council suggests that referral fees risk impeding the competitive structure of the market. They risk establishing a network of arrangements which introduce selection criteria for service providers which are based on established contractual relationships rather than the factors of quality and price, which should guide the client’s decision-making in relation to their choice of provider (and the exercise of that choice by a solicitor on the consumer’s behalf, acting in the client’s best interests).

17. We note Lord Justice Jackson’s comments on referral fees in the personal injury market, which we consider to be of wider application:

“... In very many cases, though not of course all cases, referrers simply refer cases to the highest bidder. That is in no sense matching case to solicitor or remedying the information asymmetry. On occasions it leads to clients being sent to the wrong solicitors with potentially damaging results.

... The effect of allowing referral fees is that clients now have less choice than they would if referral fees were prohibited.”<sup>6</sup>

The normal effects of competition are distorted in the context of personal injuries litigation, because the clients generally do not pay the costs. ... Under the present regime, solicitors are not competing to get business on price. Nor are they competing on quality of service. They are usually competing to see who can pay the highest referral fee. Such competition is not beneficial to [clients] or indeed to anybody else, apart from the referrers. Where cases fall under the fast track fixed recoverable costs scheme in CPR Part 45, the amount of costs available is a fixed sum. The more of that sum is paid to the referred, the less are the resources available to devote to the handling of the case. In the context of fixed costs the effect of referral fees is either to drive up the level of fixed costs or to drive down the quality of service or both.”<sup>7</sup>

“... there is no benefit in competition terms to be gained from allowing referral fees.”<sup>8</sup>

18. The Bar Council is concerned that referral fees risk creating information asymmetries between the client and solicitor. Even if the solicitor discloses the fact that a referral fee has been paid and any relevant interests, it may not be possible for the client to discern whether or not the solicitor has been motivated to make the referral on the basis of the fee paid as opposed to the referral being in the client’s best interest. Furthermore, there is no reason to suggest that transparency could solve this problem. The lay client would not be able to discern whether the fee distorted the advice that the solicitor provided. It undermines the role that the Bar Council argues that solicitor’s play in assisting the client choose a barrister based on their knowledge and expertise of the market (See paragraph 7 of our original submission to the CMA).

19. It may also be helpful for us to highlight that there has, on occasion, been some misunderstanding of what constitutes a referral fee.

20. Referral fees are defined as follows in the Bar Standards Board Handbook<sup>9</sup>:

“any payment or other consideration made in return for the referral of professional instructions by an intermediary. For the avoidance of doubt, a payment for the provision of a particular service or for some other reason, and not for the provision or referral of professional instructions is not a referral fee for the purposes of this definition.”

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<sup>6</sup> Chapter 20, paragraph 3.12 ‘Review of Civil Litigation Costs: Final Report (2009).’ Available at: <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>

<sup>7</sup> Chapter 20, paragraph 4.3

<sup>8</sup> Chapter 20, paragraph 4.4

<sup>9</sup> [https://www.barstandardsboard.org.uk/media/1720092/bsb\\_handbook\\_april\\_2015.pdf](https://www.barstandardsboard.org.uk/media/1720092/bsb_handbook_april_2015.pdf)

21. For that purpose, ‘intermediary’ is defined as “any person by whom a self-employed barrister or authorised body is instructed on behalf of a client”.

22. So far as the Code of Conduct applicable to the Bar is concerned, there is an explicit ban on referral fees (as defined) in Rule C10, together with guidance at gC18 on the circumstances under which commissions, referral fees and gifts more generally may compromise barristers’ honesty, integrity and independence under Core Duties 3 and 4 (although there may also, of course, be impacts on Core Duties 2; to act in clients’ best interests, and 5; behaving in a way which is likely to diminish the public’s trust and confidence in a barrister or the profession, as the guidance in relation to referral fees identifies at gC29). The guidance in relation to referral fees also points out that referral fees may be illegal.

23. The ban on referral fees does not prohibit genuine charges for administrative services or marketing services (as is made clear by the definition of referral fees, the guidance at gC31, and the BSB’s separate guidance on the topic to which we refer below), nor would the payment of such charges be a breach of any of the Core Duties. The prohibition does not prevent the development of competitive, innovative services that seek to offer legal services to the public in new ways, or that seek to increase market penetration by barristers, and we do not believe that it has had any such effect: on the contrary, it is important for the development of an effective market that operates in the best interests of clients and in the public interest.

24. For example, a company may set itself up as an introducer, which itself does not provide legal services and does not instruct barristers on behalf of clients, but seeks to put consumers in touch with barristers based on their expertise. The company takes on the costs of marketing and advertising and the barrister pays the company a one off or annual fee to be listed on the website. The payments by the barrister would not constitute referral fees, since the fees are a genuine charge for the company’s services, and are not in return for the referral of professional instructions by an intermediary. This and other pertinent examples of what is not caught by the prohibition are included in the BSB’s ‘Guidance on Referral and Marketing Arrangements for Barristers Permitted by the BSB’.<sup>10</sup>

25. The Bar Council has also issued an ethical assistance document concerning referral fees which can be found on our website.<sup>11</sup>

26. It is noteworthy that after the ban on referral fees was relaxed by the Law Society in respect of solicitors there were a number of high profile cases dealt with by the Solicitors Disciplinary Tribunal leading to solicitors being struck off or suspended in circumstances where they had obtained large

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<sup>10</sup>[https://www.barstandardsboard.org.uk/media/1553648/guidance\\_on\\_referral\\_and\\_marketing\\_arrangements\\_for\\_barristers\\_permitted\\_by\\_the\\_bsb.docx](https://www.barstandardsboard.org.uk/media/1553648/guidance_on_referral_and_marketing_arrangements_for_barristers_permitted_by_the_bsb.docx)

<sup>11</sup> <http://www.barcouncil.org.uk/practice-ethics/professional-practice-and-ethics/referral-fee-prohibition/>

volumes of work by payment of referral fees and compromised their independence and integrity. We would draw the CMA's attention to the Miners Compensation Scheme and *Law Society v Beresfords and Raleys*.

27. We are aware that the CMA's market study does not extend to criminal law, but we think it pertinent to note that the Lord Chancellor has promised to review referral fees in criminal cases stating, "that is not something I will tolerate. Work should go to the advocate most qualified for the job, not to the highest bidder."<sup>12</sup>

**b) Does the ban on referral fees apply to public access barristers?**

28. Yes. It is right that it should do so, bearing in mind the scope of the ban, for the reasons to which we have already referred.

**Question 3: In paragraph 24 of the Bar Council's submission, it is stated that public access clients can use a Bar Council search engine (the public access portal) to research public access qualified barristers. Does the Bar Council place any restrictions on which public access qualified barristers are included within the data filtered by that search engine?**

29. Yes, the barrister must be authorised by the Bar Standard's Board to do public access work and must pay the voluntary Bar Representation Fee (BRF) which is set at a flat rate of £100 per annum, and gives access to a range of benefits. 3,021 barristers are currently on the website (there are 5,391 public access accredited barristers<sup>13</sup>) but their eligibility to use it is now being reassessed in light of any changes that have been recorded in the authorisation to practice process, so this figure may change. It is also for eligible barristers to decide for themselves whether they *wish* to be listed on the portal: not all do so.

**Question 4: Does the Bar Council hold any research/evidence that may provide insight into how public access clients have used the public access portal? In particular, this might include:**

**4a. Feedback on the site from clients**

30. The Direct Access Portal has only been managed by the Bar Council since September 2015 (it was established by two barristers who identified a need for it) so there has not yet been sufficient time to gain feedback. However this is something that the Bar Council intends to do in the near future.

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<sup>12</sup> <http://www.lawgazette.co.uk/law/gove-promises-action-on-criminal-referral-fees/5049927.fullarticle>

<sup>13</sup> Accurate at 20.04.16.



#### **4b. Volume of traffic using site**

31. There is an average of 3,000 visits to the website every week with people looking at an average of four pages per visit and spending an average of three to four minutes on each page.

#### **4c. Numbers that have successfully instructed a barrister via the site**

32. We do not gather such information as the website is designed to have a directory type function. All queries submitted through the website go directly to the barrister or else their clerk and the Bar Council takes no role in the subsequent discussions between potential clients and barristers.

#### **4d. Conversion rates**

33. We do not gather information on this.

#### **4e. Information on webpages visited immediately before and after use of the public access portal**

34. We do not gather information on this but have some information about the profile of people using the website from the analytics. Visitors to the website include the barristers who advertise on it hence the following information applies both to them and the potential consumers of legal services. There are slightly higher numbers of women than men using the portal and the age range which most frequently using the site is 35 to 44 year olds. The four languages most frequently used by visitors to the website are in descending order, English, Russian, French and German (i.e. English is used most frequently used and German least frequently). This indicates the use of the website by international clients.

#### **Question 5: What information on prices is obtainable from the public access portal?**

35. Barristers can provide information on price structure in their profile, for example, whether they can offer fixed fees. Prices can be sought through submission of a query to the barrister or their clerk.

#### **Question 6: What research, if any, is the Bar Council carrying out for the purpose of developing a Bar-led quality mark for chambers? What were the main motivations that prompted the Bar Council to explore the development of such a quality mark?**

36. The Bar Council previously managed a quality mark scheme called BarMark. This ended in 2012 as it was out of date and there has since been a gap in the market. A number of chambers previously accredited with BarMark have been in touch with the Bar Council to express their desire for a new quality mark to be launched.

37. The Bar Council conducted research into how chambers contract with local authorities and other organisations in 2015. Discussions in some thirty chambers in England and Wales included the usefulness of a quality mark in relation to undertaking this type of work. Indeed sometimes it is requirement of the local authority contract tendering process that chambers is certified by a quality mark. To obtain more evidence, the Bar Council carried out an online survey into the market for a Bar-led quality mark earlier this year. This was sent to the whole profession. The results are in the process of being analysed. An initial scan of the results reveals that many chambers are very keen to see a Bar Quality mark initiated whilst others are less keen.

### **Consumer protection**

**Question 7: In paragraph 45 of the Bar Council's submission, it is stated that the BSB has categorised chambers as either high, medium or low risk. In the Bar Council's view, how has this system affected chambers in practice – especially between those rated high risk as compared to low risk chambers (eg what are the cost implications for each risk rating)?**

38. We do not have access to this information. This is partly because the Bar Council does not know which chambers are categorised as 'low' or 'high' risk because the BSB does not publish the risk ratings of chambers. The BSB Supervision report highlights general themes that have been identified across chambers in a particular risk category, but it does not attribute risk ratings to specific chambers.

### **Separation from the BSB**

**Question 8: In relation to the current model of functional separation between the Bar Council and the BSB:**

- a. What, in your view, are the current advantages to this model?**
- b. What, in your view, are the current disadvantages to this model?**
- c. Do you have any concerns about how this model will operate in the future?**

**Question 9: In the Bar Council's view, how would shifting to a system in which the BSB is fully (i.e. legally) separated from the Bar Council impact the market?**

39. We are anticipating a full consultation on regulatory independence from the Ministry of Justice this year and are preparing our position in collaboration with the profession. We will happily share our response as submitted with you. In the meantime, we can share some of our initial thoughts.

40. The Bar Council is a strong advocate for regulation that is independent of government and the profession. The Bar Council set up the Bar Standards Board as an independent operation in advance of the statutory requirement to do so. We disagree with recent calls for separation of the BSB from the Bar Council. Our view is that, for the public, and for the Bar and its clients, the arrangements for securing regulatory independence are working well. We have seen no convincing evidence that the work of the BSB has been hampered by the role of the Bar Council as specified under the Legal Services Act 2007 (LSA 2007) or by the way the Bar Council has discharged its responsibilities. There is, therefore, no case for taking steps to make the BSB completely separate and to excise the Bar Council and the voice of the profession from the regulatory structure set up in the LSA 2007. Furthermore we think it is premature to consider the issue of regulatory independence ahead of and separately from a wider review of the LSA 2007.

41. There is a strong case for a specialist regulator for the Bar. A specialist regulator that is tailored to the profession and the activities that barristers undertake has expertise and buy-in from the profession and is likely to regulate more effectively and more efficiently (i.e. at lower cost). This is also more likely to ensure the continuing reinforcement of ethical standards at a peer-to-peer level within the profession: this makes a significant contribution to the maintaining of ethical standards, to the overall effectiveness of regulation, and to the realisation of the regulatory objectives in an efficient, effective and proportionate manner, not least through reducing the need for intervention by the regulator.

42. If regulatory separation was introduced we would have serious concerns about the potential for significant damage to the market. The Regulatory Policy Institute<sup>14</sup> warned against regulatory change:

‘Change can be difficult to manage, and can be a burden to organisations. Regulatory change is no different in this respect, and one of the most consistent findings of Regulatory Policy Institute work over the years, across all sectors of the economy and including multiple projects for the Cabinet Office and BIS, is that it is most often change in regulations, rather than the overall level of regulation, that, on close analysis, tends to be what imposes the largest regulatory burdens, particularly on small firms.’

43. Regulatory separation would also increase the direct cost of regulation to the profession. The BSB currently benefits from a shared service arrangement with the Bar Council, which achieves considerable efficiency savings. In addition the Bar Council has also acted as a moderating influence on pressures to increase regulatory spending, and to raise the level of Practising Certificate Fees.

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<sup>14</sup> ‘Understanding the economic rationale for legal services regulation’ by Chris Decker and George Yarrow, available at [www.legalservicesboard.org.uk](http://www.legalservicesboard.org.uk)

44. Regulatory separation would also raise a significant constitutional issue. 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. Making the standards and regulation of the profession the sole responsibility of regulators solely operating within a Government or state remit would undermine the international credibility of the Bar and threaten the UK's reputation. It would put at risk the very significant contribution to UK plc of overseas legal services business. English law and the English legal system are currently held in high regard internationally. Many international financial, trade and energy contracts are based on English law, such is its reputation. This brings transactional work, as well as disputes, to the City. TheCityUK report showed that 27 per cent of the world's 320 jurisdictions use the English common law system. The number of barristers handling work for clients based overseas continues to rise and, in 2014, over 10 per cent of the profession received instructions from overseas clients. A 2015 report by TheCityUK indicated that our legal sector generates £22.6bn, or 1.6 per cent of the UK's GDP, and directly employs over 300,000 people. Any damage to the UK legal sector's reputation overseas would have far reaching consequences for the UK economy.

#### **Competition with the unregulated sector**

**Question 10: In relation to the points raised concerning McKenzie Friends at paragraph 53 of the Bar Council's submission, please set out the following:**

**a) In the Bar Council's view, how do junior barristers' (for instance, up to 2 years call) fees compare to those charged by professional McKenzie Friends?**

45. We don't have accurate information on what barristers charge – it varies significantly by practice area, expertise, experience and geographic location, for example. Nor do we have any reliable information on what McKenzie friends charge.

**b) In the Bar Council's view, has competition from McKenzie Friends had a significant impact on the Bar (e.g. the junior Bar)? Does this vary between different areas of law and how might this change in the future?**

46. There is very little information available about McKenzie Friends in terms of their numbers, the services they offer, how much they charge and why clients choose to use them. Following the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), there has been a reported rise in the number of litigants in person and, anecdotally at least, concern about the role and use of McKenzie Friends offering legal services on a professional basis has been growing. This is particularly the case in the family courts where funding for legal representation was fundamentally changed by LASPO, leaving the majority of private law family cases to be resolved without legal aid funding.

47. The Bar Council believes that the legal services designated as reserved legal activities under the Legal Services Act 2007, including ‘conducting litigation’ and exercising ‘rights of audience’, are best provided by individuals and organisations that are qualified, subject to professional regulation and hold professional indemnity insurance.

48. The Lord Chief Justice of England Wales’ recently issued a consultation paper called ‘Reforming the courts’ approach to McKenzie Friends<sup>15</sup> in which it is proposed, among other things, that McKenzie Friends are prohibited from charging for their services. The Bar Council is supportive of this proposal.

49. The Bar Council recently commissioned field research, to be undertaken by an independent team led by Dr Leanne Smith from Cardiff University. They will look at the role of professional McKenzie Friends in the family courts, the type of work undertaken as well as how professional McKenzie Friends handle court work. The research will look at the experience of clients of McKenzie Friends, why they instructed a professional McKenzie Friend and the nature of the service they received. We hope this research will add to the growing body of knowledge about litigants in person, how individuals access legal assistance and the impact of different types of legal assistance on the administration of justice. As such it could contribute to properly informed responses to the changing legal services market. We expect this work to be complete in January 2017 and we would be happy to share it with the CMA at that point if it is of interest.

**c) Do any ‘unregistered barristers’ work as professional McKenzie Friends (i.e. in tribunal settings)?**

50. Yes, there will be unregistered barristers doing this work in a range of different settings. But again, we have no information on specifics.

**Impact of regulation**

**Question 11: In paragraph 18 of the Bar Council’s submission, it is stated 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.’ In the Bar Council’s view, are there any other examples of regulation that is not sufficiently risk-based and proportionate?**

51. We do not have anything further to add at this stage.

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<sup>15</sup> Lord Chief Justice of England and Wales (2016) Reforming the courts’ approach to McKenzie Friends: A Consultation <https://www.judiciary.gov.uk/announcements/mckenzie-friends-consultation/>

**Question 12: In paragraph 56 of the Bar Council's submission, it is stated that '*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.*'**

**a) To what extent does the Bar Council consider that any increase in compliance costs relate to the transitional/learning period around risk-based supervision?**

52. We do not have this information.

**b) Can the Bar Council provide any evidence, even anecdotal, about increases in costs as a result of risk-based supervision? (e.g. emails to the Bar Council from barristers about this).**

53. We are aware, based on comments from clerks and barristers, that there have been increases in costs that have arisen because of risk-based supervision. For example, historically, not all chambers employed either a Chief Executive or a Chambers' Manager. We are told by the immediate past Chairman of the Institute of Barristers Clerks that these positions are becoming more common because of the need for chambers to manage the work resulting from risk-based supervision. Staff time has a cost associated with it both in terms of direct cost and indirectly through time spent away from day to day business tasks.

**Question 13: In paragraph 17 of the Bar Council's submission, it is stated that the regulatory objectives set out in section 1 of the LSA07 are so broad that they allow for regulators to regulate certain aspects that are more properly left to the profession. Are there any further examples of where, in the Bar Council's view, the BSB acts/regulates in areas that are not appropriate? How might these actions/regulations affect competition in the market?**

54. The Bar Council has voiced concerns that some BSB activities stray beyond the core function of regulation and into representative territory, perhaps due to the broadness of the regulatory objectives. For example there are plans to participate, "more actively in policy work at a national and international level on the rule of law and access to justice". We are aware that the BSB has a duty in the Legal Services Act 2007 to meet the regulatory objective of 'supporting the constitutional principle of the rule of law', and we would accept that there will be some areas (such as restrictions in the availability of legal aid) where the BSB may have a legitimate role to play in identifying and expressing concerns as to the impact of such measures on the regulatory objectives. However, a proposal to participate more actively in policy work on this subject *in general* seems to us to go well beyond the BSB's role as regulator. It is our view that the BSB should ensure its regulation, through the setting and enforcement of standards, contributes to this purpose, but that its role should not extend to inputting into national strategic debates on these subjects beyond those limits. This is something that should be undertaken by the profession itself rather than the regulator.

55. The Bar Council also has some concerns that the BSB is interpreting its role too broadly in relation to its diversity work as detailed in a letter<sup>16</sup> from Chairman of the Bar Council, Chantal Aimee-Doerries QC, to the BSB. Whilst we would agree that the BSB should set regulatory standards in line with the LSA 2007 and the Equality Act 2010, and ensure compliance with the Equality and Diversity rules within the Handbook, we consider the active promotion of diversity objectives to be something better suited to, and already being undertaken by, the Bar Council. The Bar Council has discussed these concerns with the BSB and we have agreed to review activities with a view to ensuring that there is no duplication, which would be an inefficient use of time and money.

56. We do not know what if any impact this might have on the legal services market.

**Question 14: Please provide further details as to how the establishment of BARCO has affected the ability of barristers to offer a wider range of services to consumers and which particular legal service areas have been most affected (eg for direct access work). Is the Bar Council working on any further initiatives that may facilitate the ability of barristers to provide services directly to the clients (without solicitor mediation)?**

57. Yes, BARCO, which was established three years ago and has since handled 450 cases, has enabled barristers to offer a wider range of services to consumers. It enables barristers, chambers and entities to receive funds from clients, which are required in relation to on-going legal services for legal fees, alternative dispute resolution costs, disbursements and settlements. They are not ordinarily permitted to do this due to the prohibition on barristers and BSB-regulated entities handling client money. With BARCO they can offer a wider range of services to the client.

58. 80% of the cases BARCO has handled have been Public Access in nature, so it has assisted barristers working directly with lay clients. It has been used for instances where there is uncertainty over the cost of the case which prevents the payment of a fixed fee in advance. Barristers, cautious of doing work that runs the risk of goes unpaid (absent a fixed fee in advance or a solicitor who bears contractual responsibility for payment of fees) can with use of BARCO have the guarantee of payment upon completion of pre-agreed tasks. Any unused funds are returned to the client, with interest. Therefore BARCO enables lay clients to access a barrister directly in circumstances in which they would not otherwise be able to do so and this increases lay client choice.

59. Recently BARCO was used for the first time by an SRA regulated firm. This firm had first to receive a waiver from the Solicitors Regulatory Authority (SRA) as they are ordinarily not permitted to use escrow accounts. However there is appetite amongst some law firms to use them as they do not want to have a client account themselves. The SRA is expected to consult this year on whether to relax this rule, mindful

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<sup>16</sup> [http://www.barcouncil.org.uk/media/420672/160222\\_sir\\_andrew\\_burns\\_bsb.pdf](http://www.barcouncil.org.uk/media/420672/160222_sir_andrew_burns_bsb.pdf)

of the risks of solicitors holding client money<sup>17</sup>. If it did permit the use of escrow accounts, we would anticipate an increase in use of BARCO by law firms and SRA-authorized ABS.

60. The Direct Access Portal also includes information on barristers who provide mediation and arbitration services (working in the capacity of arbitrator). The Bar Council has been promoting the portal and the public access method of instruction to the Federation of Small Businesses (via participation in its recent conference in Glasgow and an article in its magazine) and the Citizens Advice Bureau. Clients are able to go directly to barristers to obtain these services, without the need for a solicitor. Please note that mediation and acting as an arbitrator are not legal services.

**Question 15: In our meeting on 27 January, the Bar Council mentioned that there was always some duplication in regulation that regulators should take steps to remove. Would the Bar Council be able to identify any particular duplicative rules that barristers are currently subject to?**

61. We do not recall making this comment.

**Bar Council**

Friday 22 April 2016

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<sup>17</sup> <http://www.lawgazette.co.uk/law/sra-director-questions-holding-of-client-money/5043303.fullarticle>