



Bar Council response to the Competition and Markets Authority's (CMA) initial questions on the reserved activities

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's initial questions on the reserved activities.

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.

4. These initial questions on reserved activities are very wide-ranging. Our response is rather brief and relatively limited in relation to a number of these questions reflecting the short period of time we have had to address what are far ranging questions and the challenges posed by the summer holiday period. Our focus is therefore at this stage very much on those markets specifically covered by the CMA market study.

Question 1- On the basis of your knowledge and experience, to what extent are providers able to work around reserved activities? For instance:

a. How common are business models where a provider undertakes the non-reserved aspects of the service and then outsources the reserved activity to an authorised person/entity?

5. As the vast majority of barristers in private practice (i.e. not those working for employers in non-authorised bodies) engage primarily in legal activities – both reserved and unreserved – related to disputes and litigation, our in-depth knowledge is limited.

6. Moreover, as a right of audience is required in relation to advocacy involved in litigation, it is inevitable that any person instructing a barrister to provide advocacy services must be authorised to conduct litigation (another reserved activity) or be exempt from authorisation. This inevitably – and rightly – restricts the circumstances in which barristers' services will be engaged by providers of non-reserved activities.

7. With that qualification, and from such information as we do have, we suggest that providers are well able themselves to engage in unreserved activities while outsourcing reserved activities. We draw that conclusion from the following sources.

8. The Bar's traditional way of working itself involves one reserved activity (advocacy) being outsourced by providers who are authorised to provide other reserved activities (typically, but not exclusively, solicitors). In this sense, the legal services market has long worked well with outsourcing. Related to this, it is commonplace for authorised legal practitioners also to seek legal advice from barristers, whether in the context of disputes/litigation or not. That advice may be related to other reserved activities (such as in relation to a conveyancing transaction) or to activities, which are unreserved (the simple giving of legal advice to clients).

9. The same happens among solicitors themselves. In particular, small solicitors' firms – who may themselves undertake no reserved activities other than those related to documents – may outsource litigation to larger or specialist firms.

10. The fact that this works well in all of those contexts indicates that there is no reason to anticipate any barriers to the outsourcing of reserved legal activities by non-authorised providers. Indeed, so far as the Bar is concerned, this can be seen to have been happening in recent decades in two particular areas – licensed access work and public access work – and there are also many situations in which a need for reserved legal activities only arises at a late stage, at which point those activities are outsourced. We propose to explain these situations in a little more detail. On this basis, we would regard the types of situation raised in question 1(a) as commonplace. In short, reserved legal activities are often provided by individuals within a team of providers, most of whom are providing only unreserved services (but which may include legal advice, at least at a basic level).

Public access work

11. An end client may instruct a public access barrister for reserved activities such as advocacy or unreserved legal advice. It is common, if the case becomes litigious, for the lay client to conduct their own litigation. This division of work typically arises when a barrister is not authorised to conduct litigation. As there is no professional client to conduct litigation on the client's behalf in public access cases, we understand that it is common for the lay

client to undertake this reserved activity on their own behalf (often, but not necessarily, with the advice and guidance of the barrister). This may be for several reasons, but will typically be because the client is an experienced litigator (particularly in the case of corporate or public authority clients) or is seeking to keep costs low and wishes to instruct a barrister for discreet pieces of work in an unbundled way, but does not wish to instruct a litigator to handle the entire case. Approximately one third of practising barristers¹ are currently accredited to undertake public access work², but fewer than one tenth of these (5% of practising barristers) are authorised to conduct litigation³. Barristers do not acquire automatic rights to conduct litigation when they obtain a practising certificate, but must acquire an extension to their practising certificate to undertake such work. Those accredited to conduct litigation are often also public access accredited, and the extension allows them to provide the full range of services to clients. That said, the majority of barristers do not have such an extension (out of choice). As a result, it is common for a client to instruct a barrister for advisory or advocacy services and for the lay client to conduct their own litigation.

12. Clients are able to conduct their own litigation by virtue of an exemption in the Legal Services Act 2007. Further, they will be required to do so if they have not instructed a solicitor to undertake the work and the barrister does not have the litigation extension to their practising certificate. A barrister cannot conduct litigation on the lay client's behalf without BSB authorisation, as that would be both a criminal offence and a breach of the provisions of the BSB Handbook.

13. Certain functions that a public barrister will undertake for their client will be ancillary to the conduct of litigation. For instance, many barristers draft correspondence on their lay clients' behalf. *Agassi v Robinson*⁴ makes it clear that correspondence during litigation does not itself amount to the conduct of litigation.

14. However, just because the lay client is undertaking the formal 'conduct of the litigation' (i.e. the reserved activities involved in this) does not mean that the lay client will necessarily be doing so without additional assistance from a provider of unreserved activities. For example, third parties may be employed to provide assistance with identifying and preparing documents for disclosure. Those third parties might be brought in by the client when needed, or might have a larger role: for example, the third party may offer its unreserved activities (e.g. through a website) and offer also to assist the client in identifying suitable lawyers (particularly, a public access barrister) as and when needed. The client may, thus, engage the third party first, who will then provide litigation support services throughout the duration of a dispute. We understand that such business models already exist, but the market is still in the early stages of development. In a similar vein, we understand that some public access barristers may already employ, or have arrangements

¹ i.e. those with current practising certificates.

² 5,558 barristers had public access accreditation on 02.09.2016.

³ 562 barristers were authorised to conduct litigation on 02.09.2016.

⁴ *Agassi v Robinson* [2005] EWCA Civ 1507.

with, others to provide unreserved activities to barristers' clients, particularly as regards litigation support; and if such arrangements are not already in place, we are aware that there are barristers who are considering such arrangements. There is no reason to believe that there are any unnecessary barriers to such arrangements, or that they undermine the provision of – or need for – the reservation of key legal activities.

Licensed access work

15. The Bar's Licensed Access scheme covers disputes/litigation, but it works much more widely. Further information about licensed access can be found in our original submission⁵ to the CMA. It may be of assistance for us to expand on this.

16. Members of certain professional bodies such as accountants, architects and engineers or those with a license from the BSB are automatically able to instruct any barrister directly for certain types of work connected to their own professional work. So, typically, an accountant might instruct a barrister for tax advice or other legal advice, a surveyor might instruct a barrister to provide legal advice or to conduct advocacy at a hearing (e.g. an arbitration hearing) which does not require a right of audience, and a planning professional might instruct a barrister to speak at a planning committee meeting or appeal hearing.

17. Where a right of audience is required, a barrister would need to be authorised to conduct litigation, or instructed by an authorised or exempt litigator, but either way the public access rules allow this to take place with the continued involvement of non-authorised service providers. The client may instruct the barrister directly, or through those service providers as intermediaries, so long as the client conducts the formal aspects of the litigation.

More generally

18. Similarly – but both within and outside the sphere of licensed access work – we know of plenty of situations in which a matter may become the subject of litigation after a long period during which only non-reserved activities have been provided.

19. In these situations, the provider of unreserved activities is likely to be involved in the decision to instruct lawyers, and in advising the client on the choice of lawyer. Whether the instruction of the lawyer is then, strictly, by the client or the provider may matter little, and is of little consequence as regards the CMA's competition remit.

20. Just one example, flowing from one of those given above, will illustrate this. A planning application may have been through several stages, and even hearings (e.g. at a planning committee meeting or appeal hearing), outside the sphere of reserved legal

⁵ [Paragraph 8, Bar Council \(2016\) Bar Council response to the Competition and Markets Authority Legal Services Market Study](#)

activities, and with legal advice being provided either by a lawyer and/or one or more other professionals. An appeal or judicial review application may then need to be made to a court or tribunal which will involve reserved legal activities: the exercise of rights of audience, and possibly also the conduct of litigation. In practice, the same team will continue with the case, and while a solicitor and barrister may already have been involved, this will not necessarily be so: many such cases would be dealt with by other planning professionals. A barrister alone (if authorised to conduct litigation) or a barrister and an authorised litigator will be instructed to deal with the court proceedings in one of the ways indicated above, while the existing team continues to provide their other, non-reserved services. This type of situation is commonplace.

b. How common are business models where a provider undertakes the non-reserved aspects of the service and then has the client undertake the reserved activity on their own behalf.

21. We repeat what we have said in answer to question 1(a) above.

c. Are you aware of any other techniques for circumventing the current reserved activities?

22. We are not entirely clear on what the CMA intends by the term ‘circumventing the current reserved activities.’ The term ‘circumvent’ suggests deliberate (and illegitimate) evasion of the law, which could involve the commission of a criminal offence. The examples that we have provided above are all perfectly legitimate and permissible under the Legal Services Act 2007.

23. We intend to focus on the right of audience in particular in our answer to this question, as this is the reserved activity that is of greatest relevance to the Bar. We will look at rights of audience conferred by statutes other than the Legal Services Act, and comment very briefly on the operation of ‘McKenzie Friends’ and so-called ‘solicitors’ agents’.

Other statutes

24. There are other statutory provisions that do not emanate from the Legal Services Act, which nevertheless confer a right to undertake a reserved legal activity. Sometimes this right is conferred on persons who are authorised for the purposes of the Legal Services Act, but on occasion it applies to persons who are unauthorised. For example, all barristers who are employed by the Crown Prosecution Service and who are Crown Prosecutors have a right to conduct litigation that derives from the Prosecution of Offences Act 1985 as opposed to the Legal Services Act 2007. Another example is s.223 of the Local Government Act 1972, which enables a duly authorised officer of a local authority to prosecute or defend in a magistrates’ court. Such provisions might in one sense ‘circumvent’ the Legal Services Act

insofar as such officers are not required to have practising certificates, yet are legally enabled to exercise rights of audience by virtue of these other statutes.

Paid 'McKenzie Friends'

25. The Bar Council considers that the support offered by individuals who act as a 'McKenzie Friend' in a voluntary capacity, providing moral support to a litigant, taking notes and generally assisting with case papers and organisation, have an important function in the justice system. There has been an increase of individuals seeking to fulfil this role (largely as a result of the radical legal aid cuts), but who charge for their services. Where legal services are paid for or offered in a 'professional' capacity, and particularly where an individual seeks to exercise a right of audience, however, the Bar Council strongly believes that these services are best provided by people who are qualified, subject to professional regulation and hold professional indemnity insurance.

26. Paid McKenzie Friends do not appear to fall within any of the exemptions in the Legal Services Act. The Legal Services Institute⁶ makes the point that:

'The expectation seems to be that anyone who exercises rights of audience (other than a litigant in person) will be appropriately qualified, and so there is no exemption in respect for someone appearing 'otherwise than for, or in expectation of, any fee, gain or reward.' However, judicial discretion will exist to allow a friend to represent a party without payment.'

On this interpretation, paid McKenzie Friends also do not appear to be within the spirit of what is intended by the provisions of the Legal Services Act.

27. Paid McKenzie Friends are a particular problem in those areas impacted by the withdrawal of legal aid e.g. family and social welfare case. The Judicial Executive Board (JEB) has issued a consultation paper proposing reforms to the existing guidance for 'McKenzie Friends'⁷ to which the Bar has responded in detail⁸.

The So-called 'solicitors' agents'

28. The Bar Council has received reports and anecdotal evidence from members of the Bar that where individuals are appearing in court as so-called 'solicitors' agents' there is

⁶ Legal Services Institute (2010) *'The Regulation of Legal Activities – History and Rationale.'*

⁷ Reforming the Courts' Approach to McKenzie Friends

<https://www.judiciary.gov.uk/publications/consultation-reforming-the-courts-approach-to-mckenzie-friends/>

⁸

http://www.barcouncil.org.uk/media/472412/bar_council_response_to_proposals_to_reform_the_courts_approach_to_mckenzie_friends.pdf

often uncertainty as to whether or not these individuals are acting contrary to the requirements of the Legal Services Act 2007. This is a serious concern as where an individual does act contrary to the requirements it would involve the commission of a criminal offence.

29. The Bar Council has produced a detailed guidance note⁹ for unregistered barristers to help to provide some clarity on this issue (and to which we refer as setting out our concerns). The Bar Council and the Personal Injury Bar Association wrote to the Civil Rules Procedure Committee about this issue. We had become aware of the increasing use of so-called 'solicitor's agents' to conduct advocacy in open court at Stage 3 personal injury quantum hearings under the applicable Pre-Action Protocol; that is to say where liability is no longer in issue but the parties are unable to reach agreement as to the appropriate level of damages. We suggested that it was anomalous for an unqualified advocate to act in these circumstances and suggested a clarifying amendment to the Civil Procedure Rules.

30. To address this issue, judges need at least to be provided with sufficient information about advocates appearing before them to make informed decisions about the advocates' rights of audience. Where a member of the judiciary grants a right of audience and there are concerns about the individual's entitlement to act, the matter should be reported to either the Council of Circuit Judges or the Association of District Judges as appropriate.

31. The issue of the right of audience of these so-called 'solicitors' agents' was recently considered in the case of *McShane v Lincoln*¹⁰ in the county court. In his judgment, the District Judge found that hearings 'in chambers' refers to hearings in private, that by exercising a right of audience a 'solicitor's agent' is not assisting with conduct of the litigation, and that the 'solicitor's agent' is not being supervised by an authorised person. Accordingly, the advocate in that case had no right of audience for the hearing in question.

32. The Bar Council has no wish to prevent businesses from providing legal services in ways that comply with the requirements of the Legal Services Act 2007. There is a need, however, to ensure that:

- Individuals recruited to work as so-called 'solicitors' agents' are aware of when they have a right of audience and when they do not;
- Businesses (particularly authorised litigators) using such 'solicitors' agents' are aware of the limitations created by the operation of the Legal Services Act 2007;
- Judges are mindful of the need to ensure that individuals appearing before them do in fact have a right of audience; and
- Where there are concerns about the existence of a right of audience, these are reported to relevant regulatory and/or representative bodies.

⁹ Available here: http://www.barcouncil.org.uk/media/404046/acting_as_a_solicitor_s_agent.pdf

¹⁰ *McShane v Lincoln* (Birkenhead County Court, 28 June 2016) (unreported)

Question 2- In what way do the business models outlined above affect competition between different types of providers in the legal services sector? How successful are the business models outlined above when competing with providers who can directly undertake the required reserved activity? Do these business models possess any particular competitive advantages or disadvantages in comparison to other providers?

33. Public access barristers (the model referred to above) retain the same competitive advantages as the self-employed Bar in general. We set out these advantages in our earlier response to the CMA. To summarise, these advantages include: low overheads, adherence to high ethical standards and the ability to take on unbundled work with ease.

Question 3- What has been the effect of previous regulatory reforms that have added to the types of providers that can undertake certain reserved activities in certain instances? For example:

a. The entry of ICAEW-regulated firms and practitioners who may undertake probate activities

34. We do not have any comments that we wish to make.

b. The entry of CLC-licensed probate practitioners who may undertake probate activities

35. We do not have any comments that we wish to make.

c. The entry of CLC-licensed conveyancers in the conveyancing sector

36. We do not have any comments that we wish to make.

37. We would observe, however, that (anecdotally) some have suggested that there has been a loss of residential conveyancing expertise, of the sort necessary to identify and address more complex issues in a conveyancing transaction, as well as a shrinking of the numbers of solicitors firms engaging in conveyancing work. If so, then one factor influencing this may be that market prices for conveyancing are at a level which is too low to retain such specialist expertise within that market, particularly if the number of transactions has reduced. Low prices may also contribute to lower levels of due diligence, and less attention to detail, in ordinary transactions.

d. The ability of solicitor advocates to provide advocacy services in the higher courts

38. There is limited evidence of the impact of this in that part of the civil sphere which involves the exercise of rights of audience in the higher courts. The Bar continues to carry

out the vast majority of this work in the higher courts, reflecting a highly competitive market where decisions as to which advocate to instruct are very largely made based on an informed choice on quality and price.

39. As stated in earlier responses to the CMA, the Bar Council is of the belief overall that the referral model continues to be the most efficient business model for clients, enabling targeted access to a wide range of competing specialist legal advice and advocacy services. This model 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.

40. Very different issues arise in the context of criminal Crown Court advocacy where the Bar Council has considerable concerns regarding the operation of the market and the quality of advocacy. However, we do not understand the CMA currently to be considering this area in their market study, but would be able to expand if this was considered to be relevant.

41. There is also a concern regarding the payment of referral fees, and the taking of additional fees by intermediaries. We have previously set out our concerns that referral fees undermine the proper working of a sustainable and ethical legal services market dedicated to serving both client interests and the public interest in our detailed responses to the CMA Legal Services Market Study and to the CMA follow up questions¹¹.

e. The ability of non-employed barristers to conduct litigation

42. There are currently only 562 barristers authorised by the BSB to conduct litigation. As barristers have only been able to apply for an extension to their practising certificates since 2014, it is too early to say what the impact of the reform will prove to be.

How have these (and any other relevant) reforms affected competition, consumer protection and public interest considerations in legal areas relevant to these activities?

43. We refer, in the limited time available to respond to what it a very wide-ranging question, to our above responses. We do not have any further comments that we wish to make at this time.

Question 4- How do the current reserved activities affect:

- a. the quality of service provided to consumers by authorised persons?**
- b. the price of services provided to consumers by authorised persons?**

¹¹ Paragraph 42 Bar Council (2016) Bar Council response to the Competition and Markets Authority market study and paragraphs 8-28 Bar Council (2016) Bar Council response to the Competition and Markets Authority follow-up questions on the legal market study.

44. These are very wide-ranging questions; too wide-ranging to enable us to respond as effectively as we would wish at such short notice, even less so during the summer holiday period.

45. These questions also seek to treat all of the reserved activities in the same way, which we believe would be an error: although some are closely related to each other (e.g. the conduct of litigation and the exercise of rights of audience), others operate in different circumstances and context, or have a different role, and may thus have different effects. We shall seek to address this briefly in answer to question 5.

46. Just as importantly, they focus only on two aspects, quality and price, and only on consumers. The reserved activities have additional aspects, which are just as important, and have wider roles. It would be wrong to look at questions of price and quality of services to consumers in isolation. We will seek to address this, too, in answer to question 5.

47. We would also observe that these are questions which relate to areas of legal activity which go well beyond the scope and focus of the CMA's current inquiry, particularly so far as concerns most of the legal services provided by the Bar. With that in mind, we do not propose to try to answer them in any detail, at least at this stage, particularly given the tight time limit on responding.

48. So far as question 4(a) is concerned, we have no doubt that reservation of the current reserved legal activities is a very important factor in securing and maintaining quality of service provided to consumers, alongside securing the other regulatory objectives and the quality of service for all others affected by this (including the courts, the public and those institutions affected by reserved instrument activities). Reservation, in addition to the regulation which flows from it, reinforces the professional principles (identified in the Legal Services Act) which underpin the securing of those objectives, including maintaining proper standards of work (s.1(3)(b)), in a positive and effective way. It also helps to underpin the continuation of the very positive practical effects, which flow from the long-term adherence to the professional principles by the legal profession.

49. So far as question 4(b) is concerned, we propose to focus our answer on only two of the current reserved activities: the exercise of rights of audience, and the administration of oaths.

50. As regards rights of audience, we are not aware of any evidence which shows that, across the market generally, reservation leads in itself to any difference in price. On the other hand, we would accept that, in principle, prices for a particular service might be expected to be somewhat higher if an activity can only be carried out by those who are properly qualified, have the necessary skills, and adhere to standards of quality and ethical behaviour. In essence, we would expect reservation to exclude from the market those who

do not satisfy these conditions, and thus who cannot provide the necessary quality of service and other requirements needed to fulfil the important regulatory objectives.

51. It is important to note that the cost of advocacy services (where that cost is not fixed, as it is for much of the work funded by legal aid) varies – as it would be expected to do – by reference to a variety of factors, not the least of which are the skill, experience, expertise and reputation of the individual advocate. Advocacy is an individual, personal skill; it cannot be carried out by anyone other than an individual. The market reflects this.

52. The reservation of rights of audience allows readily for extensive, but not excessive, price competition while both preserving quality and promoting the other regulatory objectives. By ‘excessive’ we mean to such a degree as to result in insufficient quality of service or in too great a risk to other regulatory objectives. Barristers compete against each other (both in other chambers and within their own chambers) to provide advocacy services, and against all others who are authorised to provide these services. They compete on price and on quality in relation to all aspects of their role.

53. In fact, our current perception is that, in several areas, there may already be an oversupply of those authorised to engaged in these reserved activities at the moment, and that this is (as would be expected in an effective, competitive market) leading to ever greater price competition. This indicates that effective competition is in operation, but it also reinforces our view that reservation is not a significant barrier to entry for those who have the ability to provide advocacy services of the quality necessary to achieve the regulatory objectives.

54. The quality of service would be likely to be reduced if rights of audience were not a reserved activity, and there was a free-for-all in advocacy services. Other interests and regulatory objectives, too, would be put at serious risk – a point to which we shall return in answer to question 5 below – and that could also include effective price competition.

55. So far as the administration of oaths is concerned, the cost of this is modest and we do not believe that the price of this service is of concern to consumers.

Question 5- What harms or risks to clients do the current reserved activities protect against? For instance, how do the reserved activities safeguard (i) consumer protection or (ii) the wider public interest? As presently defined, are the reserved activities effective in safeguarding these concerns?

56. Again, this is a very wide-ranging issue; too wide-ranging to enable us to respond as effectively as we would wish at such short notice, even less so during the summer holiday period.

57. We have done what we can, however, and would be happy to expand on and add to any of our comments, if that might assist the CMA.

58. The reserved legal activities are concerned with promoting the regulatory objectives set out in the Legal Services Act 2007. These derive from the report¹² of Sir David Clementi, with the addition of a general public interest objective, and might be said to express the intention of Parliament (with which we would agree) that promoting the public interest (in all of its facets) is the primary, overarching aim in continuing to reserve these legal activities. Those objectives highlight the fact that there are much wider, public interest related objectives, which extend beyond consumer protection or individual client interests. We strongly support those objectives, which in part speak for themselves but which also underpin the maintenance of the rule of law and its strength in the United Kingdom.

59. The reserved activities are necessary for those regulatory objectives. We propose to give just a few examples of this, without intending to be exhaustive.

60. Our first example concerns the rule of law. The rule of law requires the effective and efficient administration of justice. The reservation of the conduct of litigation, and of right of audience, contributes to this by safeguarding the quality and reliability of those who conduct litigation, and appear as advocates, in the courts. The courts themselves, and the conduct of litigation in those courts, depend on the integrity, honesty, reliability, independence, skills and legal expertise of those involved in these activities. These requirements are reinforced by the imposition on those engaged in these activities of an overriding duty to the court: an important duty, which is critical in balancing the public interest with the best interests of individual clients.

61. Similarly, both the rule of law and the proper administration of justice also depend on a strong, independent, diverse and effective legal profession, and adherence to the professional principles set out in the Legal Services Act 2007. Independence and the professional principles are key parts of this, but they depend on lawyers being able to operate in such a way that independence and those principles can be maintained. They also depend to a significant extent on the existence of an ethical ethos and culture of the legal professions. Competition from those who have no duty to maintain independence, or to honour the professional principles, and neither an interest in doing so, nor a culture of doing so, would be likely to undermine this. We believe that this can be seen to have happened in other fields – in particular, in financial services – in which true professions and embedded ethical cultures have been absent. The reservation of both rights of audience and the conduct of litigation is, thus, essential to these objectives.

62. Those elements all operate in the public interest, and are essential to the public interest. They ensure that, in relation to the critical activities which are reserved to authorised persons, those activities are all carried out in a manner which supports and is consistent with the public interest. They avoid individual client or consumer interests

¹² Sir David Clementi (2004) 'Review of the regulatory framework for legal services in England and Wales.

holding sway when it would not be in the public interest for them to do so. In the absence of reservation of these activities, the public interest can be expected to be trumped by other interests.

63. A further example concerns the effectiveness, efficiency and integrity of litigation in courts and relevant tribunals. If the conduct of litigation and rights of audience were not reserved legal activities, we believe that there would be a very serious impact on the courts and tribunals. There is ample evidence of the difficulties for the courts that flow from high levels of self-representation by litigants-in-person, clear evidence of similar difficulties poor advocacy, and numerous appeals (successful and unsuccessful) that can be seen to have resulted from such difficulties, or themselves to have been caused by such difficulties (due to hopeless appeals being brought). We believe that if these activities were not reserved, then courts and tribunals would find it very difficult indeed to operate. Competent advocacy, assurance as to the honesty, integrity and public duty of authorised persons conducting cases and litigation before them, and the ability to provide legal expertise, are all critical to the efficient conduct of disputes. These, in turn, are critical to the effective functioning of the judicial system, and in turn to public confidence in it. Regulation of these activities began with the judges themselves, and for good reason. The legal duty to the court – which is a matter of common law, not just statute – is a manifestation of this. The removal of reservation would be likely to be seriously detrimental to the public interest in this respect, and in turn to the interests of litigants themselves.

64. Reservation – together with the professional duties, and regulation, of all activities by those who are authorised to provide the reserved activities (to which we will return below) – also has a critical role to play in relation to the existence and effective operation of Legal Professional Privilege. This privilege, which is the client's privilege, is crucial to the proper administration of justice and to the protection of the human rights of individuals and organisations, and is internationally recognised as so. The effect of the privilege in protecting communications between clients and their lawyers, and the advice given to clients, is generally absolute. Both its importance and its absolute nature mean that it is a privilege which is accorded – and ought to be accorded – only when clients are involved with qualified, authorised lawyers who are subject to the professional principles, both legally and in terms of professional culture and ethos. Reservation of legal activities (particularly the exercise of rights of audience and the conduct of litigation), and the related professional duties and regulation, ensure that the privilege can both exist, work effectively, and be kept within proper bounds in the public interest.

65. Reservation of rights of audience and the conduct of litigation is equally important to consumer protection and competition. To give just a few examples:

- (a) It underpins both the quality of service (in all of the aspects which make up a good quality of service) and the ethical basis on which the service will be provided. This can reduce the costs for consumers (and thus promote

competition and access to justice) by providing a level of assurance as to quality and ethics.

- (b) It promotes competition by creating and sustaining consumer confidence in the market for these services, as well as public and judicial confidence.
- (c) It assists in addressing the economically inevitable information asymmetry between lawyers and clients, not least by imposing duties on lawyers to act in clients' best interests (duties which, as we mentioned earlier, are supported and sustained as much by the existence and ethical ethos and culture of the professions as by the existence of regulation).
- (d) So long as the threshold for authorisation is set appropriately – which we believe is happening – any barrier to competition which reservation sets is a limited one. There is no barrier to competition between authorised providers and, indeed, competition is fierce, and is being both supported and encouraged by regulation.
- (e) Reservation, and the regulation which comes with it, enable regulators to ensure that consumer interests and competition have their proper role and influence as part of all of the regulatory objectives in relation to the reserved activities.

66. Reservation also promotes both the public and consumer interests in tandem in another way. Litigants in the higher courts (whether they are individuals or organisations) are seeking to vindicate or defend their rights or position, and in doing so are seeking to participate fully in society as an equal citizen – equal under the rule of law. A failure to achieve this when they are entitled to do so could lead to significant detriment, to their liberty, to their physical, mental, emotional or social well-being, or to their property or financial position. In this event, compensation after the event, important though that is, may be an insufficient remedy. The payment of money may in many situations be poor or thoroughly inadequate recompense. Reservation of these activities puts in place an important method of seeking to *avoid* the failure to vindicate or defend citizens' positions in the first place.

67. Furthermore, reservation has the effect that all legal services provided by authorised persons are subject to regulation, unlike (for example) the provision of legal advice by others. Reservation is both a suitable and an effective way of achieving a greater level of consumer protection and indeed, from this perspective, it might be said that the scope of the current reservations are somewhat too narrow.

68. In summary, the reservation of rights of audience and of the conduct of litigation ensures that the conduct of disputes in the higher courts is critical to all of the regulatory objectives we have mentioned and to the public interest, and is a more effective tool than any other for these purposes. By ensuring that key steps and actions must be taken by

authorised persons, it ensures that the process is conducted in accordance with those objectives and the professional principles set out in the Legal Services Act.

69. Reserved instrument activities, the administration of oaths and notarial activities are less directly concerned with the activities of barristers as barristers are rarely involved in these activities in practice. We do, however, have an interest in maintaining these as reserved legal activities for public interest reasons. In particular,

- (a) Many of the points we have already mentioned in relation to rights of audience and the conduct of litigation will also apply to court-related instrument activities. The points which follow may also apply, depending on the nature of the instrument.
- (b) So far as property-related reserved instrument activities are concerned, our system of conveyancing, the integrity of our system of land registration (which carries a state guarantee and indemnity), and the reliability of unregistered titles, depend on the reliability, integrity and competence of those carrying out these reserved instrument activities. The absence of reservation could lead to both breaking down, and/or to both becoming more expensive and less efficient, and to a widespread loss of confidence in conveyancing and in the property market. This could only damage the economic interests and efficiency of the UK, as well as damage its reputation internationally. We would also see additional justification in the fact that these activities relate to the creation of (valuable) legal interests in land, to the completion of significant financial transactions, and to the protection of existing owners of land from exploitation and fraud.
- (c) Oaths are administered only in circumstances where it is important to the administration of justice and/or to the public interest that a transaction or document is authenticated and given additional importance through the formality of an oath, and/or that the contents of a document are given added reliability through the administration of an oath. The making of an oath brings added sanctions for an untruthful oath, but the aim is to ensure that a document authenticated by an oath should be reliable in the first place. The standing of an oath is dependent to a large degree on the reliability and standing of the person administering it. It is essential that oaths are administered only by those in whom the courts, the state, and the public can have proper confidence. Reservation of this activity ensures this.
- (d) For similar reasons, the public importance (both domestically and internationally) of the activities of notaries mean that it is essential that this activity should be a reserved legal activity.
- (e) Reservation of these activities also serves both the consumer and public interest in a manner similar to that which we described in paragraph 64 above. These

reserved activities are concerned with transactions of great important to citizens and organisations. Prevention of harm is better than cure after the event.

70. As regards probate activities, some of the justifications we have mentioned above would seem to apply here to, but we have no further comment to make.

71. There are also additional public interest objectives which reservation serves, but which are not mentioned in the Legal Services Act. The UK derives significant income and international standing from the reputation of the UK justice system, of the UK as a forum for dispute resolution and for safe commercial transactions, and of the common law as a law to be chosen for multinational commercial transactions. These reputations are founded on reality. We believe strongly that the reservation of the current activities promotes and protects all of these, and that there is a very strong public (and economic) interest in this for the UK as a nation. This has long been so and the UK's decision to leave the European Union might be said to make these even more important.

Question 6- In your view, should the reserved activities be reformed and, if so, in what way(s) could they be changed? Please note how your suggested reform might affect:

- a. Competition in the legal services market**
- b. Consumer protection concerns**
- c. Public interest considerations**

72. This, too, is a very wide-ranging issue; too wide-ranging to enable us to respond effectively at such short notice, even less so during the summer holiday period.

73. We do not have any detailed comments that we wish to make to make at this stage, and in the time available, about any of the reserved activities. In general terms, we do not see a need for the reserved activities to be reformed in the areas most relevant to barristers' practices. They operate fairly well at the moment. If any changes *were* to be contemplated, then they should be relatively limited in scope.

Bar Council

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