

Legal Services Regulatory Authority

Public Consultation on Issues Relating to Barristers

Competition and Consumer Protection Commission submission

Overview

The Competition and Consumer Protection Commission (CCPC) welcomes the opportunity to respond to the consultation on issues relating to Barristers. The CCPC believes that there are certain key features of any profession regulated in the public interest. Those features include:

- ease of access for the consumer to professionals,
- transparency in respect of consumers understanding their rights and what to expect from those professionals,
- value for money for the consumer in terms of both cost and quality, and
- regulations that are designed to serve the public interest.

These features underline the positions that we take in response to this consultation.

The CCPC believes that retention of the restriction on legal practitioners, other than solicitors, from holding the monies of clients, would be a major barrier to the successful operation of new business structures in the legal profession, and should therefore be removed. Similarly if consumers are enabled to directly access barristers, situations will arise in which barristers are required to handle client money, in so far as a barrister is a partner in a legal partnership. Regulatory changes will have to be made to facilitate this process.

The CCPC also supports the removal of restrictions on barristers receiving instructions in contentious matters from members of the public. By increasing the numbers of lawyers competing, direct access offers increased choice for clients of legal services. It may also reduce some clients' costs by allowing them to cut out the services of a solicitor where they are not necessary. Furthermore it is unclear how new legal partnership structures can function effectively without the removal of direct access restrictions.

To facilitate these changes the CCPC recommends that the LSRA should examine the potential for a system of oversight which departs from the existing regulatory structures while ensuring that there are adequate safeguards to protect consumers and preserve professional standards. This long term look at the market can be carried out whilst in parallel seeing what regulatory structures can continue to work in the interim. These immediate fixes should be vetted to ensure that they do not solidify what exists today and that any potential conflicts are managed with the LSRA taking some oversight role.

The CCPC believes that several possible business structures can co-exist in the legal profession. The best form is arrived at by the process of experimentation with the competitive process choosing the one that is most efficient and responsive to consumer needs. The LSRA should aim to ensure that the profession is given the freedom to achieve this.

We will respond to the consultation by answering questions (a) and (c) together, and then question (b).

Consultation Response

Consultation Question (a) *the extent, if any, to which the restriction on legal practitioners¹, other than solicitors, holding the moneys of clients, as provided under section 45 of the Act, should be retained,*

Consultation Question (c) *the circumstances and manner in which a barrister may hold clients' moneys and the mechanisms to be applied for the protection of clients' moneys which may be so held.*

Retention of the restrictions on legal practitioners, other than solicitors, holding the moneys of clients will greatly limit the successful operation of legal partnerships, and make the development of other new business structures such as the profession of conveyancer, Multi-Disciplinary Practices (MDPs) and Limited Liability Partnerships (LLPs) highly unlikely.

Point 18 of Part 3 of the LSRA report to the Minister on Legal Partnerships states the following:

“The important question was raised whether legal partnerships between barristers and solicitors could work in a general partnership form, given a possible incompatibility between “joint and several liability” of partners under the Partnership Act 1890, and the different roles that solicitors and barristers would play in a legal partnership. Particularly significant in this regard is the issue of the handling of client money, since current regulatory arrangements impose very different requirements on barristers and solicitors. Indeed, the point is fairly made by the Bar Council that section 45 of the Act prohibits barristers from holding client monies which would lead to a deeply uneven and therefore unstable partnership.”

The excerpt above underlines the need for the question of handling client money to be resolved in order to give certainty to the manner in which legal partnerships might operate, particularly in regard to the matter of the liability of partners. A situation in

¹The LSRA 2015 defines “legal practitioner” as a practising solicitor or a practising barrister and a reference to a solicitor includes a reference to a firm of solicitors;

which only solicitors are responsible and liable for the debts and liabilities of the partnership is not realistic and reduces the likelihood that barristers and solicitors will go into partnership with each other. If legal partnerships are to operate to their maximum potential regulations regarding the handling of client money will have to be introduced.

Future changes to the market

The Act makes provision for the possible development of the profession of conveyancer alongside the potential introduction of Multi-Disciplinary Practices (MDPs) and Limited Liability Partnerships (LLPs). The Act also makes provision for the examination of unifying the professions of solicitor and barrister. Any regulatory initiative undertaken in respect of client money should be designed to be easily applicable to new professions/business structures such as LLPs and MDPs.

Regulation and consumer protection

There is a comprehensive regulatory structure in relation to solicitors and the handling of client funds, but there is no similar regulatory structure for barristers. The Solicitors Accounts Regulations provide a strong basis of consumer protection in respect of client money, trusts, insolvency proceedings and accounting records. It may be that new regulations will be required that mirror those Regulations. This raises the question of how regulation will operate in future. In the event that barristers are given similar powers and responsibilities to solicitors, they should face similar levels of regulation, with the most efficient and lowest cost form determined by regulatory impact assessment (RIA). Any RIA conducted should examine the potential for a system of oversight which departs from the existing regulatory structures while ensuring a high standard of consumer protection. In the interim period the LSRA should examine how it can ensure the extension of client money regulations to new business models without unnecessarily preserving the current regulatory structures where they could potentially conflict with a long term unified model of regulation.

A further consideration is that certainty will be required regarding the responsibility for the regulation of the handling of client money by non-legal practitioner partners, if permitted, in MDPs.

As noted above there is the potential for the LSRA to consider a new approach to regulation and consumer protection in this area rather than replicating existing regulation. The CCPC is aware that the sectoral regulators in England and Wales have collectively examined the potential for alternatives to handling client money for legal practitioners². To date, however, there have been no definite proposals for change. If

²http://www.legalservicesboard.org.uk/what_we_do/pdf/20150720_Proposals_For_Alternatives_To_The_Handling_Of_Client_Money.pdf

change were to occur the general thrust of the reforms in England and Wales would likely be to favour third party bodies providing regulated services to handle client money on behalf of legal service providers³.

The CCPC recommends that further research be undertaken by the LSRA in relation to how the holding of clients' money by legal practitioners is regulated.

Competition

A system of regulation for handling client money by both solicitors and barristers will establish, in principle, an ability by legal practitioners to compete for similar business. Without this change new barrister partnerships will be constrained in their ability to compete with solicitor barrister partnerships. In addition, the possible future addition of conveyancers to the ranks of legal practitioners should ensure further competition in the legal services market. Legal partnerships and LLPs will potentially provide a broader variety of legal services to consumers and it is to be hoped that the cost to the consumer will reflect the greater scale available from such partnerships. Conversely without regulatory facilitation of changes to the structure of the market the current structural features are likely to persist.

Consultation Question (b) the retention or removal of restrictions on a barrister receiving instructions in a contentious matter, directly from a person who is not a solicitor, and the reforms, whether administrative, legislative, or to existing professional codes, that are required to be made in the event that the restrictions are retained or, as the case may be, removed.

The CCPC supports the removal of restrictions on barristers receiving instructions in contentious matters from a person who is not a solicitor (Direct access restrictions) which would mean clients would have direct and ongoing access to barristers for both advice and litigation in contentious and non-contentious matters. Direct access restrictions increases the cost of obtaining legal services for certain clients as they have to pay a double mark-up, first to the solicitor, and then to the barrister. They also reduce competition by restricting barristers' ability to compete with each other and solicitors. Furthermore, it is unclear how new legal partnership structures can function effectively without the removal of direct access restrictions. In general, the CCPC supports regulations that protect consumers while providing market operators with the flexibility

³ A further matter for consideration is the potential impact of what is known as 'Legal Tech', that is new business models that involve the transformation by technology of traditional legal practices. Such business models may involve a different relationship with the consumer than heretofore and thereby a different approach to managing client money. At a minimum regulation should take cognisance of developments in regard to distributed ledger technologies (such as Blockchain) and software based payments systems.

to compete. In the CCPC's view, removing direct access restrictions, providing proper regulatory structures are in place to protect consumers, will afford barristers greater flexibility and choice, which will ultimately benefit clients of legal services.

The direct access restriction reduces competition between solicitors and barristers for certain types of work that could be completed by either a barrister or a solicitor. Furthermore, the restriction prevents barristers from directly competing with each other for client services as consumers are removed from the decision over what barrister suits their needs best. The barrister's incentive is to fulfil the solicitor's needs, which may not be directly aligned with the consumer's, particularly on fees.

The direct access restriction also means that all interactions have to be client-solicitor-barrister and then barrister-solicitor-client. The potential for misunderstandings between barristers and clients in some cases is therefore increased, which reduces the probability that the client will obtain the best legal advice possible. The removal of this restriction will be particularly valuable for occasions when a client has previously received advice from the same barrister in a similar matter and knows how to ask for the required advice. In such an instance, the solicitor's fee would appear to represent a totally unnecessary cost to the consumer. The proposals will expand the number of providers of legal services the consumer can initially access for advice and, in some cases, may result in lower overall costs.

The establishment and subsequent regulation of legal partnerships is provided for in Part 8 of the Legal Services Regulation Act (2015) ("the Act"). These legal partnerships will include both solicitor- barrister partnerships and barrister partnerships. It is unlikely that these new structures will be able to effectively function without some form of public access to barristers, for example having public access to solicitors and not barristers would create frictions in solicitor barrister partnership, and would prohibit barrister partnerships from effectively competing with solicitor-barrister partnerships.

It has previously been argued by the Bar Council that the removal of direct access restrictions would result in increased costs for consumers and barristers due to the additional costs associated with the handling of client fees, and the potentially increased workload for barristers. Experience in England and Wales suggests that direct access will result in barristers competing for client services in smaller cases that do not require extensive litigation. Large cases that require significant litigation will most likely still need the services of both barristers and solicitors. It is possible that barrister partnerships could have the administrative support necessary to undertake larger cases without requiring the services of a solicitor. However, the overall effect this will have on the market will depend on the number of barrister partnerships which are formed. If the current system, whereby solicitors do most of the organisation, preparation and management of the case

is indeed the most efficient system for consumers then it will persist as the norm, regardless of the changes that are made. The fundamental point is that barristers should in general have the freedom to choose how they operate, in response to a client's needs, and if a client believes that they can direct a barristers without the services of solicitor they should be permitted to do this.

In England and Wales Public Access was introduced in 2004 as a means of giving members of the public direct access to barristers. It was initially introduced with a number of restrictions, however, over time these have been gradually lifted⁴. Important changes were made in 2013 and 2014, which included new training requirements, the option to conduct litigation, and an extension of the scheme to enable barristers of less than three years' practising experience to undertake public access work. As of 2016 only 37% of barristers in England and Wales were registered on the public access scheme. Providing barristers are registered, members of the public can directly access barristers for both contentious and advisory services. There is no evidence to suggest that either the quality of service or the price paid for these services has suffered as a result of this policy. In fact, a recent Legal Services Board report⁵ found that direct access provisions have been associated with a greater amount of innovation and will continue to be a catalyst for innovation in the sector in the near future.

If direct access restrictions are removed the LSRA will need to introduce new rules regarding advertising and the handling of client funds, in order to protect consumers. In respect of advertising, this should not be too difficult as many of these rules are already in place for solicitors, however, this is not to suggest that they are directly transferable. In regard to client money, as noted above, the CCPC believes that an RIA should be conducted to establish the best way forward.

ENDS

⁴ Initially the public access scheme was not available for areas of family, immigration and criminal law. In 2010 the public access scheme was opened up for all areas of law.

⁵ Legal Services Board "Evaluation of changes in the legal services market 2006/07 – 2014/15" July 2016. Pg 54