# RESPONSE OF THE BAR COUNCIL TO THE LEGAL SERVICES BOARD DISCUSSION DOCUMENT "ENHANCING CONSUMER PROTECTION, REDUCING REGULATORY RESTRICTIONS"

The General Council of the Bar (the Bar Council) is the governing body for all barristers in England and Wales. It represents and, through the independent Bar Standards Board, regulates over 15,000 barristers in self employed and employed practice. Its primary objectives are to ensure access to justice on terms that are fair to the public and practitioners, to represent the Bar as a modern and forward-looking profession which seeks to maintain and improve the quality and standard of service to all clients, and to work for the efficient and cost-effective administration of justice. This response to the discussion document is made by the Bar Council acting in its representative capacity and in the public interest.

**Introduction**

Before responding to the questions posed for discussion by the LSB, we address the ambiguity in the title of the discussion document. The objective of enhancing consumer interests and promoting consumer protection appears to be in conflict with the adjoining goal of reducing regulatory restrictions.

**Underlying Presuppositions**

The key issue underlying this debate is centred upon the theory that greater competition in the provision of all legal services is good for the consumer. This is a theme in the Decker-Yarrow research commissioned by the LSB. This is trite economics, first expounded by Adam Smith with which many would agree; the legal consumer should, in the words of Adam Smith, be sovereign. We understand that to mean that the legal consumer's interests and entitlements as a purchaser of specialist quality legal advice or advocacy must be of paramount importance. The touchstone must be quality of representation, advice and service.

It can, in our view, never be over-emphasised that in the provision of legal services "bottom line" economics may prove to be catastrophic financially and deleterious to a person's way of life. The fee element of the winning tender is of little importance if it is not to be accompanied with professionalism and quality of service. Quality of service means accurate and informed advice which addresses and satisfies the

consumer's specific needs, being understood by the consumer to be guaranteed and underwritten by a proper and transparent system of redress.

How do the advocates of competition for the sake of the consumer define "competition", particularly when the disparate providers may not have the same ethos of quality nor the rigorous professional obligation to provide it? How is one comparing like with like when one considers the provision of legal services by barristers with those services provided by non-lawyers? Can the provision of legal services from non-lawyers and the proliferation of service providers (other than those regulated by the SRA, BSB, or ILEX) be seen as an economic end in itself? Or is it no more than a doctrinaire agenda, to be deprecated as much as the underlying prejudice which motivates it, namely that the legal profession (if left to itself) would exploit the public via cartels, monopolies or other restrictive practices?

We suspect that the politico-economic agenda which drives these developments will be unsympathetic and unyielding in spite of our legitimate concern that society under the Rule of Law is best served by a legal profession, with exacting and demanding entrance requirements, scrupulous ethical training, and equipped with both prescriptive codes of conduct, and inveterate professional standards, which, quite apart from the intellectual demands of this profession promote inherent standards of competence and excellence. Quality and professionalism are the hall-marks of a satisfied protected consumer. The core values which underpin quality and professionalism are given scant weight in the LSB's discussion document.

**Decker-Yarrow research**

We believe it was a missed opportunity and a seriously misguided approach by the LSB to commission research based upon a purely theoretical approach to understanding the economics of the need for regulation in legal services. The non-empirical and impractical nature of the exercise is best exemplified not by the theoretical micro-economics which forms a large tranche of the paper (theories of the firm/commodity supplier that are largely non-transferable and alien to the concept of the legal professional service industry) but more by failure to descend to detail when it was germane to do so and compounded by a failure to devote a greater proportion of the report and more substance to the section at 6.3 beginning at page 66 (A framework for the assessment of the effects of the rules).

There is also a certain degree of confusion and muddle in the approach taken by the authors, which is of concern given the apparent influence they both had upon the LSB discussion paper. They concede that modern neo-classical economics [MNC] is of limited value in its application to the legal services industry, not least because of its "abstraction" (ibid pp8-9). More obviously, the belief that perfect competition is the answer to all perceived difficulties (the mantra of MNC) is not applicable to legal services and has largely been discredited as an economic philosophy. In spite of this, a conclusion we happily endorse, the authors (at page 56 of their own report) quote the doyen of MNC economics (Hayek) in support of their contention "that competitive processes should be allowed to operate, since competition is the best

discovery procedure that we know". This strikes a dissonant chord with earlier reasoning and would give little comfort to someone who subsequently "discovered" that their trust document was being challenged by HMRC, or discovered that their parent's will was defective, their meritorious appeal had been positively advised against or the discovery they had paid a penalty, upon advice, which was unenforceable or contrary to law.

That is the real mischief of the "asymmetry of information" of which they speak; not the obvious distinction in status between the knowledge of the lay consumer and that of the skilled and competent lawyer whom he consults, but the risk that a hapless consumer may unwittingly go to someone ill-qualified to the extent that he does not know what he should know and is wholly incapable of giving correct advice.

**Unasked questions**

There are more fundamental omissions which are summarised in a most thoughtful piece by an American Jurist, Professor Terry, in response to the Decker-Yarrow research. The omissions concern three questions, which are not "cost-centric" but arguably represent cornerstones of our system of justice, its proper administration and the Rule of Law.

In her essay, "Understanding the Economic Rationale for Legal Services Regulation: The Importance of Interdisciplinary Dialogue", Professor Terry poses the following for discussion:

1) Whether there is a relationship between the independence of the legal profession and the robustness of a society's rule of law;
2) Whether the legal profession's regulatory structure affects the independence of the legal profession; and
3) Whether regulation by other branches of government or by those outside the legal profession tends to make the legal profession less independent

We believe that these are the questions which ought to have been asked by the LSB and considered in the research paper they commissioned. Such questions lie at the core of this subject, from the consumer's perspective. Constitutional and societal principles of great moment have been overlooked.

**Question 1: What are your views on the three themes that we have put at the core of our vision for the legal services market? If different, what themes do you believe should be at the core of our vision?**

The Bar Council is concerned that the vision espoused is at risk of defeating the statutory objectives

http://www.legalservicesboard.org.uk/news_publications/publications/pdf/regulatory_objectives.pdf.

The Bar Council is not persuaded that the three themes set out in paragraph 41 of the discussion document place any or sufficient emphasis on protecting and promoting the public interest, supporting the constitutional principle of the rule of law, improving access to justice, encouraging an independent, strong, diverse and effective legal profession and increasing public understanding of the citizen's legal rights and duties. The themes do not appear to add to the underpinning mandate set out in paragraph 40:

*"…….to ensure that regulation delivers the public interest and that the interests of consumers are placed at the heart of the system. We have the responsibility in our oversight role to ensure that legal services regulation through the approved front-line legal regulators delivers the regulatory objectives and the statutory better regulation principles of being transparent, accountable, proportionate, consistent and targeted only at cases where action is needed"*

The consultation uses will-writing as the example for analysing what should or should not be a reserved activity under the Act. The market analysis demonstrated that there were serious quality concerns in the provision of will-writing services, a non-reserved activity, by both solicitors subject to regulation and unregulated specialist providers. Unscrambling the regulatory speak, what that means for the consumer is that proper standards of work are not being maintained, which for the solicitors amounts to a breach of the professional principles. The conclusion reached at paragraph 162, that there is a strong prima facie case to be answered for making will-writing a reserved activity and thereby regulated may well be reasonable on the grounds of redress, but how can the case be made out that regulation ensures proper standards of work? It clearly does not as the service standard provided by solicitors is as poor as non-regulated providers.

We suspect after the banking crisis, hikes in fuel, domestic heating and train fares (yet again) to name but a few examples in the regulated sector that public confidence in regulation is low. How much lower will it be to propose regulation without addressing the quality control issues? As the consultation makes clear the deficits in standards often go unnoticed for many years, so whilst the issues of redress are important it is surely of greater importance to raise public confidence by effective raising of standards.

**Question 2 : What is your opinion of our view that the purpose of regulation is to ensure appropriate protections and redress are in place and above this there are real competitive and cultural pressures for legal services to deliver the highest possible standards with a range of options for consumers at different prices? If different, what do you consider that the role of regulation should be?**

We note the presupposition within the question and repeat what we understand the purpose of regulation to be as enshrined in the Act and set out above. We believe the LSB has, as Professor Julia Black warned in her paper Calibrating Regulation,

sacrificed promoting the public interest, supporting the constitutional principle and improving access to justice for the comfort of a model of economic analysis:

*"It is much easier to argue that the attainment of goals of the public interest or access to justice can be derived from promoting consumers' interests and ensuring a competitive market in legal services than to try to identify what access to justice or the public interest might require quite separately from an efficient market".*[1]

We are fortified in this view by the manner in which the LSB approached the issue of referral fees or customer acquisition costs as the consultation chose to denote such practices, that is, an efficient market was the sole consideration. The public outcry and Government response to claims management companies on the issue of referral fees, a practice the Bar Council has consistently opposed for the benefit of the consumer, brings in to question and undermines the approach adopted by the LSB. We note the observations of Professor Black on risk based regulation:

*"The question being asked by risk-based regulators is: what are the risks posed to our objectives – all our objectives? The method is perhaps not always a sophisticated one, but it does at least require a systemic analysis of what all those objectives are, what the risks are that those objectives might not be achieved, and how those risks need to be addressed.*

*Economic analysis can provide a similar systematic methodology, but when regulators turn to economic analysis to provide an ordered system of decision making, it is the goals of economics and its way of viewing the world which dominate. If their regulatory objectives are solely economic, that is appropriate. Where they are not, then a broader approach is required. The objectives of the LSB are far wider than economics, and deserve a more thorough consideration. They then need to be rendered tractable and, in management terms, operational……..*

*Being a rights regulator as well as market perfecting regulator, and an educator and profession-supporter, is not easy, but finding a systemic method to analyse and address all of the LSB's objectives is necessary if the inevitable trade-offs are to be appropriately made"*[2]

We take the view that the approach adopted is narrow and flawed and the LSB ought to abandon the economic analysis as an appropriate approach to deliver regulation which is in the public interest.

The consumer, when seeking legal advice, may be diverted by low fee advertisements, predicated by high volume business plans which take no account of difficulty or complexity. The providers of such services may be non-lawyers with rudimentary skills, or following computer generated templates or precedents without insight, learning, judgment or discernment. In such circumstances the consumer is unlikely to be aware of the potential or latent hazards in his case.

[1] Page 21
[2] Page 23

**Question 3: In light of the changing market do you think that specific action may be needed to ensure that more legal services activity can unequivocally be included within the remit of the Legal Ombudsman and, if so, how can this best be achieved?**

We accept that there has been a changing market in legal services not necessarily envisaged by the Act and providing little positive benefit to consumers in the standard of service delivery. We accept that further deleterious changes are likely. We would expect a thorough analysis by the LSB following the section 120 request of complaints in respect of non-reserved legal services in accordance with the regulatory objectives and that such a review should include the risks posed to all the objectives.

**Questions 4: What are your views of our diagnosis of the weakness of the existing system and the problems within it?**

**Question 5: What do you see as the benefits and downsides of regulating through protected titles such as solicitor and barrister?**

**Question 6: What are you views on whether there should be a consistent approach to the allocation of title to authorised persons? What are your views on whether title should be linked directly to the activities that a person is authorised to undertake or linked to the principal approved regulator that authorises them?**

The Bar has always relied on a strong identifiable brand and believes that there can be significant public confidence in the provision of services by those with the title barrister. The Bar, as a referral profession, has always provided internal price competition and the Code of Conduct exceeds the professional principles in imposing obligations on service delivery to the consumer.[3] Whilst we would argue that the representational regulatory difficulties, the "envelope theorem" were not a feature of the Bar Council, such concerns have in any event been eradicated by the BSB. We note in the Decker-Yarrow research that they were asked to provide advice without regard to the current regulatory system. We cannot understand why they were not asked to comment even if by way of postscript. We further suspect that the general public and particular those consumers who have had to use barristers would find the comparison of the supply of gas and electricity to legal services, particularly advocacy services to be ludicrous. We would agree.

We note that the LSB has not commissioned research to consider the harmonisation of the rule book between approved regulators as a more critical step than extending the category of reserved activities, particularly in exercising rights of audience/advocacy. We believe that a rule which prevents an advocate from undertaking advocacy beyond their competence is implicit in the professional

[3] Unlike the Solicitors Code of Conduct which does not prohibit HCAs in the criminal courts from undertaking advocacy beyond their competence.

principles in the Act. It is explicit in the Bar's Code of Conduct but not an SRA requirement. The regulatory objectives in the criminal defence field are simply not being met as a consequence of the changes in funding structure, the different rule books and the gatekeeper position of the solicitor. QASA is being developed to address the falling standards in advocacy.

Thus we have seen that changing regulation in the provision of advocacy services has conferred a market advantage upon solicitors, or rather those, we believe in the majority, who fail to advise that they can be represented by a barrister rather than themselves, without congruent and equivalent regulatory procedures, to the detriment of the public and the consumer, hence the perceived need for QASA. The question the consumer may want to ask is what is the point of regulation when under a new regulatory regime service standards in advocacy have fallen, in some cases, to wholly unacceptable levels?

The consumer may consider that an overarching regulatory body, such as the LSB would use its voice in opposition to government policies which threaten the objectives enshrined in the Act. They would of course be wrong. Indeed, the economic approach, competition, competition, competition and a drive down of consumer prices is one now seemingly adopted by other government departments, without consideration of the impact on the consumer.[4]

Reputational importance – As the Decker-Yarrow report made plain, the reputation of the profession is one of the main priorities of the professions and professional chambers and practitioners. As a means of combating the perceived mischief of information asymmetry, reputational importance is seen as effective, indeed, we would argue the most effective. Accordingly distinctions such as Queen's Counsel (QC), awarded to elite advocates, are helpful to consumers. This form of elitism is not anti-competitive buts acts as a hallmark. We note and endorse the observations made at page 56 of the Decker-Yarrow research that:

*"We do not, for example, think that a general conclusion to the effect that restrictions on business structures are clearly always anti-competitive is warranted"*

And at page 57:

*"…the strength of the case for the retention of restrictions on forms of business organisations is bound up with the strength of the proposition that certain organisational arrangements will likely undermine or weaken the ethical standard that a legal service provider has special responsibilities not to abuse a position of power over a "dependant" client, and should rather act in the best interests of that client"*

[4] Perhaps the best current example was the Legal Services Commission's attempt to use the proposed QASA competence levels to effectively abolish, what has hitherto been seen as the high quality mark of advocacy skills, QC's.

Professor Moorhead in his paper "Why there might be a market for lemons: Some thoughts on competition quality and regulation in legal service markets" at page 26 notes that research suggests that competition on quality alone increases quality. That is a proposition the Bar Council would endorse. He suggests that:

*"… for a market for legal services to function effectively signals about the relative quality of legal services have to be at least as meaningful as signals on price. If they are not quality is likely to diminish significantly as a result of competition. That is not to say consumers cannot, or should not, choose price over quality, but that they should do so on a reasonably informed basis as long as signalling quality in this way can be done on a proportionate basis)…….Ensuring that stronger signals of relative quality develop within legal service markets should be a central goal of professional service providers and professional regulators."*

Accordingly the benefits to the consumer of regulating the protected title of barrister are significant. We believe title-based professions, such as barristers within BSB regulation, provide the best product and are more likely to satisfy the regulatory objects. Activity based regulation would fail to provide any signalling as to quality. As can be seen from the examples cited above regulation does not equate to quality standards.

**Question 7: What are your views on our proposal that areas should be examined "case-by-case", using will-writing as a live case study, rather than through a general recasting of the boundaries of regulation? If you disagree, what form should a more general approach take?**

We have already expressed reservation on the benefit of regulation in the will-writing as a live case study as promoting "deserved public confidence in the legal system". We agree with a case by case analysis but have little confidence that the regulatory objectives will be satisfied given the emphasis the LSB sets out in questions 1 and 2.

**Question 8: What are you views on our proposed stages for assessing if regulation is needed, and if it is, what regulatory interventions are required?**

For the reasons set out in answer to question 2 we would have strong reservations on the proposals for assessing if regulation is needed.

**Question 9: What are your views on the implications of our approach for professional privilege?**

We are concerned that the ambit of legal professional privilege or perhaps more pertinently legal advice privilege and litigation privilege is considered a "competitive benefit". This is a doctrine of precedent, which is long established with potent policy and ethical imperatives. To describe it in such terms reveals a lack of understanding and antipathy towards professional standards.

**Question 10: Do you believe that any of the current reserved legal activities are in need of review? If so, which activities do you think should be reviewed and why?**

We believe that harmonisation of the rule book is a greater priority and will lead to greater public confidence if those who provide legal services under the current reserved legal activities do so to the same professional standard.

**Question 11: What are your views on our analysis of the regulatory menu and how it can be used?**

It should be apparent from the foregoing that we do not believe that the approach adopted by the LSB to regulation promotes the regulatory objectives. We are concerned that the LSB will by its proposals have the unintended effect of encouraging consumer confidence in products which are not fit for purpose.

**Question 12: Do you have any comments on our thoughts on other areas that might be reviewed in the period 2012-15, including proposed additions, and suggestions on relative priority?**

We believe that consideration should be given to a review of harmonisation of rule books and of commissioning research to look at how the LSB could promote the regulatory objectives in the Act. The costs of regulation are passed on to the consumer in the privately funded market and necessarily absorbed by those predominately practising in public funded areas. Should not the LSB consider the impact of government initiatives on the regulatory objectives?

In a different context, in February 2007, Professor Yarrow, in a paper to Parliament made the following observations as to the experience of the Regulatory sector in the UK which holds an important message for the LSB and other bodies:

*"There has been a trend toward re-politicisation of decision making, and also a tendency for more and more responsibilities to be given to regulatory agencies. The second of these tendencies gives rise to a risk that an analogue of the Peter Principle might emerge: the scale and scope/remit of regulatory agencies are expanded to the point at which the organisation becomes incompetent. If the aim is to improve regulatory effectiveness, therefore, the first thing to do is to buttress the existing position so as to resist these unhelpful pressures, wherever appropriate by narrowing its remit"* [extracted from http://www.parliament.uk/documents/upload/regulatory-policy-institute.pdf]

We are mindful of the political climate in which the provisions of the Legal Service Bill which became the Act were drafted and believe that at the point of implementation the Peter Principle applied to the notion of a Legal Service Board.

**Question 13: Do you have any comments on the approach that we have adopted for reviewing the regulation of will-writing, probate and estate administration?**

Yes, it will not address the breaches of the professional principles identified.

*4th November 2011*