

To:	Legal Services Board	Agenda Item: Item 4
Date of Meeting:	18 January 2017	Item: Paper (17) 01

Title:	Initial response to CMA market study
Work stream(s):	CMA market study
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Status:	Official

Summary:
<p>This paper is a first opportunity for the Board to consider the CMA's final report into its legal services market study. The CMA has recommended to the LSB that it:</p> <ul style="list-style-type: none"> • Monitors and engages with the frontline regulators on their progress in implementing the CMA's recommendations directed to them • Reports publicly, at appropriate intervals, on the sufficiency of action plans published by regulators individually and collectively and the progress in delivering those action plans • Takes appropriate action where regulators fail to address information gaps <p>The paper provides our initial analysis of the CMA's conclusions and sets out options for our response, including use of informal and formal regulatory approaches. The Board will be invited to formally agree its response to the recommendation directed to it at its March meeting and to confirm its regulatory approach, but based on our initial analysis we suggest that it should be able to support the recommendations.</p> <p>The paper provides the latest details on the governance of the implementation group that the CMA has recommended be established and describes how our response can be integrated with other planned work.</p>

Recommendation(s):
The Board is invited to:

- Discuss the CMA’s final report and indicate whether it is likely to support the recommendation directed to it
- Provide a steer on a preferred regulatory approach, to be finalised and agreed in March
- Note the CMA’s plans for the implementation phase.

Risks and mitigations	
Financial:	N/A
Legal:	[REDACTED]
Reputational:	Reputational risks may materialise should we reject the CMA’s recommendation to us. The main reputational risks are faced by the regulators and relate to whether they are willing to act on the recommendations directed at them and do so effectively. As oversight regulator we may be judged on whether the sector delivers real change.
Resource:	This work stream is included in the LSB’s 2016/17 Business Plan. The draft 2017/18 Business Plan reflects the high priority given to these issues by the Board but the resources required will need to be balanced with the Board’s other priorities. We are alive to the need to give the regulators sufficient headroom in relation to other demands we might make of them to make progress on this agenda, but without compromising on regulatory performance.

Consultation	Yes	No	Who / why?
Board Members:	X		The Board received an oral update at its meeting on 14 July 2016, considered a paper at its October 2016 meeting (where it also met the CMA senior team) and had regular updates via the CEO’s reports. The Chairman and CEO met Lord Currie before the CMA published its interim report and again at the beginning of November 2016.

Consumer Panel:	X	The LSCP is an active participant in the CMA's work and has published position papers. The LSB is shortly due to receive advice on information remedies from the LSCP which will inform future work on market transparency.
Others:	The CMA's market study has been discussed by the CEOs of the frontline regulators collectively and in bilateral meetings. The CEOs are due to discuss the CMA's final report collectively at their next LSB-convened meeting on 25 January. The Chairs briefly discussed the CMA study at their LSB-convened meeting in November.	

Freedom of Information Act 2000 (Fol)		
Para ref	Fol exemption and summary	Expires
Risks and mitigations: Legal	Section 42: information subject to legal professional privilege	
9, 12-13, final sentence of para of para 14, final sentence of para 19, 20-22, Second half of para 27, 30-46, 48-52	Section 36(2)(b)(ii) – Information likely to inhibit the exchange of views for the purposes of deliberation by the Board	N/A
Annex C	Section 36(2)(b)(ii) – Information likely to inhibit the exchange of views for the purposes of deliberation by the Board	N/A

LEGAL SERVICES BOARD

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Initial response to CMA market study

RECOMMENDATION

1. The Board is invited to:
 - (i) Discuss the CMA's final report and indicate whether it is likely to support the recommendation directed to it
 - (ii) Provide a steer on a preferred regulatory approach, to be finalised and agreed in March
 - (iii) Note the CMA's plans for the implementation phase.

Background

2. On 13 January 2016 the CMA launched a market study into legal services to see if they are working well for consumers and small businesses. The scope of the market study encompassed legal services in a broad sense by considering services that are reserved, regulated or unregulated across a broad range of different legal areas. However, criminal legal services were excluded from scope. The CMA also did not focus on the experiences of medium-sized and large businesses acting as consumers of legal services.
3. On 8 July 2016 the CMA published an interim report setting out its initial findings and emerging views on possible remedies. In addition, it published reports of two consumer surveys it commissioned to understand the experiences of individual and small business consumers. At this point the CMA also gave notice of its decision not to make a market investigation reference. This meant that the CMA could not impose remedies on the LSB or other organisations, but instead could only make recommendations.
4. In August 2016, consistent with the steer provided by the Board at its meeting in July 2016, the LSB submitted a high-level response to the CMA's interim report. This was largely supportive of the CMA's diagnosis, but emphasised the need for transparency and regulatory reform to proceed in parallel. We also made a supplementary submission on the reserved activities in response to a follow-up questionnaire by the CMA. In addition, we attended two CMA stakeholder workshops, on transparency and regulation respectively.
5. There has been ongoing and good engagement between the CMA and LSB in the run up to and throughout the market study. This has included providing LSB research as one of the main CMA sources of 'hard' evidence. In addition we

have exchanged information, responded to queries and held bilateral meetings at technical, senior and board levels. We have also provided two 'teach-in' sessions: an overview of the market and regulatory framework at the beginning of the market study; and a more detailed session in September 2016 on the LSB's functions, duties and powers. There has also been good engagement at board level, in particular the CMA's senior team attended the LSB's October 2016 board meeting and the CMA participated as a panellist at the event in Manchester following the November 2016 board meeting. The Chairman and CEO met their counterparts twice during the lifetime of the market study and have exchanged written correspondence.

6. The CMA published the final report of the market study on 15 December 2016. **Annex A** reproduces the recommendations for easy reference. We issued a media release on publication of the report which stated that the report should act as a catalyst for change building on the LSB's previous work and welcomed the CMA's dual focus on market transparency and structural reform.
7. **Annex B** provides a summary of stakeholder press reaction to the report.

Initial analysis of the final report

8. It is important for the Board to take an independent view of the CMA's analysis and not simply adopt the CMA's conclusions as its own without further consideration (while of course recognising the expertise and resources the CMA has invested in this study and its status as the UK's national consumer and competition authority). The recommendations cannot be considered in isolation: rather, the board must assess them by reference to the alternative activities it could undertake in pursuance of the regulatory objectives. The CMA, by having previously chosen not to launch a formal market investigation, is unable to use its order-making powers, nor has it undertaken a formal proportionality assessment of its chosen remedies. Therefore, we must judge for ourselves the proportionality of implementing what the CMA has recommended, and how its proposals relate, in terms of priority, to our other areas of work. Likewise, we should respect the autonomy of each of the frontline regulators to exercise independent judgement on the recommendations in light of the circumstances in their parts of the market.

9. [REDACTED]

10. Our initial analysis of the wider report below follows the three main areas of focus for the market study: competition, consumer protection and regulation.

Competition – greater market transparency

11. The CMA has found that competition in the legal services sector for individual consumers and small businesses is not working well. Its main concern is that a lack of information weakens the ability of consumers to drive competition through making informed purchasing decisions. Its recommendations to the frontline regulators to address these issues include:

- Action to deliver a step change in standards of transparency to help consumers (i) to understand the price and service they will receive, what redress is available and the regulatory status of their provider and (ii) to compare providers. In particular, it wishes the regulators to establish a new minimum standard of provider transparency
- Promotion of the use of independent feedback platforms to help consumers to understand the quality of service offered by competing providers
- Facilitation of the development of a dynamic intermediary market through making data more accessible to comparison tools and other intermediaries
- Development of a consumer education hub by overhauling the Legal Choices website currently operated by the SRA on behalf of the frontline regulators.

12. [REDACTED]

13. [REDACTED]

[REDACTED]

[REDACTED]

- [REDACTED]

Consumer protection

14. The main focus of this section is on extending access to redress for customers using unregulated providers. The CMA has recommended that the Ministry of Justice review whether and how to extend redress to such consumers. The CMA indicates that the Legal Ombudsman provides more user-friendly and timely access to redress than the courts and other ADR providers available to legal services consumers under the ADR Regulations. It does however identify solutions other than extending the Legal Ombudsman's scope. [REDACTED]
15. The CMA's final report confirms its initial analysis on unregulated providers, which is consistent with the analysis in our recent mapping project. It has made a recommendation to the Ministry of Justice about working with other bodies to try to get more data on unregulated providers. Further, the CMA also found no significant quality issues relating to the use of McKenzie Friends. It considers such providers provide an important service to the vulnerable and those who cannot afford to instruct a solicitor and therefore believes that the proportionality of a blanket ban needs to be assessed carefully given its likely impact on consumer choice¹. This is consistent with our own view.
16. Finally, we are pleased the CMA welcomed the LSB's recent action on first-tier complaints handling as a means to increase consumer awareness of redress mechanisms and use complaints intelligence to improve the feedback loop.

Regulation

17. The Board will be particularly pleased to note the two recommendations directed at the Ministry of Justice to conduct reviews of the independence of regulators (from government and representative bodies) and of the regulatory framework. The CMA has moved its position since its interim report on these matters. Furthermore, there is a large degree of consistency between the CMA's design principles for an optimal regulatory framework and the LSB's vision document. However, the CMA has framed the review of the current regulatory framework recommendation as a long-term review.
18. The CMA has found general agreement that regulatory costs remain excessive despite reforms introduced since the Legal Services Act. It is supportive of current efforts to remove unnecessary regulations, and in particular helpfully indicates support for progress on the Ministry of Justice consultations on Schedules 11 and 13 relating to ABS authorisation processes.
19. Finally, the CMA has commented positively on the SRA's current reform proposals and, in particular, has recommended to the SRA that it remove

¹ The senior judiciary has indicated that the outcome of the JEB consultation will be known shortly.

regulatory restrictions to allow solicitors to practise in unauthorised (i.e. unregulated) firms - a proposal on which the SRA has already been consulting.

[Redacted text block]

20.

[Redacted text block]

[Redacted text block]

[Redacted text block]

Ministry of Justice response

23. The Board will be interested to know the Ministry of Justice's response to the CMA's report. So far it has provided an immediate short official reaction in which it welcomed the report and undertook to respond publicly in due course.
24. The report highlights that in its strategic steer to the CMA, the government has stated that there will be a presumption that the government will accept all of the CMA's published recommendations unless there are strong policy reasons not to do so. The strategic steer also commits to responding to the CMA's recommendations within 90 days, indicating the steps that it will take in response or the reasons that it is unable to take forward recommendations.
25. We will update the Board on any developments at the meeting.

The role envisaged for LSB to monitor and report on progress

26. The CMA has made a recommendation to the frontline regulators that an implementation group be established to coordinate and deliver a sector wide response to its recommendations on market transparency. It expects regulators individually and collectively to develop action plans and then individually to consult on proposed amendments to their regulation and guidance.
27. The CMA has been considering various governance options to support the implementation phase in response to representations by different stakeholders. The terms of reference and membership of the implementation group was not detailed in the final report, although it does suggest the LSB should be part of the group. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

28. In this context, the CMA has recommended to the LSB that it:
 - Monitors and engages with the frontline regulators on their progress in implementing the CMA's recommendations directed to them
 - Reports publicly, at appropriate intervals, on the sufficiency of action plans published by regulators individually and collectively and the progress in delivering those action plans²
 - Takes appropriate action where regulators fail to address information gaps.
29. The CMA also wishes the LSB to monitor the impact that the CMA's recommendations are having on the sector through repeating our pricing research and triennial Market Evaluation which considers a range of published research including the LSCP's tracker surveys. The LSCP's press statement in

² Elsewhere in the report the CMA suggests that LSB publishes its assessment of the regulators' action plans as soon as practicable, and that it reports publicly on at least an annual basis the progress of regulators in responding to its findings and recommendations.

response to the report committed to continuing its annual tracker surveys for the next three years.

30. [Redacted]

[Redacted]

32. [Redacted]

[Redacted]

34. [Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

- [Redacted]

- █ [Redacted]

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- █ [Redacted]

- [Redacted]

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- █ [Redacted]

[Redacted]

Discussion

42. [Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

46. [Redacted text block]

[Redacted text block]

[Redacted text block]

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- [Redacted]
- [Redacted]
- [Redacted]
- [Redacted]
- [Redacted]

Timetable and resourcing

47. The CMA has suggested a provisional implementation timetable post publication of the final report, as follows:

- **by 31 January 2017** an implementation group is established and has met to coordinate and deliver a sector wide response to the recommendations (this has been scheduled for 19 January and the CEO will attend)
- **by 30 June 2017** both the implementation group and the individual regulators should publish their respective action plans stating the actions that they are pursuing and anticipated milestones in delivering those actions
- **by 30 September 2017**
 - o the individual regulators commence a public consultation on any proposed amendments to their regulation and guidance; and
 - o the Legal Choices website is relaunched with revised content and expanded scope.

48. [Redacted]

[Redacted]

[Redacted]

[Redacted text block]

[Redacted text block]

Next steps

- 51. [Redacted list item]

[Redacted text block]

January 2017

Annex A – The CMA’s recommendations

Heading	Recommendation
<p>Recommendations on changing supplier behaviour on transparency</p>	<p>We recommend that the BSB, CILEX Regulation, CLC, CLSB, ICAEW, IPREG, The Master of the Faculties and SRA should individually and collectively:</p> <ul style="list-style-type: none"> • Act to improve the quality, utility and prominence of disclosures on providers’ websites in relation to price, service, redress and regulatory status. • Develop and consult on an enhanced regulatory minimum level of transparency for legal services providers, supported with guidance on implementation. • Introduce guidance or regulatory requirements as necessary to improve information provided on engagement such as through the client care letter. • Promote the use of quality signals by providers and issue guidance for providers on engaging with online reviews.
<p>Recommendations on helping consumers navigate the sector</p>	<p>We recommend to the BSB, CILEX Regulation, CLC, CLSB, IPREG, The Master of the Faculties and SRA that they should:</p> <ul style="list-style-type: none"> • Review and further develop the content of the Legal Choices website to: <ul style="list-style-type: none"> ○ present a comprehensive whole of market overview of different types of provider including those not regulated by frontline regulators; ○ provide information and practical guides on comparing and choosing a legal services provider; and ○ provide guidance on what information consumers and small businesses should reasonably expect from legal services providers on engagement and during the course of ongoing cases. • Identify how best to support the vulnerable and those who are either unable or do not have confidence to access the Legal Choices website. • Actively consult the LeO, the LSCP, the LSB, relevant consumer and small business groups such as Which?, Citizens Advice, and the FSB, ICAEW and self-regulatory bodies on content and focus. Furthermore, the frontline regulators should consider how to meet ongoing consumer and business needs in future changes to editorial content. • Engage with government including the MoJ, BEIS and the Government Digital Service to improve signposting to Legal Choices and consistency of content between Legal Choices and GOV.UK. • Engage with relevant bodies in Northern Ireland and Scotland to consider how to ensure individual consumers and small businesses across the UK can be signposted to appropriate information. <p>We recommend to the BSB, CILEX Regulation, CLC, CLSB, ICAEW, IPREG, The Master of the Faculties and SRA to:</p> <ul style="list-style-type: none"> • Actively promote Legal Choices from their websites and on published materials. • Encourage legal services providers to make consumers aware of Legal Choices.

	<ul style="list-style-type: none"> • Explore other channels to promote awareness of the Legal Choices website including paid search. <p>We recommend to the MoJ that it coordinates changes to content on GOV.UK and introduces signposting to the Legal Choices website across its content.</p>
<p>Recommendations on facilitating comparison</p>	<p>We recommend to the BSB, CILEX Regulation, CLC, CLSB, ICAEW, IPREG, The Master of the Faculties and SRA that they should:</p> <ul style="list-style-type: none"> • Identify and publish relevant information on entities and professionals which can be made available to customers, DCTs and other third party intermediaries under an ‘open data’ licence. • Publish relevant regulatory data in a standard format across all regulators and with consistent frequency. • Assess the feasibility a single digital register across authorised professionals combining relevant regulatory and customer focused information.
<p>Recommendations on consumer protection</p>	<p>We recommend to the MoJ that it should review whether and how to extend redress to consumers using unauthorised providers.</p> <p>We recommend to the MoJ to work with LeO, the self-regulatory bodies, Citizens Advice, HMCTS and the Probate Service in order to consider whether there is scope to adapt existing data sources to collect additional information relating to the unauthorised part of the sector.</p>
<p>Recommendations on regulation</p>	<p>Short-term recommendations</p> <ul style="list-style-type: none"> • We recommend to the MoJ that it should undertake the review of independence of regulators • We recommend to approved and frontline regulators to take steps to reduce regulatory burden in areas where not justified by consumer protection risk or public interest • We recommend to the SRA to remove regulatory restrictions to allow solicitors to practise in unauthorised firms. <p>Long-term review</p> <ul style="list-style-type: none"> • We recommend to the MoJ that it should review the current regulatory framework for legal services.

Recommendations on implementation

We recommend to the BSB, CILEX Regulation, CLC, CLSB, ICAEW, IPREG, The Master of the Faculties and SRA that:

- By **31 January 2017** an implementation group is established and has met to coordinate and deliver a sector wide response to our recommendations.
- By **30 June 2017** both the implementation group and the individual regulators should publish their respective action plans stating the actions that they are pursuing and anticipated milestones in delivering those actions
- By **30 September 2017**:
 - the individual regulators commence a public consultation on any proposed amendments to their regulation and guidance; and
 - the Legal Choices website is relaunched with revised content and expanded scope.
- To make sure that customers are best able to engage with information and act on it, they consider conducting consumer research and testing to understand how individuals and small businesses interact with and respond to different styles and formats of presentation of information.
- Consumer and business groups should be appropriately consulted during the implementation of our recommendations.

We recommend to the LSB that it:

- Monitors and engages with the frontline regulators on their progress.
- Reports publicly, at appropriate intervals, on the sufficiency of action plans published by regulators individually and collectively and the progress in delivering those action plans.
- Takes appropriate action where regulators fail to address information gaps.

Annex B – Stakeholder reaction to the report

The list below includes key points in press statements by frontline regulators, approved regulators and consumer organisations. Notable organisations who have yet to comment include: Association of Costs Lawyers, Costs Lawyer Standards Board, ICAEW (representative arm), CITMA, CIPA, IPReg, Master of Faculties.

Bar Council

- Welcome the report
- Not aware of evidence that separation between the Bar Council and BSB is not operating as Parliament intended

Bar Standards Board

- Welcome the CMA's report and looks forward to working with them and other legal regulators to take forward their recommendations

CILEx

- The sector has come a long way but there is much further to go
- Encourages price and services transparency that benefits consumers and urges members to be as open as possible about their pricing structures and service models so consumers know what to expect. The majority of CILEx members though are employees of legal businesses, and therefore the regulatory mechanisms available to encourage transparency are not necessarily as applicable as they are to the businesses themselves.
- Anticipates the review of whether and how to improve access to redress for customers of unregulated providers will highlight consumers are unaware of the enhanced protections available to them of using a regulated professional. However, regulated professionals fund the enhanced consumer protection mechanisms, and if the review considers incorporating unregulated providers into these mechanisms it should also consider fair cost contributions
- Foresees potential advantages in working towards making Legal Choices the initial go-to hub for consumers
- Supports the sharing of data in a way that can enhance information provision and the means to compare services and providers but the co-ordination, infrastructure and technical challenges of doing so effectively (when that data comes from a variety of sources) should not be underestimated
- Favours a holistic review of legal regulatory framework. However, it is a complex and balanced system and the MoJ may be better advised to do that

over the medium term rather than tinker piecemeal with certain elements in isolation, such as the independence of the regulators.

- From a CILEx perspective, the frontline regulator is, to all intents and purposes, already independent and CILEx is ready to engage in exploration of the next stage of the evolution of that independence

CILEx Regulation

- We are very pleased to receive the CMA's recommendations and have committed to working with them and the other regulators on any associated action plan arising to address their findings.
- We will continue to develop the Legal Choices platform and support its promotion to customers
- There is further discussion to be had about quality marks and client protection arrangements. It will be important to understand how consumers are able to distinguish between accreditations and quality marks as part of their decision-making process and what they understand about the level of protection that may be afforded to them.
- Happy to explore the feasibility of a single digital register with other regulators
- The CMA recommendations offer us an opportunity to consider the different stages of the customer journey and how we as regulators can encourage improvements to the level of information that is made available to them. We would not envisage taking a prescriptive approach, but will consider whether our current standards empower providers to deliver services with sufficient transparency

Council for Licensed Conveyancers

- CMA has moved forward the conversation on price and service transparency and comparison. We have already debated these issues and we will begin consultations soon on a range of possible ways forward
- Pleased that the CMA shares our view of the need for a review of the scope of legal services regulation and a move to a more rational, risk-based approach
- Before we can move forward though, it is vital that the other front line regulators of legal services enjoy the same regulatory independence that we do. The CMA recommends the MoJ undertake a review of independence, but this is unnecessary in our view. The LSB has powers to secure independent regulation. We urge the LSB to take action now

ICAEW (reported in Legal Futures)

- It is disappointing the CMA has talked about of pricing, service and quality. There is little attempt to define what these look like, what 'good' might look like on transparency, and on quality it appears to be a race to the bottom rather than an effort to improve it
- The outcomes sought seem to be enablers rather than an end game of a stronger more effective diverse market

Law Society

- Welcome decision not to conduct a market investigation
- It is astonishing that some of the CMA's recommendations prioritise deregulation over consumer protection
- The Law Society has a responsibility to make sure that the legal sector works in the best interests of each one of us - regardless of wealth, ethnicity or gender. Our concerns are wider than the CMA's
- Regulation can be a blunt instrument. Solutions driven by consumer demand are more flexible and less costly than regulation
- Public education in identifying legal problems, which the Law Society promotes, also plays a significant role in empowering people to make the right choices about when and how to seek legal advice
- It is the wrong time to review regulation of the legal sector, nor is there demand from consumers or the profession for such reforms

Legal Services Consumer Panel

- Although there has been some progress over the years, the pace of change has been too slow. The CMA's review must be a catalyst for advancement
- The remedies proposed will require tenacity, drive and focus from the regulators and the oversight regulator. Solutions will not always be universally popular, welcomed, or straightforward.
- Regulators must invest time and effort in understanding the challenges from both the consumer and provider perspective, and the oversight regulator must be robust in its support and challenge
- Commits to continuing its tracker survey and will publish a Consumer Impact Report before the CMA's three year timeframe is out

Ministry of Justice (reported in Legal Futures)

- We welcome the CMA's work in this important area. The report makes a number of thoughtful recommendations and covers a broad range of legal services, which we will respond to in due course

Solicitors Regulation Authority

- Welcomes the report
- Pleased that the CMA has strongly endorsed its reform proposals
- The report makes a good case for regulation that is independent of both representation and Government, echoing the SRA view that independent regulation is key for public confidence and will help increase public trust

Annex C

[REDACTED]