

Response to consultation on the Regulatory Framework for Legal Services in England and Wales

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Introduction

1. I was pleased to be able to attend one of your open sessions in London last month and reassured by the open-minded and critical approach you are taking to this matter.
2. If any of what follows is not clear, or would benefit from amplification, do not hesitate to contact me. I am on 020 7611 9330 or davidwolfe@matrixlaw.co.uk or at Matrix, Gray's Inn, London, WC1R 5LN.
3. I am a barrister in independent practice in London. In 1999/2000 I was closely involved in establishing Matrix, a barristers' practice set up with the express intention to innovate in the delivery of legal services. We have done so, albeit within the constraints of the existing regulatory regime.
4. My personal practice is almost entirely public law based (such that judicial review is the principal form litigation with which I am involved). In that capacity, I have advised the Bar Council on reform of the bar's complaints procedures (with a view to ensuring compliance with the Human Rights Act 1998). I have also acted in judicial review challenges to decisions of the GMC's PCC (in each case by complainants aggrieved by the PCC's decision that the admitted/proved conduct did not amount to Serious Professional Misconduct). I undertake a large amount of "public interest" work including much for which I am not paid.

The Kentridge Report

5. When the OFT produced its report on Competition in the Professions, I and others at Matrix (barristers and staff) met with the OFT to discuss the report. We subsequently wrote a critique of the Bar Council's response (the "Kentridge Report") to the OFT Report. Our critique was only provided to the OFT but I have the authority of its other authors (who it identifies) to provide it to you and for it thus to be in the public domain. I am sending it with this document and it should be read as part of this response. I hope you will not mind if I do not repeat in this document all the points we made, some of which are very pertinent to the issues you raise. I suspect they may be of more use in their original form.

6. The only general point I make at this stage about the Kentridge report is that it read very much as a “defence” by the Bar Council to a complaint by a competition authority and not as a document coming from a self critical and vigilant regulator. Indeed, as follows, that was a very typical Bar Council approach.

The approach of practitioners and the Bar Council

7. The approach taken by the Bar Council (to the OFT and more generally) is relevant here in (at least) two respects (and notwithstanding my sense that there is no real prospect of the status quo – being self regulation by bodies which are also trade unions – surviving the review exercise¹). Firstly, it should inform the way in which you read the representations that the Bar Council makes to you in this review. And secondly, and more substantively, it should inform thinking on the extent to which “the profession” (or, more particularly, the Bar²) should be involved in the future in regulation of itself (and thus the comparison between the options which you present). I will return to this further below.
8. I thus observe that, based on my experience of following bar matters over a number of years, the Bar Council’s approach (as manifested, say, in “Counsel” magazine) is consistently that of staunch defender of the status quo.
9. Indeed, my own informal inquiries (including of former Chairmen of the Bar Council) has yet to reveal any significant examples of the Bar Council initiating any actions (such as rule changes) which significantly challenge the traditional ways in which barristers operate and organise themselves in a manner which might threaten the self interest of maintaining profits³. Wherever change has come, the Bar Council seems only to have reacted to pressure from outside and then (so I believe) only when it feels it has no real choice but to do so. Thus, for example, the Bar Council has permitted a limited relaxation of the rules on “direct access”, but only when under pressure to do so from (among others) the OFT.
10. My strong sense from 12 years dealing with barristers is that the overwhelming majority of barristers, and certainly the Bar Council as an institution will staunchly defend the status quo; and not exclusively out of

¹ It is plainly unsustainable to continue a system where single entities are both regulator and trade union

² I cannot comment on the position of the Law Society or other legal regulators

³ A possible, but modest, exception was the attempts by David Bean, when Chairman, to improve the arrangements for funding “pupils”. But, even then I am not sure that this too was not reactive and, in any event, his proposals were rejected by the bar generally.

an inherent individual conservatism. They simply realise that the current arrangements basically suit us (or the majority of us, at least) very nicely, thank you. And, they also consider barristers to be (quite wrongly) somehow special and different from other service providers⁴.

11. Self regulation and the maintenance of clear boundaries between barristers and solicitors have allowed barristers to sustain (without great public scrutiny or justification) the archaic working practices and high profits which we (me included) enjoy. Of course, that overlooks the benefits which might arise for some providers through liberation (say of business organisation rules as discussed further below). But the vast majority, and certainly the Bar Council, do not see it that way.
12. Two further illustrations will suffice.
13. Firstly, the Bar Council's approach to quality control by the LSC. Para 6 of your report states that "*There is also a quality assurance system covering those contracted to provide legal aid services*". That sentence paints a very incomplete picture. There is no quality assurance system in place for barristers doing "legal aid" (now Publicly Funded) work (other than the long stop complaints regime of the Bar Council); and certainly nothing comparable to the regime which exists in relation to solicitors who do such work. The LSC has developed its "Quality Mark" system for the Bar but QM is voluntary for the Bar (i.e. having QM is not a pre-requisite to doing barristers doing LSC funded work), even though it is mandatory for solicitors' firms wanting "franchises". QM for the Bar is also very weak in substance – it does not deal with "quality" issues directly but, instead, relies on organisational proxies (such as presence of administrative systems) and, even then, imposing relatively low requirements. And finally, it operates only at the level of the "chambers" and not the individual barrister. Thus, the chambers may have systems (e.g. for "returning" cases) in place, but the barristers involved may be operating at the barely competent level. But my point here is not just about your report. My intention is to illustrate the apparent approach of the Bar Council to anything which impinges on the way in which barristers currently operate: namely resist. In particular, I understand that the LSC wanted to make QM compulsory (i.e. a barrister could not undertake LSC funded work unless their chambers had QM). But the Bar Council resisted this fiercely and the LSC has backed off (at least for now) in deference to

⁴ In the end, we are simply another provider of services. Like many sectors, there need to be some special rules for our sector (eg duties to court) but other obligations (eg duty to the client, confidentiality) are not special to lawyers, let alone the bar.

"The Professions". Likewise, the LSC floated the idea of a QM for individual barristers (an obvious next step). The Bar Council resisted, and the LSC has (at least for the moment) backed off. So, yet again, the Bar Council is seen to resist. But what possible legitimate⁵ basis is there for providers of a service to a public sector purchaser fiercely to resist any significant quality control? And yet that is the Bar's knee jerk reaction to such suggestions.

14. My second example comes from the "Chairman's Column" in Counsel Magazine from May 2003 (a copy of which I attach for ease of reference). Matt Kelly wrote:

"I have already used this column to deplore the inexcusably low rates of pay that have been provided for counsel in the family graduated fee scheme.

So it was to my horror that I learned from the North Western Circuit of a scheme engineered by a firm "First Law" to purchase the Bar's services in child care cases on an exclusive basis on behalf of a group of local authorities.

Not only are the rates provided far lower than those under graduated fees, the Bar Council has a real concern that the scheme breaches competition law. It is, certainly, an exercise designed to fix prices in purchasing legal services in Child care.

We have warned the Council's concerned of this, and are raising our objections to the scheme at the highest level. It is for the individual barristers to decide whether or not they are willing to take on work at these rates being discussed on a "take it or leave it" basis. Watch this space."

15. As it happens, I don't think Mr Kelly returned to the subject in his column again⁶. But his approach to this innovation was firstly confused (object to the scheme while recognising that it is up to individuals) and secondly, yet again showed the core Bar Council⁷ response to innovation or to change which otherwise threatens traditional ways of barristers working: namely resist (in the perceived general interest of the bar), even if (so it seems) both the particular barrister providers and clients were willing to explore such business arrangements.

16. I thus turn to answer your specific questions.

⁵ As opposed to arguments about the cost of compliance, etc, which are not good public interest arguments.

⁶ And I know nothing more about the "First Law" scheme than what he describes

⁷ I do not believe that Mr Kelly was unusual in his reaction

Consultation questions

17. **A1:** I agree with the objectives you identify. I would add (a) the public interest, (b) public confidence/perception (i.e. not just regulating effectively but being seen/perceived to do so), and (c) avoidance of unjustified restrictions. All of these (particularly (b)) point away from any significant degree of self regulation.
18. **A2:** They should be kept to a minimum (say duty to the client, duty to the court, confidentiality); and they should be the same for all providers of legal services (i.e. not separate rules for e.g. barristers and solicitors).
19. **A3:** Yes, if properly framed (including by reference to the wider factors such as those above).
20. **B1/B2:** I see model A as significantly preferable to model B although a B+ type scheme might be acceptable provided it was much nearer to A than B (as described below).
21. The principal factor in that response is my belief (based on the things I describe above) that any significant “self regulation” (particularly in the rule-making function, perhaps less so when it comes to dealing with individual complaints) will continue to resist innovation and is unlikely to act in the public interest (except where the public interest coincides with the private interests of barristers) and certainly not command public confidence to the extent which is desirable⁸. It will certainly not initiate change.
22. Of course, it may be that some individuals practitioners could be found to act as regulators who would not adopt that approach. But they would – in my experience – be a tiny minority and thus unlikely to make up the numbers on the board.
23. Any significant degree of self regulation is – in my view – likely to perpetuate regulation in the interests of the providers, as now.
24. Model B is also much less able to cope with any variant on the traditional business organisation (whether a form of LDP or MDP).
25. Moreover, as we explained in our analysis of the Kentridge Report, the things which the Bar Council points to as distinguishing barristers from solicitors (ability to litigate, cab rank rule, etc) do not, in fact, stand up to

⁸ I believe that the public perception would be that barristers – through the Bar Council – look after barristers’ interests first and foremost. And the perception would be correct.

scrutiny. That, in turn, leads me to favour regulation by function/activity rather than by "profession" (i.e. whether or not the model is A, B or B+). Thus, for example, there should be a common regulatory approach to everyone who appears in the higher courts (whether traditionally a barrister or a solicitor), or who "litigates" (ditto). A system of separate regulation, particularly "self regulation" is likely to lead to discrepancies. A system of functional regulation can secure the optimum regulation to the particular activity, across the board.

26. **B3:** As above, a B+ model could be acceptable, but only (a) if much closer to A than B, and (b) if, in effect, a stepping stone to A in the long term (rather as the SROs in the financial sector were a step on the way to the FSA).
27. In a B+ model, there would need to be a very clear separation between the regulator and trade union (I am thus very concerned by the term "regulatory arm" in your para 21).
28. There may, of course, be a small degree of overlap of personalities (e.g. the head of the trade union might be a member of the regulatory board) but it should be kept to a minimum. Moreover, any such overlap is potentially problematic in entrenching a particular trade union's position. In particular, while the State should secure the regulatory body's position, it is for the "profession" to set up and organise its trade union(s). I can foresee multiple trade unions developing over time (even if only to represent the employed vs independent bar; but why not the "criminal bar" or the "family bar" each of which have clear sectoral interests?⁹). With a potential proliferation of trade unions, a "place on the regulatory board" for the head of each would probably be unworkable.
29. Moreover, within the B+ model, it would still be critical (for the reasons above) to ensure that the profession/practitioners were a minority within the regulatory board. Such a minority could bring such "expertise" as was needed. I note, however, that for doctors at least in the field of discipline, the highest arbiter (eg of whether particular conduct is SPM) is not a medical person or body, but the High Court (formerly the Privy Council); so I am not clear why it is felt that, say, barristers are best placed to decide how barristers should act. That would not, of course, preclude the regulatory body from drawing input from all sources, including, no doubt, practitioners.

⁹ cf the different unions which represent the teaching profession

30. **B4/B5/B6:** No comment.
31. **C1:** Any complaints process should involve a very high “lay” content, even if not being actually completely independent from “professional bodies”. But even where a lay element is injected into a “professional” complaints process, there are real risks of assimilation and deference by the lay element. My own dealings with the Bar’s process (as mentioned above) left me feeling that, on a “public perception” test¹⁰ of whether the lay element was, indeed, independent of the profession, the process could fail.
32. **C2:** There should be a uniform complaints body or, at the very least, a single point of initial public access. That is not just to ensure that a problem which, in truth, lies partly at the door of the barrister and partly at the door of the solicitor, ends up falling through the middle. It is also to ensure common (high) standards. Take a simple example: note taking and record keeping. I suspect that the solicitors’ complaints regime is far tougher in ensuring good record keeping/note taking (e.g. through attendance notes) than is the bar’s – because that has been a traditional solicitor activity and is not a traditional barrister activity.
33. **C3:** See my answers to C1-C2.
34. **C4:** As above, I see a strong case for a single body to secure common high standards. The counter argument is, in effect, that only (say) barristers can truly judge what is acceptable conduct by barristers. That is nonsense.
35. **C5/C6:** No comment
36. **D1:** It is too risky to rely on an individual. The regulator should be a board. Apart from anything else, a board is more likely to be able to have a diverse membership (gender/age/race/etc) and thus command public confidence.
37. **D2:** As above, the board should be overwhelmingly lay with a small minority practitioner involvement. Appointment should be on merit and not the “representatives” (in part for the reasons mentioned above).
38. **D3:** No comment.

¹⁰ cf the test for “bias” in public decisions: a decision can be vitiated by “perception of bias” (would the reasonable and properly informed observer consider there was a risk of bias?) without the need for proof of actual bias. Thus, I am not saying that the lay element did indeed lack independence; but an observer might well have concluded that there was a real risk of it

39. **D4:** Appointments should be for several years (say 5) but on a phased basis to ensure both continuity and yet turnover.
40. **D5:** The key quality of the regulator is that they must “take no bullshit” in defending the public interest (which, of course, includes an interest in a strong and vibrant pool of providers of legal services), by which I mean they must approach what they are told (e.g. by practitioners and the trade unions) with a sceptical and questioning mind.
41. **D6/D7:** No comment.
42. **D8:** Not sure but certainly not the court. (Because, for the foreseeable future, the judges will, themselves have been brought up in the traditions of the bar and thus project those values and experiences onto any supervisory role they may have.)
43. **D9:** No comment.
44. **D10:** There should be no relationship with the law officers because those officers are themselves parties to legal actions (on behalf of the government). It is not acceptable, say, to have the Attorney General acting for the government in court while, at the same time, overseeing the regulation of other advocates.
45. **E1/E2/E3:** No comment.
46. **F1:** I believe there is demand, although probably not much at the moment.
47. But, restrictions on business organisation should only survive if justified in the public interest. Lack of (expressed) current demand is not a justification and may simply reflect a (correct) recognition that there is little point in talking about alternative business models in the world in which they will be fiercely resisted by (eg) the Bar Council – see above.
48. By way of specific examples of actual and potential organisational innovation:
- (1) The matters described by Matt Kelly above suggest to me there may be demand for change.
 - (2) Indeed, in a field such as family law, I can certainly see organisations developing which include people who do what has traditionally been solicitors’ work with what has traditionally been barristers’ work. It has long been the case that close professional

relationships develop (e.g. barristers who, in practice, do all or almost all, their work for one firm of solicitors). I can well imagine that the individuals might combine together (e.g. to lower overheads and improve service).

- (3) I have a friend who qualified and practiced for several years as a criminal barrister. He decided he wanted more direct client involvement but the only way to do it was to requalify as a solicitor¹¹. He has now gone into partnership with other solicitors (some of whom are also former barristers), all of whom do exclusively criminal defence work operating in what is, in effect, a hybrid organisation. In regulatory terms, they are all solicitors and they are partners in a firm. But in practice, they have (like barristers) their own clients and cases, albeit that they see them through from police station (like solicitors) to court (including higher courts)(more like barristers). In terms of fees/profits, their partnership arrangements mean that each of them, in effect, pays a percentage of their earnings to cover the central overheads but keeps the rest (much more like a barristers' "chambers" than a firm of solicitors). But why should that not all have happened without him needing to requalify?
- (4) For my own part, I would be unlikely to join a single "firm" of combined professionals because the nature of my practice means that no one firm could sustain the volume of work within my area of expertise (in contrast, say, to the position of a family lawyer). But, if it were possible to be a member of several firms at the same time (which I believe is the position taken by some prominent solicitors), then it may well be an attractive option. I already have very close working relationships with key solicitors, with very flexible boundaries (possibly inconsistent in strict terms with current regulatory rules) on who does what and how we work. I can well see myself becoming a "partner" in each of the 4 or 5 main firms which presently provide the bulk of my work. I certainly do not rule out the possibility.

49. **F2:** LDPs could bring a range of benefits to both providers and clients.

¹¹ The Bar Council's oft repeated suggestion that the present regulatory barriers on what barristers can do is not a problem because barristers can always requalify as solicitors is not in my view deal with the problem. That is, in part, because (see thus the Kentridge Report and our critique of it) it is based on hanging on to a particular – but unsustainable and unjustifiable notion of what a barrister is and does (or is not and does not/cannot do).

50. For (barrister) providers, there is the obvious potential benefit of greater financial security than comes when not a sole practitioner as well as a more corporate approach (which some would prefer).
51. For clients, there could be cost savings and clear service improvements (such as better continuity of service, e.g. through being able to promise continuity of personnel or certainty of service, from the start to the end of the case in a way which is very difficult at present).
52. **F3:** I see no need to restrict LDPs in terms of management or ownership other than an unspecified caution as to the risks of doing so. It may be that relaxations on those matters should wait to see how the other changes bed down. It may be that a "lawyer majority" rule should remain, at least for the moment.
53. **F4:** Clearly not.
54. **F5:** LDPs could not properly be regulated by either a barrister regulator or a solicitor regulator.
55. Accordingly, if a B or B+ model were adopted, there would need to be a special LDP regulator.
56. Of course, there is no reason of principle why any individual should not be regulated by, say, the bar regulator, while working within an LDP which regulated by the LDP regulator. But that seems unduly cumbersome to me. As above, this contributes to my preference to an A type regulator and/or functional regulation.
57. **F6:** I don't know. But, even within my own areas of work, I can see examples of where MDPs might come about.
58. Thus, for example, in Town and Country Planning, I can well see that barristers, lawyers and planning consultants could effectively combine together to provide a complete service to clients¹². Or, in education law, barristers, solicitors and educational psychologists, could do the same¹³.
59. **F7/F8:** I think MDPs of the kind mentioned above could bring real benefits and I see little disadvantage or risk. I am, however, concerned about the possibility of legal services simply being a small add-on to other organisations. Thus, a "firm" providing mixed legal and other services but

¹² Planning consultants can already instruct barristers directly

¹³ The majority of education law cases which I do involve a barrister, solicitor and educational psychologist working together

with (say) majority lawyer control/ownership might be acceptable; whereas “Tesco law” would not. But, I have to admit that my thoughts on this are not well developed.

60. **F9:** As above, an MDP (legal) regulator would be needed. So again, model A would be preferable.
61. **F10:** No comment.
62. **Finally:** Thank you for reading my response. As above, I would be happy to clarify or amplify the above (or the points made in the attached critique of the Kentridge report) if it would be helpful.

David Wolfe

Matrix

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