

## Research Specification: Learning from the legal services in the Personal Injury market

### Purpose

The purpose of this research is to explore whether there are any lessons from the operation of legal services in the Personal Injury (PI) in particular:

- What are the intrinsic features of the market and its regulatory and legislative treatment that have encouraged access to justice ?
- What specific regulatory risks, if any, have been thrown up as a result and how effectively have these been tackled ?
- To what extent are these positive and negative features unique to PI or how far are they transferrable – and, if so, to which market segments in particular ?

### Background

The LSB has been set up to reform and modernise the legal services market in the interests of consumers, enhancing quality, ensuring value for money and improving access to justice across England and Wales. The LSB will achieve this pursuing its regulatory objectives<sup>1</sup> and providing regulatory oversight for the eight approved frontline regulators<sup>2</sup>. All approved regulators share these regulatory objectives.

A key aspect of the regulatory objectives for all is to increase access to justice and ensure more people benefit from appropriate legal solutions. In our work<sup>3</sup> we define access to justice broadly:

*“We define access to justice as the acting out of the rule of law in particular or individual circumstances. The tools to achieve that outcome range from informing the public about their rights, routine transactional legal services and personalised advice, through to action before tribunals and courts. The agents of delivery are wide and, of course, legal professionals are at the heart of this along with many other actors in legal services and the wider justice sector.”*

Others e.g. Stephen Mayson<sup>4</sup> take a more narrow view of the scope of access to justice, linking it to access to courts. For the purposes of this research we are keen to maintain a wider view of access to justice as set out in our own paper.

Regulation of legal services in England and Wales is based on a foundation of six reserved activities<sup>5</sup> which can only be supplied to members of the public for profit by individuals or entities authorised by one of the eight approved frontline regulators. In practice those regulated may, depending on the rules of the individual regulator, then be subject to the regulation of all of their activities whether reserved or not.

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<sup>1</sup> <http://www.legislation.gov.uk/ukpga/2007/29/section/1>

<sup>2</sup> The Law Society, General Council of the Bar, Council for Licensed Conveyancers, The Institute of Legal Executives, The Chartered Institute of Patent Attorneys, The Institute of Trade Mark Attorneys, Association of Cost Lawyers, Master of the Faculties.

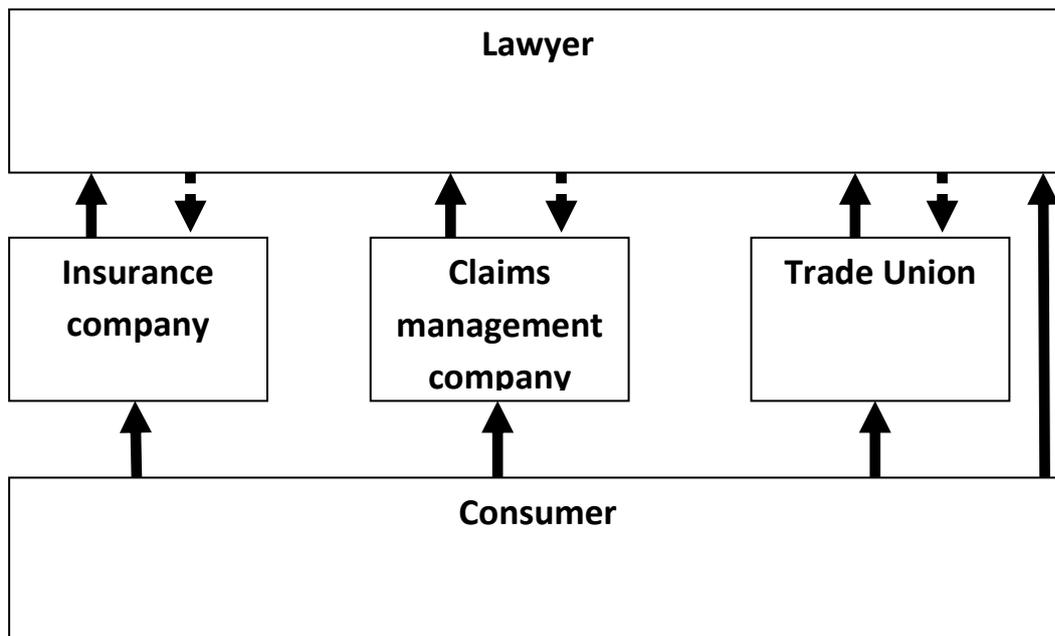
<sup>3</sup> <https://research.legalservicesboard.org.uk/wp-content/media/Evaluation-measuring-A2J-11-09-12-Discussion-paper-FINAL-FORMATED.pdf>

<sup>4</sup> <http://www.thelegaleducationfoundation.org/the-legal-services-institute-downloads/improving-access-to-justice-scope-of-the-regulatory-objective/>

<sup>5</sup> 1) the exercise of a right of audience; 2) the conduct of litigation; 3) reserved instrument activities; 4) probate activities; 5) notarial activities; 6) the administration of oaths.

In this context, the PI market is seen as an excellent example of a market that achieves high levels of access to justice. A summary of information about the PI market is included in Annex A. PI is not a reserved activity as such, though for those cases that do become more formal the litigation and the exercise of a right of audience [in court] are. Hence the collection and settlement of cases without reliance on courts can and sometimes is exercised by firms and individuals who are not regulated by legal services regulators.

**Figure 1: Supply of legal services in personal injury (hashed arrows represent referral fees)**



Source: Cost benefit analysis of policy options related to referral fees in legal services, CRA, 2010

When compared to the wider legal services market<sup>6</sup>, the result is a market that tends towards consolidation of work in larger firms and less face to face delivery. Consumers are informed of their rights to compensation through extensive (largely daytime) advertising with services delivered by national firms who are a mix of solicitors firms and claims management companies, or through affinity deals such as with trade unions, again delivered predominately through large firms operating nationally. Claims management companies are regulated separately by the Claims Management Regulator which sits within the Ministry of Justice.

Introducers (insurance companies, claims management companies and trade unions) provide a range of services from simply taking contact details then passing onto a solicitor to conducting all of the pre-litigation work themselves before passing the case on. Some claims management companies will act as a “one stop shop” in offering other services such as vehicle repair, arranging medical experts or compiling accident reports.

Initially in any PI claim details of the claim are taken, medical reports completed and the defendant given the opportunity to make a Part 36 offer in effect settling the case before legal action is taken. This process can be facilitated by the Claims Portal<sup>7</sup> which facilitates the exchange of claims information for low value PI claims. If legal action is taken a range of funding options are available

<sup>6</sup> <https://research.legalservicesboard.org.uk/wp-content/media/Changes-in-competition-in-market-segments-REPORT.pdf>

<sup>7</sup> <http://www.claimsportal.org.uk/en/>

including “no-win no-fee”, which alongside insurance to cover the defendants legal costs in the event of an unsuccessful case can make taking legal action relatively risk free. In cases where court settlement is required, options available include both fast track<sup>8</sup> and multi-track<sup>9</sup> civil procedure rules.

The result is a market where access to justice appears to be good, but one which suffers from the perception of having created a “compensation culture” where all individuals are out to make a fast buck from often made up or minor injuries. In practice there is little evidence of a “compensation culture” despite widespread media interest in individual cases<sup>10</sup>. Furthermore, at its heart this issue is about individual consumers and their ability to enforce their legal rights. Extending affordable access to justice must be of benefit to society unless and until Parliament decides that these rights are no longer appropriate.

The development of the PI market has undoubtedly been driven by a series of government interventions, most notably the removal of legal aid for PI cases and introduction of Conditional Fee Agreement or “no win no fee” in the 1999 Access to Justice Act. Recent reforms following the 2009 Review of Civil Litigation Costs<sup>11</sup> are likely to further impact on the market in the coming years through measures to ban the use of referral fees and changes to the fixed fee for many claims (among other reforms). Regulatory changes, such as the introduction of Alternative Business Structures (ABS) open the market for mixed solicitor/claims management/insurer entities offering legal services. Already the data from the SRA reveals that ABS firms have a disproportionately large share of the PI market (compared to the number of ABS firms authorised).

Tracking changes in access to justice in the PI market is not straightforward, though through legal needs surveys such as the Civil and Social Justice Survey<sup>12</sup> and the LSB’s legal needs survey<sup>13</sup> some time series data can be collated. Such data could then be matched against changes to the legal and regulatory environment to identify particular reforms correlated to changes in access to justice in this market. An analysis of the PI market in the context of referral fees was published by the LSB in 2010<sup>14</sup>.

## **Aims and Objectives**

This research should explore:

- What are the intrinsic features of the market and its regulatory and legislative treatment that have encouraged access to justice ?
- What specific regulatory risks, if any, have been thrown up as a result and how effectively have these been tackled ?
- To what extent are these positive and negative features unique to PI or how far are they transferrable – and, if so, to which market segments in particular ?

To the extent to which it has been successful the research should explore the development of the market and link particular changes to regulation, legislation, government policy or other events were

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<sup>8</sup> Claims with a value no more than £25,000 and above £1,000

<sup>9</sup> Claims above £25,000

<sup>10</sup> <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/mr-speech-compensation-culture.pdf>

<sup>11</sup> <http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf>

<sup>12</sup> <http://www.justice.gov.uk/publications/research-and-analysis/lsrc>

<sup>13</sup> <https://research.legalservicesboard.org.uk/wp-content/media/2012-Individual-consumers-legal-needs-report.pdf>

<sup>14</sup> <https://research.legalservicesboard.org.uk/wp-content/media/2010-Investigation-into-referral-fees-report.pdf>

particularly important in increasing the take-up of legal services in this area. Furthermore, the research should explore which particular features that can explain the success of access to justice in this area could be exported to other legal markets to expand access to justice elsewhere. In doing this we would expect the research to consider what conditions would need to be met to allow increased access to justice on this basis.

Equally, the research should explore whether there are lessons that can be learned from the operation of the market that we would not wish to be transferred to the other markets. In particular whether the risk sharing in PI cases encourages spurious claims or claims which impose a higher burden on society than the benefit through access to justice.

### **Issues and scope**

In the past 30 years there have been a range of societal, legal, regulatory and legislative changes which have led to an increase in the take up of legal services for Personal Injury cases. These include:

- Introduction of Conditional Fee Agreements
- Withdrawal of legal aid for PI cases
- Liberalisation of advertising rules
- Growth in claims management companies
- Liberalisation of the use of referral fees

The key interest to the LSB is which (if any) of these changes can be shown to have had a significant impact on access to justice for consumers in this market. It is unlikely that data availability will allow the use of sophisticated econometric techniques to explore the relationship between reforms and access to justice. Instead the analysis will need to rely on a mixture of data analysis and correlation to draw conclusions about particular events which have been key to the development of the PI market.

In considering the ability of such developments to have a beneficial impact in other markets the research should have regard to the OXERA segmentation framework<sup>15</sup> developed for the LSB. This framework provides an outline of the segmentation of the legal services market that will be relevant to any analysis of the extent to which reforms could be extended to other parts of legal services with similar positive benefits for consumers.

Equally, the research should consider whether there is evidence that the market is unfairly weighted towards those making claims to the detriment of wider economic interests. Our previous research on referral fees found little evidence that the quality of claims had fallen since the referral fees had been allowed. But other evidence may suggest that the relative balance of costs and risk encourages defendants to settle unwarranted claims in preference to accepting risk of cost of legal action. This may particularly be the case for claims such as whiplash where it may be medically difficult to prove the presence or absence of an injury.

We would expect the researcher to consider the features of different market segments that make some segments more likely to see similar benefits to the PI market in the presence of similar market changes. The researcher will need to consider why changes in the PI market have not transferred to

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<sup>15</sup> <https://research.legalservicesboard.org.uk/wp-content/media/A-framework-to-monitor-the-legal-services-sector.pdf>

other markets and whether simple reforms could create the conditions where such market features could transfer. In other markets existing features e.g. commoditisable legal service, may make lessons from PI more relevant. Equally features such as the relatively fixed compensation levels in PI may provide transferrable lessons.

Other factors which have been criticised within the market may provide lessons which we would wish to avoid. While evidence of a claims culture is weak, lessons on the implementation of reforms, use of intermediaries, referral fees etc. may illustrate wider lessons on the environment and behaviours within a liberalised market. In particular the research to consider whether the market arrangements lead or have led to particular challenges to the regulatory objectives.

### **Tender Evaluation Criteria**

All projects commissioned by the LSB are subject to our standard terms of contract. Tenders will be evaluated on best value for money and will be assessed on the basis of:

1. Overall cost. Please include appropriate breakdowns
2. Proposed team composition, expertise and management and the organisation's diversity policy
3. The ability of the research team to write about complex technical issues in clear accessible language
4. Demonstration of understanding of the project.

### **Deliverables**

#### Output

The output for this research should be a report with executive summary, suitable for publication, summarising:

- The features of the PI market that have been responsibly for the high level of access to justice
- Which features of the PI market might be transferable to other legal services markets
- What conditions would need to be in place in other markets to allow the transference of lessons from the PI market.

#### Project plan

Tenders should include a project plan and time schedule for the work that identifies the main task and key milestones that will be used to monitor progress. The plan should be accompanied by a resource profile, giving a breakdown of the resources in person days allocated to each task. We would also expect the tenders to include a clear analysis of the potential risks and how they propose to mitigate them during the project. We value tenders that are short and concise.

### **Duration**

The research should commence in December 2013. Tenders should set out dates for completing key milestones such as information gathering, analysis, synthesis and report writing. The report should be finalised by 28 March 2014.

### **Legal Services Board Contact Details**

Tenders with any queries about the research specification should contact:

Alex Roy 020 7271 0060

**Tenders must be submitted by 4pm on 22 November, 2013**

| <b>Injury<sup>16</sup></b>                                    | <b>2010/11</b>   | <b>2011/12</b>          | <b>2012/13</b>          |
|---|--|-------------------------|-------------------------|
| <b>Assumed geography:</b>                                     | National   |                         |                         |
| <b>Assumed consumer segments:</b>                             | Individual consumers (natural persons), Small businesses, charities, (legal persons - small) large businesses' (legal persons – large)   |                         |                         |
| <b>Action in response to this type of legal problem:</b>      | <p><b>Individuals:</b><br/> 2010: Take no action – 15%; Don't seek formal advice – 36%; Seek advice – 47%<br/> 2012: Take no action – 17%; Don't seek formal advice – 27%; Seek advice – 51%</p> <p><b>Small businesses – 2012/13:</b> Take no action – 5%; Don't seek formal advice – 30%; Seek advice – 60%</p> <p><b>Large business:</b> unknown</p>  |                         |                         |
| <b>Of those that seek advice other providers are used by:</b> | <p><b>Individuals:</b> Insurance company – 20%; CAB – 5%; Claims Management Company (CMC) – 4%; The Police – 3%; Other – 22%<br/> Solicitors were used by 46% of individual advice seekers in this segment.</p> <p><b>Small businesses:</b> Insurance company – 33%; HR/Employment service – 8%; Other legal advice service – 8%<br/> Solicitors were used by 50% of individual advice seekers in this segment</p> <p><b>Large business:</b> unknown</p> |                         |                         |
| <b>Overall demand proxy indicators:</b>                       |  |                         |                         |
| Compensation Unit DWP   | 861k   | 987k<br>(15% ↑ 2010/11) | 1.04m<br>(5% ↑ 2011/12) |
| Claims to NHS Litigation Authority for Negligence             | 10.7k  | 13k<br>(21% ↑ 2010/11)  | 13.7k<br>(6% ↑ 2011/12) |
| <b>Individual consumers who shopped around:</b>               | 16%  | 10%                     | 10%                     |
| <b>Claims Management Regulated organisations<sup>17</sup></b> |  |                         |                         |

<sup>16</sup> In the Oxera Segmentation Framework this covers road traffic accidents, injury at work, clinical negligence, and slips and trips. This was matched to the Personal Injury SRA category. Individual consumer legal needs were matched to the Personal Injury and medical negligence categories used in the 2006-2009 CSJS. 2012 Individual consumer legal needs in the 'Been injured at work', 'Clinical negligence (injury or health problems after treatment)', 'Involved in a road traffic accident', and 'Other personal injury that was not your fault' problem types used in the 2012 survey were matched to this category. LSCP tracker survey category of Accident or injury claims was matched to the Injury segment. This was matched to the Personal Injury, practice area reported in the 2011 Barrister survey.

<sup>17</sup> Figures taken from CMR annual reports – 2010/11 -

<http://www.justice.gov.uk/downloads/publications/corporate-reports/cmr/cmr-annual-report-2010-11.pdf>  
2011/12 - <http://www.justice.gov.uk/downloads/publications/corporate-reports/cmr/cmr-annual-report-2011-2012.pdf>

|  |                                       |                                       |                                       |
|--|---------------------------------------|---------------------------------------|---------------------------------------|
| <b>Total Personal Injury CMC turnover</b>                                  | £377m                                 | £445m                                 | £337m                                 |
| <b>Total Personal Injury CMCs</b>  | 2,553                                 | 2,435                                 | 1,902                                 |
| <b>Estimated self employed barristers in this market segment (2011)</b>    | 10% (1,267)                           |                                       |                                       |
| <b>Total solicitors turnover - %age of total:</b>                          | £2bn (11%)                            | £2bn (11%)                            | £2.1bn (12%)                          |
| <b>Total solicitors firms- %age of total:</b>                              | 31% (2,821)                           | 30% (2,688)                           | 31% (2,713)                           |
| <b>Share of the market by degree of turnover (% of firms):</b>             |                                       |                                       |                                       |
| <b>Committed (90% or more of their turnover)</b>                           | 35% (14%)                             | 39% (16%)                             | 39% (16%)                             |
| <b>Focussed (50%-89%)</b>  | 30% (10%)                             | 33% (11%)                             | 34% (12%)                             |
| <b>Spread (5%-49%)</b>   | 32% (41%)                             | 26% (41%)                             | 26% (40%)                             |
| <b>Fringe (less than 5%)</b>   | 3% (36%)                              | 2% (33%)                              | 2% (33%)                              |
| <b>Market share: (%age, £)</b>   |                                       |                                       |                                       |
| <b>5 firm ratio</b>  | 14% (£277m)                           | 17% (£355m)                           | 17% (£364m)                           |
| <b>10 firm ratio</b>   | 22% (£427m)                           | 25% (£501m)                           | 25% (£535m)                           |
| <b>HHI: &gt; 1,000 =concentrated</b>                                       | 78                                    | 101                                   | 97                                    |
| <b>Continuity:</b>   |                                       |                                       |                                       |
| <b>Firms in the market for 3 years:</b>                                    | 100% (2,821)                          | 81% (2,185)                           | 68% (1,854)                           |
| <b>Market Share :</b>  | 100% (£2bn)                           | 86% (£1.8bn)                          | 70% (£1.5bn)                          |
| <b>Number of the top 5 and top 10 firms in the market for all 3 years:</b> | 1 of top 5 firms<br>3 of top 10 firms | 1 of top 5 firms<br>4 of top 10 firms | 1 of top 5 firms<br>4 of top 10 firms |
| <b>Entry: % of firms (% of market share)</b>                               |                                       |                                       |                                       |
| <b>All new entrants</b>  | 19% (14%)                             |                                       | 13% (15%)                             |
| <b>New entrants – new to segment</b>                                       | 13% (5%)                              |                                       | 10% (3%)                              |
| <b>New entrants – brand new firms</b>                                      | 6% (9%)                               |                                       | 3% (12%)                              |

2012/13 - <http://www.justice.gov.uk/downloads/publications/corporate-reports/cmr/cmr-annual-report-2013.pdf>

Cash figures converted to real turnover using the HMT GDP deflator.

|  |           |           |
|--|-----------|-----------|
| Of new entrants in 2011/12, those remaining in 2012/13 |           | 78% (12%) |
| <b>Exit: % of firms (% of market share)</b>            |           |           |
| All exits  | 23% (20%) | 14% (19%) |
| Firms who closed by the start of the year              | 10% (13%) | 8% (19%)  |
| Firms who left segment by the start of the year        | 12% (7%)  | 5% (0%)   |
| Exited in 2011/12, re-entered in 2012/13               |           | 4% (0%)   |