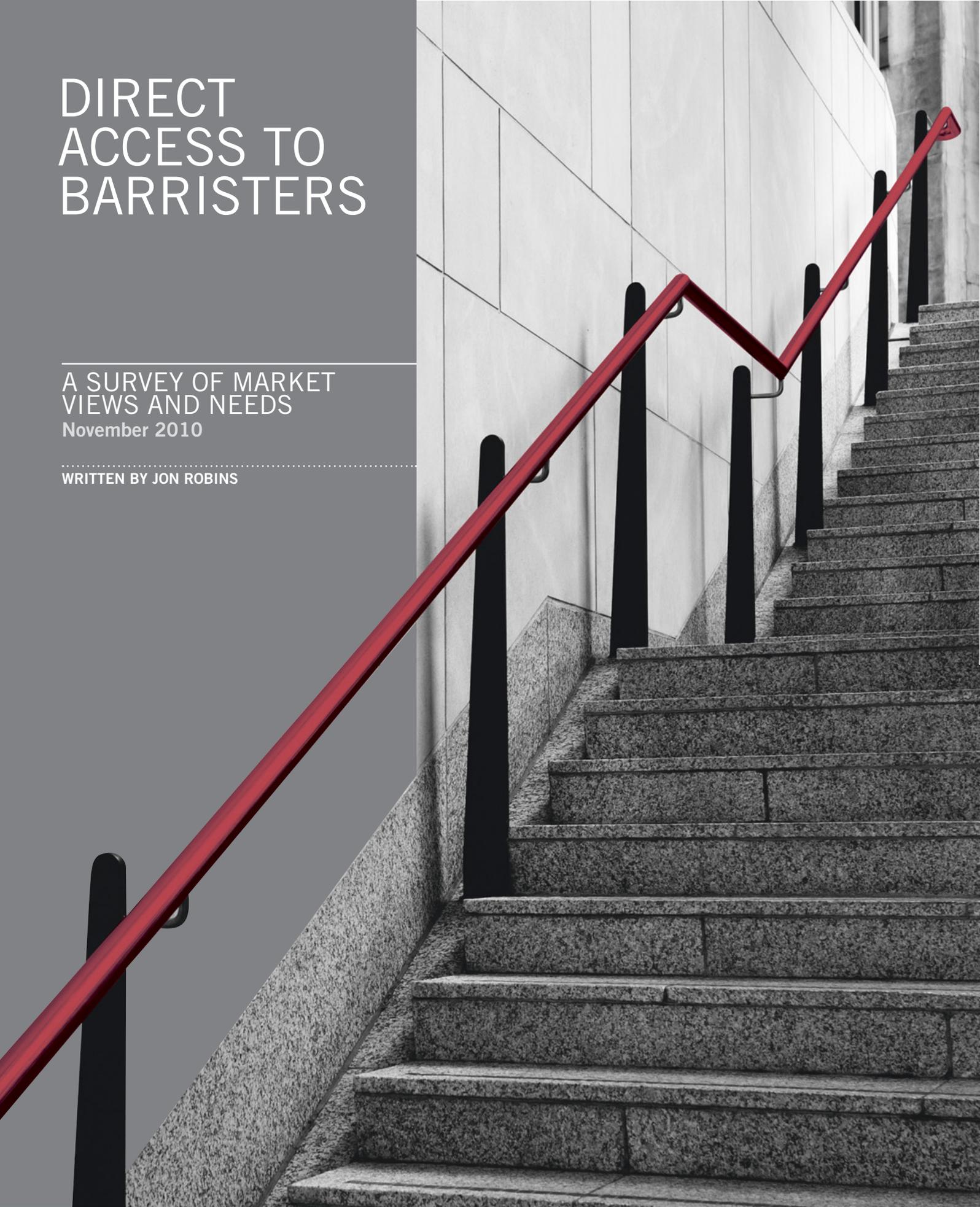


DIRECT ACCESS TO BARRISTERS

A SURVEY OF MARKET
VIEWS AND NEEDS

November 2010

WRITTEN BY JON ROBINS



ABOUT HARDWICKE

Hardwicke is a forward-looking barristers' chambers providing commercial solutions to legal problems. Chambers' members are dedicated to helping clients meet their objectives, whether in litigation, dispute resolution or advisory work. Hardwicke is at the forefront of alternative dispute resolution. Chambers specialises in commercial, insurance, property & private client and public law. Clients include professional firms, businesses, banks, lenders, insurance companies, charities, government bodies and individuals both in the UK and internationally.
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ABOUT JURES

Jures is a new independent research company dedicated to the legal services market. The idea behind Jures is to become a leading source of considered, independent-minded and thought-provoking commentary on the law in a way that informs and influences debate within the profession and beyond. Publications include *Big Bang Report: Opportunities and threats in the new legal services market*; *Shopping Around: what consumers want from the new legal services market*; and *Closing the Justice Gap: Some new thinking about an old problem*.
www.jures.co.uk

ABOUT THE AUTHOR

Jon Robins has been writing about the law for the national and specialist legal press for over 14 years. Jon wrote *The Justice Gap: Whatever happened to legal aid* (Legal Action Group, May 2009 with Steve Hynes).

THANKS

Special thanks to freelance journalist Ben Rigby and James Boyd-Wallis and Sarah Catterick of Jures for assisting in the research phase of this project.

ABOUT THE REPORT

This report is the third in a series of studies commissioned by the barristers' chambers *Hardwicke* exploring how potential clients view the benefits and barriers to working directly with the Bar. The results draw on a confidential survey of 65 senior in-house counsel, company secretaries and commercial directors of medium and large UK companies conducted earlier in the year by the legal research company *Jures*.

Throughout the report we contrast the new findings with the two previous reports which draw on similarly-sized polls. The first study was conducted in November 2006 and the second in spring 2008. Taken together the three studies indicate an increasing trend on the part of corporate clients in terms of their willing to instruct barristers directly.

The English Bar is undergoing significant revolution as the regulatory, structural and financial landscape shifts. *Hardwicke* commissioned this survey to ensure that it both understands and can effectively meet the changing needs of its clients in the future.

REGULATORY BACKGROUND

Barristers practice as self-employed, referral professionals and until 2004 it was not normal practice to go to a barrister directly. Instructions were referred to them by a solicitor or some other recognised professional. However the Bar Council has relaxed its rules relating to direct access and there are now three main routes to a barrister.

○ PROFESSIONAL CLIENT ACCESS

There are categories of people who can instruct barristers either on behalf of clients or on their own account and in all types of work including solicitors, other authorised litigators, parliamentary agents, patent agents, trademark agents and notaries, European lawyers registered with the Law Society or Bar Council, in-house lawyers, corporates, legal advice centres and licensed conveyancers (only for conveyancing matters).

○ LICENCED ACCESS

This access replaces BarDIRECT and Direct Professional Access. It is a system whereby organisations or individuals who have expertise in particular areas of the law can apply to instruct barristers directly in those areas on their own affairs or on behalf of their clients.

○ PUBLIC ACCESS

Members of the public may instruct barristers direct but there are restrictions on the terms of these instructions. For this survey, finance directors or commercial directors etc would fall into this category.

EXECUTIVE SUMMARY

THE KEY FINDINGS INCLUDE:

- **An exponential increase in direct instructions:** Almost one third of respondents have instructed a barrister directly in the last two years (32%), more than twice the number in the 2008 research (15%) which doubled the 2006 figures (6%).
- **A growing understanding of the practice of direct access:** Almost nine out of 10 respondents felt that they understood sufficiently (87%) how to access the Bar direct, compared to four out of ten in 2008 (40%).
- **The emergence of a new business-minded Bar:** Some six out of 10 respondents (60%) disagreed with the stereotypical notion of barristers being out of touch with the commercial world.
- **Increasing confidence in direct access:** The survey reveals a striking surge in confidence amongst respondents with almost nine out of 10 (87%) believing that they had a sufficient grasp of the issues so as to be able to instruct barristers directly, more than doubling the 2008 finding of four out of 10 (40%).
- **Room for improvement:** Whilst there were significant improvements in terms of how respondents viewed commonly perceived barriers to instructing barristers directly – for example, over six out of 10 respondents (63%) did not see the clerking structure of barristers' chambers a barrier (compared to 29% in 2006) – still more than half of respondents (53%) agreed to some extent that the Bar was not 'user-friendly'.

INTRODUCTION



This survey arrives at an important moment in the rolling program of reforms under the Legal Services Act (LSA) 2007 which began with Sir David Clementi's 2003 review of legal services. Next October will see the most radical aspect of the 2007 legislation coming into force as the first alternative business structures (or ABSs) open for business.

ABSs will allow for external ownership of law firms. This innovation has been likened to the City's own 'big bang' back in 1986 with its mass deregulation of the financial services markets. The introduction of ABSs is expected to, in the words of one commentator, 'blow apart the established conventions' of the law'. Whether the change will be revolutionary or evolutionary is a moot point, but nonetheless change for the entire profession (including the Bar) is inevitable.

In the context of the scale of the reforms of the LSA, 'direct access' is a small but significant step in the direction of liberalisation. As noted before, direct access is still in its infancy. It was only six years ago that the Bar Council scrapped the centuries-old rule that litigants who want to instruct a barrister had to do so through a solicitor following pressure from the Office of Fair Trading.

Our respondents did not make much of the connection between the LSA and the increasing practice of direct access though. In fact, only one in 10 reckoned the legislation had any impact on how they instructed lawyers (see *Table 8*).

Whilst the LSA is a pressing issue for solicitors in private practice and the self-employed Bar, the issue is way down the agenda for employed lawyers working in commerce and industry.

There are more pressing reasons for the business community and their lawyers to embrace the Bar. The economic downturn of the last two years and the possibility of a double-dip recession are their main preoccupations. The last Hardwicke direct access study was commissioned just before the collapse of US investment bank Lehman Brothers (which happened in the autumn of 2008) and the liquidity crisis had yet to take its grip on the economy.

Unsurprisingly, the collective mindset of general counsel has moved on since 2008. At a breakfast roundtable at the College of Law in September this year, Beat Hess, legal director at Shell, reported that his company like others faced huge pressure on costs. They have to come down, he said bluntly. 'I've been saying that for years, but it's felt like I've been preaching at a graveyard: There are plenty of people down there, but nobody's listening. Law firms have had Christmas every day for decades now, but the party is over.'²

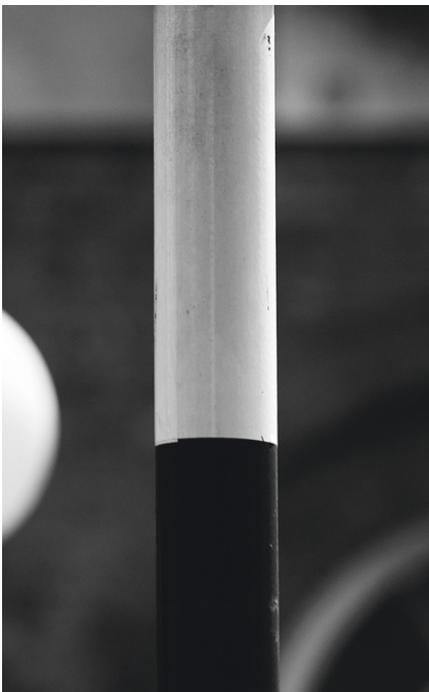
Corporate Britain's relationship with the lawyers it regularly instructs is going through a radical upheaval change. When Orange and T-Mobile announced their review of law firms in July this year in the wake of their merger to become Everything Everywhere they included barristers' chambers as well as law firms. 'We have had success instructing directly to the Bar in the past and would be keen to continue working in this way with the larger group of internal lawyers,' general counsel James Blendis (formerly head of legal at T-Mobile) was reported to say.³ Such changes in long-held orthodoxies need to be seen in the context of a more general rethink on the part of corporate



¹ *The Times*, May 21 2009

² *Legal Week*, September 23 2010

³ *Legal Week*, September 17 2010



counsel. Established assumptions are being challenged. The legal press widely reported the decision by ITV to become the first big British company to ditch the billable hour. At the same time, the broadcaster cut down its panel of legal advisers from 50 firms to nine.

'In the past when we have had a major piece of litigation which required counsel to be engaged, we would instruct external solicitors to instruct counsel. This would mean that you ended up paying the solicitors to summarise your file, photocopying your paperwork and then to put it all in a nice ring binder,' comments Sapna Bedi Fitzgerald, past chair of the Commerce & Industry Group and general counsel at LSL Property Services plc. 'Whereas now, we realise we can instruct the Bar directly. The Bar offers an alternative.'

Paul Gilbert is a former in-house lawyer and chief executive of the LBC Wise Counsel consultancy. As a consultant, he has conducted in the region of 45 law firm panel reviews for companies over the last two years. The relatively recent innovation of panel reviews is a response to the demand for greater governance and accountability in the relationships between general counsel and external lawyers. 'In the last 12 months, we have started suggesting to general counsel that as part of their panel arrangements, they either allow for the opportunity to go to the Bar direct or they actually look at the appointing barristers' chambers for direct access purposes,' comments Gilbert.

Direct access does have an important role to play in the changing world of the legal services market. 'The Legal Services Act opens up an array of possibilities that place 'direct access', and especially 'public access', at the centre of the agenda for the future of the Bar,' wrote Professors John Flood and Avis Whyte recently.⁴ In the same report, they noted the 'potentially apocalyptic' impact of the Clementi reforms. According to the director of the Legal Services Policy Institute, Professor Stephen Mayson's well-quoted forecast as many as 3,000 firms could go to the wall as a result of increased competition.

The Bar Council chairman Nicholas Green QC recently urged chambers to develop 'ProcureCos', separate business units to win work direct from companies and public bodies. The idea of the ProcureCo is to bring together barristers and other professionals to enable chambers to offer a one-stop shop to clients.⁵ 'The Bar has a cost advantage compared to many firms of solicitors,' Green said. 'Last year we thought ProcureCos might just apply to the publicly funded Bar, but we realised this is something the commercial Bar can take advantage of as well.'⁶

Professors Flood and Whyte said that one of the Bar's 'possible salvations' was its development of direct access. 'If the Bar were to alter radically following the LSA changes, an expansion of the access scheme would enable it to capture a larger and more varied client base thus maintaining its position as the core legal service provider.' Direct access is still in its infancy but, as our study indicates, from its tentative beginnings there has been a significant step change.

⁴ Straight there no detours: direct access to barristers, University of Westminster, November 2008

⁵ Bar Council press release, Bar Council launches 'ProcureCo' model as Bar looks to evolve business structures, April 26 2010

⁶ Legal Week, April 29 2010

Jon Robins
November 2010

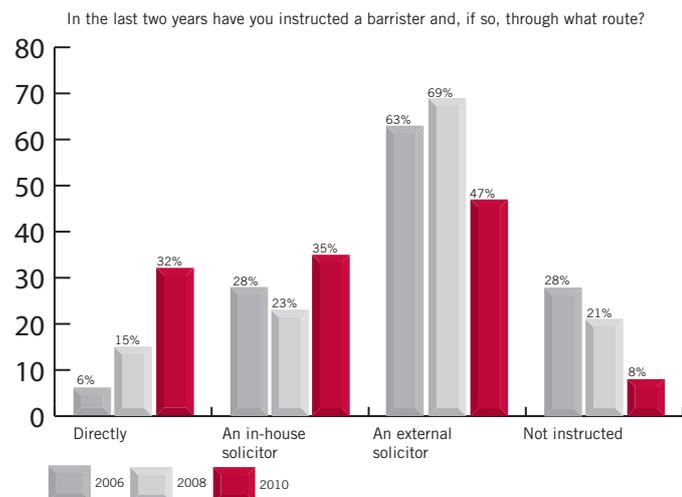
FINDINGS

“Everybody is looking at costs. Part of the job is to consider whether you are delivering what you’re supposed to deliver in a cost-effective and efficient manner. Whether that’s the procurement of legal services or lead for pencils. The same pressures apply

POINT OF ACCESS

The first section of our questions measures the in-house profession’s experience of direct access and considers the kind of routes that are currently used by general counsel for instructing barristers. The research begins by considering the ways in which general counsel can instruct the Bar – directly, through an in-house solicitor, or an external solicitor.

TABLE 1



Almost one third of our respondents (32%) have instructed a barrister directly, twice as many as in the last 2008 survey (15%) which doubled on the previous year (6%). That increase is exponential and indicates that in terms of the development of direct access a corner has been turned. When that finding is taken together with instructions through an in-house solicitor, more than two-thirds (67%) have instructed a barrister in the last two years.

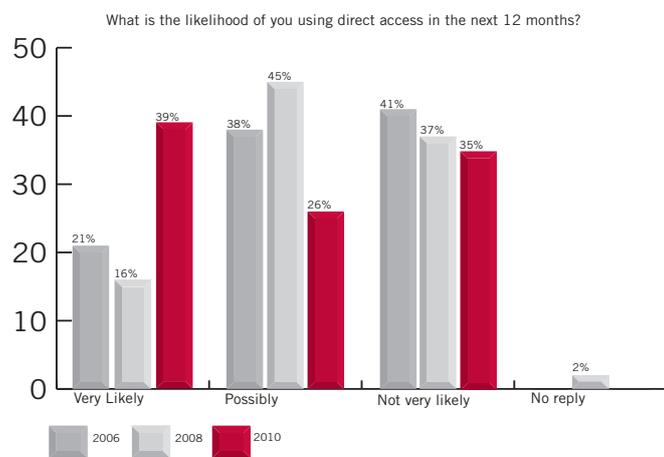
It is striking that less than one in 10 respondents had no experience of instructing a barrister in the last two years, compared to just over one quarter in 2006 (28%).

“ There are economies which the Bar can offer - and that's precisely why we make these decisions

When respondents were asked what was the likelihood of instructing barristers directly in the next 12 months there was a further endorsement of the direct access approach with almost four out of 10 (39%) saying that it was 'very likely' that they would instruct directly - a considerable increase on 2008 (16%).

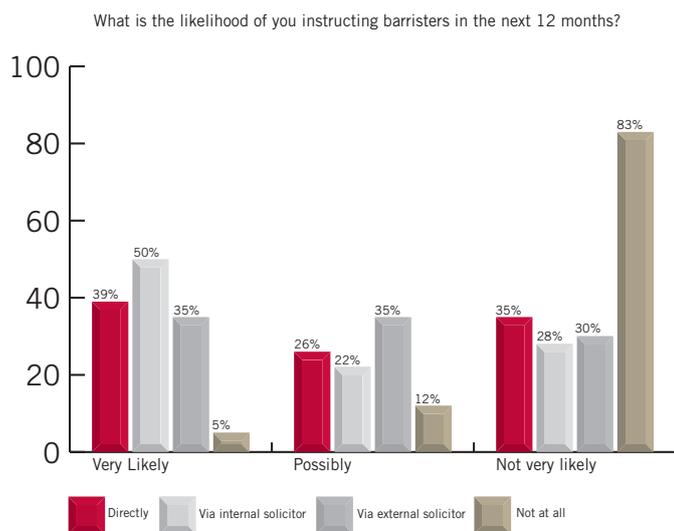
That said, there appears to be a fixed proportion of the in-house profession who are resistant to direct instruction. More than one in three respondents (35%) said that they were 'not very likely' to use direct access which is consistent with previous years.

TABLE 2



Respondents were marginally less likely (possibly or very likely) in the table below to instruct a barrister directly (65%) than to instruct one via an external solicitor (70%).

TABLE 3



“ A serious issue for the Bar is its lack of transparency. It is very hard to assess where you should go for something specific

FINDINGS

“ One knows that there are certain sets that specialise in certain areas, but chambers aren’t like a corporate law firm where you know instinctively that there will be a large corporate team, a good pensions team, and a good employment team. It’s harder to get that level of transparency

BARRIERS TO ACCESS

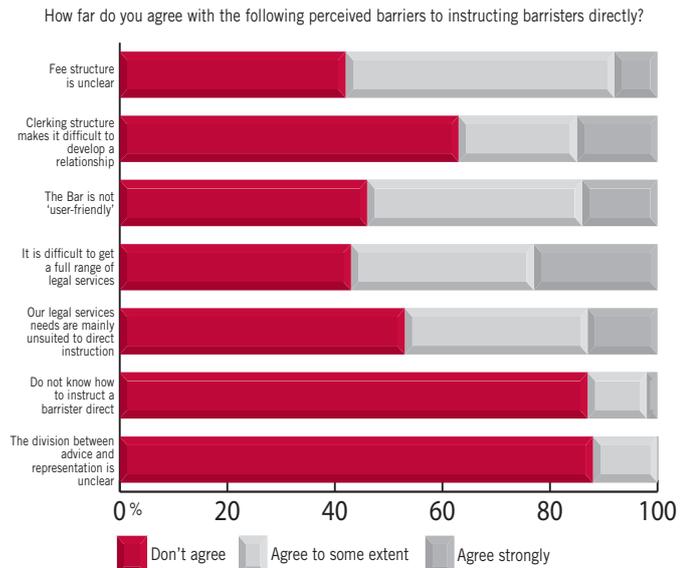
We then asked our respondents to indicate how far they agreed with a series of statements about perceived barriers to direct instruction of barristers.

The table below adds further to the trend of a warming towards the Bar on the part of the in-house legal community. Two years ago over one in five (22%) agreed strongly with the proposition that ignorance over how best to instruct a barrister directly was an impediment, that is down to just 2%. An overwhelming majority (86%) disagreed that lack of understanding was an issue. No one at all agreed strongly with the notion that there was a lack of clarity in the division between advice and representation (compared to 9% in 2008).

Although there is a persistent feeling that a lack of transparency over fees and the clerking structure is a hindrance to direct instructions. Nearly six out of 10 (58%) agreed that a lack of clarity over the fee structure was an issue and over one in three (37%) took issue with the traditional clerking structure. Although interesting to contrast with *Table 6* where respondents were asked to identify perceived advantages. Almost six out of 10 (57%) associated transparency over fees and costs with solicitors compared to slightly one third (36%) who associated it with the Bar.

Clearly the Bar has some work to do to persuade its corporate clients that it fully understands their needs. This is evidenced by the finding that over half (53%) regarded Chambers as ‘not user friendly’ (roughly consistent with the 2008 findings).

TABLE 4

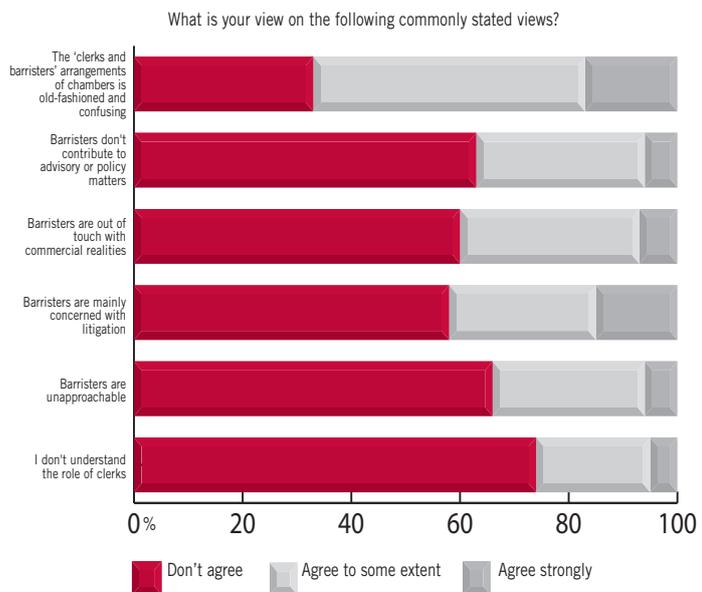


“ It’s not what the Bar’s business model is. It’s not what their costs model is and it’s not what their price point is. It is a bit like the debate about whether a City law firm can do commodity legal work. It’s very routine, very easy but it is not necessarily where they see themselves being expert

In the following set of questions we seek to measure our respondents’ views as to the commerciality of the advice from the Bar. The findings indicate a growing trend in favour of barristers and so, for example, six out of 10 respondents did not agree that barristers were out of touch with ‘commercial realities’ (this compares with 56% in 2008 and 48% in 2006). A similar proportion (63%) took issue with the assertion that barristers did not contribute to advisory or policy matters (this compares with 60% in 2008 and 48% in 2006).

Two thirds of respondents (66%) disagreed with the description of the Bar as ‘unapproachable’ (50% in 2008 and 49% in 2006). Of the list of negative perceptions around the Bar in the question below, it was concerns about the ‘old-fashioned and confusing’ clerking arrangements that resonated most with over one in five of our respondents (21%) agreeing strongly with the idea that they were outdated.

TABLE 5



“ There is a cost benefit with the Bar but also you get a different service and a different relationship

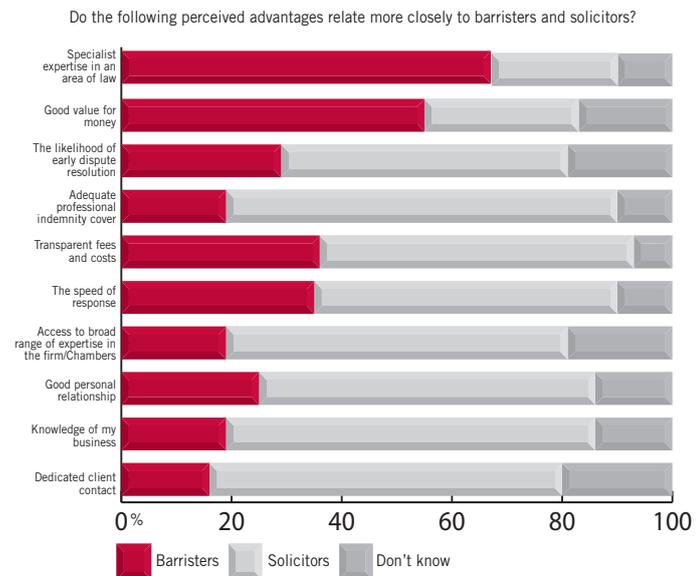
FINDINGS

“ I like the culture of barristers’ chambers. The idea of walking into an aircraft hangar reception area with modern art displayed on the wall at some City firm is maybe flaunting wealth a little bit too much

“ I can go straight to one of the most intelligent people I know - a heavyweight commercial barrister - and be paying less than what I would a junior associate at a law firm

The clearest advantage of barristers over solicitors relates to their specialist expertise, a point acknowledged by more than two thirds of respondents (67%)

TABLE 6



Interestingly, in view of the economic climate, barristers were perceived by a slim majority (55%) to be offering better value for money. This compares with less than one third of respondents (30%) in the 2006 survey who recognised barristers as offering better value for money (the 2008 survey adopted a different format in this question).

“Commerciality... that’s the quality that needs to be worn on the sleeve of the barrister

“The old cliches persist. A lot of in-house lawyers will imagine barristers will be very wordy, very worthy ... “on the one hand this, on the other hand that”. What’s needed is the ability to get to the point, to understand commercial drivers and be pragmatic. If these are the qualities that are exhibited then chambers will have a fantastic opportunity to acquire work on a long-term basis

This set of findings indicates that there is work to be done for the Bar. The solicitors’ particular perceived strengths related to the critical areas of knowledge of the client’s business and provision of a dedicated client contact. Two thirds of respondents believed that solicitors scored more highly than the Bar for ‘knowledge of my business’ (67%) and less than one in five (19%) identified that characteristic with the barristers’ side of the profession (although that finding was up markedly from the 2006 survey (6%). A similar proportion of respondents rated solicitors for their client contact (64%).

Just over one third of respondents saw transparency over fees and costs as a perceived advantage of the Bar (36%), up from 14% in 2006. Just under six out of ten (57%) favoured solicitors.

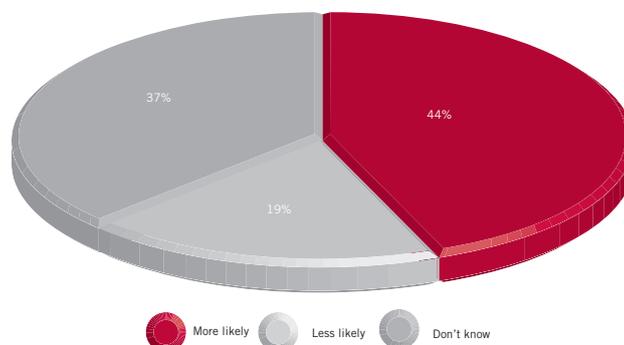
DRIVING FACTORS

We asked two new questions in this year’s survey relating to the economic and regulatory climate, and the extent to which our respondents identified them as factors driving the uptake of direct access.

As discussed in the introduction, more than four out of ten respondents (44%) specifically identified the economic downturn as having an impact on their decision to instruct members of the bar directly.

TABLE 7

Do the economic conditions of the last 18 months mean that you are more or less likely to consider instructing the Bar directly?



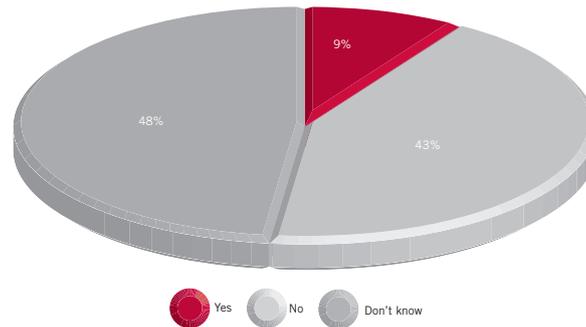
FINDINGS

“The clerking structure? That’s not my main consideration. What I need is specialist legal advice on a particular matter and the question for me is where I feel the specialist legal advice can best be provided

As noted before, respondents did not make a connection between the radical shake-up of legal services market and the way in which they instructed lawyers.

TABLE 8

Will the reforms of the Legal Services Act 2007 have an impact on the way you instruct lawyers?



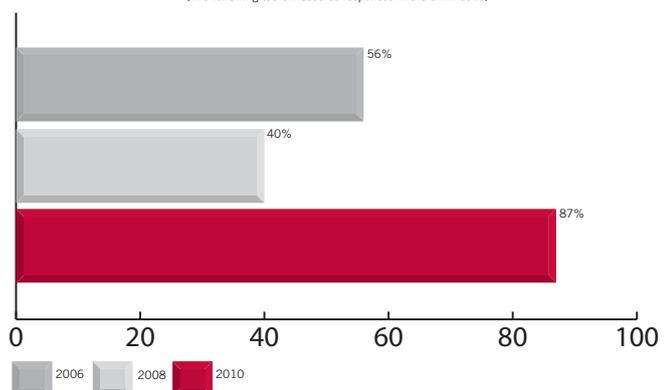
UNDERSTANDING DIRECT ACCESS

Finally, we asked our respondents questions relating to their understanding of direct access, how they select barristers and what areas of law are best suited to the Bar. We asked:

- Do they feel they sufficiently understand how they can access the bar direct?
- How they would go about finding an appropriate barrister?
- Which areas of law do they consider particularly suitable for direct access?

TABLE 9

Do you feel you sufficiently understand how you can access the bar direct?
(The following table measures responses in the affirmative)



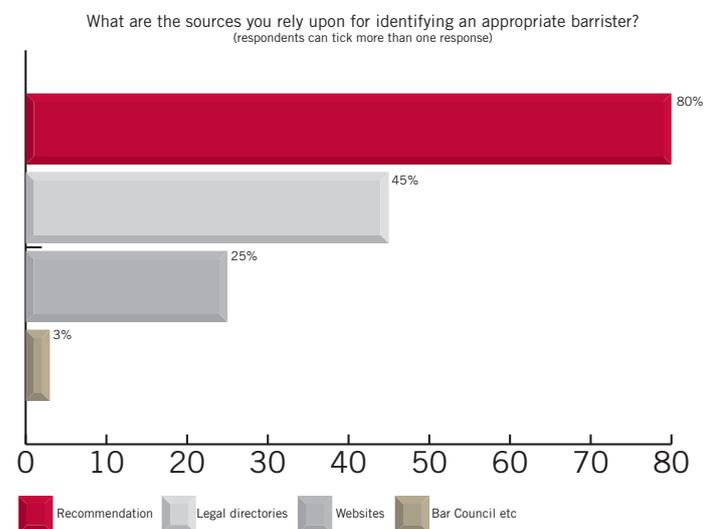
“One of the frustrating things about solicitors is that you send your work to a firm and then it is sent around to their colleagues upstairs. There is a degree of over-lawyering

“If a Chambers was going to come to me and say: “The next time that you have a dispute if you give it to us ‘lock stock and barrel’ as you would a law firm and we will do as good a job for less money”... clearly, that would be an attractive proposition

The survey reveals a striking increase in confidence amongst respondents with almost nine out of 10 (87%) believing that they had a sufficient grasp of the issues so as to be able to instruct barristers directly, more than doubling 2008 finding of four out of 10 (40%).

Eight out of 10 respondents identified recommendation or word of mouth as a means of identifying the appropriate barrister for the job, clearly ahead of the legal directories which was viewed by less than half (45%).

TABLE 10



“Often people who go to the Bar are the people who don’t like the structure of the law firm. They don’t like the idea of hourly reporting, client development, managing people and administration

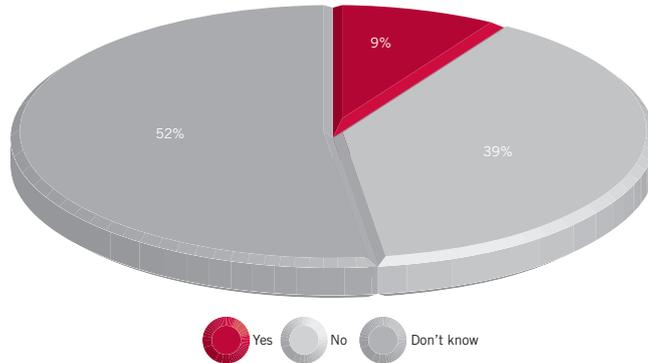
If the Bar Council want to establish itself as a gateway through which corporate clients can identify its members it has yet to achieve that. Only a tiny fraction (3%) of respondents regarded it as useful in that context. We also asked what kind of job the Bar Council (or other professional bodies) was doing in promoting or explaining direct access – less than one in 10 (9%) thought that they were providing clear information.

FINDINGS

“ I do not think that the economic climate has made a huge difference. We are always under pressure to cut costs

TABLE 11

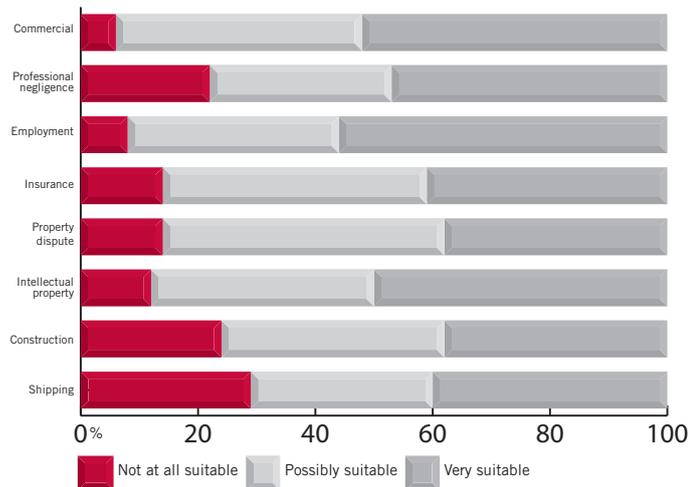
Has the Bar Council (or other representative organisations) given clear information on how to access the Bar?



The chart below showing respondents' views as to the areas of law that are considered particularly suitable for direct access illustrates confidence that it can be widely applicable. Commercial and employment are regarded as the two areas considered to be most suitable. The more sector specific areas, such as construction and shipping, were listed towards the bottom of the suitability list reflecting the persistent belief that barristers have expertise in the law but perhaps not in the gritty commercial realities of commercial and industrial sectors (a point noted in previous reports).

TABLE 12

What areas of law do you consider suitable for direct access?



“ There has been more pressure over the last 18 months but even when the market picks up I suspect we will constantly be challenged on how we are spending the group's cash

“ We just accept the old outdated practice that you cannot go to the Bar direct. It's nonsense. The problem is until you speak to someone who is doing it about how easy it is you do not actually appreciate that you can do it

METHODOLOGY

This research draws on 65 responses from in-house counsel, company secretaries and commercial directors from UK companies from a range of sectors.

No of respondents	Total	In-house counsel	Company Secretary	Commercial director	Other
	65	54	5	0	9



Hardwicke

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