

Market study into the supply of legal services in England and Wales

A submission by
The Chartered Institute of Legal Executives (CILEx)

February 2016

Contents	Page
1. Introduction	2
2. General Points	3
3. Case studies	6
4. Theme 1	8
5. Theme 2	11
6. Theme 3	12
7. Summary of recommendations	15

For further details

Should you require any further information, please contact;

Richard Doughty
Public Affairs Officer
rdoughty@cilex.org.uk
01234 845710

February 2016

1. Introduction

- 1.1. The Chartered Institute of Legal Executives (CILEx) is the professional association and governing body for Chartered Legal Executive lawyers, other legal practitioners and paralegals. CILEx has around 20,000 in membership, including approximately 7,500 qualified Chartered Legal Executive lawyers.
- 1.2. Genuine access to justice and affordable legal services are goals that must be permanently strived for. The task of balancing market forces, public duties, consumer protection, and the rule of law is something that requires constant vigilance and effort from all involved. As such, we welcome this opportunity to support the Competition and Markets Authority's study into legal services in England and Wales (civil justice).
- 1.3. As an Approved Regulator we are authorised to grant practice rights in relation to litigation, advocacy, probate, reserved instrument activities, immigration services and the administration of oaths. We have delegated our regulatory functions to the independent regulator CILEx Regulation Ltd.
- 1.4. The majority of CILEx members are employees of their firms, but this profile is expected to change over time. The content of this submission summarises opinions and concerns regularly expressed by CILEx and our members, and is provided here for consideration.
- 1.5. Before we answer the questions posed in the Scope of study, we would like to offer general considerations on the scope, particularly in a critical area that we feel would benefit from the Authority's focus.
- 1.6. We welcome the opportunity to discuss these matters with the Authority as the market study progresses.

2. General points

- 2.1. The cost of administering a fair legal system that achieves positive outcomes for participants and wider society is significant. Aside from the substantial training and qualifications a legal professional requires to help the public navigate the system, there are also insurance and regulatory requirements, even in 'low-risk' areas of law, which carry their own costs.
- 2.2. The Statement of Scope rightly identifies the potential impact of these burdens and the mismatch in information available to consumers when purchasing an important professional service.
- 2.3. For many years the State recognised these as prohibitive issues faced by those acquiring legal services out of necessity rather than choice, and provided what many acknowledge as a positive level of support to many seeking civil justice. However, more recently there appears to have been a 'de-prioritisation' of the primacy of access to justice. We see this with public policy reforms denying consumers of their access to legal support in entire areas of law, the increasing cost of using the courts, and in the collapse of many sources of free legal support. In addition, we have seen unprecedented demand for pro bono and support services from charities and the not for profit sector.
- 2.4. To evidence this, within the immediate twelve months following implementation of the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) there was a drop of available support in Citizens Advice Bureaux by 88% (132,000 to 12,000 cases a year).¹ Over the same period, mental health charity Mind reported that only 12% of those surveyed had gained access to the legal advice they needed.² More recent figures from the Legal Aid Agency indicate that generally around two-thirds fewer new matter starts now occur

¹ Citizens Advice Submission to the Justice Select Committee inquiry into the impact of changes to civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012
https://www.citizensadvice.org.uk/global/migrated_documents/corporate/citizens-advice-submission-to-jsc-on-impact-of-laspo-april-2014.pdf

² Mind submission to the Justice Select Committee into the impact of changes to civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012
<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/impact-of-changes-to-civil-legal-aid-under-laspo/written/8949.html>

since the introduction of LASPO, although further reductions have been seen with new matter starts from July to September 2015 being 8% lower than in the same period of 2014.³

- 2.5. These figures are indicative of a fall in supply, not a fall in demand. Current legal services providers have not stepped into the breach, indicating that whilst there is a gap in the market, there is a great deal of unmet need. All signs point to the public going without the legal support they require, with a deeply worrying rise in the numbers of people going through the courts without legal support (Litigants in Person), and the increasing use of uninsured and unregulated providers of legal services charging fees, including Mckenzie Friends. We welcome the scope of the study encompassing an analysis of the unregulated sector as it is growing and there is the potential for consumers to be misled. The Legal Services Board has actively reviewed this area and while we would not wish to see duplication of effort, the work that has already been undertaken provides a firm foundation for further review.
- 2.6. We recognise the CMA's intention to not consider the current provisions for legal aid, or whether there is a case for subsidising the costs of legal services for certain groups. However, we do not think this precludes the CMA from considering the broader issue of affordability of legal services, and whether the market is equipped to meet the needs of all consumers. The intention not to consider the current state of legal aid arrangements may have the potential to undermine the credibility of the study. Other initiatives, such as the work conducted on the Contingent Legal Aid Fund (CLAF) should be built into the study.
- 2.7. We think there are important public interest considerations to justify the inclusion of these matters. Legal services play a role unlike many other commercial services, as access to justice and enforcement of rights are fundamental to the upholding of the rule of law and a properly functioning democratic society.

³ Legal Aid Agency - Legal Aid Statistics in England and Wales July to September 2015
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/486034/legal-aid-statistics-bulletin-jul-to-sep-15.pdf

- 2.8. The Scope of study states that *'In almost any market there will be some consumers whose willingness to pay is below the market price, and who therefore choose not to purchase.'* Whilst this framework applies well to non-essential purchases, it conflates the 'unwilling' and the 'unable' and therefore applies less well when referring to essential services, which may include legal services. It is difficult to argue that members of the public are making an active choice to not to purchase the legal services necessary to enforce their rights when their primary reason is that they cannot afford them. Consumers with the greatest need to access legal services are disproportionately those with issues around vulnerability, poverty, and other disadvantages that make the expense of legal services an impeding factor on their ability to secure quality legal services in times of crisis.
- 2.9. CILEx remains concerned over the lack of evidence used to inform public policy decisions affecting those making distress purchases of legal services. If this market study takes a considered look at the affordability of legal services, as well as issues of information, redress, and regulation, it may prove invaluable to the future delivery of legal services.
- 2.10. In addition to the above, we have considered the other questions posed in the Scope of study.

3. Case studies

- **Do you agree with our three proposed case studies?**

- 3.1. The three proposed case studies cover areas we consider would benefit from the more detailed investigation a market study can provide, and we support their inclusion.
- 3.2. However, the case studies largely represent consumers who are securing legal services at their discretion, rather than making a distress purchase. Without adequately investigating this latter group we are concerned the market study could be at risk of being dismissed as irrelevant to the full range of consumers who need legal services.
- 3.3. We would therefore encourage the inclusion of one or more consumer groups who make distress purchases of legal services. This could be in family law, immigration and welfare benefits, for example. We would suggest that more than one of these areas is profiled to ensure a sufficient picture is compiled.
- 3.4. The scope of the study should also analyse an area of law that has been substantially impacted upon by the use of technology, and we believe that the recent review by Lord Justice Briggs into the need for an online court for defined claims should also be considered.⁴
- 3.5. The Authority may also wish to consider regional variations in the quality and accessibility of legal support through the choice of case studies. We are concerned that reductions in legal services for vulnerable consumers, combined with reduced services from free advice providers and court closures, has the potential to lead to legal advice deserts.
- 3.6. We would also recommend that selection of case studies is able to assess the variance between regulated and unregulated providers.

⁴ Lord Justice Briggs - Civil Courts Structure Review: Interim Report, December 2015
<https://www.judiciary.gov.uk/wp-content/uploads/2016/01/CCSR-interim-report-dec-15-final-31.pdf>

- **Do you agree with the scope of our case study on commercial law services?**

3.7. Yes we think this is appropriate. The experience of small businesses as consumers of legal services remains a concern, as highlighted by the research conducted for the Legal Services Board in October 2015.⁵ Only 13% of firms viewed lawyers as cost effective, and almost 50% agreed that legal service providers are a last resort to solve business problems.

3.8. In addition to the concerns highlighted by the LSB, we recognise the impact of increased court fees on small businesses as being particularly negative.

⁵ Kingston University - An analysis of small businesses' experience of legal problems, capacity and attitudes. <https://research.legalservicesboard.org.uk/wp-content/media/PUBLISH-The-legal-needs-of-small-businesses-19-October-2015.pdf>

4. Theme 1: The ability of consumers to drive effective competition through making informed purchasing decisions

- **What information do consumers use to judge the quality of legal services and/or legal services providers? What price information is made available to consumers? Do consumers find it easy or difficult to compare the quality and prices of legal services?**

4.1. The Scope of study document rightly identifies that ‘...*legal services may need to be obtained urgently and consumers may lack time to shop around before coming to a decision.*’ Sufficient, accurate and clear information is therefore fundamentally important to consumers in order to decide which provider to purchase from.

4.2. We agree that the two major components relevant to making an informed choice are information on cost and quality.

4.3. Consumers from the outset should have a clearer understanding of how much their case will cost, and transparency on how costs are accrued including the circumstances under which costs might change. We are concerned a lack of transparency in this field creates a disincentive to consumers seeking legal services in the first place for fear they will be left with a larger than expected bill.

4.4. There have been longstanding issues as to how consumers can make effective choices based on quality. CILEx as a professional association has established a code of conduct that must be adhered to by all members, and CILEx Regulation as an independent regulator investigates and disciplines members for breach of the code. They also ensure applicants for independent authorisation meet the minimum quality standards they set (including requirements for qualifications, work-based learning and day-one outcomes). Members must then maintain their standards through the planning and

completion of outcomes focused CPD - continuous professional development.⁶

- 4.5. By these means, only practitioners that meet minimum quality standards are allowed to practise as Chartered Legal Executives. Consumers can be assured therefore that where their legal adviser is a Chartered Legal Executive there are minimum quality criteria that individual has met.
- 4.6. We would however emphasise that whilst sufficient, accurate and clear information is of enormous importance, if the consumer cannot afford the service then they are largely irrelevant. Whilst increased competition and further unbundling of services may help this, a fuller exploration of the issue of affordability as already outlined is necessary.

• **How do providers of legal services compete with each other in seeking to win new business? Do they face any difficulties in winning new business?**

- 4.7. Feedback from CILEx members indicates that their businesses use a variety of methods to seek and win new business. This can come in the form of advertising and marketing, brand, reputation, recommendations and referrals, locality, word-of-mouth, networking, and a variety of other legitimate means.
- 4.8. Chartered Legal Executives experience some barriers through lack of recognition amongst the public. Whilst the responsibility for addressing this issue lies with individual Chartered Legal Executives, their businesses, and us as their professional association, it is something we would like to bring to the attention of the CMA. Many members of the public think of solicitors and barristers when they think of lawyers, and not the full range of professionals who are lawyers. If consumers are unaware of all their options, including which branch of lawyer to secure services from, then they are less likely to secure the service that is appropriate for them. Our members are at the forefront of providing cost effective, accessible legal services to the public.

⁶ CILEx Regulation also requires applicants to submit information on any prior conduct, which is considered as part of the application process. In cases where the prior conduct is relevant to their suitability for Fellowship, they can be rejected.

- **Do intermediaries (such as estate agents, insurers and accountants) play a role in helping consumers to choose legal services providers?**

- 4.9. There are wide-spread practices of consumers being 'referred' to preferred providers, and at times referral fees have been of great importance and there has been a lack of transparency.
- 4.10. This gives rise to conflicts of interest, but in some situations consumers welcome a referral model. Securing your own legal adviser can take time and effort, and some consumers will prefer this be done for them as part of securing a service, rather than duplicate the effort themselves.
- 4.11. CILEx to date has emphasised that if the consumer is fully aware of their rights to secure their own legal support, and there is transparency, then that assists.
- 4.12. Having said that, anecdotal evidence indicates that this is not occurring in all circumstances, and so we would welcome the CMA considering it as part of the market study.
- 4.13. Other concerns have been expressed regarding the criteria businesses will use when appointing legal businesses to be on their panel of firms. For example, banks utilise a panel of conveyancing firms for their services. CILEx members applying to join these panels have found internal rules placing undue restrictions on the sort of firms the bank will use, such as requiring that only solicitors should be partners. Other restrictions include requirements for minimum numbers of cases transacted previously and these being set at a very high level.
- 4.14. CILEx has had successful discussions with some banks to reform these rules and accept Chartered Legal Executive run firms, or firms with a mixture of solicitor and Chartered Legal Executive partners. We would welcome greater transparency in the arrangements and more accessibility onto such panels.

5. Theme 2: Whether information failures expose consumers to harm that is not adequately addressed through existing mechanisms

- **Are current regulations effective in protecting consumers' interests?**
- **Are consumers aware of the existing redress mechanisms? Are they being pointed to redress mechanisms by providers when appropriate?**

5.1. Regulation is often less prevalent in the minds of consumers when purchasing legal services, in part as it is less visible at the point of purchase, and because interaction with regulators usually only takes place when a complaint arises or redress is sought. It remains an important consumer protection issue particularly when some legal practitioners, but not others, are subject to regulation.

5.2. Chartered Legal Executives are required to provide information to clients on their complaints procedures, regulatory arrangements, and avenues of redress. Whilst this can increase the already voluminous amount of information the consumer receives from the outset, we consider this important for consumer protection.

5.3. This requirement is not present amongst all legal services providers, particularly for unregulated providers. There are real concerns that some consumers are being misled when using the services of unregulated providers, with a lack of clarity about charges and the level of regulation and insurance that might be in place.

- **Are redress mechanisms effective in addressing consumers' complaints?**

5.4. Feedback from CILEx members indicates that generally avenues for consumer redress are effective. This does not mean there is no room for improvement, or that regulators should not remain vigilant to ensure they operate well.

5.5. Where a client is dissatisfied with the outcome of a contentious case, there can be circumstances where lawyer is blamed for substandard service. We should be mindful that there will be cases where the complaint is valid, there will also be times when it is not, which can be exacerbated by the existing asymmetry of information between client and lawyer.

6. Theme 3: Impact of regulations and the regulatory framework on competition

- 6.1. We feel this is a significant issue that requires consideration. Currently the legal services market is unfair in requiring some providers to be qualified, insured and regulated, and others not to be.
- 6.2. We recommend consideration be given to consumer protection issues for clients of unregulated firms, and the disparity consumers may experience when one purchases services from a regulated provider as compared to an unregulated provider.
- 6.3. Since 2015 the vast majority of legal businesses have had the option of seeking regulation from CILEx Regulation Ltd. All of these entities must follow the CILEx Code of Conduct, and if they are delivering immigration services or reserved legal activities they can seek specialist authorisation.
- 6.4. However, unregulated legal businesses are not compelled to seek regulation. This creates uncertainty for consumers, places them at risk of poorer services, limits their means of redress, and creates an unfair market with lawyers subject to regulatory costs, insurance and reporting requirements being at a disadvantage when compared to unregulated businesses.
- 6.5. We have significant concerns about the unequal standards of client care and consumer protection. For example, those working in Estate Administration (but not conducting Probate services) can hold large amounts of client monies without the comparable regulatory standards as regulated legal professionals. This means no guarantee of separation between client and office accounts, no insurance requirements for loss of funds, and greater exposure to risks from money laundering. It should be noted that CILEx members working in this field have duties to comply with the CILEx Code of Conduct, including on the safeguards required for the handling of client money.
- 6.6. The Study may also consider to what extent there is scope for the existing approved regulators and regulatory bodies to work together to improve the market for consumers, at the moment the drivers are largely ones of competition with very little collaboration.

- **Do the current regulations create disproportionate barriers to entry and expansion into the legal services sector? What difficulties have new entrants faced?**

6.7. We would encourage the Authority to consider a recent report submitted by CILEx Regulation to the Legal Services Board on the issue of run-off insurance cover when law firms switch regulator. Currently firms must have six-years' run-off insurance cover in the event that they close down. However the same rule applies if they were to switch to a regulator that is more appropriate for their business model. This, in effect, prevents some firms from switching to a more appropriate regulator without transferring significant cost on to their consumer.⁷

- **Does the current regulatory framework impose disproportionate costs on legal services providers?**

6.8. The cost of delivering effective regulation is substantial. Authorisation and investigation functions require staffing and resources, and independent regulators require governance arrangements, back office functions, infrastructure and resources to operate day-to-day.

6.9. Other regulatory demands include the establishment, resourcing and financial backing of compensation funds, as well as associated indemnity insurance.

6.10. Similarly there are costs to developing, delivering and administering qualifications and CPD systems.

6.11. Whilst the reasoning for these arrangements is sound, the costs remain significant. These costs are passed indirectly onto the consumer via qualification costs and practising certificate fees.

6.12. CILEx, in securing authorisation for regulating entities and reserved legal activities, had to prove its ability to operate all of these regulatory mechanisms to a standard consistent with other Approved Regulators. For unregulated

⁷ CILEx Regulation Ltd - Report to the LSB on the restrictions created by run-off insurance
<http://www.cilexregulation.org.uk/latest-news/run-off-cover-report-to-lsb>

providers to not be subject to similar requirements, with their associated costs, creates an unequal market place.

- **What has been the impact of ABS entry on competition in the legal services sector, including on innovation, price and quality? Are the rules governing ABSs unnecessarily restrictive such that they have hindered the entry and expansion of ABSs?**

6.13. Broadly, we do not consider the requirements on ABSs to be restrictive. Having said that, easing of restrictions on ABSs and other new market entrants would enable greater competition.

6.14. It is important that they are not the only new legal businesses to be encouraged. The market has need of small and specialist providers as well as larger new market entrants. As measures that make it easier for new ABSs are considered, so should measures that reduce the barriers for small and specialist legal service providers.

- **Have there been opportunities for more competition in particular legal service areas as a result of regulatory reform?**

6.15. It is important to recognise that the legal market is changing. Last year Chartered Legal Executives gained the ability to set up their own legal businesses delivering reserved legal activities. This is the first time at a market-wide level that lawyers from one profession have been able to compete for business on an equal footing with lawyers from another. The changes received significant support from stakeholders because of the opportunity it presented for increased competition in the market, which would improve standards and drive down costs for consumers.

6.16. We would urge caution, as it is too early for this change to have had an impact on the market. Chartered Legal Executives must be given sufficient opportunity to establish their own businesses and compete for consumers before the impact of these reforms can be measured. We feel patience is merited, as CILEx members hold the advantages of reduced training costs, and reduced insurance costs, which can ultimately be passed on to the consumer.

7. Summary of recommendations

- 7.1. The market study should consider the issue of affordability of legal services, and whether the market is equipped to meet the needs of all consumers.
- 7.2. One or more consumer groups who make distress purchases of legal services should be included as case studies. Without adequately investigating this group we are concerned the study could be at risk of being dismissed as irrelevant to the full range of consumers who need legal services. The impact of technology on the market should also be explored.
- 7.3. Consumer protection issues for clients of unregulated firms should be considered, along with the disparity consumers may experience when purchasing services from a regulated and unregulated providers.
- 7.4. Reforms enabling Chartered Legal Executives to compete on an equal footing with existing legal services providers must be given sufficient time and opportunity to take effect before the impact of these reforms can be measured.
- 7.5. The Study may also consider to what extent there is scope for the existing approved regulators and regulatory bodies to work together to improve the market for consumers, at the moment the drivers are largely ones of competition with very little collaboration.