



## Competition and Markets Authority: The Supply of Legal Services in England and Wales

ICAEW welcomes the opportunity to comment on the *Market Study into the Supply of Legal Services in England and Wales: Statement of Scope* published by Competition and Markets Authority (CMA) on 12 January 2016, a copy of which is available from this [link](#).

We hope to work further with the CMA on this important study, and be able to contribute a reasoned analysis of our experience, taking account of the views of all our members. This has not been possible in the short time during which the Statement of Scope has been open for comment.

This ICAEW response of 4 February 2016 has been prepared by the representational arm of ICAEW, and reflects consultation with the Business Law Committee which includes representatives from public practice and the business community. The Committee is responsible for ICAEW policy on business law issues and related submissions to legislators, regulators and other external bodies. We understand that our regulatory arm has responded to this opportunity to comment independently.

ICAEW was granted status as a accrediting body for the reserved legal service of probate in August 2014, and since that time has both authorised accountancy firms and also licensed them as Alternative Business Structures (ABSs) for probate services. We have currently accredited over 200 firms for probate services, most of which are small or medium sized practicing firms.

The majority of our member firms are still prohibited from providing any reserved legal services, but they invariably provide advisory services which come within the definition of other legal services. This includes giving front line advisory services to many SME clients (who frequently have a close working relationship with their accountant) as well as individuals seeking advice on their tax and other financial affairs.

ICAEW is a world-leading professional accountancy body. We operate under a Royal Charter, working in the public interest. ICAEW's regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the UK Financial Reporting Council. We provide leadership and practical support to over 146,000 member chartered accountants in more than 160 countries, working with governments, regulators and industry in order to ensure that the highest standards are maintained.

ICAEW members operate across a wide range of areas in business, practice and the public sector. They provide financial expertise and guidance based on the highest professional, technical and ethical standards. They are trained to provide clarity and apply rigour, and so help create long-term sustainable economic value.

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## MAJOR POINTS

### Scope of Market Study

#### The Supply of Legal Services and the Legal Profession

1. The legal profession, traditionally defined as solicitors and barristers, do not (of course) represent the whole class of legal service providers. However, for reasons which are not entirely clear, the two seem to be often so closely associated that judgements are made, or risk being made, that are not appropriate to the actual situation in the wider market for legal services. One of the reasons why we welcome the CMA's current study, is that we anticipate it will help dispel some of the resulting misapprehensions in the minds of consumers, regulators and other decision makers. This will enable the market to develop, and be regulated, in a way which will be both more competitive and safer for consumers.
2. An example of this effect lies in the results of the Legal Services Board's (LSB's) research commissioned from YouGov into the supply of legal services relating to probate, will writing and estate administration<sup>1</sup>. This indicated that only 2% of clients sought professional help from an accountant in relation to these services (as against 86% from a solicitor) though our experience of our own membership indicates a far higher proportion, especially in relation to estate administration and estate duty. For example Smith and Williamson, one of the ten largest professional accountancy firm in the UK, counts these activities as a significant proportion of their work. Many smaller firms also have long standing professional relationships with clients which can be individuals, families or small business owners, whose work extends beyond life-time services into estate administration and other services after death. This was taken into account by the LSB in their later work on the reservation of estate administration.
3. We also note the comment on the LSB's response to the Market Study Notice that "There are significant levels of unmet legal need. Half the public will have a legal problem over a three year period, but only 20% of those individuals will use a lawyer to solve it. Only 13% of small businesses view lawyers as cost-effective". Taken separately each of these statements is true, but taken together they suggest that the use of a lawyer is essential to the meeting legal needs. If a competent and appropriately regulated alternative supplier is better able to meet the need, then this is not the case. Similarly, in paragraph 2.5 of the Statement of Scope, the CMA states that "Legal services are particularly important to the UK economy for two reasons. Firstly, the sector is significant in its own right...". The legal profession is important economically, in its own right, with a turnover of around £30 billion. The provision of (broadly defined) legal services is still greater, though difficult to quantify as many such services are generally measured as part of a different sector (including 'accountancy services'). The distinction should not be under-estimated in this study. The fact that many professionals have habitually provided unreserved legal services within their competence and under their own professional regulation, without the public and political concern that led to the introduction of the Legal Services Act, has been of very significant benefit in particular to individuals and small businesses. If it were to be restricted, or become less cost effective, as a result of the conclusions drawn by this study, this could cause significant damage to the UK.
4. In our experience, besides members of the traditional legal profession, legal services are mainly provided by:
  - A) Providers of specialist legal services who form or join a professional association, including both:
    - Ai) professionals, such as Trade Mark Attorneys, which have gained statutory recognition as giving equivalent status, within their specialism, as members of the traditional legal professionals, as well as members of legal professional bodies such as Chartered Legal Executives which have also been given statutory recognition; and

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<sup>1</sup> [http://www.legalservicesboard.org.uk/Projects/reviewing\\_the\\_scope\\_of\\_regulation/yougov\\_research.pdf](http://www.legalservicesboard.org.uk/Projects/reviewing_the_scope_of_regulation/yougov_research.pdf).

Aii) professionals, who do not have statutory recognition, though many of them aspire to gain it, such as certain will writing associations.

B) Members of other regulated professions or trades, who provide their clients with legal advice, and sometimes other legal services, where the relevant knowledge and skills have arisen from the activities carried out under the regulatory oversight of their own professional body or regulatory authority. These include many banks as well as members of chartered bodies, including the largest accountancy related professional bodies and the Royal Institution of Chartered Surveyors.

C) Charities, mutual support organisations and trade unions.

D) Commercial, profit based, legal service providers without any allegiance to any association providing externally imposed standards of competency or ethical behaviour, nor any protection for clients in terms of complaint handling or redress.

5. 'Unregulated legal services' are defined in paragraph 3.4 of the Statement of Scope as those which can be provided by persons who are not authorised by an approved regulator or regulated under a specific statute. However, regulation is not limited to that which is required under a specific statute. For example, much regulation is recognised in statute, though not required, such as most of the regulatory arrangements of the front line legal services regulators listed in Section 21 of the Legal Services Act (the Act). All those service providers within categories A and B above will be subject to their own professional and/or statutory regulation, adapted to their own particular specialisms. Though not termed as legal services regulation it will frequently provide adequate regulatory protection for those clients seeking legal services from such providers, and be recognised as such by the users of those services as well as in many cases having statutory recognition.

6. Members of the largest professional bodies for accountants have for many years been providing unreserved legal services to their clients, especially in relation to legal advice and assistance on the requirements in relation to financial information, and in particular the requirements for the preparation of annual financial statements of commercial organisations and tax returns for both businesses and individuals. Further general advisory services to businesses have grown up in most professional accountancy firms, developed from this base. These services are subject not only to rigorous professional regulation, but the activities of their professional bodies are within the scope of the oversight functions of the Financial Reporting Council, a body of equivalent status to the LSB. In the case of small businesses, the importance of this advice has been recognised in research commissioned by the LSB on the Legal Needs of Small Businesses<sup>2</sup>. To categorise such services as "unregulated" is entirely inappropriate.

7. ICAEW has issued Guidance on the provision of legal services by its members, and on working with lawyers, which is available from [here](#). Please let us know if you would like more information on our regulatory arrangements for our members.

### The Reserved Legal Services

8. Statutory regulation of legal services is mainly provided for by the Legal Services Act 2007 (the Act) in the form of specific requirements in relation to the reserved legal activities identified in Section 12 of the Act. 'Other legal activities' are also defined in this section, which are not subject to statutory regulation, but may be provided by any of the persons identified in paragraph 4 above. Other legal activities are typically included within the scope of the oversight of professional bodies, and their general regulatory arrangements, for all entities within categories A and B. However, when such activities are provided by entities within

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<sup>2</sup> <https://research.legalservicesboard.org.uk/news/latest-research-small-business/>

categories C and D, they will not generally be covered by any externally imposed oversight or other protections for consumers.

9. The list of reserved legal services was carried forward from previous legislation, rather than being reconsidered in the drafting of the Act. Research carried out for the Legal Services Institute by Stephen Mayson and Olivia Marley<sup>3</sup> analysed the origin of the reserved legal services, and concluded that they were generally not calculated to consistently cover those services where consumers were most likely to suffer detriment. Very significant harm can be caused to individuals and small businesses, by the providers of legal services other than the reserved legal services. The CMA's Statement of Scope notes that regulatory protection for consumers is likely to be required in the presence of the information asymmetry such as that which applies in the case of legal services. However, in the case of legal services, that protection may not provide protection in those areas where there is greatest danger of harm to consumers.
10. Even the most vulnerable of consumers receiving legal services from charities, mutual support organisations and trade unions are likely to be well aware of the nature of the entity from which they receive them. This will not necessarily be the case for consumers receiving services from the unregulated legal service providers in category D above, potentially leaving them with unsatisfied expectations of the levels of protection that they can expect.

### **Statutory and Common Law Distortions to the Market in Legal Services**

11. Besides the provisions of the Act requiring regulation for the reserved legal services, there are a number of other statutory or common law provisions which affect the market in the provision of legal services in ways which may unnecessarily hamper free and fair competition. We are particularly aware of the distorting effects of the limits to the persons who can generate legal professional privilege for their clients (addressed in paragraphs 12 to 14 below) and the fact that in some cases only solicitors have been granted exemptions from statutory requirements when exemption would be equally appropriate to some other professions (addressed in paragraph 15 and 16 below).

### **Legal Professional Privilege**

12. The ability to generate Legal Advice Privilege (LAP) for the benefit of clients has traditionally been limited to barristers, solicitors and their firms. Section 190 of the Act extended this to members of other bodies where they have been authorised for the provision of any of the reserved legal services, but only in relation to services relating to that which is reserved. Together with the rapidly evolving case law on LAP, this has led to a very complex situation, where even the most knowledgeable of clients may be unclear or misinformed on when they could be entitled to a right to LAP. In the meantime, chartered accountants and their clients are likely to be disadvantaged, in cases where LAP becomes important to the outcome of a legal issue.
13. In 2012, ICAEW intervened in the case of *Prudential vs HMRC*, in Prudential's appeal to the Supreme Court, where it was argued that tax advice should be privileged where given by a professional advisor equally well qualified and regulated to give that advice as is a solicitor or barrister. The Supreme Court acknowledged the anomaly of this situation, but declined to interpret the law as appropriately extending the generation of LAP to chartered accountants or other skilled tax advisers, noting that reform in this area would be more appropriate to Parliamentary action.
14. We are aware that some law firms have marketed their services on the basis that they are in a position to keep their advice completely confidential, with the benefit of LAP, where

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<sup>3</sup> <https://stephenmayson.files.wordpress.com/2013/08/mayson-marley-2010-reserved-legal-activities-history-and-rationale.pdf>

accountants are not able to do so. The anomaly remains, not just in relation to tax advice, but all other advisory services where accountants or other professional advisers are both appropriately skilled and regulated. This results in a serious distortion to the competitive environment, where clients may seek professional services on the basis of the availability of LAP, rather than on the basis of a more cost effective service.

## Exemptions from Statutory Requirements

15. On occasion, members of the traditional legal professions been granted exemptions from legal or regulatory requirements, or permitted to provide services under the oversight of their usual professional regulatory body, but such exemptions have not been granted to members of other professions, even where they would have been equally appropriate. We are particularly aware of this in the context of the requirements for claims management regulation, under the Compensation Act 2006. We believe that chartered accountants should be subject to the same exemption as legal practitioners. Chartered accountants are subject to professional regulation which is comparable to that of solicitors and barristers, and their basic training and competence is more usually associated with dealing with complex financial matters, such as the assessment of appropriate redress in relation to financial claims and in the assessment of consequential loss. Further, their business model usually includes providing regular and routine business and financial advice, which makes them a cost effective and already well-regulated provider of such advice to their clients.
16. This argument also applies to immigration advice, as noted in paragraph 3.5 of the Statement of Scope. Though this is less central to accountancy practice, occasions may occur when our member firms have a particular specialism in international business, and where their clients have a need for advice on the relocation of skilled persons to the UK.

## RESPONSES TO SPECIFIC QUESTIONS

### Q1: Case studies

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

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

17. We are pleased that the CMA will be considering a broad range of legal services, and agree that it is appropriate to exclude the provision of criminal legal services at this time.
18. We agree that the CMA's three proposed case studies, which are:
  - will writing and probate services to individual consumers;
  - employment law services to individuals and small businesses; and
  - commercial law services, including trading issues and advice relating to commercial contractswill provide appropriate illustrations of the types of legal services most likely to cause detriment to consumers, and other market imperfections.

### 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?**

**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?**

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

19. We comment above on the potential difficulties for consumers to differentiate between regulated and unregulated commercial legal service providers (paragraphs 8 to 10 above under 'major points').

20. Other than that, we have limited information on how consumers make their legal services purchasing decisions other than in relation to our own members. The most frequent way that chartered accountants gain legal services clients is through their provision of services more typically associated with professional accountants, such as the preparation of tax returns and financial statements. Client relationships can extend over many years, with the trust and familiarity which arises from the provision of a regular annual service in relation to tax and accounts preparation work. This provides many appropriate opportunities for informal advisory services ranging across a very wide range of business, financial and commercial matters.
21. Chartered accountants typically refer on their clients to solicitors, barristers or other specialist legal service providers where appropriate, for the provision of legal services which they cannot provide themselves. Such references will be provided under ICAEW's oversight, and using the members skill knowledge and experience, as for all other functions carried out in the course of practise as a chartered accountant.

**Theme 2: Whether information failures expose consumers to harm that is not being adequately addressed through existing regulation or redress 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?**

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

22. No system of regulation can be totally effective without becoming unrealistically costly. But we are confident that, with the oversight of the LSB, statutory regulation of those providers within the scope of the regulatory provisions of the Act is becoming appropriately rigorous and cost effective for the protection of consumers. Statutorily regulated legal service providers are also required to alert their clients of their rights to seek redress through the Legal Ombudsman and also to relevant complaints mechanisms.
23. We are also confident of our own arrangements for the protection of the clients of our members, and have no reason to doubt those of other professional bodies or associations. There can be no such assurance, in relation to unregulated legal service providers (category D in paragraph 4 above).

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

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

24. In the case of our own members, until recently it was impossible to enter into some sectors of legal service provision, or some ways of setting up working partnerships between lawyers and accountants, not just because of the statutory restrictions but also because of unnecessarily severe practice restrictions put in place by first by the Law Society but later maintained by the Solicitors Regulation Authority (SRA). We are pleased to note that more recently the SRA (with the encouragement of the LSB) has been taking a far more liberal approach to the dismantling of their less defensible restrictive practices. We are confident that this process will continue, under current personnel and conditions, without the need for further intervention.

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

25. Regulation is expensive, and it is important that it is kept under constant review to ensure that costs do not exceed those that are essential for the protection of consumers and other public interest considerations. Given that, we are not aware of significant evidence to the effect that the current costs of legal services regulation are disproportionate, given the information asymmetries and the dangers of detriment to consumers.

26. Current potential developments may actually tend to damage this situation, and increase unnecessary costs rather than reduce them. We understand the need for increased independence of the regulatory arms of professional bodies from their representational arms, but we are concerned that this is likely to reduce their general accountability, including the motivation to keep their costs as low, and their working methods as efficient, as possible. As a general rule, public bodies (including statutory regulatory authorities) are accountable, directly or indirectly, to the democratic process. Private sector regulators are generally accountable, directly or indirectly, to their regulated population as a whole and/or to the market. We consider that it is essential for the maintenance of the cost effectiveness of regulation, for very careful consideration to be given to setting up the conditions under which independent private sector regulators can be held accountable. While the front line bodies are accountable to the LSB, as their oversight regulator, we are unclear as to the extent that this is a sufficient as a mechanism of accountability.
27. Similar arguments apply in relation to the LSB's current proposals for a single legal services regulator. Regulatory authorities are not exempt from the general rule that monopoly providers tend to develop inefficiencies over time. This has been demonstrated over the years by the number of regulatory failures that have occurred under the watch of large public sector regulators. Nor are monopoly or public sector regulators exempt from the effects of 'regulatory capture'. So self-evident does this appear to us, that we are amazed that the government appear to be promoting and encouraging the development of monopolies in the provision of regulation, even while they are trying to limit and dismantle the effects of monopolies and oligopolies in every other sector.
28. We are aware of the sometimes acrimonious, and doubtless costly, disagreements between legal professional bodies and their regulatory arms, and agree that it would be preferable both for consumers and for the reputation of these professions and their members for a mechanism to be found for these to be resolved – not excluding the possibility of complete separation. However, in the case of ICAEW such disagreements have not occurred. Both the representational and regulatory arms of ICAEW share a commitment to our Charter Objectives (including a determination to serve the public interest in all we do) and a clear understanding that the future of our profession depends on the reputation of our members (including a need for firm, fair and cost effective regulation). The problems experienced by the major professional bodies for lawyers should not lead to less diverse and cost effective regulatory arrangements for providers of legal services which have not experienced their problems.
29. Nor would a single legal service regulatory structure be simpler or easier to understand for all legal service consumers. Our member firms are currently in a position where they can answer to a single regulatory body – our own. The clients of our member firms are able to contact us with their complaints on any aspect of the professional services provided by our members and expect an appropriate response, even in those areas where our members provide some services which are subject to additional regulatory oversight. This simplicity and comprehensibility would inevitably be damaged if our members had to answer to a unified legal services regulator in relation to legal services, while still being answerable to ICAEW in relation to accountancy services, especially in view of the very extensive areas of professional practice which could easily be considered to come within both of those categories.

**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?**

30. In our view, the impact of ABS entry on competition in the legal services sector has been wholly positive. Not only has it allowed entry to the market of alternative suppliers, and suppliers subject to an alternative management structure and business model, but we have also seen signs that it has also led to increased attention to cost effectiveness and client service among members of the traditional legal professional bodies.



31. We look forward to seeing the development of further reforms, as being initiated by the Ministry of Justice (MoJ) to dismantle any remaining unnecessary restrictions.

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

32. From our point of view, and that of our members, the particular area of the market in legal services which has benefitted from regulatory reform is in the provision of probate services and the related areas of estate administration and will writing.

33. We look forward to further reforms, leading to a competitive environment where all clients, personal, small business or very large entities, can freely seek their legal services from the provider who is most knowledgeable (both on the legal issues concerned and the circumstances of the client) cost effective and well regulated, without having to take into account unnecessary externalities.