



ICAEW REPRESENTATION 128/16 REGULATORY REPRESENTATION

Supply of Legal Services in England and Wales

ICAEW Professional Standards welcomes the opportunity to comment on the *Legal Services Market Study interim report* published by the Competition and Markets Authority (CMA) on 8 July 2016, a copy of which is available from this [link](#)

ICAEW has both regulatory and membership functions which operate independently in a single unitary body. On occasions representations are asked from both the regulatory and membership arms and this is one of those occasions. A separate representation in addition to this one has accordingly been made by the membership arm through their Business Law Committee.

We hope to work further with the CMA on this important study, and be able to contribute further, providing a reasoned analysis of our experience, taking account of the views of all our regulated firms.

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 145,000 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.

ICAEW was granted status as an Approved Regulator and Licensing Authority for the reserved legal service of probate in August 2014, and since that time has both authorised accountancy firms and licensed them as Alternative Business Structures (ABSs) for probate services.

In addition ICAEW as a regulatory body is;

- (a) the largest Recognised Supervisory Body (RSB) and Recognised Qualifying Body (RQB) for statutory audit in the UK, registering approximately 3,300 firms and 8,400 responsible individuals under the Companies Act 1989 and 2006.
- (b) the largest Prescribed Accountancy Body (PAB) and Recognised Accountancy Body (RAB) for statutory audit in Ireland, registering approximately 3,300 firms and 7,500 responsible individuals under the Companies Act 1990.
- (c) the largest single insolvency regulator licensing some 750 insolvency practitioners as a Recognised Professional Body (RPB) under the Insolvency Act 1986 out of a total UK population of 1,700.
- (d) a Designated Professional Body (DPB) under the Financial Services and Markets Act 2000 currently licensing approximately 2,300 firms to undertake exempt regulated activities under that Act.
- (e) a Supervisory Body recognised by HM Treasury for the purposes of the Money Laundering Regulations 2007 dealing with approximately 13,000 member firms.
- (f) an accredited body under the Financial Conduct Authority (FCA) Retail Distribution Review (RDR) arrangements.

In discharging these duties ICAEW are subject to oversight by the FRC's Conduct Committee, the Irish Auditing and Accounting Supervisory Authority (IAASA), the Insolvency Service, the FCA and the Legal Services Board.

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MAJOR POINTS

Legal Services Market Study

1. The supply of legal services in England & Wales has seen many changes in the last 8 years since the passing of the Legal Services Act 2007 (the act). The act sought to change the way legal services were offered and to provide openness and transparency in the way legal services were provided. Although the act has been quite successful in bringing about change, it is becoming a victim of its own success and starting itself to be a barrier to the development of the markets. We therefore have welcomed this review by the Competition & Markets Authority (CMA) as a timely intervention.
2. The act introduced eight regulatory objectives which the regulators and regulated are bound by. Some of these compete against each other and the challenge is for the regulators to interpret these in a balanced fashion, and not to exclude any in their decision making. In our comments on the scope of the study in February, we expressed some surprise that whilst four of these objectives were referred to (consumer interest, access to justice, competition and public interest), the others were not, and if not taken into account in the final recommendations could cause some difficulty for regulators in putting such recommendations into practice. It is disappointing that the statutory objectives are not addressed at all in this report and as a consequence the approach to the proposed remedies could be compromised by these obligations.
3. In section 2 the report quite rightly refers to the unmet demand for legal services as being one of the drivers for the market assessment. However the focus of the report seem to be more around the informed consumer who then is constrained in some of the information made available to them, be it for choice or redress. Whilst we agree that there are important observations to be made around such a consumer, it is the uninformed consumer who lacks incentive to access the market be it through education, access to electronic media or financial circumstance that is a significant victim of the lack of competitiveness in the market. We believe further research and remedies should perhaps have been devoted to this area.
4. We note that the report is if anything circumspect on the regulatory framework, and as to whether separation of the regulatory and membership parts of professional bodies should be completely separate. In paragraph 7.68 it mentions that the government intends to consult on this area and then appears to step back. We suspect that both the regulatory bodies and the government may be disappointed that a greater steer has not been given in anticipation of the Ministry of Justice's consultation, but gain the impression that such issues are not critical to the competitiveness of the market.

RESPONSES TO SPECIFIC QUESTIONS

Questions on improving price and service transparency;

1. What are the barriers to providers sharing price and service information with consumers and do these vary by legal service?
2. Is there a minimum level of information that providers should either (i) publish or (ii) provide to consumers either in advance of or on engagement. Should this be mandatory?
3. Are there examples of good practice in price and service transparency that could be shared more widely?
4. How and when should legal service providers communicate:
 - Fees and rates to clients; and
 - Anticipated or actual cost overruns (ie where the fee will exceed an estimate or quote)?

5. **Are there any measures of quality that can readily be collected by regulators or government (including HM Courts and Tribunal Service in relation to civil actions and probate) on observable trends in quality of legal services?**
5. Although we are cautiously in favour of better transparency, we think there are dangers associated with the proposals above, not least in the apparent assumption that the services can be commoditised. Some transactions clearly can be treated in this fashion, but in many instances a legal service requirement may contain a number of components and contingencies, and attempting to articulate these and price them individually could lead to consumer confusion in understanding the overall commercial obligation on their part in utilising the services. On the other hand a range of pricing such as used in the building industry does enable the consumer to form initial views and make comparisons and it may be that pricing ranges based on certain assumptions may be a better approach.
6. Disclosure of service information should be a standard mechanism for sign-posting the availability of the Legal Ombudsman for addressing complaints under section 112 of the act. The content of that service information though does vary from the very brief to the over detailed, both ends of the spectrum not serving the consumer well. The regulators jointly are seeking consumer feedback on the effectiveness, timing and relevance of client care letters under a current research project and this may better inform how these letters and their timing should be organised.
7. These proposals can of course be forced on the regulatory bodies to include in their rules and impose on the firms they regulate, but do not impact other suppliers of non-reserved legal services unless some form of licensing or control was imposed on them as well. The proposals therefore could be seen as a burden on the regulated sector to the advantage of those not so regulated.
8. Communication with a client regarding an engagement spread over a period of time is important, and the opportunity should be taken by the practitioner to update the client on the costs position. The timing and frequency should be down to the practitioner and the client, but it may be that some guidelines on best practice should inform this approach.
9. Pricing comparison websites can be misleading where the basis of the information disclosed is not always readily apparent. The inclusion or exclusion of VAT for example would not be a consideration immediately apparent to vulnerable clients and any attempt at regularising pricing disclosure should address the sources of these variations.
10. We are not aware of any measures of quality in this area, save perhaps the ratio of engagement letters issued and possible customer feedback survey data obtained by the firms themselves.

Questions on addressing barriers to comparison and search

1. **What are the barriers to comparison and search?**
2. **Are those barriers consistent across different legal services (by area of law, activity and the extent to which a service is commoditised)?**
3. **What additional information could be made available by regulators and trade bodies?**
4. **What measures would allow consumers to be better able to compare the non-price attributes of legal services providers (such as quality or consumer protections)?**
5. **How can intermediaries and those making recommendations better support consumers in selecting a legal service provider?**

6. **Is there any additional information held by government or regulators that if published would assist the development of the comparison sector or assist consumers directly conducting comparisons?**

11. The report is fairly comprehensive in looking at these areas, but does so from the viewpoint of the informed consumer, and does so largely in isolation from other buying patterns for the service industry. In practice the informed consumers using the internet will be able to secure sufficient information to make a buying decision in the same way they might for estate agents, building, and car servicing. Additional information sought through these questions may marginally aid this experience, but in our view does not go to the heart of the unmet demand which will be equally affected by lack of access to the internet and the limited skills of the uninformed consumer in asking the right questions. This aspect is better addressed in the next set of questions.

12. We have in our [representation](#) on the scope of the CMA report drawn attention to the role of intermediaries and the limited knowledge that some of these have, for example in indicating certain types of work can only be done by a solicitor, or refusing dialogue with professional service firms unless they are solicitors when dealing with client matters. We believe there is a role for other oversight bodies to require their regulators and the firms they regulate to be clearer on their interactions with legal service providers and not have in place restrictive practice rules that inhibit the competition objectives of the act. This is a process that has recently been applied in relation to the reserved service of audit.¹

Questions on improving consumer information

1. **How and what information should be provided by a central information hub?**
2. **Should Legal Choices act as the central information hub for legal services in England and Wales or would an alternative website be more appropriate?**
3. **How should any central information hub be promoted?**
 - **Should front line regulators, representative bodies and self-regulatory bodies be asked to promote an information hub?**
 - **Should legal services providers be obliged to link to an information hub?**
4. **Should legal Choices include information on unregulated and self-regulated providers?**
5. **What materials should be developed to aid in comparing and selecting a provider?**
 - **Should materials be made available through channels other than a central information hub (such as Citizens Advice)?**

13. The observation made in paragraph 11 above concerning unmet demand equally applies to the remedies being sought here. The problem for the potential consumer is understanding the nature of their need in the first place, before going anywhere and making comparisons. In the area of probate the government gives guidance to the consumer on what the service looks like, the key components and how a professional service provider might assist. Similar government led guides for example on conveyancing, will writing and divorce could provide that information on an independent basis. The proposed remedy focuses on Legal Choices as being the core solution, but whilst it may be part of the solution, we believe a wider educational strategy may be appropriate.

14. The proposed remedy is also internet focused. Information can be disseminated in a number of ways outside the internet, not just the traditional ones operating before 1990 but also

¹ The Statutory Auditors and Third Country Auditors Regulations 2016 section 12

innovative techniques available through other media. This inter alia should look at education into schools and support given through local authorities.

Questions on improving client care communication and increasing access to redress

1. **How can client care communication be improved to better protect consumers' interests and are there examples of client care communication that provide succinct and relevant information?**
 2. **What would be the consumer protection benefits and impact on competition of restricting the use of the title 'lawyer'?**
 3. **What are the barriers to using LeO and are there any benefits in amending its scope, jurisdiction or approach?**
 4. **Are the current arrangements for ADR in legal services clear and readily understandable to consumers and is there scope for greater use of ADR?**
 5. **Should legal services providers be provided with additional guidance on communicating redress options?**
 6. **Do any additional redress mechanisms need to be introduced for unregulated providers?**
15. The earlier bank of questions addressed the communications issues.
16. Restricting the use of title "lawyer" when it is being used generically would certainly short term lead to confusion in the market and not necessarily achieve its objective. We find such issues in the term "accountant" which given the wide use of the description would be equally confusing if restricted. Quality hallmarks are what the consumer would most likely be looking for, and these can be exemplified in other ways, for example by firms stating who they are regulated by and the bodies of which they are a member.
17. The redress mechanisms as they stand are out of balance for the regulated and unregulated firms, and indeed are a partial inhibitor for the development of Alternative Business Structures. The extremely wide scope of LeO's remit under section 128 of the act mean that in theory they can handle any complaint about any activity within a business registered as an ABS. So for example in an ABS of lawyers and doctors LeO could handle a complaint about medical performance. In practice LeO seek to limit their scope to the definitions in section 12 of the act but even then this can extend into other professional areas inadvertently.
18. The redress mechanisms on the other hand for unregulated businesses are only affected by the ADR regulations, and as these are light touch there is a mixed experience for the consumer. Any thought of extending the scope of LeO or the other legal service ADR providers to the non-regulated legal service providers would need to consider the enforcement framework supporting that. Currently LeO is able to rely on the professional bodies to deal with inappropriate practices and discipline where required.

Questions on the regulatory framework

- **Are the high level criteria for assessing the regulatory framework that we have identified appropriate?**
- **Does the current regulatory framework prevent, restrict or distort competition?**
- **Would the potential changes to the regulatory framework that we have identified promote competition?**
- **Is a further review of the regulatory framework justified on the basis of competition concerns?**

19. We consider the high level criteria set out in the report forms a good starting point for assessing the effectiveness of the regulatory framework. Areas where we think further thought may be required include;
 - 19.1. Quality – this is considered from the point of view of deterioration but not improvement. A process of continual improvement to reduce the risk to the consumer and levels of dissatisfaction should be an important element in such a framework
 - 19.2. International relevance – in an increasingly international environment where for example legal services can be supplied to the consumer in the UK from overseas via the internet the framework needs to consider the practicalities of such inputs into the market
20. We note that whilst the report at paragraph 6.38 suggests independence of the regulator from the providers it regulates is a key principle in a review of framework, this does not feature in the high level criteria. We endorse this omission since we consider that whilst independence is an important enabler of quality and consumer protection, we do not believe it should trump the 8 statutory objectives set out in section1 of the act.
21. In paragraph 6.39 the independence issue has been explored from the viewpoint of difficulties that the different regulatory bodies currently experience in their current structures, and note that governance may be an important factor in enabling these bodies to function effectively. However the report does not go on to explore the potential risks to competition that could be encountered in a total separation of these bodies, for example through some of them withdrawing from the market or disengagement of the professional bodies resulting in a deterioration of quality standards. It may be that the CMA would wish to examine these aspects further when the Ministry of Justice issues its consultation on the matter.
22. We note that the review of framework in the report does not address other models for legal regulation elsewhere in the world, or indeed regulatory models in the UK save for references to consolidations in financial services and communications. An examination of the strengths and weaknesses of these other models may better inform an alternative regulatory structure should it be considered it is required.
23. We believe that some of the weaknesses in structure may simply be down to the constraints made upon the regulators in their activities by the act. The current consultations by the Ministry of Justice to apply more flexibility to the licensing of Alternative Business Structures may serve to loosen those constraints and promote better competition.