



Legal Services Market Study. Interim Report

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

This ICAEW response of 25 August 2016 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. The response should be read in conjunction with our response ([TR 33/16](#)) to the CMA's initial consultation [Market Study into the supply of legal services in England and Wales: Statement of Scope](#)

ICAEW was granted status as an accrediting body 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. 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.

Many of our members firms are also SMEs in their own right and will on occasion have need to obtain legal advice, in that capacity as well as in their capacity as individuals. They also, on occasion, refer clients to lawyers or other appropriate legal service providers and on occasion have clients referred to them by legal service providers. This response takes account of the needs of our members in those capacities as well as their capacity as legal service providers.

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.

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MAJOR POINTS

1. ICAEW welcomes the opportunity to comment on the CMA's *Legal Services Market Study. Interim Report*.
2. We believe that the Interim Report gives a detailed analysis of the competition issues which arise from the market in legal services for those consumers and small businesses that obtain their legal services from a solicitor or barrister. Less detailed consideration is given of those services supplied relatively often by other providers. In addition, considerable weight has also been given to those parts of the market covered by the CMA's three (narrowly defined) case studies, with a risk that other parts which have differing market conditions may not have been considered sufficiently.
3. We note that the CMA market study is still ongoing. Work will be carried out in continuing engagement with stakeholders (including ourselves); building on submissions received; and completing the analysis of the case studies. We hope that the CMA will also be able to spend time on:
 - More analysis of the 'unregulated' legal services market, how consumers and small businesses can benefit from the growth of a wide spectrum of both regulated and unregulated providers within that sector of the market in legal services - and be adequately protected within it.
 - The extension of research and further analysis of research results, particularly covering the general market, and areas not included within the scope of the CMA's case studies. In particular we suggest analysis of areas where divergences have emerged between the findings of the CMA working from their case studies, and the findings of other authoritative research studies.
 - Consideration of whether other key issues affecting competition in legal services need to be addressed. In particular, the ability to generate Legal Professional Privilege provides a very considerable competitive advantage to traditional legal services providers but is only mentioned in passing. Also significant is the fact that mandatory statutory regulation of legal services is based around the six reserved services, which have been carried forward from previous legislation rather than being considered in a modern context.

The conclusions drawn in the final report of the market study need to give appropriate weight to new and emerging trends in the legal service market. If current evolutionary factors are not given sufficient weight, the conclusions drawn will have only short term relevance in considering the improvements that should be made to market conditions and the protection of consumers.

4. We consider each of these three aspects of the study below, before considering our responses to your specific questions.

Legal Service Provision, not subject to Regulation under the Legal Services Act

5. The conclusions reached by the CMA consider first, and most comprehensively, the issues for solicitors and barristers, and only to a secondary degree the issues for other providers of legal services. We question whether this is appropriate in such a swiftly developing market. It is less than ten years since the Legal Services Act passed into law, and considerably less since the Legal Services Board came into active operation and the first Alternative Business Structures (ABSs) were licensed. Though most legal services are still provided by solicitors and barristers, the proportion provided by ABSs is growing fast. Further, we believe that the

proportion provided by those not subject to regulation under the Legal Services Act is also growing very fast. This both benefits consumers by giving them a wider choice of supplier, and risks detriment to them, by provision by less reputable suppliers, without appropriate regulatory protection.

6. The text of the Interim Report throughout draws comparisons between ‘regulated’ and ‘unregulated’ providers. This is highly misleading. Appendix D does add a category for ‘self-regulated’, though even this does not recognise the strength and diversity of some of the regulatory controls that exist in this market. Regulation under the Legal Services Act is not the only kind of statutorily recognised regulation, nor the only kind that is appropriate to the provision of legal services. Many professional associations, whose members provide legal advice within their specialism, are Chartered Bodies whose constitution is bound by the requirements of the Privy Council, and others are subject to additional statutory oversight bodies.
7. In our own case, most of our member firms are regulated entirely outside the scope of the Legal Services Act, since they provide no reserved legal services. Nevertheless, they provide unreserved legal services in a highly regulated environment. Our regulation of all our members (not just auditors) is provided under the oversight of the statutorily recognised Financial Reporting Council. Base standards of conduct and competence are set by the International Federation of Accountants – though we would consistently expect to exceed these. Further, our regulatory standards have been recognised as adequate not just by the Legal Services Board (LSB) but also the Solicitors Regulation Authority ([SRA](#)). All our practising firms are also bound by our “[Practice Assurance](#)” Framework. Though not formally categorised as regulation, under these arrangements each of our member firms is visited by our reviewers on a rolling ten-year basis or more frequently according to risk and impact – annually for the largest firms. This provides us with the ability to assure ourselves that our firms maintain appropriate standards of client service, to an extent not provided by the main legal services approved regulators. To describe these multiple layers of client protection as ‘unregulated’ is likely to be more misleading than helpful to consumers and small businesses.
8. At the other end of the spectrum, some (unreserved) legal services providers have absolutely no externally imposed standards or norms imposed on them, other than those imposed by the general trading laws. The legal services market suffers (as noted) from information asymmetry and also the temptations of fairly frequent access to client money. Though most totally unregulated suppliers will undoubtedly act honourably and professionally, the temptations will be higher in circumstances where they will not be observed by, or answerable to, a regulatory authority. In these circumstances, it could be inappropriate for the CMA to appear to rely (as in paragraph 7.12) on changes in the behaviour of regulated providers providing a sufficient incentive for unregulated providers to do the same. As the supply of unregulated legal services increases, consumers of such services may suffer significant higher levels of detriment than those apparent among the clients of regulated suppliers.

Difficulties in legal services research and divergences in research findings

9. The findings of the Interim Report rely very heavily on the results of the individual case studies, which as noted above are narrowly focussed and may not be indicative of conditions in the wider market. For example, the figure in paragraph 3.27 identifies 22% of SMEs experiencing tax as causing a significant legal problem – the second largest category, based on a study conducted by [R Blackburn](#) and others for the LSB. The same study is referenced in paragraph 4.13 as stressing the importance of accountants, but the conclusions drawn by the CMA reflect more the fact that respondents to the CMA study did not say that accountants played an important role. A footnote gives the view that this is partly because the CMA study did not address tax issues, but also suggests that the differences may be due to the CMA study approaching smaller organisations. We would suggest that even the smallest of businesses would be more likely to approach an accountant than a lawyer to help sort out their tax problems.

10. We have experienced previous problems in apparently well conducted and authoritative research studies producing results which are very different from our own understanding of the work done by our members as part of their routine accountancy practice. For example, the LSB initially concluded that accountants are insignificant in the market for estate administration, working on the basis of the results of a [YouGov](#) poll that they commissioned. Our own experience is that our members are very active in this field. The executors of large estates will tend to consult both lawyers and accountants, with the work divided in a way which leaves the bulk of work on financial management and control of the estate to the accountants. In the case of smaller estates, especially the more complex ones involving business assets, families will frequently seek advice or executor services from accountants, to assist with financial management and tax issues, without requiring the services of a lawyer. In the event, the LSB's conclusions reflected this revised understanding. Our own view on these matters is that most ordinary people, when invited to respond to a survey on legal services, will tend to respond in terms of the services for which they would seek the assistance of a lawyer and discount the services for which they would seek alternative professional advice, even where that professional advice concerns the operation of the law and legal problems. At very least, we suggest that this possibility should be taken into account in the drafting of research questions and the interpretation of the results.
11. The effect is apparent not just in relation to tax and estate administration, but other areas where small businesses and consumers approach an accountant for advice and assistance. Blackburn's study also revealed the importance of accountants for small businesses in dealing with issues of regulation. This term is undefined, but seems to be used to include legal and reporting requirements including those of company and other specialist law. Besides advising on legal and regulatory requirements for businesses, accountants also routinely advise clients on the running of their businesses in a way that forestalls or avoids the emergence of legal problems. For example, good credit control and record keeping procedures can avoid many trading disputes arising. Accountants can also advise on dealing with such problems informally, once they have emerged, without the need for recourse to the law or legal professionals.
12. Given these factors, we were surprised to see the low showing of accountants in the CMA's study relating to commercial law services, and speculate that this too may be partly as a result of the unintended research bias that we have seen elsewhere. The quantum of 'unmet legal need' could also benefit from analysis of the extent to which these needs have in fact been satisfied by consumers or small businesses themselves, acting with or without the help of professional advisers other than lawyers. If so, this way of tackling legal problems may be the result of a rational decision on the likely balance of costs and benefits, rather than being 'unmet' in the sense that any action is needed to improve the market.

Issues affecting competition – Legal Professional Privilege

13. Over the last half century or more, accountants have increasingly provided most of the professional services in relation to taxation in the UK, reflecting the professional emphasis and training of our members, and other professional accountants, on financial and reporting matters including tax law and reporting. This predominance has emerged despite the fact that the confidentiality of tax advice and information is a highly sensitive matter, and the clients of solicitors and barristers can be confident that, due to the availability of legal professional privilege, their professional adviser cannot be required to disclose that information, even by the operation of the law except in the rarest of circumstances. Though individual consumers and small business owners may be less aware of this factor than larger players, traditional legal service providers will make use of it, emphasising the benefits of a professional service provided under the protection of privilege in their formal and informal marketing.
14. So important do we consider this factor, in the operation of the market in tax advisory services, that we supported the taking of the case of HMRC vs Prudential, which hinged on this factor, to

the Supreme Court. Though the decision of the Court declined to rule in favour of accountants, this [decision](#) was reached on the grounds that such a major change in the understanding of the law was outside the scope of the Court, but should be left to Government action. However, it was confirmed that accountants are the main providers of advice of the law of taxation (key to the operation of all businesses) and that there is no rational reason why exactly the same advice given by differently but appropriately regulated professional advisers should be treated differently.

15. The distortion of the market in legal services applies not only in relation to tax advice, but in relation to any other advisory service provided by an appropriately regulated professional other than a lawyer. Any study of the market in legal services is incomplete without consideration of the effects on competition of legal professional privilege.

Issues affecting competition and consumer protection – the Reserved Legal Services

16. Mandatory regulation of legal services, and the range of services which can be legally provided by those not bound by such regulation, is required in relation to the reserved legal services listed in section 12 of the Legal Services Act. These services were not considered during the passage of the Act, but were carried forward from previous legislation. Historical research by Stephen Mayson, for example, (see [here](#)) has indicated that in some cases they were initially introduced centuries ago and for reasons entirely unrelated to consumer protection, or any of the other regulatory objectives set out in section 1 of the Act. This has led to a number of anomalies, where the market is unnecessarily restricted in some areas where consumers are unlikely to be at risk, but where totally unregulated providers are able to freely provide legal services in areas where consumers are at considerable risk of detriment.

17. By way of example, we note the following distortions:

- The probate reservation is very narrow, operating only in relation to applications for probate clearance. Nevertheless, it has introduced a quite unnecessary need for many well regulated professionals (including our own members) to seek an additional professional adviser to assist in this one small area of the consequences of death and inheritance, or else to need to seek additional unnecessary regulation themselves. In the meantime, totally unregulated providers can provide clients (including the most vulnerable) with the far riskier services of will writing, where the information asymmetries are particularly dangerous, and estate administration which involves free access to the estates of deceased persons, with no third party involvement and even the beneficiaries sometimes unaware of the value or intended disposition of those estates.
- The reserved instrument reservation applies not just to conveyancing services, but also to the drafting of trust deeds. We have been advised that this reservation may be severe enough that it could preclude even such well-regulated professionals as our members from providing low risk activities such as assisting clients to amend standard pro-forma trust deeds (such as that provided by the Charities Commission) for their own use.

18. Reform of the nature and extent of the reserved activities would assist considerably in producing a fairer and better targeted regulatory environment. But a truly well-functioning market would also not require regulation under the Legal Services Act for those services and professionals whose alternatively provided regulation is adequate for the purpose.

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 (i.e. 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?**
19. The most difficult issue in sharing price and service information, in our view, is the diverse nature of the needs of particular clients, and how the professionals' understanding of those needs will vary over the course of a client engagement. While some legal services are suitable for commoditisation and standard charging more complex and unusual services, and those provided over the course of a continuing client engagement, are less suitable for provision in advance, and using standardised measures readily usable by consumers.
20. Guidance on information that should be provided to consumers should be given to all providers, together with strong encouragement for it to be provided and agreed before the start of an engagement - though it is difficult to see who should be responsible for this, quite onerous, responsibility in relation to totally unregulated providers.
21. We understand that solicitors are required to ensure that consumers are aware of certain 'client care' information before they sign up to the service on offer but that these may not always provide details of fee rates, the basis of charging or the nature of the services to be provided. The CMA might like to compare these requirements with the ICAEW recommendations for the '[engagement letters](#)' issued by our members or those of other professionals.
22. It should be strongly advised, as best practice, that information on services and fees should be provided in advance of an engagement, but we do not think that this should be mandatory, due to the danger of this restricting the availability of important and urgent legal advice (and other legal services) when they are needed. This point is well illustrated by an example given to us by one of our sole-practitioner members, who was rung at ten o'clock at night by a judge wishing to consult him about financial reporting and accounting requirements relevant to a case he was due to hear the next day. If the advice had not been given, there would have been damage to the operation of the court and/or access to justice. It would be totally unfair to expect our member to give this advice without charge, and nor would that have been expected by his friend and client. More generally, clients not infrequently amend their understanding of the services that they require, during the course of an engagement. It can be difficult and onerous to ensure that all of these are accommodated in engagement terms as soon as they become apparent.
23. We are sure that examples of good practice in client communication exist, though we are not aware of any that we can draw particular attention to.
24. So far as possible, fees and rates should be communicated to clients before the engagement, and anticipated or actual cost overruns as soon as they become apparent, without prejudice to the operation of the engagement.

25. We are not aware of any measures of quality that operate across the whole spectrum of legal service provision, though clearly specific research studies and statistics collected by the Legal Ombudsman, as quoted in the Interim Report, have been valuable.

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?

26. We have no additional suggestions on these matters, at this time, other than those already mentioned in the Interim Report.

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)?

27. We are attracted to the concept of a single central information hub, freely available to all actual and potential consumers of legal services. But we do not think that it is fair, practical or realistic to expect totally unbiased advice to be provided by the SRA or any other single approved regulator under the Legal Services Act, or grouping of them. Inevitably the approved regulators will have more information on the services provided by, and the protection available in relation to, their own members, and to a lesser extent members of other approved regulators than they do on alternatively regulated or unregulated suppliers. Also, potential clients may be unduly influenced by the mere fact that information has been provided by a particular body, towards consulting a member of that body.

28. This does not mean that we think that the SRA should be discouraged from continuing and maintaining their Legal Choices web site. But centrally available information provided by a totally disinterested provider, scanning the advantages and dangers of consulting not just a traditional legal service provider but also alternatively regulated and unregulated providers would of be greater value, if the resources can be found to ensure that it is adequately

maintained and comprehensive. Such a hub could be set up and maintained by the LSB, or one of the legal advice charities such as Citizens Advice.

29. Such a hub would need to be given wide publicity, including cross links from the sites of approved regulators, self-regulatory and alternative regulatory bodies. However, to require all legal services providers to provide a link to such a site would be an unnecessarily onerous additional regulatory requirement. Nor is it clear how such a requirement would be enforced on unregulated legal service providers.

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?
30. These are complex matters, on which we are unable to give adequately considered responses, in the time available. However, given more time, we would be happy to contribute further to the discussion on these or other matters. For example, we have been considering the related issue of possible restriction of the use of the term 'accountant' to regulated providers.
31. However, we think that imposing any additional legally imposed regulatory burdens on regulated providers, without them also being imposed on currently unregulated providers should be viewed with extreme caution.

Questions on the regulatory framework

1. Are the high level criteria for assessing the regulatory framework that we have identified appropriate?
 2. Does the current regulatory framework prevent, restrict or distort competition?
 3. Would the potential changes to the regulatory framework that we have identified promote competition?
 4. Is a further review of the regulatory framework justified on the basis of competition concerns?
32. Our initial views on the high level criteria for assessing the impact of possible regulatory changes set out on page 101 of the Interim Report are that these represent a useful and comprehensive framework, but it is difficult to judge them adequately before they are actually used in practice. In the meantime, a simpler set of criteria of areas for more urgent action could focus on the benefits of regulation in reducing the dangers of consumer detriment in terms of:

- Distortions caused by information asymmetry, resulting in consumers being unable to assess the quality of legal services either before or after provision (as with will writing)
- Risks caused to consumer interests by uncontrolled access to client assets (as with estate administration).

Drawing higher risk services into the scope of regulation would help in reducing (justified) suspicion that obtaining such services from an unregulated supplier and thus improve their willingness to seek out alternative suppliers. Other regulatory changes would undoubtedly be desirable or necessary to a well-functioning market, but could be more appropriately left to individual regulators or the LSB.

33. The current regulatory framework as it is operated by the existing approved regulators does still prevent, restrict and distort competition, but the distortions are reducing both in extent and importance. This is a continuing process and we do not think that further action or recommendations are necessary or appropriate at this time.
34. We think that activity based regulation should be introduced, to the extent that currently totally unregulated providers should be included within the scope of regulation when providing high risk services to clients. This could be achieved, for example, by the introduction of a new default regulator for legal services, to provide minimally acceptable standards for providers in the fields of controls over client funds, disclosure of fees and charges and the availability of redress. Such regulation could also help to raise the awareness of consumers to the availability of alternative suppliers in proportionately regulated.
35. We do not think that the high standards and reputation of members of the main approved regulators should be risked, by the removal of their ability to 'regulate by title'. The use of the designation 'solicitor' or 'chartered accountant,' for example, is restricted to those who have standards in education, codes of conduct, continuous professional development and can be subject to disciplinary action if they fail to comply with these standards. In this respect consumers may well consider that paying extra for the services of a solicitor or chartered accountant is money well spent. More importantly the reputation of a professional body is jealously guarded by its members. The professional pride of solicitors and barristers and the consequence of this for their standards of service should not be underestimated. In the desire to open up the market, the risk of diluting the professional 'brand' and the quality associated with such brands should not be overlooked. Further, such high profile brands are important not just in the UK, but in the global market for legal services, including litigation. It would be unfortunate if the UK's ability to compete in the world market for legal services were to be inadvertently damaged in an effort to improve the domestic market.
36. Nor do we think that any improvement in the market would be likely to result from an enforced reduction in the number of regulatory bodies. The smaller approved bodies themselves provide a good indicator of the particular skills and specialisms of their members, and thus help consumers identify an appropriate supplier. The motivating effect of pride in the membership of such bodies has the same effect on standards of service as noted above for solicitors and barristers. If the members of such bodies find that the costs of running them exceed the market advantages they have in membership, this will tend to result in them negotiating merger or closure, effectively a market led reduction in the number of regulators.

CONSULTATION PROCESS

37. We appreciate that pressure on public spending limits the resources that can be deployed on major studies like this. Nevertheless, the CMA must appreciate that short consultation periods on lengthy documents (such as the Interim Report) also puts pressure on respondents. These factors may be particularly problematic with smaller stakeholders and their representatives, or those where reserved legal services represent a smaller proportion of their business offering. In a rapidly changing market, it is particularly important for the CMA to engage with those

smaller categories of supplier and new entrants to the market which are likely to represent a wider proportion in the future.