



Interim CMA Review: Response from the Legal Action Group

Introduction and general comments

The Competition and Markets Authority's interim report on its review into the legal services market correctly identifies, many of the key issues in today's legal services sector and the reasons why legal services are not working well for consumers, including issues of price transparency, lack of information, absence of comparators for benchmarking quality and aspects of regulatory confusion. However we believe that the interim report does not sufficiently address the policy and regulatory challenges going forwards. In particular we would like to see greater focus on:-

- Understanding the scale of unmet needs or "legal exclusion" and the affordability challenge for consumers in the context of changing market structures
- How regulatory tools might be able to further the complementary regulatory objectives of the Legal Services Act 2007 of widening access to justice, promoting the public interest and the rule of law, protecting consumers and increasing public understanding of the citizen's legal rights and duties.
- How competition works within a wider policy and strategy framework for access to legal advice and services, including policy on legal aid, the public policy drivers of need and demand, and strategies for consumer empowerment and public legal education.

LAG is a national access to justice charity, we campaign for sustainable legal and advice services, work with the legal sector to improve the administration of justice on social welfare, family and criminal law issues, and through our publishing and training activities we promote and advance education and knowledge of the law. We believe that a diverse, competitive and healthy legal services sector with a mixed economy of services is essential to securing access to justice and the rule of law. Of course the context of access to justice and competition within the legal sector has changed immeasurably in recent years, over two decades ago there was largely one model of legal services provision, costing and delivery, based on a dense structure of small partnerships offering localised face to face services for which there were outlets on just about every main high street, and with widespread use of the Legal Aid "Green Form" scheme which allowed solicitors to do up to the value of two hours work on any matter of English law for financially eligible clients.¹ Indeed the legal aid scheme, especially in crime and family work, has had an important 'market shaping' function as a system intended to redress the market failures whereby only the wealthiest can use the legal system, and it has also helped to support a significant increase in the number of lawyers in private practice over previous decades.

Commercialisation, globalisation, developments in information technology, legal training changes and the tightening of public funding have impacted on the structure of legal services, with knock on consequences both for competition within the sector and for access to justice. The cost of legal services has generally been allowed to rise to unsustainable

¹ Hynes and Robins. *The Justice Gap: whatever happened to legal aid?*

levels; in the commercial law sector hourly rates can now exceed £1,000.² Pricing structures have been driven by a tendency to use qualified lawyers for just about everything, and when combined with the historic problem of disproportionate litigation costs,³ especially within civil law, the market puts costs of a whole suite of services from advice to and representation, to drafting, mediation and settlements well beyond the means of those on low or medium incomes. And as the LSB's research has suggested the response of the solicitor's sector to the economic shocks of the 2009-2012 downturn has been to increase prices, rather than to compete on service offerings to increase business volumes.⁴

However the legal needs research from the *Civil Justice Survey*, and subsequent panel surveys and research, have consistently shown that around at least a third of the population have unresolved civil legal problems at any one time, and that a significant percentage (around half, although the figure varies in different surveys) get no legal advice at all in the face of multiple law related problems. Put simply there is a lack of services appropriate to the needs of low income consumers, a problem which recent legal aid cuts and restrictions have accentuated with the withdrawal of an important consumer subsidy in critical areas of law.

The CMA is right to conclude that there needs to be far greater transparency of price and service quality in the legal market; this is not a market in which consumers feel empowered or are able to shape what's on offer – this is especially true of vulnerable consumers. However we believe that the review is only really touching the surface of this problem, given that there is a significant cohort of potential consumers who are not being reached at all.

Unmet demand and legal exclusion

The CMA touches on this broader issue of what might be called “legal exclusion”, and why consumers do not use professional legal advisers, or often have very negative perceptions about the benefits of legal services. Across all consumer research into legal need “too expensive” is consistently the highest ranking barrier to accessing legal services, as the CMA acknowledges in 4.7 of the interim report.

Demand side

Individual consumers

4.7 According to LSB and Law Society research, the main reasons that individual consumers do not use professional advisers⁸² once they have identified a legal need are assumptions that it would be too expensive, a lack of knowledge that advisers could help or not knowing how to find an adviser.⁸³ Many of those who assumed fees would be too high did so without searching for information on prices. Qualitative research carried out by the LSB also suggests that some unmet demand is due to a lack of knowledge, awareness and trust in legal services providers.⁸⁴ In addition, other research finds that consumers may even have limited awareness of whether their issue is legal in nature, which would prevent them from even considering whether they need advice.⁸⁵

² Diamond: *The price of law* CPS 2016

³ <https://www.judiciary.gov.uk/publications/review-of-civil-litigation-costs/>

⁴ 2012 survey of solicitors' firms <https://research.legalservicesboard.org.uk/wp-content/media/Summary-and-LSB-context-survey-of-solicitor-firms-January-2013.pdf>

In addition to the LSB research mentioned there are various datasets which help understand the scale of the problem. However, taking the LSB-Law Society research as a starting point, analysis of the survey data shows the respective strategies for the 'average' respondent dealing with legal problems were adopting as follows 14% 'do nothing', 57% handle alone or with informal help, 10% advice from a 'legal professional', 5% advice sector advice and 13% 'other advice'.⁵ Although this survey uses a slightly different methodology to previous legal needs surveys, similar results are attributable to going back to UCL's 1997 *Paths to Justice* survey of 4125 adults. The *Paths to Justice* survey was followed over the next decade by five iterations of the similarly structured but much larger *Civil and Social Justice survey* (CSJS) (including two waves of the Civil and Social Justice Panel Survey (CSJPS)). Thirty-six per cent of 2006-9 survey respondents reported having experienced a difficult to resolve civil justice problem and respondents more vulnerable to social exclusion tended to report more problems than other, but under half of respondents managed to obtain advice successfully. If anything the latest LSB research, whilst consistent with previous findings, show that the "access to advice gap," the clearest indicator of unmet demand has widened.

In LAG's view the question of unmet demand cannot be separated from 1) The changes in Government policy which have significantly reduced the availability of free legal advice, alongside the steep increases in court and tribunal fees which deter use of legal procedures, 2) changes in the structure of housing, employment, welfare and citizenship rights which throw up unexpected legal problems 3) levels of legal awareness a (the PLE or "legal capabilities" gap).⁶ People's need to access specialist legal advice to resolve often complex problems continues to grow, and the context for provision of advice to communities has changed. April 2013 marked not only the date of legal aid cuts coming into effect, but also the beginning of a major restructuring of the welfare state, employment and social security rights. At precisely the time when people's need for specialist advice increased, to assist them to understand, adjust to, and in many cases challenge decisions affecting their income, housing and work status, changes to the legal aid system have drastically reduced the availability of that advice.

The CMA review makes no reference though to what may be described as the "LASPO effect". There are a number of consequences arising from the changes civil law funding under the Legal Aid, Sentencing and Punishment of Offenders Act including:

- The creation of geographic gaps in the availability of advice: the effect of the cuts has not been evenly distributed across England and Wales. Research has demonstrated that individuals in rural areas are particularly vulnerable. The recent graphic of the Law Society for example illustrates what has happened to the supply of housing law advice.⁷
- Changes in the types of legal assistance available under civil legal aid that have led to a shift in focus away from early intervention in civil law problems resulting in adverse outcomes for many individuals.
- A large number of non-profit organisations have been forced out of the specialist legal advice sector by the cuts, with those that remain operating at a vastly reduced

⁵ LSB survey of individuals' handling of legal issues in England and Wales 2015

⁶ <http://www.lawforlife.org.uk/wp-content/uploads/Legal-needs-Legal-capability-and-the-role-of-Public-Legal-Education.pdf>

⁷ <http://www.lawgazette.co.uk/law/shocking-infographic-highlights-housing-advice-deserts/5056873.fullarticle>

capacity. It is estimated that the effect of the cuts on the non-profit sector has resulted in 120,000 fewer people receiving assistance for their civil law problems.

- The increase in unmet demand for services places further pressure on those services that remain and the individuals that provide them.

When the reforms around civil legal aid were designed that was clear expectation that market and regulatory reform would help close the gap, encourage more affordable services. However, the 2012 survey of solicitors' firms found that 28% of firms reporting a decrease in turnover over the previous three years had responded by simply increasing fee levels. In the 2015 survey 29% of respondents reported increasing prices in the previous 12 months. Full datasets on providers pricing regimes have been impossible to compile, but the LSB's conservative estimate is that one hour of litigation advice from a solicitor is now more than half of the average weekly earnings of all UK adults.⁸ It is therefore hardly surprising that the problem of unmet demand and affordability is getting far worse. So the problem of legal exclusion is likely to accentuate a available data suggests that key groups of consumers unlikely to access legal services. For example, the 2012 Legal Needs Survey found that those in social grade DE were considerably less likely to obtain advice/assistance in response to a legal problem than those in AB (35% compared to 44%).

Market structure issues

The Legal Services Act 2007 was intended to make the regulatory system more independent from the professional bodies, and to liberalise the market to facilitate a wider range of business models and services which could within the same corporate structure in order to deliver better value for consumers (eg to assist consumers being able to access both legal and financial advice, and insurance products from the same provider), and to enable legal businesses to access new capital and investment to innovate. Alternative business structures have been slow to take off although has seen a significant increase in license applications over the last two years. New business models in the form of LDPs and ABS now account for 33% of the total turnover of SRA regulated entities.

Since the passage of the Legal Aid, Sentencing and Punishment of Offenders Act, and the more uncertain financial footing it has put many solicitors on, there has been further consolidation in the marketplace. The result is that fewer small firms are growing in size and the idea of the local independent firm is increasingly become an outdated concept, and with it the access for those who prefer dealing with individuals rather than remote services or call centres. The decline in the traditional structure is confirmed by LSB research which find that rates of entry into the SRA regulated legal service market appear to have fallen over significantly over the past five years.⁹ Between 2012 to the end of 2015, the number of law firms in England and Wales has fallen by just over 600.¹⁰ It has not only been the high street sector that has been impacted by changing Market conditions, a survey of 100 London based firms by PCW found that whilst that the top 10 firms have increased their dominance of the market with an increase their average profit margin to 38.5%, for the rest it fell by around 24%.¹¹

⁸ Legal Services Board's (LSB) *Prices of Individual Consumer Legal Services* report

⁹ <https://research.legalservicesboard.org.uk/wp-content/media/2015-2016-FINAL-Market-Evaluation-Summary.pdf>

¹⁰ <http://www.irn-research.com/wp-content/uploads/2015/11/UK-Legal-Services-2016.pdf>

¹¹ <http://www.pwc.com/jg/en/publications/survival-is-by-no-means-certain-for-struggling-uk-law-firms-pwc-survey.html>

It is not just the high street firm, or mid-tier firms that have been impacted by an adverse economic and public policy climate and changing market conditions; the often overlooked non-profit sector has been impacted the worst of all. A recent study from the MoJ identified that there are currently total of 1,462 NfP legal advice outlets were identified including Citizens Advice local offices and outreaches, Law Centres and others, and those aimed at specific clients groups such as older people; however the same report also mentions were an estimated 3,226 centres in 2005. In other words the number of outlets has therefore declined by over 50% in ten year. More significantly though just over half of the responding organisations (51%) reported there were some client or problem types they had been unable to help with in the last financial year. Of these, 62% reported that this was due to a lack of resource, 49% reported that problems fell outside of their remit, and 47% reported not having the appropriate expertise within the organisation.¹²

Expectations though around ABS being able to re-capitalise, invest, innovate and develop more appropriately priced convenience services and brands for consumers seeking a one-stop shop have largely proven to be ill-founded. As the CMA review finds, many ABS in the market do not differ greatly from traditional firms and service offerings, but rather that the new regulatory structure has been used to bring non-lawyers into senior management roles and integrate more accountancy services, rather than to develop new business models or access new capital for service development. Traditional practitioner equity ownership pyramids still remain the norm, and an ever larger market share is being taken by elite global firms which far outpace rest of legal market.

None of this should be taken to suggest that there has been no innovation in retail legal services market to make it more accessible and affordable for ordinary consumers. The increasing use of fixed fees over hourly rates, unbundled products, process automation and the proliferation of online legal services have all been welcome developments that are reshaping the market in a positive direction. The Law Society's recent report on "The Future of Legal Services" acknowledges that the market for legal services is changing permanently and in fundamental ways.¹³ However, the pace of change in practice has been slow and piecemeal, and is not reaching out to the needs of low income consumers. Given this and the absence of seed funding for further innovation, LAG believes that there is an important strategic role for Government to set a policy framework which can help drive the shift towards greater accessibility and consumer benefit using the best of public, private and voluntary sector innovation and resources, and would suggest that the adoption of a national advice and legal support strategy as recommended by the Low Commission might be an appropriate response.¹⁴

Consumer information

The CMA review correctly identifies the "asymmetry of information" between providers and consumers as a key driver of any market dysfunction or failure, but it seems to us that this is only part of the story and that the challenges of consumer information are not unrelated to the issues of market structure. In particular the parts of the market that are closest to the needs of communities and ordinary low income consumers, and able to deliver information in an accessible way have, as suggested above, been progressively eroded. Moreover the recent Ministry of Justice "Varying Paths to Justice" report found there to be a direct

¹² <https://www.gov.uk/government/publications/survey-of-not-for-profit-legal-advice-providers>

¹³ <http://www.lawsociety.org.uk/news/stories/future-of-legal-services/>

¹⁴ www.lowcommission.org.uk

relationship between being able to access and understand “procedural information” and “a number of recent significant reforms to the civil and family justice systems (which) have changed the landscape within which people can seek to resolve their civil and family justice problems. Notably, these include changes to the legal aid scheme, which removed a number of civil, family and administrative justice problems from the scope of legal aid.”¹⁵

The CMA’s intervention in calling for a greater range of information requirements and obligations on legal service providers is welcome. However, it is not clear to us how this could be brought about. Firstly, the regulator’s powers and scope are limited in this regard and the LSB has no specific jurisdiction over information standards and remedies. It’s principal powers relate to regulating the regulators of quite specialist “reserved” activities, whilst the majority of consumer transactions with the legal services sector are for unreserved activities such as legal advice, casework and negotiation, mediation, contracts and wills. Also often consumers’ interactions with legal services additionally involve a range of unregulated or differently regulated intermediaries (including banks, building societies, accountants, independent financial advisers, claims management companies, charities, trade unions and employers). The frontline regulators have attempted to address the challenge of the “information gap” by establishing the Legal Choices website, but it is not clear whether this initiative has had much traction or whether such information might be better supplied through Citizens Advice’s channels.

A consumer information strategy also needs to be supported by Government, which means that Government need to make public legal education a greater priority. As the recent report by Lord Justice Briggs on civil court structures concludes, the success of reform initiatives in the civil justice sector such as online dispute resolution “will depend critically upon parallel progress being made with public legal education generally. The tradition in this country has been to think of Legal Aid as performing that function, by funding private lawyers to provide the necessary education to those unable to afford it for themselves, with voluntary agencies such as the CAB filling particular gaps. It is not therefore surprising that, now that Legal Aid has largely been withdrawn in relation to civil litigation, we are generally less well advanced in the provision of public legal education than some countries.”¹⁶

So whilst the CMA’s emphasis on consumer information and costs transparency is welcome, the CMA is unclear on what market interventions might help bring this about other than the rather weak suggestion of improving the quality of client care letters. However the real issue is overall levels of knowledge and awareness – what we have described earlier as the “legal capabilities gap”.¹⁷ As Citizens Advice’s “Standing Alone” report looking at how people interact and why people become litigants in person concludes “Unclear information about the services lawyers can provide makes it difficult for people to judge the quality of a professional or compare services. Without clear information, unrealistic expectations about what lawyers do causes people to feel frustrated with the service they ultimately receive. Consumer protections are not well enough known and people do not know how to complain. This means that one poor experience can put someone off the whole sector...”¹⁸

¹⁵ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/484182/varying-paths-to-justice.pdf

¹⁶ <https://www.judiciary.gov.uk/civil-courts-structure-review/civil-courts-structure-review-ccsr-final-report-published/>

¹⁷ <http://www.lawforlife.org.uk/wp-content/uploads/Legal-needs-Legal-capability-and-the-role-of-Public-Legal-Education.pdf>

¹⁸

<https://www.citizensadvice.org.uk/Global/CitizensAdvice/Crime%20and%20Justice%20Publications/Crime%20and%20Justice%20consultation%20responses/StandingAloneGoingtothefamilycourtwithoutalawyerfinalversion.pdf>

Conclusion

Whilst acknowledging that the CMA has concluded that there is insufficient evidence of market dysfunction or failure to merit a proceeding to a full scale market investigation, we believe that Government needs to make a major intervention in the legal services market to ensure that the sector can offer a range of services appropriate to a range of incomes and needs and supported by greater consumer information and public awareness around legal rights and responsibilities. A competition regime which is tending to favour the hyper-growth of the top 10 firms whilst leaving the rest behind is not a balanced market. We also hope that the final report draws on a wider range of data sources about unmet needs, especially in areas like debt, housing, employment rights, neighbour and consumer disputes – the problems of every day life.