



LEGAL SERVICES CALL FOR EVIDENCE

Issued 9 October 2020

ICAEW welcomes the opportunity to submit information as part of the Competition and Markets Authority Call for Evidence in September 2020, the link for which is [here](#).

ICAEW is a world-leading professional body established under a Royal Charter to serve the public interest. In pursuit of its vision of a world of strong economies, ICAEW works with governments, regulators and businesses and it leads, connects, supports and regulates more than 154,000 chartered accountant members in over 160 countries.

This response dated 9 October 2020 reflects the views of ICAEW as an Approved Regulator for the reserved legal service of probate. ICAEW Professional Standards is the regulatory arm of ICAEW. Over the past 25 years, ICAEW has undertaken responsibilities as a regulator under statute in the areas of audit, insolvency, investment business and most recently Legal Services. In discharging its regulatory duties it is subject to oversight by the Conduct Committee of the Financial Reporting Council (FRC), the Irish Auditing and Accounting Supervisory Authority (IAASA), the Insolvency Service, the Financial Conduct Authority (FCA), the Legal Services Board (LSB) and the Office for Professional Body Anti-Money Laundering (OPBAS).

Amongst ICAEW's regulatory responsibilities it is;

- the largest Recognised Supervisory Body (RSB) and Recognised Qualifying Body (RQB) for statutory audit in the UK, registering approximately 2,600 firms and 7,000 responsible individuals under the Companies Act 2006.
- a Prescribed Accountancy Body (PAB) and Recognised Accountancy Body (RAB) for statutory audit in Ireland, registering approximately 40 firms and 250 responsible individuals under the Republic of Ireland's Companies Act 2014.
- the largest RSB for local audit in England. It has eight firms and over 90 key audit partners registered under the Local Audit and Accountability Act 2014;
- the largest single insolvency regulator in the UK licensing some 800 of the UK's 1,600 insolvency practitioners as a Recognised Professional Body (RPB) under the Insolvency Act 1986;
- a Designated Professional Body (DPB) under the Financial Services and Markets Act 2000 currently licensing approximately 2,000 firms to undertake exempt regulated activities under that Act.
- a Supervisory Body recognised by HM Treasury for the purposes of the Money Laundering Regulations 2007 dealing with approximately 11,000 member firms.
- designated an Approved Regulator and Licensing Authority for probate under the Legal Services Act 2007 (the Act) currently accrediting approximately 300 firms to undertake this reserved legal activity.

INTRODUCTION

General approach

1. ICAEW welcomes the opportunity to contribute to the Competition & Markets Authority's (CMA's) call for evidence as part of their review of the legal services market study in England and Wales. Four years have now nearly passed since the issue of the CMA's recommendations following the December 2016 review. In that period ICAEW alongside the other regulators have sought to achieve the outcomes intended as part of the measures and believe they have made good progress in seeking change in the marketplace.
2. The measures were complex for accountancy firms to apply as their blended services as multi-disciplinary practices required some degree of compromise. However the transparency outcomes resonated with the professional assurance standards of the accountancy profession and working with the representative function of ICAEW an approach has been applied which is proportionate and practical for the firms that are regulated for probate services.
3. The approach has been monitored through a series of surveys in how ICAEW firms regulated for probate have presented themselves in their websites and collateral. Surveys were undertaken in 2018 and 2019 which are to be used as benchmarks for a 2020 review currently underway. The results of this review will be shared with the CMA in the next few weeks.
4. In the comments on other areas we have restated our commitment to Legal Choices which we believe has been an effective vehicle for consumer engagement with the market, Some steps are required to achieve market balance and secure effective governance for the project, but as a whole we have been content with progress.
5. The new Internal Governance Rules of the LSB in our view have more than compensated for the shortcomings believed to exist in the previous set of rules. Far from requiring further adjustment we consider that certain elements of the new rules need to be eased back if only in being less prescriptive whilst achieving the necessary outcomes.
6. Further regulatory change, though desirable, is difficult to foresee in the short to medium term simply because of other pressures on government and the parliamentary timetable. We welcome Professor Mayson's continued insights on the area and support the risk-based approach to reservation. We do not however agree with the single regulator concept, considering it to be counter-productive to the statutory objectives and the diversity of the market that the act was seeking to achieve.

RESPONSES TO SPECIFIC QUESTIONS

Q1: What challenges have legal service providers faced in complying with transparency measures, and how could these be addressed?

Strategic issues

7. From the outset, there have been three practical issues for the firms regulated by ICAEW for legal services to comply with the measures preferred by the CMA.
8. The first is the duality of the regulatory structure which licenses by activity and/or title. Many of the firms regulated for legal services by ICAEW predominantly supply accountancy services. Under the Act, ICAEW regulates only the activity of probate, with the non-probate activities (with the exception of estate administration for probate licensed firms) not falling within legal services regulation.

9. The CMA recommendations apply, therefore, to only a narrow slice of business within the probate-regulated firms (which are only 334 out of ICAEW's 12,000 member firms). Diversity reporting in March 2019 revealed that only 21% of the revenue of the probate-regulated firms came from taxation services and probate, as a subset of that, is likely to form less than 10%.¹ This means that the recommendations only apply to less than 0.3% of the activities of ICAEW's regulated population.
10. The duality at firm level provides a number of challenges in applying the recommendations including primarily whether transparency of pricing be confined only to the probate services, or be extended to all of the licensed firm's activities. If confined, the consumer could find transparency of pricing for only part of the services being purchased. If wider, a probate accredited firm would find itself being forced to be transparent about pricing of its accountancy services (which will likely form most of their revenue) in contrast to another accountancy firm next door or in the same town which is not probate accredited and under no such obligation to be transparent about the costs of its accountancy services. This uneven playing field could be viewed by probate-accredited firms as a commercial disadvantage and might lead to them withdrawing from providing probate services. We are conscious that this would, in turn, reduce competition locally in the offering of such services. Given those considerations, we opted for a compromise solution by issuing guidance rather than prescribing by regulation so that it enabled probate accredited firms to be flexible in their approach.
11. A further issue is the cross-over in a multi-disciplinary firm of the remit of regulators and other oversight bodies. Audit in particular (2/3rd of ICAEW's probate firms are also licensed for audit²) has separate rules for pricing dictated by EU law³ which, in part, are counter-intuitive to the CMA recommendations. Separate expectations are also given by the FCA in financial services and by the Insolvency Service for restructuring and insolvency services. Any approach taken by us must, therefore, take account of these differing obligations.
12. A final issue is the nature of the transparency measures being proposed and whether they comfortably sit within a regulator's duties. Inherent in the CMA recommendations is the fact that firms providing legal services have been poor in marketing their services, almost expecting the work to fall on their laps rather than going out and actively seeking customers by explaining why their services would be cheaper for consumers. Many of the transparency measures proposed are marketing tools, and the support to firms to help them better market themselves is something that more comfortably sits with those bodies (or part of bodies) which perform representative functions than those exercising regulatory functions, a point that was observed by Professor Mayson.⁴

Strategic response

13. We have been fully sympathetic to the objectives of the measures and are anxious to achieve the outcomes.
14. It is an inherent part of ICAEW's Practice Assurance standards⁵ for firms that the terms and engagement with clients should be transparent. Equally, the standards are part of the voluntary regulation of practising members. Accordingly, the steps taken by our Professional Standards Department to secure the outcomes sought by the CMA have been to develop transparency guidelines with executives working within the representative functions of ICAEW so as to provide clear marketing guidance to the whole accountancy sector and then,

¹ ICAEW Diversity report March 2019 page 8 <https://www.icaew.com/-/media/corporate/files/technical/legal-and-regulatory/probate-and-abs/icaew-probate-diversity-report-2019.ashx?la=en>

² ICAEW Diversity Report March 2017 page 9 <https://www.icaew.com/-/media/corporate/archive/files/technical/legal-and-regulatory/probate-and-abs/icaew-probate-diversity-report-september-17.ashx?la=en>

³ EU Directive 20006 (2006/43/EC) Article 25

⁴ Independent Review of Legal Services Regulation – Assessment of current regulatory framework 2018 p15

⁵ ICAEW [ehttps://www.icaew.com/regulation/practice-assurance/practice-assurance-standards-larger-firms/standard-2-larger](https://www.icaew.com/regulation/practice-assurance/practice-assurance-standards-larger-firms/standard-2-larger)

as a subset of that, to provide detailed guidance for pricing within the area of probate and ancillary services for our probate accredited firms.

15. The project group leading this initiative was chaired by the Deputy President and included the Chair of the Members' Board, and a representative of the Probate Committee. The resulting outcome was targeted and proportionate and, we believe, achieved the consumer and public interest objectives of the CMA recommendations. In addition, the consultative approach did not produce the pushback experienced by other regulators from their regulated firms because the obligations were presented as best practice and made sense commercially.

Tactical approach within probate

16. Our approach to monitoring compliance with transparency measures within probate services has been one of guidance and support, supplemented by periodic review of websites to assess the impact of our communications. In February 2018, we published a best guide to marketing⁶ and followed this by encouraging all firms to provide transparency information in our Best Practice Guide to Price and Service Transparency (the Guide), published in May 2019.⁷ Additionally, we actively monitor accredited firms on a cyclical visit schedule and review their compliance with transparency guidance.
17. As at 29 June 2020, we have accredited 334 firms for probate activities. Accredited firms have between 1 and 56 principals and between £1,000 and £41,400,000 gross practice income. When the CMA proposals were issued, 32 probate accredited firms did not even have a website, with 19 of these firms being sole practitioners. The resources available to our accredited firms varied (and varies) enormously and the challenge we face in monitoring this disparate population is how to apply the same measurement criteria whilst being proportionate. For smaller firms, we cannot always easily obtain information about their pricing and servicing approach. To address this challenge in 2019, in addition to website reviews, we canvassed these firms, asking them to provide information by way of completed questionnaire about how they communicate transparency information to their clients, the results of which are included in our transparency benchmarking report published in September 2020.⁸
18. We believe that it is essential to provide regular reminders to our accredited firms about the value of complying with transparency measures and, to that end, we have a wealth of materials on our website to assist firms. This initiative is supported by regular communication initiatives (for example Probate News) and there is a dedicated communications team within Professional Standards who constantly review effective ways to communicate with our probate accredited firms. Probate email communications to August 2020 have a year to date average open rate of 57%, with an engagement rate of 61% (percentage of people who opened the email and went on to click a link). This compares favourably to all regulatory emails which score 53% and 40% respectively.

⁶ ICAEW Marketing guide "Boost your practice using probate" - <https://www.icaew.com/-/media/corporate/files/technical/legal-and-regulatory/probate-and-abs/icaew-guide-for-probate-accredited-firms.ashx?la=en>

⁷ ICAEW Transparency guide – Best Practice Guide to Price and Service Transparency - <https://www.icaew.com/-/media/corporate/files/technical/legal-and-regulatory/probate-and-abs/icaew-best-practice-guide-to-price-and-service-transparency.ashx?la=en>

⁸ Transparency report Sep20 Transparency – Room for Improvement - <https://www.icaew.com/-/media/corporate/files/technical/legal-and-regulatory/probate-and-abs/transparency-benchmarking-report-probate-firms.ashx>

Q2. Are consumers engaging with the new transparency measures including the availability of price information, eg by accessing the pricing information on the provider websites and/or using this information in their interactions with providers? Does this differ between different areas of law?

19. We have no data that would enable us to be able to respond to this question. Reserved legal services form such a small part of what the accountancy firms do.

Q3. How effective have transparency measures been in driving competition? Does this differ across areas of law?

20. We have no data that would enable us to be able to respond to this question.

Supplementary Transparency Questions

1. How satisfactory has progress on transparency been to date?

21. In 2019, we published our Best Practice Guide to Price and Service Transparency (the Guide). While our subsequent 2019 research showed there had been some improvement in transparency in all areas from 2017, there was a large number of firms who were yet to adopt the recommendations of the Guide. The pricing disclosures, in particular, were not common, with only 5% of probate accredited firms giving details of their charges. Also, the provision of information relating to complaints and redress, compensation arrangements and PII was low. The progress of our probate accredited firms in the provision of transparency information up to September 2019 has been summarised in a recent benchmarking report published in September 2020.⁹

22. Since 2019, targeted communications have continued to encourage firms to be more transparent and we are committed to regular future communications, messaging and monitoring to its probate accredited firms.

23. Our Professional Standards Department is currently undertaking a further review of our accredited firms' progress in transparency disclosures over the last 12 months and we are optimistic that the results will show further improvement in the uptake of recommendations made in the Guide. The results of this review will be shared with the CMA when they have been collated and assessed by the ICAEW Regulatory Board (IRB) in November.

2. What are the challenges faced in setting and enforcing transparency rules or guidance? **a) What are the key learnings from the initial implementation and monitoring of transparency rules or guidance?**

24. We have summarised in the answer to Question 1 some of the issues which are associated with the setting and enforcement of the transparency rules. Because a voluntary approach was adopted, the focus has been not on enforcement but on strong engagement and encouragement. This is seen most obviously in the regulatory visits which are carried out at probate firms within the first 24 months after they are licensed and which will be carried out on regular cycles thereafter based on a risk assessment. The visits will include a review with the firm of the steps it has taken to be transparent with its pricing.

⁹ Transparency report Sep20 Transparency – Room for Improvement - <https://www.icaew.com/-/media/corporate/files/technical/legal-and-regulatory/probate-and-abs/transparency-benchmarking-report-probate-firms.ashx>

25. The challenges faced in setting and enforcing any guidance differ depending on the size and nature of some of probate accredited firms. Many are sole practitioners or small practices with either no website, or basic websites that may not actively market probate services. They regard the ability to offer probate services as an extension to other accountancy services, particularly the provision of tax services. These practices will often offer probate services to existing clients with whom the firm has had a long-standing professional relationship.

3. What more could frontline regulators do to drive increased transparency?

a) What further work is being planned?

b) Are there any plans to review or change the rules or guidance in place?

26. As referenced above (paragraph 22), all probate accredited firms are already subject to initial regulatory visits and thereafter cyclical monitoring by reviewers from our Quality Assurance Department. We are also contemplating producing an updated webinar on transparency guidance, after the results of the current website review are known, and making it mandatory for accredited firms to attend.
27. Careful consideration will be given to the results of the current review of websites of probate accredited firms and decisions will be taken by the ICAEW Regulatory Board, depending on the results, on whether a move to mandatory transparency rules will be the most effective way to produce greater change.

Where transparency rules have been put in place:

4. Is there sufficient enforcement of the transparency rules by frontline regulators?

a) What levels of compliance have been observed? What do you consider to be the main drivers for non-compliance to date?

b) What steps are taken to enforce compliance with transparency rules?

c) What key factors have driven the enforcement strategy to date? Are changes planned for future enforcement?

28. Not applicable.

Where guidance has been provided in place of transparency rules:

5. Are frontline regulators sufficiently incentivising compliance with the guidance?

a) What levels of compliance have been observed? What do you consider to be the main drivers for non-compliance to date?

b) What steps are taken to encourage compliance with the guidance?

c) What steps have been taken to evaluate the effectiveness of the guidance approach? Are changes planned in future, eg a move from guidance to rules?

29. We consider that we have been incentivising compliance with the guidance through a combination of continuous communication through Probate News¹⁰ and checks being carried out on the level of compliance through regular monitoring visits.
30. Compliance has been much harder to achieve at our smaller practices including sole practitioners, some of whom do not actively market their services and / or have a website. Nevertheless some improvement in this sector is expected to be identified from the further transparency research currently underway (in October 2020) via a combination of questionnaires and websites reviews.

¹⁰ Probate News - <https://www.icaew.com/regulation/probate-services/support-for-probate-accredited-firms/latest-probate-news>

31. Should this review demonstrate minimal change in the transparency of the regulated firms, then the IRB will actively consider whether the guidance should be mandated going forward to secure the required engagement..
- 6. *If possible, to illustrate your responses to the questions in the CFI on transparency please provide examples of good and bad implementation of transparency of price/service/quality/redress/regulatory status by providers.***
32. From recent research, we identified the following good examples of transparency information from within our probate accredited firms:
- <https://www.getprobate.com/>
 - <https://www.morrisowen.com/what-we-do/probate-and-estates/>
 - <https://www.ukprobate.org/>
33. At the other end of the scale, there may be little or no transparency information provided by many smaller probate accredited firms who do not actively market their services and / or who lack a website. In some instances as we found in 2018 and 2019 this may be because though having received approval they have not yet commenced the supply and marketing of their probate services.
- Q4. *To what extent has the Legal Choices website helped consumers to navigate the legal services sector? To what extent has improved content been actively promoted by regulators, consumer/industry bodies and service providers?***
34. We are not aware of any data that would enable us to be able to respond to this question.

Supplementary Transparency Questions

- 7. *What are your views on the future of the Legal Choices website?***
- a) *What key challenges has this faced to date?***
- b) *What funding and governance arrangements are most appropriate going forwards?***
35. Legal Choices was formed in 2014 by 7 of the authorised bodies. ICAEW were not invited to join initially as it had only just been approved by Parliament in 2014 as a regulator and had no firms to regulate and no income to fund the venture. However, the Probate Committee monitored the development of the website and, in October 2016, it determined there was sufficient critical mass in the number of firms accredited to justify participation in Legal Choices and to contribute to its cost. This coincided with the CMA recommendation made two months later that effectively required ICAEW to do this.
36. Since engaging with the project, we have been an enthusiastic supporter and participant in the evolution of Legal Choices. Our initial financial contribution in 2017 was £10,000, but was increased to £18,000 in 2018 in the expectation that, following approval by the Legal Services Board (LSB), it would be authorised to regulate more legal services. Despite the Lord Chancellor ultimately refusing to accept the LSB's recommendation, we have continued to honour the higher contribution. Indeed, in 2019, we were among the first to volunteer to contribute further funds to fill the funding gap left by the withdrawal of the Bar Standards Board (BSB) from the Legal Choices project in 2019-20.

37. We believe that, over the past three years, under the stewardship of the Solicitors Regulation Authority (SRA) as main contractor, the Legal Choices website has achieved its objectives and this year has been ahead of its KPIs. We have played an active part in quality assessments and in guiding risk management, with a senior manager from Professional Standards attending all meetings. We believe that Legal Choices can continue to play an important part in promoting legal services education and signposting the consumer to finding and choosing legal services as well as accountancy services. These are all enablers of a better market in legal services.
38. A proposed budget and funding programme for the three years to 2023 has been put forward by the Legal Choices Steering Group. The ICAEW Regulatory Board have agreed to the proposed ICAEW financial contribution, with the proviso that modifications may be necessary to the funding programme if the regulators' income is significantly adversely affected by Covid19. We believe that we are ahead of many of the other regulators in making this funding commitment despite the limited number of probate accredited firms.
39. Even though we are satisfied with the outcomes achieved so far, we have raised two areas of concern. We are concerned that the front-end of the Legal Choices website continues to be lawyer-focused and does not adequately reflect the offerings of the many legal services providers other than lawyers including accountancy firms¹¹. Although a working sub-group of the steering group put together proposals in June 2019 to amend the relevant pages, these were shelved by the steering group on recommendation from the project team because they were out of scope. This was a source of irritation to a number of regulators and this may have been a contributory factor to the exit of the BSB. Whilst this distortion remains, we feel uncomfortable about actively promoting the site although we have maintained a link to it from the regulatory pages of our website.
40. We have also expressed concerns about the governance of the Legal Choices project from two particular aspects. Firstly, as an unincorporated association, the project brings with it joint and several liability for its participants which creates unacceptable liability risk for the smaller regulators and large regulators like ICAEW which has a limited role in this regulated area. We have suggested that the risk could, and should, be contained by placing the operation in a separate corporate body, limited by shares or guarantee but this has not found favour. While the SRA has indicated that it is prepared to front and manage the risk, this needs to be articulated in a constitutional document so the parties are aware of the rights and obligations associated with the undertaking, if unprotected by a corporate status. This is currently under consideration by the regulators.
41. A significant challenge moving forward is the inevitable dominance of the SRA both in financing and in providing and contracting the resources to deliver the Legal Choices platform. There may be issues about the speed with which the other smaller regulators can agree on key matters and contribute to discussions due to their own limited resources (in manpower / financing). We understand, therefore, the frustrations voiced by the SRA in its letter to the LSB on Legal Choices earlier this year.
42. We believe that the incorporation of the project and a constitutional document which sets out voting and control rights may help the balance of discussion. So too would an independent chair and/or chief executive, but these entail costs that might not be attractive to smaller regulators and may be unacceptable to the SRA as the principal funder. While we intend to continue our role as an enthusiastic partner, we will be monitoring the balance of discussion and decision-making over the next three years of the project to ensure that ICAEW and the other smaller regulators are properly represented in this joint endeavour.

¹¹ See for example home page <https://www.legalchoices.org.uk> which states "Supporting your legal choices by giving you independent and factual information about legal issues and lawyers".

Q5. To what extent are quality indicators needed to drive consumer engagement and competition? Which further indicators are needed and what are the barriers to these indicators being developed?

43. While we acknowledge that there is a role for quality indicators, we believe that some caution is required as it is easy to over-estimate the importance of these to the consumer and to over-engineer a response. In common with other respected regulators, we see our 'ICAEW Probate Accredited'¹² and "Chartered Accountant"¹³ descriptors as a key indication of quality. Our website sets out the standards expected of our firms, our quality monitoring work and the actions which will be taken to remove licences or to prevent them representing themselves as ICAEW member firms if they fall significantly short of those standards. We do not consider that any further quality indicators are necessary for our regulated firms at present.

Supplementary Transparency Questions

8. What further analysis would be most helpful to develop an understanding of what type of quality indicators consumers find useful? What are the main barriers to the successful implementation of quality indicators?

44. We would welcome another CMA survey to establish an understanding of what type of quality indicators consumers find useful.

Q6. To what extent are DCTs currently operating in the legal services market? What are the main barriers to greater use of DCTs in legal services and how can they be overcome?

45. We are unaware of any industry-wide DCTs currently operating in respect of probate services.
46. From our recent review of websites containing transparency information, we have identified one firm that is utilising Trustpilot. We are unsure of the reliability of this website review and do not have the data to comment on the extent to which other accredited firms are using such DCTs, but it is something we could consider suggesting to our firms in future.

Supplementary Transparency Questions

9. Is there more that regulators could do to encourage the development of DCTs?

47. We would be prepared to engage with accredited firms to explore areas for further support and the appetite to develop appropriate DCTs.

10. To what extent are providers engaging with DCTs?

a) Has this improved since the market study and if not, why not?

48. We do not have any data on which we can draw a conclusion on this.

¹² <https://www.icaew.com/membership/offers-discounts-and-services/promoting-your-practice/icaew-logos/icaew-probate-accredited-firm-logo-uk>

¹³ <https://www.icaew.com/membership/offers-discounts-and-services/promoting-your-practice/icaew-logos/member-logos>

Q7. What impact have ABSs and lawtech38 had on driving innovation in the legal services sector? Are there any barriers deterring further innovation?

49. The fact that we can offer ABSs as a way for ICAEW members and non-members to access the legal services market encourages increased access for the consumer, albeit in the area of probate only under the current ICAEW accreditation. Some of our larger accountancy member firms have used ABSs in more innovative ways as vehicles to access offering a wider suite of reserved legal activities by setting up separate practices under SRA supervision.
50. Our decision to become a legal services regulator has encouraged many small firms, who would not have entered the legal services market if they had had to deal with a second regulator, to become probate accredited so that they can offer a one stop shop for the consumer. This has been enhanced further by the Ministry of Justice's own innovation initiatives around the automation of the probate process and the replacement of associated oaths by attestation statements. The wider skills of accountancy firms now allow for a complex estate that requires audit, accountancy, taxation and liquidation services, as well standard probate and estate administration, to be completed within one firm without outsourcing. This aids the consumer in accessing the one stop shop, providing clear lines of accountability and facilitating a single relationship point.
51. The disadvantage to consumers from Lawtech38 driving innovation is the fact that the consumer may not benefit from qualified experienced professionals bringing their skills and judgement to bear in probate services.

Q8. Are there other developments which have had or will have a significant impact on competition in the sector?

52. In April this year, the statutory orders approving ICAEW as an Approved Regulator and Licensing Authority for the administration of oaths were approved by Parliament. We will shortly be starting the process to amend our Legal Services Regulations in order to offer this additional accreditation to firms.
53. Subject to re-checking demand among ICAEW member firms, we may consider making a further targeted application to be authorised to accredit ICAEW member firms to provide additional reserved legal services with a focus on those services which are complementary to services already provided by accountancy firms, for example, legal instruments (trust deeds). We are working on the basis that the governance concerns voiced by the Lord Chancellor in 2018 will no longer prove a barrier to authorisation given the changes which we have made to comply with the new Internal Governance Rules introduced by the LSB.
54. We believe that the time and costs of dealing with two regulators is a barrier to accountancy firms considering a move into offering legal services and that it is no coincidence that over 300 accountancy firms entered this market when ICAEW became authorised to regulate probate when they could have entered this market earlier by seeking regulation from another legal services regulator. We believe that the barrier which is now limiting the growth in the number of ICAEW firms doing legal services work is the limited number of reserved legal services which we are authorised to regulate. More such services will encourage more firms to make the investment in this area and this will increase competition and drive up quality and down costs for the consumer.

Q9. Are further measures needed to drive consumer engagement and competition in legal services in addition to the areas we have identified above?

55. We believe that there is a risk of an increasing regulatory burden discouraging new players coming into the marketplace and encouraging an exodus by others from the supply of legal services. This has been a trend in the supply of audit services where regulated firms have reduced in number by 40% in the last 10 years¹⁴, partly driven by greater regulatory burden. Any further measures imposed on firms must balance the economic realities of those businesses surviving and thriving against the consumer need. Fewer firms in any marketplace will reduce competition and drive up costs.
56. Accountancy firms licensed by ICAEW to carry out probate work have also encountered a traditional bias towards lawyers in the marketplace by certain bodies which refuse to deal with licensed probate practitioners “who are not lawyers”. These include banks denying practitioners access to the deceased’s bank accounts, life insurers refusing to pay the proceeds of insurance policies and even probate offices refusing to accept the probate submission. These have been addressed by direct correspondence from the regulator concerned but indicate a continuing tendency by third party suppliers to continue the monopolies historically enjoyed by the legal profession which the Act sought to dismantle.

Q10. Are there any issues specific to the provision of legal services for small businesses that should be considered in order to improve competition for such customers?

57. ICAEW probate-accredited firms deal with individual consumers for the provision of probate services, not small businesses.

Q11. What measures can be taken to develop a more flexible and proportionate regulatory framework within the Legal Services Act 2007 without requiring any, or only light touch, further legislative change, for example a review of the reserved activities as being considered by the LSB?

58. The Act was an important step in opening up the market and the framework was seen as an important part in securing a change in the way the sector was regulated and a better focus on the service to the consumer. By 2013, it was already becoming evident that whilst some change had been achieved, the provisions of the Act were starting to inhibit further progress and some additional modernisation was needed. In that year the regulators under the chairmanship of Professor Mayson jointly wrote to Shailesh Vara¹⁵ making a series of recommendations, that the LSB resurrected in their vision statement in September 2016¹⁶ and which have been largely revisited by the recent findings of Professor Mayson’s review.
59. We have taken an active part in these discussions, supporting important aspects such as basing reserved services on risk profile, but we have also challenged other aspects explored by Professor Mayson such as the creation of a single regulator as we consider that this would be a retrograde and unnecessary step. Over the six years of debate our views have not fundamentally changed and we share the frustration of the other regulators in the inability of the Ministry of Justice to secure time to re-consider what legal services should really be reserved and encourage the LSB to put forward recommendations. As a regulator of accountants, we are constantly surprised and concerned that, while the highest risk accountancy services (such as audit, insolvency, investment business advice) are regulated and require minimum levels of expertise and experience to be authorised, the reserved legal services are still in 2020 based on historic areas where tax could be more easily raised and

¹⁴ From 7910 to 5127 – source Key Facts and Trends 2020 and 2010 published by the Financial Reporting Council

¹⁵ Letter to Shailesh Vara dated 6 July 2015 Legislative Options beyond the Legal Services Act 2007

https://lsbstaticwebsites.z33.web.core.windows.net/what_we_do/pdf/20150727_Annex_To_Submission_Legislative_Options_Beyond_LSA.pdf

¹⁶ A vision for legislative reform of the regulatory framework for legal services in England and Wales September 2016

https://www.legalservicesboard.org.uk/news_publications/LSB_news/PDF/2016/20160909LSB_Vision_For_Legislative_Reform.pdf

bear no relation to the highest risk legal services. Although reservations bring with them some adverse consequences, we believe that consumer protection must take precedence and some statutory intervention is necessary. Areas we believe which should be considered for reservation include will-writing and lasting powers of attorney.

60. Part of the dichotomy of the Act is the combination of regulation by title and regulation by activity which is confusing to the regulators as well as the consumer. This is resulting in over-regulation on low risk activity performed by, say, a solicitor and under-regulation on areas which are becoming higher risk as a consequence of automation which can be performed by anyone regardless of qualification.
61. Flexibility and proportionality are requirements within section 28(3) of the Act. These requirements apply, not only to the legal services regulators, but also to the LSB itself. We are not convinced that adequate consideration has been given to these important aspects of the Hampton principles in some of the regulatory directions and interpretation of the Act by the LSB in recent times. Certain provisions which are required for one regulator may be inappropriate and unnecessary for another, and the application of a 'one size fits all' set of rules at times is unhelpful within a framework that is meant to promote the market and consumer experience. A more outcomes-focused set of regulations rather than prescription would aid flexibility and proportionality.

Q12. Would such measures above be sufficient to deliver effective change that can promote competition and optimise consumer outcomes in the longer term?

62. The measures outlined above would not in themselves be sufficient, but would create a better regulatory environment for alternative business structures and other suppliers to evolve in the market, whilst balanced regulatory interventions would apply the proportionate protections required for the consumer.

Q13. To what extent is there merit in extending the regulatory framework to include unauthorised providers? What evidence is there of consumer detriment from unregulated providers, or other rationale, to warrant this?

63. We cautiously support some mechanism for the handling of complaints across all suppliers of legal services but we believe that those services which are low risk should be capable of supply by both regulated and unregulated individuals.

Supplementary Transparency Questions

11. What are the main options for short-term regulatory reform that requires no, or limited, legislative amendment?

a) What are the key advantages and disadvantages of each?

b) What issues would remain without longer term reform?

64. There are two areas where we consider short term reform may be possible. The first is a re-examination of the areas of reservation which are discussed above. The advantages of this are they would provide a better risk-based focus for the application of regulation and the protection of the consumer. The disadvantage lies in the need for parliamentary sign-off on such proposals, the length of time this would take and the combatting of vested interests.
65. A second as noted above is that a more outcomes-focused approach should be pursued in the regulation of the sector. This would enable the regulators to be more innovative and competitive in their approach and drive a move to better quality. .

66. We have previously observed that the mechanisms currently in play for the approval of new regulators and the extension of their regulatory reach, and their termination, are all the subject of a long, arduous and expensive approval process culminating in the need for orders to be passed by Parliament. We know from experience that it can take two to three years for these processes to complete. In contrast in accountancy, the government has entrusted the authorisation of bodies to regulate audit to the FRC. This means that decisions on the appointments and extensions of remit can be effected quickly to encourage regulators and firms who are already regulated by them to move quickly into new markets.
67. Given that the LSB has been in place for over 10 years, and demonstrated itself to be a competent supervisory authority, we believe that consideration should be given to extending its powers in the area of approvals / extensions and deregistrations and that these decisions should be taken away from the political influence of Parliament and Ministers.

12. What are your views on the options for extending redress to customers of unauthorised providers, such as extending access to LeO, or industry run 'kite schemes' requiring that providers direct consumers to ADR schemes?

68. We welcome the extension of redress to customers of unauthorised providers and believe it to be a good idea that all consumers of legal services are provided with the protection, such as access to LeO.
69. We also believe that there may be benefits in the establishment of 'kite schemes' which require providers to direct consumers to ADR schemes.

**13. What are the key emerging regulatory challenges, for example with respect to lawtech?
a) To what extent can these be addressed under the existing regulatory framework?**

70. We have identified three emerging challenges arising as a result of lawtech. These are not dissimilar to those faced by the accountancy sector.
71. The first relates to the tools used by firms in engaging with their customers. Firms are starting to use small algorithms and automated chat on their websites to answer simple questions from consumers to help them decide whether to further engage with that firm in person on something they think may be a legal issue. There are risks on the quality and accuracy of those algorithms and their maintenance. Some regulation may be necessary for firms to assure the continuing reliability of these programs.
72. A second challenge relates to the automated process systems operating within a firm, be it for administering financial arrangements, or for providing legal advice. Systems similar to the IBM Ross which synthesise legislation and precedent to assist in the provision of advice need regular accurate update to remain relevant and there are maintenance issues similar to those for direct client access.
73. A third challenge relates to the IT systems operated by the regulators themselves in discharging their regulatory duties. These need to be fit for purpose, adequately maintained and their algorithms and programs assured on a regular basis.
74. All three scenarios are alternative means of delivering process, and those processes are under the supervision of the LSB. It should not need actions outside the existing regulatory framework. Audit procedures had to be adapted to accommodate the automation of book-keeping in the 1960's and 1970s. This did not require legislation but rather an innovative approach by the profession and the firms in adapting their methodology to secure the necessary assurances. The LSB and regulators should be able to identify the steps needed and external supply readily adapted to secure the appropriate assurances over the integrity of these systems, protecting both the consumer and the firm supplying the services.

14. What evidence is available on the experiences of consumers of unauthorised providers?

75. We have no data that would enable us to be able to respond to this question.

Q14. *We recommended a review of the independence of regulators both from the profession and from government, to the MoJ in the CMA market study. Is that review still merited, taking into account, for example, the work that has been undertaken by the LSB on IGRs and the arguments put forward by the IRLSR?*

76. The independence of the regulators from their professional bodies has always been a challenging topic. While we recognise the importance of this regulatory principle, it is one that needs to be applied alongside and in the context of other regulatory principles such as the eight statutory objectives and the Hampton principles. In our previous submissions on this matter we have always argued that there were sufficient powers for the LSB within section 30 of the Act to secure the appropriate level of independence, a view which was echoed by Lord Keen in his response to this CMA recommendation in December 2017.¹⁷
77. We welcomed the initiative by the LSB in 2018 to apply a more rigorous approach to the independence rules but we found some of the proposed approaches inconsistent with the regulatory principles set out in section 28 of the Act. In particular, the detailed approach forcing a 'one size fits all' has resulted in the creation of a new set of governance rules which are more applicable to address the specific difficulties which arose between the Law Society and the SRA than other regulators who did not suffer from the same issues and who had other compensating controls to ensure independence through their unique governance structures.
78. In January 2019, as a result of the feedback from regulators, the LSB modified its proposed rules which has allowed us to comply with some adjustment. However, elements remain that we believe to be unnecessarily intrusive into the effective day to day functioning of a regulatory body and are not replicated by any of our other oversight bodies. Any further impositions would be disproportionate and at the expense of many of the statutory objectives unless they were targeted at specific areas of difficulty and tied to those regulators that do not have sufficient alternative safeguards.

Supplementary Transparency Questions

15. *Is there any more work that can be done within the existing regulatory framework to strengthen regulatory independence?*

79. As we have indicated in response to the previous question, we believe that the current IGRs themselves already push the appropriate boundaries and any further steps would be counter-productive and would run contrary to the Act which expressly referred to unitary professional bodies being authorised as legal service regulators. If further requirements were imposed, we would have to re-consider our continued involvement in this sector and, if we withdrew, this would damage competition in the provision of probate services because we believe that most of our accredited firms would more likely exit the market than re-register with another unfamiliar regulator and take on the compliance burden of dealing with two regulators.
80. Two of the panaceas that have been mooted in the last six years of debate have been total separation of the two wings of unitary bodies, and the appointment of a single regulator. We have resisted both of these suggestions. Partly because we believe they jettison the effective ethical and quality inputs of the professional bodies built up over decades of experience, (an approach we believe is at the expense of the public interest), but also because effective regulation requires tensions and accountability between regulatory bodies and supervisory bodies that drive up quality. A single regulatory body inevitably breeds complacency and moves risk closer to relevant government departments.

¹⁷ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/669507/Govt-Response-to-CMA-study.pdf

81. It is also worth reflecting on the unique role of ICAEW's Professional Standards Department as a regulator of both statutory and voluntary codes. The statutory roles are contracted by state but the voluntary role is effectively contracted by the professional body. There has to be a degree of interaction between the regulatory and representative arms in the operation of that voluntary code, and indeed influence in the way that code is applied and effected. Should separation be strictly applied then the voluntary regulation would most likely revert to the representative side and be administered by that part of the organisation. At the moment, as a consequence of legal services and the voluntary code being administered side by side, there are ripple effects which are beneficial to the consumer, not just of legal services, but also accountancy services.

Q15. What work has been undertaken by regulators to reduce the regulatory burden on providers of legal services for individual consumers and small businesses? What impact has this had?

82. We provide regular, comprehensive and ongoing support to our probate accredited firms. For example, we have an annual probate compliance review checklist available to accredited firms for them to review and document their own compliance with the regulations. The results of our monitoring reviews indicate that firms use the checklist and this improves their level of compliance.
83. We also operate an annual return programme for all of our 12,000 regulated firms which is comprehensive in covering all areas of statutory regulation as well as unregulated activities. This complex document has been simplified and automated in the last few years to make it easier and quicker for firms to complete, enabling a cheaper and more accurate data collection system. This data informs the risk assessment for quality inspection programmes.
84. We send regular newsletters called Probate News. Recent communications sent in November 2019, April 2020 and July 2020 contain sector-specific news and guidance to support our probate accredited firms and, in particular, draw attention to transparency issues.
85. We have also published, the Best Practice Guide to Price and Service Transparency (the Guide) in 2019.
86. We have support materials on the website to help firms get the most out of their probate accreditation and we are planning to run a conference in winter 2020 for 'family offices' who wish to provide both accountancy and legal services to their clients.
87. In our role as an improvement regulator, our reviewers spend time at the end of each visit discussing the areas in which firms can improve the quality of their work.

Supplementary Transparency Questions

16. Are there remaining areas where there is scope to significantly reduce regulatory costs? a) If so, what plans are in place to tackle these?

88. We have alluded to the need for an outcomes-focused approach to regulation which would reduce the time spent on managing detail and enable regulators to focus on the performance and quality of their regulated firms.

Q16. What impact has the removal of restrictions to allow solicitors to practise in unauthorised firms had on the availability of lower cost options in the sector?

89. We have no data that would enable us to be able to respond to this question.