



THE LAW SOCIETY  
of SCOTLAND  
[www.lawscot.org.uk](http://www.lawscot.org.uk)

Response

# Competition & Markets Authority Legal Services Market Study – Interim Report

**The Law Society of Scotland's response  
August 2016**

## Introduction

1. The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. As a statutory professional membership body pursuing legal excellence, the Law Society of Scotland supports the needs and requirements of the Scottish solicitor profession in delivering legal services to Scottish, UK and global businesses and consumers.
2. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.
3. We have a statutory duty to work in the public interest,<sup>1</sup> a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective Scottish solicitor profession working in the interests of the public and protecting and promoting the rule of law.
4. We welcome the publication on the 8 July 2016 of the Competition & Markets Authority's (CMA) Interim Report<sup>2</sup> (the Report) on the Legal Services Market and the opportunity to comment on the interim findings contained therein. We note that the Report is focused on legal services in England and Wales, where many of our members are employed by a large number of cross border firms.<sup>3</sup> We further note that the CMA made the decision not to extend their consideration of competition matters, in relation to the legal services market, to Scotland. We understand and accept the rationale behind the CMA decision in recognising that Scotland has a

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<sup>1</sup> Legal Services (Scotland) Act 2010, Section 1

<sup>2</sup> <https://assets.publishing.service.gov.uk/media/577f76daed915d622c0000ef/legal-services-market-study-interim-report.pdf>

<sup>3</sup> The Law Society of Scotland currently (10 August 2016) has 586 members practising in England and Wales and there are 28 cross border firms.

different legal system, and that regulatory reform within Scotland is at a different stage.<sup>4</sup>

## General comments

5. From a comparative perspective, we make reference to the Scottish legal service sector, as many of the points raised within the Report are UK wide.
6. We note that the CMA intends to actively engage with the UK Government, the legal service regulators and industry bodies in considering improvements to transparency in the provision of legal services.<sup>5</sup> Although the CMA review and Interim Report is focused on the legal services market in England and Wales, where the regulatory framework is different to that which applies in Scotland, many of the themes touched upon in the Report relate to the UK legal services market as a whole. Therefore we would welcome the opportunity to discuss the Scottish and the UK legal service market with the CMA and we would hope to be involved in any engagement exercise.
7. As background information; we are currently in discussions with the Scottish Government in relation to the regulation of legal services in Scotland. In December 2015 we submitted our paper *The Solicitors (Scotland) Act 1980 - The case for change*,<sup>6</sup> which sets out in detail our ambition to secure a modern, flexible and enabling legislative framework for the regulation of the solicitor profession and the provision of legal services in Scotland, placing the consumers interests and protection at the centre of proposals.
8. Our paper sets out the need for change in detail and includes proposals for;
  - better regulation of legal firms ('entity regulation') in addition to the regulation of individual solicitors to protect consumers,
  - opening the Law Society of Scotland (LSS) 's membership in order to improve standards amongst other legal professionals,

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<sup>4</sup> CMA Press release 13 January 2016: <https://www.gov.uk/government/news/legal-services-study-launched-by-cma>

<sup>5</sup> CMA Interim Report, paragraph 1.40

<sup>6</sup> <http://www.lawscot.org.uk/media/732471/The-Solicitors-Scotland-Act-1980-The-case-for-change-Regulation-Pa.pdf>

- the ability for the LSS to regulate legal work beyond the domestic Scottish jurisdiction in order to provide simpler regulation for cross border firms and,
  - more flexible business models which allow legal firms to adapt to market changes.
9. In January 2016, ahead of the Holyrood elections, we published a detailed set of priorities for the next term of the Scottish Parliament.<sup>7</sup> This included a call for Scotland’s political parties to commit to a modern, fit-for-purpose framework for legal services in Scotland which;
- maintains the advantages of the current system, including the independence of the legal profession, a robust system of co-regulation involving strong professional bodies and an independent complaints handling organisation and discipline tribunal,
  - provides a more agile system of consumer protection and addresses the impact of the unregulated legal services market,
  - allows flexible regulation that reflects the rise of alternative business models, cross-border firms and internationalisation of the sector and
  - enables the Law Society of Scotland to respond to the changing needs of its members and to open up associate forms of membership to other legal professionals, including paralegals and legal executives.
10. We were pleased to note that the Scottish National Party, in its election manifesto,<sup>8</sup> gave ‘*a commitment to take forward a consultation to review the regulation of the legal profession in Scotland and to support a modern and effective legal sector, including new forms of business models*’<sup>9</sup> We look forward to considering and responding to the Scottish Government consultation in due course.
11. We are supportive of raising competition within the legal services market and recognise the important benefits that this would bring to the consumer. This is one

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<sup>7</sup> Our priorities for the Scottish Parliament Election 2016 <http://www.lawscot.org.uk/media/695383/2016-priorities-web-v4.pdf>

<sup>8</sup> <https://drive.google.com/file/d/0B8Tu6kHw0HUMdXZyB0RHHNdRSzQ/view?pref=2&pli=1>

<sup>9</sup> Ibid at page 40

of the reasons why we advocated and were fully supportive of the Legal Services (Scotland) Act 2010 which creates the legal framework for alternative business structures. This will give alternative business structures the opportunity to enter the legal services market, generating competition through innovation and structuring which meets consumer needs. We are currently engaged with the Scottish Government on becoming an approved regulator of licensed legal services providers.

### Specific comments

12. The CMA has taken into account and considered the role of the legal service sector and regulators in widening competition in the face of the way the market is evolving and the rapid growth of digital sales channels, comparison sites and feedback tools.

13. The Interim Report is focused on three main issues:

- the role of information in driving competition
- the role of regulation in protecting consumers
- the potential for regulation to restrict competition

14. We note that the Report sets out possible remedies to address identified transparency concerns and the aforementioned issues in relation to information in paragraphs 1.32–1.40. We have restricted our comments to those aspects of the Report, issues and remedies we believe we are in a position to express views on.

### The role of information in driving competition

15. We agree that the legal services sector should be fully transparent from a competition and consumer protection perspective and the provision of clear information has a role to play in this.

16. We believe that consumers should have easy access to all the information necessary for them to make a fully informed and reasoned choice in selecting a legal service provider. The availability of information would encourage a level playing

field. We actively strive to help consumers make the right choice in selecting a legal service provider and we provide information in a number of ways:

- Our practice rules provide that all Scottish solicitors when tendering for business, or at the earliest practical opportunity upon receiving instructions, shall provide to the client in writing, an outline of the work to be carried out on their behalf and an estimate of the total fee to be charged for the work, including VAT and outlays which may be incurred in the course of the work.<sup>10</sup>
- We currently provide a comprehensive and fully searchable database of Scottish solicitors and the law firms in which they work.<sup>11</sup> This allows consumers to easily identify firms who could help them with their specific legal problem and are in their local area. Over the past twelve months,<sup>12</sup> 420,206 members of the public visited the site to find a legal service provider.
- We directly support and help consumers through our helpline and receive, circa 1,000 calls each month. We recognise that there is more to be done to allow consumers to compare firms on cost and quality. We are currently looking at ways to enhance and develop the information available to the public, to help them make a more fully considered choice of legal service provider.
- We have produced a number of helpful and informative videos for consumers<sup>13</sup> explaining common legal processes which are of day to day importance, such buying a property<sup>14</sup>, making a will<sup>15</sup>, setting up a business<sup>16</sup> and matrimonial matters<sup>17</sup>.

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<sup>10</sup> <http://www.lawscot.org.uk/rules-and-guidance/section-b/rule-b4-client-communication/rules/b4-client-communication>

<sup>11</sup> <http://www.lawscot.org.uk/find-a-solicitor/>

<sup>12</sup> Figures correct as at 10 August 2016. 12 months August 2015 - 2016

<sup>13</sup> <http://www.lawscot.org.uk/for-the-public/what-solicitors-can-do-for-you/>

<sup>14</sup> <http://www.lawscot.org.uk/for-the-public/what-solicitors-can-do-for-you/buying-and-selling-a-property/>

<sup>15</sup> <http://www.lawscot.org.uk/for-the-public/what-solicitors-can-do-for-you/making-a-will/>

<sup>16</sup> <http://www.lawscot.org.uk/for-the-public/what-solicitors-can-do-for-you/starting-a-new-business/>

<sup>17</sup> <http://www.lawscot.org.uk/for-the-public/what-solicitors-can-do-for-you/getting-a-divorce/>

- We also provide information sheets and FAQs to help consumer identify their legal needs and choose the right legal service provider for this.<sup>18</sup>
- We fully comply with the EU Services Directive 2006<sup>19</sup> which provides EU consumers with the right to access greater information on services and for service providers to access markets across the EU. The policy intent behind the Directive, as well as stimulating the economic and social development, is to expand consumer choice, encouraging competition by opening and developing markets. We provide our members with information relating to the Services Directive and the requirements to provide information on their services – additional to the requirements set out in the solicitors' standards of conduct rules.<sup>20</sup> In addition we have created an application page,<sup>21</sup> which complies with the Directive and allows an EU lawyer to access the Scottish legal services market by applying for a licence to practise in Scotland.

17. Many of the legal services providers in Scotland actively promote information about their services through online platforms, developing their websites and using social media to provide as much information as possible to consumers.

18. The Law Society of Scotland Practice Rules 2011 allow solicitors, subject to certain restrictions to protect the public, to '*...advertise and promote your services in any way you think fit...*'<sup>22</sup>. This is much less restrictive than the former rules relating to advertising and in our view significantly helps to promote competition.

19. Under the terms of the Scotland Act 2016<sup>23</sup> there has been further devolution to the Scottish Parliament concerning consumer advocacy and advice powers and the Scottish Government has committed to create a statutory, unified consumer and competition body. In support of this, the Scottish Government has established a new Consumer and Competition Policy Unit to develop an overarching consumer and

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<sup>18</sup> <http://www.lawscot.org.uk/for-the-public/frequently-asked-questions/>

<sup>19</sup> Directive 2006/123/ec of the European parliament

<sup>20</sup> <http://www.lawscot.org.uk/members/membership-and-registrar/eu-services-directive/>

<sup>21</sup> <http://www.lawscot.org.uk/members/membership-and-registrar/applications/>

<sup>22</sup> <http://www.lawscot.org.uk/rules-and-guidance/section-b/rule-b3-advertising-and-promotion/rules/b3-advertising-and-promotion/>

<sup>23</sup> The Scotland Act 2016 section 50 -Consumer advocacy and advice

competition strategy fit for Scotland and to progress policy development and expertise in these areas.

20. In their recent report,<sup>24</sup> the Working Group on Consumer and Competition Policy for Scotland recommended that an independent consumer body (Consumer Scotland) be established. We look forward to engaging with this consumer body at the earliest opportunity in considering legal services and discussing what changes could be made to provide greater information to the public. An appropriate platform for this would help consumers to make a more informed choice in advance of committing themselves to a single service provider.

21. We are in full agreement that we need to help build on current consumer awareness, in particular to highlight the differences between regulated and unregulated legal service providers. We further agree that better 'signposting' may help develop awareness. As we refer to above, we also believe that consumers should be advised of the level of protection available for each legal sector, as well as the complaints processes.

#### The role of regulation in protecting consumers

22. We note the concerns that consumers are unaware of the differences in consumer protection between regulated and unregulated legal service providers. We believe that consumer protection is paramount, particularly in the area of legal services where there is a risk of a serious detrimental effect on the consumer in the unlikely event that something goes wrong. We have concerns that the unregulated legal sector may not give consumers, the assurance of, protection that they expect.

23. We note (at paragraph 5.8) that the Report suggests that the majority of consumers are not aware of the status of their legal service provider, nor the level of protection offered, and further, would appear to assume that their legal service provider was regulated.

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<sup>24</sup> <http://www.gov.scot/Resource/0048/00488834.pdf>

24. As in England and Wales, Scotland has seen a significant increase in the number of business structures providing legal services to businesses and consumers over recent years, and we have heard concerns from our members and the public in regards to these. Many of those businesses in the unregulated legal sector use the term 'legal' or 'law' in their business title to give credibility. This promotes the misconception that the business is a regulated law firm.
25. There is also a significant problem with individuals who are offering legal services using the title 'lawyer'. Members of the public often cannot differentiate between the title 'solicitor' and 'lawyer', and may not understand that a solicitor is a qualified and regulated professional and there is no such guarantee of someone using the term 'lawyer'. In a recent MORI poll which we commissioned, 52% of those asked understood solicitor and lawyer to mean the same thing.<sup>25</sup>
26. Gaps within the current regulatory framework<sup>26</sup>(in Scotland) mean that a business is not required to be regulated to provide advice and services in relation to unreserved areas. The provisions of the legislation relating to regulated firms in Scotland are ambiguous and businesses are finding effective ways of circumventing the legislation to the detriment of consumer protection.
27. The 'unregulated legal sector' is not defined within legislation, UK or Scottish. It is a default term referring to those legal service providers who provide advice and representation on any area of law which is not reserved to solicitors or other regulated legal professionals, such as copyright attorneys, and licenced conveyancers, who are therefore not part of the regulated sector. As is clearly implicit in this description / term, there are no regulators in the unregulated sector. Consumers purchasing legal services in the unregulated sector leave themselves seriously exposed if the advice turns out to be incorrect or something goes wrong.
28. We believe that there is a very strong case, from a consumer protection perspective, for the regulation of the legal services market (throughout the UK) to be rationalised

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<sup>25</sup> MORI Poll conducted between 6th t - 12th June 2016 – Results are based on 1,000 respondents

<sup>26</sup> Primarily the Solicitor (Scotland) Act 1980

so that all those offering and providing any legal advice or services are, at least proportionately regulated. This would ensure that all consumers enjoy and have the benefit of consistent and assured protection, as is currently afforded to all those seeking advice and representation from a regulated firm.

29. The SRA is currently consulting on proposals to require solicitors (including those employed in the unregulated legal sector) to inform consumers of their regulatory status and the protection afforded.<sup>27</sup> We are supportive of this proposal. We believe that consumers should be in the position of being able to make a fully informed choice in selecting a legal service provider.

30. We note that in considering the unregulated legal service sector, the CMA has chosen to use will writing as a case study of an unregulated area. As referred to (5.15) the profession of will writers is self-regulating. This, we would suggest, is misleading as the case study does not consider an area which is truly unregulated, for example employment, and the reason for selecting this area for case study has not been clearly set out within the Report. In Scotland the provisions of the Legal Services (Scotland) Act requires all will writers to be regulated, however the relevant provisions of the Act are yet to come into force.<sup>28</sup>

## Additional comments

### Notaries Public.

31. We note that although the Report gives small mention to Notaries Public (paragraph 12, page 106) it is disappointing to further note that this was not included in the CMA study of the legal services market.

32. We believe that the Legal Services Act 2007<sup>29</sup> should be amended to provide practice rights for Scottish Notaries Public working in England and Wales. Intra UK practice rights for solicitors have been recognised since the Courts and Legal

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<sup>27</sup> SRA Consultation Looking to the future - flexibility and public protection, para 115

<sup>28</sup> Legal Services (Scotland) Act 2010 Chapter 2

<sup>29</sup> <http://www.legislation.gov.uk/ukpga/2007/29/contents>

Services Act 1990<sup>30</sup> and the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.<sup>31</sup> However there are no corresponding provisions concerning notaries public.

33. The Legal Services Act 2007 and earlier legislation such as the Public Notaries Act 1801 effectively prohibit any person from acting as a notary in England and Wales unless that person is admitted as a notary in England and Wales. We consider this legislation to be anti-competitive and not in the public interest.

34. There are currently 299 notaries public admitted in Scotland who practice as solicitors in England and Wales.<sup>32</sup> They are prohibited from exercising the profession of notary by the statutes to which we have referred. This has had significant impact on clients in terms of cost and inconvenience. For example:

- Financial impact on clients: Consumers regularly need notarisation of documents. The costs for notarisation can be substantial, and can often be as much as £500 per occasion. In-house Scottish solicitors report having spent over £85,000 in the calendar year of 2015 on two London-based notarial and consular services. The vast majority of these fees being for attendance to witness execution of documents. The significant costings impact on the ability for the business to budget and reduce legal costs.
- Delays for clients: Where the services of a notary are required, there can be significant time costs including the inconvenience of finding a suitable time when the notary and the person who is to sign the document are both available. In addition, it can be very difficult for a consumer based in London to find a notary urgently.
- Not in the client best interests: The current restriction impacts on the ability of Scottish notaries to serve consumers particularly those who need documents executed for use abroad. There can be delays in progressing matters for

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<sup>30</sup> <http://www.legislation.gov.uk/ukpga/1990/41/contents>

<sup>31</sup> <http://www.legislation.gov.uk/ukpga/1990/40/contents>

<sup>32</sup> Figures correct at 19 August 2016

consumers – they are required to take an additional step to instruct an English qualified notary.

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