



# *ICAEW Consultation – CMA Action Plan*

JULY 2018



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July 2018

## INTRODUCTION

### **Our current regulatory responsibilities**

#### **Statutory**

1. In August 2014 ICAEW was designated as an approved regulator and licensing authority for the reserved legal activity of probate. This designation provided members with the opportunity to offer a wider range of services to their clients and for ICAEW to demonstrate its increased focus on protecting consumers.
2. Following a year-long study of the legal service market the Competition and Markets Authority (CMA) published a 500-page report on 15 December 2016 which found that the market was not working well for individual consumers and small business. It concluded that the lack of transparency of information provided caused substantial detriment to consumers and weakens their ability to drive competition through making informed purchasing decisions.
3. The CMA made a number of recommendations to legal services providers in its report to address these concerns. This consultation sets out ICAEW's approach to delivering these recommendations. In summary we are consulting on the following areas:
  - Transparency of pricing and service provision
  - How to help consumers navigate information on legal services
  - Regulatory status and redress
  - The use of independent feedback platforms
  - Data for intermediaries
4. This consultation will run for 12 weeks closing at 17:00 on 30 September 2018.
5. We welcome responses from our members, authorised firms, and other stakeholders including members of our regulated community; consumers of legal services; consumer organisations and other interested parties.

## BACKGROUND

6. On 13 January 2016 the CMA launched a market study into legal services to see if they are working well for individual consumers and small businesses.
7. The **CMA published the final report of its market study** on 15 December 2016 which concluded that competition in the legal services sector for individuals and small businesses was not working well. The CMA's main concern was that a lack of information weakens the ability of consumers to drive competition through making informed purchasing decisions. It has suggested that consumers currently experience 'substantial detriment' and it has proposed remedies by way of recommendations that it believes could lead to significant long-term benefits for consumers, including improving access to legal services for less well-off consumers. The CMA recommends that frontline legal regulators:
  - (a) Take action to deliver a step change in standards of transparency to help consumers:
    - to understand the price and service they will receive, what redress is available and the regulatory status of their provider; and
    - to compare providers.
  - (b) Ensure that better information is made available to assist consumers when they are identifying their legal needs and the types of legal services providers (both regulated and unregulated) who can help them.
  - (c) Promote the use of independent feedback platforms to help consumers to understand the quality of service offered by competing providers.
  - (d) Facilitate the development of a dynamic intermediary market through making data more accessible to comparison tools and other intermediaries.
8. The CMA believes that using appropriate information remedies to implement these recommendations will ensure that consumers have the information they need to be confident navigating the legal services sector and to get a good deal from providers. Its objective is to facilitate consumers who are confident, well-informed and engaged when using the sector and have effective access to redress when things go wrong.
9. In addition, the CMA has made specific recommendations to the Legal Services Board (LSB) that it:
  - Monitors and engages with the frontline regulators on their progress in implementing the CMA's recommendations directed to them.

- Reports publicly, at appropriate intervals, on the sufficiency of action plans published by regulators individually and collectively and the progress in delivering those action plans.
  - Takes appropriate action where regulators fail to address information gaps.
10. As a legal regulator of probate activities, ICAEW is committed to improving consumer engagement in the legal services sector by developing regulatory processes, and delivering better outcomes for consumers and the general public that cater for the needs of a diverse range of clients. ICAEW therefore fully supports the recommendations made by the CMA in its report.

### **Current ICAEW guidelines**

11. Transparency of services has been part of the ethos of ICAEW for many years. In 1994 Lord Benson in his definition of the profession indicated;
- “..... the governing body must satisfy itself that there is fair and open competition in the practice of the profession so that the public is not at risk of being exploited. It follows that members in practice must give information to the public about their experience, competence, capacity to do the work and the fees payable.”*
- These concepts were articulated further in Practice Assurance Standard 2 Client Acceptance and Disengagement in 2004, and have been monitored through the Practice Assurance visit programme since then.
12. The ICAEW Practice Assurance Scheme requires all ICAEW members holding a practising certificate to comply with the Practice Assurance Regulations, and under Regulation 1 all holders of the practising certificate are required to comply with the four Practice Assurance standards. These standards are fairly brief in themselves but are underpinned by extensive guidelines which indicate areas of best practice. The monitoring programme enforcing this best practice is carried out at least once every eight years and in shorter periods where risk indicators suggest this may be prudent.
13. The Practice Assurance Scheme, though enforced at the top by regulation, is largely a mechanism for encouraging best practice, and significant shortfalls would be required in service delivery for the Practice Assurance Committee (which considers such matters but has no enforcement powers) to refer matters to the Investigation or Disciplinary Committees.
14. Most firms regulated by ICAEW for legal services are member firms and already subject to this regime. Non-member firms accredited for probate are also subject to these standards and they undergo monitoring visits within two years of being authorised and then under a rotation cycle. A summary of the Practice Assurance Scheme and the Practice Assurance Standards is set out at appendix A.

## Client engagement letters

15. A key part of the guidance supporting Practice Assurance Standard 2 is the information expected in communication with the clients typically through engagement letters (referred to as client care letters by the legal profession). This sets out a series of parameters particularly on nature of service and its delivery which meet to some considerable extent the recommended approach set out in the CMA report.
16. In 2016 ICAEW and other legal regulators co-funded a research project undertaken by Optimisa Research which examined consumer perceptions on client care letters for legal services. The report issued November 2016 identified a number of areas where these letters could be better drafted to meet the needs of consumers, and these resonate in a number of areas with the client engagement letters prepared for accountancy services. The report is available on [icaew.com/probate](http://icaew.com/probate) - the [support for probate accredited firms](#) webpage.
17. The guidance on engagement letters is reviewed on an annual basis and amended for best practice and matters arising from monitoring inspections. The review currently underway for 2018 includes drawing on the conclusions of the Optimisa research including aspects of their recommendations in the new policy. These updated guidelines are due to be issued in the autumn on 2018.
18. The Practice Assurance Standards and Guidance were developed in an era when the website as a commercial tool for firms was in its infancy. The standards and guidelines accordingly though touching on this area of marketing are not as detailed as they are for the engagement letters, and do not lend themselves to the open competition that Lord Benson was aspiring to in his principle above.

## Complaints

19. It is part of ICAEW's disciplinary bye-laws that firms advise clients of the complaint process. Both member firms and probate firms are signed up to this principle, and in the case of probate firms they are also required to disclose to clients the availability of the Legal Ombudsmen as a source of redress. This requirement also forms part of the Probate Regulations. This area of recommendation by the CMA accordingly is already part of the culture of ICAEW firms.

## Conclusion

20. The Practice Assurance Scheme and the advice flowing from it covers a number of the areas being pursued by the CMA. However certain areas such as transparency of pricing and the management of web sites are not addressed. Any approach therefore has to build on existing practice and guidance and develop new principles where gaps arise. Some of these may be contentious and more appropriate in the area of legal services only.

## ICAEW'S ACTION PLAN TO IMPLEMENT THE CMA'S RECOMMENDATIONS

21. To fulfil its responsibilities as a legal regulator, ICAEW, along with the other legal regulators, has developed an **Action Plan** setting out how we will implement the CMA's recommendations. The actions set out in this plan will not only ensure consumers are better informed to identify their legal needs and make comparisons and informed choices but will also have many commercial benefits for our regulated firms.

22. Because the Practice Assurance Standards afford the consumer of accountancy services a significant amount of support and protection already, this Action Plan will apply to ICAEW accredited probate firms only and only in relation to the reserved legal service of probate, will writing and lasting powers of attorney. However, where bundled services are provided to a consumer involving a mix of legal and accountancy or other services, the scope will extend to require a greater degree of transparency across all these bundled services.

**Question 1:** Do you have any comments on the firms and service area(s) that will be requested to comply with best practice to ensure transparency of pricing and services?

### **Transparency of pricing and provision of legal services**

23. A key element of the plan is the development of best practice in the communication of pricing and service provision, both through firms' websites and in client engagement letters. Over the past few months we have been reviewing the current approach of firms accredited by ICAEW to provide probate services towards disclosure of their pricing and provision of legal services, and evolving on from that we will be producing a best practice guide. We have found that 85% of accredited probate firms have websites, but only one of them provides specific pricing information on their services.

24. This best practice guide will, where appropriate, incorporate and build upon the minimum levels of transparency that consumers should expect from legal services providers. This would be linked to but not form part of the Practice Assurance Standards guidance for all ICAEW firms.

25. Consideration will be given to what information remedies are appropriate to address the CMA's concerns balancing the level of risk and the ability of consumers to adequately comprehend the significance of such information.

26. We will also draw on the advice given by the Legal Services Consumer Panel (LSCP) in its *Development of Information Remedies in Legal Services Report* dated March 2017. This report advised on the effectiveness of information remedies in legal services regulation and how these could be improved. It concludes that the success of the information remedies recommended by the CMA will depend very much on their design and implementation. The LSCP found that ‘even with the best will and intention, information remedies can be ineffective’ and it therefore outlined in its report key criteria for success when thinking about information remedies which include:

- (a) **Appropriateness test:** Regulators should consider whether information remedies are appropriate. This should take into consideration the level of risk and the ability of consumers to adequately comprehend the significance of the information.
- (b) **Accessibility of information:** It is important that information is given at the right time, the right place, and for the intended groups.
- (c) **Information overload:** Too much information can make decision-making worse. Regulators should work hard not to create a risk that firms, and even themselves, adopt a ‘tick-box’ approach to their disclosure regimes. Instead, regulators should design an effective disclosure regime to help consumers understand and engage better
- (d) **Consumer Awareness:** For it to be effective consumers must be aware of the information remedies in the first instance. Information remedies may need to be accompanied with measures around the prominence and timeliness of the disclosure.

### **Transparency of pricing**

27. Where firms have a website, it is likely that the guide will expect price information to be made available there. It is also likely that it will recommend the use of one of the communication methods listed below. However the appropriate method is likely to be dictated by the size of the firm and/or the extent of its probate practice:

- Publication of a comprehensive price list of all of the factors that might impact the price of a transaction.
- Through an estimate generator on their own website.
- Through a digital comparison tool.

28. It should be possible for firms to provide reliable and comprehensive estimates to clients either through their website or directly to clients in response to enquiries made by face to face meeting, telephone or email.

29. The pricing information guidelines will offer advice on the disclosure of hourly rates, fixed price fees, disbursements, treatment of VAT and overall cost illustrations for the consumer.

30. We anticipate there may be concern that using pricing information alone will lead to a race to the bottom with consumers focusing only on price when choosing their probate services provider. Information that enables consumers to assess level, mode and quality of service is therefore another very important information remedy that needs to be considered along with transparency of pricing.

## **Service**

31. When producing the best practice guide we will therefore also need to consider the extent to which firms should make it clear to potential clients the services they can provide, the service model, and the level/mix of staff that will be delivering them. The Practice Assurance Standards already provide key principles but they may need to be built on for the legal services market. We are also aware that there is likely to be a difference in the information a firm will be able to provide for the initial estimate and later in the client engagement letter.

**Question 2:** What are the challenges for firms publishing information on pricing and services?

**Question 3:** Are there any particular areas that you would like the best practice guide to cover to assist you with transparency publications?

**Question 4:** How prescriptive would you like the best practice guide to be?

**Question 5:** Do you have any recommendations on how best to present pricing information to consumers?

## **Helping consumers to navigate information on legal services**

32. ICAEW has created a probate logo to ensure probate regulated firms are easily identifiable by consumers on firms' websites and other social media. We will also be participating in a nationwide register for legal services (similar to that currently in place for audit) and in **Legal Choices**, a consumer guidance website sponsored by the legal regulators.

33. Furthermore, an area of ICAEW's website will be dedicated to providing information specifically for consumers of legal services. Examples of the sort of information that will initially be provided are:

- A register of accredited probate firms.
- The benefits of engaging the services of regulated firms as opposed to non-regulated firms.



- What pricing and service provision information consumers should expect to be provided with before and after engaging with a firm which will also be set out in the best practice guide.
- The ICAEW probate regulated firm logo which will easily identify our probate regulated firms.
- A link to information on disciplinary decisions.

34. These initiatives will provide an opportunity for ICAEW probate firms to promote and compete with other legal services providers on a more transparent and competitive scale, where we believe our firms have the edge in pricing and quality.

**Question 6:** Do you think firms will benefit from using the ICAEW probate regulated firm logo and, if so, why?

**Question 7:** Will your firm be using the logo?

**Question 8:** Do you think that providing such information to consumers is helpful? Should additional items be added, and if so which? Do you agree that this information will not only help consumers but will also benefit firms? If so, how?

35. Many of the information remedies under consideration are online. As noted above 85% of accredited probate firms will have a website and most consumers will have access to the internet. Nevertheless consideration must also be given to those firms and consumers that don't.

**Question 9:** If your firm does not have a website, in what way do you promote your service and provide information on pricing?

### **Mandatory rules v voluntary requirements**

36. When producing the Action Plan we carefully considered whether to make the transparency requirements compulsory in the Probate Regulations or voluntary in a best practice guide. We concluded that considerable care will be needed on our part not to undermine the outcomes sought by the CMA in improving competition and choice of service provider for the consumer through this form of execution. For example, mandatory regulation on accredited accountancy firms places them at a commercial disadvantage to other local non-accredited firms which might lead the accredited firms to re-think their willingness to continue to be authorised to provide reserved legal services. If this were to be the impact, there would be a reduction in alternative business structure (ABS) engagement and competition and therefore would run

contrary to the CMA's wider market objectives.

37. ICAEW therefore intends to introduce the best practice requirements on a voluntary basis to begin with and then conduct follow-up research to ascertain whether transparency of pricing has improved since the issue and monitoring of the best practice guide. Voluntary compliance will be sought from ICAEW accredited probate firms only and only in relation to the legal services of probate, will-writing and lasting powers of attorney. However, where bundled services are provided to a consumer involving a mix of legal and accountancy or other services, the scope will extend to require a greater degree of transparency across all these bundled services.
38. We believe that there will be strong incentives for ICAEW accredited firms to voluntarily comply with best practice. There will be many commercial advantages for firms that comply, for example:
- A link to the register of accredited probate firms will be provided on a dedicated consumer area of ICAEW's Legal Services website and consumers will be advised of the benefits of engaging the services of regulated firms.
  - Consumers will be advised on this dedicated area of the information they should expect to receive from a firm complying with ICAEW's Guide to Best Practice on transparency of pricing and legal services provision. They are therefore more likely to engage with a firm whose website contains such information.
  - It could save firms costly time in dealing with first-tier complaints from clients about fees caused by ambiguity or lack of information on pricing and services at the outset of the engagement. It could also reduce the number and therefore the cost of cases referred to the Legal Ombudsman.
  - An advantage of an ABS is that services can be provided as a one stop shop thus keeping costs low. Transparency of pricing would highlight this.
39. Should however the research conducted at the end of phase one of the action plan show that there is insufficient voluntary compliance by accredited firms with the transparency requirements in the best practice guide, ICAEW will give serious consideration to making these requirements compulsory in the Probate Regulations.
40. Before making this decision however, we will consider whether the benefits of making the requirements compulsory outweigh the disadvantages.

41. If mandatory requirements are considered appropriate, ICAEW will consult on its proposed changes to the Probate Regulations.
42. The **LSB has assessed ICAEW's Action Plan as satisfactory**. While it is clear from this assessment that the LSB would have preferred ICAEW to introduce the transparency requirements on a mandatory basis, they do state they are encouraged that we plan to review compliance with the requirements and consider making them mandatory if compliance by firms is considered insufficient. We are therefore happy to continue with this approach in order to mitigate the risks outlined above.

**Question 10:** What are the challenges that a mandatory basis would create? Would practitioners move to the required outcomes without enforcement? Do you agree that the approach should be mandated if there is little evidence of change over say a 12-month period?

### **Regulatory status and redress**

43. A register of our probate regulated firms is currently published on our website and a link to this will be placed on the consumer area of the website to enable consumers to check the regulator status of firms.
44. A link will also be provided to the area of our website that contains full reports of disciplinary orders and regulatory decisions made against our regulated members and firms.

**Question 11:** Do you think firms should be encouraged to publish their disciplinary and regulatory decisions? Please explain your response.

45. As mentioned above, we will also be providing firms with a logo that will enable a consumer to easily identify an ICAEW probate regulated firm.
46. ICAEW regulated probate firms are required to signpost ICAEW and the Legal Ombudsman for conduct and service complaints respectively. They are also required to advise clients of their entitlement to make a claim on the Probate Compensation Scheme.

### **Data for intermediaries and the use of independent feedback platforms**

47. We will consider making basic data on our probate regulated firms available to intermediaries such as comparison websites. We will also be examining the reliability and benefits of independent feedback platforms and, if appropriate, will encourage their use in our best practice guide.

**Question 12:** Do you think ICAEW should provide information to intermediaries and, if so, what sort of information and why?

**Question 13:** What do you consider to be the benefits and challenges of using independent feedback platforms for your firm?

## ICAEW'S ACTION PLAN

48. The Action Plan implements the recommendations in three phases as follows.

Phase 1: Actions will be carried out in order to decide whether to introduce a voluntary or mandatory scheme as follows:

- (i) Research ICAEW accredited firms to ascertain the current position regarding transparency of pricing and what clearly identifiable non-reserved legal services ICAEW's probate firms are providing.
- (ii) Create a dedicated consumer page on [icaew.com/probate](https://www.icaew.com/probate).
- (iii) Produce and implement an ICAEW Guide to Best Practice for transparency of pricing and legal services provision.
- (iv) Publish and consult on ICAEW's action plan to increase market transparency
- (v) Continue with client care initiative
- (vi) Introduce a badging scheme for firms regulated to provide legal services
- (vii) Conduct follow-up research to ascertain whether transparency of pricing has improved since the implementation of the voluntary guidance in the ICAEW Guide to Best Practice.

Phase 2: Using the results of research conducted in phase 1 we will decide:

- (i) whether to extend the scope of the transparency requirements to non-reserved legal activities; and
- (ii) whether to continue with compliance arrangements for the transparency of pricing and related services on a voluntary basis; or, make the compliance arrangements mandatory in the probate regulations.

Phase 3: We will:

- (i) Assess the success and impact of the changes introduced during phases 1 and 2 by conducting a consumer survey and analysing and assessing indicative evidence of market change in the medium to long term.
- (ii) Work with the other frontline regulators to research the existence, reliability and effectiveness of independent feedback platforms; and if appropriate, assist and encourage firms to engage with them.

- (iii) Publish details of future disciplinary and appeals hearing, summary decisions and full reports of disciplinary orders and regulatory decisions.
- (iv) Publish data that may be of use to comparison websites.
- (v) Continue to participate with other frontline regulators in the Legal Choices project.

**Question 14**

Do you have any general feedback on the Action Plan?

## CONSULTATION QUESTIONS

**Question 1:** Do you have any comments on the firms and service area(s) that will be requested to voluntarily comply with best practice to ensure transparency of pricing and services?

**Question 2 :** What are the challenges for firms publishing information on pricing and services?

**Question 3:** Are there any particular areas that you would like the best practice guidance to cover to assist you with transparency publications?

**Question 4:** How prescriptive would you like the Guidance on Best Practice to be?

**Question 5:** Do you have any recommendations on how best to present pricing information to consumers?

**Question 6:** Do you think firms will benefit from using the ICAEW probate regulated firm logo and if so, why?

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**Question 9:** If your firm does not have a website, in what way do you promote your service and provide information on pricing?

**Question 10:** What are the challenges that a mandatory basis would create? Would practitioners move to the required outcomes without enforcement? Do you agree that the approach should be mandated if there is little evidence of change over say a 12 month period?

**Question 11:** Do you think firms should be encouraged to publish their disciplinary and regulatory decisions? Please explain your response.

**Question 12:** Do you think ICAEW should provide information to intermediaries and, if so, what sort of information and why?

**Question 13:** What do you consider to be the benefits and challenges of using independent feedback platforms for your firm?

**Question 14:** Do you have any general feedback on the Action Plan?

## HOW TO RESPOND

Please send your response to [michelle.jones@icaew.com](mailto:michelle.jones@icaew.com) by 30 September 2018. Alternatively, you can post your response to:

ICAEW Professional Standards

321 Avebury Boulevard

Milton Keynes MK9 2FZ

## APPENDIX A

### Summary of current Practice Assurance Regulations around transparency

ICAEW's Charter and bye-laws, in particular **Principal Bye-law 54**, cover its Practice Assurance Scheme, the relevant section of the bye-law reads;

Members and member firms shall co-operate with any scheme, system, or arrangement for inspection, monitoring and review of their professional and business efficiency and competence established by the Institute and shall comply with any regulations made in respect thereof. The bye-law is supported by the **Practice Assurance Regulations and Standards**.

Practice Assurance aims to strengthen the distinction between members of the profession and unqualified practitioners by supporting members in practice in delivering a good quality service to clients.

All **ICAEW Practising Certificate holders**, member firms and non-member firms licensed for reserved activities (including probate services) are expected to act in accordance with the **four principles-based Practice Assurance Standards** (the standards). The principles underlying the standards are those in the **Code of Ethics** and are fundamental to a professional providing client services.

The standards are:

Standard 1 – Laws regulations and Professional Standards

Standard 2 – Client Acceptance and disengagement

Standard 3 – Competence

Standard 4 – Quality control

The guidance has been updated to provide clearer pathways for new firms, smaller firms and sole practitioners as against the larger firms so that the obligations are proportionate to size and risk. The guidance for Standard 2 in particular addresses transparency in service and resources and currently gives brief advice on pricing.

ICAEW also carries out Practice Assurance reviews at non-member firms if they have entered into a contract for ICAEW to act as their anti-money laundering supervisor.

It is a requirement of **Probate Regulation 2.7(q)** that firms accredited for probate be subject to the **Practice Assurance scheme**. ICAEW carry out a monitoring visit to all probate accredited firms within the first two years after accreditation. Thereafter the firms fall within ICAEW's normal Practice Assurance review cycle.

ICAEW's probate monitoring visits focus on the procedures, processes and controls established by firms to ensure that authorised work complies with the professional standards and the Practice Assurance Standards and that the firm meets the requirements of the Probate Regulations. ICAEW's monitoring process as a whole makes a significant contribution to ICAEW's strategic aim of maintaining the highest standards and adding value to regulated firms in the area of legal services.