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By email to: UnregulatedLegalServicesTeam@cma.gov.uk

CMA Consultation: Draft Guidance for unregulated providers of will writing and other legal services

About us

Consumer Scotland is the statutory body for consumers in Scotland. Established by the Consumer Scotland Act 2020, we are accountable to the Scottish Parliament. The Act defines consumers as individuals and small businesses that purchase, use or receive in Scotland goods or services supplied by a business, profession, not for profit enterprise, or public body.

Our purpose is to improve outcomes for current and future consumers, and our strategic objectives are:

- to enhance understanding and awareness of consumer issues by strengthening the evidence base
- to serve the needs and aspirations of current and future consumers by inspiring and influencing the public, private and third sectors
- to enable the active participation of consumers in a fairer economy by improving access to information and support

Consumer Scotland uses data, research and analysis to inform our work on the key issues facing consumers in Scotland. In conjunction with that evidence base we seek a consumer perspective through the application of the consumer principles of access, choice, safety, information, fairness, representation, sustainability and redress.

Consumer principles

The Consumer Principles are a set of principles developed by consumer organisations in the UK and overseas.

Consumer Scotland uses the Consumer Principles as a framework through which to analyse the evidence on markets and related issues from a consumer perspective.

The Consumer Principles are:

- Access: Can people get the goods or services they need or want?
- Choice: Is there any?
- Safety: Are the goods or services dangerous to health or welfare?
- Information: Is it available, accurate and useful?
- Fairness: Are some or all consumers unfairly discriminated against?
- Representation: Do consumers have a say in how goods or services are provided?
- Redress: If things go wrong, is there a system for making things right?
- Sustainability: Are consumers enabled to make sustainable choices?

We have identified Choice, Safety, Information, Fairness and Redress as being particularly relevant to this consultation proposal.

Our Response

Summary

Consumer Scotland welcomes the development of this guidance, aimed at providers of unregulated legal services. There are concerns that any consumer accessing legal services may experience vulnerability in this market, which is exacerbated by low levels of legal confidence among consumers. This may lead to a risk of significant consumer harm.

The guidance is especially targeted towards the will writing, online divorce and pre-paid probate markets. Our research shows that there is a demand for will-writing, executry and conveyancing services in Scotland.

It is not clear what the size of the unregulated legal services sector is in Scotland or how effective current consumer protection measures are. With the proposed relaxation of current restrictions on the ownership of firms providing legal services, it may be increasingly difficult for consumers to distinguish between regulated and unregulated providers. The nature of the services that are reserved to the legal profession differs across the nations, and

there are also different regulatory and jurisdictional requirements in place, adding complexity to this picture. We make suggestions as to how these factors can be reflected in the guidance and in the approach taken to publicising and developing it. Our research suggests weaknesses in consumer knowledge and understanding of complaints and regulatory measures in the legal services market and we would welcome the CMA also developing consumer facing guidance in this area.

Background

The CMA has produced draft guidance as part of its investigation into will-writing and other unregulated legal services, which was launched in July 2023. The purpose of the draft guidance is to help unregulated providers of will writing, online divorce and pre-paid probate services in the UK to better understand and comply with their existing obligations under UK consumer protection law. The guidance will apply across the UK.

We begin by setting out some general comments on the needs and experiences of consumers accessing legal services in Scotland, before providing comments on the specific questions posed by the consultation.

The needs and experiences of consumers accessing legal services

Consumer Scotland undertook research into this issue recently.¹ We found that 48% of adults in Scotland said they had experienced something in the last two years that indicated they may have needed legal support. The most common reported experiences were buying and selling houses, dealing with wills, powers of attorney, and estates of people who have died. Almost a third (31%) of adults based in Scotland told us they had used legal services in the last two years, most commonly in connection with conveyancing (11%), powers of attorney or wills (both 7%). Our survey of users of legal services found that 75% said they used a solicitor, with 5% using a Citizens Advice Bureau and smaller numbers reporting using other sources of help such as charities, advice agencies, trade unions or insurance companies.

Regulated and Unregulated Legal Services

The high proportion of people using solicitors in our survey reflects the nature of the legal services being used, which are often reserved to the legal profession. It is also linked to the restriction on business models that have previously applied in the Scottish legal services market. The reliance on solicitors to provide these types of service suggests that there could be room for the market to diversify in order to provide a wider variety of ways in which consumers can seek support. We consider that having clear guidance in place for providers of unregulated services would be useful. It is also timely, as the *Regulation of Legal Services (Scotland) Bill*, currently before the Scottish Parliament, seeks to reduce restrictions on business models and also moves towards a system of entity regulation.

Previous reports have estimated that there are around 12,000 authorised providers of unreserved legal services in Scotland, and at least an additional 13,000 professionals are active in Scotland – including paralegals, advice providers and specialist will-writers. Some

regulatory oversight exists via the provision of national standards for advice or through trade bodies, however it is not possible to estimate what proportion of the market is covered by any regulatory oversight.² The report also found that consumers were often unaware of whether the provider they chose was regulated or authorised or not. In addition, it is difficult to assess the effectiveness of consumer protection measures in the absence of an overarching complaints and redress framework for unregulated legal services.

Our survey indicates that there are strong levels of consumer demand for legal services in the areas of the market that this guidance is aimed at. Accessing legal services in these sectors can help people to resolve legal issues in everyday areas of life such as property law, family and personal care and estates. However, because legal services are often purchased in stressful situations, and given the knowledge disparity between professionals and clients, there are concerns that consumers are potentially at risk of vulnerability in this market. For example, people setting up wills, trusts or executry services may be experiencing illness or entering end of life care.

In addition, responses to our survey showed that more than half of legal services users in Scotland (56%) either do not know or are uncertain about how to complain about the service they receive, raising concerns about the potential for unresolved consumer detriment in this sector. In relation to executry or will-writing services, problems with the service received may not emerge until many years after the consumer has purchased the service. Even where complaints processes are available there may be restrictions on the ability of those who are impacted to complain if they were not the original client.³

Our survey of adults based in Scotland also explored people's legal confidence and the perceived accessibility of justice, using an analysis of standardised measures of legal confidence and perceived accessibility of justice. Our findings indicated that just over a third (37%) of adults based in Scotland have low levels of legal confidence and only 8% have a high level of confidence. In a market where so few consumers feel confident in navigating legal issues, low levels of legal confidence reinforce the risk of information asymmetry between legal service users and legal professionals.

Risks of Consumer Harm

Research by the Legal Services Board in England and Wales found that anyone using legal services can be considered inherently vulnerable, primarily due to the situation that prompts their legal need, but also due to the way the legal services market works. In addition, the review also pointed to specific 'additional risk factors' which may influence vulnerability for users of legal services, such as poverty or low income; disabilities; low literacy; digital exclusion; and domestic abuse.⁴

For these reasons, we agree with the CMA that in the context of unregulated will writing, online divorce, and pre-paid probate services, failures to comply with consumer protection law are particularly likely to give rise to significant consumer harm. As the CMA notes, that is because:

- these are infrequent purchases, and involve complex legal concepts and terminology with which consumers may not be familiar
- these are important services which are likely to have serious and long-term consequences for consumers
- consumers often purchase these services at a challenging and stressful time of their lives when they may be more vulnerable to misleading or aggressive sales practices
- the nature of these services is such that problems may not come to light until many years after the initial purchase is made
- consumers who purchase legal services from unregulated businesses cannot necessarily access the same complaints processes and redress as in the regulated parts of the market.

Consultation Questions

Question 1: Coverage of the Guidance. *Does the draft guidance cover the most important consumer protection law issues relating to unregulated will writing, online divorce and pre-paid probate services? If not, what additional issues should the compliance guidance address and why?*

We note that the guidance is not intended to be exhaustive and should be read alongside the CMA's guidance on, for example, consumer protection from unfair trading, unfair contract terms and other consumer protection law.

We welcome the focus on the issues identified in the consultation, including price transparency. We welcome the focus on avoiding use of misleading information regarding the nature and extent of services offered or the degree of regulatory protection available to consumers. We consider that information given to consumers should be clear, accurate, transparent and accessible. Consumers should also be protected from unilateral changes to contract terms, for example, in relation to pricing. Unjustified restrictions on liability for loss, where these would be deemed unfair under consumer law, should also be within the scope of this guidance, as proposed in the draft.

Given the risks of consumer vulnerability in this sector, we also welcome the guidance addressing issues around misleading or aggressive sales tactics, misleading claims regarding the effectiveness of products or the inappropriate use of consumer information to upsell products. This may be an issue of particular concern where lead generation or intermediary companies provide information where a consumer has made a one-off purchase, which enables aggressive marketing of other products.

We note that the guidance is aimed primarily at unregulated providers, who are not subject to the additional requirements of professional regulation. While we understand the need for this focus, we consider that the passing of the Digital Markets, Consumer and Competition

Act does place additional requirements on regulated providers, for example in relation to drip pricing, subscription traps and fake reviews. For this reason there may also be merit in the CMA working with existing legal regulators and professional associations across the UK to highlight current and future consumer protection requirements along with the CMA's new powers.

While delivery of certain legal services is still reserved to solicitors, the removal of certain restrictions on the ownership and control of legal firms and the ability to develop alternative business structures may mean that any dividing line between regulated and unregulated providers becomes more difficult to draw. This may make it more difficult for consumers to navigate the landscape and for this reason we would welcome a degree of consistency of approach across both regulated and unregulated services.

We are aware that the *Regulation of Legal Services (Scotland) Bill* proposes that the Scottish Legal Complaints Commission will have a new role in monitoring complaints relating to the provision of unregulated legal services. It would be useful for the guidance, or any associated guidance aimed at consumers, to reference this potential new role, especially for providers who operate across the UK, who may not be aware of this development.

Question 2: Clarity of the Guidance. *Is the draft guidance clear and helpful on the relevant legal principles and the issues of concern the CMA has identified? If not, how could it provide guidance on those principles and issues more clearly and helpfully?*

The draft guidance appears to be clear and helpful. It outlines the principles which guide the approach and provides illustrative examples.

The guidance does identify that the nature of the legal services that are reserved or unreserved to the legal profession differs across jurisdictions within the UK. We understand that the guidance is intended to operate at a high level and should not be unduly technical or complex. However, we would welcome more explicit recognition that the legal systems across the UK, and therefore the procedural requirements associated with executry, will writing or divorce differ across the nations. As the guidance stands, there is a risk that companies operating on a UK-wide basis may sell consumers products that do not meet the requirements of the jurisdiction they live in and therefore do not meet their needs.

The guidance already addresses the need for providers to operate with reasonable care and skill, including having appropriate qualifications, being clear about the scope of the services offered and having in place measures to protect consumer money or assets. Additional reference could be made to providers needing to ensure that that products meet the requirements of the legal jurisdiction they will be used in. This additional factor could also usefully be added to the relevant checklists addressed below.

Question 3: Use of Checklists. *The draft guidance sets out a number of 'do and don't' checklists for businesses to follow. Are these the right ones? If not, what others would help businesses comply with consumer protection law and why? In any event, are the 'do and don't' checklists clear and easy to follow? If not, how can they be improved?*

The checklists are a useful guide for providers and it is helpful to see suggested do and don't checklists that are specific to the nature of the service. We would welcome the addition of a further point regarding the need to ensure the products sold meet the requirements of the consumer, having regard to the nature and requirements of the legal system where they live. With the potential new complaint provisions under the *Regulation of Legal Service (Scotland) Bill*, there may also be merit in reminding providers to check that they are complying with all relevant regulatory requirements, including those applying in devolved nations where they are selling products in those nations.

Question 4: Use of Case Studies. *To help businesses engage with the compliance guidance and with consumer protection law compliance more generally, we have included a range of case studies. Are the illustrative examples provided in the draft guidance helpful? If not, why not? How could they be improved? Are there any additional or different illustrative examples that would help businesses to understand how to comply with their obligations under consumer protection law? If so, what would these cover and why? If possible, provide examples of when these issues would arise.*

We welcome the case studies that have been developed and consider these are helpful in illustrating the dos and don'ts. It may also be helpful to develop an additional case study which looks at the use of consumer information to upsell other related products and illustrates where this may breach consumer law. A case study that picked up issues where there were differing legal or regulatory requirements, or procedures or practices across the nations, might also be helpful.

Question 5: *Are there any aspects of the draft guidance that you consider need further clarification or explanation, and why?*

Subject to our comments above regarding the need to further explain the differing legal jurisdictions and requirements across the UK, we do not consider that the guidance is unclear or requires further explanation.

Question 6: *Overall, is the draft guidance sufficiently clear and helpful for the intended audience? Is the language and terminology helpful? In particular, we are mindful that the majority of businesses in the unregulated legal services sector are small and medium enterprises (SMEs), many of which are micro-businesses.*

We consider the guidance is clear and helpful.

Question 7: *Are there any other comments that you wish to make on the draft guidance?* No.

Question 8: Consumer Facing Guidance. *The CMA is also considering publishing a consumer advice document at the same time as the final compliance guidance. Do you think that a consumer advice document is required in this market, and do you think the CMA would be the best placed body to provide such advice? If so, what should the scope and content of such a document be: for example, is there a need to help consumers better understand their rights and the steps they can take to address problems?*

For the reasons set out above, consumers may find it difficult to navigate redress in the unregulated legal services sector (and the legal services market more generally). Consumer Scotland would support the development of consumer facing guidance. Given the complex interaction between regulated and unregulated, and reserved and unreserved legal services, there may be merit in the CMA working with legal regulators, trade bodies, ADR providers and professional associations to develop this. A focus on complaints and redress would be helpful given that our research identified weaknesses in consumer knowledge and understanding in this area.

¹ [using-legal-services-in-scotland.pdf \(consumer.scot\)](#) The research consisted of two surveys, the first being a national sample of 1013 adults which explored people’s understanding of the legal services market and established incidence rates for both people’s experience of issues where legal support may have been needed and for their use of legal services. The sample was representative of adults based in Scotland by age, gender, social grade, urban/rural region, and Scottish region. The second survey was of 1504 adults based in Scotland who had used at least one legal service in the past 2 years. The sample was representative by the type of legal service used, based on the incidence data gained from the first survey.

² The Regulated and Unregulated Legal Services Market in Scotland: A Review of the Evidence, Europe Economics (2018) available at <https://webarchive.nrscotland.gov.uk/20191009234128/https://www2.gov.scot/About/Review/Regulation-Legal-Services>

³ For example, legal services complaints in Scotland can be brought by third parties, but they must be able to demonstrate that they have been directly affected by the poor service

⁴ <https://legalservicesboard.org.uk/wp-content/uploads/2022/10/Vulnerability-in-legal-services-research-FINAL-REPORT-v2-1.pdf>