



LEGAL SERVICES

13 JUN 2013

BOARD

11 June 2013

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Dear Chris

ICAEW's application to become an approved regulator & licensing authority

1. We are responding to you pursuant to a letter sent to the Legal Services Board (LSB) on 10 May 2013 by the Law Society, a copy of which you kindly forwarded to us on the same day and asked for comment. The letter has been sent to you in connection with the application by ICAEW to become an approved regulator and licensing authority for probate activities under the Legal Services Act 2007 (the Act), and refers to a number of concerns the Law Society has in connection with the application.
2. We should observe that the timing of the Law Society's letter appears to be rather irregular. The process that you require as the oversight body appointed by Parliament is that applicants for accreditation should put forward their proposals for public consultation before a formal submission is made to you. We complied with this element of process through a public consultation between 29 June 2012 and 7 September 2012, and as a matter of courtesy separately notified other interested bodies, including the Law Society, of this step on 29 June 2012. We did receive a letter dated 12 September from the Law Society indicating that they did not intend to respond at that point, which did puzzle us at the time as they were not on the list of subsequent consultees required under the Act. The application itself has been a matter of public record since 14 December 2012, the date it was lodged with the LSB.
3. Nevertheless, as the formal oversight body you have asked us to comment on the matters raised and this we duly do in the paragraphs below.
4. We should mention at the outset that there are two important principles underpinning the application and act as a backdrop to the responses below.
 - Firstly that the objectives of the Act section 1 are key to the processes and approach adopted
 - Secondly that the principle of proportionality should apply consistent with the LSB's own guidelines and the approach taken by Her Majesty's government as part of the red tape initiative

In our view, some of the Law Society's observations are inconsistent with the objectives of the Act or are disproportionate to the relevant consumer and public risk.

Separation of functions

5. The separation of the regulatory and member function is an important part of the Act as noted by the Law Society. The area has been the focus of much discussion between LSB advisors and ICAEW as a precursor to the application. The LSB has been mindful of its own advice within its Internal Governance Rules and the appropriate role of proportionality in low risk or low volume activities, such as probate licensing would be to ICAEW. Nevertheless certain key independence measures, most notably the independence of the Probate Committee within ICAEW and the parity of lay and non-lay members (with a lay chairman's casting vote), are steps that ICAEW has taken to meet the LSB's concern in this area. The mechanism of answerability as described in the Law Society is erroneous and the accountability of the Probate Committee if anywhere is to the LSB itself and not ICAEW as the approved regulator. This is clearly set out in paragraphs 8.14 and 8.15 of the application and in the opening paragraphs of the terms of reference for the Probate Committee at Annex 19.
6. We would also note that the Law Society expressed some concern around professional self-interest overcoming public interest. In contrast to the legal profession, the primacy of public interest is written into the 1880 founding Charter of ICAEW and has characterised the conduct of the profession ever since. This is not a new concept introduced by the Legal Services Act but something built into the DNA of the accounting profession for over a century. We understand that the LSB has taken account of this principle and philosophy in forming a view as to whether the public interest is being served.

Limitation to non-contentious probate work

7. The limitation of accreditation to non-contentious probate is an important point of demarcation, and one that is immediately recognised. The Law Society perhaps underestimates the amount of work that is already carried out by accountants in the area of estate administration which is closely linked to the issues here. The LSB in its consultations on the proposed reservation of estate administration was able to gain a wider comprehension of the role of accountants in this market, and note the checks and balances operated by ICAEW in ensuring consumer protection. One of these is the ethical code itself (repeated in the draft probate regulation 3.1) which requires accountants to only undertake work that they are competent to do.
8. We concede that the application does not make clear that a key part of the induction training will be the demarcation point between the two disciplines and the consumer remedies available. This will, however, be dealt with during the education and training of the applicant and by explaining a methodology for the accredited probate firm to comply with ICAEW Practice Assurance standards, which require firms to notify such risks and options in their letters of engagement.
9. We are not convinced by the arguments around low activity not justifying entry as a regulator. Regulatory objectives (c), (e) and (f) under section 1(1) of the Act covering access to justice, promoting competition and encouraging a diverse profession would not be easily achieved were this be accepted as a reason for not accepting a new approved regulator. Taken to its conclusion it would not allow any regulators to emerge thereby effectively frustrating these objectives.

Regulatory requirements

10. The regulatory standards quoted by the Law Society are those set out in the LSB's document Developing Regulatory Standards issued December 2011. These are concepts that drive the LSB's approach to assessing the strength of an approved regulator application, but as is also made clear in that document the objectives those standards are seeking to underpin can be supported by other means provided the outcomes are still achieved. Our application has not been built around these concepts per se, but the cross reference to the LSB's own checklists in Annex 23 to the application, combined with the commentary around regulatory objectives in section 8 do provide considerable assurance around a control environment that can meet those objectives.
11. A key example of the control environment is the Practice Assurance review which firms receive at least once every 8 years, coupled with additional risk visits where required. We understand that this is a more rigorous and complete process than that operated by other regulatory bodies and means this particular approach is more proactive and less reactive in securing better consumer outcomes.
12. In our meetings with you to discuss the applications, and in your site visits, we understand that you have been able to gain further assurance around this environment. Consequently we do not see the LSB as having failed to comply with its own guidelines set out in the Developing Regulatory Standards guidance.

Unregulated activities

13. With respect to the Law Society we do not see it as the role of an approved regulator to start regulating activities not currently regulated by law. Although Section 85(7) of the Act allows for restrictions to be imposed on non-reserved activities, it was not intended to act as a carte blanche to extend reservation through the back door. That would be to usurp the powers of Parliament and indeed could be construed as an attempt to first guess the LSB as the body which makes recommendations on that aspect of law. Indeed such steps could be construed as a restraint of trade. Our application makes clear at section 5.141 that it does not place any restriction on unreserved activities conducted by an accredited probate firm.
14. We have also noted in section 5.142 that such impositions would also create imbalance in the market place and be in conflict with the regulatory objectives.
15. Notwithstanding the above, in order to mitigate any risk to the consumer in connection with the conduct of probate itself, ICAEW has proposed that a firm's estate administration services will come within the scope of the Practice Assurance scheme where they form a significant part of a firm's fee income. Further, the PII and compensation arrangements for accredited probate firms will extend to both probate and related estate administration activities.

Scope of regulation

16. It has been a concern of ours throughout that the consumer could be confused by the differing remedies possible as a consequence of a partially regulated firm. Our move to seek the same appeal process for authorised firms as for licensed firms is an example where we have sought consistency for the consumer. The approach to the Legal Ombudsman (LeO) is no different in this respect. We are in discussion with LeO as to the most effective way of handling complaints, but it is clear at the outset that any service complaint relating to a firm's legal activities would be dealt with by LeO. The letter of engagement is a key step in this process and appropriate paragraphs setting out differing complaint remedies will be agreed with LeO prior to being shared with accredited probate firms. This proactive approach will reduce the risk of the circumstance of a stranded consumer suggested by the Law Society.

Regulation of non-accountants

17. Our draft application had indeed restricted the regulation to accountancy firms. However, upon further consideration of the wider statutory objectives, particularly those of increased competition and access to justice, we have made provision to include non-accountants as applicants. We are deemed competent by other oversight bodies (the Financial Reporting Council, the Insolvency Service and the Financial Conduct Authority) to regulate the substantial reserved activities of audit, insolvency and financial advice, and believe that we can apply the same rigour to both accountancy and non-accountancy firms for the reserved legal activity of probate. In addition there would seem to be some inconsistency if the SRA were able to license accountancy firms (as in the recent example of Price Bailey) and yet the reverse was not able to be applied.

Education & Training

18. The focus of the application has been around the licensing of member firms of ICAEW to carry out the activity of probate. In this respect the ACA qualification combined with a relevant course (regulation 4.1(a)) or other qualifications recognised by another approved regulator are expected to be the prime qualification assessment of applicants. The initial education and training is outlined in scope in the application, but as noted in paragraphs 7 and 8 above, these processes will cover both contentious and non-contentious probate, and the practice steps necessary to manage this area to the extent that applicants will be able to identify and advise accordingly on, for example, potential claims against an estate and the likelihood of them arising; a defective will and how to remedy such defects where possible; the interpretation and effect of the will and possible disputes as to its validity.
19. In respect of those without the ACA qualification, and without the recognition of other bodies, the approach is likely to be rigorous and will require evidence that an applicant's qualification has ensured that they have the skills and knowledge required to practise in non-contentious probate. We will therefore look to ensure that they have the relevant knowledge and skills acquired by applicants applying under Probate regulation 4.1(a).

Professional Indemnity Insurance

20. It would appear that the Law Society have confused our general requirements for firms under the PII regulations, with the specific requirements for accredited probate firms under Probate regulation 2.10. That is to say that they should comply with the PII regulations, but carry a minimum limit of indemnity of £500,000 per claim in relation to probate and estate administration activities. Further, firms are under a prior obligation to carry out a risk assessment to consider the level of PII that is appropriate for them, irrespective of the minimum limit of indemnity (see PII regulation 2.10). This should take into account a range of factors such as, *inter alia*, the size of the firm, the client base, the nature of their work, their turnover and so on.
21. We would also question the translation of legal profession experience in the area of PII claims to the area of accountancy. The claims history for ICAEW firms as commented upon in the application has been low and the area of estate administration has not been a significant part of the claims history.

Probate Compensation Scheme

22. The compensation scheme has been designed in ICAEW against a backdrop of very little claims history in the area of estate administration. The scheme is not boundless, but does afford the consumer protection in this area, and sufficient for that consumer to make an informed choice, as this capacity will be made clear in engagement letters. We believe the

steps here, which have been debated with the LSB and the Legal Services Consumer Panel as the application has been formalised, are proportionate to the consumer risk in this area.

Code of ethics

23. We are slightly puzzled by the comments made here concerning the code of ethics. Protection of the public interest is set out as the first regulatory objective in Section 1(1) of the Act and whilst the fourth refers to the consumer, it is not defined in the Act which if any of these objectives should take precedence. The SRA may have chosen to place the consumer interest alongside public interest for their regulations, but that is not the approach of ICAEW for whom public interest has been an over-riding factor since incorporation in 1880. We do not see the Act as directing a change in approach and we do not see the SRA as a body determining our own policy in this area.
24. The Law Society has drawn attention to conflicts of interest involving tied arrangements. These have been the subject of regulation by ICAEW for a number of years through the disciplinary byelaws and Practice Management regulations, and have been particularly rigorously applied through the regulation of audit not only in the UK but by the US and EU regulatory authorities. The firms we regulate as well as the regulatory oversight are well-skilled in managing this important part of ethical performance. As matter of completeness we would refer to section 240 of the Ethical code set out in appendix 8 to the application which mirrors the international standards in this area set by the International Ethics Standards Board of Accountants (IESBA).
25. Equality and diversity requirements have been addressed in the application at sections 5.46 to 5.52 and in the draft application form at section 21. The application of diversity and equality is a natural outcome of Ethical Standard 150 on behaviour.
26. Cooperation with the regulator is a requirement of the Act which is mirrored in the draft probate regulations chapter 2 and 3. Management of the business is built into the requirements of the Disciplinary Byelaws, the Ethical Standards and the Probate Regulations, quite apart from being part of the practice management regulations of ICAEW.

Client Money Regulations

27. The amount of £10,000 is applied across the other regulatory sectors that we service such as insolvency and financial services. The oversight regulators are content with our oversight arrangements. The regulations attached as Annex 12 to the application give as guidance in note 13 the appropriate proportionate steps which are deemed reasonable to trace a client – in other words relying on common sense.
28. Jointly held accounts are not a natural feature of accountancy firm arrangements. It would be difficult to regulate a client in these circumstances. Abilities to sign on a client held account are monitored through the annual return and are addressed in paragraph 4 of the Client Money Regulations also at Annex 12.

Fit and proper test for owners and HOLPs

29. We are proposing to carry out basic Disclosure and Barring Checks (DBC, formerly known as CRB) for individuals authorised for probate in accordance with Probate regulation 4.1(c). These will not disclose spent convictions and cautions. We are proposing the 'next level up' – ie, standard DBC checks – for applicants for HoLP, HoFA and NAP status, but only because we will have an exemption from the Rehabilitation of Offenders Act 1974 to run checks on these people as a licensing authority.

Intervention powers

30. The information on intervention powers is limited as hitherto the experience of this occurring has been limited. The quality assurance visiting of firms at least every 8 years, coupled with pro-active inspections on identification of risk, considerably reduces the risk of intervention being required. The additional powers being secured under the Act concurrently with the application are being developed closely with the LSB and the Ministry of Justice to provide extra security, should it be required, partly at the recommendation of the LSB, rather than leaving them to be secured at a later stage when the application process would be more difficult.

Complaints

31. The Law Society underestimates the reach that LeO has in the handling of complaints in this area. Prima facie LeO will have jurisdiction for determining all complaints about legal activities carried on by accredited probate firms (chapter 7 of the Probate Regulations). The Law Society is referring here to ICAEW's usual complaints processes for non-legal complaints.

Conclusion

32. We have sought to answer as best we may the questions that the Law Society has put to you regarding the application. For the most part we believe these are issues that you have already addressed with us and have included in the documentation that supports the application. Should you require any further clarification or comment you are welcome to contact us.

Yours sincerely



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