

To:	Legal Services Board	Agenda Item: 8
Date of Meeting:	28 April 2017	Paper Item: Paper (17) 26

Title:	Institute of Chartered Accountants in England and Wales (ICAEW) applications for designation as an approved regulator and licensing authority for reserved legal activities
Work stream(s):	Statutory Decisions
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Status:	Protect

Summary:

This paper sets out LSB's assessment of the ICAEW's applications seeking a recommendation to the Lord Chancellor to be designated as an approved regulator and licensing authority for further reserved legal activities (**RLA**).

We are bringing this paper to the Board because it is a matter and decision that is entirely reserved to it. The paper summarises the assessment of the applications and our view, for the Board's consideration, that the ICAEW has met the criteria for approval for both designations as set out in the Legal Services Act 2007 (**the Act**) and, the Rules for Applications for Approved Regulator and Qualifying Regulator designation (1 April 2011) and Rules for applications to be designated as a licensing authority (13 June 2011) (**LSB's Designation Rules**).

It recommends that the Board approve the ICAEW's application for a recommendation for designation as an approved regulator for reserved legal activities. It then recommends the approval of the second application for a recommendation as a licensing authority. It also recommends that the regulatory arrangements and licensing rules are approved.

The full application (which combines both the approved regulator and licensing authority parts) is not included in this paper but is on the [LSB website](#), where it has been published since 10 August 2016. A copy can be provided to any Board member and will be available at the Board meeting.

Recommendation(s):

The Board is invited to:

1. Determine (under paragraph 14(1) of Schedule 4 to the Act) the ICAEW's application for a recommendation to the Lord Chancellor for designation as an approved regulator for further reserved legal activities.
2. To approve the proposed regulatory arrangements (which will come into effect in the event that a designation order is made).
3. If the first application is granted, to determine (under paragraph 12(1) of Schedule 10 to Act) the ICAEW's application for a recommendation to the Lord

Chancellor for designation as a licensing authority for further reserved legal activities.

4. To approve the proposed licensing rules (which will come into effect in the event that a designation order is made).

Risks and mitigations

Financial: N/A

Legal:

[REDACTED]

Reputational:

If the Board grants the application (and assuming that the recommendation is accepted by the Lord Chancellor) the timetable for designation will not be within the control of the LSB. The LSB may nevertheless be seen as the cause of the delays should they arise.

The recommendation is not consistent with the advice of the Lord Chief Justice so may attract public comment; we will be writing to the LCJ to explain how we have considered his advice.

Resource:

Once the decision is made by the Lord Chancellor the LSB's work is manageable within our usual activity.

Consultation	Yes	No	Who / why?
Board Members:	√		A draft of the Paper was shared with Marina Gibbs
Consumer Panel:	√		It is a statutory requirement to seek advice from the Panel as a mandatory consultee (see Schedule 4, Part 2, paragraph 7 and Schedule 10, Part 1, paragraph 5 to the Act).
Others:			It is a statutory requirement to seek advice from The Lord Chief Justice and the Competition and Market Authority (see Schedule 4, Part 2, paragraphs 6 and 7 and Schedule 10, Part 1, paragraphs 4 and 7 to the Act).

Freedom of Information Act 2000 (Fol)

Para ref	Fol exemption and summary	Expires
Risks and mitigations: Legal	Section 42: information subject to legal professional privilege	

LEGAL SERVICES BOARD

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Applications from the ICAEW for designation as an approved regulator and licensing authority for reserved legal activities

Introduction

1. The ICAEW submitted two applications to the LSB on 20 July 2016 to become an approved regulator and licensing authority for further reserved legal activities (**RLA**). Schedule 4, 15(2) and Schedule 10, 13(2) of the Act requires that the LSB must give a decision on an application within 12 months beginning with the day the application is made to the Board.
2. The first application has been made under Part 2 of Schedule 4 to the Act for designation as an approved regulator, and the second application is for designation as a licensing authority, under Part 1 of Schedule 10 to the Act.
3. The applications, if granted, will allow the ICAEW to authorise firms¹ to undertake reserved legal activities as either:
 - an authorised firm in which all principals and owners are individually authorised; or
 - a licensed firm (Alternative Business Structure (**ABS**)) in which not all principals and owners are authorised.
4. This paper summarises our assessment of the applications and confirms our view that the ICAEW has met the criteria set out in the Act and the LSB's Designation Rules for both applications.
5. We recommend that the Board grant the application for ICAEW's designation as an approved regulator under Part 2 of Schedule 4 to the Act and approve the associated regulatory arrangements. If that recommendation is accepted, we then recommend that the Board approve the designation of ICAEW as a licensing authority under Part 1, Schedule 10 of the Act and approve the licensing rules.
6. If the applications are granted, we will make our recommendations to the Lord Chancellor² who will have 90 days to decide whether to accept the recommendation and decide to make designation orders.

¹ A sole practitioner, a partnership or body corporate accredited to conduct probate work under ICAEW's Probate Regulations. This includes both ABS and Non-ABS probate firms.

² Under Schedule 4, Part 2, paragraph 16 (2) and Schedule 10, Part 1 paragraph 14 (2) to the Act.

Scope of application

7. The reserved legal activities the ICAEW wishes to authorise as an approved regulator and licensing authority are:
 - Conduct of litigation
 - Rights of audience
 - Reserved instrument activities
 - Notarial services
 - Administration of oaths.
8. In relation to the first three activities, it is restricting the scope of regulation to taxation services.
9. In accordance with the principles of better regulation, and for the purposes of consistency, the ICAEW has developed, where possible, a single regulatory framework that will apply for the most part equally to authorised firms and licensed firms (ABS) wishing to undertake reserved legal activities. In the limited circumstances where additional requirements apply only in respect of licensed firms (for example, fitness to own tests, ownership, appointment of a Head of Legal Practice and Head of Finance and Administration) this is to comply with requirements of the Act.

Background to the applicant and rationale for the applications

10. The ICAEW is a chartered body. It was founded by Royal Charter in 1880 and received a Supplemental Charter in 1948. It is an experienced regulator with responsibilities under statute in the areas of audit, which is within the remit of the Financial Reporting Council (**FRC**), and insolvency, which is overseen by the Insolvency Service (**IS**). The ICAEW's responsibilities also extend to investment business; in January 2012, the ICAEW became an accredited body under the Financial Services Authority (now the Financial Conduct Authority) Retail Distribution arrangements (having previously been a designated professional body).
11. In August 2014 the ICAEW was granted designation as an approved regulator and licensing authority for probate activities and started accrediting³ firms for probate activities in September 2014. As of January 2017, the ICAEW had received 301 applications (105 for authorisation and 196 for licensing) and it had accredited 250 firms (83 authorised and 167 licensed)⁴. The ICAEW is the second largest licensing authority.
12. The ICAEW's rationale for making these applications is that it will build on its success in regulating probate firms, and in doing so further the promotion of

³ Accredited is the term used by the ICAEW to describe authorised and licensed bodies collectively

⁴ Figures provided by ICAEW in January 2017

competition in the market. The ICAEW believes that work currently being carried out by accountancy firms would be complemented by the further reserved legal activities it seeks. It cites its research that 18 out of the top 20 accountancy firms conduct tax investigation work and provide services relating to tax evasion/fraud and financial crime as part of their litigation support/forensic services⁵.

13. In short, the ability for ICAEW regulated firms to conduct reserved legal activities restricted to taxation would be a natural adjunct to the current services they provide. By way of examples, ICAEW have pointed out that accountants currently represent clients before tax tribunals; and debt recovery cases brought by HMRC in the civil courts can include debt and personal bankruptcy proceedings.
14. ICAEW has indicated in its application that there is demand from ICAEW firms to apply for accreditation to carry out the further reserved legal activities, particularly firms with between 6-50 partners. However, the research also indicated that the level of demand fell once information on the likely costs was introduced⁶.

Alterations to the Legal Services Regulations

15. In December 2016, the ICAEW submitted changes to the application and alterations to the Legal Services Regulations. Primarily these were concerned with the regulation of individuals conducting litigation and rights of audience. The ICAEW has concluded that at this stage the demand for individual authorisation is too uncertain to commit resources to developing the necessary qualifications. Therefore, it plans to authorise and license entities to offer these activities where those entities employ individuals holding practising certificates for the relevant activity from another legal services approved regulator or licensing authority. Should the ICAEW decide to alter its approach to authorising individuals undertaking litigation and rights of audience in the future, it would need to submit a rule change application to the LSB.

Process of assessing the applications

16. The following bullet points summarise the steps taken by LSB in assessing the applications:
 - an initial assessment of the applications against the LSB designation rules
 - a detailed review of the applications against the criteria for designation set out in the Act

⁵ Source: ICAEW Application Research Section paragraph 4.12

⁶ Source: Annex 28 of ICAEW application - Report on Survey, Application to Regulate Further Reserved Legal Activities

- development of an 'Issues Log' to ensure that matters we identified were considered and we have an audit of the conclusion we reached or how each issue was resolved
- meeting with a team from the ICAEW Quality Assurance Department (QAD) to review existing supervision processes, systems and controls
- a meeting with the lay-Chair (non-accountant and non-lawyer) of the Probate Committee during which we discussed his experience and views on the role of the Probate Committee and transition to the proposed Legal Services Committee.

Assessment of the applications against the criteria for approval in the Act and the LSB's Designation Rules

17. The table at **Annex A** is a summary of the criteria to be satisfied for designation as an approved regulator as set out in Schedule 4, Part 2, paragraph 13 of the Act and the LSB's Designation Rules. The table at **Annex B** sets out our assessment of the ICAEW's application against the criteria for designation as a licensing authority as set out in Schedule 10, Part 1, paragraph 11 of the Act and the LSB's Designation Rules.
18. During the process of the LSB's assessment, we identified specific parts of the applications, which required further analysis.

Independence of the ICAEW's governance structures in relation to RLA

19. This is perhaps the most important and potentially contentious issue in respect of these applications. The criteria on independence for both the approved regulator and licensing authority applications is that the applicant must have appropriate internal governance arrangements at point of designation; regulatory functions must not be prejudiced by representative functions; and as far as reasonably practical, regulatory decisions must be taken independently of representative ones.
20. In addressing governance and independence, there were two questions the LSB needed to resolve:
- Should the ICAEW continue to fall outside the definition of an applicable approved regulator (AAR) and therefore not be subject to the full LSB Internal Governance Rules (IGRs)?
 - Are the ICAEW's internal governance arrangements sufficient to satisfy the IGRs?

Does the ICAEW continue to fall outside of the definition of an AAR?

21. An AAR is defined in the IGRs as “an approved regulator that is responsible for the discharge of regulatory and representative functions in relation to legal activities in respect of persons whose primary reason to be regulated by that Approved Regulator is those person’s qualifications to practise a reserved legal activity that is regulated by that Approved Regulator”. ICAEW members’ primary reason to be regulated by ICAEW is their Associate Chartered Accountant (ACA) qualification which enables members to practise as a Chartered Accountant; the primary reason is not to carry out reserved legal activities.
22. There is a category of “affiliate membership” which is for individuals who do not hold an accountancy practising certificate fee but who are required to observe the rules and regulations of the ICAEW which is relevant to these applications. Lawyers delivering legal services through ICAEW accredited entities who hold practising certificates for legal services issued by another legal services approved regulator or licensing authority will become affiliate members of ICAEW. While affiliate members are required to pay regulatory fees to ICAEW and have access to a number of services, they do not pay an ICAEW practising certificate fee and the ICAEW does not carry out any representative type functions for them.
23. We have therefore concluded that the ICAEW continues to fall outside of the definition of AAR and that the full schedule to the IGRs does not apply.

Are the ICAEW’s internal governance arrangements sufficient to meet the IGRs?

24. Our view is that the external concern about independence perhaps reflects a misunderstanding about ICAEW’s governance arrangements. Following a review by Sir Christopher Kelly in 2013 the ICAEW Regulatory Board (IRB) was established to enhance the distinction between the ICAEW’s representative and regulatory functions. The IRB has a greater degree of independence from the rest of ICAEW and is responsible for overseeing the development of ICAEW policy on professional standards, including discipline. The Professional Standards Department which is responsible for delivering all ICAEW licensing and discipline work, including that related to legal services and is accountable to the IRB. The IRB has an equal number of accountant and lay members; its chair has to be a lay member and is currently Michael Caplan QC (ICAEW’s usual definition of lay is to have never qualified or practised as an accountant). Unlike its predecessor, the Professional Standards Board (PSB), members of the ICAEW Council and ICAEW Board are not eligible to sit on the IRB.
25. The IRB was not in place at the time of the first designation. Since the then arrangements for the leading governance body, PSB, were not in the spirit of our expectations about independent governance, a new approach was adopted for legal services regulation. A separate Probate Committee was established which

has equal lay and non-lay membership with the Chair being lay and having the casting vote. The terms of reference for that Committee contain the following definition

“A lay member is defined as a person who has never qualified or practised as a professional accountant. Solicitors or persons with legal training cannot be lay members”.

26. The Probate Committee oversees the delivery of legal services regulation through the reports it receives and (as is the case for all ICAEW committees) through Committee members inspecting the work on site. It is currently the only ICAEW committee that produces an annual report of its activities.
27. In granting the first ICAEW applications, the Board concluded the arrangements were proportionate given the limited regulatory scope and were capable of delivering independent regulation.
28. The ICAEW has decided to continue this approach, not least because the current chair of the IRB is a qualified lawyer. The new Legal Services Committee (LSC) will consist of no fewer than 12 members, split equally between lay and non-lay members, with a lay Chair who will have a casting vote. Like its predecessor, the Probate Committee, the LSC will approve all regulations that apply to legal services and has a role in the development of legal services regulatory policy. As we have concluded that the ICAEW continues to be outside the definition of an AAR, we have judged that these arrangements are appropriate.
29. In the assessment we have considered not only the nature of the governance arrangements but how they have been delivered. In particular, we noted that the Probate Committee’s low profile might contribute to the perception that probate regulation was not wholly independent from the ICAEW. If these designations are granted and more legal services are delivered through ICAEW, its regulation of those activities should be subject to enhanced scrutiny and in particular, if the proposed arrangements are agreed, then there needs to be greater transparency about the nature of the governance arrangements.
30. ICAEW have accepted this point. It recognises that while legal services regulation will still be a small part of its activities, its position as a legal services regulator may change (it is already the second largest licensing authority). The ICAEW also recognise and agree that the new LSC will need to have a higher profile than the Probate Committee had. The LSC will be a new Committee (rather than the Probate Committee with expanded terms of reference and membership). The selection criteria for the Chair will include the ability to engage at an executive level with external stakeholders. The members of the new committee will bring a much broader legal services expertise and experience. Indeed, the selection criteria will specifically include the ability to contribute to the development of legal services regulation. The recruitment of the new Chair will be through a process which meets the requirements of the LSB’s IGRs.

31. We acknowledge that there is scope for the LSC to adopt a much more robust and proactive role going forward than was the case with the Probate Committee. We are encouraged by ICAEW's commitment to enhance the role of the LSC. In addition, the LSB will maintain closer oversight of how independence operates in practice at the ICAEW, through half yearly meetings with the Chair of the LSC, just as we do with the Chairs of the other approved regulators.
32. We recognise that the decision for this application is more finely balanced than it was for the probate application, given the increased scope of regulation proposed. However, after careful assessment and consideration, it is our judgement that the independence arrangements of the ICAEW continue to be proportionate. Furthermore, in terms of setting the structural arrangements against the LSB's IGRs, we consider that the governance requirements are met.
33. This conclusion is based on the current IGRs. If the planned review of the IGRs leads to changes, we will need to review the ICAEW arrangements.

Scope of taxation and regulatory arrangements

34. For the conduct of litigation, rights of audience and reserved instrument activities, the ICAEW will be restricting its scope of regulation to taxation services only. The definition of taxation services and the scope is described in the ICAEW application at paragraphs 4.42 – 4.52. The definitions of Tax, Tax Authority and the work under the specified RLAs are explained in the proposed Legal Services Regulations at para 1.6 and the ICAEW have stated that they intend to provide further guidance on RLAs (application paragraph 4.52(a)(i)).
35. Having sought the view of relevant colleagues, there is nothing in the definition itself that causes us concern; no fundamental gaps or difficulties in the way the ICAEW have described tax activities were identified. We also take some assurance from ICAEW that it instructed Counsel to specifically and clearly define in the regulations each of the further reserved legal activities that are restricted to taxation services only.
36. We did have a more general concern about how practitioners and consumers would know what was in scope and that there may be a risk of firms straying beyond tax matters. ICAEW has experience from its wider activities of policing the regulatory boundary and has an extensive understanding of the tax sector. Indeed, ICAEW consider the tax area is potentially clearer than probate to regulate, as it is rooted in tax legislation. ICAEW recognise the need to be clear as to where the boundary of tax activity lies, as this will be essential in determining whether a breach has occurred and whether it needs to take disciplinary action. ICAEW reviewers who undertake inspections (see section on Quality Assurance below) are trained to detect where firms are providing services

beyond the scope of their accreditation (for all ICAEW activities) and will be provided with specific training in relation to taxation and legal activities.

37. Inevitably this is a fit for purpose assessment and the robustness of the definition and the policing of the boundaries will only be tested if ICAEW accredited firms are permitted to offer these service. We are satisfied that the ICAEW has appropriate arrangements in place to exercise effective oversight of this.

Regulation of notaries

38. The ICAEW said in its application that it understood that the Master of the Faculties (MoF) was of the opinion that it would not be possible for another regulator to regulate notarial activities.

39. Notarial activities is defined in Schedule 2, paragraph 7 of the Legal Services Act 2007. We therefore asked the Faculty Office to clarify its position. The Faculty Office confirmed that, in terms of the substantive legal issue it was not arguing that there is a legal bar on any other organisation being designated as an approved regulator of notarial activities. Rather, it cites the statutory provision limiting recognition as a 'public notary' to those individuals who have been enrolled by the Master. The Faculty Office accepts that Legal Services Act 2007 explicitly removed the statutory provision limiting to those enrolled individuals the power to perform any 'notarial act'. As a matter of law, therefore, the ICAEW is clearly entitled to seek designation to authorise and regulate notarial services.

40. There were public interest arguments raised by the Master of the Faculties and in separate submissions made to us by the representative Notaries Society and The Society of Scrivenor Notaries (and these submissions were also sent to the Lord Chief Justice). Three themes emerged:

- The exercise of independent judgement on the part of the person providing notarial services.

We note these public interest concerns and the perceived risk that independent judgement could be compromised. Since all notaries working in ICAEW accredited entities will have individual authorisation from the MOF, we consider that this is a low risk and there are adequate safeguards in place to ensure, as far as reasonably possible, that the independent judgements of notaries working in ICAEW authorised firms would not be compromised.

- Whether as a result of the proposals the respect and prestige enjoyed by English and Welsh notaries abroad would be diminished.

Similarly, we note the comment about "prestige and respect". Again, since all notaries carrying out notarial activities will be authorised by the MoF, we consider this to be a low risk that the fact that the individual is

working with an ICAEW accredited firm will have an adverse impact on the quality and credibility of the service.

- Impact on regulatory objectives: the MoF contend that there is no evidence of demand for notarial services from accountancy firms and therefore no evidence that in allowing this application it would promote the regulatory objectives.

Research from the ICAEW suggests that there is demand for such services from accountants; the extent of this will only become apparent if the designation is granted. If such services are available from ICAEW accredited firms, our view is that this is likely to have a positive impact on competition, access to justice and encouraging a diverse profession. The regulatory arrangements are sufficient to mitigate any negative impact.

Quality Assurance

41. As part of the assessment process we met with the ICAEW Quality Assurance Team to increase our understanding of how ICAEW assures itself that those that it regulates are operating within the rules. The Quality Assurance Department is part of Professional Standards Department and is responsible for delivering the ICAEW's Practice Assurance Scheme. From the meeting we were satisfied that

- The team undertaking visits are suitably qualified and receive appropriate training
- there is a system that identifies when a Practice Assurance visit is needed – either on a cyclical basis or as a result of a risk assessment
- there are appropriate internal quality assurance arrangements which can ensure that the correct issues are being identified and appropriate action is taken, including reporting cases to the relevant ICAEW committee if necessary
- the QAT are aware of the risk of advice being offered that is beyond the scope of the firms accreditation; this is something that is a common feature in all areas of QAT Assurance Visits.

42. QAT is preparing itself for the extension of the legal services scope with plans to provide further training to QAT and recruitment of additional experienced team members should the number seeking accreditation be higher than anticipated.

43. Overall, as a result of our assessment and the meeting with the QAD team we are reassured that the ICAEW has longstanding independent regulatory systems and processes in place, and flexibility to respond to the new challenges associated with firms undertaking taxation related reserved legal activities and for effective monitoring and supervision of firms.

Requests for advice to the mandatory and selected consultees⁷

44. The Act requires the LSB to seek advice from mandatory consultees in relation to all designation applications. These bodies are the Competition and Markets Authority (**CMA**), the Legal Services Consumer Panel (**the Panel**) and the Lord Chief Justice (**LCJ**).
45. The Act also allows the LSB to seek advice from selected consultees when considering a designation application, however, we did not consider this necessary for this application.
46. This section summarises the advice that was given. All the advices and the ICAEW representations have been published on the website. Copies will be available at the meeting.

Competition and Markets Authority

47. The CMA made the following points:

- It found no evidence to suggest that the ICAEW becoming an approved regulator or licensing authority for RLA would prevent, restrict or distort competition within the market
- allowing ICAEW to authorise and license entities to undertake the further reserved legal activities may strengthen competition e.g. firms accredited by the ICAEW could act as an alternative to traditional suppliers in the conduct of these reserved activities.
- accountant firms would be able to offer a more integrated service to customers, complementing the tax services which accountancy firms are already providing.
- the increase in firms providing legal services would increase competitive pressure on pricing and consequently broaden access to justice. This could reduce the cost of legal services and reduce delays in the provision of those services.
- the CMA noted concerns which relate to the potential for confusion about the scope of taxation services but the CMA considers that the positive effects of new entry into the market are likely to outweigh these concerns.
- The only circumstances in which the CMA might take a different view is if the ICAEW's regulatory scheme distorted competition between ICAEW-regulated providers and other regulated legal providers. However, if the LSB is satisfied that the ICAEW's proposed regulatory scheme is appropriate and adequately protects consumers, the CMA believes that a distortion of competition is unlikely to arise in practice.

⁷ Links to each of the advices provided by the mandatory consultees may be found on the LSB's website here: http://www.legalservicesboard.org.uk/Projects/statutory_decision_making/icaew.htm.

48. In its representations, the ICAEW welcomed the CMA's positive comments in respect of competition. In respect of the CMA referring to the consumer concerns of other stakeholders, the ICAEW said it was confident, for the reasons set out in its application, that its regulatory framework will provide sufficient consumer protection.

49. Neither the advice from the CMA nor the ICAEW representations raise any issues that prevent us making the recommendation. We are satisfied that the regulators provide sufficient consumer protection.

The Legal Services Consumer Panel

50. The Panel was broadly supportive of the ICAEW's application and made the following key points:

- it welcomed attempts to stimulate competition in the legal services market and accepted that by enabling consumers to use the same provider for various legal services was a potential cost saving for clients.
- on independence it believed that the safeguards needed to be greater than those for the restricted area of probate.
- With regard to consumers, the Panel had some concerns as to how limitation to taxation matters may operate in practice, and how the limitations may be communicated to consumers.
- the Panel expressed concern about client money that this can be placed in accounts outside the UK. It said that money placed in accounts outside the UK, and particularly outside the EU, may not have the same protections as those in the UK.

51. The ICAEW noted in its representations that the Panel was broadly supportive of the application. It re-stated and defended its governance and independence arrangements. With regard to consumers, it said ICAEW research had indicated that that most, if not all, consumers would be either business clients or sophisticated private clients/high net worth individuals. This information enabled ICAEW to clearly define in the Legal Services Regulations what services an accredited firm can and cannot provide. On client money being placed in overseas bank accounts, the ICAEW says that its client rules already includes safeguards to cover client money in overseas bank accounts.

52. Neither the advice from LSCP nor the ICAEW representations raise any issues that would prevent us from making the recommendation. We note the comments about independence; our views on the arrangements are set out in paragraphs 19 to 33 above. We consider that the Quality Assurance programme will ensure that the limits to taxation advice are met and properly communicated to consumers and that the controls and disclosures in relation to client money are adequate to secure consumer protection.

The Lord Chief Justice

53. The advice from the Lord Chief Justice (LCJ) was received at the beginning of February and was based on the original application and subsequent amendments. In accordance with the requirements of Schedules 4 and 10, he also had the opportunity to review the advice from the CMA and the LSCP. He also received a similar submission to us from the representative societies of the notaries.
54. The LCJ repeated concerns of his predecessors that regulatory competition could have a negative effect on standards and that “shopping around” for the least restrictive regulatory regime should be avoided. Currently authorised and licensed persons can switch between regulators but LSB research shows that there is generally limited activity and hardly any in relation to ICAEW. Since the ICAEW’s designation for probate, it has been ICAEW members who have sought accreditation. The fact that ICAEW is currently only designated for probate is likely to be a major factor in this and this could change if it is designated for a wider range of activities. That said, the limitation in some activities to taxation related matters is likely to discourage firms from switching to ICAEW. We can monitor this through the section 55 notice information request on regulator switching.
55. In relation to standards of regulation, our existing and planned work on regulatory performance will help to ensure that a minimum acceptable standard is achieved by all regulators.
56. The LCJ does not raise any issues in relation to reserved instrument activities (restricted to services related to taxation) nor administration of oaths. In relation to conduct of litigation, rights of audience and notarial activities, he made the following comments.
57. Given his role, the LCJ is understandably concerned with the maintenance of standards of conduct and ethics which impact on the tribunals and courts of England and Wales. Currently ICAEW members can represent clients before the tax tribunals of the General Regulatory Chamber and provide expert litigation support to solicitors relating to both civil and criminal actions. In doing so, there is no evidence that conduct and ethics have been raised as issues of concern. Widening the scope of ICAEW regulation to include conduct of litigation and rights of audience does change the risk. However, we think the risk is effectively mitigated since, at least at the outset, all individuals within ICAEW regulated firms delivering these activities will be subject to the professional conduct standards of their individual regulator.
58. LCJ expressed his serious concern that it is premature to seek designation if the ICAEW has no immediate plans to develop qualifications to authorise individuals for the conduct of litigation and rights of audience. This lack of information on the qualification regime means that the LCJ does not feel that he is in a position to

properly advise on the impact on courts and tribunals. In our view, the ICAEW decision not to develop qualifications at this time, given the degree of uncertainty for demand, seems sensible. Nevertheless, it does need to be designated if it is to be able to accredit entities and enable these to deliver the further reserved activities through individuals who are qualified under other approved regulators' arrangements.

59. It is expected that most entities seeking ICAEW accreditation will be licensable bodies and therefore, ICAEW will need to be a licensing authority. Schedule 10(1)(3) to the Act requires that a body can only be designated as a licensing authority in relation to reserved legal activities for which it is (or has applied to be) designated as an approved regulator.
60. The LCJ advice identified the risk that individuals and consumers could be confused as to which body is responsible for regulation if individuals within the entity are subject to separate professional conduct rules. This was an issue that we had identified and which, following discussion with the ICAEW, has led to an amendment of the Legal Services Regulations to clarify the position. Under section 52 of the Act, where there is a conflict between the requirements of the entity and individual regulation, then the requirements of the entity regulator prevail. The ICAEW would be able to take action against both the entity and the individual (who will be an affiliate member of ICAEW) in the event that there is a breach of ICAEW regulations. Any breach that might amount to professional misconduct can be referred to the relevant individual regulator for consideration. This situation can arise currently (for example, in relation to a Chartered Legal Executive working in a solicitors firm) and there is an established Memorandum of Understanding between all of the regulators to deal with such situations.
61. On balance, having carefully considered this advice, our view is that there are effective controls and mitigations to address the significant issues raised by the LCJ and that these allow us to proceed with the recommendation. We will write to the Lord Chief Justice to explain how we have taken account of his concerns and our conclusions in the light of his advice.

Conclusion and recommendations

62. Having completed the assessments of the applications over a period of nine months, we are satisfied that the arrangements that the ICAEW will put in place if it is designated for these further reserved legal activities meet the requirements of our rules and, in relation to the licensing authority application, the requirements of the Act.

63. The Board is invited to

- Determine (under paragraph 14(1) of Schedule 4 to the Act) the ICAEW's application for a recommendation to the Lord Chancellor for designation as an approved regulator for further reserved legal activities.
- To approve the proposed regulatory arrangements (which will come into effect in the event that a designation order is made).
- If the first application is granted, to determine (under paragraph 12(1) of Schedule 10 to Act) the ICAEW's application for a recommendation to the Lord Chancellor for designation as a licensing authority for further reserved legal activities.
- To approve the proposed licensing rules which will come into effect in the event that a designation order is made).

28 April 2017

Annex A – Assessment of ICAEW for designation as an approved regulator

Criteria for designation as an approved regulator	Summary of the LSB assessment	MET or not MET by the applicant
<p>Appropriate internal governance arrangements at point of designation; regulatory functions not be prejudiced by its representative functions; as far as reasonably practical, regulatory decisions be taken independently of representative ones.</p>	<p>The LSB is satisfied the arrangements for the Legal Services Committee (LSC) will allow it to operate independently from the representative functions of the ICAEW.</p> <p>The ICAEW is not an Applicable Approved Regulator (AAR) under the LSB’s Internal Governance Rules (IGRs) and so is not required to adhere to the LSB’s full IGRs. The ICAEW must ensure their governance arrangements are in the spirit of independence and we are satisfied that the arrangements are capable of delivering this.</p> <p>There is further comment in this paper, including an explanation of ICAEW’s definition of lay, which <u>excludes</u> both accountants and lawyers. The ICAEW definition goes one step further than the definition of lay person within Schedule 1, paragraphs 2(4) and (5) of the Act which excludes lawyers only (as authorised persons), but not accountants.</p>	<p>MET</p>
<p>Applicant competent has sufficient resources to perform the role of approved regulator in relation to reserved legal activities.</p>	<p>The LSB is satisfied that the ICAEW is competent and has sufficient resources in which to regulate RLA.</p> <p>This assessment is based on a review of ICAEW’s regulatory capacity and capability; resources; budget and fees scale for RLA firms. We conducted a meeting with the Quality Assurance Team to gather information in relation to the approach to authorisation and supervision, and inspection visits.</p> <p>The ICAEW is a well-established regulator of accountancy services and since 2014 of probate. Much of the regulatory framework for RLA is based on a tailored version of the ICAEW’s current processes for audit and insolvency.</p> <p>The LSB is satisfied that the ICAEW have met this criterion in full.</p>	<p>MET</p>
<p>Applicant proposed regulatory arrangements make appropriate provision for the regulation of those it wishes to authorise; examples of evidence found in Part 2 of LSB’s</p>	<p>The LSB has conducted a thorough review of the proposed regulatory arrangements for ICAEW as an approved regulator. There has also been a review by the LSB legal team.</p> <p>The LSB is satisfied that the regulatory arrangements make appropriate provision for those who it wishes to authorise for RLA. The regulatory arrangements cover the requirements set out in the LSB’s Designation Rules which include:</p>	<p>MET</p>

Criteria for designation as an approved regulator	Summary of the LSB assessment	MET or not MET by the applicant
Designation Rules (approved regulator)	<ul style="list-style-type: none"> • Client money; • Acting in client interest; • Compliance with professional principles; • Complaints handling; • Supporting competition; • Independence; • Rule of law; • Diversity; and • Consumers being actively involved in decision making throughout their dealings with the profession. 	
Compliance with s.52 of the Act makes provision reasonably necessary to prevent regulatory conflicts .	<p>ICAEW has included within its proposed Legal Service Regulations a requirement that firms inform ICAEW promptly – within 10 business days – if they consider that any other regulatory requirement to which they are subject (including the requirements of another approved regulator) might cause them to compromise their compliance with the ICAEW regulations.</p> <p>Since 2010, ICAEW have been involved in an inter-regulator working group that has been considering the issues around regulatory conflict in multi-disciplinary practices and ABS. This has led to the creation of a Multi-Disciplinary Practices Framework Memorandum of Understanding (MDP MoU). ICAEW is a signatory to the MDP MoU, which provides a framework for cooperation, coordination and the exchange of information between regulators and professional bodies. Although a non-binding document, it sets out a statement of intent comprising principles to which all signatories agree to adhere, as far as they practically and lawfully can.</p> <p>The LSB is satisfied with the procedures in place to deal with regulatory conflict if it arises.</p>	MET
Compliance with s.54 of the Act as reasonably practical prevent external regulatory conflicts , provide	ICAEW envisage that conflict could arise with the requirements of other regulators that are not approved regulators under the Act. Given the nature of its members' work, ICAEW consider that the most likely source of conflict would be with the regulatory	MET

Criteria for designation as an approved regulator	Summary of the LSB assessment	MET or not MET by the applicant
for resolution of any external regulatory conflicts that arise; prevent unnecessary duplication or regulatory provision made by an external body	<p>requirements of the FRC, the Financial Conduct Authority (FCA) and the IS.</p> <p>The FCA is a signatory to the MDP MoU and a member of the working party. ICAEW anticipates that the FCA and other professional bodies will discuss issues around the scope and risks of regulatory conflict under the Act.</p> <p>The LSB is satisfied with the procedures in place, to deal with external regulatory conflict if it arises.</p>	
Compliance with s.112 of the Act make provision for each authorised person to establish and maintain a complaints procedure ;	<p>ICAEW's regulatory arrangements make provision for firms to notify their existing clients of their right to make a complaint at the first opportunity.</p> <p>ICAEW also indicate that in keeping with an outcomes focused approach to legal service regulation, the regulations do not prescribe the steps that firms should take in seeking to resolve complaints. They provide firms with the freedom to resolve matters as they see fit, but contain some minimum requirements to ensure that clients' rights and interests are protected and that they are able to raise their concerns and access redress as appropriate.</p> <p>The LSB is satisfied that the regulations for complaints handling are compliant with section 112 of the Act. We also note that the ICAEW's arrangements in relation to complaints handling are in line with the LSB's decision document on changes to first-tier complaints handling requirements and guidance for approved regulators .⁸</p>	MET
Compliance with s.145 of the Act requiring each authorised person to give ombudsmen assistance when requested; and make provision for enforcement of that requirement;	<p>ICAEW have set out a framework for compliance with section 145 of the Act. It requires authorised persons to give the Legal Ombudsman assistance when requested. This is supported in the Legal Services Regulations. If a firm fails to cooperate with the Legal Ombudsman (Legal Services Regulation 7.9), this may result in disciplinary procedures against that firm.</p> <p>ICAEW is in the process of agreeing a MoU with LeO to ensure procedures are in place for sharing of information.</p> <p>The LSB is satisfied that ICAEW's regulations are compliant with section 145 of the Act.</p>	MET

⁸ For further information on the Guidance, please refer to the LSB website at this link: http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/2016/20160715_s112_Decision_Document.pdf

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<p>Authorised persons may not provide immigration advice unless authorised by ICAEW to do reserved legal activities;</p>	<p>Not relevant to this application as the ICAEW is not seeking Qualifying Regulator status.⁹</p>	<p>N/a</p>
<p>Consistency of regulatory arrangements with s.28 of the Act (RO, BRP etc).</p>	<p>ICAEW's application includes a statement of policy on how they will exercise their regulatory functions as an approved regulator and licensing authority in accordance with the requirements of section 28 of the Act. The statement demonstrates how their proposed regulatory arrangements will support the regulatory objectives and professional principles set out in section 1 of the Act.</p>	<p>MET</p>

⁹ Means a body, which is a Qualifying Regulator for the purposes of Section 86A of the 1999 Act by virtue of Part 1 of schedule 18 to the Act 2007 (Approved Regulators approved by the Board in relation to immigration matters).

Annex B – Assessment of ICAEW for designation as a licensing authority

Criteria for designation as an licensing authority	Summary of the LSB assessment	MET or not MET by the applicant
<p>Licensing Rules must comply with s.83 of the Act. When considering the application the Board will consider how consistent an applicant's proposed licensing rules are with the LSB's guidance on licensing rules.</p>	<p>Section 83 of the Act sets out what must be contained in the licensing rules of a licensing authority; the licensing authority application has been assessed against this and we are satisfied that the proposed regulatory arrangements meet the requirements.</p> <p>We note that the ICAEW has aimed to provide a single regulatory framework for the regulation of authorised and licensed firms and that the regulations for licensed firms will differ only where required by the Act.</p> <p>The ICAEW expects to accredit mainly firms whose principal business is accountancy. ICAEW do not intend to place restrictions on the nature or the extent of external ownership other than those set out in the Act. The Legal Services Committee consider all applications on a case-by-case basis, and ICAEW will impose conditions and/or restrictions on accreditation where necessary to protect the public interest.</p> <p>ICAEW will not restrict its members from working within entities regulated by other approved regulators or licensing authorities.</p> <p>The LSB is satisfied that the licensing rules comply with section 83 of the Act.</p>	MET
<p>An appeals body in place to hear and determine appeals against decisions of the applicant</p>	<p>As with current ICAEW appeals in relation to probate, all appeals will be directed to the First Tier Tribunal (General Regulatory Chamber). This is consistent with the approach favoured by the LSB which considers that a single mechanism for all appeals in relation to ABS</p>	MET
<p>Appropriate internal governance arrangements at point of designation; regulatory functions not be prejudiced by its representative functions; as far as reasonably practical, regulatory decisions be taken independently of representative ones</p>	<p>The same governance arrangements apply to ICAEW whether acting as an approved regulator or licensing authority. The LSB is satisfied that ICAEW will have appropriate internal governance procedures in place to meet the independence requirement when acting as a licensing authority.</p>	MET

Criteria for designation as an licensing authority	Summary of the LSB assessment	MET or not MET by the applicant
Applicant competent , has sufficient resources to perform the role of licensing authority in relation to RLA	<p>The ICAEW's regulatory resources and processes will be applied equally to the regulation of authorised and licensed firms</p> <p>The LSB is satisfied that this criterion has been met in relation to ICAEW' status as a licensing authority.</p>	MET
Approach to licensing rules are consistent with requirements in s.28 of the Act (RO, BRP etc)	<p>The ICAEW will have a single regulatory framework, the Legal Services Regulations, in its capacity as approved regulator and licensing authority (except where it explicitly states specific requirements in relation to ABS).</p> <p>A review of the ICAEW's licensing rules has confirmed that the LSB is satisfied that this criterion has been met.</p>	MET
In accordance with s.82 of the Act, an applicant must prepare and issue a policy statement as to how, in exercising functions under Part 5 of the Act, it will comply with s.28 of the Act	<p>The ICAEW has provided a policy statement demonstrating how the ICAEW's proposed regulatory arrangements will support the regulatory objectives and professional principles in section 1 of the Act.</p> <p>The LSB is satisfied that the criterion has been met in relation to ICAEW' status as a licensing authority.</p>	MET