

<b>To:</b>	Legal Services Board	
<b>Date of Meeting:</b>	27 November 2013	<b>Item:</b> Paper (13) 80

<b>Title:</b>	Institute of Chartered Accountants in England and Wales (ICAEW) applications for designation as an approved regulator and licensing authority for probate activities	
<b>Work stream(s):</b>	Statutory Decisions	
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<b>Status:</b>	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 probate activities.

It summarises the assessment of the applications and our view 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 first application for a recommendation for designation as an approved regulator. It then recommends the approval of the second application for a recommendation as a licensing authority.

Finally, it provides a summary of the statutory orders process.

The full application is not included in this paper but is on the LSB website (where it has been published since 21 December 2012). A copy can be provided to any Board member and will be available at the Board meeting.

### Recommendation(s):

The Board is invited to:

- Grant (under paragraph 14(1) of Schedule 2 to the Act) the ICAEW's application for a recommendation to the Lord Chancellor for designation as an approved regulator for probate activities.
- If the first recommendation is accepted, to grant (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 probate activities.
- To delegate to the Chairman the approval drafting of the recommendation
- To delegate to the Chairman and the Chief Executive approval of the drafting of the final decision notice

<b>Risks and mitigations</b>	
<b>Financial:</b>	N/A
<b>Legal:</b>	Given the hostility of the Law Society to the recommendation and the fact that this would be the first “new entry” to legal regulation since the Board was established, the risk of a challenge, perhaps most likely on governance issues cannot be discounted. (Nor, indeed, should the risk of a challenge from ICAEW if the recommendation were not approved). Mitigation lies in the robustness of the approval process as demonstrated in the paper and supporting documentation.
<b>Reputational: [FoIA s36(2)(b)]</b>	[REDACTED]
<b>Resource:</b>	There is a Statutory Orders process following a recommendation in favour of designation. This, when taken together with the other applications for designation from the ICAEW and ILEX Professional Standard ( <b>IPS</b> ), may require a significant proportion of the resources available for statutory decisions which may impact on other applications.

<b>Consultation</b>	<b>Yes</b>	<b>No</b>	<b>Who / why?</b>
<b>Board Members:</b>	√		We asked for feedback from non-Executive members Barbara Saunders and Andrew Whittaker on the draft Board paper.
<b>Consumer Panel:</b>	√		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).
<b>Others:</b>			<p>It is statutory requirement to seek advice from The Lord Chief Justice and the Office of Fair Trading (see Schedule 4, Part 2, paragraphs 6 and 7 and Schedule 10, Part 1, paragraphs 4 and 7 to the Act).</p> <p>The Financial Reporting Council (<b>FRC</b>) and the Insolvency Service (<b>IS</b>) were approached by the LSB as a selected consultee for advices in relation to ICAEW’s capacity as a regulator of their current activities in audit and insolvency (see Schedule 4, Part 2, paragraphs 8 and Schedule 10, Part 1, paragraph 6 to the Act).</p> <p>We received a letter from The Law Society (<b>TLS</b>) urging the LSB to refuse the ICAEW’s applications. This is not part of the statutory consultation process and does not form part of the assessment against the criteria for designation set out in the Act. A copy of the TLS letter and ICAEW’s response are published on the LSB’s website.</p>

<b>Freedom of Information Act 2000 (Fol)</b>		
<b>Para ref</b>	<b>Fol exemption and summary</b>	<b>Expires</b>
Paragraphs 65 and 72	Section 36(2)(b)(ii)- likely to inhibit the exchange of views for the purposes of deliberation by the Board	N/A

## LEGAL SERVICES BOARD

To:	Board		
Date of Meeting:	27 November 2013	Item:	Paper (13) 80

### **Applications from the ICAEW for designation as an approved regulator and licensing authority for probate activities**

#### **Introduction**

1. The ICAEW submitted two applications to the LSB on 14 December 2012 to become an approved regulator and licensing authority for probate activities. 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.<sup>1</sup>
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 firms<sup>2</sup> to undertake probate 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 report 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. The Executive recommends that the Board grant the application for ICAEW's designation as an approved regulator under Part 2 of Schedule 4 to the Act. 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.
6. If the applications are granted, we will make our recommendations to the Lord Chancellor<sup>3</sup> who will have 90 days to decide whether to make the designation orders to designate the ICAEW as an approved regulator under Schedule 4, Part 2, paragraph 17 of the Act and a licensing authority under Schedule 10, Part 1, paragraph 15 of the Act.

#### **Background to the applicant and rationale for the applications**

7. The ICAEW is a chartered body. It was founded by Royal Charter in 1880 and received a Supplemental Charter in 1948. The ICAEW must make amendments

<sup>1</sup> This can be extended to no more than 16 months (Schedule 4, 15(4) and Schedule 10, 13(4)).

<sup>2</sup> 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.

<sup>3</sup> Under Schedule 4, Part 2, paragraph 16 (2) and Schedule 10, Part 1 paragraph 14 (2) to the Act.

to the Supplemental Charter to allow for additional powers required for the effective discharge of its functions as an approved regulator and licensing authority for probate, this is to ensure that ICAEW have the appropriate powers to regulate the new area of work and mixed members of practices of members and non-members. ICAEW have met Privy Council officials to agree the process for approving the changes to their Charter and they are confident that approval will be granted soon after the LSB's decision.

8. The ICAEW 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 governed 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).
9. The ICAEW's rationale for making the application is to allow its members to be authorised to do probate activities alongside related services (e.g. trust planning and estate administration) that they currently provide. It will enable firms to offer a more integrated service to clients who, in non-contentious cases, will be able to use a single adviser. This should have an impact on the overall cost of the service for consumers and increase competition.
10. ICAEW have indicated to us that around 250 firms (of whom 150 are sole practitioners) have expressed some initial interest in offering these services, although the number with firm business plans is unknown. They have also indicated an interest in possibly applying for further rights in due course: this may depend on the extent to which they perceive accounting –led ABS and other forms of MDP taking root in the market and feeling that ICAEW regulation offers a more favourable regulatory environment for integrated services.

### **Scope of application**

11. The ICAEW's applications apply for the right to regulate probate activities. This is a reserved legal activity. Probate activities are defined in Schedule 2, paragraph 6 to the Act as the preparation of probate papers for the purposes of the law or in relation to any proceedings in England and Wales. The Act further defines „probate papers' as papers on which to found, or oppose a grant of probate or, a grant of letters of administration.
12. The ICAEW's proposed regulatory arrangements will restrict the authorisation of probate practitioners to „non-contentious probate', i.e. the grant of probate or letters of administration only. The authorisation will not extend to opposing a grant of probate or letters of administration.
13. ICAEW has also elected to include estate administration within the scope of its regulations. The rationale for this is that accountants may do „unreserved legal activities' ancillary to an application for a grant of probate i.e. tax and trust planning and estate administration and it is in the interest of consumers to ensure there is adequate client protection. Therefore, estate administration is included within ICAEW's regulations relating to professional indemnity insurance, probate compensation fund, consumer complaints and practice assurance. It should be noted that some ICAEW members currently offer estate administration services.

14. 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 probate 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 (**HOLP**) and Head of Finance and Administration (**HOFA**) etc) this is to comply with requirements of the Act.

### Process of assessing the applications

15. 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;
- three site visits of ICAEW offices to review existing processes, systems and controls on which the probate regulations are based (during these visits, authorisation, supervision, complaints handling and disciplinary processes have all been considered);
- a meeting with the recently appointed lay-Chair of the Probate Committee during which we discussed his experience as a lay member of committees and tribunals, the ongoing recruitment of committee members, the challenges and issues for the Probate Committee in its first year of operation.

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

16. The following table 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.

Criteria for designation as an approved regulator	Summary of the LSB assessment	MET or not MET by the applicant
Appropriate <b>internal governance arrangements</b> 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>The LSB is satisfied the arrangements for the Probate Committee (<b>PC</b>) will allow it to operate independently from the representative functions of the ICAEW.</p> <p>The ICAEW is not an Applicable Approved Regulator (<b>AAR</b>) under the LSB's Internal Governance Rules (<b>IGRs</b>) 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 on this in paragraphs 18 to 29 of this paper, including an explanation of ICAEW's</p>	MET

Criteria for designation as an approved regulator	Summary of the LSB assessment	MET or not MET by the applicant
	<p>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>Applicant <b>competent</b> has <b>sufficient resources</b> to perform the role of approved regulator in relation to probate.</p>	<p>The LSB is satisfied that the ICAEW is competent and has sufficient resources in which to regulate probate.</p> <p>This assessment is based on a review of ICAEW's regulatory capacity and capability; resources; budget and fees scale for probate firms. We conducted three site visits to ICAEW Offices to gather information in relation to the approach to authorisation and supervision, and reviewed of the proposed programme for inspection visits.</p> <p>The ICAEW is a well-established regulator of accountancy services. Much of the regulatory framework for probate is based on a tailored version of the ICAEW's current processes for audit and insolvency. We have taken into consideration that the current oversight regulators (the FRC and the IS) consider ICAEW to be a competent regulator in the areas they currently regulate including audit and insolvency.</p> <p>The LSB is satisfied that the ICAEW have met this criterion in full.</p>	MET
<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 <b>LSB's Designation Rules (approved regulator)</b></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 probate activities. The regulatory arrangements cover the requirements set out in the LSB's Designation Rules which include:</p> <ul style="list-style-type: none"> <li>• Client money;</li> <li>• Acting in client interest;</li> <li>• Compliance with professional principles;</li> <li>• Complaints handling;</li> <li>• Supporting competition;</li> <li>• Independence;</li> <li>• Rule of law;</li> </ul>	MET

Criteria for designation as an approved regulator	Summary of the LSB assessment	MET or not MET by the applicant
	<ul style="list-style-type: none"> <li>• Diversity; and</li> <li>• Consumers being actively involved in decision making throughout their dealings with the profession.</li> </ul>	
Compliance with s.52 of the Act makes provision reasonably necessary to <b>prevent regulatory conflicts.</b>	<p>ICAEW has included within its proposed probate 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 (<b>MDP MoU</b>). 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 <b>external regulatory conflicts</b> , provide for resolution of any external regulatory conflicts that arise; prevent unnecessary duplication or regulatory provision made by an external body	<p>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 requirements of the FRC, the Financial Conduct Authority (<b>FCA</b>) 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>	MET
Compliance with s.112 of the Act make provision for	ICAEW's regulatory arrangements make provision for firms to notify their existing clients of their right to make a complaint at the first opportunity.	MET



Criteria for designation as an approved regulator	Summary of the LSB assessment	MET or not MET by the applicant
each authorised person to establish and maintain a <b>complaints procedure</b> ;	<p>ICAEW also indicate that in keeping with an outcomes focussed 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 Guidance on First-tier complaints handling.<sup>4</sup></p>	
Compliance with s.145 of the Act requiring each authorised person to give <b>ombudsmen assistance</b> 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 probate regulations. If a firm fails to cooperate with the Legal Ombudsman (probate 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. This is expected to be completed and in place before the ICAEW is designated.</p> <p>The LSB is satisfied that ICAEW's regulations are compliant with section 145 of the Act.</p>	MET
Authorised persons may not provide <b>immigration advice</b> unless authorised by ICAEW to do reserved legal activities;	Not relevant to this application as the ICAEW is not seeking Qualifying Regulator status. <sup>5</sup>	N/a
Consistency of regulatory arrangements with s.28 of the Act ( <b>RO, BRP etc</b> ).	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	MET

<sup>4</sup> For further information on the Guidance, please refer to the LSB website at this link: [http://www.legalservicesboard.org.uk/Projects/pdf/10\\_05\\_24\\_Isb\\_signposting\\_requirement\\_and\\_guidance\\_Decision\\_document.pdf](http://www.legalservicesboard.org.uk/Projects/pdf/10_05_24_Isb_signposting_requirement_and_guidance_Decision_document.pdf).

<sup>5</sup> 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).

Criteria for designation as an approved regulator	Summary of the LSB assessment	MET or not MET by the applicant
	regulatory arrangements will support the regulatory objectives and professional principles set out in section 1 of the Act.	

17. The following information 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.

Criteria for designation as an licensing authority	Summary of the LSB assessment	MET or not MET by the applicant
<p><b>Licensing Rules</b> 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 Probate Committee will (at least initially) 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 <b>appeals body</b> in place to hear and determine appeals against decisions of the applicant</p>	<p>The ICAEW set out in their original application that they have elected to have the General Regulatory Council of the First Tier Tribunal (<b>GRC</b>) as the single appellate body for all regulatory decisions relating to probate. Therefore, there will be a consistent mechanism in place between regulatory appeals for decisions made in relation to both authorised and licensed firms.</p> <p>To achieve this section 69 and section 80 orders are needed so that ICAEW can make the relevant rules to</p>	MET

Criteria for designation as an licensing authority	Summary of the LSB assessment	MET or not MET by the applicant
	<p>allow the GRC to consider ICAEW decisions and for the GRC to be established as the appellate body for all probate decisions.</p> <p>However, due to the length of the timetable needed to complete the necessary MOJ reviews and the parliamentary processes to lay the orders, the ICAEW has proposed an interim measure to achieve designation at an earlier date. This interim measure would establish the existing ICAEW Appeals Committee as the single appellate body for all probate decisions until such time as the relevant orders are in place. The ICAEW's Appeals Committee is independent of ICAEW as the representative body.</p> <p>The LSB accepts this approach as an interim measure; our assessment is that there will be a limited number of cases for the ICAEW Appeal Committee to consider in the interim period.</p> <p>There is further information on this in paragraphs 67 to 72.</p> <p>The LSB is satisfied that an appeals body will be in place (both in the interim and for the long term) to hear and determine appeals against decisions.</p>	
<p>Appropriate <b>internal governance</b> 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> <p>There is information on this in paragraphs 16, and 19 to 31.</p>	<p>MET</p>
<p>Applicant <b>competent</b>, has <b>sufficient resources</b> to perform the role of licensing authority in relation to probate</p>	<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> <p>There is further information on this in paragraph 15.</p>	<p>MET</p>
<p>Approach to</p>	<p>The ICAEW will have a single regulatory framework in</p>	<p>MET</p>

Criteria for designation as an licensing authority	Summary of the LSB assessment	MET or not MET by the applicant
licensing rules are consistent with requirements in <b>s.28 of the Act</b> (RO, BRP etc)	<p>their 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>	
In accordance with s.82 of the Act, an applicant must prepare and issue a <b>policy statement</b> as to how, in exercising functions under Part 5 of the Act, it will <b>comply with s.28 of the Act</b>	<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

18. During the process of the LSB's assessment, we identified specific parts of the applications, which required further detailed analysis.

*Independence of the ICAEW's governance structures in relation to probate*

19. The criteria on independence for both the approved regulator and licensing authority applications indicates that the applicant must have „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’.
20. The ICAEW has created the Probate Committee (**PC**), a new quasi-judicial body with responsibility for overseeing ICAEW's regulatory framework for probate. It will have full-delegated responsibility from the ICAEW for dealing with all matters concerning probate practitioners including rule making, policy/strategy setting, budget setting and day-to-day casework.
21. The PC has ten members, split equally between lay and non-lay (professional). It is a requirement of the terms of reference of the PC that the Chair is a lay member with a casting vote. A lay member is defined as “a person who has never qualified or practised as a professional accountant. Solicitors and persons with legal training are also unable to act as lay members on the committee.” The exclusion as a lay member of anyone with legal training is broader than the definition in the IGRs where the reference is to authorised persons only. It is possible that the make up of non-lay members on the PC, by virtue of being a mixture of both accountants and lawyers, may in fact result in the ICAEW meeting the definition of a lay-majority as set out in Schedule 1, paragraphs 2(4) and (5) to the Act. A further safeguard in the absence of a lay majority membership of the PC is the fact that the lay-Chair has a casting vote in the event of a split decision.

22. The Chair of the PC has been appointed. Brian Yates has a professional background in civil engineering and experience on a number of regulatory and consumer boards including a period as Chair of the Consumers Association, and a panel member for the General Medical Council and the Nursing and Midwifery Board. Recruitment of lay and non-lay members is in progress. Training of appointed members will take place in January and February 2014.
23. We are satisfied that the arrangements for the PC will allow it to exercise the regulatory functions in a way that is not prejudiced by the ICAEW representative functions. There will be some circumstances whereby the representative body is consulted for some decisions, for example, when developing ICAEW policy for probate practitioners the PC will consult with the Professional Standards Board and other stakeholders (where appropriate). However, decision-making powers are solely up to the discretion of the PC.
24. We have considered whether these arrangements are consistent with the LSB's IGRs.
25. All approved regulators must comply with general duties in relation to independence set out in rules 6 and 7 of the IGRs. This includes having arrangements that observe and respect the principle of regulatory independence; acting in a way that is compatible with it; ensuring regulatory functions are not prejudiced by and are independent from representative functions; and making available reasonable resources to deliver regulatory functions. Our assessment is that the arrangements are designed to meet these general duties
26. We have concluded that the ICAEW is not an applicable approved regulator (**AAR**) and therefore do not have to comply fully with the IGRs.
27. An AAR is 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, which is regulated, by that approved regulator.<sup>6</sup> The majority of those who are expected to seek authorisation from ICAEW for probate will be accountants who are already subject to regulation by ICAEW. Their primary reasons for regulation by ICAEW is accountancy related activities and not to practise a reserved legal activity. The regulatory arrangements allow non-accountants to apply to the ICAEW for authorisation for probate; ICAEW will not be discharging any representative function for these individuals (it is expected that non-accountants will be mainly solicitors for whom The Law Society provide representative functions).
28. Consequently, the full schedule (which includes the requirement for a lay majority on the governing body of the regulatory function) to the IGRs does not apply to ICAEW. However, as explained in paragraph 21 above, it is possible that the ICAEW meets our definition of a lay-majority board in any event, by virtue of an accountant (either qualified or trained as an accountant) being excluded from the definition of a lay-member.

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<sup>6</sup> For further information, please refer to the IGRs ([http://www.legalservicesboard.org.uk/Projects/pdf/internal\\_governance\\_rules%202009\\_final\\_km.pdf](http://www.legalservicesboard.org.uk/Projects/pdf/internal_governance_rules%202009_final_km.pdf))

29. When considering the ICAEW's proposals for regulatory independence, it was important to determine what a proportionate approach would be. Taking into account the scale of probate activities (compared to other ICAEW regulatory activity), we consider that having placed responsibility for governance with PC is appropriate. The terms of reference, membership and powers of the PC are capable of delivering regulatory functions independent from representative functions.
30. We note that the ICAEW propose a membership review within 3 years, which would ensure that the PC has had some time in practice to review if the 50:50 membership split is the most appropriate approach.
31. We also understand that the independent report into the governance of the ICAEW, chaired by Sir Christopher Kelly, which is due to report very shortly, is likely to recommend further strengthening of independent lay input into the work of the Institute at a number of levels more generally

*Client protection arrangements for consumers of probate services*

32. ICAEW intend to address client protection through the following sets of arrangements:
- a requirement for authorised firms and accredited probate firms to hold Professional Indemnity Insurance (PII);
  - the setting up of a Probate Compensation Scheme to provide redress for consumers on a comparable basis in cases where PII is invalidated (i.e. in some cases of fraud);
  - the requirement for accredited firms to have arrangements in place to handle complaints made against a firm or individual employed within a firm; and
  - a requirement for those holding client monies to comply with ICAEW's client monies regulations.
33. In relation to PII, accredited probate firms will be required to carry a minimum of £500k PII per claim arising in connection with authorised work which includes probate and estate administration. This is a minimum level of indemnity only; the majority of medium-sized and large firms will carry PII at levels far in excess of these limits to reflect the nature of their businesses. In cases where the value of the estate is likely to exceed the level of insurance, firms will be required to notify their clients in writing at the beginning of the engagement that their PII is capped and their level of cover.<sup>7</sup>
34. The PII policies are on an "each and every claim" basis; therefore, multiple claims (each up to the £500k limit) can be made rather than having an upper limit on a policy.
35. In terms of the probate compensation fund, individual grants from the scheme will be capped at a level comparable to ICAEW's minimum requirements for PII i.e. £500K per estate.
36. The maximum amount that may be paid from the compensation fund in any one year is capped at £5m. There is a risk that this cap could cause temporary

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<sup>7</sup> In developing these arrangements, ICAEW have been conscious of the need to ensure the proposals do not act as a deterrent to market entry (Source: ICAEW application, para. 4.103, pg.34).

consumer detriment if a systematic issue is identified affecting multiple cases – those who make later claims may find that the cap is reached before their claim is settled. In these circumstances, or if single claim would take the payment for the year over the cap, the PC will be able to defer payment to the following year. This appears to be an appropriate approach.

37. ICAEW will not be prescriptive about the way in which firms deal with complaints, provided firms can demonstrate that they have mechanisms in place to deal with complaints in a fair, prompt, constructive and honest manner by a principal of the authorised firm or, in the case of a licensed firm, by the HOLF. The complaints regulations meet the requirements of the Act and the LSB Guidance on First Tier Complaints Handling.
38. Members and firms holding client monies must comply with ICAEW's client money regulations. These regulations require firms to place any clients' monies in a separate, interest bearing account, unless the client agrees otherwise. Firms must also obtain agreement from their bankers that there is no right of set off between a client money account and the firm's own account.
39. We are satisfied that these arrangements are consistent with the requirements of the Act and will provide an appropriate level of consumer protection.

#### **Requests for advice to the mandatory and selected consultees<sup>8</sup>**

40. The Act requires the LSB to seek advices from mandatory consultees in relation to all designation applications, these bodies include the Office of Fair Trading (**OFT**), the Legal Service Consumer Panel (**the Panel**) and the Lord Chief Justice (**LCJ**).
41. The Act also allows the LSB to seek advice from selected consultees when considering a designation application. We considered it reasonable to seek advices from the FRC and the IS in light of the important role both bodies play as oversight regulators for ICAEW's current regulatory work.
42. A summary of the advices received and the representations from the ICAEW is in **Annex A**.

#### *Office of Fair Trading*

43. The advice from the OFT was that it had found no evidence (actual or theoretical) that the ICAEW becoming an approved regulator and licensing authority would (or would be likely to) prevent, restrict or distort competition within the market for reserved legal services. Furthermore, the OFT considered that by allowing ICAEW members authorisation to deliver probate services as accredited probate firms, may strengthen competition for these services, e.g. ICAEW members could act as an alternative supply to solicitors in the conduct of probate activities, especially as an ABS. This could potentially place competitive pressure on the pricing of these services and broaden access to justice.
44. The ICAEW welcomed the advice made by the OFT.

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<sup>8</sup> 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](http://www.legalservicesboard.org.uk/Projects/statutory_decision_making/icaew.htm).

### *The Panel*

45. The Panel was asked to provide advice on the likely impact on consumers of the Lord Chancellor making an order for designation in accordance with a recommendation from the LSB.
46. The Panel submitted a detailed response to ICAEW when it consulted on its draft proposals and met regularly with ICAEW officials during the last two years as their plans have evolved. The Panel commended ICAEW for the level and nature of its engagement with them, which has led to their proposals becoming more consumer focused.
47. The Panel indicated that they continue to support ICAEW's proposal to include estate administration within the scope of regulation when an accredited probate firm conducts the activity. It highlights that there is a high risk to consumer detriment in estate administration work.
48. The ICAEW informed the LSB that they wish to make some minor changes to their regulatory arrangements set out in the original applications. The LSB considered it appropriate to consult on these changes with the Panel for a second time due to its impact on the proposed client protection arrangements. In particular, ICAEW wished to introduce a new regulation giving the PC the ability to refuse to make a grant if payment could exhaust all the funds available in the Compensation Fund for payment. The Panel indicated that it supports the proposal because the interests of all potential claimants should outweigh those of a single individual.
49. The Panel had some further specific comments in relation to detailed parts of the application that relate to consumers. We believe that the ICAEW has provided a satisfactory response to the Panel's concerns which are summarised in **Annex A** to this paper.

### *The Lord Chief Justice*

50. The LCJ was asked to provide advice on the likely impact on the courts of England and Wales if the applications were granted. The LCJ had some concerns in relation to the applications, which are explained in more detail in the paragraphs below and in **Annex A** of this paper.
51. The LCJ made a wider point (which he had made before in respect of previous designation applications), that competition will have a detrimental effect on standards and that a variation in standards between regulators is inappropriate in principle.
52. As with consideration of all applications for rule changes and designation as approved regulators or licensing authorities, this application is not simply about regulatory competition. We consider it to be about the competence and capacity of ICAEW to regulate probate (as set out in paragraphs 16 and 17 of this paper, from a thorough review of ICAEW's regulatory arrangements, we are satisfied that ICAEW are competent and have sufficient resources in which to regulate probate). It is also about ensuring that the right protections are in place for consumers, that ICAEW's regulatory arrangements meet the requirements, and criteria for being an approved regulator and licensing authority as set out in the Act and in our rules. We are of the view that ICAEW's experience as a regulator



of audit and insolvency and the proposed regulatory arrangements will result in an appropriate level regulation of probate.

53. We are also satisfied that ICAEW's proposed training and assessment of authorised persons for probate do not represent a variation in standards of existing regulators.
54. As explained in **Annex A**, in developing their education and training regime the ICAEW conducted a full review of the requirements for trainee solicitors for the areas of wills, probate and estate administration as set out in the Legal Practice Course (**LPC**) Learning Outcomes 2011. ICAEW also made a comparison of the LPC and ACA qualifications to ascertain which of the SRA's education and training requirements relating to wills, probate and estate administration were covered by the ACA qualification. Further work around developing learning outcomes were also considered in relation to the work involved in both contentious and non-contentious probate to ensure that ICAEW authorised practitioners who successfully complete the ACA qualification or an equivalent qualification are trained, as a minimum, in the same areas and to the same standard as trainee solicitors.
55. The LCJ also expressed a concern about the absence of a clear statement in ICAEW's Code of Ethics (**the Code**) that those working in non-contentious probate must not recklessly or knowingly mislead the court and must only act when competent to do so, and questions whether the enforcement mechanisms are sufficient to enforce such a requirement.
56. ICAEW in their response clarified that the Code does not refer to the types of work that members undertake specifically but takes a general approach that its principles apply to all professional and business activities. **Annex A** indicates several references to the Code which guide members' behaviour including a requirement to ensure professional competence and due care. The section on integrity specifically sets out that all members „shall not knowingly be associated with reports, returns, communications or other information where the professional accountant believes that the information and among other things, omits or obscures information required to be included where such omission or obscurity would be misleading’.
57. In response to the LCJ concerns on enforcement, ICAEW is committed to enforcing the Code by disciplining members who do not meet the reasonable ethical and professional expectations of the public and other members. ICAEW and the PC have the power to take regulatory action against a firm if the firm does not comply with the probate regulations. ICAEW may also impose conditions or restrictions on a firm, who need to comply and failure to do so would result in disciplinary action against the firm.
58. Some other concerns were noted by the LCJ in relation to the definition of non-contentious probate and ICAEW membership in relation to those working in a licensed firm. We believe that the ICAEW has provided a satisfactory response to the LCJ's concerns in these two areas; a summary of the ICAEW's response to both points are contained in **Annex A**.

*Financial Reporting Council & Insolvency Service*

59. The LSB requested advice from the FRC and the IS who are currently oversight regulators for ICAEW's audit and insolvency work. Both bodies confirmed that ICAEW is a competent regulator for what they currently do and did not raise any specific concerns regarding ICAEW in their current capacity.
60. The ICAEW welcomed the advice made by the FRC and the IS.

**Other correspondence received by the LSB in relation to the applications – letter from The Law Society**

61. The Law Society (TLS) did not make a submission to the ICAEW during the public consultation on their draft applications held in June 2012. They instead chose to wait until after the ICAEW made their final submission to the LSB in December 2013 before issuing a letter directly to the LSB setting out a number of concerns about the applications, which it felt, should lead to the applications being refused.
62. The LSB invited the ICAEW to respond to the issues raised in the letter and both the TLS letter and the ICAEW response have been published on the LSB's website.<sup>9</sup>
63. The LSB have summarised the main points of the TLS letter and the ICAEW's response to that letter in **Annex B** of this paper. We are of the view that the response from ICAEW was clear, concise, and overall provided an adequate response to the TLS's concerns.
64. One of the main concerns raised by TLS was around independence of the ICAEW's governance arrangements in relation to probate. TLS were particularly concerned that the ICAEW's PC would not have a lay majority and that the LSB approval of such an arrangement would indicate willingness to countenance revised arrangements for the existing approved regulations closer to the ICAEW model.
65. We have explored the ICAEW's governance arrangements for probate in some detail, as set out in paragraphs 19 to 31. We have determined that the ICAEW's governance regulations are in line with the relevant criteria in the Act for approval of designation as an approved regulator and licensing authority. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] However, we acknowledge the ICAEW's wider review of lay majorities on all decision-making bodies within their governance structure, which is due to be completed by the end of 2013 with implementation sometime in 2014. In response to the requirements of another oversight regulator, ICAEW has indicated that they will be moving towards a lay majority for their Appeals Committee.
66. It is worth noting that the criteria for approving the approved regulator applications makes specific reference to the requirement that ICAEW must make reasonable provision for the prevention of regulatory conflicts (including those with other approved regulators and external bodies). Although this issue was not

<sup>9</sup> [http://www.legalservicesboard.org.uk/Projects/statutory\\_decision\\_making/icaew.htm](http://www.legalservicesboard.org.uk/Projects/statutory_decision_making/icaew.htm)

specifically referred to in the TLS letter, the LSB must take an important criterion into account before making a recommendation for designation to the Board and the Lord Chancellor thereafter. Paragraph 16 of this paper indicates that both the criteria for both types of regulatory conflict have been met by the ICAEW. The LSB is satisfied with the procedures in place, to deal with external regulatory conflict if it arises.

### **Other statutory orders related to the designations**

67. In addition to the designation order, there are two other statutory orders related to the ICAEW designations.

68. A section 69 order is required to:

- give the ICAEW intervention powers when acting as an approved regulator to match those that would be granted automatically for the ICAEW status as licensing authority on designation (under schedule 14 of the Act);
- give the ICAEW a power to create regulatory arrangements and licensing rules providing for appeals against its decisions to be heard by the FTT;
- give the FTT a standalone power to hear and determine appeals on ICAEW decisions (whether acting as an approved regulator or licensing authority);

69. A section 80 order will establish the FTT as the body to hear and determine appeals against decisions of ICAEW as a licensing authority.

70. Due to the length of time expected to complete the MOJ and parliamentary processes to lay the orders, the ICAEW has proposed an interim measure to help them gain designation at an earlier date. The following paragraphs set out the proposal in further detail:

- ICAEW will rely on its existing interventions powers in its Charter, at the point of designation as an approved regulator. The ICAEW will have a wider set of powers when acting as a licensing authority. ICAEW are content that there will be a difference but these powers will be sufficient as an interim measure.
- ICAEW will use its existing Appeals Committee as the body to consider appeals for all approved regulator and licensing authority decisions. The Appeals Committee is independent of the ICAEW's representative responsibilities. This will require some technical changes to the regulatory arrangements, which will be completed before the recommendation is made to the Lord Chancellor.
- The interim proposal would mean that the designation order would not be immediately dependent on the section 69 and section 80 orders going through the necessary parliamentary procedures and allowing the designation order to be laid earlier.

71. The LSB is content with this approach as an interim measure.

72. [REDACTED]



## **Recommendations**

73. The Board is invited to

- Grant (under paragraph 14(1) of Schedule 2 to the Act) the ICAEW's application for a recommendation to the Lord Chancellor for designation as an approved regulator for probate activities.
- If the first recommendation is accepted, to grant (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 probate activities.
- To delegate to the Chairman the approval drafting of the recommendation
- To delegate to the Chairman and the Chief Executive approval of the drafting of the final decision notice