

Draft business plan 2017/18

A public consultation issued by the Legal Services Board (LSB)

Comments from ACCA
February 2017
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ACCA (the Association of Chartered Certified Accountants) is the global body for professional accountants. We aim to offer business-relevant, first-choice qualifications to people of application, ability and ambition around the world who seek a rewarding career in accountancy, finance and management.

Founded in 1904, ACCA has consistently held unique core values: opportunity, diversity, innovation, integrity and accountability. We believe that accountants bring value to economies in all stages of development. We aim to develop capacity in the profession and encourage the adoption of consistent global standards. Our values are aligned to the needs of employers in all sectors and we ensure that, through our qualifications, we prepare accountants for business. We work to open up the profession to people of all backgrounds and remove artificial barriers to entry, ensuring that our qualifications and their delivery meet the diverse needs of trainee professionals and their employers.

We support our 188,000 members and 480,000 students in 178 countries, helping them to develop successful careers in accounting and business, with the skills required by employers. We work through a network of 100 offices and centres and more than 7,400 Approved Employers worldwide, who provide high standards of employee learning and development. Through our public interest remit, we promote appropriate regulation of accounting, and conduct relevant research to ensure accountancy continues to grow in reputation and influence.

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ACCA welcomes the opportunity to comment on the LSB's proposed business plan for 2017/18.

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GENERAL COMMENTS

In September 2016, the LSB published its vision for the regulatory framework for legal services (the 'vision paper').¹ This was not accompanied by an invitation to comment on the vision, and so this consultation response is heavily weighted towards the vision paper, in an attempt to persuade the LSB to encourage wide consultation on its future, and the future of the legal services market.

There is little reference in the draft business plan to specific consultations planned in 2017/18 by the LSB. We suggest that this represents a lost opportunity to exploit the vast experience of approved regulators, potential approved regulators and consumers, and weakens the impact of any future proposals of the LSB with regard to the future framework for regulation of the legal profession.

Since the publication of the draft business plan on 6 December 2016, the Competition and Markets Authority (CMA) has published its final report: 'Legal services market study'. The report has found that competition in legal services is not working well, and ACCA would expect this market study report to have a significant impact on the LSB's final business plan. At the very least, it would be expected to have an impact on the LSB's vision of the future.

Paragraph 3 of the vision paper sets out the aims of the LSB, which are, in essence, to promote competition and consumer choice, enhance the confidence of stakeholders (reducing the level of unmet demand), and ensure redress for consumers 'when things go wrong'. We suggest that something is missing from this list: enhancing the quality of legal services provision. Competition and choice are merely a means to an end. Consumers deserve value for money and confidence in the services they are receiving. The required level of confidence is dependent upon (among other things) the expectation of high quality.

¹ A vision for legislative reform of the regulatory framework for legal services in England and Wales



We do not believe that the current structure of regulatory oversight is inappropriate. While the list of reserved activities is not sufficiently clear (to consumers, practitioners and professional bodies), ACCA supports the regulatory framework whereby certain legal services are identified and regulated by way of a risk-based approach.

In principle, ACCA could support a single regulator structure, so long as it did not result in artificial barriers. However, we do not believe that the argument for a single regulator has been made out. The issue centres on those activities that should be reserved – activities that pose systemic risk, ie those involving advocacy – and those such as probate and notarial activities, which should be unreserved as they pose little risk. With regard to the latter, the regulation of the legal services should recognise the impact of other regulatory frameworks, for example that provided by the accountancy profession. Eligible members of an approved professional body should be able to undertake low-risk activities, such as probate, under the licence of their professional body.²

If the current effectiveness of the oversight regulator is deemed inadequate, there should be a focused review of the oversight regulator's role and powers, together with the range of reserved legal activities, in order to enhance effectiveness, and better serve the public interest.

The appendix to this paper considers each of the 'proposals' areas set out on page 5 of the LSB's vision paper.

² A model similar to that of the Financial Conduct Authority (FCA) might be used, whereby high risk activities are reserved, but low-risk activities may be undertaken by appropriately regulated professionals – in the case of the FCA, by members of Designated Professional Bodies.



AREAS FOR SPECIFIC COMMENT:

In this section, we set out our responses to the specific questions set out on page 11 of the consultation document.

Question 1: Do you have any comments on our proposed programme of work?

The LSB's business plan for 2017/18 covers the final year of its Strategy for 2015-18. The only mention in the consultation paper of the Strategy for 2018-21 is as follows:

*'In 2017/18 we will also be developing our new Strategy for 2018-21. This is an important project that will involve the whole organisation and will determine the LSB's direction for the next three years. In 2017/18 we will engage with our stakeholders as we develop our new Strategy.'*³

In view of the importance of this longer-term planning, in our opinion, this exercise to develop the three-year strategy should have commenced earlier. We would also question whether a period for strategic planning of only three years is sufficient.

We are pleased to see the LSB's on-going support for changes in legislation to remove barriers. However, it is disappointing that the draft plan is not more specific in respect of the changes to legislation that might be sought, and appears to be very reactive to proposals driven by others such as the CMA and the Ministry of Justice.⁴

Although one of the objectives of the LSB is to encourage innovation in legal services, the draft plan of the LSB itself does not demonstrate innovation. An opportunity exists to establish a fresh approach concerning independence of regulation (while acknowledging the legislative framework within which the LSB is currently constrained). Fundamentally, it would be useful to establish (through research) what 'independence of regulation' entails. (We comment further on this in the appendix to this paper.)

We are encouraged by the planned deliverables in respect of approving changes to regulatory arrangements and designating new regulators. During 2017, ACCA will be seeking approval of its regulatory arrangements in respect of probate activities. It is also

³ Draft: Business Plan 2017/18, page 9

⁴ Tailored reviews of the Legal Services Board and the Office for Legal Complaints 2016: call for evidence



considering seeking designation as an approved regulator in respect of other reserved legal activities. In particular, we note the LSB's aim 'to ensure that the changes [to the regulatory arrangements] are centred around outcomes and minimise regulatory burdens while at the same time ensuring that the statutory approval process does not unnecessarily impede developments.'⁵ This appears to be an appropriate response to the CMA's market study report, which stated '... the process to become an approved regulator in relation to the reserved legal activities is complex, time-consuming and ultimately requires changes to legislation.'⁶

Question 2: Do you have any comments on the research we have proposed?

We have no further comments on this specific area of the business plan, although we have suggested above where the intended outcomes need to be supported by appropriate research, including consultation.

Question 3: Do you have any comments on our proposed indicative budget?

It is essential to have adequate resources to be able to perform the statutory functions. It was noted in the CMA report that '... the process to become an approved regulator in relation to the reserved legal activities is complex [and] time-consuming ...'. The report states that changes to legislation are required. However, the LSB also has a responsibility to recognise and address this issue.

⁵ Draft: Business Plan 2017/18, Annex A, Paragraph 22

⁶ Legal services market study, page 209



APPENDIX

A VISION FOR LEGISLATIVE REFORM OF THE REGULATORY FRAMEWORK FOR LEGAL SERVICES IN ENGLAND AND WALES: COMMENTS FROM ACCA

It is assumed that the stated vision of the LSB will inform its planning processes – for 2017/18 and the longer-term strategy. Therefore, the proposals set out within the LSB’s ‘vision document’ are worthy of comment alongside ACCA’s comments on the LSB’s draft plan for 2017/18.

Regulatory objectives

We broadly support the regulatory objectives as set out on page 9 of the vision paper, and welcome the focus on an overarching objective that safeguards the public interest, recognising that this lies in a combination of consumer protection and the wider interests of society.

Scope of regulation

We would support an independent review to determine the scope of regulation, given the overarching objective of safeguarding the public interest. The existing legal framework within which changes to the reserved legal activities may occur has been seen to be resistant to change. In light of the LSB’s strategic outcome of breaking down the regulatory barriers to competition, innovation and growth, we would expect the LSB to support an independent review that can explain, for each reserved and regulated activity, how the benefits of regulation exceed the costs. We support the LSB’s position that such a review ‘should start from the presumption that sector-specific regulation is only required on the grounds of sector-specific risk to the public interest’,⁷ and that the minimum necessary regulation should be used to address the risks identified.

We note that the LSB has considered whether the scope of legal services regulation should be broadened. We agree that alternative solutions for the resolution of disputes

⁷ A vision for legislative reform of the regulatory framework for legal services in England and Wales, page 15



and conflict are different in nature to legal services. We believe that the regulatory burden and other costs of extending the scope of regulation to such areas would significantly outweigh the benefits.

Focus of regulation

We agree with the LSB's views on the focus of regulation, namely that regulation should be based on the activity undertaken. This will enable a regulatory framework better focused on risk. However, we believe it is too soon to suggest that higher risk activities should include 'before-the-event regulation' and 'during-the-event regulation', while lower risk activities should be subject only to 'after-the-event regulation'. Appropriate, proportionate regulation protects consumers and enhances the reputation of the legal profession (in turn serving the public interest). Therefore, the legal activity being undertaken should be the initial focus, with a further degree of focus (ie targeted regulation) being based on factors such as the vulnerability of the consumers concerned.

In order to regulate an activity, it is important to be able to identify the regulated community by way of registration. Authorisation of practitioners entails (as a minimum) the agreement of the practitioner to be subjected to regulation (including a code of conduct). It is a step beyond mere registration, but one that has benefits exceeding the costs. We support the LSB's suggestion that practitioners could be provided with authorisation for a suite of legal activities. Risk-based regulation would then result from an analysis of the *actual* services being provided over a particular period.

In reviewing the regulatory framework for legal services in England and Wales, it is advisable to consider compatibility with the framework (now and in the future) for anti-money laundering supervision in the UK. Legal service providers fall within the regulated sector, and so the registration and regulation of legal services should be designed to support anti-money laundering supervision.

Independence of regulation

In order for regulation to promote trust among consumers of legal services, there must be the perception of appropriate independence of regulation. However, consumers understand that regulators must have the necessary familiarity with the sector that they



are regulating. In addition, trust in a profession may emanate from the profession being seen to self-regulate effectively and responsibly (rather than being seen to regulate according to directions given by an independent body). We believe that the independent review to establish those activities that should be subject to regulation should also suggest how regulatory independence may be demonstrated in each sector. We do not believe that a single regulator covering the whole of the legal services sector is the answer to achieving appropriate independence. There may be a range of solutions, and assessing the adequacy of each – comparing the advantages, disadvantages and suitability – is the role of an oversight regulator. For example, the accountancy bodies⁸ have each established their own oversight arrangements, which go a long way towards safeguarding the public interest, and help to demonstrate that their regulatory arrangements operate “at arm’s length” from their other activities.

We believe it is too soon to state the conclusion that ‘regulation should be structurally, legally and culturally independent of the professions and government’.⁹ After the necessary review process, a pragmatic and proportionate solution should take account of the likelihood that the funding of an ‘independent’ regulator will inevitably be perceived as compromising its independence.

The issue of independence should be kept separate from that of the regulatory structure, and we disagree with paragraph 72, which is based on various assumptions. An effective and well-resourced oversight regulator will be able to demand appropriate arrangements within an organisation that demonstrate independence of its regulatory activities from its representative activities. In addition, rigorous regulation by a professional body (which would always include appropriate lay involvement in its regulatory arrangements) supports ‘the brand’, and so is consistent with the professional body’s representative aims. The value of this synergy to the overall regulatory framework should not be overlooked.

Consumer representation

When considering consumer representation, the overarching regulatory objective of safeguarding the public interest should be a driving force, and this involves recognition of the need for both consumer protection and due regard for the wider interests of

⁸ These include ACCA and ICAEW.

⁹ A vision for legislative reform of the regulatory framework for legal services in England and Wales, page 24



society. Therefore, consumer representation should not be considered without regard for the interests of society as a whole.

We agree with the LSB's view that there should be a duty on regulators to consult with consumers (and others) on certain proposed policy changes. However, the establishment of a 'consumer voice' in each legal services sector would give rise to the need for clarity about the status of consumer groups, and to manage the expectations of consumers. Consumer representation must have more of an advisory role than a decision-making role. A single consumer panel, with constituents from a range of backgrounds (including legal practice), will be able to provide a valuable perspective across the range of legal activities. For an oversight regulator, the consumer panel would be a valuable element in its two-way communications strategy.

Structure of the regulator

We agree with the LSB's claim that 'the structure of the regulatory body or bodies should depend on the structure of the regulatory system'.¹⁰ However, we do not believe that the scope of regulation should be the only factor to consider when trying to determine the appropriate regulatory structure.

The three options set out within the vision document¹¹ demonstrate the magnitude of the issue. Options 1 and 2 mix the question of focus with those of independence and oversight. All three options consider focus on professional groupings or on regulated activities separately. In practice, the best solution might entail a combination of regulation by professional grouping and regulation by activity. In short, there are many possible permutations of relevant factors to be considered.

In principle, ACCA could support a single regulator structure, so long as it did not result in artificial barriers. However, at this point, it appears that the LSB's conclusion that there should be a single regulator is inconsistent with the 2015-18 strategic outcome of breaking down the regulatory barriers to competition, innovation and growth. We hope that an independent review would, itself, adopt an innovative approach, and so take advantage of the range of approved regulators (including accountancy bodies) and their members, and the potential benefits of diversity.

¹⁰ A vision for legislative reform of the regulatory framework for legal services in England and Wales, page 34

¹¹ Ibid.



The legal services sector currently encompasses a diverse range of reserved legal activities, and diversity in the nature of service providers. In most cases, the support provided by professional bodies provides value to their members, but also value to consumers and the wider society in terms of the quality of service resulting from that support. Clearly, the issue of structure cannot be separated from the issues of regulatory independence and quality of service. Taking these three considerations together, we believe that the costs would significantly outweigh the benefits of a single regulator.

We note the list of outcomes sought by a future regulatory structure (paragraph 99), but we do not agree with the statement that ‘... a single regulator covering the whole sector would deliver these outcomes’.¹² Outcomes such as the increase in transparency and clarity are better addressed through communications led by an oversight body. Similarly, an oversight body has the ability to remove barriers to knowledge sharing across regulators. We would support a structure in which consistent high standards are demanded by an oversight regulator. However, the need for consistent standards should not be confused with a need for uniform standards.

The vision document states that the desired regulatory architecture is one that ‘brings decisions on relative prioritisation of areas for regulatory attention into a more coherent over-arching framework, and avoids a situation where resources are spent on issues of low overall consumer or public impact simply because a dedicated regulator exists for that part of the market’.¹³ This vision risks stifling innovation. A professional body that has appropriate independence arrangements is well placed to identify areas for regulatory attention, and an oversight regulator can learn from that body’s continuous improvement.

We take a different view to that of the LSB, which states in a footnote: ‘... we do not believe that it is inherently impossible for a regulator with a wide scope to have access to the necessary specialist expertise ...’.¹⁴ The work of some providers of legal services is complex. In particular, the regulatory framework must recognise the value to society of providers of mixed disciplines. For example, the opening up of the legal services market has allowed small firms of accountants to provide a limited range of legal services to their clients. It would be undesirable to require such practices to be subject

¹² A vision for legislative reform of the regulatory framework for legal services in England and Wales, page 35

¹³ Ibid.

¹⁴ Ibid.



to regulation from a number of different sources, nor from a single regulator that does not understand the practice of accountancy. We believe that accountants providing legal services, such as probate and the administration of oaths, are best regulated by accountancy bodies that have appropriate internal governance arrangements and are subject to independent oversight.

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