

ICAEW REP 36/06

DRAFT LEGAL SERVICES BILL

Text of a letter submitted in June 2006 by the Institute of Chartered Accountants in England and Wales, to the Joint Parliamentary Committee on the Draft Legal Services Bill, as written evidence. The Institute also gave oral evidence, a copy of which is available from the Parliamentary website.

Kate Lawrence
Clerk to the Joint Committee on the draft Legal Services Bill
House of Lords
London SW1A 0PW

By email

Dear Ms Lawrence

DRAFT LEGAL SERVICES BILL

The Institute of Chartered Accountants in England & Wales ('The Institute') is pleased to respond to your request for written evidence to the Joint Committee on the Draft Legal Services Bill.

We refer throughout to the draft Legal Services Bill as 'the Bill'.

You are in possession of our response to the White Paper, '*The Future of Legal Services: Putting the Consumer First*'. It is therefore not our intention to rehearse the arguments therein save for those matters which we believe require further emphasis.



Introduction

1. The Institute of Chartered Accountants in England and Wales is the largest professional accountancy body in Europe, with more than 127,000 members. The qualifications offered by the Institute are recognised around the world and allow members to call themselves Chartered Accountants and to use the designatory letters ACA or FCA.
2. The Institute has operated under a Royal Charter for more than 125 years, working in the public interest as a Charter obligation. It is regulated by the Department of Trade and Industry (DTI) through the Financial Reporting Council and its members are also regulated in a number of specialized areas for example by the FSA for investment business activities. Its primary objectives are to educate and train Chartered Accountants, to maintain high standards for professional conduct among members, to provide services to its members and students, and to advance the theory and practice of accountancy.
3. The characteristics of Chartered Accountants, developed through selection, training, support, regulation and monitoring, are of the highest standards. Our members are skilled in providing professional advice to clients including complex financial information, tax and financial reporting. Clients seek professional services from their Chartered Accountants (including unreserved legal advice and other services) as a first port of call, because of confidence in their abilities, knowledge of the client's affairs, linkage to the accounting services already provided and because of our members' competence to provide such services, cost effectively.
4. It is important to maintain the distinction between the legal and accountancy professions, in order to ensure that appropriate ethical and competence standards continue to be imposed on both. Each profession requires high standards of integrity, but professional accountants are also required to act with objectivity. The principles set out in the Bill do not provide for this additional principle and require those covered by the Bill to act in the interests of their clients. Clearly, there are some areas of practice where these two principles could conflict: auditors act objectively in reporting on financial statements; lawyers representing their clients in court cases do so specifically in the interests of their clients.
5. There are many areas where the principles do not conflict, and the two professions can each provide legitimate and valuable services. The most obvious example is in the area of tax advice, where accountants have been providing advice on taxpayers' rights and obligations under the law for many years but there are many other circumstances where adversarial proceedings are not in question and the professional is not engaged in forming an independent judgement. If this legislation does not take the opportunity to maintain and promote the ability of Chartered Accountants to compete freely with lawyers in these areas, a key opportunity will have been lost, to protect and promote the interests of consumers.
6. We are keen to see development that promotes choice and variety, in the provision of professional and legal services. As our profession is subject to rigorous standards, we believe that our members can play a key and increasing role in the development of this market.

Regulatory objectives

7. We strongly support the regulatory objectives of the Bill, with the single exception that we question why Objective (b), on promoting competition, has been limited to competition between authorised persons providing reserved legal services. The Act should also seek to support competition between those supplying unreserved legal services, where this is in the interests of consumers.
8. There are aspects of the drafting of the Bill that we believe undermine its effectiveness in meeting the regulatory objectives. In particular, if an unfair regulatory burden is imposed on Chartered Accountants seeking to provide legal services, within their areas of competence and the oversight of their professional body, this will fail to open the market, and thus fail to serve the interests of consumers.

Alternative Business Structures

Jurisdiction in relation to the unreserved and non-legal activities of licensed Alternative Business Structures (ABS)

9. We welcome the recognition, implicit in the Bill, that there is an interest in allowing professionals to practice together, and that this could be in the interests of their clients. However, the structure envisaged to allow this is complex, has adverse consequences and may not encourage take up of this option.
10. Part 5, Section 59(1) states “*the provisions...have effect for the purposes of regulating the carrying on of reserved legal activities **and other activities** by licensed bodies*” (our emphasis).
11. In order to provide clients with reserved legal services within an accountancy firm, the firm would be required to hold a licence as an ABS. In order for a legal practice to admit a Chartered Accountant as an owner or manager (even if the Chartered Accountant would not be providing legal services) would likewise require a licence.
12. As currently drafted, all activities of the licence holder, including non-reserved and non-legal services, would be subject to regulation at the same level as regulated legal services. This is unduly onerous, and does not give rise to an obvious benefit to clients. Where such non-lawyers are members of existing recognised professional bodies with high ethical standards of equal standing to those of lawyers, such regulation would appear to provide no additional safeguard to clients at all.
13. We suggest that the OLC and LSB would not wish to consider matters arising from the provision of services, which could be as diverse as pure accountancy to road-side breakdown recovery and regulated by other more appropriate bodies.
14. We submit that a distinction should be made between entities seeking to combine services under one roof (e.g. solicitors providing legal services and accountants providing accountancy services) and entities seeking to provide reserved legal services through hitherto unreserved individuals (e.g. accountants wishing to conduct reserved litigation). There is no risk to consumers in qualified professionals providing services within their professional competencies, and under the jurisdiction

of their professional bodies, without subjecting such services to additional regulation. It would seem unfair that these professionals should effectively be prevented from admission to principal status by virtue of their admission rendering the firm an ABS (thus requiring a licence).

Regulatory co-ordination

15. Our regulatory arrangements with the FSA stand as a model of how inter-regulator referrals and co-ordination of jurisdictions by regulators has worked in practice. Consumers, in our experience, have not been confused or disadvantaged by these arrangements. We would urge the Joint Committee to consider this as an example that could be applied to the regulation of legal services.

Involvement of non-lawyers in legal practices

16. We agree that, before a licence is granted to an ABS, consideration should be given to whether the non-lawyers involved are fit and proper. Where member firms of this Institute include non-Chartered Accountants as partners, we have rigorous tests of fitness and propriety, contained in our “Affiliate Regulations”. Among other requirements, these oblige affiliates to agree to abide by our ethical requirements and to subject themselves to our disciplinary regime. We do not understand why similar arrangements would not be possible for small numbers of non-lawyer professionals joining law firms, without the need for them to convert to ABS format.
17. We welcome the principle of permitting investment of non-lawyers in firms providing regulated legal services. We question whether law firms will change their approach and permit non-lawyers to enter partnership if to do so would require the additional requirements of an ABS licence.

Practical considerations

18. We do not envisage that our member firms will wish to provide regulated legal services as the primary function of their practice. Such services are more likely to be provided by lawyers through a legal department within an accountancy firm.
19. Whilst some entities may be attracted by the prospect of providing legal services through ABS the reach of the Bill to other unregulated activities would be an unwelcome prospect.

Definition of Legal Services

20. Our response to the White Paper addresses a number of issues on the definition of legal services. We refer the Joint Committee to those arguments generally (see Paragraphs 29 and 30 particularly).
21. We note that those legal services currently reserved (broadly to lawyers) have been unchanged. As argued in paragraph 4 above, some reserved legal services could equally be provided by non-lawyers, who are subject to existing and rigorous oversight structures, without the need to license the provider as an ABS.

22. Services, such as applying for probate are completely within the competence and skill set of Chartered Accountants. Others such as the drafting of some legal instruments (e.g. trust deeds), whilst requiring a high degree or skill and competence could be provided by professionals such as Chartered Accountants. Indeed, it is common for Chartered Accountants to undertake significant work for clients, submitting the resulting product to a solicitor only because the law prohibits the accountant from providing the services personally. This creates an additional cost for the client without benefit.
23. We would not advocate deregulating these services entirely as in our view the provision of these services without any form of oversight would reduce quality and is counter-intuitive to promoting or protecting consumer interests.
24. We recommend that the Bill is amended to enable the provision of services which include;
- Applying for probate
 - Reserved instrument activities
 - The administration of oaths
- by listed professionals, including Chartered Accountants, under the jurisdiction of an appropriate professional body or other regulator. This would have the attraction of widening the market for the provision of these services whilst maintaining mechanisms that safeguard consumer interests.
25. We would stress that our members are required to undertake work only where they are competent to do so, or risk disciplinary action.

Licensed Access Scheme

26. Fair access to justice requires not only the ability to source optimal legal support and advice but also the ability to recover the costs in respect of the same. We remain concerned in respect of the Licensed Access Scheme and specifically the decision in *Agassi v Robinson*.
27. In that case, there was no doubt that the advice given was appropriate, high quality and cost effective. Nonetheless, due to restrictions regarding the awarding of costs in legal proceedings, Mr Agassi's choice of advisers (Chartered Tax Advisers rather than lawyers) meant he was unable to recover his costs. It would undermine the future provision of legal services, whether through ABS or traditional accountancy practices, if the costs incurred in circumstances similar to the *Agassi* case are not recoverable in the same way as the fees incurred by a legal practice would be. This would be a clear impediment to choice for consumers.
28. We urge the Joint Committee to reconsider this important area. This Bill presents an opportunity to clarify the position.

Legal Professional Privilege

29. Legal Professional Privilege is a sensitive issue, but it should be recognised that it does represent a competitive distortion in the market for professional services, where

exactly equivalent services are provided by equally professional qualified service providers. We suggest that this matter does need to be included in the consideration of the Joint Committee.

Conclusions

30. The intensions of the Bill are to be supported and applauded.
31. We broadly welcome the proposed removal of the legal restrictions on law firms to include non-lawyers amongst their principals and the concept of ABS. However, adoption of the ABS will be deterred by the licence requirements effectively meaning the status quo is retained.
32. We strongly urge the Joint Committee to amend the Bill, excluding from regulation unreserved and non-legal services provided by an ABS, where an existing professional body has jurisdiction.
33. A consequence of the Bill should not be to undermine the key role non-lawyers play in the provisions of professional advice spanning legal and non-legal areas.
34. The Bill as currently worded misses opportunities for radical reform and further steps could be taken to simplify and open up the provision of legal services without compromising consumer protection or quality.
35. We submit that as currently drafted the Bill is not in the interests of consumers or the economy.

We would welcome the opportunity to clarify any points contained in this submission. Should the Committee value our further input, in particular in clarifying its understanding of the accounting profession's role in the provision of legal services, please do not hesitate to contact me.

Yours sincerely

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