

## Entitlement to carry out a reserved legal activity

### INTRODUCTION

1. The question of whether a person (individual or body (corporate or unincorporated))<sup>1</sup> is entitled to carry on a reserved legal activity is governed solely by the provisions of the Legal Services Act 2007 (the Act)<sup>2</sup>. Section 13(2) states that a person is entitled to carry on a reserved legal activity where the person is an “authorised person” or an “exempt person” in relation to that reserved legal activity.
2. Under section 18 of the Act, an “authorised person” is:
  - (a) person who has been authorised to carry out the reserved legal activity by a relevant approved regulator; or
  - (b) a licensable body, which by virtue of its license<sup>3</sup>, is authorised to carry out the reserved legal activity by a licensing authority.
3. Section 20(6) of the Act states that: “An approved regulator may authorise persons to carry on any activity which is a reserved legal activity in respect of which it is a relevant approved regulator”.
4. An approved regulator is a “relevant approved regulator” in relation to a reserved legal activity if the approved regulator is designated by Part 1, or under Part 2 of Schedule 4 of the Act in relation to that reserved legal activity.<sup>4</sup>
5. An approved regulator is a “licensing authority” if it is designated as a licensing authority under Part 1 of Schedule 10 and whose licensing rules are approved for the purposes of the Act<sup>5</sup>
6. Therefore provided ICAEW’s applications to become an approved regulator under Part 2 of Schedule 4 of the Act, and to become a licensing authority under Part 1 of Schedule 10 of the Act, are approved, ICAEW may authorise and license persons (individuals and bodies) to provide all the further reserved legal activities of:
  - (a) Rights of audience
  - (b) Conduct of litigation
  - (c) Reserved instrument activities
  - (d) Notarial activities
  - (e) Administration of oaths

### ICAEW’S APPLICATION TO BECOME AN APPROVED REGULATOR AND LICENSING AUTHORITY FOR NOTARIAL SERVICES

#### The right to carry out notarial activities and their definition.

7. The Master of Faculties is currently the sole regulator appointed under Part 1 of Schedule 4 of the Legal Services Act 2007. However, as with all other reserved legal

<sup>1</sup> A “person“ is defined in section 2007 of the Legal Services Act 2007 as included “a body of persons (corporate and unincorporated).”

<sup>2</sup> Section 13(1) Legal Services Act 2007

<sup>3</sup> Granted under Part 5 of the Legal Services Act 2007

<sup>4</sup> Section 20(3)(a) of the Legal Services Act 2007

<sup>5</sup> Part 5 section 73(1)(b) of the Legal Services Act 2007

services, the right to carry out notarial services is governed solely by the Legal Services Act 2007 (section 13 of the Act), not the legislation relating to Public Notaries such as the Public Notaries Act 1801.

8. Notarial services are defined in the Act as activities which, immediately before the *appointed day*, were *customarily* carried on by virtue of enrolment as a notary in accordance with section 1 of the Public Notaries Act 1801 (c.79).
  - (a) “Appointed day” is defined in the Act as – “...the day appointed for the coming into force of section 13 (entitlement to carry on a reserved legal activity),” as outlined in paragraph 1 above.
  - (b) Section 1 of the Public Notaries Act 1801 (c.79) states: “From Aug. 1, 1801, no person in England shall act as a Publick Notary, unless duly admitted..

From and after the first day of August one thousand eight hundred and one, no person in England shall be created to act as a publick notary, F1..., unless such person shall have been duly sworn, admitted, and inrolled, F2 . . . in the court wherein notaries have been accustomedly sworn, admitted, and inrolled.”

9. Although section 1 states that no person can act as a notary without being admitted, the Legal Services Act does not appear to prevent someone who is not ‘admitted’ from carrying out notarial activities provided they are a person authorised by an approved regulator or licensing authority under the Act.
10. Therefore section 1 of the Public Notaries Act 1801 appears only to be relevant in so far as it assists in *defining* what notarial services are ie, the services that could be provided before section 13 of the Act came into force, by virtue of an a person’s enrolment as a notary in accordance with section 1 of the Public Notaries Act 1801,
11. Therefore provided ICAEW’s applications to become an approved regulator under Part 2 of Schedule 4 of the Act and a licensing authority under Part 1 of Schedule 10 of the Act are approved, ICAEW may authorise and license persons to provide the reserved legal activity of notarial services as defined in paragraph 8 above.

### **Regulatory arrangements**

12. Part 2 of Schedule 4 of the Act and Part 1 of Schedule 10 of the Act include the requirement that the applications be accompanied by the applicant’s proposed regulatory arrangements and licensing rules which must include regulations as to the education and training which persons must receive, and any other requirements which must be met by or in respect of them, in order for them to be authorised.
13. The Act states in section 21(1) that ....references to the “regulatory arrangements” of a body are to –
  - (a) Its arrangements for authorising persons to carry on reserved legal activities,
  - (b) Its arrangements (if any) for authorising persons to provide immigration advice or immigration services,
  - (c) Its practice rules,
  - (d) Its conduct rules,
  - (e) Its disciplinary arrangements in relation to regulated persons (including its discipline rules),
  - (f) Its qualification regulations,
  - (g) Its indemnification arrangements,

- (h) Its compensation arrangements,
- (i) Any of its other rules or regulations (however they may be described), and any other arrangements, which apply to or in relation to regulated persons, other than those made for the purposes of any function the body has to represent or promote the interests of persons regulated by it, and
- (j) Its licensing rules (if any), so far as not within paragraphs 9a) to (i), (whether or not those arrangements, rules or regulations are contained in, or made under, an enactment.

14. Therefore, an important part of these regulatory arrangements are;

- its regulations as to the education and training which persons must receive, and any other requirements which must be met by or in respect of them, in order for them to be authorised; and
- its rules as to the conduct required of persons in carrying on any activity by virtue of the authority to conduct the reserved legal activity.

### **Qualification arrangements**

15. As set out in ICAEW's Authorisation and Qualification Framework (Annex 2) the proposed qualification requirements for applicants applying to ICAEW to conduct notarial activities will be those set out in paragraph 12(4) of Part 2 of Schedule 5 of the Act (which relates to the transitional arrangements) namely:

An applicant who is a notary and who either –

- '(a) has in force a practising certificate as a solicitor issued under the Solicitors Act 1974 (c.47), and is duly entered in the Court of Faculties of the Archbishop of Canterbury in accordance with rules made by the Master of the Faculties, or
- (b) has in force a practising certificate as a public notary issued by the said Court of Faculties in accordance with rules so made.

16. We are confident that this will assure the Legal Services Board and also the Master of Faculties that notaries working within an ICAEW accredited entity would be:

- (a) qualified to and therefore able to work at the same standard as those working in entities regulated by the Master of Faculties; and
- (b) be subject to the same professional rules of practice and conduct as notaries working in entities regulated by the Master of Faculties (subject to any regulatory conflict (please see below));

17. This will also ensure that ICAEW complies with the professional principals of the Act, as set out in section 1 paragraph (3) namely:

- (a) that authorised persons should act with independence and integrity
- (b) that authorised persons should maintain proper standards of work,
- (c) that authorised persons should act in the best interests of their clients, and
- (d) that the affairs of clients should be kept confidential

### Regulatory conflict

18. Section 21 of the Act states that a Regulatory Arrangement includes a body's practice rules and section 52 of the Act states that:
- (1) The regulatory arrangements of an approved regulator must make such provision as is reasonably practicable to prevent regulatory conflicts
  - (2) For the purposes of this section and section 53, a regulatory conflict is a conflict between -
    - (a) A requirement of the approved regulator's regulatory arrangements, and
    - (b) A requirement of the regulatory arrangements of another approved regulator.
19. If ICAEW's application to regulate notarial services, as an approved regulator and licensing authority, is approved, it is our intention to work closely with the Master of Faculties (and, if necessary other approved regulators for example the Solicitors Regulation Authority), to ensure, as much as is reasonably practicable, that there is no regulatory conflict.
20. ICAEW is aware that the duties of notaries are largely regulated by rules made by the Master of Faculties under the authority granted by s.57 of the Courts and Legal Services Act 1990. This is confirmed in the key publication that notaries refer to, namely "Brooke's Notary" which states that "...pursuant to this section, the Master has made rules relating, inter alia, to the practice and conduct of notaries, the keeping of records and accounts and the handling by notaries of clients' moneys.
21. ICAEW has reviewed these rules made by the Master of Faculties, and most particularly, the Notaries Practice Rules 2014, and can see nothing in these rules which would prevent a notary from working in an entity regulated by ICAEW, whether as a "principal" as defined in our draft Legal Services Regulations (Annex 1) or as an employee of such an entity.
22. Although paragraph 11.1 of the Notaries Practice Rules 2014 states:
- "Save as permitted by rule 11.2 a notary who is the employee of a non-notary shall not perform any notarial act as part of his employment or do or perform any notarial act for his employer or his employer's holding, associated or subsidiary company."
- Paragraph 11.2 states:
- "A notary may act for a person who is also the client of a qualified legal practitioner or firm of qualified legal practitioners by which he is employed but he shall take all proper and reasonable steps in the exercise of his notarial practice to maintain his independence of his employer and in particular he shall:
- 11.2.1 ensure that his independence and integrity as a notary is fully recognised in writing in any contract of employment entered into by him; and
  - 11.2.2 annually send to his employer a written statement of professional independence in a form approved by the Master from time to time, and shall declare in his application for a notarial practising certificate that he has complied with this rule."

23. Therefore as:

- (a) a “qualified legal practitioner” is defined in these rules as: “a person qualified to provide legal services to the public in England and Wales”; and
- (b) a “firm” is defined in these rules as including “a sole practitioner and professional partnership (which expression shall include a limited liability partnership and any other body corporate) the members of which are authorised to conduct legal practice as such.”;

Rule 11.2 appears to allow a notary to be employed by a firm (“a firm of qualified legal practitioners”) authorised by ICAEW to provide notarial services under our proposed Legal Services Regulation 2.2;

24. Furthermore, as:

- (a) a “qualified legal practitioner” is defined in these rules as –“a person qualified to provide legal services to the public in England and Wales”; and
- (b) a “person” is defined as including a “body corporate or unincorporated association or group of person”:

25. Rule 11.2 appears to also allow a notary to be employed by a firm “licensed by ICAEW to provide notarial services as such a licensed entity would be a “person (which includes a body corporate or unincorporated association or group of person, in addition to an individual) qualified to provide legal services to the public in England and Wales

26. The Notaries Practice Rules 2014 also appear to allow notaries to carry on business with others (who are not their employers) provided they comply with their duty to “Act impartially in respect of Notarial Acts” and in particular must not perform any notarial act which involves or may affect:

- his own affairs, including matters in which he is personally interested jointly with another person;
- the affairs of his spouse or partner or a person to whom the notary is engaged to be married (for the purpose of this sub-rule, “partner” means a person with whom the notary cohabits or with whom he has a sexual relationship and includes a partner of the same sex);
- the affairs of a person to whom he is directly and closely related;
- the affairs of a person with whom he is in a professional partnership or by whom he is employed or from whom he receives a benefit by being provided with office accommodation or other facilities for his notarial practice;
- the affairs of a person who has appointed the notary to be his attorney which concern a matter within the scope of the power of attorney granted;
- the affairs of a trust of which he is a trustee or of an estate where he is a personal representative of the deceased;
- the affairs of a body corporate of whose board of directors or governing body he is a member;
- the affairs of an employee of the notary;
- the affairs of a partnership of which he is a member or of a company in which the notary holds shares either exceeding five percent of the issued share capital or having a market value exceeding such figure as the Master may from time to time specify.

27. Should this interpretation of the Notaries Practice Rules 2014 be challenged and it is asserted that the Notarial Practice Rules 2014 and/or any other of the regulatory arrangements of the Master of Faculties, prevent persons authorised to conduct notarial activities from working in an entity either authorised and/or licensed by ICAEW under regulations 2.2 and 2.3 of our proposed Legal Services Regulations (Annex XX). We would assert in response that such regulatory arrangements would be in breach of the Master of Faculties duties (as an approved regulator) under the Legal Services Act to - promote the regulatory objectives of the Act (section 28) – most particularly relating to:
- improving access to justice
  - promoting competition in the provision of services within subsection (2);
  - encouraging an independent, strong, diverse and effective legal profession
28. Furthermore, creating regulatory arrangements which prevent an approved regulator and licensing authority which has received designation to authorise persons to conduct notarial activities from regulating those activities would frustrate the intentions of the Legal Services Act 2007.
29. Should such conflict occur, as stated above, we will work closely with the Master of Faculties to ensure, as much as is reasonably practicable, that this regulatory conflict is removed. However, we are aware that, if this does not prove possible or practicable, section 52 of the Act states that:
- ‘(3) Subsection (4) applies where a body is authorised by an approved regulator (“the entity regulator”) to carry out an activity which is a reserved legal activity.
- (4) If a conflict arises between –
- (a) A requirement of the regulatory arrangements of the entity regulator, in relation to the body authorised by the entity regulator or an employee or manager of the body (“an entity requirement”), and
- (b) A requirement of the regulatory arrangements of another approved regulator in relation to an employee or manager of the body who is authorised by it to carry on a reserved legal activity (“an individual requirement”)
- The entity requirement prevails over the individual requirement’.
30. Furthermore, as stated in section 12 of this application, since 2010 we 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 MoU, a copy of which is contained in Annex 24. We are a signatory to this 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. These include the principles that regulators and professional bodies should:
- work together to establish arrangements to prevent and resolve regulatory conflicts;
  - work together to agree common standards of regulation;
  - share information where it is lawful and in the public interest to do so;

- cooperate and coordinate investigation to ensure that regulatory costs and duplication are minimised as far as possible; and
  - ensure client money and the financial interests of consumers are protected.
31. If an individual working within an ICAEW accredited firm is, or may be, in breach of our regulatory arrangements, we will liaise, and coordinate our investigations, with the relevant approved regulator. Although it is generally anticipated under the MoU that the entity regulator will lead investigations in these circumstances, we will approach the relevant approved regulator to discuss the process and determine who should lead the investigation. We will seek, where possible, to resolve any regulatory conflicts, and will share with other regulators the outcome of our investigations. Where possible, we will admit information obtained from other regulators within our own disciplinary processes.