

ANNEX 33



The Law Society

ICAEW's reserved legal services application
The Law Society's response
May 2016



Introduction

1. The Institute of Chartered Accountants England and Wales (ICAEW) is consulting on its proposed application to the Legal Services Board (LSB) to become a regulator (approved regulator/licensing authority) for the five remaining reserved legal activities (i.e.: beyond probate) but only in so far as they relate to taxation services, which is seen as providing 'a natural link to the traditional accountancy practice'.
2. The ICAEW bases its application on the success of ICAEW's current probate regulation, as well as the processes put in place as a result of designation as an approved regulator and licensing authority for probate. This 'success' is measured purely in terms of numbers, firm size and geographical spread, with a direct link made from these factors to increasing competition, access to justice and, thus, the public interest. There is no tangible evidence, however, that there has been any increase in competition and, in particular, any increase in access to justice. The ICAEW's business case is not compelling (and based on research undertaken by the ICAEW with member firms only). Outside the large firms, there has been relatively little interest in offering other reserved legal activities, indicating that widening the ICAEW's regulatory capabilities is unlikely to have a major impact on the legal services market. If firms wished to be regulated in these areas, they could do so via regulation under the SRA.
3. We have specific concerns about the detail of the ICAEW's latest application for several reasons and these are discussed below.

Limiting the application to taxation services

4. The Legal Services Act 2007 does not provide for designating a regulator in relation to part of a reserved legal activity (Part 2, Schedule 4 of the Legal Services Act). It would appear from the relevant provisions of the Act that the LSB would have to designate the ICAEW for all 'further reserved legal activities'. This is in reality therefore an unlimited application to regulate reserved legal activities and should be presented and treated as such.
5. If in practice the ICAEW chooses to authorise firms to carry out reserved legal activities within prescribed limits (i.e.: only in relation to taxation matters), there is a danger that clients will be confused about the limitations around reserved activities offerings and will fail to understand the extent of the services that can be provided by an accountant. Such consumer confusion could have an adverse impact on costs.
6. Although the ICAEW has developed guidance to allow firms to differentiate between tax services which relate to reserved legal activities and those that do not (so that reserved activity work can be identified and carried out in accordance with the ICAEW's Legal Services Regulations), the proposal does not define taxation services. For this guidance to be effective a definition of taxation services would need to be applied.

Internal Governance

7. Following a review, the ICAEW is altering its internal governance structure to provide more independence for regulatory committees and also to increase lay representation on these committees to achieve a 50:50 lay/non-lay split. In addition, there is also a proposal to ring-fence matters, including appointments, within the regulatory committees. We would note that there is still, however, a direct reporting line from the Legal Services Committee through to the Professional Standards Board (to become the Regulatory Board) and then to the ICAEW Board, which in turn is responsible to Council. The latter two bodies cover both regulation and representative matters and do not have requirements around lay participation. The ICAEW's plans are therefore not in compliance with the LSB's Internal Governance Rules (IGRs), as applied to other legal regulators.
8. The ICAEW currently avoids the requirements of the IGRs because it is not an applicable approved regulator.

It seems likely that its proposed new regulatory powers will attract two categories of individuals:

1. Those qualified by another regulator e.g. solicitors or barristers who will undertake reserved activities but will not be undertaking accountancy activities
2. Accountants seeking to specialize in providing legal work who will wish to undertake reserved activities

i.e. authorised persons whose primary reason for being regulated by the ICAEW is to undertake reserved activities.

Given the likely change of status to an applicable approved regulator, the ICAEW will need to satisfy itself that it can comply with the IGRs before this application progresses any further.

Education and training

9. We recognise that some accountants who provide advice to solicitors undertaking litigation in relation to tax, appear before tribunals and act as expert witnesses. This does not require the same knowledge or skills as undertaking litigation or advocacy in a court.
10. The ICAEW proposes that applicants will need to undertake certain courses in order to practise in these areas in the lower courts¹ (see schedule 1 and 2 of the draft Legal Services Regulations). There is, however, limited information about the depth of study that will be undertaken and we note that although the course cover areas of education and training covered by solicitors, the scope is narrower. This could mean that accountants undertaking reserved legal activities are unable to recognise elements that

¹ In relation to authorisation to appear in higher courts, the ICAEW will require applicants to have been awarded a qualification by another legal regulator which awards such rights.

arise that are outside their area of expertise, and on which they should seek further advice.

11. We have made detailed comments on the education and training requirements below:
 - (a) The largest component by far is tax. Tax is imposed by statute on underlying legal constructs. There is therefore no such thing as pure tax law. To give advice on how tax is imposed to a proficient standard requires substantive legal knowledge of the underlying issues to which the legislation applies.
 - (b) The syllabus does not indicate the duration of the courses or depth of instruction. The courses should be equivalent to the instruction given on the Graduate Diploma in Law (GDL).
 - (c) Trusts allow for the devolution of property: real estate, shares in companies, works of art, chattels and intellectual property. To effectively devolve property would at a minimum require competence in the law of real property, the law of equity and equitable remedies and the rule in *Hastings Bass* and the rule against perpetuities.
 - (d) Civil Litigation and Advocacy modules will enable members of ICAEW to:
 - i. defend taxpayers in the County Court in relation to enforcement of debts in proceedings instituted by HMRC. Knowledge of tax law is an irrelevance in the County Court. A County Court judge may not make any determination of a liability to tax. If there is any issue of liability, the case would have to be remitted to the tax tribunal for determination. Issues in the County Court are likely to be –whether a stay may be ordered and whether time to pay can be arranged. While these issues are simple, issues of enforcement may be much more complex giving rise to consideration of real estate issues: co-ownership and joint ownership and trusts for sale, impact and rights of persons in occupation and the impact of the existence of a charge or mortgage. Given that members of the ICAEW are likely to be exempt from module 2, modules 1 and 3 seem to focus on structure and process and not on the substantive issues, described above, that would arise.
 - ii. defending a person in recovery proceedings who has been found guilty of VAT carousel fraud. These proceedings are not related to tax, the liability to pay having already been determined by the tax tribunal. The issue of recovery will raise the same sorts of issues as mentioned above. The law of equity and tracing will also be relevant. The education on the law of property accordingly seems to be inadequate.

The Society would argue, given the examples of the type of issues that would be considered in relation to tax proceedings, that the equivalent of the GDL would be required to ensure ICAEW members have a full grasp of all the relevant legal concepts.

An important part of developing the necessary skill set is having the ability to be trained by someone more experienced in that area for example a two year training

contract for solicitors or one year's pupillage for barristers. There is limited information about how firms will supervise those undertaking legal work and it may be difficult in firms where there is no previous experience of providing these services. We believe that the deficiency should be addressed in any potential application.

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12. The suggested level of cover (£500k) is lower than the Law Society considers appropriate. The application indicates that suggested level of cover is, in part, a reflection of the no claims being made of the Probate Compensation Fund - which might be expected after only one year of regulating probate services. It is unlikely any probate claims will be made for several years but experience of the level of claims in probate suggest that there will be claims larger than £500K.
13. As accountants have not previously undertaken this type of work, it is unlikely they will have experience of assessing what level of cover they are likely to require. This is an area where training and guidance will be required.
14. Where accountants seek to limit their liability, the implications of so doing should be made clear to the client. Solicitors are required to make this very clear to the client and the outset and are not permitted to limit their liability to a level below that set out in the Minimum Terms and Conditions (MTC) currently set at £2million or £3 million dependent on the type of firm.

Business case

15. The ICAEW's business case is not compelling (and is based only on research undertaken by the ICAEW with member firms²) and the research indicates that outside the large firms, there has been relatively little interest in offering reserved legal activities. If firms wished to be regulated in this area, they could do so via regulation under the SRA.
16. There is no evidence that either the ICAEW's move into probate regulation or the SRA's move to regulate accountancy firms for legal services has cut costs for consumers or increased competition. Nor is there any compelling evidence that allowing the ICAEW to regulate in these additional areas will do so. It may, however, create consumer confusion.

Legal professional privilege

17. We note that a successful application by the ICAEW could lead to accountants being able to claim legal professional privilege in their tax work where the work involves a specified reserved activity e.g. litigation; advocacy; reserved instrument activities or probate. The Society would have concern about any extension of legal professional privilege beyond those qualified to practise under the Solicitors Regulation Authority or Bar Standards Board rules as other professionals do not have the same duties to their clients, or to

² Re the potential for further expansion provided by ability to undertake further reserved activities

the courts. These duties are important in protecting a fundamental duty on which the administration of justice as a whole rests.

Ethical duties

18. We will be keen to see that the ICAEW's proposed regulations for regulating authorised litigators and advocates includes a duty to the court and the administration of justice as overarching principles. We note that the proposed application only includes a commitment to expanding the Code of Ethics to include rules relating to litigation and advocacy including duties to the Court (see paragraph 4.33). The absence of similar requirements around conflicts of interest and general fiduciary duties undermines the ICAEW's ability to comply with the professional principle within the Legal Services Act that 'authorised person should act in the best interests of their clients'.³

³ Legal Services Act 2007, s1(3)(c)