



ICAEW's policy statement on probate and ABS Regulation

Policy statement made in accordance with the requirements of section 82(1) of the Legal Services Act 2007

Section 82(1)

Each licensing authority must prepare and issue a statement of policy as to how, in exercising its functions under Part 5 (concerning the regulation of ABS), it will comply with the requirements of section 28.

Section 28

In discharging its regulatory functions the approved regulator must, so far as is reasonably practicable, act in a way which is compatible with the regulatory objectives and which the approved regulator considers most appropriate for the purpose of meeting those objectives:

- Protecting and promoting the public interest;
- Supporting the constitutional principle of the rule of law;
- Improving access to justice;
- Protecting and promoting the interests of consumers;
- Promoting competition in the provision of services;
- Encouraging an independent, strong, diverse, and effective legal profession;
- Increasing public understanding of the citizen's legal rights and duties; and
- Promoting and maintaining adherence to the professional principles, ie:
 - authorised persons should act with independence and integrity;
 - authorised persons should maintain proper standards of work;
 - authorised persons should act in the best interests of their clients;
 - the affairs of clients should be kept confidential.

The approved regulator must have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and any other principle appearing to it to represent the best regulatory practice.

- 1.1 The following section is intended as a statement of policy on how we will exercise our regulatory functions as an approved regulator and licensing authority in accordance with the requirements of section 28 of the Act.
- 1.2 The statement is also aimed at demonstrating how our proposed regulatory arrangements will support the regulatory objectives and professional principles set out in section 1 of the Act.

The regulatory objectives

Promoting the public interest and protecting and promoting the interests of consumers

- 1.3 As a professional membership body and regulator with a duty to operate in the public interest, we have taken care to ensure that our regulatory arrangements for probate will promote the public interest and protect and promote the interests of consumers.
- 1.4 By becoming an approved regulator and licensing authority, we will be in a position to accredit accountancy-led firms to deliver probate services directly to consumers. We consider that this will almost certainly increase competition in the market for probate services, which should benefit consumers by encouraging the formation of new and innovative business services and more competitive prices.
- 1.5 In developing our regulatory arrangements we have also taken care to ensure that the appropriate safeguards will be in place to ensure that probate is only delivered by persons of sufficient skill and competence. Accordingly, we have restricted the category of individuals who can apply to be authorised individuals through attendance on a course, to our members and the members of other international chartered accountancy bodies with which we hold reciprocal arrangements. As we consider that the activities involved in conducting non-contentious probate work involve a high degree of accountancy content, we have concluded that a short course in wills, probate and estate administration should build on our members' current skills and competencies and equip them with the necessary knowledge to provide a competent and professional service.
- 1.6 In addition, individuals who are authorised by other approved regulators may be recognised as authorised individuals under our regulations, and we will consider applications from other individuals with appropriate probate qualifications and experience on their merits.
- 1.7 We have also designed our authorisation processes to ensure that only persons who are fit and proper will be able to conduct probate work. Again, we see this as being consistent with the regulatory objectives of consumer protection and the promotion of the public interest. We will require applicants for accreditation (both entities and individuals) to disclose any issues that might call into question their integrity and ability to conduct probate work in a fair and honest manner, and we will run checks on the data we receive from both internal and external sources.
- 1.8 Applicants will be required to confirm that they have processes in place for dealing with matters such as clients' money, staff training and review procedures, record-keeping and complaints-handling. They will also need to confirm that they have appropriate levels of PII. We will monitor compliance with these arrangements through annual returns, and our system of targeted monitoring and Practice Assurance reviews, the frequency of which will be determined by our assessment of risk for each firm.
- 1.9 In cases where our supervision of firms highlights an actual or possible breach of our regulatory arrangements, we will act to protect the public interest and the interests of consumers. This may be through a range of measures, from obtaining an informal undertaking from the firm or individual to put things right to the imposition of formal regulatory and disciplinary sanctions such as the imposition of conditions or restrictions, the

suspension or withdrawal of accreditation, disqualification or a fine (the level of which will be guided by our Guidance on sentencing).

- 1.10 We have also taken care to ensure that appropriate levels of redress will be in place to protect consumers if things do go wrong. Firms will be required to maintain an internal complaints system that is prompt, transparent and straightforward. They will be obliged to highlight the availability of their complaints procedure to new and existing clients, and to signpost the availability of the Legal Ombudsman both at the beginning of the engagement and during the complaints process.
- 1.11 In the case of negligence, bankruptcy or fraud, clients will have access to redress due to the requirement on firms to hold a minimum of £500k in PII per claim. In cases where PII is invalidated – for example in cases where a fraud is conducted by a sole practitioner – clients will also have recourse to redress through ICAEW's Probate Compensation Scheme.
- 1.12 At the beginning of the engagement, firms will be under an obligation to highlight to clients the availability of compensation arrangements, a measure which we see will not only promote consumer protection, but also improve consumers' understanding of their rights in relation to redress in the provision of legal services.
- 1.13 We are confident that the arrangements we are proposing will protect both consumers and the public interest. We will develop a consumer engagement strategy, which will provide information and advice to consumers about probate and our regulatory framework. We will also collect information on consumers' expectations and experiences around the provision of probate services, which will inform our regulatory arrangements going forward.

Improving access to justice

- 1.14 Although 'access to justice' is not a defined term in the Act, it has been suggested that, in the context of legal services provision, it might be improved in a variety of ways such as increased availability of services geographically, improved technology, new and innovative business models and lower prices.
- 1.15 As our designation as an approved regulator and licensing authority should lead to increased competition and a more liberalised market for probate services, we consider that our application is consistent with the regulatory objective of improving access to justice.
- 1.16 As required by the Act, we will take note of the objective of promoting access to justice when we consider applications for accreditation. All firms applying to become either authorised or licensed for probate will have to provide us with a statement on how their accreditation will promote access to justice. We would be prepared to collate and analyse this data to assist the LSB in creating a sector-wide evidence base that assesses the impact of various factors on access to justice.
- 1.17 As a matter of policy, however, we consider that it would be extremely rare for us to decline an application solely on the basis of a firm's response to this section. We agree with the LSB that it will be difficult, if not impossible, for firms to assess in isolation how their application will affect this regulatory objective. Accordingly, although we will consider the

concept of access to justice in determining each application, we do not envisage that this criterion alone will be necessarily determinative.

Promoting competition in the provision of services

- 1.18 We consider that our designation as an approved regulator and licensing authority will increase and promote competition in the provision of legal services. It will enable us to accredit accountancy firms to conduct probate work, which until now has been an activity reserved solely to lawyers. We consider that this should drive various benefits for consumers in terms of an increased availability of services nationally, lower prices and efficiencies in service delivery.
- 1.19 To promote a level playing field between firms we accredit for probate, we have sought to develop a single regulatory regime that will be consistent and apply to both authorised and licensed firms. No additional requirements have been placed on ABS, unless required by the Act.
- 1.20 Where the Act has set out requirements that apply solely to ABS, we have sought where possible to limit restrictions so as not to impede competition. Accordingly, we have elected only to apply the fitness to own test to non-authorised owners holding a material interest of 10% or more in a licensed firm as required by the Act. We decided against imposing additional checks on holders of lesser interests, or to include, for example, a capital adequacy test or additional share limits. We consider that additional checks would be likely to result in a disproportionate regulatory burden on firms, which is unjustified and may create a disincentive to market entry. We consider that the default value of 10% is sufficient to protect consumers without hindering diversity in the provision of probate services.
- 1.21 Similarly, although we may have the ability as an approved regulator and licensing authority to impose restrictions or conditions on the non-reserved activities an accredited firm may carry out (such as will-writing and estate administration), we do not intend to do this unless we have reason to believe that the firm's activities in these areas are posing a threat to its compliance with the probate regulations or the regulatory objectives. We do not consider it reasonable to place additional restrictions on accredited probate firms if these activities can be carried out in an unregulated capacity. This would appear to us to be anti-competitive and not in keeping with the Act's objectives.

Encouraging an independent, strong, diverse, and effective legal profession

- 1.22 We consider that the accreditation of accountancy firms for probate work will contribute to a more competitive, strong and diverse market. Firms we accredit for probate will be asked to monitor and report on the diversity profile of their firms on a periodic basis. This initiative, which is in accordance with LSB guidance, is intended to drive change in the profile of providers in the legal services market. It should also provide consumers with the ability to make informed choices about where to obtain legal services.

- 1.23 We also consider that our regulatory arrangements will encourage a strong, effective and independent market by enabling firms to determine how best to ensure compliance with our regulations within their own commercial context. Our CPD requirements, for example, give firms the freedom to identify their own training and development needs. We are not prescriptive in the activities accredited firms must carry out on an annual basis, but we will monitor compliance with the principle that professional training and development should be kept under review on a continuing basis.
- 1.24 Similarly, our requirements for complaints-handling are not prescriptive. We will require only that firms demonstrate to us that they are complying with certain minimum requirements (such as ensuring appropriate signposting to the Legal Ombudsman and cooperation and compliance with that body's decisions). Otherwise, firms will have the freedom to determine for themselves how best to deal with consumer complaints.

Increasing public understanding of the citizen's legal rights and duties

- 1.25 We have included within our proposed regulations guidance on the importance of good communication with clients about the anticipated scope of the engagement. We have suggested that, in order to increase client satisfaction and to reduce the likelihood of complaints, firms should set out in writing at the beginning of the engagement what they can expect to happen and the steps involved. They will also need to alert clients to their right to refer matters to the Legal Ombudsman, and be prepared to explain to clients aspects of their work (and the costs involved) as it progresses. We believe that this will improve consumers' understanding of the legal processes governing probate and promote public legal education generally.

Promoting and maintaining adherence to the professional principles and supporting the rule of law

- 1.26 Firms we accredit for probate will be under an obligation to comply with the professional principles and the rule of law. The professional principles are set out in our proposed probate regulations, and are consistent with the five fundamental principles underpinning our Code of Ethics: integrity, objectivity, confidentiality, professional competence and due care, and professional behaviour.
- 1.27 If we consider that there is a threat (either real or emerging) to compliance with the professional principles and the rule of law, we will act. This may be by the imposition of a condition or restriction on accreditation, or, in serious cases, through the suspension or withdrawal of accreditation, or disqualification. In the most serious cases, if there are concerns that the financial or other interests of clients may be being compromised, we may intervene in the practice.

Better regulation principles

Transparency

- 1.28 We will be transparent in the way in which we exercise our regulatory functions. If we intend either to decline an application for accreditation, or approve the application subject to conditions or restrictions, we will explain clearly to the applicant the reasons for our decision and they will have an opportunity to seek a review of the decision. Similarly, if we are considering taking regulatory action, the affected individual or firm will be informed of this 5

and invited to make representations. Once the decision has been taken, we will provide our reasons and advise them of their right to apply for a review and the timescales for this.

- 1.29 We will also be transparent in the way in which we approach enforcement. We will be transparent in our sentencing (our Guidance on sentencing is in the public domain) and there will be a presumption that penalties will be made public, unless there is an overriding public interest reason why redaction or non-publication is necessary in the particular circumstances of the case. Accountability
- 1.30 We will be accountable for the way in which we exercise our regulatory functions. If we have set targets for the determination of applications, for example, we will publish these targets on our website and monitor our performance against them.
- 1.31 We will also work cooperatively with the LSB as oversight regulator. We appreciate that we will be accountable to the LSB for the decisions we take and the way in which we discharge our regulatory functions. We will therefore undertake to provide accurate information in line with the LSB's requirements on a prompt basis.

Proportionality

- 1.32 In developing our proposed qualification requirements, we have sought to adopt a proportionate approach that is aimed at fostering competition, while ensuring that those persons undertaking and supervising probate work are competent to do so. Having assessed the skills required for probate and related activities such as estate administration, we are satisfied that the training and skills required to become a chartered accountant form a solid foundation for further studies in this area. We have therefore set our qualification requirements at a level which we believe is appropriate to build on applicants' existing skill sets and competencies.
- 1.33 In our approach to monitoring and enforcement, we have also sought to be proportionate. The frequency and focus of our reviews will depend on our assessment of risk. In cases where we see a threat to the regulatory objectives emerging (particularly that of consumer protection) we will increase monitoring and supervision and focus our resources in that area.
- 1.34 As in the other regulated areas of audit, insolvency and investment business, we will apply our enforcement mechanisms in a proportionate manner. Where possible, we will seek always to resolve issues initially with individuals and firms in an informal manner. We consider that this fosters a culture of compliance which helps to reduce regulatory costs and delays for both parties.
- 1.35 If, however, we consider that there has been, or may be, a breach of our regulatory arrangements, we will act. This may result, in less serious cases, in the imposition of a condition on a firm's accreditation, or in an appropriate sanction such as a reprimand, fine or regulatory penalty. It would only be in the most serious cases that we would suspend or withdraw accreditation to carry on probate work, or disqualify an individual from holding a position in a licensed firm. We would only apply these sanctions in cases where we considered that the breach of the regulations was so serious, or the risk to the regulatory objectives so severe, that a lesser penalty would not be appropriate.

Consistency

- 1.36 In developing our regulatory arrangements for probate, we have sought to be consistent. Our arrangements use comparable procedures to those that we use in the areas of audit, insolvency and investment business regulation.
- 1.37 Except in cases where the Act has prescribed requirements that apply only to ABS (for example, the fitness to own test) we have applied our requirements equally to both licensed and authorised firms. Where possible, we have sought to minimise the risk of a competitive disadvantage arising where additional regulatory requirements are placed on a certain type of firm.
- 1.38 We will also seek to be consistent in the way in which we discharge our regulatory functions as an approved regulator and licensing authority. Decisions in relation to our authorisation processes and our monitoring of firms will be taken by a small number of trained staff or the Probate Committee. The Probate Committee will also be responsible for determining applications for dispensations or to modify accreditation, and for taking regulatory action if there has been a breach of the probate regulations. We consider that vesting these powers in a single body will ensure consistency in decision-making across cases.
- 1.39 Similarly, we will also be consistent in our use of regulatory and disciplinary powers. Through the application of our Guidance on sentencing, we consider that penalties will be applied in a consistent and proportionate manner. Committees will consider the guidance in determining what, if any, penalty to apply and the level of penalty, having taken into account the particular circumstances of the case and any mitigating or aggravating factors.
- 1.40 In our approach to appeals, we have sought also to be consistent. We are proposing that appeals on decisions of the Review and Disciplinary Committees should be referred to the GRC for consideration. We do not consider that there should be a distinction between appeals of authorised and licensed firms, and consider that the GRC will have the competence to determine appeals in a cost-effective and timely manner.
- 1.41 On a broader level, we will continue to foster a consistent approach to the regulation of probate and ABS. As a member of the ABS working party, we will continue to cooperate and coordinate our regulatory activities with other approved regulators and professional bodies. This should facilitate consistent and joined-up regulation across the sector, and enable us agree common standards to regulation and specific issues.

Targeted

- 1.42 We will adopt a targeted and proportionate approach to monitoring and enforcement. In determining the level of supervision that will be required to monitor accredited probate firms, we will take into account a range of factors in assessing risk. These are likely to include factors such as the size of the firm; the level of turnover; the frequency with which probate work is being conducted; and the experience and seniority of the authorised individuals, and the firm's HoLP and HoFA.

- 1.43 We consider that a targeted approach to monitoring and enforcement will ensure that resources are directed appropriately in areas of greatest risk. We will also seek to focus reviews on specific areas of concern if we see an emerging risk to compliance with our regulatory arrangements or the regulatory objectives.

Conclusion

- 1.44 In developing this application, we have taken care to ensure that our proposed regulatory arrangements for probate and ABS will be consistent with, and promote, the Act's regulatory objectives and better regulation principles. If our application is successful and we are designated as an approved regulator and licensing authority for probate, we will be committed to ensuring that we discharge our regulatory functions, so far as reasonably practicable, in accordance with the regulatory objectives and best regulatory practice.