



Application by ICAEW under the Legal Services Act 2007
to become an approved regulator and licensing authority
for the reserved legal activities of:

Conduct of litigation
Exercise of rights of audience
Reserved instrument activities
Notarial activities
Administration of oaths

ICAEW's Representations, February 2017

ICAEW's representations in response to the advice received from the mandatory consultees

Executive summary

1. ICAEW is grateful for the advice received from the Competition and Markets Authority, the Legal Services Consumer Panel, and the Lord Chief Justice (the mandatory consultees). This document constitutes ICAEW's written representations about the advice given by the mandatory consultees which are made in accordance with paragraph 11, schedule 4 and paragraph 9, schedule 10, Legal Services Act 2007.

Advice of the Competition and Markets Authority

2. The advice received from the Competition and Markets Authority (CMA) dated 18 October 2016 raised no issues or concerns on ICAEW's application. Indeed, it concluded that allowing ICAEW to authorise and license firms to undertake the further reserved legal activities may strengthen competition for these services; and enable ICAEW accredited accountancy firms to offer a more integrated service to customers, complementing the tax services which accountancy firms are already providing. This, in turn, could reduce the cost of legal services and reduce delays for consumers.
3. The CMA also considered that the positive effect of new entry into the market outweighed the concerns raised by others including; the potential for confusion about the scope of taxation services; ICAEW's qualification requirements; and its minimum amount of Professional Indemnity Insurance cover.
4. The CMA confirmed that the only circumstances in which its conclusion might change would be if ICAEW's regulatory scheme distorted competition between ICAEW-regulated providers and other regulated providers (if, for example, it failed to secure adequate consumer protections). ICAEW is confident, for the reasons set out in its application and paragraphs 34 to 36 below, that its regulatory framework will provide sufficient consumer protection to satisfy the Legal Services Board (LSB) that there will be no distortion of competition within the market should ICAEW's application be successful. ICAEW is grateful to the CMA for its positive and supportive advice.

Advice of the Legal Services Consumer Panel

5. The advice received from the Legal Services Consumer Panel (LSCP) dated 18 October 2016 is broadly supportive of ICAEW's application and welcomes ICAEW's attempt to stimulate competition in the legal services market and the potential cost saving to the consumer this will bring. However it raises concerns in relation to the independence of ICAEW's regulatory function; how ICAEW will ensure that there is a clear distinction around what an ICAEW accredited provider can and cannot do and how this will be conveyed to the consumer; and in relation to ICAEW's client money regulations.
6. We believe that ICAEW's governance structure and regulatory self-financing model ensures regulatory independence as there is no dependency for any financing from the membership fees or practising certificate fees, with regulatory operations being funded out of regulatory fees, disciplinary fines and costs and other revenue generated by our Professional Standards Department. The supervision of ICAEW's regulatory function rests with the ICAEW Regulatory Board which has equal lay and chartered accountant representations and a lay Chair, Michael Caplan QC. It is a model which has been approved, outside of legal services, as part of ICAEW's authorisation to act as a Recognised Supervisory Body for the regulation of audit work, ICAEW's authorisation to

act as a Recognised Professional Body for the regulation of insolvency work and ICAEW's authorisation to act as a Delegated Professional Body for the regulation of investment business advice.

7. ICAEW's unitary model also has the benefit of keeping regulatory fees low and additional benefits from co-operation and the sharing of technical knowledge with the membership side of the Institute (paragraphs 52 and 53).
8. As for clarity as to what firms can provide, research carried out by ICAEW identified the types of taxation services accountancy firms could provide relating to the further reserved services and the types of consumer likely to use such services. The conclusion was that most, if not all, consumers would be either business clients or sophisticated private clients/high net worth individuals. This information enabled ICAEW to clearly define in the Legal Services Regulations what services an accredited firm can and cannot provide. As accountancy firms are experienced in differentiating between reserved and non-reserved legal work, ICAEW is confident that the information remedies firms are likely to rely on to advise clients what work they can, and cannot, carry out, will be effective.
9. The concerns raised by the LSCP regarding client money being placed in overseas bank accounts and lack of information about currency fluctuations were addressed to the LSCP's satisfaction during ICAEW application to regulate probate activities by ICAEW outlining the safeguards that ICAEW has in place to address them. As the financial risks associated with the further reserved legal services are lower than those for probate, ICAEW is of the opinion that these safeguards will continue to be adequate.

Advice of the Lord Chief Justice (LCJ)

10. The advice received from the LCJ dated 1 February 2017 supported ICAEW's application to become an approved regulator and licensing authority for the further legal activities of reserved instrument activities (restricted to the services relating to taxation) and oaths of administration. The LCJ was of the opinion that these designations are an appropriate next step for ICAEW to take as it builds capacity as an approved regulator and licensing authority in respect of reserved legal activities. ICAEW would like to thank the LCJ for supporting this aspect of its application.
11. With regard to ICAEW's application to become an approved regulator and licensing authority for conduct of litigation and rights of audience (restricted to the services relating to taxation); and notarial services; the LCJ raised concerns about whether professional standards would be maintained; whether ICAEW would be able to authorise individuals and accountancy firms for litigation and rights of audience; and the risk of "regulatory arbitrage" and "shopping around" for the least restrictive regime.
12. As explained in paragraphs 92 to 104, maintenance of professional standards will be assured by the continued cooperation and adherence to a Multi-Disciplinary Practices Framework Memorandum of Understanding by the legal regulators that was signed in 2012. This will also ensure that there is no risk of "regulatory arbitrage" and "shopping around" for the least restrictive regime.
13. Furthermore, ICAEW's recent amendment to its legal services regulations, will ensure that the status quo will be maintained and the pre-eminence of London as an international centre for dispute resolution will be protected. Despite this change, however, ICAEW can assure the LCJ that, in relation to the reserved legal activities of litigation and rights of audience, should ICAEW's application be successful, unlike the Solicitors Regulation Authority (SRA), it will be able, in the short term, to authorise as well as license individuals and accountancy firms for probate; reserved instrument activities; oaths of administration; and notarial services; and in the long term litigation and rights of audience.

Conclusion

14. For the reasons set out in these representations ICAEW is confident that the concerns raised by the mandatory consultees have been adequately addressed as they are covered by appropriate procedures and safeguards or are not material in the context of the application.

Introduction

15. On 20 July 2016 ICAEW applied to the Legal Services Board (LSB) to become an approved regulator and licensing authority for the reserved legal activities of; conduct of litigation; exercise of rights of audience; reserved instrument activities; notarial services; and administration of oaths; restricted for the first three aforementioned activities to the service area of taxation (the further reserved legal activities).
16. In making its determination, the LSB is required to consult with the following mandatory consultees:
 - the Competition and Markets Authority (representations on advice are set out in paragraphs 27 to 36);
 - the Legal Services Consumer Panel (representations on advice are set out in paragraphs 37 to 66); and
 - the Lord Chief Justice (representations on advice are set out in paragraphs 67 to 114)
17. ICAEW welcomes the comments of the mandatory consultees and the opportunity to respond to them. This document constitutes our written representations about the advice given which are made in accordance with paragraph 11, schedule 4 and paragraph 9, schedule 10, Legal Services Act 2007 (the Act).

Background

18. ICAEW was founded by Royal Charter in May 1880 and received a Supplemental Charter in 1948. As a chartered body, we work in the public interest to further the profession of accountancy worldwide.
19. As a world-leading professional accountancy body, we provide leadership and practical support to over 147,000 members in 154 countries, working with governments, regulators and industry in the UK and abroad to ensure the highest standards are maintained. We have over 24,000 students studying for ICAEW's chartered accountant qualification.
20. We engage regularly with governments, professional membership organisations and other bodies on issues affecting the accountancy and finance profession both within the UK and around the world. We are a founding member of the Global Accounting Alliance (GAA) with over 800,000 members worldwide, and are a member of the Consultative Committee of Accountants (CCAB) which is the body for all the major professional accountancy bodies in the UK and Ireland.
21. ICAEW has a strong regulatory background. Over the last 25 years, ICAEW has undertaken responsibilities as a regulator under statute in the areas of audit, insolvency and investment business. In August 2014 it became an approved regulator and licensing authority for non-contentious probate.
22. As a regulator and professional membership body, we undertake a range of activities to support members and students internationally. This includes;
 - educating and training chartered accountants;
 - facilitating members' continuing professional development; and
 - supporting members through the provision of advice and services.
23. In discharging these duties, we are subject to oversight by the FRC's Professional Oversight Team, the Insolvency Service, the Financial Conduct Authority and the Legal Services Board. These bodies regularly monitor our arrangements and have not identified

any significant areas of concern in the way we have discharged our regulatory responsibilities to date.

24. Furthermore, ICAEW has in-house experience of the development and delivery of legal education and training in addition to accountancy.
25. As part of its regulatory arrangements for probate, ICAEW has established professional indemnity and compensation fund arrangements and is expanding these for the regulation of the further reserved legal activities.
26. ICAEW's application has been made with a view to building on the success of its current probate regulation and extending ICAEW's regulatory expertise further into legal services and to help the government in its aims of promoting competition in the market for legal services.

Advice of the Competition and Markets Authority (CMA)

27. The CMA has a statutory duty under the Act to review applications for approved regulator and licensing authority status and provide the LSB with such advice as it 'thinks fit' regarding whether the applications should be granted. In providing such advice, the CMA must consider whether any given application, if granted, would (or would be likely to) prevent, restrict or distort competition within the market for reserved legal services to any significant extent.

CMA's advice

28. In its advice of 18 October 2016, the CMA concluded that ICAEW's current applications to become an approved regulator and licensing authority are unlikely to raise any substantive concerns unless there is compelling evidence to show a significant detriment to competition, as this is likely to increase choice for consumers and professionals. It gave the example of firms authorised by the ICAEW being able to act as an alternative to traditional suppliers (such as solicitors' firms) in the conduct of these reserved activities, particularly as ICAEW's authorisation and licensing would not be limited to ICAEW members only, but could also apply to individuals who can demonstrate compliance with ICAEW's qualification requirements.
29. The CMA stated that it had found no evidence to suggest that ICAEW becoming an approved regulator and licensing authority for the further reserved legal activities under the Act would (or would be likely to) prevent, restrict, or distort competition within the market, provided that ICAEW's regulatory framework (as set out in Annex 1 of the application (ICAEW's Legal Services Regulations)) provides sufficient consumer protection.
30. The CMA was also of the opinion that accountancy firms authorised by ICAEW to undertake the further reserved activities would be able to offer a more integrated service to customers, complementing the tax services which accountancy firms are already providing. It believed that this could reduce the cost of legal services and reduce delays for consumers.
31. During the public consultation on ICAEW's application in early 2016, ICAEW met with the CMA to discuss the application. During these discussions ICAEW addressed the concerns expressed by other parties as at that date on ICAEW's application including the potential for confusion about the scope of taxation services, queries about the appropriateness of ICAEW's qualification requirements and proposed minimum amount of professional indemnity insurance cover. ICAEW explained to the CMA how its regulatory scheme and intended approach would address these concerns. As a consequence of this meeting, the CMA has confirmed in its advice that, while the LSB is best placed to evaluate the

ICAEW's assurances on these matters, it considers that the positive effects of new entry into the market are likely to outweigh these concerns.

32. The CMA closed its advice by stating that the only circumstances in which it might take a different view is if ICAEW's regulatory scheme distorted competition between ICAEW-regulated providers and other regulated legal providers (if, for example, it failed to secure adequate consumer protections). Provided the LSB is satisfied that ICAEW's proposed regulatory scheme is appropriate and adequately protects consumers, the CMA believes that such a distortion of competition is unlikely to arise in practice.

ICAEW's response

33. ICAEW agrees that its regulatory scheme will increase competition and is satisfied that its scheme will not distort competition.
34. ICAEW is also satisfied that its regulatory scheme will adequately protect consumers. As outlined in the application, particularly paragraphs 9.3 to 9.15, in developing its regulatory arrangements, ICAEW has taken care to ensure that the appropriate safeguards will be in place to ensure that the further reserved activities are only delivered by persons with appropriate skills and competence; and that applicants have processes in place for dealing with matters such as clients' money, staff training, review procedures, record-keeping and complaints handling. Compliance with these requirements will be monitored.
35. 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 professional indemnity insurance per claim. In cases where professional indemnity insurance 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 Legal Services Compensation Scheme.
36. ICAEW is therefore confident that the arrangements it is proposing will protect both consumers and the public interest. It is also currently developing a consumer engagement strategy, which will provide information and advice to consumers about the further reserved legal activities and its regulatory framework. It will also collect information on consumers' expectations and experiences around the provision of further reserved legal activities, which will inform its regulatory arrangements going forward.

Advice from the Legal Services Consumer Panel (LSCP)

37. The LSCP has a statutory duty under the Act to consider and give advice on applications from bodies to become approved regulators and licensing authorities and, when giving such advice, must, in particular, have regard to the likely impact on consumers of the Lord Chancellor making an order for designation as set out in the application.
38. Accordingly the LSCP provided advice to the LSB dated 18 October 2016. In this advice the LSCP welcomed ICAEW's attempt to stimulate competition in the legal services market, noting ICAEW's comments around the number of entity applications it received in respect of probate activities which exceeded its expectation. The LSCP also accepts in its advice that, by enabling consumers to use the same provider for various legal services there is potentially a cost saving to be made.
39. The LSCP states that it welcomes the shift to ensure that the disciplinary tribunal arrangements feature a lay majority and notes the extensive research carried out to establish whether or not firms would benefit from being able to practice in areas other than probate.
40. Against the background of these comments however, the LSCP advises that, whilst it is broadly supportive of ICAEW's application to become an approved regulator and licensing

authority in respect of all the further reserved legal activities, it has concerns relating to the following areas: Lack of;

- independence of regulation;
- identification of consumer and concerns around the effectiveness of information remedies; and
- safeguards relating to ICAEW's Client Money Regulations.

LSCP's concerns about independence of regulation

41. The LSCP comments that, unlike the other approved regulators of legal services, ICAEW is still one body carrying out both regulatory and representative functions. The LSCP noted ICAEW's unitary structure and expressed its opinion that independence of regulation is vital for ensuring consumer confidence in the legal profession, and for ensuring that regulation is carried out in the best interests of the consumer as much as the profession. Whilst it acknowledged ICAEW's reasoning that its current arrangements lower the cost burden on firms through the sharing of services, the LSCP stated that it had seen this act as a barrier to regulatory development elsewhere. The LSCP expressed its belief that regulatory and representative independence is needed for effective regulation and that it believed that this is the direction all regulators should follow.
42. While the LSCP acknowledged the safeguards which ICAEW has put in place to protect regulatory independence of the Legal Services Committee, it expressed its concern that these safeguards may not be sufficient for a broader offering of legal services beyond just probate.

ICAEW's response on the LSCP's independence concerns

43. ICAEW agrees that independence of regulation is necessary for ensuring consumer confidence in the legal profession, and that a regulatory function should be carried out in the best interests of the consumer as well as the interests of the profession. ICAEW is also aware of the wider government agenda relating to independence of regulatory bodies which is being driven by its wish to enable regulators to be free and unencumbered to set rules that widen access to the legal services market.
44. However, ICAEW does not understand why it is considered that an independent regulatory function can only be achieved by the physical and/or legal separation of the regulatory function from the membership functions. Independence should be assessed by a qualitative assessment of the governance processes put in place to ensure regulatory independence; whether and to what extent influence can be exerted, in particular, through the financial dependency of the regulatory function; and on an assessment of performance.
45. The independence and competence of ICAEW's regulatory function is a pre-requisite for its continued authorisation by the Financial Reporting Council (FRC) for the regulation of audit work, by the Insolvency Service for the regulation of insolvency practitioners and by the Financial Conduct Authority for the regulation of investment business advice. Indeed, due to the changes made in 2016 to the Companies Act in relation to the supervision of statutory audit work; and the appointment of the FRC as the UK's competent authority for the supervision of audit work; ICAEW had to apply formally to be accepted as a suitable delegatee to continue to be authorised to regulate audit work. This application was successful and the FRC re-confirmed ICAEW's status as a Recognised Supervisory Body. Such an appointment would not have happened if the FRC had had any concern regarding the independence of ICAEW's regulatory function.

46. Furthermore, as part of its independence agenda, ICAEW understands that the government wishes to ensure that innovative businesses are able to enter the market, providing greater choice for consumers, and to make sure that the cost of regulation and representation is distinct and identifiable. The government has concerns that the practising certificate is acting as a barrier to entry and compromising the ability of the regulatory bodies to license outside the traditional existing legal firms. It would therefore like to ensure that there is transparency in how the practising certificate fees are allocated between the representative and regulatory functions so that the legal services providers can differentiate between the cost of representation and the cost of regulation.
47. ICAEW supports these objectives to widen access to the legal services market and to increase competition and choice for the consumer as these are regulatory objectives of the Act. However, independence and these government objectives can be achieved without a body's representative arm separating from its representative arm which can be demonstrated by ICAEW's structure and regulatory model.
48. While ICAEW is a unitary body, its regulatory function operates by way of a self-financing model. Unlike other legal regulators, all of ICAEW's practising certificate fees go to the representative side with the operations of the Professional Standards Department being financed by regulatory fee income and disciplinary fees and costs. ICAEW's structure ensures that its practising certificate fees and main accountancy qualification are not intrinsically linked with its regulation of legal services and are therefore not barriers to entry to the legal services market.
49. Furthermore, in order to meet the requirements of the LSB and ensure consumer competition, ICAEW amended its Charter during its application to regulate probate services to enable it to regulate non-members and non-accountants.
50. ICAEW's regulation of legal services therefore meets the government's objectives for the following reasons:
- Probate accreditation is not in any way linked to membership (non-members can therefore apply for accreditation).
 - ICAEW's main accountancy qualification is not linked to accreditation of legal services, the professional standards department has developed its own distinct probate qualification and, where required, will do the same with the further reserved legal services.
 - Non-members do not need a practising certificate (unless they are required to have one by their own professional body). So they make no contribution to the costs of ICAEW's representative functions, only its regulatory.
51. Therefore, any type of entity, including innovative businesses, are able to apply to ICAEW for accreditation and enter the legal services market; and our cost of regulation and representation is distinct and identifiable so we are able to differentiate between the cost of representation and the cost of regulation.
52. ICAEW's unitary structure also has the following additional benefits:
- The technical exchange between the membership and regulatory functions is more freely enabled thus leading to quicker assessments and robust advice to the practitioner.
 - The regulatory arm is better able to influence the educational agenda of the membership body to address key regulatory aspects.

- There is an ownership by the profession to the regulatory process espoused by Lord Benson as part of his definition of a profession in 1992.¹ That ownership results in self and cross-policing by members which would be weakened by total separation. This potentially undermines quality especially in the non-reserved areas.
 - The regulatory body has accountability to those it seeks to regulate as well as the Legal Services Board and consumer. This is part of another government agenda under the Small Business, Enterprise & Employment Act 2015 and the use of business champions.
 - Professional bodies also help to ensure regulations are fit for purpose and proportionate and the membership function acts as an effective check and balance against over-regulation which is another important initiative of the current Government.
53. Furthermore, the operation of a regulatory function within a unitary body provides for significant cost-savings and synergies that are possible through shared services with ICAEW's representative arm (such as IT, human resources and procurement) – areas which do not infringe on the regulatory body's ability to regulate independently – which reduce the cost of regulation for the firms and the potential impact on fees charged by firms to the consumer. Were ICAEW required to separate its legal services regulatory function, it is estimated that this will increase the cost base (and therefore the fees) by around 30% in relation to increases in the overhead, corporate administration, purchased services and dedicated (rather than a proportion) of expert staff areas.
54. We would also observe that independence is not one of the eight statutory objectives. It is an important enabler and feature of those objectives and the justice system, but it is not an override to those principles. A similar position arises in audit where independence is highly important but it is not to be pursued at the expense of audit quality which is where the markets find greatest assurance.

LSCP's concerns about the identification of consumer and effectiveness of information remedies

55. As ICAEW is proposing in its application to ring-fence three of the further reserved legal activities to taxation only through its proposed regulatory regime, the LSCP is concerned about how ICAEW will ensure that there is a clear distinction around what work the provider can and cannot carry out. The LSCP expressed concern that it has not seen any evidence or research conducted by ICAEW into who its consumers are, or how effective the proposed information remedies at the time of engagement will be.

ICAEW's response

56. Prior to drafting the application, ICAEW carried out research into;
- The nature of the taxation services already being provided by accountancy firms which relate to the further reserved legal activities; and
 - The nature of the legal services these firms could provide relating to taxation should they be accredited for the further reserved legal activities.
57. Counsel was also instructed to specifically and clearly define in the Legal Services Regulations each of the further reserved legal activities that are restricted to taxation services only. For example, the activities of conduct of litigation and rights of audience are defined as specific claims/proceedings brought by or against a Tax Authority or other

¹ House of Lords, 8 July 1992. Referred to in the Hunt Review of the Regulation of Legal Services 2009 page 27.

prosecuting body or agency. Civil proceedings are defined as proceedings for the payment or recovery of tax; and criminal proceedings as matters relating to the non-payment of tax. Reserved instrument work is specifically defined as work that is connected to the tax affairs of the client.

58. The definitions in the Legal Services Regulations can be used to draft client engagement letters setting out the work that forms part of the engagement and any other appropriate guidance information.
59. ICAEW's research confirmed that most, if not all, consumers would be business clients, many of whom will have long standing business relationships with the firm providing the advice. Private clients are likely to be wealthy clients seeking advice on tax planning and wealth management, who have committed large scale fraud/tax evasion or who are disputing or having difficulty paying large tax debts. None of these clients could be considered to be 'vulnerable' and all should be sufficiently sophisticated consumers to understand the information given to them about what services the accountancy firm can and cannot provide, whether it be by way of engagement letter and/or advice in a meeting. We will of course continue to monitor, through our inspection visits, the nature and level of sophistication of the consumers being advised and make any necessary adjustments to the nature of the information which firms should provide.
60. Furthermore, accountancy firms are already very experienced in identifying what work is a reserved and non-reserved activity as most provide accountancy advice as part of a wider client need which can often involve a reserved legal activity and are accustomed to referring clients to solicitors or other professionals who are regulated to provide such advice. With regard to letters of engagement and client care, ICAEW has commissioned along with the other legal regulators the research in this area carried out by Optima Research, and has published its recent findings on its website and drawn the attention of practitioners to the findings especially the eight key principles. ICAEW is looking to broaden this guidance in the coming year as part of a consumer engagement project.

ICAEW's Client Money Regulations

LSCP concerns

61. The LSCP stated in its advice to the LSB that when ICAEW first applied to become an approved regulator and licensing authority in respect of probate, the Panel raised two concerns about its client money regulations. These concerns were, firstly, that client money can be placed in accounts outside the UK, and particularly outside the EU, as such client money may not have the same depositor protections as those in the UK; and, although clients may be informed of this, they are unlikely to be aware of what these risks could mean in practice or take steps to mitigate the risks. Secondly, there is no information on how currency fluctuations should be handled which could exacerbate the risk. The LSCP stated in its current advice that, as far as it can see, these risks remain as the proposed regulations have not changed.

ICAEW's response

62. ICAEW does not understand why these concerns are being raised as outstanding issues as ICAEW provided the LSCP with a formal response to these concerns as part of its probate application which stated that it did not propose to amend its client money regulations as the following safeguards were in place to address them:
 - Regulations 9 of the clients' money regulations obliges firms to inform their clients in writing when monies will be placed in bank accounts outside the UK/RoI. If the bank does not provide assurance that (amongst other things) client monies will not be

combined with other accounts and that no right of counterclaim or set-off against the money will be exercised, the client must also be informed of this in writing.

- Where monies are held outside the EU the client has to consent to this in writing. Additionally, money must be held in the currency in which it was received unless the client instructs otherwise in writing.
63. As a consequence of this formal response, the LSCP advised the LSB in its advice as statutory consultee under the Act, that the LSCP considered that these safeguards are likely to be adequate.
64. As the money risks associated with the further reserved legal activities are less than those of probate, ICAEW is of the opinion that these safeguards will continue to be adequate.
65. Caution is also required in setting regulation in overseas jurisdiction. ICAEW knows from experience with audit and data protection that over-demanding regulation cross border is frowned upon and at times impeded by overseas jurisdictions where it is seen as conflicting with local law. Any regulations touching overseas assets needs to be carefully worded so as not to create this conflict.
66. ICAEW did, however, note the LSCP's recommendation in 2013 that clients should be made aware of what the risks are in practice and should not simply be given large amounts of information to take away which they may never read or may not fully understand. This recommendation was one of the drivers for the research commissioned from Optima Research mentioned in paragraph 60 above. A key message from that research is that consumers are more concerned to be informed up front about deliverables, price and timing and are less interested in the caveats and other terms and conditions.

Advice of the Lord Chief Justice

67. The LCJ has a statutory duty under the Act to consider and give advice on applications from bodies to become approved regulators and licensing authorities and, in particular, to have regard to the likely impact on the courts in England and Wales if the application were to be granted. The LCJ has provided his advice on ICAEW's application dated 1 February 2017.

Advice relating to reserved instrument activities and oaths of administration

68. In his advice, the LCJ supported ICAEW's application to become an approved regulator and licensing authority for the further reserved legal activities of reserved instrument activities (restricted to the services relating to taxation) and oaths of administration. The LCJ was of the opinion that these designations are an appropriate next step for ICAEW to take as it builds capacity as an approved regulator and licensing authority in respect of reserved legal activities. ICAEW would like to thank the LCJ for supporting this aspect of its application.

LCJ's advice relating to conduct of litigation, rights of audience and notarial services

69. The LCJ expressed concerns about ICAEW's application to regulate the conduct of litigation, rights of audience and, by association, notarial services. The LCJ's concerns were that;

- the highest professional standards of conduct and ethics required in litigation will fail to be maintained; and
- ICAEW is unable to provide qualifications and therefore authorise individuals and entities for the activities of conduct of litigation and rights of audience; and
- the increase in competition will risk “regulatory arbitrage” and “shopping around” for the least restrictive regime.

Maintenance of the highest professional standards of conduct and ethics required in litigation

70. The LCJ expressed his belief that ethical standards, integrity and independence of those providing legal representation in litigation, and those practising law more widely, is one of the foundations of the pre-eminence of London as an international centre for dispute resolution. He expressed concern that this should not be imperilled at this present time, nor action be taken that may affect it, without careful thought and strong safeguards; particularly as London’s pre-eminence is facing strong worldwide competition which is likely to be intensified by *Brexit*.
71. ICAEW agrees with the LCJ that this is not the time to take risks and that the current status quo in relation to ethics, integrity and independence of legal representatives should be maintained in the area of dispute resolution. However, ICAEW does not understand the basis of the LCJ’s concern that the approval of ICAEW to regulate litigation and rights of audience will undermine this position, not least because of the recent amendments ICAEW has made to its Legal Services Regulations. ICAEW’s change to its regulations will maintain the status quo as only lawyers with qualifications that currently enable them to conduct litigation and appear in the courts would continue to be able to do so. ICAEW does not propose, at this current time, to train and authorise non-lawyers, such as accountants, to conduct litigation and advocacy in the courts.
72. Furthermore, as the qualified lawyers ICAEW will be authorising to work in its accredited firms will still continue to be individually regulated by their own profession’s regulator and, therefore, bound by its code of professional conduct, there would appear to be no reason why they will not be able to maintain their ethical standards, integrity and independence.
73. It should be pointed out that the Solicitors Regulation Authority (SRA) intends to amend its practice rules to enable the solicitors it regulates to practice in non-regulated entities. To do so, the SRA must be very confident that its regulatory arrangements are robust enough to ensure high standards of professional service are maintained by the solicitors it regulates that work in such non-regulated entities². If the SRA is confident of this it follows that it must be even more confident that its professional standards will be maintained in entities regulated by other legal regulators.
74. ICAEW has, for over 25 years, undertaken responsibilities as a regulator under statute in the areas of audit, insolvency and investment business. Maintaining the highest professional standards of conduct and ethics in the provision of accounting and financial services ensures the pre-eminence of London as an international centre for financial services and this is also facing strong worldwide competition likely to be intensified by *Brexit*. ICAEW as a regulator of these services has been, and will continue to be, at the forefront of ensuring such standards are maintained and therefore that this pre-eminence continues.

² SRA Consultation: Looking to the future – flexibility and public protection – September 2016

75. ICAEW can, therefore, see no reason why the pre-eminence of London as an international centre for dispute resolution would be imperilled simply because those lawyers that conduct litigation and appear in the courts provide such services on behalf of an entity that is regulated by a body that regulates four important professional services which include legal services, rather than one that regulates only legal services.
76. Furthermore, references to *Brexit* suggest that the decisions around licensing should be adapted to take account of political circumstance. However, *Brexit* is currently not law and the application process should be dealt with on the basis of current law, not future political circumstance. The courts have recently fought to maintain the independence of the judiciary from the political process; the judiciary should not be compromising its stance on this in its own internal processes. As it happens we believe that the proposals would not jeopardise negotiations on cross-border equivalence arrangements, but that is outside immediate consideration.

Provision of qualifications and authorisation of individuals and entities

77. The LCJ expressed the following concerns regarding the qualifications and authorisation of individuals and entities to conduct litigation and hold rights of audience;
- that, as ICAEW has no immediate intention or ability to offer qualifications and, subsequently, individual authorisation in respect of them, its application to regulate these services is premature; and
 - as a consequence of not providing these qualifications, ICAEW would not be able to authorise (as opposed to license) entities, given its expectation that mainly accountancy-led practices will seek “accreditation”.

ICAEW’s authorisation of individuals

78. It would appear that the LCJ has misunderstood ICAEW’s amended application. ICAEW does intend to authorise individuals to conduct litigation and to hold rights of audience but such authorisation will be restricted to lawyers with qualifications awarded by other legal regulators until the demand for bespoke qualifications for accountants and other non-lawyers can be ascertained.

ICAEW’s ability and intention to provide qualifications for the further reserved legal activities

79. With regard to the LCJ’s concern that ICAEW has no immediate intention or ability to offer qualifications for these services; it most certainly is not the case that ICAEW has no immediate ability to offer qualifications for the conduct of litigation and rights of audience. Schedules 1 and 2 to ICAEW’s Legal Services Regulations (annex 1 to its application) set out in detail ICAEW’s intended Qualification and Authorisation Framework which, at the time the application was initially submitted, ICAEW had already been in discussions with a chosen qualification provider to develop and deliver.
80. ICAEW’S decision to amend its regulations so that, in the short term, it could only authorise individuals to conduct litigation and advocacy who are already qualified by another legal regulator to carry out these services, was taken purely to address commercial risk both for ICAEW and its chosen qualification provider, not because it was not able to develop and deliver high quality professional qualifications.
81. As set out in ICAEW’s application to amend its regulations, ICAEW’s recent research shows there is definitely a demand by accountancy firms to deliver these services. This is corroborated by the fact that the SRA has already authorised a number of ICAEW’s member firms to carry out reserved legal activities. What is unclear at the moment causing

the commercial risk - is whether they would want to deliver legal services such as litigation and rights of audience through appropriately qualified accountants, bearing in mind the cost and time commitment this would entail to train them, or through lawyers who are already qualified to deliver them. Even if ICAEW had not amended its regulations, but rather had retained its ability to train and authorise accountants, it is likely that many accountancy firms may well have opted in any event for the latter option in the short term in order to assess the success of such a new business area before it invested time and expense in training accountants to do so.

82. Likewise the chosen qualification provider, before exposing itself to the commercial risk of developing and delivering expensive qualifications, wants to assess the demand for such courses in order to assess the likely risk. Should ICAEW start accrediting accountancy firms to deliver conduct of litigation and rights of audience, it will be able to assess the demand of these firms to train accountants to deliver them in addition to their authorised lawyers.

Impact on the courts and tribunals of England and Wales

83. The LCJ also expressed his inability to foresee the impact of ICAEW's application on the courts and tribunals.
84. ICAEW's proposed regulatory scheme in relation to the activities of conduct of litigation, rights of audience and by association notarial services, supports the status quo and therefore does not risk the reduction of professional standards (which we would not have expected to happen in any event) and therefore the pre-eminence of London as an international centre for dispute resolution.
85. Should ICAEW's amended application be successful and should it at a future date wish to extend its qualification regime to include conduct of litigation and rights of audience, ICAEW will need to apply to the LSB to amend its regulations. A future consultation related to such an application will include consideration of the likely impact it may have on the courts in England and Wales should the application be granted.

ICAEW's authorisation and licensing of entities

86. The LCJ also expressed a concern that ICAEW will not be providing qualifications for conduct of litigation and rights of audience and therefore it will not be able to authorise entities to carry out these services, it will only be able to license them.
87. In addressing this concern, it should be stressed that, as ICAEW's main qualification, the ACA, is not intrinsically linked to its legal services regulation; the regulatory arm of ICAEW has been able to develop its own distinct qualification for probate. This enables ICAEW to train accountants and other non-lawyers to conduct probate and thus to both authorise and license multi-disciplinary entities to conduct probate work. ICAEW intends to do the same, in the short term, for reserved instrument activities and oaths of administration and, in the longer term, once demand has been assessed, for conduct of litigation and rights of audience activities.
88. Therefore should ICAEW's application be successful, it will be able to both authorise and license multi-disciplinary entities for probate, reserved legal activities, oaths of administration and notarial services; and, possibly, in the longer term, for conduct of litigation and rights of audience, should there be demand for ICAEW to run related qualifications.

Comparison with the Solicitors Regulation Authority (SRA)

89. By comparison however, the SRA's qualification (the Legal Practice Course) is intrinsically linked to its authorisation of individuals for all the reserved legal activities. Therefore, although it is accrediting accountancy firms to conduct some or all the reserved legal activities, it is unable to offer separate qualifications for accountants and other non-lawyers. It is therefore unable to authorise accountants and other non-lawyers individually to carry out any reserved legal activities. It is also unable to authorise, only license, accountancy firms to carry out reserved legal services. The LCJ's opposition to this part of ICAEW's application would, therefore, appear to run contrary to what the LSB has already permitted the SRA to do. It would seem that the SRA's licensing activity was not considered by the LCJ.
90. If the LSB were to follow the LCJ's advice on this point, firms would have to take on the extra regulatory burden and expense of having dual regulation for these activities and the LSB would be rejecting an application to do something which the SRA is already permitted to do which would be inequitable.
91. Furthermore, whereas ICAEW's inability to authorise multi-disciplinary entities will only relate to the activities of conduct of litigation and rights of audience and is only likely to be short term. The SRA is unable to authorise multi-disciplinary entities for all reserved legal activities and this situation is likely to be long term.

An increase in competition risks “regulatory arbitrage” and “shopping around” for the least restrictive regime

92. The LCJ stated in his advice that it was unclear to him whether ICAEW's application and regulations envisage that a qualified lawyer (of whatever description) working within an ICAEW-Licensed entity will;
- i) continue to be authorised and regulated by the regulator connected to their profession; or
 - ii) be authorised and regulated by ICAEW; or
 - iii) be required to hold dual authorisation; or
 - iv) be authorised and regulated by ICAEW, but with conduct matters being left to the professional regulator.

ICAEW's response

93. A key feature of the act is the introduction of Alternative Business Structures through the licensing arrangements that permit the multiple functioning of entities within a business, these being seen in particular as models for innovation and wider access to the consumer. The model brings with it complex cross-regulator arrangements, provision for which is made in sections 52 and 54 of the act. It can mean that the regulator of an entity may be different to the regulator of the individual, and that there can be overlap of regulatory responsibilities.
94. The Memorandum of Understanding between the 8 regulators (referred to below) to which external bodies such as the FCA are also party facilitates this interaction, with the intent that the highest quality of standards are upheld at the higher of the entity regulator or that of the individual. This is a model ICAEW is very familiar with having operated in concert with five other regulatory bodies for the recognition of audit since 1989 when the Companies Act of that year imposed a similar framework.

95. For those unfamiliar with the framework, it can be difficult to understand the functionality and efficiency that can operate within it. We are not convinced that the LCJ has fully understood the framework as evidenced by his four questions, outlined above, when the act answers those questions and the application is referenced to those provisions.
96. Regrettably his conclusions taken to extreme would suggest that the act cannot function as it stands and alternative business structures should not be licensed.
97. ICAEW's Legal Services Regulations envisage that a qualified lawyer (of whatever description) working within an ICAEW accredited entity will be regulated as set out in paragraph 92.iv) above, i.e. they would be authorised and regulated by ICAEW, but with conduct matters being left to the lawyer's professional regulator.
98. Whilst the LCJ is of the view that a separation of authorisation and professional conduct matters should be avoided, this form of separation is already occurring in entities regulated by ICAEW and other legal regulators. As one of the nine current legal regulators, ICAEW's regulatory arrangements are comparable to and compatible with, those of the other legal services regulators
99. As explained in section 12 of ICAEW's application, Section 52 of the Act places a duty on approved regulators to make provision as is reasonably necessary to prevent regulatory conflicts and, in this regard, since 2010 ICAEW has been involved in inter-regulator working groups that have been inter alia considering the issues around regulatory conflict between the approved regulators.
100. In 2012 this resulted in the creation of a Multi-Disciplinary Practices Framework Memorandum of Understanding. This 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 interest of consumers are protected.
101. This document has recently been updated jointly by the SRA and ICAEW in consultation with the other regulators to address individuals operating in authorised as well as licensed firms and is currently being signed by each of the regulators through their governance processes.
102. 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. We are not aware of any situation to date where there has been a dispute or a lack of clarity as to which body would be responsible for taking action.
103. Therefore to state that such separation would be inappropriate in ICAEW-regulated entities when it has been considered appropriate in entities regulated by other legal regulators would be to apply different standards and criteria to ICAEW's application.

104. As the regulatory arrangements set out in paragraph 92.i,ii and iii above, do not apply, the LCJ's concerns relating to these, for example, "regulatory arbitrage" and "shopping around" will also not apply.

Other advice considered by the LCJ

The advice of the Competition and Markets Authority (CMA)

105. The LCJ noted the concerns expressed by other parties which relate to the potential for confusion about the scope of taxation services. The LCJ confirmed that he agreed with those concerns. However, the CMA went on to state in its advice that ICAEW has explained to it how its regulatory scheme and intended approach should address these concerns and the CMA felt that the positive effects of new entry into the market were likely to outweigh these concerns. Both the CMA and the LCJ did however also acknowledge that the LSB is best placed to evaluate ICAEW's assurances on these matters.

The advice of the Legal Services Consumer Panel (LSCP)

106. The LCJ has echoed the concerns raised by the LSCP in its advice to the LSB however, ICAEW believes it has adequately addressed these concerns in paragraphs 37 to 66 above.

The Notaries

107. The LCJ has advised in his advice that he received joint representations from The Notaries Society and The Society of Scrivener Notaries, also enclosing representations from the International Union of Notaries (the Notaries).
108. These representations are dated 8 November 2016 and oppose ICAEW's application broadly on the following grounds;
- the notaries profession favours a single regulator, the Master of Faculties;
 - it could damage the reputation of the English legal system within the international arena;
 - the profession needs to be completely independent from its regulator – separation is the only way of achieving this;
 - it may adversely affect competition in that it may make it more difficult for notaries in England and Wales to compete with those from other jurisdictions;
 - it will not be in the public interest as it may adversely affect the ability of notaries in England and Wales to ensure that their acts are recognised in all other jurisdictions whether civil law or common law;
 - if the status of Anglo-Welsh notarial acts abroad is weakened due to inappropriate regulation or regulatory change, the ability of consumers to access justice will be affected proportionately. The consequences of this on international trade are also alluded to.
109. The Notaries' representations to the LCJ state that they will be submitting a full response and evidence in due course to the LSB (not requested by the LSB) and the LCJ states that these representations clearly merit full consideration.
110. In response to these representations, it should be noted that ICAEW launched a six week public consultation on its application during the first quarter of 2016 inviting responses from interested stakeholders. During this consultation, ICAEW met with the Master of Faculties in March 2016 to discuss ICAEW's intentions relating to the regulation of notarial activities.

111. Following this public consultation, ICAEW received letters from The Society of Scrivener Notaries and the Notaries Society, both stating that they did not think that it would be in the public interest for its profession to be regulated by ICAEW and that, should ICAEW formally submit its application to the LSB, they would both oppose it. Neither, however explained at that time why they felt it would not be in the public interest for ICAEW to regulate notaries, nor did they state on what basis they would be opposing the application. For this reason, ICAEW was unable to address their concerns before finalising its application prior to formal submission.
112. The Master of Faculties did, however, respond to ICAEW's meeting with him and the public consultation in a letter dated 27 April 2016. In this letter, he raised similar, if not the same, concerns as those now being raised by the Notaries Society and The Society of Scrivener Notaries. These related to independence of regulation; recognition and status in foreign jurisdictions; whether the respect and prestige enjoyed by English and Welsh notaries abroad would be diminished; and that the application would not be in the public interest.
113. ICAEW believes it adequately addressed all these concerns raised by the Master of the Faculties during its meeting with him in March 2016 and in section 14 of its application. Furthermore, it should be stressed that, if Parliament had in 2007 believed these were important issues that could jeopardise the future performance of legal services in this area, it would have exempted notarial activities from the provisions of the act. It didn't. The risks associated with these objections, if accepted, would effectively nullify the intent of the legislation as no one could make such an application. Care is therefore needed in judging the relevance of these observations in the context of the application.
114. ICAEW should further point out that The Society of Scrivener Notaries and the Notaries Society had ample opportunity to raise their concerns and outline the grounds of their opposition to ICAEW's application with ICAEW prior to formal submission in July 2016. They chose not to do so but have chosen instead to raise their concerns directly with the LCJ in November 2016 during the statutory consultation process. They have also chosen – for reasons unknown to ICAEW – not to provide ICAEW directly with a copy of these representations. ICAEW has, therefore, not been afforded the opportunity to provide the LCJ with its comments specifically on their representations. However, as mentioned above, ICAEW believes it has adequately addressed them in section 14 of its application.