

The Institute of Chartered Accountants in England and Wales' Regulatory Standards report 2015/16

May 2016

Background

Who we are and what we do

1. The Legal Services Board (LSB) is responsible for overseeing legal services regulators in England and Wales. We are independent of Government and of the legal profession. We hold to account regulators for the different branches of the legal profession. We drive change in pursuit of a modern and effective legal services market: one that better meets the needs of consumers, citizens and practitioners.

Regulatory standards

2. We have a process in place to hold the regulators to account for their performance. We consider the legal services regulators' performance against five regulatory standards: outcomes-focused regulation, risk assessment, supervision, enforcement and capability and capacity.
3. Effective delivery of the regulatory standards should lead to higher standards of professional conduct and competence amongst lawyers. It should help to create a legal services market with increased consumer choice and consumer confidence. It should encourage innovative practitioners who, if posing fewer risks, are not subject to intrusive or inflexible regulation. It will introduce a level of consistency in the approach to the regulation of legal services.
4. This is our first full assessment of the Institute of Chartered Accountants in England and Wales' (ICAEW) performance against the regulatory standards. To undertake this assessment, we asked the ICAEW to complete a self-assessment against the five regulatory standards. We also considered other evidence such as the results of a questionnaire aimed at understanding the experiences of individual users of the ICAEW, the outcomes of in-depth interviews with, and written responses from, key stakeholder organisations and information gained in other areas of our work, such as statutory decisions and thematic reviews.
5. This report sets out our view on the performance of the ICAEW against each regulatory standard as well as the grades we allocated to it. It should be read in conjunction with our thematic report on the performance of all of the regulators against the regulatory standards.¹ At Annex 1 we have provided some facts and figures about the ICAEW.
6. Individual reports have been produced for each of the eight regulators. Care should be taken, if reading the other reports, to ensure misleading comparisons are not made, particularly in relation to the grades given. There are differences in: the size of the regulators, in terms of staff numbers, budget, and the regulated communities; the risk profiles; who they regulate (individuals, entities and

¹ The thematic report can be found here: http://www.legalservicesboard.org.uk/Projects/developing_regulatory_standards/index.htm

alternative business structures (ABS)); and the types of consumers their regulated communities engage with. We have taken the context of the ICAEW into account when considering its performance against the regulatory standards. The grades available are:

- Good – all indicators embedded appropriately in the organisation and inform day to day working practices.
- Satisfactory – significant progress is being made to embed indicators and use them in day to day working practices.
- Undertaking improvement and work is well underway – indicators have been introduced but are not yet embedded appropriately in the organisation and do not yet inform day to day working practices.
- Needs improvement and work has started recently.
- Recognise this needs to be done but work has not yet started.

The next steps

7. The report indicates the areas where we think that there is scope for improvement. We will agree with the ICAEW a specific action plan as the basis for our future monitoring of performance. We aim to publish the action plan by the end of June 2016.
8. We would like to thank all those who contributed time, energy and insights to this regulatory standards review.


Overall assessment

9. This report sets out our assessment of the performance of the ICAEW as a legal services regulator against the regulatory standards in the short time (since July 2014) it has been designated to regulate firms for the reserved legal activity of probate. It is important to note that in the context of this report, the ICAEW's regulatory arrangements for probate were subject to a rigorous and thorough assessment when the approved regulator and licensing authority applications were granted by the LSB. This has been reflected, where appropriate, in the report.
10. The ICAEW is an experienced regulator with responsibilities under statute in the areas of audit (which is within the remit of the Financial Reporting Council) and insolvency (which is overseen by the Insolvency Service). The ICAEW's responsibilities also extend to overseeing some investment business activities as a Designated Professional Body (DPB) under the Financial Services and Markets Act 2000 (and previously a Recognised Professional Body under the Financial Services Act 1986). The ICAEW is also an accredited body under the Financial Conduct Authority (FCA) Retail Distribution Review (RDR) arrangements. The ICAEW has adapted its established procedures and processes in the existing area of expertise for probate, and therefore has a sound base on which to regulate legal services.
11. The ICAEW has provided evidence that it is an outcomes-focused, risk-based regulator which takes account of consumer needs. Due to the relatively short period that the ICAEW has been operating as an approved regulator and licensing authority for probate, its regulatory framework is yet to be fully tested within the legal services market. However, we consider that its regulatory arrangements are fit for purpose. We encourage the ICAEW to monitor its processes to ensure that this remains the case.
12. We consider that the progress the ICAEW has achieved so far is to be commended. We agree with the ICAEW that there is still more work to do. We will be monitoring the progress of the ICAEW in areas set out later in this report.

Grades

13. We set out below the grades that the ICAEW awarded itself and those the LSB has awarded in 2015/16. These illustrate that the ICAEW has a good understanding of its own performance and is aware of the improvements that are needed. The only area where our grades differ is capability and capacity and this is because of our view that consumer knowledge needs to be developed before it can be considered satisfactory.

Standard \ Grade	Recognise this needs to be done but work has not yet started	Needs improvement and work has recently started	Undertaking improvement and work is well underway	Satisfactory	Good
Outcomes-focused regulation	LSB 2015/16				
	ICAEW 2015/16				
Risk assessment	LSB 2015/16				
	ICAEW 2015/16				
Supervision	LSB 2015/16				
	ICAEW 2015/16				
Enforcement	LSB 2015/16				
	ICAEW 2015/16				
Capability and capacity	LSB 2015/16				
	ICAEW 2015/16				

 A shaded progress bar indicates where the LSB considers that the regulator's arrangements are fit for purpose but as they are yet to be tested or have only been tested to a limited extent we cannot be certain as to their effectiveness.

Assessment against the regulatory standards

Outcomes-focused regulation

To deliver this regulatory standard, we consider that regulators must:

- have high quality, up-to-date and reliable evidence on what legal services consumers need and how they use the services
- have effective engagement with consumers
- demonstrate that outcomes are being achieved
- review and update their arrangements based on the evidence they gather.

14. The ICAEW takes an outcomes-focused approach to key aspects of its regulatory arrangements. Two key examples of this are its code of conduct and its approach to continuing professional development (CPD). The code of conduct shows how key principles apply to the regulated community and subsequent sections deal with specific situations that the regulated community may encounter in practice. In relation to CPD, the ICAEW does not specify the form that the CPD should take nor specify the number of points that must be obtained. The regulated community must undertake whatever development activity is required for them to remain competent in their roles.
15. The ICAEW has demonstrated that it actively informs its regulated community about its approach to regulation. This can be clearly seen from its approach to sharing information on its approach to practice assurance, where information is published in a user-friendly format on its website, as well as shared at events with the regulated community. From the stakeholders we spoke to it is apparent that the ICAEW is clearly engaged with its regulated community and that it is receptive to feedback on its performance and how its processes could be improved.
16. One specific area we consider the ICAEW should give further thought to is its understanding of the needs of consumers who use probate legal services as well as how they use such services. We consider that obtaining high quality, up-to-date information about consumer needs and use of legal services is a priority for all regulators. We are therefore pleased that the ICAEW is shortly to undertake a project aimed at understanding how it can improve its work with consumers as well as how it can help the regulated community to engage with consumers. We also welcome its commitment to participate in joint projects around consumer needs and risks, such as the approach to use in client care letters, if they align to the needs of the ICAEW. This is a particular area we will monitor going forward.
17. Given the short time that the ICAEW has been an approved regulator and licensing authority for probate activities, we understand and accept that it is not yet in a position to know who its consumers are and whether the outcomes consumers need are being achieved. However, it is important that it starts to

consider how it will carry out such an evaluation once it has begun to gather information on consumers (as set out in paragraph 16). Similarly it has not needed to carry out any reviews of its regulatory arrangements. Evidence provided by the ICAEW indicates that it is responsive to feedback on the authorisation and monitoring process, but we encourage the ICAEW to gather evidence from other areas of its work including, but not limited to supervision (practice assurance), so that it can be used to test the appropriateness of its regulatory arrangements.

Risk assessment

To deliver this regulatory standard, we consider the legal services regulator must:

- have formal, structured, transparent, evidence-based approaches to the collection, identification and mitigation of current and future risks which inform all regulatory processes
- focus their risk analysis on vulnerable consumers and consumer detriment
- have processes in place which are understood by the Board and staff
- demonstrate that outcomes are being achieved.

18. From the evidence we have seen and heard, the ICAEW's staff and the Probate Committee (its governing committee) appear to understand the reasons for risk assessment and how it informs other aspects of the ICAEW's legal services regulatory activities. The ICAEW has demonstrated that it has robust processes in place to gather information on generic risks, such as the holding of client monies, and risks specific to probate activities. It has information sharing arrangements with key stakeholders such as the FCA which enables intelligence to be gathered as well as using information from its own internal processes such as supervision of firms.
19. However, from the evidence presented, the ICAEW has not published a framework on how it conducts its risk assessments such as that of an applicant firm. It is good practice that this information should be published and readily available to applicants and consumers in order for the ICAEW to be consistent with the better regulation principles of transparency, consistency and accountability.
20. The ICAEW has demonstrated that it responds to risk. For example, through its practice assurance visits of firms not authorised for probate, it identified instances where estate administration activities may risk straying into the reserved area of probate. It therefore issued guidelines around when a probate licence would ordinarily be required. It has also issued guidance to the regulated community to help them respond to vulnerable consumers. The guidance includes information on the probate compensation fund and wording concerning how to complain to the Legal Ombudsman to be applied in letters of engagement. It has obtained wider intervention powers to enable it to respond to a firm's failure and is currently developing its approach on how such powers would be used. The LSB encourages the ICAEW to publish the finalised approach in the interests of transparency.
21. As noted in paragraph 16 above, the ICAEW's understanding of consumer needs or their use of probate activities is developing, and it is yet to properly focus its risk assessment on consumer detriment. We are pleased that, as part of the

consumer interest project, the ICAEW will consider how to address the lack of information.

22. Due to the short time frame that the ICAEW has been regulating probate activities, it is too early to tell whether the ICAEW's approach to risk is working in practice. The ICAEW will need to consider how it will assess the effectiveness of its risk assessment process and what evidence it needs to do this. We expect that by gaining a more robust understanding of consumer needs, the ICAEW will then be able to ensure that its approach to risk is comprehensive.

Supervision

To deliver this regulatory standard, we consider the legal services regulator must:

- have a supervision policy that is carried out with reference to identified risks, all available information and is underpinned by an evidence-based understanding of the different market segments
- have access to a range of supervisory tools and willingness and capacity to use them
- have processes in place to enable learning to be shared and performance to be monitored.

23. As part of the assessment of the designation application, we concluded that the ICAEW's supervisory framework was fit for purpose. The ICAEW has an established process for practice assurance already in place and this is being developed to cover probate activities. We are encouraged that the ICAEW is building on its established processes to enable a risk-based approach to be taken to supervising probate firms. This risk-based process will commence in spring 2016. In the meantime the ICAEW is gathering evidence to inform its risk assessments through, for example, its annual regulatory returns and from its information sharing arrangements with other key stakeholders.
24. The supervisory activity undertaken at present is that each newly authorised firm will be subject to a practice assurance visit within 24 months of authorisation. We have been told that these visits (31 as of April 2016) have not indicated any significant risks.
25. The ICAEW has demonstrated that it is adequately resourced. It also appears to have clear and structured feedback loops between supervisory activity and staff learning. For example, a 'Special Interest Group' has been established which will collate best practice and act as a further source on consultation on the evolution of probate practices. It has also demonstrated that it has systems in place to share learning from its supervisory activities with its regulated community. For example, learning from supervision is shared with the community via user-friendly publications on its website and at regular workshops.
26. The regulatory standard of supervision is closely aligned to that of risk assessment. The LSB acknowledges that the performance of the ICAEW against this standard is somewhat restricted by the lack of a fully implemented risk-based approach to legal services regulation, a lack of information on consumer needs and the use of legal services. However, the LSB commends the ICAEW for the work it has done so far in relation to both standards. We acknowledge that good work has begun to fill knowledge gaps and learn from the practical implementation of processes and systems.

27. We note that the Probate Committee has oversight responsibility for supervisory activities concerning individuals and entities authorised for probate activities. It will review whether the processes and procedures are effective and represent value for money.

Enforcement

To deliver this regulatory standard, we consider the legal services regulator must:

- have a range of effective and proportionate enforcement tools
- have published policies and guidance that enables others to understand the regulator's criteria for deciding to take action
- operate the enforcement function in a timely, evidence-based, fair and proportionate manner
- have appeal processes that are independent from the body or persons who made the original decision
- have processes in place to ensure that learning is shared and performance is monitored.

28. The ICAEW's regulatory arrangements underwent a thorough assessment as part of its application to become an approved regulator and licensing authority for probate. Through that assessment we judged its enforcement processes as fit for purpose. We also note that this is the view held by its other oversight regulators which monitor their performance in relation to accountancy and insolvency regulation and evidenced in the FRC's last inspection report for the ICAEW.
29. The ICAEW has in place enforcement tools which appear proportionate and focused on those matters not suitable for resolution through other means such as supervision. The ICAEW has indicated that the tools can be deployed quickly by staff who have the appropriate level of experience and are well-trained. The ICAEW uses the civil standard of proof at both stages of its enforcement process (early stage decisions made by the Investigations Committee and those made by the Disciplinary Committee). This is in line with best regulatory practice as set out in our report Regulatory sanctions and appeals processes report – an assessment of the current arrangements (March 2014).² Currently the ICAEW has a separate appeals committee which it administers, but appeals, in respect of cases linked to the provision of reserved legal services, may be made to the First-tier Tribunal (FTT) if a firm or individual is unhappy with the decision of the ICAEW's internal arrangements. The ICAEW has indicated that if designated for a wider range of reserved legal activities, its intention is that all appeals related to those activities will be directed to the FTT. This is in line with our view on best regulatory practice as set down in the report above. We also note that the ICAEW states that it has worked with the Intellectual Property Regulation Board (IPReg) to effect a 90% saving on the costs initially mooted by the FTT appeals mechanism.

² LSB report on Regulatory sanctions and appeals processes- an assessment of the current arrangements. (March 2014)
http://www.legalservicesboard.org.uk/projects/thematic_review/pdf/20140306_LSB_Assessment_Of_Current_Arrangements_For_Sanctions_And_Appeals.pdf

30. We are satisfied that the ICAEW will be transparent about its approach to the enforcement processes. For example, it currently publishes the outcome of disciplinary cases, it publishes guidance on how decisions are reached within the enforcement process and it publishes guidance for practitioners/firms involved with the process. It will do the same for disciplinary cases, decisions and guidance relating to probate services. That said, there would seem to be scope for improvement particularly with regard to ensuring consumers understand the ICAEW's enforcement and disciplinary procedures. We encourage the ICAEW, as part of its new consumer engagement work, to develop consumer facing guidance and documentation on all stages of the enforcement process including the appeals stage.
31. We understand from discussions with the ICAEW staff that there will be scrutiny of the performance of the enforcement process by the Probate Committee once a case has been considered.
32. It is important to note that as the ICAEW's enforcement processes are yet to be tested in relation to legal services regulation, we are unable at this time to comment on their effectiveness.

Capability and capacity

To deliver this regulatory standard, we consider the legal services regulator must:

- have clear and consistent leadership that ensures the whole organisation has a strong consumer focus
- have regulatory budgets and staffing set at appropriate levels for the risks associated with the market
- have a culture of transparency and improvement
- have management and governance processes in place which are capable of scrutinising the performance of the regulator.

33. The LSB has previously conducted a thorough assessment of the ICAEW's capability and capacity when considering its designation application. We considered then that the ICAEW's arrangements were fit for purpose; that the ICAEW was competent and that it had sufficient resources, including an adequate budget, in which to regulate probate activities. We were satisfied at that time, and we have had no reason to change this view in light of the 2015/16 assessment.
34. The Probate Committee which is responsible for overseeing the ICAEW's responsibilities as approved regulator and licensing authority, has a clear and consistent leadership structure. From the evidence that we have seen and our discussions with the ICAEW, we are assured that the Probate Committee is able to act independently, in line with its terms of reference, and is overseeing the probate activity work effectively.
35. It is not clear from the little publicly available information on the Probate Committee whether it has a clear focus on consumers. While we welcome the establishment of a consumers' interest project, going forward, we would nonetheless expect the Probate Committee to be clearer about its commitment to being consumer-focused. We also note that Probate Committee minutes and papers are not published, nor is any performance data regularly published. Whilst we understand that this information often contains confidential or commercially sensitive information, more could be done by the ICAEW to enhance the transparency of the Probate Committee work. We are encouraged that the ICAEW has said they will include a summary of what was considered by the Probate Committee and detailed performance management information in its annual Probate Committee report. We expect that future reports will enable the reader to clearly understand how the regulator is performing in each of its functions and how the Probate Committee has held the executive to account over the previous 12 months.

36. As noted in previous sections of this report, the ICAEW has demonstrated a commitment to learning from its regulated community's experience of regulation and from the ICAEW's own experience of applying its approach to regulation. It has also demonstrated that it wishes to learn or share its learning with other regulators. For example, the ICAEW has worked with other regulators to address barriers in support of services to the regulatory market that were inhibiting the exercise of rights by the accreditation of bodies, particularly in the area of probate. The ICAEW and IPReg alerted the HM Revenue and Customs to an inaccuracy on the government website which indicated that probate could be carried out by the executor or a solicitor. This was subsequently amended to read, "You can apply for a grant of representation yourself or use a solicitor or another person licensed to provide probate services". Such an approach by the ICAEW is welcomed and can only be beneficial for consumers, the regulated community and the market.

Annex one

What is the Institute of Chartered Accountants in England and Wales?

Key facts:

- At 1 April 2015, a total of 92 probate practitioners were regulated by the ICAEW.
 - In 2015, the ICAEW approved 46 authorised firms and 104 licensed firms (ABS).
 - The Probate Committee's regulatory budget for 2014/15 was £130,000.
 - At 31 March 2015, the ICAEW employed two full time equivalent staff.³
1. The ICAEW is a regulator and professional membership body for the accountancy profession in England and Wales. The ICAEW is a new entrant to the legal services sector and was designated as an approved regulator and licensing authority for the reserved legal activity of probate in 2014. There is no separate regulatory body; all decisions relating to legal activities are delegated to the independently chaired Probate Committee.
 2. Under the Probate Committee's regulatory arrangements, firms may apply for authorisation to deliver probate services as probate firms. If individuals working within these entities wish to conduct or supervise probate work, they must apply to the ICAEW for approval as 'authorised individuals'.
 3. The Probate Committee's regulatory responsibilities include:
 - considering and determining applications for probate accreditation (for authorised individuals, head of legal practice, head of finance and administration, non-authorised owner or probate affiliate status)
 - monitoring compliance with probate regulations
 - taking regulatory action as required to ensure compliance with the probate regulations
 - referring matters to the ICAEW disciplinary committees as required
 - keeping a register of licensed firms and supplying this information to the LSB as required
 - determining applications for grants under the probate compensation scheme regulations
 - developing policy in relation to probate practitioners, in consultation with the ICAEW Regulatory Board (IRB) and other key stakeholders
 - rule-setting and making any amendments to the probate regulations and probate compensation scheme regulations in consultation with the LSB, the IRB and other stakeholders

³ Information provided in response to a data request from the LSB.

- budget and fee-setting in relation to accredited probate firms, in consultation with the LSB, PSB (and the ICAEW board where any proposed increase is above the rate of wage inflation)
 - liaising freely with the LSB and other stakeholders on matters concerning probate practitioners and responding to requests for information from the LSB.
4. The Probate Committee has five lay and five technical members. The chair is lay with a casting vote.