

From the Chief Executive

Mr C Kenny
Legal Services Board
Victoria House
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The Law Society

10 May 2013

Dear Chris

The ICAEW's application to become an approved regulator

I am writing to you in response to the application of the Institute for Chartered Accountants England and Wales (ICAEW) to become an approved regulator in relation to the grant of probate. It did not appear appropriate to us to comment on the application in its early stages though we signalled our interest and concern. We have significant concerns about the final application and in the light of them, we do not believe that the ICAEW's application should be approved.

Separation of functions

There is a significant flaw in the application in respect of the governance arrangements for achieving the separation of representative and regulatory functions required by the Act. This was one of the key purposes behind the Act and one which has been achieved after substantial debate and discussion by all the other regulators.

The ICAEW's proposal is that it should create an 'independent' probate committee. However, that committee will be answerable to the Professional Standards Board which is answerable to the Council. The Probate Committee will not have a lay majority and will be answerable to a Board that does not have a lay majority. Disciplinary decisions will still be made by the disciplinary committee which sits in the current regulatory structure and does not have a lay majority. Similar concerns apply to the investigatory committee.

These arrangements resemble those adopted by the Law Society and Bar Council prior to the Clementi report and contrast starkly with the current regime that has been agreed for the Law Society, the Bar Council and CILEX, all of whom have created regulatory arrangements which have lay majorities, which are not answerable to their Councils and have elaborate mechanisms to ensure independence and which impose a substantial burden on their professions. The aim of this is to ensure public confidence in regulation and that, in the public interest, there is independent regulation in the public interest.

The ICAEW's arguments to support their arrangements are unconvincing. First, they suggest that they are a smaller regulator and will deal with a small number of firms and a relatively small part of the market. While this is inconsistent with the statement elsewhere in the document that they expect to increase the number of probate suppliers to the extent that they will improve competition and access to justice, of course, the fundamental issue is that the firms regulated by the ICAEW and

competing with other firms differently regulated will be offering services directly to consumers and those consumers deserve the same level of regulatory assurance across all providers.

Secondly, they refer to difficulties caused in the relationship with other regulators. In our view, it is for the ICAEW to resolve those problems and they should not be used as an excuse to adopt an arrangement which suggests that the ICAEW is a special case exempt from the philosophy of the Legal Services Act. The ICAEW says that it is reviewing its governance arrangements. That may well be appropriate but their application should wait until that is complete.

The philosophy of the Act was to ensure that, neither in fact nor perception, could professional self-interest overcome the public interest. The ICAEW's arrangements do not achieve that and there must be a clear risk that its arrangements, if permitted, will give rise to a regime that leads to differential, inconsistent and anti-competitive arrangements among probate practitioners. This would be to the detriment of consumers and adds significant additional work for the LSB in scrutinising their rules.

If the LSB approves the arrangements here, it would signal that the LSB is so concerned to encourage new entrants to the market that it will ignore the philosophy behind the Act, adherence to the regulatory objectives and its own practice so far and treat existing regulators and their regulated firms unfairly. If that be the case then it would also indicate willingness to countenance revised arrangements for the approved regulators closer to the ICAEW's model.

Limitation to non-contentious probate work

We believe that the application significantly under-estimates the range of work undertaken in non-contentious probate. The applications states: "We have analysed the steps and activities that need to be undertaken in preparing the papers for a grant of probate or letters of administration, and note that this is a largely an accounting and administrative exercise that should not require firms to hold client or estate monies or other assets".

There is no reference here to commonly found situations such as lifetime gifts, pre-owned assets, guardianship issues, or claims by dependents or disappointed beneficiaries – all of which ever more frequently in modern day situations. Moreover, where superficially non contentious matters are later disputed whether as to validity of wills or as to interpretation of the effect of the will then the matter would fall outside the scope of the authorisation and the public will be prejudiced by delay and lack of expertise quite apart from becoming involved in issues of litigation privilege. The distinction between non contentious and litigious work is not discussed and not as clear cut as suggested by its omission.

We also find surprising the suggestion that client or estate monies would not need to be held. Simply consider the realisation of shares, ISAs, or real property held by the deceased to be disimbursed to multiple beneficiaries. It is difficult to see how that could be done without holding client money.

The application also states that “Almost two thirds of the sole practitioners and nearly one third of the larger firms ...[are]... not currently engaged in any probate-related activity (e.g., estate administration). For those that were engaged in some probate-related activity, the level of activity was relatively low”. It is, therefore, not clear to us why it is necessary for the ICAEW to become a regulator at all. In the present market, accountants work together with authorised bodies in relation to aspects of the work within their expertise and authorisations. Further, it is now possible for accountants and solicitors to form ABS firms if they wish to do so. In choosing this option they would be regulated by a body with long-standing expertise in the field and for which probate is an important activity. For the ICAEW, this will be a non-mainstream activity affecting a very small proportion of their members. We do not believe that it is in the public interest for probate services to be regulated in this way.

Regulatory requirements

In its report on regulatory standards for self-assessments, the LSB are very clear as to the essential constituent parts of regulation:

- an outcomes-focused code or handbook
- a risk identification framework
- proportionate supervision targeted at risk
- an appropriate approach to compliance and enforcement.

The ICAEW's application provides no evidence as to how it meets these criteria and we see no reason nor valid basis for the LSB to make exceptions in this case.

Unregulated activities

We do not believe that the application adequately deals with the way in which other legal work undertaken by accountants' firms should be handled, particularly if it is ancillary to probate work, such as will-writing. There is potential for significant confusion among consumers about the extent to which they are able to complain about such services and to whom if there is poor service. They are unlikely to appreciate that only a proportion of the firm's work falls within the ambit of legal regulation. In our view, serious consideration needs to be given to bringing other legal work undertaken by accountants within the ambit of regulation under a framework approved under the Legal Services Act.

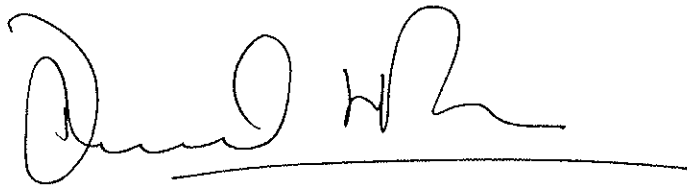
Other matters

In addition, the Society feels that the application reveals significant short-comings in respect of the rules concerning training, referrals, protection of client money and assets, charging and complaints, client care and record keeping requirements. We have summarised these in the attached annex. They cause us to question whether the ICAEW understands the regulation of legal service or is prepared to address them.

In the light of these serious concerns, I would urge you not to approve the ICAEW's application in its present form.

I am copying this letter to the Lord Chief Justice, the Master of the Rolls, the Chief Executive of the Office of Fair Trading, the Chairman of the Bar and the Chair of the Legal Services Board's Consumer Panel.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Desmond Hudson', written over a horizontal line.

Desmond Hudson
Chief Executive

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Annex A

Scope of regulation

The current proposals will lead to confusion for clients about other legal type services provided by accountancy firms. These will not be covered by the accreditation, but clients are not likely to draw the distinction. This will be particularly problematic if they have a complaint and find that it cannot be considered by the Legal Ombudsman.

Regulation of non-accountants

The ICAEW should limit its regulation to accountancy firms, as the application provides no mechanism for it to assess suitability of non-accountancy firms. Without this information, the LSB cannot assure itself of its competence in this area. The application is based on regulating accountancy-led practice that the ICAEW already knows and has a relationship with. If it wishes to accept applications from non-accountancy firms then the application needs to be re-thought.

Education & Training

The ICAEW needs to clarify the criteria that it will use to authorise people who are neither ICAEW or other accountancy body members or holders of probate qualifications recognised by other regulators. It is insufficient to say that this will be dealt with on a 'case by case' basis.

The training concentrates on non-contentious probate. However, we are concerned that the narrow focus of the training, coupled with a lack of broader legal knowledge of many of the applicants, will prevent them from recognising the range of issues that need to be addressed and whether a Will and other legal documents or background factors to the case presents more complex and potentially contentious issues.

Client financial protection arrangements

Professional Indemnity Insurance (PII)

The minimum cover is £1.5 million for any one claim and in total. However, there is an allowance for firms with gross fee income of less than £600,000 to have a smaller limit. The minimum limit of indemnity for any one claim and in total must be equal to two and a half times its gross fee income, with a minimum of £100,000.

A firm's gross fees are not necessarily an indication on the level of its potential exposure to civil liability and professional negligence. In terms of probate work, we agree with the ICAEW's submission that the risk of discrete probate work is low. However, the minimum level of indemnity should not be set based on a firm's turnover. The minimum level of cover should reflect the potential liability for the work undertaken. Similarly, the level of claims and costs should not be determined by the value of the estate alone, rather a range of risk factors should be considered. While we accept the ICAEW's assertion that discrete probate work is low risk, the ICAEW proposes that authorisation is also extended to estate administration. Our figures show that the area of wills & estate administration accounts for the third highest number of PII claims. If the ICAEW proposes to regulate in this area then the minimum level of cover is inadequate.

The ICAEW allows for an aggregate of total claims under the policy. By capping the total amount that can be paid under the policy, the ICAEW is opening the potential to client detriment and uninsured loss.

The ICAEW only has two years mandatory run-off cover in contrast to the mandatory six years required by most approved regulators. The consumer panel are looking at this issue currently. Until it has completed its research, we believe approved regulators should ensure that firms put in place a mandatory requirement for six years of run off cover.

Compensation Fund

Compensation payouts are capped at £500,000 per estate and an aggregate of £5m per year. A cap per estate means that there could be a 'race to claim', unless there is some form of prioritisation. Capped compensation fund payouts may result in client detriment.

Code of Ethics

Acting in the public interest appears to be the overarching principle and the introduction to the Code specifically states that "a professional accountant's responsibility is not exclusively to satisfy the needs of an individual client or employer". This is a different approach to that adopted in the SRA Code in which the 10 mandatory principles are equal in standing, including Principle 4 to "act in the best interests of each client". Where the duty of a professional accountant lies is dependent on the nature of the work undertaken, thus their duty is not always to the client.

Measures should be put in place to ensure that referrals are made to independent professionals, and do not form part of a tied arrangement. Such arrangements may compromise the quality of advice provided and restrict autonomy, thereby placing clients at risk. Because of the limited scope of their involvement in the full range of case work referrals are likely to be a significant feature for the regulator but does not appear to have been considered.

The ICAEW Code makes no mention of equality and diversity. There are also no specific requirements on managing your business properly and cooperating with your regulator. These appear to be significant omissions.

Other Regulatory requirements

Clients' Money Regulations

£10,000 is too high a *de minimis* for payment to charity where a client cannot be traced, placing client money at risk. £250 would be more appropriate, and the regulations should specify what administrative steps a firm should take if the figure exceeds this. Further guidance should also be provided to clarify what steps a firm should take in order to trace a client in these circumstances.

Regulations should be included to determine how a jointly held account should be managed, and for circumstances where the firm shares operation of the account with the client.

Fit and proper test for owners and HOLPs

Under the current proposals the ICAEW will not consider spent convictions of non-accountants wishing to become authorised persons. Given such checks are deemed necessary for accountants; we believe that they should also be a requirements for non-accountants.

Intervention

The information on how the ICAEW will carry out interventions is limited and needs to be more detailed to provide assurance of their ability to carry out this work. No consideration is given to issues such as long term storage of files and mechanisms for distributing client money, returning files and ensuring client work is continued.

We would expect to see the ICAEW granted powers of intervention before they become an approved regulator otherwise clients will be left unprotected.

Complaints

The ICAEW process for dealing with complaints does not fully distinguish between service complaints and disciplinary complaints. For instance, in its application it states that complaints of a more minor nature are dealt with by conciliation. This indicates that it is handling complaints that relate to service and resolving them by conciliation. This is a role for Legal Ombudsman.