Revisions to ICAEW's disciplinary, fitness to practise and appeals framework – application to the LSB

SUMMARY AND OVERVIEW

1. This is a formal application to the Legal Services Board (LSB) in accordance with Part 3 of Schedule 4 of the Legal Services Act 2007 ('the Act') for approval of changes that are proposed to ICAEW's disciplinary, fitness to practise and appeals framework later in 2022 / early 2023. The LSB is requested to approve new Disciplinary Bye-laws (DBLs) **(appendix 1)** and the following regulations which will form Parts 1 – 3 of ICAEW's new Regulations Handbook **(appendices 2 – 4)**:

    - Draft Investigation and Disciplinary Regulations (IDRs) - save for the appeal provisions
    - Draft Fitness to Practise Regulations (FTP Regulations) – including the procedure for appeals
    - Draft Regulatory Review and Appeal Regulations (RRARs) – procedure governing hearings of the Review Committee only.

2. The LSB is not asked to approve the appeal procedure set out in the draft IDRs and RRARs as, in accordance with the procedure set out in chapters 11 and 12 of the Probate Regulations (to be re-named the 'Legal Services Regulations'), appeals against decisions of the Review Committee in legal services regulatory cases, and Disciplinary Tribunals for breaches of the Probate Regulations, are dealt with by an external appeal body (the General Regulatory Chamber of the First-tier Tribunal) rather than by ICAEW's own Appeal Committee.

3. The LSB is requested also to approve amendments to the existing Probate Regulations and Probate Compensation Scheme Regulations, and the Terms of Reference for the Probate Committee **(appendices 5 – 7)** which are required as a consequence of the drafting changes to the new DBLs and IDRs (including changes to the names of the Investigation and Disciplinary Committees which will be known, respectively, as the 'Conduct Committee' and the 'Tribunals Committee' following the launch of the new framework).

4. For the purposes of this application, the Probate Regulations and Probate Compensation Scheme Regulations are referred to hereafter as the 'Legal Services Regulations' and 'Legal Services Compensation Scheme Regulations'.

OBJECTIVE OF THE PROJECT

5. During recent years, ICAEW has made a number of significant changes to its disciplinary arrangements for members and other regulated individuals and firms (including accredited probate firms) with the aim of improving consumer protection and access to justice. These include the introduction of a fitness to practise process; a fixed penalty process for more minor compliance-type issues, a fast-track process for serious criminal conviction complaints, and provision for settlement orders and interim orders. These changes have been introduced through a series of incremental amendments to the existing DBLs with the drafting reflecting current terminology and approach.

6. As the DBLs currently contain provisions governing the procedure to apply in disciplinary and fitness to practise cases, as well as key provisions concerning e.g. individuals' and firms' liability to disciplinary action, the ICAEW Regulatory Board (IRB) was concerned that these changes had resulted in the DBLs becoming overly complex and difficult to navigate. The IRB was also concerned that some of the language used in the DBLs was overly legalistic, and that the governance requirements for changes to bye-laws under ICAEW's constitution meant that procedural changes could not be implemented swiftly if issues and/or gaps were identified in the process.

7. Consequently, in 2019, the IRB resolved that the disciplinary and fitness to practise framework should be simplified and re-drafted generally to make it more accessible to users – whether they be individuals or firms who are subject to the DBLs, their representatives, complainants, ICAEW committee members or Professional Conduct Department staff. Following advice from Leading Counsel, it was agreed that the DBLs should be streamlined to focus solely on the core provisions necessary to impose duties and obligations on those who are subject to the DBLs, and to specify the powers that ICAEW committees and staff can exercise over members and other regulated individuals and firms. The remaining provisions in the DBLs which deal with matters of procedure could consequently be re-cast in regulation and combined with provisions setting out the processes of the disciplinary and fitness to practise committees, which are currently set out in separate sets of regulations governed by each committee. Accordingly, the DBLs were re-drafted and a five-part Regulations Handbook has been developed comprising:

   - The Investigation and Disciplinary Regulations (IDRs);
   - The Fitness to Practise Regulations (FTP Regulations);
   - The Regulatory Review and Appeal Regulations (RRARs);
   - The Readmission and Re-registration Review and Appeal Regulations (RRRARs); and
   - The Fitness to Practise Committee: Provisional Membership Review and Appeal Regulations (Provisional Membership Regulations).

8. Note - the RRRARs and the Provisional Membership Regulations (Parts 4 and 5 of the Regulations Handbook) concern the procedure to apply to student applications and applications for readmission to ICAEW membership and re-registration of ICAEW Foundation Qualification Holder status. As these regulations do not concern accredited probate firms / legal services matters, approval of the LSB is not sought in respect of these regulations. In addition, as noted above, only the regulatory review section of the RRARs is relevant to legal services regulation.

PART A: THE KEY POLICY CHANGES- SUMMARY AND RATIONALE

9. The IRB's objective in launching the DBLs project was to simplify and update the disciplinary and fitness to practise frameworks, while maintaining the cornerstones of each process. Therefore, in the disciplinary context, the three-tier committee structure has been maintained, although the names of two committees have changed: the 'Investigation Committee' is to be re-named the 'Conduct Committee' and the 'Disciplinary Committee' is to be renamed the 'Tribunals Committee'. Core aspects of the disciplinary process are also being maintained – i.e:

- ICAEW's Professional Conduct Department (referred to in the DBLs and IDRs as the 'Conduct Department') remains responsible for assessing complaints; investigating 'conduct matters'[i]; proposing fixed penalties in respect of more minor conduct matters, and for referring 'serious conviction complaints' directly to the Tribunals Committee;

- ICAEW's Conduct Committee remains responsible for reviewing, on request from a complainant, decisions of the Conduct Department to close complaints it considers:

    - do not disclose a potential liability to disciplinary action;
    - are time barred; or
    - are repetitive or vexatious (see IDR 10).

  Where the Conduct Department intends to close a complaint following investigation on the basis that it does not disclose a liability to disciplinary action, the important safeguard has been maintained whereby every complainant has the right to insist that their complaint still be reported to the Conduct Committee for review.

- ICAEW's Conduct Committee remains responsible for reviewing allegations referred to it by the Conduct Department in the first instance and will continue to be able to deal with matters by consent order (which may include a caution or an order for no further action) where it finds the test set out in DBL 5.1 to be met;

- Where the Conduct Committee does not find the test set out in DBL 5.1 to be met in respect of an allegation, the complainant will retain the right to request that the matter be reviewed by an independent reviewer (IDR 28) as is the case now under the 'Reviewer of Complaints' process;

- Where a respondent refuses a consent order, or where the allegation concerns a serious matter for which the Conduct Committee lacks sufficient sanctioning power, the matter will be referred by the Conduct Committee to the Tribunals Committee for hearing;

- Tribunals comprising 3 members of the Tribunals Committee will continue to be convened to hear formal allegations referred to the Tribunals Committee by either the Conduct Committee or the Conduct Department. A case management process will continue to apply to allow for the fair and efficient handling of matters pre-hearing, with

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[i] A 'conduct matter' is defined as a complaint which has been assessed by the Conduct Department as giving rise a potential liability to disciplinary action under the DBLs.

sanctions hearings being conducted in cases where the respondent admits liability to disciplinary action but does not agree sanction;

- In cases where both liability and sanction are agreed, it will still be possible for the respondent and the PSD Chief Officer to agree a settlement agreement to avoid the need for a contested hearing, which will require approval by an individual ‘Settlement Chair’ on behalf of the Tribunals Committee;

- Respondents will continue to have a right of appeal against orders of the Tribunals Committee. In the legal services context, such appeal right will be to the General Regulatory Chamber of the First-tier Tribunal under the Legal Services Regulations.

10. In the fitness to practise context:

- Referrals will continue to be made to the Fitness Committee (re-named the ‘Fitness to Practise Committee’) by either the PSD Chief Officer on behalf of ICAEW, or by the individual themselves;

- The test for orders of the Fitness to Practise Committee remains the same – i.e. whether a respondent’s fitness to respond to an investigation or (disciplinary or regulatory) proceedings and/or fitness to practise is seriously impaired by their physical or mental health (although, for completeness, the test has been widened to refer not only to an individual’s fitness to respond to disciplinary proceedings, but to regulatory proceedings also).

- ICAEW will continue to be able to request that a Fitness to Practise Panel make an expedited order in respect of the respondent in urgent cases, which may remain in place for a maximum of 3 months until a full hearing of the panel can be convened;

- Parties will still be able to agree consent orders to resolve matters without the need for a panel hearing;

- Hearings of Fitness to Practise Panels will continue to be conducted informally applying an inquisitorial (rather than adversarial) approach, and orders of the Fitness to Practise Panels will continue to be subject to a review (including an interim review) and an appeals process.

11. While the cornerstones of ICAEW’s disciplinary, fitness to practise and review and appeal processes will remain the same, some key changes are proposed which are set out below:

Duty to report misconduct

12. Currently, the duty to report potential misconduct is limited to ICAEW members under (current) DBL 9.1. It is also subject to ‘public interest qualifier’ so members need only to report matters to ICAEW where ‘it is in the public interest for them to do so’. The IRB is concerned that the current, subjective test can result in inconsistent reports being made to ICAEW and that limiting the duty to ICAEW members does not reflect the reality that, in practice, many reports are made to ICAEW by the compliance or legal departments within larger firms.

13. The IRB proposes, therefore, to amend the duty in new Core DBL 6.1 to remove the 'public interest' test and to make it an obligation on all those who are subject to the DBLs (including accredited probate firms) to report matters to ICAEW which indicate a possible liability to disciplinary action, either in respect of the individual or firm themselves, or in respect of another individual or firm. It proposes also to extend the duty to all individuals and firms who are subject to the DBLs and not just members.

14. The IRB considers that this change to the reporting duty is important to ensure the effectiveness of the disciplinary process, and that the Conduct Department is made aware of serious conduct and professional competence matters requiring investigation. It also believes that the duty must be applied consistently to all individuals and firms who are subject to the DBLs in keeping with the Better Regulation Principles and the counter-inclusive strategy of the LSB. Indeed, in 2020, the IRB made changes to the existing guidance on what should be reported to make clear that the IRB considered that it was in the public interest for members to report matters where they have a reasonable belief that there could be a liability to disciplinary action. The changes proposed now to the DBLs reflect the change of emphasis set out in the guidance change.

Change of role for the Conduct Department and Conduct Committee

15. Under the current DBLs, the Investigation Committee has two very different roles. It operates a filtering function in determining whether a complaint discloses a *prima facie* liability to disciplinary action. Where it finds a *prima facie case* to exist, it may propose a consent order or caution to the respondent, or make an order for no further action, or it may refer the matter to the Disciplinary Committee for hearing (the most serious complaints will always be referred to the Disciplinary Committee, as the Investigation Committee lacks sufficient sanctioning powers to deal with such complaints under the DBLs). In addition, currently, the Investigation Committee is the prosecuting body for any complaint which it refers to the Disciplinary Committee and is the respondent to any appeal made by a member or firm against a Disciplinary Tribunal decision.

16. The new DBLs and IDRs have been drafted on the basis that the Conduct Department will be the prosecuting body for formal allegations which the Conduct Committee decides to refer to the Tribunals Committee, save in the case that the Conduct Committee determines to refer a matter to the Tribunal for hearing contrary to the recommendation of the Conduct Department. In such circumstances, the Conduct Committee will remain the prosecuting body rather than the Conduct Department.

17. The IRB is proposing this change for clarity and to remove the confusion over the role of the Conduct Committee. In doing so, it believes that accredited probate firms and others who are subject to the DBLs will be better able to understand the role of the committees and ICAEW staff in the process and that the DBLs and IDRs will better reflect what happens in practice.

Clarification of liability test to be used by the Conduct Committee

18. The current test for the Investigation Committee in determining whether to offer a consent order or caution to the respondent, or to refer the complaint to the Disciplinary Committee, is whether there is *'prima facie case'* of liability to disciplinary action (see current DBL 15). The IRB proposes to replace this test in Core DBL 5.1 with a requirement for the Conduct Committee to determine whether there is 'a realistic prospect, if the allegations were referred to a Tribunal for

hearing, the allegation or allegations would be found proved'. The IRB notes that this is a similar test to those used by other professional accountancy body regulators such as the ACCA for the initial determination.

19. The IRB considers that this change will make this key threshold test clearer and much more comprehensible to all users, including complainants, which the IRB considers to be in the public interest.

New orders which can be made by Disciplinary Tribunals

20. The IRB is proposing to widen and supplement the types of orders which can be made by Disciplinary Tribunals where matters are referred for hearing by either the Conduct Committee or the Conduct Department. Disciplinary Tribunals will have the power for the first time to order that accredited probate firms and others must carry out specified training of staff, and the types of orders that may be made against members, firms, affiliates and relevant persons have been standardised.

21. These changes have been proposed by the IRB to provide additional flexibility to Tribunals in determining the most appropriate (and proportionate) sanction in each case. The proposal to allow for orders for specified training is considered an important tool for protecting the public and the consumer from inadequate or poor service.

Expansion of the circumstances in which interim orders can be made

22. The current DBLs provide only for interim orders to be made where an ICAEW member, student or other individual has been charged with an indictable offence, excluded from another professional body or where there is evidence that they have abandoned their practice. The circumstances in which an interim order can be made are a legacy of the grounds for an 'intervention order' of the Investigation Committee which were available under the DBLs until a few years ago.

23. The IRB is proposing to introduce a broader test which will allow the Conduct Department to apply for an interim order where it has received a complaint and it considers that there is 'risk of significant harm to the public (or a section thereof)' if interim measures are not put in place. The IRB is also proposing revisions to the procedure for review and appeal of interim orders.

24. The IRB considers these changes to be necessary to ensure that appropriate action can be taken on an interim basis to e.g. suspend an individual's membership or their regulatory authorisation pending a full disciplinary hearing. The IRB considers that broadening the test is an important step to protect the public and the consumer.

Lie on file process

25. The IRB is proposing to introduce a 'lie on file' process to allow for the efficient disposal of complaints in cases where an individual, who is the subject to a series of complaints, is excluded from ICAEW membership, or has their affiliate or provisional membership status withdrawn, before all complaints or allegations have moved through the disciplinary process.

26. The IRB is proposing that the Conduct Department should be able to apply in those circumstances for the remaining allegations to 'lie on file' unless the Conduct Committee or a Tribunal Chair believes that they should still be investigated or heard in full.

27. The IRB is concerned to ensure that the resources within the Conduct Department are directed towards shortening the time between a complaint being made and the ultimate outcome and believes that the discontinuance of proceedings in circumstances where an exclusion order has already been made will help the Conduct Department better achieve that objective. Appropriate safeguards have also been built into the readmission process whereby the processing of any such application made by a former member will be suspended until any outstanding matters lying on file are dealt with.

Changes to the Reviewer of Complaints process

28. The IRB is proposing to make some amendments to re-focus the current Reviewer of Complaints process. The Reviewer process was originally incorporated into the DBLs at a time when the Investigation Committee comprised a majority of chartered accountant members and was seen as an appropriate safeguard to ensure the public interest was protected by allowing complainants to request a full review of the investigation, and the decision to reject any complaints by the Investigation Committee, by an external legal assessor who was not a member of the profession. The IRB notes that the constitution of the Investigation Committee was changed in 2015 to ensure a parity of lay and chartered accountant members with a lay Chair. In addition, since the Reviewer process has been in place, there has been no recommendation made by the Reviewer that the Investigation Committee should reconsider its rejection of a complaint (the only referral back to the Investigation Committee – a recent one – has been on the basis that the Investigation Committee referenced the wrong Disciplinary Bye-law in its decision. There is no suggestion however from the Reviewer that there is anything wrong with the decision itself).

29. The IRB considers that a safeguard is still necessary to ensure that a full and proper investigation is undertaken and is proposing instead that future reviews focus specifically on:

    - Whether there was a failure by the Conduct Department case manager to investigate any of the events referred to in the complaint or a failure to follow up one or more relevant lines of enquiry which were known to the case manager at the time and which are likely to have produced information and evidence supporting a liability to disciplinary action; and/or

    - Whether there was a failure to provide all relevant information and/or evidence obtained during an investigation to the Conduct Committee at the time it made its decision; and/or

    - Whether there was a failure by the Conduct Department and/or the Conduct Committee to follow the procedure specified in the regulations for investigating complaints and considering allegations, and the Committee's consideration of the allegations is likely to have been prejudiced by that failure.

30. If there has been a failure in relation to one or more of these limbs, the new process will lead to the Conduct Committee Chair requiring the Head of Investigation to carry out further work and/or deliver a supplemental conduct report to the Committee before a final decision is made.

31. The IRB considers that the changes to this process reflect the three areas where additional assurances should be provided to members of the public and the consumer to assuage any concerns about the robustness of the investigation process.

Presumption that hearings of the Review Committee will be in public

32. All hearings of appeals against decisions made by ICAEW's regulatory committees are currently held in private unless a successful application is made for a hearing to be held in public.

33. The IRB proposes in the new RRARs that all regulatory and appeal hearings should be held in public unless there are exceptional circumstances that warrant all, or part, of the hearing being held in private. As under the Legal Services Regulations appeals in regulatory cases are referred to the First-tier Tribunal, this change is relevant only to hearings of the Review Committee at the initial stage.

34. The IRB believes that the presumption of public hearings in regulatory cases is important to improve transparency around ICAEW's processes for scrutinising alleged failures by members and firms in providing regulated services.

Orders of the Review Committee

35. At the moment, if a panel of the Review Committee determines to uphold an order made by a regulatory committee and the member or firm appeals against that order, nothing is published unless and until that appeal is dismissed or withdrawn.

36. The IRB proposes in the new RRARs that all orders made by a Review Panel be published as soon as reasonably practicable following a hearing, but that the publication should include a note that the matter may be subject to appeal, with only the record of decision being withheld under the determination of any appeal. The IRB is proposing this change for consistency with the approach to publicity in disciplinary cases and to ensure that the public has access to information at an early stage which may impact their decision on whether to instruct or retain an ICAEW-accredited probate firm. The changes set out in paragraphs 32 to 36 have also been requested by the Insolvency Service in its role as oversight regulator of ICAEW's work as a Recognised Professional Body.

PART B: IMPACT ASSESSMENT AGAINST THE REGULATORY OBJECTIVES

37. In making this application we have considered the impact of the significant changes set out in Part A above on the regulatory objectives in section 1 of the Act:

a) protecting and promoting the public interest

The following proposed changes are consistent with the regulatory objective of protection and promotion of the public interest insofar as they will improve transparency and users' understanding of the processes and the role of the Conduct Department and the committees in the process:

- The structure of the DBLs has been streamlined to retain only those provisions that are necessary to impose duties and obligations or confer powers on ICAEW, with provisions of a procedural nature being moved into underlying regulations, which should make the DBLs easier to use for individuals / firms subject to the DBLs, their representatives and members of the public who wish to bring a complaint about an accredited probate firm;

- The language of the DBLs has been updated and Latin phraseology removed to make the DBLs more accessible and understandable to users;

- The roles of the Conduct Department and the Conduct Committee have been clarified so that it is clear that the body investigating complaints and prosecuting formal allegations before Disciplinary Tribunals and on appeal will be the Conduct Department (save in the limited circumstances that the Conduct Committee determines to refer an allegation to the Tribunals Committee contrary to the recommendation of Conduct Department).

The following changes are also consistent with the public interest insofar as they strengthen the effectiveness of ICAEW's disciplinary framework and promote consistency in the application of the rules:

- The expansion of the circumstances in which an interim order can be made (IDR 30.2).

- The change in the test for the Duty to Report and the extension of the duty beyond ICAEW members (DBL 6.1).

- The expansion of the types of orders that may be made by ICAEW disciplinary committees (which include the ability, for the first time, for a disciplinary committee to make an order for specified training where a learning, compliance or behavioural gap is identified).

Other changes are proposed to increase efficiency in the disciplinary process and to ensure that ICAEW is able to target resources as effectively as possible, which we also consider to be in the public interest:

- The introduction of a new procedure for matters to 'lie on file' where an individual has already been excluded from ICAEW membership or had their provisional membership or affiliate status withdrawn;

- Streamlining the Reviewer of Complaints process so that any review is more focused on any shortcomings in the investigation process so as to ensure that all relevant information is placed before the Conduct Committee.

Finally, increasing the level of transparency in regulatory cases is consistent with the public interest. Therefore, we consider that the presumption that hearings will be held in public and publication in probate cases before the Review Committee will positively contribute to public confidence in ICAEW's regulatory processes. The changes will increase the level of material publicly available about ICAEW's processes, which we consider to be in the public interest.

b) supporting the constitutional principle of the rule of law

The procedures specified in the new IDRs, FTP Regulations and RRARs support the rule of law. Consistent with current arrangements, provision is made to protect the rights and interests of persons subject to the processes – e.g. the right to adequate notice of a hearing; the right to be represented at a hearing, to make representations to the committees, and to appeal adverse orders of the committees to the First-tier Tribunal or Appeals Committee (in the case of orders of the Fitness to Practise Committee). Increased transparency and simplification of process supports the rule of law by ensuring that those subject to the regulations understand what is expected and can reasonably be expected to act accordingly.

We have also maintained existing processes such as e.g. provision for settlement orders and fixed penalties which are designed to promote efficiencies in the process and allow matters to be dealt with more swiftly by the Conduct Department for the benefit of respondents and complainants. We consider that this approach also supports the rule of law.

We have not identified any specific impacts in relation to the substantive changes set out in Part A above in relation to this regulatory objective.

c) improving access to justice

The steps we have taken to streamline and simplify the language and structure of the disciplinary framework should assist respondents and complainants in better understanding the disciplinary process and procedure, which will increase access to justice.

As the proposed introduction of a permission to appeal process will not affect accredited probate firms appealing decisions of Disciplinary Tribunals to the First-tier Tribunal in accordance with chapter 12 of the Legal Services Regulations, this change will not impact the regulatory objective of improved access to justice.

d) protecting and promoting the interests of consumers

Several of the policy changes listed in Part A promote the regulatory objective of protection and promotion of the interests of consumers under the Act. As is the case currently, the disciplinary and Fitness to Practise Committee will retain powers to make orders in disciplinary and fitness to practise cases to protect consumers. Indeed, the range of orders available to Disciplinary Tribunals is proposed to be expanded, and the Conduct Department will be able to apply for an interim order in a wider range of circumstances where e.g. suspension of an individual's membership or regulatory authorisation is considered necessary to protect against the risk of significant harm to the public (or a section thereof) if the order is not made.

The expansion of the Duty to Report, and the change to the test for reporting, will serve to better protect the interests of consumers and will help safeguard against the risk that potentially serious conduct or competence matters are not reported to ICAEW by individuals and firms that are subject to the DBLs.

Early publication of decisions and orders of the regulatory committees under the new RRARs will ensure that the public has access to information which may impact their decision on whether to instruct or retain an ICAEW-accredited probate firm.

Changes are proposed to the review process which can be requested by complainants where the Conduct Committee determines that the test set out in DBL 5.1 is not met in respect of any allegation (IDR 28). Unlike the current process set out in DBLs 17 and 18, a review by a 'reviewer' will put the focus more on any inadequacies in the investigation process and in the documentation provided to the Conduct Committee by asking the case file reviewer to consider:

- whether the Conduct Department case manager has failed to follow up one or more lines of enquiry which are likely to have produced further relevant information / evidence;
- whether all relevant information / evidence was provided to the Conduct Committee for review with the conduct report; and
- whether there has been a failure by the Conduct Department and/or the Conduct Committee to follow the procedure specified in the regulations for investigating conduct matters and considering allegations.

These are the key aspects which may concern consumers or the public given the required confidentiality around the investigation process.

e) promoting competition in the provision of legal services

The proposed revisions to the disciplinary, fitness to practise and review and appeals framework are not anticipated to impact competition in the market for legal services.

f) encouraging an independent, strong, diverse and effective legal profession

We do not consider that the proposed, substantive changes to the disciplinary, fitness to practise and review and appeals frameworks will impact accredited probate firms from an independence and diversity perspective. Our analysis from a diversity perspective is set out below.

g) increasing public understanding of the citizen's legal rights and duties

The steps taken to simplify and modernise the DBLs and the underlying disciplinary regulations will enhance users' understanding of the disciplinary framework – in particular, complainants and those who are subject to the DBLs. Efforts have been made, for example, to reframe the language of the framework in plain English and to remove jargon. The current test of *'prima facie liability to disciplinary action'* has been replaced with a new test for the Conduct Committee in DBL 5.1 which provides that the committee must determine whether there are *'realistic prospects'* that if an allegation were to be referred to the Disciplinary Tribunal for hearing, it would be found proved (on the balance of probabilities). Similarly, DBL 5.4 provides that, for the purposes of disciplinary proceedings, certain matters will constitute 'rebuttable evidence', whereas the equivalent provision in the current DBLs refers to *'prima facie evidence'.* We consider that these changes will enhance the public's understanding of the disciplinary framework, and in particular the role as complainants in the process.

In the regulatory context, the move to a presumption of public hearings and publicity will also promote transparency and the public's understanding of the process.

We have not identified any other impacts on the regulatory objectives arising from the substantive policy changes set out in Part A.

h) promoting and maintaining adherence to the professional principles

The professional principles are set out in section 1(3) of the Act and require that:

a. authorised persons should act with independence and integrity;
b. authorised persons should maintain proper standards of work;
c. authorised persons should act in the best interests of their clients;
d. persons who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, by virtue of being authorised persons should comply with their duty to the court to act with independence in the in the interests of justice; and
e. the affairs of clients should be kept confidential.

Paragraph (d) above is not relevant in the case of accredited probate firms which are authorised by ICAEW under the Act to conduct reserved probate activities only.

As the key features of the disciplinary framework will remain unchanged under the new DBLs and IDRs, we believe that there will be a neutral impact on the promotion and maintenance of the professional principles. ICAEW will still be able to bring effective enforcement action for breaches of the Legal Services Regulations where e.g. accredited probate firms fail to maintain proper standards of work. The framework will continue to allow for matters to be dealt with by consent by the Conduct Committee, for fixed penalties to be proposed by the Conduct Department on behalf of the Conduct Committee in respect of more minor 'compliance-type' matters and for serious conviction allegations to be fast-tracked for hearing before a Disciplinary Tribunal. The new DBLs and IDRs also provide for matters to be referred to the Tribunals Committee for hearing in cases where the Conduct Committee lacks sufficient sanctioning power or where the respondent does not accept liability and/or the consent order proposed by the Conduct Committee; and the liability and evidence provisions in the DBLs will remain largely unchanged.

Arguably, the professional principles will be further promoted by the changes that are proposed to the interim order provisions, which will enable the Conduct Committee to apply for an interim order against a firm in a wider range of cases.

PART C: IMPACT ASSESSMENT AGAINST THE BETTER REGULATION PRINCIPLES

38. We are also proposing these changes to the disciplinary, fitness to practise and appeals framework having had regard to the Better Regulation Principles:

a) Transparency

We have sought to be transparent in making these changes. An eight week public consultation was conducted on the draft disciplinary, fitness to practise and appeals framework between January and March 2022. The consultation was publicised through a variety of communication channels, with direct approaches made to oversight regulators, legal services approved regulators, the Legal Services Consumer Panel (LSCP) and consumer groups. Further information about the consultation process is set out below.

The principle of transparency in disciplinary and regulatory proceedings will also be strengthened under the new framework. DBL 15 provides that hearings of Disciplinary Tribunals and Appeal Panels will be held in public, save in exceptional circumstances where a Tribunal or Appeal Panel directs that the whole or part of the hearing be heard in private in accordance with the IDRs and any guidance that may be issued by the IRB. Similarly, where an adverse finding is made against a member, firm, affiliate or relevant person, the order of the disciplinary committee (including any settlement order or consent order) will be published, and the name of the member, firm, affiliate or relevant person will only be redacted where the Disciplinary Tribunal or Appeal Panel is satisfied that exceptional circumstances apply.

In regulatory proceedings, hearings of Review Panels under the new Regulatory Review and Appeal Regulations will be held in public in future, save in exceptional circumstances where the Review Panel considers that all or part of the hearing should be in private. Decisions of Review Panels will also be published as soon as practicable following a hearing, with a signpost that the decision may be subject to appeal where the timescales for appeal have not yet elapsed. Although this will be a departure from current practice, the IRB considers that early publication is important to ensure that clients of ICAEW regulated firms have access to information that may affect their choice of service provider.

b) Accountability

The principle of accountability will also be maintained under the proposed new framework:

- The safeguards that exist currently in the DBLs to protect the interests of the complainant will be maintained – i.e. the complainant will retain the right to request that the Conduct Committee review a complaint which has been assessed by the Conduct

Department as <u>not</u> giving rise to a potential liability to disciplinary action; the complainant will retain the right to insist that the matter be referred to the Conduct Committee which the Conduct Department considers should be closed following investigation, and a complainant will continue to have the right to request a review by an independent reviewer if the Conduct Committee determines that the test set out in DBL 5.1 is not met in respect of an allegation.

- Where an adverse order is made against an accredited probate firm in disciplinary or regulatory proceedings, the firm will still have a right of appeal against the order to the First-Tier Tribunal under the Legal Services Regulations.

- A process for review and appeal has also been retained under the proposed framework for interim orders of Disciplinary Tribunals and orders of Fitness to Practise Panels.

c) Proportionality

In proposing changes to the framework, the IRB has also sought to promote the principle of <u>proportionality</u>. The orders available to Disciplinary Tribunals under draft DBL 11 have been expanded to include, for example, suspended financial penalties and orders for specified training. The IRB believes that these changes will provide the disciplinary committees (including the Conduct Committee under the consent order process) with greater flexibility in determining a penalty that is appropriate and proportionate given the circumstances of the case.

Changes are also proposed to the review process which can be requested by complainants where the Conduct Committee determines that the test set out in DBL 5.1 is not met in respect of any allegation (IDR 28). For the reasons set out above, the IRB considers the re-focusing of the reviews on matters which are not seen by complainants through the need for confidentiality in an investigation to be a proportionate safeguard, which balances the rights of complainants with the interests of respondents in having a final determination to proceedings. The changes should also reduce costs and delay in the disciplinary process.

d) Consistency

In proposing changes to the disciplinary framework, the IRB has sought to promote the principle of <u>consistency</u>. The new test for the Duty to Report Misconduct (DBL 6.1) applies, for example, not only to ICAEW members, but to those who are subject to the DBLs, including ICAEW accredited probate firms. As the IRB was concerned that the test for reporting under (current) DBL 9 was unclear as it requires a subjective assessment of whether the report is in the public interest, this has been omitted from the new test for reporting under draft DBL 6.1.

The expansion of the circumstances in which an interim order can be made is also proposed for consistency. Similarly, for reasons of consistency, it is proposed that the types of orders that can be made in respect of members, affiliates, firms and relevant persons has been standardised in Core DBL 11 (although the relevance of the orders will depend on the circumstances of the case and the respondent).

e) Targeted only in cases in which action is needed

In keeping with Better Regulation Principles, the disciplinary framework has been designed to allow for enforcement action to be targeted and proportionate. The range of orders that are available to Disciplinary Tribunals and Appeal Panels (and, in most cases, the Conduct Committee via consent order) has been expanded to allow for suspended financial penalties, orders for specified training and for the withdrawal of authorisation to carry on regulated activity. The disciplinary committees will also be able to direct that the member, firm, affiliate or relevant person be referred to one or more of the regulatory committees. We believe that the changes will provide greater flexibility to the committees in determining the sanction or resolution that is appropriate in the circumstances of the case.

PART C: ALTERATION TO REGULATORY ARRANGEMENTS

Summary of, and rationale for, the revisions to the framework

39. The proposed new DBLs, IDRs, FTP Regulations and RRARs are set out at **appendices 1 – 4.** An overview of the key changes to the arrangements, along with the rationale for the proposed, new framework, is set out in Part A above.

How and when the new framework will be implemented

40. The new framework will take effect generally in respect of ICAEW-regulated individuals and firms following approval of the DBLs by the Privy Council. Although the date of commencement has yet to be determined due to uncertainty as to when the application will be considered by the Privy Council, it is anticipated that this will be in late 2022 / early 2023.

41. The new framework will only take effect in relation to ICAEW-accredited probate firms if it is approved by the LSB in accordance with Part 3 of Schedule 4 of the Act. Consequential amendments to the Probate Regulations and Probate Compensation Scheme Regulations (to be re-named, respectively, the Legal Services Regulations and Legal Services Compensation Scheme Regulations) will be required to take effect on the same date. As it is proposed, subject to transitional arrangements, that the DBLs and underlying regulations be repealed on commencement of the new framework, the LSB is requested to approve the framework prior to approval being obtained from the Privy Council (and an early indication as to whether the changes are approved in principle would be helpful).

42. While the new DBLs and regulations provide for transitional arrangements, steps will be taken to communicate the planned introduction of the new framework to regulated individuals and firms in advance of the commencement date – and, in particular, to those currently engaged in the disciplinary and/or fitness to practise processes.

Regulatory conflict with other approved regulators

43. We do not consider that the proposed revisions to the disciplinary, fitness to practise and appeals processes will give rise to any new conflicts with the regulatory arrangements of other approved regulators. To a large extent, the new DBLs and regulations will reflect current arrangements, although many provisions have been re-drafted and various significant policy changes are proposed, as highlighted above. As regards its disciplinary procedures, ICAEW is

already a party to a Memorandum of Understanding with other front-line legal services regulators which is intended to mitigate the risks of regulatory conflict where accredited probate firms are subject to the regulatory requirements of other front-line regulators.

44. We reached out directly to the other legal services and accountancy regulators earlier this year to publicise the consultation; however, no feedback was received.

Regulatory conflict with other external regulatory bodies

45. Similarly, as the new arrangements will substantially reflect existing processes, we have not identified any new conflicts with the regulatory arrangements of other external regulatory bodies. References to the Accountancy Scheme operated by the Financial Reporting Council (FRC) have been retained in the draft DBLs and IDRs and there will still be a requirement on members and others to report to the Conduct Department matters which could give rise to a potential liability to disciplinary action under the DBLs or the Accountancy Scheme. Existing processes allowing for the transfer of matters to and from the Accountancy Scheme will also be preserved.

46. We have consulted with the FRC during the development of the draft DBLs and IDRs and the FRC provided detailed comments on the drafts in November 2021 and March 2022. We made various changes to the drafts as a result of this feedback, including:

- the applicability of sanctioning policy in the transitional provisions;
- a change to the frequency of reviews of interim orders (which will now be at least once every 6 months unless either party requests an expedited review – see IDR 34.1);
- changes to the proposed new 'lie on file' process to allow matters to continue to be investigated / disciplinary proceedings to continue in appropriate circumstances, including where a complainant is seeking non-financial redress, even if the respondent has been previously excluded from ICAEW membership or had their affiliate or provisional member status withdrawn;
- drafting amendments to IDRs 11.1 and 18.1 concerning the circumstances in which a complaint or conduct matter may be re-opened once closed following an assessment or investigation;
- clarification that the terms of appointment of members of the disciplinary committees may not extend beyond 9 years – see IDRs 5.2, 6.2 and 7.2;
- drafting amendments, including to the definitions in the DBLs and IDRs.

PART D: CONSULTATION AND ENGAGEMENT

47. We consulted on the draft DBLs and Regulatory Handbook in two stages in early 2022. Stage 1 focused on the proposed changes to the DBLs and draft IDRs (which will form Part 1 of the new Regulations Handbook) and it ran between 19 January – 15 March 2022. Stage 2 concerned the remaining sections of the draft Regulations Handbook and ran between 3 February – 29 March 2022. The consultation documentation included a commentary setting out the main proposed changes to duties, obligations and processes and asked for comments and feedback on those areas in particular.

48. The consultation was publicised through a variety of communications channels including the 'hero panel' on the icaew.com homepage, a link on the probate consumers' area of icaew.com, Regulatory & Conduct News, ICAEW Daily emails, PracticeWire, LinkedIn, ICAEW Twitter and direct emails to the following:

- Regulated individuals and firms, including accredited probate firms;
- ICAEW's oversight regulators – LSB, FRC, Insolvency Service, Financial Conduct Authority, Office for Professional Body Anti-Money Laundering Supervision (OPBAS)
- Privy Council Office;
- Legal Services Consumer Panel;
- Other legal services and accountancy regulators;
- Citizens Advice;
- Which.

49. In addition to the above, attempts were made to publicise the consultation directly to probate firms via Probate News and Regulatory & Conduct News (January, February and March editions). None of the responses received were from firms or individuals accredited for probate, perhaps because the changes have general application and were not specifically focussed on probate authorising and regulatory arrangements.

50. In total, 11 responses were received to Stage 1. These comprised detailed feedback from 7 of the largest accountancy firms (including the 'Big 4'), an international law firm and 3 individuals. Two responses were received to Stage 2 from two of the 'Big 4' firms.

51. A summary of the consultation responses, along with the changes we have made to the arrangements as a result of that feedback, is set out at **appendix 8.**

PART E: EQUALITIES IMPACT ASSESSMENT

52. We have considered the impact of the proposed changes to the disciplinary, fitness to practise and appeals frameworks from an equalities perspective - having regard, in particular, to the impact of the changes on the following protected characteristics:
    - age
    - disability
    - gender reassignment
    - marriage or civil partnership
    - pregnancy and maternity
    - race
    - religion or belief
    - sex
    - sexual orientation

53. As the new frameworks largely reflect existing processes, we have not identified any new impacts on persons with protected characteristics. We consider that the fitness to practise regime will continue to have a positive impact on persons whose ability to participate in disciplinary proceedings or fitness to practise is seriously impaired due to their physical or mental ill health – including due to disability. This process enables matters to be dealt with sensitively through an inquisitorial process, while still enabling steps to be taken to e.g.

suspend an individual's practising certificate or probate accreditation where action is considered necessary to protect the public and the consumer.

54. The draft IDRs and Fitness to Practise Regulations also provide for a case management and pre-hearing review processes which enable Tribunal and Panel Chairs to make pre-hearing directions as appropriate to ensure that individuals receive a fair hearing – for example, by varying deadlines for the exchange of representations and/or evidence prior to the hearing, and ensuring that an individual has appropriate access to the hearing (e.g. through video links, the use of interpreters, hearing loops etc).

55. More generally, we will continue to have due regard to diversity and inclusion considerations in operating the new disciplinary and fitness to practise frameworks – e.g. in recruiting and selecting members of the disciplinary and fitness to practise committees, and in training existing committee members on matters such as unconscious bias and cultural awareness.

56. We would highlight that during the consultation we invited comments from respondents on the proposed arrangements from an equalities and diversity perspective. No comments were received.

PART F: IMPACT OF THE PROPOSALS ON REGULATED PERSONS, CONSUMERS AND THE PUBLIC INTEREST

Regulated persons

57. We believe that the steps we have taken to streamline the DBLs and modernise the language of the DBLs and the underlying regulations will have a positive impact on accredited probate firms as this should make the disciplinary framework, in particular, more accessible and user friendly.

58. We have identified that the widening of the duty to report possible misconduct will impact a greater number of accredited probate firms, as currently the duty applies to only ICAEW members (whether in practice or in business). Based on diversity monitoring data which we obtained in April 2021, there were no ICAEW members or students in 35 of the ca. 350 accredited probate firms, and a further 5 firms had within them only ICAEW students at that time. We would conclude from this, therefore, that around 40 firms (or ca. 11% of all accredited firms) will be caught by the extension of the reporting duty which were not in scope previously. However, for the reasons given above, the IRB considers that the extension of the reporting duty is important for the protection of the public so that all matters are reported to ICAEW where there is a reasonable belief of liability to disciplinary action.

Consumers and the public interest

59. We have set out in Part B above, the changes which we consider will have a positive impact on the regulatory objectives of protection and promotion of the interests of consumers and the pubic interest. As the detailed procedure of the disciplinary and fitness to practise frameworks has been moved out of bye-law and into regulation, the IRB will be able to respond more swiftly and make changes where these are required in the public interest (e.g. if a deficiency is identified or in response to legal challenge).

60. We have also set out above the changes we are proposing to the current ‘Reviewer of Complaints’ process under DBLs 17 and 18. As explained, we are proposing to alter the focus of the review to concentrate on whether the investigation was carried out appropriately; whether the Conduct Committee had before it all relevant information / evidence, and whether the case manager and Conduct Committee followed proper procedure. If a reviewer considers there to have been a failure or omission on one or more of these grounds, further investigative work will be carried out, and a supplemental conduct report produced, for consideration by the Conduct Committee. We believe that a more focused review process is proportionate and that it will strike a better balance between the rights of the complainant and the rights of the respondent to have the matter finally determined where the Conduct Committee determines there to be no case. We also consider it appropriate that the Conduct Committee should have before it a supplemental conduct report as, under current processes, a matter can be remitted to the Investigation Committee for consideration without any additional work being done first. For this reason, we consider the change to be consistent with the regulatory objectives of consumer protection and promotion and protection of the public interest.

PART G: EVALUATION AND MONITORING

61. Although the new framework will largely reflect ICAEW’s existing disciplinary, fitness to practise and appeals processes, various significant changes are proposed as explained in Part A above. The IRB will evaluate these changes on an annual basis to assess their impact. This assessment is likely to focus on feedback from the disciplinary and fitness to practise committees, the Head of Committees and Tribunals, Conduct Department staff and those subject to the disciplinary and fitness to practise frameworks (and their representatives) to understand:

    - The fairness and suitability of the disciplinary and fitness to practise frameworks and whether they remain fit for purpose and can withstand challenge;

    - Whether there are any regulations / processes that could benefit from additional guidance to promote clarity and consistency in the application of the disciplinary process (see Part H below);

    - How the processes operate in practice and whether further improvements could be made (in particular, to promote efficiency and reduce delay and cost).

PART H: GUIDES OR POLICIES TO SUPPORT THE IMPLEMENTATION OF THE NEW FRAMEWORK

62. Consequential updates and amendments will need to be made to various regulations, guidance and Professional Standards Department template letters prior to the implementation of the new framework, including the Legal Services and Legal Services Compensation Scheme Regulations (copies of which are included in this application).

63. In places within the disciplinary framework, provision has been made for the issue of guidance by the IRB to aid the interpretation and implementation of the DBLs / IDRs. An example is Core DBL 6.1 concerning the duty to report which is framed as being *‘subject to any Guidance that may be issued from time to time’* (which refers to the existing Guidance on the Duty to Report

which will be updated to tie in with the language of the new DBLs and IDRs prior to the launch of the framework). The provisions have been drafted to allow for such guidance to be issued should the IRB consider it beneficial, and the absence of such guidance will not prevent the new disciplinary framework being launched.

PART I: GOVERNANCE AND REVIEW

64. In approving the proposed, new Regulations Handbook, the IRB's attention was drawn to the regulatory objectives and Better Regulation Principles set down in section 1 of the Act. This application was then reviewed for submission to the LSB by a Sub-group of the IRB under delegated powers in July 2022. This Sub-group was comprised of 3 members, including the IRB Chair and the IRB Alternative Chair for legal services.

65. During the drafting and consultation process, the draft DBLs and Regulations Handbook were subject to rigorous review from the following:

    - A Sub-group of the IRB comprised of 3 lay members and 2 non-lay members (including the current IRB Chair)
    - The Chairs of all of the disciplinary committees (focusing on the process relevant to their committee)
    - A leading professional regulatory QC from Blackstone Chambers (Kate Gallafent QC)
    - The Financial Reporting Council's Professional Oversight team
    - The legal teams of the Big 4 accountancy firms
    - Representatives of an international law firm specialising in accountants' liability and defence work.

66. Internally, the draft DBLs have been approved by the IRB and the ICAEW Council. The draft Regulations Handbook has been approved by the IRB in accordance with ICAEW's governance arrangements (approval of the Council is not required). To take effect generally, the DBLs will require the approval of the Privy Council and an application for approval to the Privy Council will be made over the Summer.

FURTHER ENQUIRIES

67. Any further enquiries on this application can be directed to:

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