



LEGAL SERVICES BOARD DRAFT STRATEGY FOR LEGAL SERVICES REGULATION AND DRAFT BUSINESS PLAN 2021-22

Issued 05 February 2021

ICAEW welcomes the opportunity to respond to the Legal Services Board's consultation on its draft strategy for legal services regulation and draft business plan 2021-22 issued 9 December 2020, a copy of which is available from [this link](#).

ICAEW is a world-leading professional body established under a Royal Charter to serve the public interest. In pursuit of its vision of a world of strong economies, ICAEW works with governments, regulators and businesses and it leads, connects, supports and regulates more than 156,000 chartered accountant members in over 160 countries.

ICAEW's regulatory and disciplinary roles are separated from ICAEW's other activities so that it can monitor, support or take steps to ensure change if standards are not met. These roles are carried out by the Professional Standards Department (PSD) and overseen by the independent ICAEW Regulatory Board (IRB).

This response dated 5 February 2021 reflects the views of ICAEW as an Approved Regulator for the reserved legal service of probate. ICAEW Professional Standards is the regulatory arm of ICAEW. Over the past 30 years, ICAEW has undertaken responsibilities as a regulator under statute in the areas of audit, insolvency, investment business and most recently legal services. In discharging its regulatory duties, it is subject to oversight by the FRC's Conduct Committee, the Irish Auditing and Accounting Supervisory Authority (IAASA), the Insolvency Service (IS), the Financial Conduct Authority (FCA), the Legal Services Board (LSB) and the Office for Professional Body Anti-Money Laundering (OPBAS).

Amongst ICAEW's regulatory responsibilities it is;

- the largest Recognised Supervisory Body (RSB) and Recognised Qualifying Body (RQB) for statutory audit in the UK, registering approximately 2,600 firms and 7,000 responsible individuals under the Companies Act 2006.
- a Prescribed Accountancy Body (PAB) and Recognised Accountancy Body (RAB) for statutory audit in Ireland, registering approximately 40 firms and 250 responsible individuals under the Republic of Ireland's Companies Act 2014.
- the largest RSB for local audit in England. It has eight firms and over 90 key audit partners registered under the Local Audit and Accountability Act 2014.
- the largest single insolvency regulator in the UK licensing some 800 of the UK's 1,600 insolvency practitioners as a Recognised Professional Body (RPB) under the Insolvency Act 1986.
- a Designated Professional Body (DPB) under the Financial Services and Markets Act 2000 currently licensing approximately 2,000 firms to undertake exempt regulated activities under that Act.
- a Supervisory Body recognised by HM Treasury for the purposes of the Money Laundering Regulations 2007 dealing with approximately 11,000 member firms.

- designated an Approved Regulator and Licensing Authority for probate under the Legal Services Act 2007 (the Act) currently accrediting approximately 340 firms to undertake this reserved legal activity.

INTRODUCTION

General approach

1. ICAEW welcomes the opportunity to comment upon the draft strategy and business plan for the legal services sector in 2021-2. We applaud the work that has been undertaken to understand the state of the market. The budget and plan are a coherent development of that work.
2. The documents produced are an assessment of the state of the profession and how law is being provided as a service. It sets out a series of aspirations to which we relate as a body.
3. However, it is important to understand the respective role of the oversight body, the professional bodies and the regulators in moving towards the achievement of some of those outcomes.
4. The regulators are required to ensure firms and individuals meet the obligations set out in the Act. LSB are required to supervise how the regulators achieve that. Developing new law and requiring the regulators to contribute to that development is arguably straying outside the terms of reference of the Act and consequently compromising the resource and funding of the regulators.
5. Since the introduction of the Act in 2007 and the formation of LSB in 2010 society and the role of oversight bodies has changed. Sections 3 and 4 limit the scope of the LSB to be able to directly drive the industry, but a leadership role has emerged notably under Mike Pitt in response to the challenges of Chris Grayling in 2013. Leadership here in developing aspiration is good but concerns arise as to how those aspirations should be achieved and executed.
6. The opening section setting out the LSB's role is well expressed. We applaud the recognition of the obligation to firms and partners as well as to consumers. However, no mention is made in this resume of the Hampton principles which are highly important to us as regulators under the Regulatory and Legislative Reform Act 2006 as well as the LSB itself under section 28 of the Legal Services Act 2007. Targeting and proportionality are critical here and the one size fits all approach is not appropriate given the differing focus of each of the regulators.
7. It is important to bear in mind the administrative burden that already falls on firms and individuals that come within regulation. A large part of the sector is not regulated. Those who find the red tape too excessive will simply move out of supervision and offer services without necessarily the protections afforded by registration with one of the bodies. It also leads to reduced competition and increased costs in the reserved areas. These are all to the detriment of access to justice and consumer interest.
8. The government has driven forward a Brexit strategy which has the reduction of red tape at its heart. To introduce more regulation against that backdrop is politically unsound, especially when the benefits are not clear.
9. The approach outlined on the Practising Certificate focuses on the what and does not address the why. Parliament required the oversight to be light touch, not strangulating. A review of the pages of Hansard and the debates surrounding the passing of the Act make clear reference to the intended role of the LSB in this context.

10. Whilst we support the continued address of the needs of the consumer, we question the focus on areas of marginal improvement and the avoidance of areas that could have a significant impact. Comparison websites and publication of pricing may make legal services more affordable, but to the destitute this has no difference at all. The snail pace of work on future reservations and the avoidance of any address on legal aid or appropriate replacements thereof are disappointing outcomes where the LSB leadership could make a difference.
11. The steps needed around technology and artificial intelligence are well set out in the plan. They are important and recognise that regulation around these could be complex. An area that we believe is important is the continuing integrity of the systems that are used, and ICAEW's own experience in the area of accounting with these tools, including the assurance mechanisms, may be an area where we could usefully contribute to the debate.
12. The budget, in seeking a 4.4% increase against a backdrop of firms and regulators freezing practising certificate rates or applying only marginal increases due to the impact Covid has had on financial stability of providers in the industry, sends out an unsatisfactory message of a body that is out of touch with those it regulates. The absence of work on reserved activities as a reason for containing cost is ironically one of the few reasons that a 4.4% increase might be digested. As it is the approach appears ill-judged and not one that would get through the LSB's own fee assessment process in section 51.

Conclusions

13. Overall, we welcome the work that has been done to evaluate the state of the market and to determine outcomes that should be achieved within the industry. We believe that it is an ambitious agenda, but one that progress could be made towards by the professional bodies and regulators working alongside the LSB.
14. The budgeted plan however seems to have set priorities based on an easy life and left the harder decisions till later. It is accepted that ultimately there would need to be legislation to secure the outcomes, and that is unlikely to be secured in the next 12 months. However, before any legislation can be sought there needs to be groundwork and evidence. Those could be initiated now.

RESPONSES TO SPECIFIC QUESTIONS

Question 1: Do you have any comments on the three strategic themes that we have identified?

15. We have no specific comments on the identified strategic themes.

Question 2: Do you have any comments on the nine challenges that we have identified for the sector?

16. The nine challenges are characterised by proactive moves to improve the overarching consumer experience. That may be laudable in its own right but does not play easily to the role of an oversight body that is primarily meant to ensure the appropriate adherence to the regulatory standards applied under the Legal Services Act.
17. Some of the proposed steps are best served through working with the professional bodies. The duty of a regulator is to ensure compliance, not invent new rules or extend regulation, which is in any case counter intuitive to government policy on red tape. There is also a risk of a lack of independence between the oversight body and those it regulates where it partners an innovation that subsequently is proved to be unsound.

18. We welcome the inclusion of quality within the challenges. This has been an element of oversight that has been missing from previous LSB plans and direction. The moves being made on continuous education and quality assurance are areas we readily support through our own initiatives in the area of accountancy.

Question 3: How can you/ your organisation contribute to overcoming the sector-wide challenges we have identified?

19. We believe that many of the aspirations in the plan should be developed in conjunction with the professional bodies as they are developments of the professional standards and ethics of the legal profession. ICAEW can assist in developing some of the ideas, but more broadly in the context of the accountancy profession where there are common themes.
20. As the plan itself has identified, a number of barriers to overcoming the challenges are statutory in nature and need reform through the parliamentary process. Contributions should therefore be measured in the context of what can and should be achieved through natural development of existing rules and then separately a cohesive package put together on specific areas where the law can and should be changed.

Question 4: Do you have any comments on the suggested areas of priority for the sector 2021-24?

21. We would only note here that regulatory compliance is still the core function of the LSB and sight should not be lost of that responsibility in pursuing these other areas.

Question 5: Do you agree with our proposal to pursue these workstreams? Is there anything missing that you think we should focus on in 2021-22??

22. The document lists seven workstreams currently operating and the launch of a further six. There is a sense of irony in commencing the section by referring to the effects of Covid on regulatory supervision and the firms themselves, and then proceeding it seems to add to the regulatory burden, capping it with a 4.4% increase in budget when firms and their staff have foregone pay increases and bonuses and been furloughed.
23. Guidance issued by the Better Regulation Executive encourages regulators to review afresh their regulations and strip out any procedures which are unnecessarily burdensome and fail to meet the Hampton principles set out in the Legislative and Regulatory Reform Act 2006 and reiterated for legal services purposes in sections 3 and 28 of the Act. Whilst there is reference in the workstreams to a review of the regulatory arrangements there are no outcomes identified linking this exercise to the Hampton principles, and recent outputs on practising certificate fees seem to demand even more documentation rather than diminish it.
24. Excess regulatory demand translates into costs for the regulators, which are then passed on to the firms providing legal services. They then charge them to consumers, making the fees even less affordable for vulnerable clients. Balance needs to be achieved in the management of regulation and we are not convinced that the workstreams address this important part of regulation.
25. There are two major elephants in the room in terms of big issues at the present; one is the review of reserved activities and the second is legal aid. As the consultation addresses the former in question 7 our comments on this are given in that section.

26. The recommendations around transparency and price comparison tools may make the sector more competitive but still well out of the reach of those less fortunate and with limited resources. As such it nibbles at the edges of unmet demand rather than getting to the heart of it. Services available to the less well off and vulnerable were seriously curtailed with the reform of Legal Aid in 2013. The reforms were perhaps necessary then because of the poor focus of the relief and the misuse of the funding. However, it was a shortcoming of government at the time not to replace it with something that approached the outcomes more effectively.
27. The issue may be a politically challenging one, but if, the LSB, as it declares in the opening paragraphs, is truly independent of government then it should be strong enough to stand up and state the issue as it sees it. The area “citizens in vulnerable circumstances” is a soft pedal approach to something that requires more urgent attention and would have a far greater impact than the other new workstreams at a time of public hardship.
28. Finally, we would note in passing that there appears to be little scope for agility in the way the work has been presented. Were there to be any major issues arising around legal services regulation that require a tighter regulatory analysis and approach there would seem to be little opportunity to be able to respond to concerns that might be presented by government or the general public.

Question 6: Do you see any areas of joint working between the lsb and you/ your organisation?

29. As noted above, some caution must be exercised in drawing regulatory bodies into exercises that are outside the direct regulatory remit as they may not have the required resources.
30. However ICAEW does have resource that could assist in two areas. Firstly to aid on the effectiveness of current regulatory controls, ICAEW, through its IT Faculty has taken part in discussions with the LSB on the use of innovation and regulatory risk in professional services delivery, and may be able to provide further insight and research in this area.
31. Secondly the quality assurance regime exercised by ICAEW Professional Standards may be able to support and inform LSB initiatives around ensuring quality within practices.

Question 7: Do you agree with our proposals that we should not undertake a statutory review of reserved legal activities in 2021-22?

32. We do not agree with this step. In 2012 the LSB was not averse to carrying out such a review whilst in its infancy and made a recommendation on will writing which was rejected by the then Lord Chancellor Chris Grayling. At the time ICAEW and most of the other regulatory and professional bodies were in agreement with the LSB’s proposal.
33. The work that was done by the regulators in 2014 in their recommendations to Shailesh Vara, the LSB in its Vision Statement in 2016 and more recently the recommendations of Profession Stephen Mayson and the Competition and Markets Authority (CMA) all indicate that this is where focus is needed to give balance to a market where there are considerable consumer vulnerabilities outside the sphere and protection of the LSB and the nine front line regulators.
34. In the consultation document the proposal is to merely carry out some light touch investigative work. We believe more can be done in this area. Whilst Covid and Brexit are currently dulling the appetite for engagement in this area by Parliament, the research and consultation work needed before anything can be presented means that any representation to the Lord Chancellor for change would be made in mid-2022 at the earliest, when the agenda for the House should have returned to some sense of normality.

35. In addition, the pandemic has brought with it some major economic challenges which will require some innovative taxation policies in the next few months. Previous reservations have been driven by taxation needs of the Exchequer, and there is a risk that Treasury may step in and determine the approach in this area to support new tax streams if the LSB are not themselves leading the debate.
36. The observation that further increase would be needed to the budget were this area of work to be extended feels somewhat disingenuous. It could be accommodated at the expense or reduction of some of the other 12 workstreams.

Question 8: Do you have any comments on our proposed market intelligence work? Is there anything missing that you think we should focus on?

37. As legal education and diversity are given prominence elsewhere in the plan, we would have thought some research might have been planned in terms of awareness, by both the general public and at schools level, of law as a right and profession. For example, the effectiveness of Legal Choices should be measured in some way to assess whether the investment by the regulatory bodies in this enterprise is meeting the expectations of the CMA.

Question 9: Do you have any comments on our proposed budget for 2021/22?

38. At a time when businesses and their professional advisers through Brexit and Covid have struggled to sustain their businesses and foregone bonuses and wage increases, to have a body demanding an extra 4.4% sends out the wrong message to the regulated community and suggests that the body is out of touch with those it purports to regulate. The programme should have been compiled on the basis of a nil percentage increase in budget, rather than on an ambitious wish list that has been trimmed back a little.

Question 10: Do you have any comments regarding equality issues which, in your view/experience, may arise from our proposed business plan for 2021/22? Are there any wider equality issues and interventions that you want to make us aware of?

39. The richness of the legal services supply market is driven both by supply and demand. The plan pays considerable attention to the demand curve and the protections that go with it, but not as much to the supply side. The diversity requirement of the eight regulatory objectives is as much about diversity of type of supply as it is about the nine protected characteristics. These types include alternative business structures and many sole practitioners. Regulation whilst improving quality and reducing risk to the consumer can act as a deterrent to those prepared to supply and can risk having a reverse impact on those outcomes if not carefully managed within the Hampton principles. In addition, the statutory objectives include access to justice and competition driving a wider market supply, and these should not be compromised by excess focus on the consumer interest.