18 July 2011

Our ref: ICAEW Rep 70/11

Mr Michael Mackay,
Legal Services Board
7th Floor
Victoria House
Southampton Row
London WC1B 4AD

By email: consultations@legalservicesboard.org.uk

Dear Mr Mackay

Developing Regulatory Standards

ICAEW is pleased to respond to your request for comments on *Developing Regulatory Standards.*

ICAEW operates under a Royal Charter, working in the public interest. Its regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the Financial Reporting Council. As a world leading professional accountancy body, we provide leadership and practical support to over 136,000 members in more than 160 countries, working with governments, regulators and industry in order to ensure the highest standards are maintained. We are a founding member of the Global Accounting Alliance with over 775,000 members worldwide.

Having successfully established a regime to cater for legal professionals and their regulators, it is now apposite and critical for the Legal Services Board [LSB] to consider the integration of non law professionals, their clients and their regulators (described in LSB's Internal Governance Rules [IGR] as Third Category regulators), and to prepare regulatory standards that will work for them too.

The Legal Services Act [LSA] and the powers of the LSB focus on England and Wales. However many non law professionals who provide extensive legal services (such as in the field of accountancy) are already subject to pan European and international regulatory objectives, and practice requirements. In most cases these have been in existence for years **prior** to the introduction of the LSA.
It will be a tricky legal and political exercise to map through these regimes, maximising the public interest outcome, and balancing compliance with the detailed provisions of the LSA, including the regulatory objectives, while expanding the ability of consumers to profit from the legal service provided by third category professionals and their firms.

We believe high level dialogue between the LSB and ICAEW now to tease out and consider these issues is

- essential ; and
- in the public interest

to ensure that the interests of Third Category regulators, their regulated population and (most importantly) their clients and third party users of their work (consumers) are not inadvertently prejudiced, thereby restricting access to justice and the promotion of competition in the provision of legal services.

There is an inherent timetabling issue that the LSB must consider at all times. Third Category regulators will inevitably have a slower 'run in' period to construct suitable arrangements to regulate both non law and legal professionals keen and willing to participate in MDPs. Until Third Category regulators are in a position to license their existing regulated populations as ABSs there will be an inevitable need for such professionals to seek regulation from existing legal services ARs, thereby resulting in a reduction of regulatory competition, which is of course counter intuitive to the LSA.

We have answered the specific questions posed in this consultation paper in an appendix to this letter. Please contact me should you wish to discuss any of the points raised in this response.

Yours sincerely

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APPENDIX

RESPONSES TO SPECIFIC QUESTIONS/POINTS

Question 1

Do you agree with our analysis of the changing legal services market? Are there other factors that should be taken into consideration?

We read with interest the comments made in relation to ABS, and also the need to avoid a two tiered regime to avoid inconsistency amongst ARs. This is to be welcomed as a general principle. Nevertheless, a fundamental but less well examined plank of the LSA reforms (as compared to the impact of Tesco law) is the future impact of MDPs.

It is not adequate to infer that any issues relating to MDPs will be dealt with via the framework Memorandum of Understanding that is in the course of finalisation. If the rules, standards and procedures which are put in place are based predominantly on those required for the "legal sector", then there is a strong danger that the regulatory objectives will be irreversibly breached. The Memorandum of Understanding cannot assist if the underlying rules, standards and procedures are based on the assumption that legal services are invariably provided by legal professionals.

An MDP is just that, a mix of professional working together. It may have previously been a law firm, an accountancy firm, a surveying firm or indeed a newly formed firm of three different professionals working together. MDPs involving accountants and lawyers have existed for many years; however Code of Conduct restrictions prevented acknowledgment of their formal existence. Accordingly the LSB, Legal Ombudsman and other interested parties do have a fully extant and tested, regulatory and professional regime to investigate and learn from. This should be examined separately and independently, to help evaluate an appropriate and integrated approach to apply across the entire legal services sector - not just the sector providing reserved services and allied legal activity as per section 12 of the LSA.

We are not suggesting the LSB should attempt to regulate non-reserved legal services provided by non-authorised persons acting outside the scope of the LSA, law firms or ABSs. But where such services are already being regulated as an integral part of another profession or other regulated activity, the LSB should take account of such activity in their assessment of the regulation of legal services as a whole. And where such Third Category regulators approach the LSB, with a view to becoming an AR or licensing authority, existing regulatory provisions should be fully taken into account.

It is crucially important that an assumption is *not* made that whatever is good for the legal profession, its regulators and consumers, must by definition be equally good or better than arrangements that currently exist for the non legal sector providing legal services.

Question 2

Do you agree with our focus on outcomes focused regulation; risk identification framework; proportionate supervision; and, appropriate enforcement strategy?

As stated above, it is crucial that the LSB does not make its decisions on regulatory policy based exclusively on its own secular analysis but takes full account of regulatory policies which have applied well before 2007 and which will continue to apply to potential ABS participants.

Within the accountancy sector, for example, we believe already apply a regulatory focus which is broadly according to these priorities. However, our regulation has evolved and adapted according

to our own risk analysis and changing priorities. To go back to first principles, in assessing our regulatory standards against this number of criteria, would be onerous, unnecessary on a risk-focussed basis, and any changes that resulted could risk losing some of the nuances developed in response to our own regulatory experience.

Question 3

How do you think that a more flexible and responsive regulatory regime should be developed?

We think any new regime developed by the LSB needs to specifically accommodate existing regulated professionals who have been successfully regulated for many years, and to ensure that the regulatory objectives are not breached inadvertently as a result of disregarding the relatively low risk presented by these entities.

We have had the benefit of seeing the prompt response by LeO to your consultation. We agree wholeheartedly with the LeO comments that customer confusion arises in relation to regulated and non regulated services (page 3 of their response). However this has been dealt with successfully within the accountancy profession which also has regulated and non regulated accountancy services. We will be writing separately to the LeO on this point and are happy to liaise with the LSB, as these issues are paramount to the successful future regulation of MDPs.

A second observation from LeO (page 4) identifies problems caused by "phoenix "firms. ABS developed by well established and well run accountancy practices expanding into reserved legal services may provide a degree of business consistency and professionalism of approach that is currently sometimes lacking in the wider legal services market. It is therefore even more important that the LSA regulatory regime should not proceed on the assumption that any requirements it imposes on legal firms can apply equally and appropriately to non law MDPs. If it does then barriers to entry will be inadvertently created, and the LSB may frustrate the very objectives it is trying to fulfil.

Question 4

We would welcome views on whether self-assessment is an appropriate approach or whether LSB should deliver its oversight by conducting its own reviews.

We think self assessments backed up by reviews on a risk basis are most proportionate. This allows the LSB to focus its resources on areas that may appear to it as high risk from time to time, as the impact of the LSA and ASB regime becomes apparent.

Question 5

What are your views on the benefits, costs and risks to ARs and their regulated communities of our proposals?

There is a clear distinction to be drawn between

- Existing legal services regulators for whom regulatory modernisation plans are required and
- Third Category regulators whose core business is not reserved legal activities and whose own oversight regulators must lead on any regulatory modernisation plans.

As stated above, there is a strong danger that the consumers of legal services already provided successfully by Third Category firms may be prejudiced if the LSB applies exactly the same formula to Third Category ARs as legal ARs.

Question 6

We would particularly welcome feedback on the criteria at Annex A, including suggestions on others that might be appropriate.

Annex A give the impression of being a well thought through and comprehensive analysis of appropriate indicators of, and criteria for, regulatory standards for a profession which is introducing outcomes focussed risk-based regulation for the first time.

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