



18 November 2011

Our ref: ICAEW Rep 108/11

Michael Mackay,
Legal Services Board
7th Floor, Victoria House
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By email: consultations@legalservicesboard.org.uk

Dear Mr Mackay

Enhancing consumer protection, reducing regulatory restrictions

ICAEW is pleased to respond to your request for comments on *Enhancing consumer protection, reducing regulatory restrictions*.

Please contact me should you wish to discuss any of the points raised in the attached response.

Yours sincerely

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ICAEW REPRESENTATION

ENHANCING CONSUMER PROTECTION, REDUCING REGULATORY RESTRICTIONS

Memorandum of comment submitted in November 2011 by ICAEW, in response to The Legal Services Board consultation paper Enhancing consumer protection, reducing regulatory restrictions published in July 2011

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INTRODUCTION

1. ICAEW welcomes the opportunity to comment on the consultation paper *Enhancing consumer protection, reducing regulatory restrictions* published by The Legal Service Board on 28 July 2011, a copy of which is available from this [link](#).

WHO WE ARE

2. ICAEW is a world-leading professional accountancy body. We operate under a Royal Charter which obliges us to work in the public interest. ICAEW's regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the UK Financial Reporting Council. We provide leadership and practical support to over 136,000 member chartered accountants in more than 160 countries, working with governments, regulators and industry in order to ensure that the highest standards are maintained.
3. ICAEW members operate across a wide range of areas in business, practice and the public sector. They provide financial expertise and guidance based on the highest professional, technical and ethical standards. They are trained to provide clarity and apply rigour, and so help create long-term sustainable economic value.
4. This response reflects consultation with the ICAEW Business Law Committee which includes representatives from public practice and the business community. The Committee is responsible for ICAEW policy on business law issues and related submissions to legislators, regulators and other external bodies.

RESPONSES TO SPECIFIC QUESTIONS/POINTS

Question 1: What are your views on the three themes that we have put at the core of our vision for the legal services market? If different, what themes do you believe should be at the core of our vision?

5. *'Setting out the scope and nature of regulation must be linked to developing regulatory standards and performance among approved regulators'*. This theme of the three requires amplification.
6. Legal services can be provided by;
 - Legal professionals regulated by approved regulators – let us call this 'Tier 1 activity'
 - Non legal professionals regulated by other regulators, for whom non reserved legal services are already part of their professional work - 'Tier 2 activity'
 - Non-professionals - non regulated - and this area is rightly identified by the LSB as a primary area for concern – 'Tier 3 activity'
7. Standards and performance must be developed in conjunction with Tier 2 regulators and not in isolation from them. A failure to do so may cause a direct negative impact upon Tier 2 consumers and professionals, and therefore breach the better regulation principles and statutory objectives in the LSA.
8. It is not adequate and indeed dangerous to treat Tier 2 regulators who may become approved regulators as if they were the same as legal services regulators; they are not and continue to have substantial responsibilities outside legal services regulation and often on a basis extending way beyond England and Wales. Any strategic approach established by the LSB as a result of this Discussion Document must embrace and accommodate such complexities, particularly if multi-disciplinary practices are to be encouraged to form and flourish.

9. This is thrown into relief by the issues relating to will-writing which are considered at further length in question 13 below. Clarification is required in the use of reservation and regulation as tools to achieve these theme objectives.

Question 2: What is your opinion of our view that the purpose of regulation is to ensure appropriate protections and redress are in place and above this there are real competitive and cultural pressures for legal services to deliver the highest possible standards with a range of options for consumers at different prices? If different, what do you consider that the role of regulation should be?

10. Protection of the consumer is paramount. Provided existing suppliers and their regulators are not disadvantaged to the benefit of others as a result of regulatory mechanism introduced, then the market will assist in settling options and prices.

Question 3: What are your views of our diagnosis of the weakness of the existing system and the problems within it?

11. There is an inherent tension in the methodology used which is inevitable. Research to date and legal services regulation focus on legal services provided by;
- Legal services professionals within some form of regulated structure (through reservation or regulation of activity) or
 - Non-regulated non-professionals outside regulation.
12. There is little focus on the implications for Tier 2, other than an assumption that multi-disciplinary practices of some sort will form, and will be brought into legal services regulation by virtue of the fact that MDPs must migrate to approved regulators or their existing regulators will become approved. This is a dangerous oversimplification.

Question 4: In light of the changing market do you think that specific action may be needed to ensure that more legal services activity can unequivocally be included within the remit of the Legal Ombudsman and, if so, how can this best be achieved?

13. This statement demonstrates the conflict outlined above. If the aim is simply to bring more legal services activity unequivocally within the remit of the Legal Ombudsman, then this could inadvertently or deliberately result in vast swathes of regulated professional service work in accountancy, surveying and other professional services passing to the Legal Ombudsman, when it is already successfully regulated elsewhere.
14. Such a fundamental shift in the regulation of professional services is not the intent behind the LSA, and is not the problem that needs to be addressed, but may be the unintended consequence if the impact on Tier 2 activity is not taken into account as an essential and required part of setting regulatory 'boundaries'.

Question 5: What do you see as the benefits and downsides of regulating through protected title such as solicitor and barrister?

15. The use of protected title is a key regulatory mechanism and element of professionalism, and we believe can be utilised even more to promote the regulatory objectives. These titles are easily recognisable by consumers, even if the work that is done is not.
16. It also implies that the person;
- has a degree of personal skill separate from the organisation for which he/ she may work, and which may assist in the consumer validation process and
 - is also regulated as an individual, as well as part of a regulated entity.

17. It may be easier to maintain and police standards through stringent regulation of protected title, which may not be as easy to achieve exclusively through regulated entities or indeed just brands, which can emerge and disappear with scant regard for the future, their customers or professionals within them.
18. Maintenance of dual professional oversight of individuals and entities is a delicate balancing exercise for the LSB as well as front line regulators.

Question 6: What are your views on whether there should be a consistent approach to the allocation of title to authorised persons? What are your views on whether the title should be linked directly to the activities that a person is authorised to undertake or linked to the principal approved regulator that authorises them?

19. Please see our comments under question five for contextual background. This debate is actually looking at the difficult philosophical area of what is a professional; as opposed to a professional service provider and far more analysis is required before a clear answer can be given.

Question 7: What are your views on our proposal that areas should be examined “case- by-case”, using will-writing as a live case study, rather than through a general recasting of the boundaries of regulation? If you disagree, what form should a more general approach take?

20. A case by case basis at least provides a measurable degree of focus. However it is essential that all decisions and evaluations, whether case by case or as a general recast, specifically consider the implications on Tier 2 consumers, professionals and regulators.
21. The LSB also needs to be alert for fundamental points of principle, or for similarities between separate areas for potential regulatory change. Addressing issues on a case by case basis should not be allowed to result in additional inconsistencies or conflicts.

Question 8: What are your views on our proposed stages for assessing if regulation is needed, and if it is, what regulatory interventions are required?

22. We welcome the comment that the LSB will assess impacts on the broader regulatory framework, and they are live to ‘unintended consequences’ for the reasons mentioned in the response at some length.

Question 9: What are your views on the implications of our approach for professional privilege?

23. It is hard to identify the precise approach from the discussion document and further clarification would assist. We are happy to work with the LSB on this issue both before and after the Prudential case reaches the Supreme Court in 2012.
24. The fundamental issue is not ‘*intra profession competition*’ and is it inappropriate to describe it as such. The right of clients for their legal affairs to be kept confidential should always prevail. The most important issue is how professional privilege (in the context of unsatisfactory drafting of section 190 and case law) can function adequately in a modern multi-disciplinary practice, with simplicity and clarity for clients.

Question 10: Do you believe that any of the current reserved legal activities are in need of urgent review? If so, which activities do you think should reviewed and why?

25. We certainly consider that probate per se (in the narrow sense of completing an application to found a grant of probate) need not be reserved and is therefore suitable for review. It is an

example where a long standing reservation created for reasons lost in the mists of time creates modern day work arounds and fudges which only confuse and ultimately cost consumers.

Question 11: What are your views on our analysis of the regulatory menu and how it can be used?

26. The proposed regulatory menu is a good place to start, subject to dialogue with Tier 2 participants and not just approved and potential approved regulators.

Question 12: Do you have any comments on our thoughts on other areas that might be reviewed in the period 2012-15, including proposed additions or deletions, and suggestions on relative priority?

27. We suggest an assessment of the potential impact of all decisions on the consumers of Tier 2 activity is made an absolute overarching prerequisite for **all** strategic decisions and this becomes embedded in LSB policy.
28. Indeed this will assist in the collection and assessment of evidence referred to in paragraph 152 and helps avoid unintended consequences.
29. Secondly, we note the proposal to consider a potential deregulation within 'corporate law' and with it a consideration of the role of privilege. We are not sure where this proposal may or could go as there appears to be confusion between a sophisticated corporate client and corporate advice. Corporate advice is also sought by the unsophisticated trader wishing to structure his tax and business affairs and any attempt to regulate his advice without a fundamental and wide ranging review is inappropriate. It is the nature of the client, not the nature of the advice, that appears to be the determining factor and even then we see it hard to justify the proposal.

Question 13: Do you have any comments on the approach that we have adopted for reviewing the regulation of will writing, probate and estate administration?

30. The regulation of these areas throws the issues surrounding Tier 1, 2 and 3 activity into sharp relief. Will writing, probate and estate administration are legal activities carried out in whole or in part as;
- reserved / regulated activities by Tier 1 professionals;
 - regulated activities by Tier 2 professionals (eg, many accountants successfully administer estates that may have been created years previously, and provide the necessary tax and trust advice to assist in will drafting and probate preparation)
 - non-reserved and non-regulated activities by Tier 3 participants.
31. The problems identified to date appear to focus upon Tier 1 and Tier 3 service providers and poor standards and lack of redress. It is crucial that any steps taken to reserve and or regulate to protect Tier 1 and 3 consumers (for example by reserving these activities exclusively to authorised persons under the LSA), do not inadvertently prejudice consumers and professionals within Tier 2.
32. If our suggestion for making the impact of regulatory decisions on Tier 2 activity an overarching prerequisite is accepted, may we suggest the work undertaken by the LSB associated parties into will writing is the first piece of work that publicly adopts this approach when assessing regulatory boundaries.

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