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Dear Sonya

**Applications by the Institute of Chartered Accountants in England and Wales to become an approved regulator and licensing authority for probate activities under the Legal Services Act 2007**

Thank you for your letter of 9 January inviting the Panel to provide advice on the above application. Under the Legal Services Act, the Panel is a mandatory consultee on applications from bodies to become licensing authorities. In deciding what advice to give, the Panel must, in particular, have regard to the likely impact on consumers of the Lord Chancellor making an order for designation as set out in the application.

Making an assessment of likely consumer impact does not lend itself to a precise formula. The Panel applies well established consumer principles – such as access, choice and redress – as reference points by which to analyse the issues. In addition, we identify the risks to consumers and the type and degree of possible harm, and then make a judgement as to whether the proposed arrangements are likely to promote access and offer sufficient protection. Finally, the regulatory objectives in the Legal Services Act underpin our assessment.

The Panel submitted a detailed response to ICAEW when it consulted on its draft proposals and we have met regularly with officials during the last two years as their plans have evolved. We commend ICAEW for the level and nature of its engagement with us, which has led to their proposals becoming more consumer focused.

The Panel's submission and ICAEW's response can be found in Annexes 22B and 22C of its application. Other than changes made following the Panel's representations, the application has not significantly altered since the consultation stage. Therefore, rather than restate our original analysis, which we encourage the LSB to read when considering the applications, this advice comments on ICAEW's response to our earlier submission.

Since ICAEW submitted its applications, the LSB has decided not to recommend to the Lord Chancellor that estate administration activities should become reserved. Despite this, we continue to support ICAEW's proposal to include estate administration within the scope of its regulation where this activity is conducted by an accredited probate firm. This reflects the high risk of consumer detriment in estate administration work (as identified by the Panel in its separate submissions to the LSB on this issue) and the scope for consumer confusion should a provider be regulated for obtaining a grant of probate but not administering the estate. These activities will often be offered as a seamless package and will seem so in consumers' eyes regardless of the regulatory implications. We note this situation would be no different to the Solicitors Regulation Authority continuing to supervise solicitors offering estate administration services.

Below we comment on each topic in order of appearance in Annex 22C.

### **Authorisation**

Following the Panel's feedback, ICAEW's application now includes a requirement for basic CRB checks for applicants for 'authorised individual' status, plus standard CRB checks for applicants for HoLP and HoFA status, and for non-authorised persons holding a material interest in a licensed firm. The Panel is satisfied with these changes, which will offer a degree of checks and balances on the suitability of key individuals. We recognise that regulation of this kind cannot eliminate the risk of fraud, but nevertheless consider this a sensible precautionary measure.

### **Continuing Professional Development (CPD)**

Following the Panel's feedback, ICAEW will now issue guidance on areas which probate practitioners need to consider in forming their CPD plans, although it will not prescribe what CPD should be carried out. This is a small step in the right direction, but we remain concerned that probate practitioners will be under no obligation to do any CPD linked to probate. This is particularly true for ICAEW's existing members for whom such work will form a minority of their business activity, as quality risks are higher for practitioners who carry out a small number of transactions. Given probate is a minority feature of ICAEW's regulatory regime, we accept this cannot dictate every detail of its overall arrangements, but equally the LSB needs to be assured that risks to legal services consumers are being adequately managed. ICAEW's overall CPD regime appears light touch at a time when approved regulators are rightly being challenged to improve their own regimes. We hope that the LSB will keep this under review and challenge ICAEW to raise its standards, taking account of the findings of the Legal Education and Training Review.

### **Client money**

The Panel raised two concerns with regard to client money. Firstly, money placed in accounts outside the UK, and particularly outside the EU, may not be subject to the same depositor protections as in the UK, and secondly monies held in accounts other than sterling may be at risk of

currency fluctuations. ICAEW has elected not to amend its proposals on these points. Regulation 9 of the clients' money regulations obliges firms to inform their clients in writing when monies will be placed in bank accounts outside the UK/RoI. If the bank does not provide assurance that (amongst other things) client monies will not be combined with other accounts and that no right of counterclaim or set-off against the money will be exercised, the client must also be informed of this in writing. Where monies are held outside the EU the client has to consent to this in writing. Additionally, money must be held in the currency in which it was received unless the client instructs otherwise in writing. After discussion with ICAEW the Panel considers these safeguards are likely to be adequate, but would stress that consent needs to be obtained on the basis of an informed decision. This means that clients must be made aware of what the risks are in practice and should not simply just be given large amounts of information to take away which they may never read or may not fully understand.

### **Professional Indemnity Insurance (PII)**

Following the Panel's feedback, ICAEW has inserted guidance to the effect that firms must inform the client in cases where the value of the estate is likely to exceed the level of PII cover. The Panel welcomes this change, but as above we underline the fact that *how* this is done is important – the client must understand the implications of what they are being informed about. The Panel also suggested that run-off cover should be six years (in line with requirements for solicitors) rather than two years. ICAEW is currently discussing with insurers the possibility of firms holding six years run-off cover. Furthermore, over time ICAEW hopes to build up a fund which will be able to encompass claims for negligence where a firm does not hold PII or run-off cover. However, it appears there is currently a gap where if a firm does not hold PII or run-off cover has expired or not been purchased, the consumer will not be able to obtain redress in cases of negligence. The Panel still wishes this gap to be closed.

### **Compensation**

After discussions with the Panel, ICAEW has extended the time limit for making an application to the Probate Compensation Scheme to 12 months from the time the client became aware, or reasonably ought to have become aware, of the loss. ICAEW has also drafted a recommended paragraph that firms can use to make sure clients are informed about the compensation arrangements from the start of an engagement. In addition to this ICAEW will provide information about the scheme on their website. The Panel welcomes these changes. However, as noted above, consumers are not covered in cases of negligence where PII or run-off cover has not been maintained, and the compensation fund does not currently address this gap. As stated, this should be closed. It is vital that in cases where funds have been lost due to negligence consumers are able to obtain recompense for this. The Panel notes that a cap on the amount paid out in grants in any given year remains and that if a systemic issue were to arise this could cause detriment to consumers who claim 'last in the queue'. Finally, ICAEW has sought confirmation from its broker that the compensation fund will respond in cases of fraud or bankruptcy

where the firm's PII is invalidated. We urge the LSB to seek confirmation from ICAEW that this risk is covered.

### **Complaints**

Following the Panel's feedback, ICAEW has softened the tone of its guidance in relation to requiring firms to notify insurers about all complaints and to also provide insurers advance notice of offers to resolve complaints. The new guidance makes clear that in the case of serious complaints, firms should bear in mind their obligations and duties under its PII cover. This revised wording represents a welcome change in emphasis.

### **Governance**

Following the Panel's feedback, ICAEW has proposed a new composition structure for its Probate Committee. The original proposals were for a committee of at least 9 members, of whom one third would be probate practitioners and one third would be lay (i.e. non-chartered accountants) and that the chair would be a lay person. The new proposal is a committee of ten members with a 50:50 split between lay and non-lay members and for the chair to be a lay person and have a casting vote. The definition of a lay person has also been modified to exclude anyone who has legal training or who has qualified or practised as a professional accountant.

The Panel would ideally have preferred a clear lay majority on the Probate Committee in line with requirements on applicable approved regulators. However, we recognise that ICAEW has made significant changes to its original proposals to meet our concerns. We are disappointed that ICAEW does not propose to alter the membership of its Disciplinary Committee at this time. We remain strongly of the view that this creates the impression of accountants/lawyers judging their own and damages public confidence. We note that ICAEW has publicly committed to a full-scale review of its regulatory governance arrangements, with changes taking effect in 2014. The Panel hopes the LSB will send the strongest possible signal that this review should result in a lay majority on the Disciplinary Committee and on its other regulatory committees.

Finally, should ICAEW become an approved regulator and licensing authority we look forward to continuing to work with it and the LSB in ensuring the smooth implementation of these arrangements.

Please contact Steve Brooker, Consumer Panel Manager, for enquiries in relation to this submission.

Yours sincerely



Elisabeth Davies  
Chair