

Consultation response

ICAEW: Probate application

Overview

1. The Panel welcomes this application, which supports our aim of competition between diverse providers within a regulated market place. We particularly support the proposal that ICAEW will authorise any competent provider, not just accountancy firms, although this also alters the nature of the risks and the consumer protections needed.
 2. It is very disappointing that ICAEW is not proposing to have a majority of lay members on the Probate Committee or Disciplinary Committee. This is needed to ensure public confidence and delivers better quality regulation. We understand that ICAEW is not bound by the detailed Internal Governance Rules set by the Legal Services Board, but must follow the spirit of those rules – in our view the lay majority principle embodies the spirit of these rules and we strongly urge ICAEW to rethink these proposals.
 3. The financial protection arrangements seem comprehensive overall, although we seek assurances that nothing will fall through the gaps between professional indemnity insurance and the proposed compensation scheme. We would also prefer that licensed firms be required to purchase a minimum of six years run off cover, as solicitors currently must do.
- The Panel has concerns about some more detailed requirements, for example allowing client money to be placed in accounts outside of the UK could mean weaker depositor protection for clients and exposure to currency fluctuations. It is possible that disclosure requirements could help mitigate some of these risks.
4. We recommend that ICAEW carries out Criminal Record Bureau and/or other checks on non-accountants seeking authorisation. This reflects the inherent risks of fraud in probate work and cases where individuals prosecuted for fraud have previously been in trouble with the authorities yet were able to become members of trade associations.
 5. It is good that firms will fall within the Legal Ombudsman's jurisdiction, but we are concerned that rules in relation to informing insurers about all first-tier complaints and offers of redress are onerous and could lead to a defensive mindset as found among many lawyers.
 6. Whilst we agree that a purely inputs based approach to CPD is ineffective, we do consider that practitioners should be required to complete an element of CPD related to probate work. We hope that ICAEW will review its arrangements in the short-term and learn from current reviews underway in this sector.

The proposals

7. The Institute for Chartered Accountants in England and Wales (ICAEW) plans to apply to become an approved regulator and licensing authority for probate activities.
8. ICAEW has developed a single regulatory framework that will apply for the most part equally to firms wishing to become accredited for probate as either:
 - Authorised firms in which all principals and owners are individually authorised to conduct probate work; or
 - Licensed firms in which not all principals and owners are authorised for probate (ABS firms).
9. The scope of the application is restricted to non-contentious probate work; ICAEW is not seeking authority to accredit firms wishing to oppose a grant of probate or letters of administration. Licensed firms conducting estate administration work will be covered by the arrangements. However, will-writing and other legal activities will not be part of the regulatory framework.

The Panel's response

10. The Panel will assume the status of a mandatory consultee under the Legal Services Act at the stage when the Legal Services Board receives the final licensing authority application. However, we are pleased to comment at this stage of the process when there is perhaps greater scope for ICAEW to amend its proposals.
11. This is the first time that a body from outside the legal sector has applied to become a licensing authority. This is welcome as our view is that anyone who can demonstrate their competence should be able to deliver legal services. The Panel wishes to see competition between diverse providers within a regulated market place and the application supports this aim. Building on this, we are pleased that the proposals foresee ICAEW authorising non-accountancy firms for probate work.
12. However, ICAEW's status as a professional body primarily focused on another sector presents some unique challenges for this application. Of course, it would not be reasonable to expect ICAEW to overhaul its existing arrangements for accountancy services when probate will represent a small proportion of its total activities. Despite this, legal services consumers are entitled to a minimum set of protections whoever they deal with and ICAEW must satisfy these expectations before being granted authorisation rights. This includes meeting practices around how regulation is delivered – for example, independent governance – that may not fit neatly with ICAEW's experience in an industry used to self-regulation, but which is vital to public confidence in the legal services sector.
13. The Panel supports the large majority of the draft application. The comments below focus on areas of disagreement or which we consider need further development. We were pleased to have met with ICAEW representatives on numerous occasions as it has developed this application and look forward to continuing good relations.

Governance

14. A Probate Committee will be responsible for overseeing ICAEW's supervisory framework for probate. The committee will comprise at least nine members, of whom one third will be probate practitioners and one third will be lay (i.e. non-chartered accountants). The chair of the committee will be a lay person.
15. The Panel welcomes the requirement that the chair will be a lay person. The chair sets the strategic direction and tone and it is important that consumer-focused regulation is led from the top. The influence of the chair on defining the commitment of the approved regulators to consumer interests has been a feature of legal services.
16. It is very disappointing that ICAEW has not specified a lay majority membership for the Probate Committee. This is a new committee which ICAEW has established specifically for this area of work. The LSB has indicated that ICAEW must follow the spirit of the Internal Governance Rules (IGRs) but it is not bound by the detailed rules which include a lay majority requirement. However, the composition of the Probate Committee goes to the very heart of the spirit of the IGRs. The Panel considers that it is vital for ensuring public confidence that regulation is seen to be conducted in the interests of the public, rather than lawyers. For us, it is the litmus test of ICAEW's commitment to public interest regulation.
17. We note that the backgrounds of only six of the minimum nine members are specified. We would agree that having professional input is necessary and suggest that three probate practitioners is a suitable threshold. There is nothing in the rules to prevent the other three members from being lay, although in practice this is unlikely to transpire. Other professional sectors have moved to lay majorities and are reaping the benefits including better decision-making and gaining from the fresh perspectives and expertise brought from other environments. ICAEW is swimming against the tide and we urge it to reconsider these proposals.
18. The make-up of the Disciplinary Committee faces similar issues as at least only one quarter of members must be lay. Findings in disciplinary proceedings are as visible sign of independent regulation as wider governance structures and there must be no impression of accountants or lawyers judging their own. Again, other disciplinary bodies have moved to a lay majority and ICAEW needs to move with the times.
19. As ICAEW defines lay as non-chartered accountants it is conceivable that the lay members could have a legal background. It would clearly be unacceptable if this was to happen and can be expected to severely undermine public confidence. The Legal Services Act gave an unambiguous signal that lay meant never having practised as a lawyer. We consider this principle should apply equally to ICAEW's arrangements.

Financial protection

20. ICAEW recognises that holding monies following a grant of probate may be relatively high risk from the perspective of consumers. The Panel welcomes this recognition and the steps ICAEW is taking to minimise risks. We consider that the

financial protection arrangements are comprehensive; they include provisions for holding client money in separate accounts, professional indemnity insurance, an assigned risks pool of last resort and a probate compensation scheme.

Client money

21. The consultation document and client money regulations set out that client money must be held separately and thoroughly documented, and contains provisions such as specifying that banks may not combine such accounts or exercise any right of set off against such accounts. Accounts should be interest bearing, with the interest returned to the client. The Panel welcomes all of these provisions.
22. However, an area of concern in the client money regulations is that currently client money can be placed in accounts outside the UK. The regulations state that the client must be informed of this in writing. We are concerned about two separate risks. Firstly, money placed in accounts outside the UK, and particularly outside the EU, may not have the same depositor protections as those in the UK. Although clients may be informed of this, they are unlikely to be aware of what these risks could mean in practice or take steps to mitigate the risks. Secondly, there is no information on how currency fluctuations should be handled – this is a factor which could place client money at risk and the implications of which may not be understood by individual clients.

Professional indemnity insurance (PII)

23. PII is mandatory, and members have to complete and return a certificate of compliance. The maximum required indemnity level (for all firms) is £1.5 million. Firms can choose to take out higher cover if they wish to, and if they do the insurance above the required level does not need to comply with the approved wording or be from qualifying insurers. For accountancy firms the minimum level of cover varies but can never be less than £100,000. In the case of licensed probate firms the minimum level of indemnity is £500,000 per claim.
24. There may be times when the value of an estate is higher than the level of insurance. We consider that in all instances where the value of an estate exceeds the level of insurance, the firm should be required to inform the client that their indemnity insurance is capped and the level of the cap. ICAEW has carried out research on average estate values which suggests that such an information requirement would likely only apply in a minority of cases.
25. Two years run off cover is required but we consider that six years is the optimal amount of time and would mirror solicitors' requirements. It is not clear if consumers are covered by PII or by the compensation fund if run off cover has not been purchased, or if the claim falls outside the two year limit and the firm has not extended the run off cover. It would be helpful if these points were clarified.

Compensation scheme

26. ICAEW intends to set up a probate compensation scheme, which will provide extra protections for consumers. The Panel welcomes this. However, compensation may be restricted to very particular cases, so not all consumers will be able to benefit even if something has genuinely gone wrong – there is, for example, a relatively short time limit of 6 months to make a claim.
27. Cases not covered by the scheme are listed in Chapter 5. There are wide exclusions, such as losses arising from professional negligence, claims for interest which should have been paid and losses resulting from misappropriation or failure to account. This would not be an issue if PII dealt with all these situations and we have sought assurances from ICAEW that there will not be circumstances which slip through the net between PII cover and the compensation scheme. This is something which we will urge the Legal Services Board to satisfy itself about as these arrangements of last resort provide a critical safety net.
28. There is a cap of £5 million in total in grants which can be paid out in a given year. If claims in excess of this are received then all remaining grants for the year will be reduced. These reductions may be made good in the next financial year but this is at the discretion of the Probate Committee. However, we do not believe consumers should be penalised simply because they are ‘last in the queue’.
29. Accredited probate firms have to inform clients of compensation arrangements at the start of an engagement. We strongly

agree that informing consumers of such arrangements is beneficial. We consider the wording suggested in the consultation could include more information (such as flagging up time limits for example). At this point it could also be helpful to direct consumers to further information about the compensation scheme, for example on ICAEW’s website. We suggest that providing this information should be made mandatory.

Checking the suitability of applicants

30. The prospect of fraud is one of the main reasons why the Panel has recommended the regulation of probate and estate administration activities. Our work has identified a series of inherent features of the market that leave consumers at higher risk of being defrauded, including the close knowledge gained of the testator’s affairs, the potentially large value of estates, the prospect of non-discovery by victims or the potential long time lag before discovery, the highly personal nature of writing a will, the targeting of vulnerable people and the difficulty in proving some types of fraud. The sums involved can be substantial, although there is also low-level fraud which has a large cumulative total.
31. Our understanding is that ICAEW does not propose to conduct Criminal Record Bureau (CRB) or other checks on the integrity of individuals wishing to be authorised for probate work, relying on self-declarations to this effect. This may be proportionate for accountants from the UK and qualifying overseas jurisdictions who have undergone a lengthy suitability process as part of their training regime, but in our view this is insufficient for other types of applicant. This

is a concern as some individuals recently prosecuted for probate fraud have previously been in trouble with the authorities yet become members of a trade association and benefited from the credibility which comes with that status. Although conducting some checks is an administrative burden and cost, we consider it is worthwhile to protect consumers. Indeed, this would be a sensible precaution for ICAEW to take given the reputational damage that might result should someone slip through the net.

Complaints resolution

32. We strongly welcome the proposal that accredited firms will be subject to the same complaints rules and Legal Ombudsman as do other law firms. ICAEW currently has a complaints function but lacks powers to award redress. This is vital given the high potential consumer detriment that can occur from poor service in probate work.
33. The application requires all complaints to be notified to professional indemnity insurers and to notify their insurers in advance before making any offers to resolve the complaint. These measures sound overly cautious and risk breeding a defensive mindset which inhibits the quick resolution of service complaints. The Panel and the Legal Ombudsman have jointly commissioned research on the consumer experience of complaining to law firms. The findings, due for publication shortly, identify a need for a cultural change in the way in which lawyers deal with complaints. ICAEW should be mindful of the unintended effects of excessive regulation in this area.

Continuing professional development

34. ICAEW does not specify the form that continuing professional development (CPD) should take nor specify the number of hours or points that must be obtained. Rather members must undergo whatever development activity is required for them to remain competent in their roles. Members must make an annual CPD declaration, which ICAEW audits on a sample basis. Failure to make a CPD declaration may be treated as a disciplinary issue.
35. This is an area where ICAEW's existing arrangements for accountants are copied across for licensed probate firms. Like ICAEW, the Panel does not favour a purely 'inputs' based CPD model, for example based on a minimum hours requirement, which has proven not to be effective in legal services. However, we do consider that practitioners should be required to complete an element of their CPD related to probate work as a failure to keep up-to-date with changes to, for example tax laws, could have serious consequences for consumers.
36. We would hope ICAEW will wish to review its CPD arrangements in the short term. The Legal Education and Training Review process, and the proposals which ILEX Professional Standards are currently consulting on, should provide useful ideas as ICAEW develops this work.

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