

Section 69 Order: to make provisions relating to the functions of the Institute of Chartered Accountants in England and Wales (ICAEW)

A consultation paper under section 70 of the Legal Services Act 2007 on a recommendation and a proposed draft statutory order to the Lord Chancellor to be made under Section 69 of the Legal Services Act 2007 for appeal arrangements and to give intervention powers to ICAEW

This consultation will close on **Friday 15 August 2014 at 5pm.**

Contents

Introduction	1
Background to the proposed changes	3
Draft section 69 order and impact assessment	5
How to respond	7
Complaints	7
ANNEX A – Draft recommendation to the Lord Chancellor and draft section 69 order which will be annexed to the recommendation	8
ANNEX B – Draft Impact Assessment.....	11

Introduction

1. Under section 69 of the Legal Services Act 2007 (**the Act**), the Lord Chancellor may, on the recommendation of the Legal Services Board (**LSB**), make an order to modify, or make other provision relating to, the functions of an approved regulator or any other body other than the LSB.¹ This can include modifying provisions made by or under any enactment, instrument or document.²
2. Any order made by the Lord Chancellor under section 69 of the Act must be made by statutory instrument³ and this must be through the affirmative procedure, i.e. approved by both the House of Commons and the House of Lords, to become law.⁴
3. Section 70 of the Act sets out the procedural requirements relating to a recommendation under section 69. Section 70(2) requires that before making a recommendation to the Lord Chancellor, the LSB publishes a draft of the proposed recommendation and the proposed draft order. Section 70(3) requires that the draft is accompanied by a notice which states that representations about the proposals may be made to the LSB within a specified period. Section 70(1) of the Act requires that the recommendation may only be made under section 69 with the consent of the approved regulator.
4. This consultation invites representations on a proposed draft recommendation and proposed draft order that, if given effect, would allow the Institute of Chartered Accountants in England and Wales (**ICAEW**) to:
 - make rules or regulations providing for appeals to the General Regulatory Chamber (**GRC**) of the First Tier Tribunal (**FTT**) against decisions made by ICAEW in its capacity as an approved regulator (including arrangements providing for a decision on such an appeal to be final and for orders as to payment of costs)
 - make licensing rules providing for appeals to the GRC of the FTT against decisions made by the ICAEW in its capacity as a licensing authority (including rules providing for a decision on such an appeal to be final and for orders as to payment of costs)
 - allow for Schedule 14 to the Act (a licensing authority's powers of intervention) to have effect in relation to ICAEW in its capacity as an approved regulator.

¹ s69(1) and s69(2) of the Act.

² s69(6) of the Act.

³ s204(1) of the Act.

⁴ s206(4)(h) of the Act.

5. The policy outcomes of the proposed provisions set out in the draft recommendation and draft section 69 order are two-fold:

- **A single appellate body to hear and determine appeals.** ICAEW has, as part of the development of its applications seeking designation as an approved regulator and a licensing authority, consulted and decided on the proposal to use the GRC of the FTT as its appropriate appellate body for all approved regulator and licensing authority decisions. This to ensure consistency of decision making between the regulation of alternative business structure (**ABS**) firms and non-ABS firms. This is in line with the LSB's overall policy that all appeals to decisions made by a licensing authority should be heard by a single appellate body (and that body should be the GRC of the FTT)⁵
- **Intervention powers.** ICAEW are seeking additional intervention powers to ensure that there is a consistent approach when it is acting as either an approved regulator or a licensing authority. This will mean that the ICAEW is able to act to protect consumer interests and it will improve the efficiency of the regulatory framework.

6. Any representations on the proposals should be made by **5pm on Friday 15 August 2014**. The proposed draft recommendation and draft order can be found at **Annex A**. Further details on how to make representations can be found on page 7.

⁵ Alternative Business Structures: appeal arrangements decision paper (published in 2011): http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/sra_abs_appeals_decision_document_final.pdf

Background to the proposed changes

7. ICAEW is a regulator of, and professional membership body for, the accountancy profession in England and Wales. In December 2012, it made two applications to the LSB. The first application (under Part 2 of Schedule 4 to the Act) sought a recommendation for designation as an approved regulator for probate activities; the second (under Part 1 of Schedule 10 to the Act) sought a recommendation for designation as a licensing authority in relation to the same reserved legal activity. ICAEW's full designation applications have been published on the LSB website.⁶
8. The LSB considered the applications from ICAEW in accordance with its rules⁷ and the requirements of the Act and, in December 2013 recommended to the Lord Chancellor that he make two orders: one designating ICAEW as an approved regulator for probate activities, and the other designating ICAEW (once it is an approved regulator) as a licensing authority for the same reserved legal activity. The decision notice in respect of the designations can be found on our website.⁸
9. On 6 March 2014 the Lord Chancellor approved recommendations for the orders to be laid designating ICAEW as an approved regulator and a licensing authority for probate. The order designating ICAEW as an approved regulator came into force on 17 July 2014. At the time of writing this paper, the order designating ICAEW as a licensing authority was subject to parliamentary processes.
10. The principal objectives of the proposals set out in the draft order on which we are now consulting are to allow for a consistent regulatory regime for the regulation by ICAEW of both ABS and non-ABS firms. Specifically it is intended that all appeals on ICAEW's regulatory probate decisions (whether made as approved regulator or a licensing authority) are heard and determined by the GRC of the FTT and that there are equivalent intervention powers for ICAEW when acting as an approved regulator and a licensing authority.
11. The LSB supports all of the proposals set out in this consultation document; the proposal to use the GRC of the FTT as its single appellate body for regulatory probate decisions is consistent with the LSB's overarching objective to have a single appellate body for all legal service regulators. We also believe it is appropriate that the ICAEW have consistent arrangements and powers for the regulation of ABS and non-ABS firms.
12. This consultation is not seeking views on the policy intentions of ICAEW in respect of the proposals. ICAEW undertook a consultation on the policy in June

⁶ ICAEW applications: http://www.legalservicesboard.org.uk/Projects/statutory_decision_making/icaew.htm

⁷ Rules for designation applications: http://www.legalservicesboard.org.uk/what_we_do/regulation/index.htm

⁸ Decision notice: http://www.legalservicesboard.org.uk/Projects/statutory_decision_making/icaew.htm

2012.⁹ Instead, this consultation is inviting representations on whether the proposed section 69 order (at **Annex A**) as drafted delivers the policy intentions of ICAEW.

13. The draft order and a draft impact assessment to accompany the order have been prepared in consultation with ICAEW and Ministry of Justice.

⁹ ICAEW consultation: <http://www.icaew.com/en/archive/about-icaew/newsroom/press-releases/2012-press-releases/icaew-announces-public-consultation-on-probate-application>.

Draft section 69 order and impact assessment

Appeal arrangements (Article 4 and Article 5 of the order)

14. ICAEW's applications proposed that the GRC of the FTT be the appellate body to consider appeals against probate regulatory decisions made by the ICAEW. For this to be effective, ICAEW needs a power to make appropriate rules or regulations.
15. Article 4 of the draft order would allow ICAEW to make rules or regulations providing for appeals to the GRC of the FTT against decisions made by ICAEW in its capacity as an approved regulator (including arrangements providing for a decision on such an appeal to be final and for orders as to payment of costs).
16. Article 5 would allow ICAEW to make licensing rules that would have the same effect.
17. The proposal has been subject to consultation by ICAEW and HM Courts & Tribunals Service has agreed to the proposed arrangements.

Powers of Intervention (Article 6 of the order)

18. Schedule 14 of the Act contains the provisions about circumstances in which a licensing authority may intervene in an ABS firm, and the powers that are exercisable upon such an intervention. Licensing authorities are granted these powers automatically at the point of designation.
19. ICAEW's regulatory framework has been based on the premise that all firms – whether ABS or non-ABS – will be subject to the same regulatory arrangements. To ensure consistency of intervention powers, Article 6 modifies the provisions of Schedule 14 so that they apply to ICAEW in its capacity as an approved regulator. Specifically, references in Schedule 14 to a 'licence' is read as a reference to an 'authorisation', a 'licensed body' is read as a reference to an 'authorised person', a 'licensing authority' is read as a reference to 'the Institute' and a 'manager' is read as a reference to a 'principal'. Article 6 will also include an additional modification on insolvency events relating to individuals, i.e. bankruptcy.
20. Accordingly, the modifications in Article 6 would result in ICAEW having the equivalent powers of intervention as an approved regulator that it will have as a licensing authority.

Draft section 69 order

21. Attached at **Annex A** are the following:

- a draft recommendation from the LSB to the Lord Chancellor that he make the order;
- a copy of the draft order.

Question 1: *Do you have any comments on either the draft order or the draft recommendation?*

Question 2: *Does the draft order deliver the policy intentions as set out above?*

Draft impact assessment

22. A draft impact assessment has been prepared to accompany the order (see **Annex B**). Given the available evidence, the LSB's view is that this represents a reasonable analysis of the likely costs and benefits of the options.
23. The final impact assessment will be subject to review by the Ministry of Justice and we welcome feedback on this draft version.

Question 3: *Do you have any comments on the draft impact assessment, in particular, the costs/benefits estimates and whether any additional costs/benefits should also be identified?*

How to respond

24. We would prefer to receive responses electronically (in Microsoft word or PDF format), but hard copy responses by post or fax are also welcome. Responses should be sent to:

Post: Michael Mackay
Legal Services Board
One Kemble Street
London WC2B 4AN

Fax number: 020 7271 0051

Email: Consultations@LegalServicesBoard.org.uk

25. The consultation period will end at **5pm on Friday 15 August 2014**, four weeks after publication. In accordance with section 70(3) of the Act, you are given notice that any representation about the proposed section 69 order must be made to the LSB by the end of this period.
26. The LSB is happy to meet respondents to discuss views on the consultation if you would find that helpful. Please send requests to:
Consultations@LegalServicesBoard.org.uk
27. We consider that this consultation satisfies the requirements of section 70 of the Act to publish a proposed draft order and proposed draft recommendation before making a recommendation to the Lord Chancellor under section 69.
28. The LSB plans to publish all responses received during the consultation period on its website. While the LSB is happy to discuss varying this general policy in individual cases, there is a strong presumption in favour of transparency. It will therefore note publicly that a submission has been received from an identified body which had withheld its consent for publication in the summary of the consultation.

Complaints

29. Complaints or queries about the LSB's consultation process should be directed to Michelle Jacobs, Consultation Co-ordinator, at the following address:

Michelle Jacobs
Legal Services Board
One Kemble Street
London WC2B 4AN

Or by e-mail to: michelle.jacobs@legalservicesboard.org.uk

ANNEX A – Draft recommendation to the Lord Chancellor and draft section 69 order which will be annexed to the recommendation

Draft recommendation by the Legal Services Board to the Lord Chancellor under section 69 of the Legal Services Act 2007

Proposed recommendation for the Institute of Chartered Accountants in England and Wales

1. At its meeting on **[DATE]**, the Legal Services Board (**LSB**) decided to make a recommendation to the Lord Chancellor that he makes an order under section 69 of the Legal Services Act 2007 (**the Act**) to make rules or regulations (and licensing rules in ICAEW's capacity as a licensing authority) providing for appeals to the General Regulatory Chamber of the First Tier Tribunal against decisions made by the Institute of Chartered Accountants in England and Wales (**ICAEW**) in its capacity as an approved regulator and a licensing authority (including arrangements providing for a decision on such an appeal to be final and for orders as to payment of costs) and, allow for Schedule 14 to the Act (a licensing authority's powers of intervention) to have effect in relation to ICAEW's capacity as an approved regulator. A draft of the order is attached to this recommendation.
2. In accordance with the requirements of section 70(2) of the Act, the LSB published a draft of the proposed recommendation and draft order on **[DATE]** and invited representations about the proposals to be made to the LSB by **[DATE]**. **[DELETE ONE: The Board has had regard to the representations duly made] or [no representations were received]**.
3. **[DELETE paragraph if no changes to the recommendation or the order in light of the consultation representations]**. The draft ordered annexed to this recommendation is materially different to that which was consulted on. Consequently, in accordance with the requirements of section 70(5) of the Act, before making the recommendation we published on our website the revised draft order along with a statement detailing the changes made and the reasons for those changes.
4. In accordance with section 70(1) of the Act, the recommendation is made with the consent of ICAEW.

Chair, Legal Services Board

[DATE]

DRAFT STATUTORY INSTRUMENTS

2014 No.

LEGAL SERVICES, ENGLAND AND WALES

The Legal Services Act 2007 (The Institute of Chartered Accountants in England and Wales) (Modification of Functions) Order 2014

Made - - - - - ***

Coming into force in accordance with article 1(2)

The Lord Chancellor makes the following Order in exercise of the powers conferred by sections 64(2) and (3), 69(1) and (4) and 204(3) of the Legal Services Act 2007^(a).

In accordance with section 69(2) and (3) of that Act, this Order is made following a recommendation made by the Legal Services Board to which was annexed a draft Order in a form not materially different from this Order.

The Legal Services Board has made the recommendation with the consent required by section 70(1) of that Act and after complying with the requirements in section 70(2) to (5) of that Act.

In accordance with section 206(5) of that Act, a draft of this instrument has been approved by a resolution of each House of Parliament.

Citation, commencement and interpretation

1.—(1) This Order may be cited as the Legal Services Act 2007 (The Institute of Chartered Accountants in England and Wales) (Modification of Functions) Order 2014.

(2) This Order comes into force on the day after the day on which it is made.

(3) In this Order—

“the 2007 Act” means the Legal Services Act 2007; and

“the Institute” means the Institute of Chartered Accountants in England and Wales.

Power to make regulations or rules providing for appeals to the First-tier Tribunal

2. The Institute may make regulations or rules providing for appeals to the First-tier Tribunal against decisions made by the Institute in its capacity as an approved regulator (including regulations or rules providing for a decision on such an appeal to be final and for orders as to payment of costs).

Power to make rules providing for appeals to the First-tier Tribunal

3. The Institute may make rules providing for appeals to the First-tier Tribunal against decisions made by the Institute in its capacity as a licensing authority (including rules providing for a decision on such an appeal to be final and for orders as to payment of costs).

^(a) 2007 c. 29.

Power of intervention

4.—(1) Schedule 14 to the 2007 Act (licensing authority’s powers of intervention) applies in relation to the Institute in its capacity as an approved regulator and persons authorised by the Institute as it applies in relation to a licensing authority and licensed bodies, subject to the modifications in paragraphs (2) and (3).

(2) Schedule 14 is to be read as if each reference to—

- (a) a “licence” was a reference to an “authorisation”;
- (b) a “licensed body” was a reference to an “authorised person”;
- (c) “a licensing authority” was a reference to “the Institute”; and
- (d) a “manager” was a reference to a “principal”.

(3) Paragraph 1(3) of Schedule 14 is to be read as if after sub-paragraph (e) there were inserted—

- “(f) the authorised person is the subject of a bankruptcy order under Part IX of the Insolvency Act 1986^(a) (bankruptcy);
- (g) the authorised person is established outside England and Wales and is subject to an event in their country of establishment analogous to an event set out in paragraphs (a) to (f) above.”

(4) In this article, “principal” includes—

- (a) an individual in sole practice;
- (b) a person who is a partner;
- (c) a member of a limited liability partnership;
- (d) a director;
- (e) a member of a governing body, or
- (f) an individual or person who is held out as being a director, partner, member of a limited liability partnership, or member of a governing body.

Signatory text

Address
Date

Name
Parliamentary Under Secretary of State
Department

EXPLANATORY NOTE

(This note is not part of the Order)

This Order is made under section 69 of the Legal Services Act 2007 (c. 29) (“the 2007 Act”). It modifies the functions of the Institute of Chartered Accountants in England and Wales (“the Institute”).

Article 2 allows the Institute to make rules or regulations providing for appeals to the First-tier Tribunal against decisions made by the Institute in its capacity as an approved regulator.

Article 3 allows the Institute to make rules providing for appeals to the First-tier Tribunal against decisions made by the Institute in its capacity as a licensing authority.

Article 4 provides for the Institute to have the same intervention powers when acting as an approved regulator in relation to persons authorised by it as it has when acting as a licensing authority in relation to licensed bodies under Schedule 14 to the 2007 Act, with the modifications listed in paragraphs (2) and (3).

An impact assessment has been prepared for this instrument and can be found at www.legislation.gov.uk or obtained from the Head of Legal Services Policy, Law and Access to Justice Group, Ministry of Justice, 102 Petty France, London SW1H 9AJ.

^(a) 1986 c. 45.

ANNEX B – Draft Impact Assessment

Section 69 order: Modification of the functions of the Institute of Chartered Accountants in England and Wales (ICAEW).	
Stage	Consultation – secondary legislation
Date	July 2014
Policy Area	MoJ
Lead department or agency	Legal Services Board (LSB)
Other department or agency	Institute of Chartered Accountants in England and Wales (ICAEW)
Contact for enquiries	To be added post-consultation
Summary of the measures in the policy area	
<p>What are the problems that the measures address?</p> <p>Currently appeals against disciplinary and regulatory decisions by ICAEW are heard by an independent panel constituted under ICAEW's bye-laws. Once designated, appeals against ICAEW's decisions as a Licensing Authority (LA) and Approved Regulator (AR) will need to be sent for hearing to the General Regulatory Chamber (GRC) of the First-tier Tribunal (FTT). ICAEW requires the powers granted by an order under section 69 of the LSA 2007 to make rules and regulations in its capacity as an AR and LA to send appeals to the GRC of the FTT. ICAEW also requires additional intervention powers as an AR to give it the same intervention powers it has as a LA.</p>	
<p>What are the measures? What is the objective/aim of the measure? What is the rationale for their introduction? How do they fit into the wider MoJ/Government Agenda?</p> <p>To put in place an appeal mechanism through which ICAEW's decisions as a LA and an AR can be appealed to the GRC of the FTT to ensure consistency across the regulation of both Alternative Business Structure (ABS) and non-ABS firms.</p> <p>To provide ICAEW with additional intervention powers to ensure that its powers of intervention as an AR are the same and consistent with those it will have as a LA when designated.</p> <p>It will fit in wider government agendas by ensuring that consumers of legal services have consistent and equal rights and protections. Furthermore, the aim is to improve the efficiency of the regulatory framework for legal services.</p> <p>ICAEW recommend a section 69 order to address the problem and policy objectives outlined above in respect of hearing appeals against decisions made by ICAEW as an AR and a LA and ICAEW acquiring additional intervention powers as an AR. Without this, ICAEW as an LA and an AR will be unable to send appeals to the GRC of the FTT and the GRC of the FTT will have no power to hear and determine appeals sent by ICAEW in its capacity as an AR. Further, without such an order, ICAEW will have fewer intervention powers as an AR and therefore it will be inconsistent with those it has as a LA.</p> <p>This is the preferred option as the expertise of the GRC of the FTT is considered appropriate for the issues that appeals involving authorisation of legal services and ABS licensing may involve. Furthermore, it is also considered appropriate for ICAEW to have consistent powers of intervention as an AR and a LA.</p>	

ANNEX B – Draft Impact Assessment

What are the main impacts of the measures and which groups of people do they affect?

Overview of impacts:

The cost of appeals will be borne by ICAEW subject to recovery from unsuccessful appellants under costs orders. Unrecovered costs will ultimately fall to ICAEW's regulated community for legal services. Estimated total first year costs are £38,000 with unit costs per case of £3,500. Ongoing costs are estimated to be around £35,000 per annum based on an assumed number of appeals of around 10 per annum.

ICAEW will incur administrative and representation costs in dealing with appeals but these are unlikely to be significant in light of the anticipated low volume of appeals.

There will be some cost to appellants but this will vary and is difficult to quantify. For intervention orders these costs will be borne by ICAEW and the wider regulated community.

Annual profile of monetised costs and benefits (£000's constant prices)

	yr0	yr1	yr2	yr3	yr4	yr5	yr6	yr7	yr8	yr9
Total annual costs	38	35	35	35	35	35	35	35	35	35
Total annual benefits	NQ	NQ	NQ	NQ	NQ	NQ	NQ	NQ	NQ	NQ
Total net benefits	NQ	NQ	NQ	NQ	NQ	NQ	NQ	NQ	NQ	NQ

Price base year	PV Base Year	PV time period	Overall NPV
2013	2013	10	-£300,000 ¹

Key costs and benefits

Group Affected	Description of Costs	Can the impact be quantified?	Detail
ICAEW regulated community	The cost of appeals is unlikely to be materially different from ICAEW's current arrangements.	Overall first year costs are estimated at £38,000 based on a unit cost of £3,500.	Page 9-12 in analytical annex.
ICAEW	The cost of intervention orders is very difficult to quantify as it is a new process.	No.	Page 9-12 in analytical annex.
Total Costs	per annum		
£350,000²	£35,000		

¹ Rounded to the nearest £10,000.

² Rounded to the nearest £10,000.

ANNEX B – Draft Impact Assessment

Group Affected	Description of Benefits	Can the impact be quantified?	Detail
ICAEW regulated community	The regulated community will have access to an independent, transparent appeals process consistent with that available to other regulated providers of legal services. This should support the perception of fairness and promote confidence in the regulated sector and encourage entry into the market. Consumers of legal services should benefit from the availability of fair, transparent and consistent processes. Consumers will be protected where ICAEW exercises its intervention powers.	No.	Page 13 in analytical annex.
Total Benefits	per annum		
NQ	NQ		
<p>What other measures were considered and why were they not pursued?</p>			
<p>For appeals to ICAEW regulatory probate decisions to be sent for hearing to the GRC of the FTT the ‘do nothing option’ was considered but not pursued as the ICAEW, in line with LSB policy, are seeking a single appellate body for all ICAEW probate regulatory decisions to ensure a consistent regulatory regime when regulating both ABS and non-ABS firms.</p> <p>Similarly, the ‘do noting option’ was also considered for intervention powers, but not pursued as ICAEW are seeking to ensure a consistent regulatory regime whereby ICAEW will have consistent regulatory powers for interventions in relation to both ABS and non-ABS firms.</p>			
<p>Are there any key assumptions or risks?</p>			
<p>Key Assumptions</p> <p>Volumes - appeals 0-10 in year 1. This is based on the fact that ICAEW currently regulates 13,000 firms and there are less than 20 appeals per annum under current processes. Intervention powers will be new but volumes of cases are expected to be low as very few intervention orders have been made under ICAEW’s existing power to make intervention orders and those we anticipate authorising/licensing for probate work will be our members or similar.</p> <p>Unit costs per case are assumed to be £3,500 per case. Volumes and costs are assumed to remain constant in the following years.</p> <p>Risks & Uncertainties</p> <p>There is a risk that appeal volumes are higher than the 0-10 assumed above. If all 20 appeals per annum under the current processes were to appeal under the new scheme then costs are likely to be around £70,000 per annum. In practice volumes of appeals are likely to be low as the potential for appeals will be from a very limited number of firms as ICAEW are expected to authorise around 250 firms; 125 of those being ABS. It is also worth noting for comparison that no appeals to the FTT have been made from</p>			

ANNEX B – Draft Impact Assessment

the pool of 30 ABS firms licensed by the CLC; whilst these do not signal that there will be no appeals in ICAEW's case it does give some indication that the number of appeals is likely to be within the HM Courts and Tribunal's Service assumption of 0-10 cases.

ANNEX B – Draft Impact Assessment

ANALYTICAL ANNEX

1. Introduction

Background

1.1 The Legal Services Board (LSB) was created by the Legal Services Act 2007 (LSA 2007) and is charged with the responsibility of overseeing the regulators of legal services and ensuring that their functions comply with the regulatory objectives set out in the LSA 2007. The LSB's mandate is to ensure that regulation in the legal services industry is carried out in a manner that is consistent with the public interest and that the interest of consumers is central in policy making. The LSA 2007 gives the LSB and Approved Regulators (AR) (the regulators of traditional legal services providers) the same regulatory objectives. In full these objectives are:

- Protecting and promoting the public interest;
- Supporting the constitutional principle of the rule of law;
- Improving access to justice;
- Protecting and promoting the interests of consumers;
- Promoting competition in the provision of legal services;
- Encouraging an independent, strong, diverse and effective legal profession;
- Increasing public understanding of the citizen's legal rights and duties; and
- Promoting and maintaining adherence to the professional principles.

1.2 The LSA 2007 enables the operation of Alternative Business Structures (ABS) by permitting the ownership of law firms by non-lawyers. The LSA 2007 also details the process of establishing Licensing Authorities (LAs) and the statutory basis on which they license and regulate Alternative Business Structures (ABS).

1.3 The LSA 2007 provides the Lord Chancellor with an order making power (to be exercised only on the recommendation of the LSB) to make provision about an existing body for the purpose of enabling it to hear and determine the appeals.

1.4 ICAEW has an existing mechanism for appeals against its disciplinary and regulatory decisions to be heard by an independent appeal panel. However,

ANNEX B – Draft Impact Assessment

in order to achieve consistency amongst regulators of legal services, a mechanism is required to enable ICAEW to send its disciplinary and regulatory appeals to the GRC of the FTT. An order under section 69 of the LSA 2007 is therefore required to grant the power to ICAEW as an AR and a LA to make rules and regulations to send its appeals to the GRC of the FTT. The GRC of the FTT is part of the unified tribunals' structure established under the Tribunals, Courts and Enforcement Act 2007 and administered by HM Courts and Tribunal Service.

- 1.5 The GRC of the FTT combines a number of previously separate administrative tribunals into one unified structure, which has its own infrastructure and administrative support function. The GRC of the FTT is made up of a variety of jurisdictions which are grouped into Chambers, including the General Regulatory Chamber (GRC) which consists of a number of jurisdictions concerned with hearing appeals against the decisions of regulatory bodies.
- 1.6 There are some explicit appeal rights under the LSA 2007 (section 96 and schedule 13), concerning decisions to impose a financial penalty or to impose restrictions on the ownership of a licensed body. The LSB has issued [guidance in December 2010](#) specifying those decisions which, as a minimum, the LSB considers ought to be appealable. We expect the following decisions of licensing authorities to be appealable, with the relevant sections or schedules of the LSA 2007 shown in brackets:
 - Refusal of application for a licence (s.84)
 - Imposition of conditions on a licence (s.85)
 - Modification of a licence (s.86)
 - Refusal to designate as a Head of Legal Practice, or withdrawal of approval (Schedule 11, paragraph 12)
 - Refusal to designate as Head of Finance and Administration, or withdrawal of approval (Schedule 11, paragraph 14)
 - Disqualification from some or all roles within a licensed body (s.99)

ANNEX B – Draft Impact Assessment

- Suspension and revocation of licence (s.101)
- Power to modify application of licensing rules etc. to special bodies s.106 and s.107.

1.7 Schedule 14 of the LSA 2007 confers powers of intervention on LAs. It is important that ICAEW is able to exercise powers of intervention in carrying out its role as a LA. In particular, to provide for intervention where relevant conditions are satisfied in relation to the following:

- Non-compliance of the terms of a licence by a licensed body;
- Appointment of a receiver or manager of the property of a licensed body;
- A relevant insolvency event;
- Suspected dishonesty by a manager or employee of the licensed body;
- Undue delay by the licensed body;
- The need to protect the interests of clients or former clients or the interests of beneficiaries of a trust;

As an AR, ICAEW requires additional powers of intervention to ensure it has the same and therefore consistent intervention powers with those it has as a LA. A section 69 order is therefore required to grant such additional powers of intervention to ICAEW as an AR.

Problem under consideration

1.8 If no provision is made in an order under section 69 of the LSA 2007 for appeals, ICAEW will be unable to refer appeals against its decision as an AR and a LA to the GRC of the FTT. Consequently, the benefits associated with consistency and transparency amongst approved regulators of legal services will not be realised. Government intervention is therefore required in order that appeals may be referred to and heard by the GRC of the FTT.

1.9 If no provision is made in an order under section 69 of the LSA 2007 granting additional powers of intervention to ICAEW as an AR, it will have fewer powers of intervention as an AR and these will be inconsistent with the

ANNEX B – Draft Impact Assessment

intervention powers it has as an LA under Schedule 14 of the LSA 2007. An order under section 69 of the LSA 2007 is therefore required in order to grant these additional intervention powers and ensure consistency of powers in the capacity of AR and LA.

Economic rationale

- 1.10 In terms of the wider context, the conventional economic approach to government intervention to resolve a problem is based on efficiency or equity arguments. The Government may consider intervening if there are sufficiently serious failures in the way markets operate (e.g. monopolies overcharging consumers) or if there are sufficiently serious failures in existing government interventions (e.g. waste generated by misdirected rules). In both cases, the proposed new intervention itself should avoid creating a further set of disproportionate costs and distortions. The Government may also intervene for equity (fairness) and distributional reasons (e.g. to reallocate goods and services to the more needy groups in society).
- 1.11 In the case of the ICAEW, the intervention is required on both efficiency and equity grounds. Providing for appeals to be sent to and heard by the GRC of the FTT will provide for a consistent and transparent process amongst ARs under the LSA 2007 and provide equal rights and protections to the regulated community. More generally, hearing appeals through the GRC of the FTT may result in increased consumer confidence in the overall regulatory framework for legal services. Providing probate authorised and licensed firms with a right of appeal to the GRC of the FTT may also be seen as fairer from the public perspective as it signals an important fair market entry process for ICAEW probate firms who want to become authorised or licensed. With the GRC of the FTT as the independent appeals body this may generate further economic gains for society, through providing greater confidence to consumers and providers in the independence and efficacy of the appeal arrangements.
- 1.12 Similarly, additional intervention powers for ICAEW as an AR are required in order that ICAEW may exercise the same and therefore consistent intervention powers it has as a LA. This will result in greater protections for

ANNEX B – Draft Impact Assessment

clients and others and may result in increased public confidence in the regulation of legal services by ICAEW and generally.

Policy objective

- 1.13 The policy objective is to enable ICAEW to make rules and regulations to send appeals against its decisions as an AR and a LA to the GRC of the FTT. Furthermore, the objective is for ICAEW to have additional intervention powers as an AR to ensure they are the same and therefore consistent with the intervention powers it has as a LA under Schedule 14 of the LSA 2007.
- 1.14 The costs and processes for ICAEW to exercise the appeal mechanism are intended to be transparent, efficient, fair and public. The body hearing the appeals should have sufficient resources and expertise to deal with the potentially complex issues that ABS appeals may relate to and the FTT is considered to be the appropriate independent appeal route to fulfil that role. The FTT is already the appeal body for Council for Licensed Conveyancers (CLC) LA decisions. It is also the stated policy position of the LSB that the FTT should hear appeals against decisions by all ARs and LAs of legal services regardless of the type of legal service being provided or whether it is an ABS or non-ABS. This will lead to greater consistency in decision making, enable a body of expertise to develop, and enable economies of scale to be achieved in relation to administrative and appellate functions.
- 1.15 The exercise by ICAEW of powers of intervention are similarly intended to provide for a transparent, efficient, fair and public process. ICAEW should have the same powers as an AR as it has as an LA in order to ensure consistency and therefore provide greater public protection and increased confidence in the regulation of legal services by the regulated community and generally.

Affected stakeholders

- 1.16 The following individuals, organisations and sectors are affected:
- ICAEW– the body whose decisions will be appealed.

ANNEX B – Draft Impact Assessment

- HM Courts and Tribunal Service – which contains the FTT of the GRC to which appeals, will be made.
- ICAEW ABS firms providing probate services (and applicants to the ICAEW for an ABS licence) – who will be the subject of the decisions that are appealable.
- ICAEW licensed bodies that will be subject to potential intervention by ICAEW.
- Consumers – who may ultimately bear the regulatory costs through the process paid for legal services.
- Appeals related service providers such as suppliers of legal advice and representation services.

2. Costs and Benefits

2.1 This Impact Assessment identifies impacts on individuals, groups and businesses in England and Wales, with the aim of understanding what the overall impact to society might be from implementing the two options. The costs and benefits of Option 1 is compared to the do nothing option (Option 0). Impact Assessments place a strong emphasis on valuing the costs and benefits in monetary terms (including estimating the value of goods and services that are not traded). However, there are important aspects of the proposal that cannot sensibly be monetised. These might include how the proposal impacts differently on particular groups of society or changes in equity and fairness, either positive or negative.

Option 0: Base case (do nothing)

2.2 Doing nothing is not considered a feasible option, as without intervention in the form of an order under section 69 of the LSA 2007, ICAEW is unable to make rules and regulations for sending appeals against the decisions it makes as an AR and a LA to the GRC of the FTT. Further, without an order under section 69, ICAEW as an AR will have fewer powers of intervention than it has as a LA under Schedule 14 of the LSA 2007 and therefore those powers will be consistent.

ANNEX B – Draft Impact Assessment

- 2.3 As the “do nothing” option is compared against itself, its costs and benefits are necessarily zero, as is its Net Present Value (NPV being the difference between the money inflows and outflows from an option).

Option 1: The ICAEW makes rules and regulations whereby appeals against its decisions made as an AR and a LA may be sent to the GRC of the FTT and for ICAEW to exercise the same intervention powers as an AR as it does as a LA.

Description

- 2.4 Under this option, an order would be made under section 69 of the LSA 2007 making provision for ICAEW to make rules and regulations as an AR and a LA for its appeals against its decisions to be sent to the GRC of the FTT and for ICAEW to have the same intervention powers as an AR as it has as a LA under Schedule 14 of the LSA 2007.

Costs

HM Courts and Tribunals Service

- 2.5 HM Courts and Tribunals Service (HMCTS) would face additional costs associated with a potential increase in cases heard at the FTT of the GRC. However, start-up and operating costs (e.g. tribunal member sitting fees) will be recovered from ICAEW by HMCTS, meaning there should be no net financial impact on HMCTS as a result of the proposal.

ICAEW

- 2.6 HMCTS has provided costs (which, as mentioned will be recovered from ICAEW) based on 0-10 cases per year. These costs will be distributed as follows:
- Start-up costs £3,000
 - First year’s running costs £35,000
 - The unit running cost of £3,500
- 2.7 Start-up costs cover update of the website, guidance, forms, staff and judicial training, senior judicial input into implementation, implementation time and expenses incurred by operational colleagues. The running cost covers judicial costs for salaried and fee paid judges, administration for those appeals and use of HMCTS’ estate for both hearing and administration. If panel members

ANNEX B – Draft Impact Assessment

were used they would be factored in to the unit cost per case.

- 2.8. The running costs aim to capture as much of the expenditure of bringing appeals, even if that appeal right is expected to lead to no appeals in practice. However, it cannot be fully cost reflective - particularly on smaller appeals - as a lot of the preparatory work will be in-house and involvement by divisions within HMCTS. Legal, policy, judicial, communications and IT colleagues will be required and travel expenses, for instance, might be incurred. The same amount of work would need to be carried out if HMCTS were to receive 0 or 10 appeals. To that end, HMCTS policy is to charge for a minimum of ten appeals in the first year. This would be invoiced as soon as the main work to implement starts. Any appeals over that number, and in subsequent years, will be charged, on a quarterly invoice basis to ICAEW based on cost per case heard by the tribunals system. Therefore if ICAEW did not have any appeals, it would not pay after that first payment - even if new judges require training in the future.
- 2.9 The number of cases referred to FTT in respect of ICAEW licensing decisions is likely to be within the 0-10 spectrum. Of the current firms ICAEW regulates, approximately 4,600 firms are licensable, which provides some indication of the number of ABS in the first year, if the ICAEW is designated as a licensing authority. Therefore, the powers in respect of registrants would be exercisable in relation to approximately 250 firms, and those in respect of ABS, would be exercisable in respect of around 125 firms. Therefore, the potential for appeals is from a very limited number of firms, compared for example to around 230 ABS firms licensed by the Solicitors Regulation Authority to date. It is also worth noting for comparison that to date, no appeals to the FTT have been made from the pool of over 30 ABS firms licensed by the CLC. While these do not signal that no appeals will be made to the FTT from ICAEW licensing decisions, they do give some indication that the number of appeals is likely to be within HMCTS' assumption of 0-10 cases.
- 2.10 ICAEW would face costs associated with appeals being heard by the FTT. These would consist primarily of daily fees for panel members, plus administrative support supplied by the HMCTS. The administrative support would include dealing with enquiries and all administrative tasks associated

ANNEX B – Draft Impact Assessment

with the appeals, including scheduling appeal dates. It is assumed that the FTT has sufficient capacity available to hear appeals and that no additional accommodation or staff resources would be required as a result of the proposal given the likely negligible number of cases going to appeal as a result of ICAEW decisions.

- 2.11 Any additional IT and telephony costs for ICAEW are expected to be negligible.
- 2.12 ICAEW would incur costs associated with defending appeals, which may include the cost of legal advice and representation. The GRC has limited power to award costs against parties, so it is assumed that ICAEW would normally be expected to bear its own legal costs. These costs have not been quantified, however it is unlikely that costs would be significant in the context of ICAEW's overall budget as it is not expected that there will be a large number of appeals in relation to ICAEW decisions as an AR or a LA.
- 2.13 ICAEW does not currently have intervention powers comparable with those under Schedule 14 of the LSA 2007 so any comparison is difficult. It is anticipated that the number of such orders will be low as very few intervention orders have been made under ICAEW's existing power to make intervention orders and those we anticipate authorising/licensing for probate work will be our members or similar. Under Schedule 14 the costs incurred by the licensing body (ICAEW) in exercising its intervention powers are payable by the relevant licensed body and may be recovered as a debt. In the absence of recovery the costs of intervention will fall to the regulated community generally i.e. all licensed bodies.

Authorised and licensed bodies

- 2.14 Any ICAEW cost in its function as an AR and a LA generally would be passed on in the form of fees. As mentioned above it is not anticipated that s69 costs will be significant in the context of ICAEW's overall budget and the likely low number of appeals. Intervention costs will be recoverable via the relevant authorised and licensed body and borne by the regulated community.
- 2.15 For the purposes of this Impact Assessment it is assumed that both ICAEW and the authorised or licensed body concerned would be legally represented at an appeal. Individual businesses appealing decisions would incur costs associated with preparing for appeals and in being legally represented before

ANNEX B – Draft Impact Assessment

the GRC of the FTT, which would result in additional costs for the firm concerned.

Consumers of legal businesses

2.16 All regulatory costs may ultimately be passed on to consumers of legal services in the form of higher prices. This includes any additional costs associated with any appeals in relation to ICAEW decisions and unrecovered intervention costs. However, as referred to above, these costs are unlikely to be significant.

Providers of legal advice and representation services

2.17 It is assumed that both ICAEW and businesses would be legally represented in an appeal. Any additional appeals that take place as a result of the proposal would therefore represent an increase in the demand for legal advice and representation services. This would represent a benefit for providers of such services. There may also be an increase in demand for legal representation in relation to intervention actions.

Benefits

Authorised and Licensed Bodies

2.18 ICAEW regulated probate firms would benefit under the proposal as they would have the right to appeal against the decisions of ICAEW as an AR and a LA. The right of appeal would apply in relation to the range of decisions listed in paragraph 1.7 of this Impact Assessment. The recourse to an independent appeals mechanism will support the perception of fairness in the process and therefore generate greater confidence in the regulatory decisions of ICAEW acting as a LA. This in turn signals fair entry to the market and an encouragement for new business models and entrants to ABS, which should enhance competition and consequently help to improve the efficiency of authorised and licensed bodies and their provision of probate services in the market.

2.19 Firms will also benefit to the extent that the regulated market will be strengthened by the ability of ICAEW to take swift and decisive action to protect clients and others where intervention is necessary.

HM Courts and Tribunals Service

ANNEX B – Draft Impact Assessment

- 2.20 HMCTS would benefit from additional income if cases were referred to it. However, this income would be intended to cover start up and operating costs (e.g. tribunal member sitting fees), meaning there should be no net financial impact on HMCTS as a result of this option.

Society

- 2.21 The proposal may lead to increased consumer confidence in the probate legal services regulated by ICAEW, which may provide economic welfare gains for society.

3. Enforcement and Implementation

- 3.1 The assumption for the proposal is that ICAEW will enforce authorisation and licensing compliance and that the GRC of the FTT will implement and operate the appeals system.