



Proposed amendments to ICAEW's Disciplinary Bye-laws and associated Settlement Order & Interim Order Regulations

EXECUTIVE SUMMARY

This is a formal application in accordance with paragraph 20 of Schedule 4 of the Legal Services Act 2007 (the Act) for approval of amendments that were made generally to ICAEW's Disciplinary Bye-laws (DBLs) in October 2019, along with supplementary settlement order and interim order regulations that were made by ICAEW's Disciplinary Committee (DC) in January 2020.

The proposed amendments to the DBLs are set out at **appendix 1** with a schedule of changes at **appendix 2**. The main, substantive amendments may be summarised as follows:

- **Liability to disciplinary action**

Various amendments have been made to DBLs 4, 5 and 7 concerning the liability of respondents to disciplinary action and the evidence ICAEW can rely on in bringing disciplinary proceedings under the DBLs.

- **Introduction of a Complainants' Code of Conduct**

DBLs 9 and 10 have been amended to embed within ICAEW's disciplinary framework a Code of Conduct for Complainants. The Code explains complainants' rights and obligations when they make a complaint to ICAEW about an ICAEW member, student, regulated individual or firm. It explains how ICAEW's Professional Conduct Department (PCD) will investigate complaints and the action it may take if complainants bring vexatious or repetitive complaints, or if they are abusive or make unreasonable demands of ICAEW staff. A copy of the Code, which was introduced generally in respect of ICAEW members and firms in October 2019, is set out at **appendix 3**.

- **Introduction of a fast-track process for certain types of criminal convictions (DBL 14B)**

This new process enables certain types of criminal conviction complaints to be listed immediately for hearing before a tribunal of the DC following investigation, removing the need for prior review of these complaints by the Investigation Committee. The types of complaints

that will be subject to this process will be determined from time to time by the ICAEW Regulatory Board (IRB); currently these concern serious conviction complaints falling within section 4, category 1 of the ICAEW Guidance on Sanctions, being offences where the member has received a custodial sentence (suspended or not) which have a starting point of exclusion.

- **Power to recall and reconsideration of complaints (DBL 18A)**

The Investigation Committee now has the power, in certain circumstances, to recall and reconsider complaints which it has previously referred formally to the DC for hearing. This will be limited to cases where new information or evidence has come to light following the referral, which may have altered the Committee's original decision or which indicates that additional or alternative complaints should have been brought.

- **Settlement orders (DBL 18B)**

Under this new process, the Head of Staff (in the disciplinary context the Professional Standards Department Executive Director) is able to agree the settlement of complaints following the review of a case by the Investigation Committee and prior to the substantive hearing of the Disciplinary Tribunal. The process requires that any proposed settlement agreement and draft settlement order be approved by a Settlement Agreement Chair (an independent disciplinary tribunals chair) to ensure the proposed settlement is in the public interest and that the level of sanction is appropriate.

- **Interim orders**

DBL 30 has been amended and DBL 30A introduced to enable a tribunal of the DC to make various interim orders pending a substantive hearing where respondents have been a) charged with an indictable offence b) abandoned their practice or c) excluded from another professional body. A tribunal may make an interim order to, e.g. suspend a respondent's membership or practising certificate where it considers an order to be necessary for the protection of the public or otherwise in the public interest. Any order will be subject to a right of review under DBL 30A and appeal under DBL 31.

New Disciplinary Committee (Settlement Order) Regulations and Disciplinary Committee (Interim Order) Regulations (together, the Regulations) have also been drafted to supplement the procedure set out in DBLs 18B and 30 / 30A. Copies of these new Regulations are set out at **appendices 4 and 5**.

GOVERNANCE

The revised DBLs came into force generally on **14 October 2019** following approval by the Privy Council. Prior to submission to the Privy Council, the proposed amendments to the DBLs were subject to a programme of full internal governance within ICAEW: they were approved by the IRB, the Probate Committee, the main ICAEW Board and by ICAEW's Council. They were then approved ICAEW members voting in Special Meeting (each resolution was approved by over 96% of members voting in meeting). A Resolution document providing commentary on each of the resolutions was available to members ahead of this Special Meeting.

The Disciplinary Committee (Settlement Order) Regulations and the Disciplinary Committee (Interim Order) Regulations took effect generally in relation to ICAEW members and other regulated individuals and firms on **1 January 2020** following approval by the DC. The Probate Committee then approved both sets of Regulations in late February 2020.

Currently, there is a note on the ICAEW website stating that these new DBLs and Regulations are not effective vis-à-vis accredited probate firms until such time as they are approved by the LSB. <https://www.icaew.com/regulation/complaints-process/complaints-process-and-regulations>

CONSULTATION

As set out above, Professional Standards staff engaged with a number of stakeholders in developing the draft amendments to the DBLs between October 2018 and March 2019. These included:

- The ICAEW Probate Committee
- The ICAEW Regulatory Board (IRB)
- The main ICAEW Board
- ICAEW's Council
- The Privy Council
- The FRC and the Irish Auditing and Accounting Supervisory Authority (IAASA) in their capacity as oversight regulators
- The ICAEW Members and Commercial Board
- The ICAEW Practice Committee

A number of amendments to the draft proposals were made as a result of this engagement – e.g. ICAEW's approach to the adoption of a Code of Conduct for Complainants was prompted to a significant degree by feedback that was received from the FRC's Professional Oversight team and the FRC's Conduct Committee during this period.

Feedback was also sought from the LSB on the draft amendments during Q1 of 2019, although ICAEW was informed at that time that the LSB would be unable to comment on the proposals until they had been approved by the Privy Council.

While consultation was not carried out with accredited probate firms specifically, it is of note that the vast majority of accredited probate firms are either ICAEW member firms or firms comprised of ICAEW members that have a close connection with ICAEW – and, as highlighted above, members were given the opportunity to vote on the proposals in Special Meeting in June 2019. It is of note that the LSB Guidance on rule change applications acknowledges that consultation with the regulated community need not take the form of a formal 12 week public consultation, which recognises that the principles of transparency and open regulation can be achieved in different ways.

LSB SIGNIFICANCE, IMPACT AND RISK FRAMEWORK

ICAEW has considered the proposed amendments to the DBLs and the new Regulations in the accordance with the LSB's Significance, Impact and Risk (SIR) Framework. The response is directed at the significance, impact and risk of the DBL amendments and the new Regulations in the context of accredited probate firms only (i.e. rather than in relation to all ICAEW regulated individuals and firms who or which are subject to the DBLs).

Significance

LSB - By significance we mean how fundamental and big the change is. We will consider the following areas to help determine significance.

- 1. Would the change require approval under the previous Ministry of Justice / Legal Service Consultative Panel system? This includes “changes relating to qualification regulations and rules of conduct relating to the rights of audience and rights to conduct litigation”. Potential impacts on rights of audience and fit with court rules has been a primary concern when considering any change in the past.**

ICAEW response – the amendments to the DBLs and the new Regulations do not concern qualifications criteria or conduct rules. Further, ICAEW accredited probate firms and authorised individuals are not authorised to conduct litigation and do not hold rights of audience.

The changes relate to ICAEW's wider disciplinary framework and govern the way in which complaints about accredited probate firms arising under the Probate Regulations are dealt with.

- 2. Is there a direct impact on or synergy with the Regulatory Objectives as detailed in Part 1 of the Act? All of the Regulatory Objectives are equally important but areas that we will particularly be considering when determining significance include:**
 - a) Impacts on competition in the provision of services, either increasing or restricting.**
 - b) Protecting and promoting the interests of consumers. As two of the areas highlighted as being of key concern to consumers we are likely to consider as being of particular significance:**
 - i. alterations to how complaints are dealt with; and**
 - ii. arrangements relating to financial protection including the handling of client money (account rules), indemnification and compensation.**
 - c) Encouraging an independent, strong, diverse and effective legal profession. Changes likely to impact on equalities and diversity will be of particular interest. Changes to core training and qualification and training requirements will also be deemed significant.**

ICAEW response –

The proposed amendments to the DBLs relate to the way in disciplinary complaints are dealt with, including complaints arising under the Probate Regulations. The changes were recommended by the IRB in order to reduce delay and improve public protection, for example:

- A new process has been introduced to enable certain types of serious criminal conviction complaints to be listed immediately for hearing before a tribunal of the DC. This removes the need for prior review of such complaints by the Investigation Committee which would invariably refer these types of serious criminal conviction complaints to the DC for hearing (both because a conviction for an indictable offence already gives rise to a liability to disciplinary action under the DBLs and because the Investigation Committee lacks sufficient sanctioning power to deal with such serious complaints). The change in process is considered important for public protection reasons to avoid unnecessary delay in the disciplinary process. Currently the process applies to complaints attracting a starting point of 'exclusion' under the Guidance on Sanctions.
- Similarly, the interim order and settlement order processes have been introduced into the DBLs primarily for reasons of public protection. Tribunals of the DC will have the power, for the first time, to suspend a respondent's membership, authorisation or practising certificate pending a substantive hearing of a complaint in limited cases where an order is considered necessary for the protection of the public or otherwise in the public interest.

Unnecessary costs and delay in the disciplinary process will be reduced by enabling respondents and the PSD Executive Director to enter into settlement agreements in cases where complaints and sanctions have been agreed and where the settlement is approved by an independent Settlement Agreement Chair.

- Consumer protection will also be enhanced by the introduction of the Complainants' Code of Conduct, which sets out the rights and obligations of complainants during the disciplinary process. The Code also sets out the process to apply in rare cases where the behaviour of the complainants risks jeopardising the ability of PCD to progress other meritorious complaints (i.e. where complainant is abusive or makes unreasonable demands of staff or where they seek to bring repetitive or vexatious complaints).

3. Is the change consistent with the Better Regulation Principles? Has consideration been given to the need to move to outcome and principle based regulation?

ICAEW response –

ICAEW adopted a transparent approach in proposing these amendments to the DBLs. The changes were subject to a full internal governance and, as detailed above, consultation was carried out with a range of stakeholders including oversight regulators, representative bodies and ICAEW's disciplinary committees.

The introduction of a Code of Conduct for Complainants is consistent with Better Regulation Principles. It aims to outline for complainants in clear, accessible language how ICAEW will deal with their complaint and their rights and obligations during the complaints process. It also specifies the approach ICAEW will adopt if complainants are abusive or make unreasonable demands of staff, or if they attempt to bring repetitive or vexatious complaints. The Code is modelled on similar codes that are in place with public bodies in the UK; it aims to embed a fair and proportionate approach to dealing with vexatious complaints and unreasonable behaviour so that PCD's staff are protected and PCD's limited resources can be utilised effectively.

4. Will the change require a statutory instrument and / or parliamentary time in order to be completed?

ICAEW response – No. The amendments to the DBLs and new Regulations have been approved by ICAEW’s Probate Committee insofar as they apply to disciplinary matters arising under the Probate Regulations. They now require the approval of the LSB under the Act to be effective.

5. Has there been activity in relation to changing the regulatory arrangement in the past two years for example an application made under the previous system, change considered by internal Board, consultation with regulated community or others? If so did the advice received, responses to consultation, or decision made raise any issues, either positive or otherwise indicate significance?

ICAEW response –

The DBLs were last amended in October 2018 and approval of the LSB was sought and obtained for those changes once they were approved by the Privy Council.

As outlined in the Governance section above, the proposed amendments were consulted on extensively with ICAEW’s oversight regulators and other stakeholders during 2018/2019. Feedback from the FRC’s Conduct Committee informed, in particular, the development of the Complainants’ Code of Conduct. Advice of Leading Counsel was also sought in developing the procedure under DBLs 18A and 18B (right of the Investigation Committee to recall and reconsider complaints and settlement orders).

6. How much interest in the alteration is there within the Justice system and therefore how much is the confidence of those with an interest in the Justice system likely to be impacted by the alteration?

ICAEW response – N/A

Impact

LSB - By impact we mean what are the potential ramifications of pursuing a particular alteration? We will consider the following areas to help determine impact

7. The number and proportion of people (consumers, procurers, regulated community) that will be affected by the alteration?

The amendments to the DBLs and new Regulations affect all ICAEW regulated individuals and firms that are subject to the DBLs. This application, however, is directed at the impact of the changes on the ca. 330 accredited probate firms where complaints arise under the Probate Regulations. The changes alter the existing disciplinary framework by introducing, for the first time, new processes for the settlement of complaints, interim orders and a fast-track process for certain types of criminal conviction complaints.

Complainants will also be affected by the introduction of a Code of Conduct which sets out expressly the rights and obligations of complainants during the disciplinary process, along with the action ICAEW will take to manage unreasonable behaviour or vexatious or repetitive complaints.

8. Is there an anticipated impact on the ability of members to practise, operate effectively, make a profit, and earn a livelihood?

ICAEW response – No. The proposed changes to the DBLs concern ICAEW’s existing disciplinary framework. While the changes to DBL 30 will enable Disciplinary Tribunals to make, for the first time, interim orders suspending a respondent’s membership, practising certificate or registration in certain types of cases, this expands upon the existing power of the Investigation Committee under DBL 30 to make an intervention order suspending a member’s practising certificate.

9. Will the change affect the ability of or requirements for prospective members to enter and/or operate effectively within the regulated community?

ICAEW response – No. The proposed changes relate to the disciplinary framework and do not affect the ability for individuals / firms to apply for probate accreditation.

10. Is there any crossover and / or conflict with other bodies regulating the same area or person? Are there differences in standards (standards must be comparable not necessarily the same)?

ICAEW response –

ACCA is an approved regulator for probate and has in place a procedure for interim orders where these are considered necessary for the protection of the public.

ICAEW firms will also be familiar with the FRC’s disciplinary regime which provides for the settlement of complaints.

11. The number of alterations included within the application.

ICAEW response – the key amendments to the DBLs are set out in the Executive Summary with a full schedule of changes at **appendix 2**. The amendments build upon ICAEW’s existing disciplinary framework but new processes have been introduced under DBLs 14B, 18B and 30 for public protection reasons and to reduce cost and delay in the disciplinary process.

The right of the Investigation Committee to recall and reconsider complaints in certain circumstances under DBL 18A has been proposed to ensure fairness and consistency in the disciplinary process. This is to prevent matters proceeding to tribunal where new evidence or information suggests that the complaint(s) should either have not be brought or that different or additional complaints should be brought instead.

12. What are the integrated consumer protection and competition impacts? Will the proposed alteration result in the addition of regulation or the removal of regulation (as opposed to a neutral amendment to existing regulation)?

ICAEW response – The proposed changes are aimed at improving ICAEW’s existing disciplinary framework by:

- strengthening ICAEW’s enforcement powers (e.g. amendments to DBLs 4 and 5 (liability to disciplinary action) and DBL 30 interim orders)
- improving fairness and transparency (e.g. Complainants’ Code of Conduct and the right of the Investigation Committee to recall and reconsider complaints – DBL 18A)

- reducing cost and delay in the disciplinary process (DBL 14B fast-track process for serious conviction complaints and DBL 18B settlement orders).

ICAEW considers that these (largely process) changes will improve the disciplinary framework without increasing the extent of regulation of accredited probate firms.

Risk

LSB - By risk we mean potential for having a detrimental impact on the regulatory arrangements. We will consider the following areas to help determine risk.

13. Previous track record of the AR in competently making changes that have been fully consulted on and the impacts fully assessed.

ICAEW response – ICAEW began authorising and licensing firms for probate in 2014. Since that time, the LSB has approved all rule change applications submitted under the exemption direction process.

14. How transparent and robust are the internal processes that the AR will follow in making changes? In particular does the process incorporate appropriate consultation and use of impact assessments (please see paragraph 13)?

ICAEW response – as outlined in the Governance section above, the amendments to the DBLs were subject to full internal governance prior to submission to the Privy Council. Consultation was also carried out with stakeholders including the ICAEW Members & Commercial Board and oversight regulators.

15. Is there a high level of good quality data and evidence to support / justify the making the change? If not are there robust plans to obtain this information and for it to inform the change and enable actual impacts to be assessed.

ICAEW response – the ICAEW Regulatory Board will keep under review the impact of the process changes – i.e. the number and types of complaints that have been settled; the extent to which the processes under DBLs 14B, 18A and 30 are being used.

16. How many would be impacted how quickly (immediacy of impact)?

ICAEW response – if approved by the LSB, the new DBLs and Regulations would apply to accredited probate firms immediately following receipt of the approved exemption direction from the LSB. The caveat on ICAEW's website noting the requirement for LSB approval will be removed.

17. If the change did not go ahead, what would the impact be?

ICAEW response – If the amendments are not approved, the former DBLs dated 15 October 2018 will continue to apply to complaints concerning accredited probate firms and the new settlement order and interim order regulations be of no effect. This would mean that a different disciplinary regime would apply for ICAEW accredited probate firms compared with other ICAEW regulated individuals and firms.

18. How and when does the AR plan to assess the impact of the change following its introduction? What action would be taken if the benefits were not realised? Has consideration been given to whether there is need to include a defined sunset clause?

ICAEW response – the impact of the new processes will be kept under review by the ICAEW Regulatory Board. Any deficiencies in the processes would be remedied through an amendment to the DBLs and/or the underlying regulations at a later date.

19. Has there been activity in relation to changing the regulatory arrangement in the past two years (see paragraph 5)? Has any other AR made a similar change or undertaken activity relating to a similar regulatory arrangement in the past and was there any detrimental outcome or did the change process identify the potential for a detrimental impact?

ICAEW response – As noted at paragraph 5 above, the DBLs were last amended in October 2018 and an exemption direction was granted by the LSB in respect of the changes on 15 March 2019. ICAEW is unable to comment on whether similar changes have been proposed or introduced by other regulators to their disciplinary frameworks and the impact of those changes, but it is of note that the ACCA also has arrangements in place for interim orders and settlement orders are a feature of the FRC’s disciplinary regime. The SRA can also enter into Regulatory Settlement Agreements.

20. If the change introduces regulation, does the AR have the capability of identifying breaches and providing / ensuring appropriate remedy and / or enforcement (see paragraph 12)?

ICAEW response – N/A. These changes do not introduce additional regulation but govern/supplement the existing disciplinary framework.

APPENDICES

1. Amendments to the DBLs
2. Schedule of amendments
3. Complainants’ Code of Conduct
4. Disciplinary Committee (Settlement Order) Regulations
5. Disciplinary Committee (Interim Order) Regulations

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