



Michael D M Izza
Chief Executive
Institute of Chartered Accountants in England and Wales
Chartered Accountants Hall
Moorgate Place
London EC2R 6EA

21 September 2017

Dear Mr Izza,

DECISION NOTICE RE: APPLICATION BY THE INSTITUTE OF CHARTERED ACCOUNTANTS IN ENGLAND AND WALES TO BE DESIGNATED AS AN APPROVED REGULATOR AND LICENSING AUTHORITY FOR FURTHER RESERVED LEGAL ACTIVITIES

On 23 June 2017 the Legal Services Board recommended that, using my statutory powers as the Lord Chancellor, I make an Order designating the Institute of Chartered Accountants in England and Wales (ICAEW) as an Approved Regulator in relation to the following reserved legal activities: the exercise of a right of audience; the conduct of litigation; reserved instrument activities; notarial activities; and the administration of oaths. The Legal Services Board further recommended that I make an Order designating the ICAEW as a Licensing Authority for the same reserved legal activities.

I am grateful for the work that the Legal Services Board has undertaken. I have carefully reviewed its recommendation and supporting documentation, including the ICAEW's application, advice on the application from the mandatory consultees (the Lord Chief Justice, the Competition & Markets Authority and the Legal Services Consumer Panel). I have also taken into account concerns raised by the Law Society and the two professional notarial associations. Having considered all of this information, I have decided not to make the Orders at this time. I have set out my reasons for this decision below.

Governance and Independence

My first reason for not bringing forward the relevant Orders is that I have concerns about the ICAEW's proposed governance arrangements for regulating reserved legal activities. As Lord Chancellor, I am keen to ensure that, as envisaged by the Legal Services Act 2007, the regulation of the legal services sector is not influenced by the representative functions of Approved Regulators. I believe this is fundamentally in the consumer and public interest, and is in keeping with the constitutional principle of the rule of law. Based on the evidence provided I am concerned that the proposed Legal Services Committee and the ICAEW Regulatory Board would neither be, nor be seen to be, suitably independent from the ICAEW's main Board and governing Council, both of which cover regulatory and representative matters and do not have requirements around lay participation. In drawing the above conclusion I paid particular attention to:

- Paragraph 3.17 of the ICAEW's application, which states "*The IRB is at the apex of ICAEW's regulatory structure and is responsible for overseeing the development of ICAEW policy in all areas of professional standards, including discipline. In discharging its roles and responsibilities the IRB discusses matters with the ICAEW Board and relevant departmental Boards (emphasis added).*" Such an arrangement suggests that there is, and will continue to be, a close relationship

between the ICAEW Regulatory Board and other areas of the ICAEW which are involved in representative functions, with limited evidence of safeguards for ensuring independent regulation. Given the link between the ICAEW Regulatory Board and the ICAEW main Board, I'm further concerned that the ICAEW's proposed regulatory framework provides the ICAEW Regulatory Board with substantial influence over regulatory matters and the proposed Legal Services Committee. For example, paragraph 3.21 of the application states that: "*the IRB...is able to take a view over the Investigation Committee, the Disciplinary Committee and the Appeal Committee – not challenging individual decisions but providing an overview on the quality of the processes that [underpin] the decision*"; and paragraph 11.49 states that: "*the IRB is therefore responsible for the quality assurance procedures and quality and efficiency of the work of the regulatory board [the Legal Services Committee]*".

- The Legal Services Consumer Panel's advice, and in particular the Panel's observations that: "*we [the Legal Services Consumer Panel] acknowledge the safeguards that have been put in place to protect regulatory independence of the Legal Services Committee. While these safeguards were appropriate when the ICAEW was applying solely in respect of probate, now that there will be a broader offering of services to consumers we are concerned that this will not stand the test of time*". I find this statement particularly persuasive given that the remit of the proposed Legal Services Committee would be larger and substantially different.
- The Legal Services Board's Decision Notice, which states "*that the current Probate Committee's low profile might contribute to the perception that probate regulation was not wholly independent from the ICAEW*" and "*we [Legal Services Board] acknowledge that there is scope for the LSC to adopt a much more robust and proactive role going forward*". Given the concerns detailed above, and concerns about the lack of a fully robust and proactive approach taken by the existing Probate Committee (notwithstanding some proposed changes), I am not convinced that the proposed Legal Services Committee would be seen to be sufficiently independent from the wider ICAEW.

I have concluded that the proposed governance arrangements for regulating reserved legal activities would neither be sufficiently independent, nor be seen to be sufficiently independent, of the representative functions of the ICAEW and therefore have concerns about its operation in the public interest and in protecting the interests of consumers.

Lord Chief Justice's Objections

I have considered the Lord Chief Justice's objections and note that he strongly opposes the application. Whilst I acknowledge that these concerns were thoroughly considered by the Legal Services Board and the ICAEW, I do believe that he raises valid and material points. I concur with the Lord Chief Justice that it appears premature to designate ICAEW as an Approved Regulator in relation to the exercise of a right of audience and the conduct of litigation when the ICAEW has no immediate intention or ability to offer qualifications or individual authorisation. It does not appear to be in the public or consumer interest to encourage a situation where an individual providing reserved legal activities would need to be regulated by a separate legal services regulator to the entity that they worked within. Such an approach would not appear to be beneficial as it would add complexity to the regulatory landscape by encouraging layers of legal services regulation which in turn may increase the likelihood of regulatory conflict and ultimately lead to consumer confusion in the case of misconduct.

Taxation Services

I recognise that for the conduct of litigation, the exercise of a right of audience and reserved instrument activities, the ICAEW planned to restrict its scope of regulation to "taxation services" only and that the ICAEW's proposed regulations seek to define "taxation services" through the definition of "Tax", "Tax Authority" and the relevant reserved legal activities. However, I share the concerns raised by the Legal

Services Consumer Panel, and echoed by the Lord Chief Justice, that such a limitation would likely be difficult to manage in practice and challenging to communicate to consumers. I believe that the limitation would add complexity to the regulatory landscape and lead to consumer confusion, which I do not believe would be in the public or consumer interest.

Notarial Services

I have noted the concerns raised by the two professional bodies which represent the notarial profession, which have also been reiterated by the President of the International Union of Notaries. I have paid particular attention to their concerns that the ICAEW's regulation of entities providing notarial services could lead to the independence of English and Welsh notarial acts being questioned, and in a worst case scenario, not being recognised in overseas jurisdictions. Whilst the Legal Services Board acknowledges this risk, and considers it to be low, I am not convinced that the ICAEW's application provided sufficient evidence or analysis to demonstrate that there would not be an adverse impact on the status of English and Welsh notarial acts in other jurisdictions.

Complementary Activities

Much of the ICAEW's rationale for seeking designation as an Approved Regulator and Licensing Authority with respect to all reserved legal activities is its contention that there is a natural link between the additional reserved legal activities and the current services offered by accountancy firms with the activities purportedly complementing each other. Whilst noting the table at Annex 15 of the ICAEW's application, which provides a helpful comparison of the additional reserved legal activities that accountancy firms might provide and services that accountancy firms already provide, it is my conclusion that there is a material distinction between the tax work which accountancy firms may currently undertake and the additional reserved legal activities they seek to undertake. For example, the former generally involves the determination of a tax liability, whilst the latter can involve managing complex criminal or civil litigation. It is one thing for accountancy practices to be an expert in taxation, but quite another to be proficient in the conduct of civil or criminal litigation in the courts.

I appreciate that this will come as a disappointment to you. I have thought about the application very carefully and have come to this decision for each of the reasons set out above. I believe that it is extremely important that regulation should be, and should also be clearly seen and understood to be, sufficiently separate from any representative functions. I am of the view that before any extension of the ICAEW's legal services regulatory work can be agreed, this and each of the other issues highlighted need to be fully addressed. I would be happy to consider a further application in the future if my concerns can be suitably addressed.

I am copying this Decision Notice to Dr Helen Phillips at the Legal Services Board. It will also be published on the Ministry of Justice's website.

Yours ever



RT HON DAVID LIDINGTON CBE MP

