Proposed Internal Governance Rules

Consultation paper published by the Legal Services Board (LSB)

Comments from ACCA
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GENERAL COMMENTS

1. ACCA is grateful for the opportunity to respond to the consultation paper published by the LSB, and for the continuing discussions between our two organisations. This response has been prepared in consultation with the Chairman of ACCA's Regulatory Board.

2. In accordance with its obligations under section 30 of the Legal Services Act 2007 (the Act), the LSB issued the Internal Governance Rules (IGR) in 2009 (amended in 2014). In discharging its functions, section 3 of the Act requires the LSB to act in a way that is compatible with the regulatory objectives (set out in section 1) and have regard to the better regulation principles. These principles include proportionality in regulation, and the need to target regulatory action at cases in which action is needed (consistent with the Regulators' Code). We recognise the challenge faced by the LSB in meeting the requirements of the Act in a proportionate way. However, the overriding importance of section 3 must be observed. Similarly, the LSB faces the challenge of furthering all eight regulatory objectives in a balanced way. These include improving access to justice, promoting competition, and encouraging a strong and diverse legal profession (as well as an independent one).

3. Although we support the LSB's objective of producing a simplified, principles based set of IGR, we do not believe that the current drafting of the IGR and guidance meets the overriding requirements of section 3 of the Act.

4. The IGR currently define an applicable approved regulator (AAR) as 'an Approved Regulator that is responsible for the discharge of regulatory and representative functions in relation to legal activities in respect of persons **whose primary reason to be regulated by that Approved Regulator is those person's qualifications to practise a reserved legal activity that is regulated by that Approved Regulator**' [emphasis added]. These IGR were issued soon after ACCA and ICAEW became approved regulators for probate services and, while there is a need to avoid the perception that some regulators are treated more favourably than others, the definition of an AAR is a means of recognising the diversity of approved regulators and the reserved legal activities in respect of which they are approved.

5. The distinction excludes some approved regulators from the additional requirements of the IGR that are more relevant to AARs only, and thereby helps to ensure that the regulatory burden is proportionate to the risks. It recognises, for example, that approved regulators such as ACCA and ICAEW are subject to oversight by other lead regulators. This allows the LSB's regulatory governance requirements to focus on the necessary outcomes, and recognises the diversity of approved regulators. The distinction that currently exists was considered particularly important for a body that regulates accountants as providers of legal services, as

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opposed to a body that regulates lawyers. If the definition of an AAR is to be removed, the LSB must be clear about how the required outcome of independent regulation will be achieved while, at the same time, supporting the regulatory objectives and paying due regard to the better regulation principles and the Regulators' Code.

6. In its response to the comments received in respect of its November 2017 consultation, the LSB committed itself to 'new rules that take a more principled and outcome-focused approach and that are supported by statutory guidance'. ACCA is supportive of a principles-based approach, as such an approach requires regulators to focus on achieving the right regulatory outcomes (and being seen to do so). This makes approved regulators accountable for having effective (and sometimes innovative) regulatory arrangements.

7. However, while we welcome the drafting of Rule 1 (the overarching duty), we do not perceive the proposed IGR as a whole to be principles-based; nor do we believe that the proposed IGR and accompanying guidance are sufficiently focused on achieving the necessary outcomes. Instead, they appear to be based on an assumption that enhancing the IGR necessarily entails additional prescriptive rules, and detailed guidance, in order to close loopholes and enhance clarity. We believe that such an approach is likely to have unintended consequences. Not only would it give rise to challenges in respect of IGR compliance, but it would fail to acknowledge that an extensive set of prescriptive rules will never succeed in being relevant to all possible circumstances.

8. The proposed IGR comprise a preamble followed by 17 Rules. The IGR are to be accompanied by statutory guidance, issued under section 162 of the Act. The status of the guidance is set out in section 162(5) of the Act:

   'When exercising its functions, the Board may have regard to the extent to which an approved regulator has complied with any guidance issued under this section which is applicable to the approved regulator.'

   This is reiterated in proposed Rule 15, which states that an approved regulator must 'have regard to' the guidance. The proposed guidance extends to 40 pages, and includes detailed guidance in respect of each of the 17 Rules. ACCA would like the final guidance to be more streamlined, and drafted with a focus on clarity, in order to help achieve effective compliance by the approved regulators. As currently drafted, the guidance includes surplus information, including processes to be adopted by the LSB. Although we accept that the proposed guidance is not intended to be prescriptive, we believe that, in practice, it would have such significance as to place a disproportionate burden on both the approved regulators and the LSB.

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Detailed Rules and guidance

9. Before addressing the specific questions asked within the consultation paper, we comment below on some of the specific Rules in the context of the draft statutory guidance.

10. We have an overriding concern that the distinction between an approved regulator and an AAR may be removed without the amended IGR being sufficiently principles-based to deliver flexibility and proportionality. Such a situation could threaten the public interest in having a diversity of approved regulators, and would fail to recognise the variety of ways in which approved regulators may achieve the principle of independent and robust regulation. At a meeting on 13 December 2018, the LSB explained to ACCA that this decision was a result of the AAR definition not being well understood, although this is not the rationale given in the July 2018 decision document.[1] According to the consultation document, a significant driver for the removal of the distinction appears to be a 'level playing field'.[2] While a level playing field is appropriate in the sense that all regulators should be required to achieve the same outcomes, it is not appropriate if it means that the same regulatory tools and processes are imposed irrespective of the regulatory risks.

11. Nevertheless, the proposed IGR acknowledge the diversity of approved regulators, as they distinguish between approved regulators that only have regulatory functions and those that also have representative functions. (The former would be completely exempt from 8 of the proposed Rules.) The challenge of perceived inconsistency in the requirements would not exist with a principles-based drafting of the IGR and guidance.

Rule 1

12. Proposed Rule 1 (described in the guidance as 'pre-eminent') sets out the overarching duty of an approved regulator 'to ensure that decisions relating to its regulatory functions are not influenced by any representative functions or interests it may have'. This Rule is expressed at a suitably high level, and clearly articulates a desired outcome in the context of section 28 of the Act (reproduced in Appendix 1).[3] However, we are very concerned by the use of the word 'influenced' while the Act uses the word 'prejudiced' in sections 29 and 30. The proposed drafting of the IGR

[1] July 2018 response and decision document, pages 15 to 17
[2] Page 4 of the November 2018 consultation document states 'all approved regulators with both representative and regulatory functions will be subject to the same obligations under the new IGR'.
[3] Section 28 mirrors the LSB's duty, under section 3, to promote the regulatory objectives and to have regard to the better regulation principles (that regulatory activities should be transparent, accountable, proportionate, consistent, and targeted only at cases in which action is needed).

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goes beyond the requirements of the Act, and fails to recognise the intent in drafting the Act, which is evident from the Hansard record of the debate in the House of Lords.[4] As a result, opportunities and innovations where the interests of both the regulatory and representative functions would be aligned, and where the insights of the regulated population may be valuable, would not be recognised.

13. Inappropriate use of the word 'influence' also introduces inconsistency in the IGR, and amounts to the LSB proposing to use the wrong standard (and a standard that has not been defined) in the Rule that is described as 'pre-eminent'.

14. Page 3 of the proposed guidance states that the IGR and the approved regulator's duty under section 28 to promote the regulatory objectives 'must be complied with simultaneously'. Inappropriate drafting of the IGR would make this impossible. For example, prescriptive and unreasonable IGR would provide a significant disincentive for regulators to enter the area of legal services regulation, and could even persuade the smaller approved regulators (in terms of the numbers of individuals and firms they authorise) to withdraw. In short, the regulatory objectives of:

    - promoting competition, and
    - encouraging an independent, strong, diverse and effective legal profession

    would not be promoted. It may be argued that the Act prevails if a conflict between the IGR, as proposed, and the simultaneous compliance with the promotion of the regulatory objectives would make the IGR unworkable. Above all, the IGR and guidance must achieve clarity among approved regulators and regulatory bodies.

Rule 2

15. The required legal status (if any) of the 'regulatory body' is unclear, and could usefully be explained in the guidance. It is defined in Rule 2(1) as a 'separate body' to which an approved regulator delegates the discharge of its regulatory functions. But the separation of regulatory and representative functions would appear to be limited by the need for the approved regulator (ie the body with the representative functions) to retain responsibility for receiving assurance that the regulatory functions are being discharged in accordance with section 28 of the Act. The consultation states:

[4] HL Deb (22 January 2007) vol. 688, col. 974

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'Misunderstandings about the residual role have underpinned a significant number of disagreements between approved regulators and their regulatory bodies under the current IGR.'[5]

This is unsurprising as, for the residual role to be performed effectively, there must be a degree of influence by the approved regulator over the regulatory body, in order to require the appropriate level of assurance. In practice, this has not been an issue with ACCA's regulatory arrangements, and it is not clear that the proposed IGR and guidance would reduce the risk of misunderstandings in the future.

16. In addition, the regulatory body's 'governing board' or 'regulatory board' (as it is termed) is not defined, and so there is a further lack of clarity in the proposed IGR and guidance. This appears to be because the LSB has assumed that all approved regulators will have structures that are similar (and regulatory bodies will be subject to only one source of oversight regulation), and so this has given rise to prescriptive rules, rather than focusing on the outcome of having independent regulatory decision-making and oversight (in the public interest). This is discussed further under Rule 5 below.

Rule 5

17. This Rule states that 'no person who is materially involved in representative functions may be a member of the board, council or committee which makes decisions about how to exercise regulatory functions'. From the proposed IGR and guidance, all that is clear is that the board is a decision-making body concerning 'how to exercise regulatory functions'. The model with which the LSB is familiar is one in which a board controls and directs the regulatory functions. An alternative model is one that provides separation of the regulatory and representative functions at the operational level, but also has in place an independent board to oversee the regulatory functions to ensure their integrity. In the case of ACCA, such a board exists and has been effective in exercising public interest oversight since 2008. ACCA's Regulatory Board has direct access to members of ACCA's council, and information concerning the Board's membership and activities is publicly available on the ACCA website.[6]

Rule 6

18. Proposed Rule 6 is a new Rule, and we would welcome it. It requires the approved regulator to ensure that individuals involved in the exercise of regulatory functions are aware of and comply with the IGR and the arrangements in place to meet the overarching duty expressed in Rule 1. If the IGR and guidance are clearly drafted, this would provide a useful safeguard, as all those involved in the exercise of

[5] November 2018 consultation, page 9
[6] https://www.accaglobal.com/uk/en/about-us/regulation/regulatory-board.html

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regulatory functions would be assured of having a clear understanding of the principle of regulatory independence.

19. Although Rule 6 is clear and succinct, the proposed guidance extends over three pages. This adds little value, but appears somewhat prescriptive in setting out what the LSB would expect in respect of training. As a result, the importance of an organisation's culture has been overlooked.

Rule 7

20. As the proposed IGR are drafted, the removal of the definition of an AAR would mean that the definition of 'lay person' in the Act (essentially, a person who is not and has never been authorised to conduct any reserved legal activities) would also apply to an accountancy body such as ACCA. ACCA has always maintained that the Act's definition of 'lay' is of little relevance for a regulator of accountants, even though some of its members may be undertaking the reserved legal activity of non-contentious probate.

21. The removal of the definition of an AAR is likely to present difficult questions concerning the constitution of an approved regulator's regulatory board. Where the approved regulator is a body of accountants, for example, it could become necessary to involve lawyers, accountants and others (who are neither lawyers nor accountants), in such numbers as would be possible to satisfy any interpretation of a 'lay' majority. However, we believe such a structure would tend to unwieldiness. Our conclusion is that requiring an accountancy body (itself subject to lead regulator oversight) to classify lawyers as non-lay when the only reserved legal activity its members undertake is non-contentious probate work would be disproportionate to the regulatory risks concerned.

22. Similarly, we would not consider it a proportionate response to require a professional body of accountants to constitute a separate regulatory board in respect of non-contentious probate activities alone. ACCA's Regulatory Board oversees the performance of ACCA's regulatory functions as a whole. It identifies areas of highest risk, providing challenge in those areas and conducting 'deep dives' into other areas. To adopt a different approach could be detrimental to effective, efficient, outcomes-focused regulation.

23. The preamble to the proposed IGR states that 'independent regulation' is essential for consumer confidence, and serves the public interest.[7] ACCA is in agreement to the extent that 'independent regulation' refers to independent regulatory decision-making and oversight.[8] For this reason, ACCA introduced independent oversight of its regulatory functions in 2008, in the form of its Regulatory Board. The preamble

[7] November 2018 consultation, page 23
[8] This also reflects the spirit of the Act, as set out in section 30.

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goes on to state:

> *'The Legal Services Board recognises the inherent tension for approved regulators … who have both representative and regulatory functions and are required to separate their regulatory functions whilst remaining responsible for assuring compliance by their regulatory body with Section 28 of the Act. In this situation, the Act does not allow for complete separation or complete independence.*[9]*'*

In situations where tension exists, the cause of the tension would appear to be the need for the approved regulator to assure compliance with section 28. In the case of ACCA, its responsibility for assuring compliance relies to a great extent on the oversight of the independent Regulatory Board.

Rule 11

24. The principle on which this Rule is founded is that the sharing of resources, including shared services, must not allow representative functions to prejudice regulatory functions. In discussing the Legal Services Bill, the matter of proportionality was considered, and Lord Kingsland said:

> *'We have already indicated at earlier stages in the Bill that we totally accept the Government's reasons for proposing a complete separation of functions, but in some cases that may not be possible, or at least, not possible at anything other than an exorbitant and disproportionate cost. In the absence of any manifest risk of conflict, we believe that Chinese walls should be permitted in agreed instances, so in this respect, we would like the Government to be flexible.'*[10]

Baroness Ashton replied:

> *'I agree completely that proportionality is very important and that the board must have regard to it when exercising its functions under Clauses 28 and 29 [now sections 29 and 30]. We believe that that is covered under the duty in Clause 3, which states:*
>
> *"The Board must have regard to … the principles under which regulatory activities"*
>
> *including its functions under Clauses 28 and 29 should be proportionate. I do not, therefore, want to set out an additional requirement for the board to pay particular regard to what is proportionate under Clauses 28 and 29, as it rather gives the appearance that it does not have to do so when discharging all its functions or*

[9] November 2018 consultation, page 23
[10] HL Deb (22 January 2007) vol. 688, col. 977

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that the tests for other functions should be of less significance. That would not be desirable.

I agree with the noble Lord, Lord Kingsland, that there might be instances when it may be more efficient and cost-effective for approved regulators to operate from the same premises, where the overheads can be shared between the regulatory and representative arms, or for some individuals to carry out functions that could have both regulatory and representative aspects - for example, if those individuals are carrying out support rather than policy or decision-making roles. …

I hope to allay concerns, in a sense, in both directions, that the detail is better set out in the internal governance rules under Clause 29, which allow the board to take a proportionate approach.'[11]

We believe that the conclusions reached in this debate allow the LSB to take a proportionate approach, and such an approach is possible through the proposed drafting of Rule 11. However, the proposed guidance suggests that 'distinct working areas and facilities' would be expected in order to comply with Rule 11. This risks the guidance being perceived as prescriptive, which would deny the flexibility (of approved regulators and the LSB) to meet the necessary outcomes in the most effective way.

Rule 13

25. As with *any* body whose regulatory activities are overseen by a lead regulator, it should be expected that an approved regulator will see its reasonable responsibilities to include candour about compliance with the IGR and any emerging shortcomings in the regulatory body's processes. This is easier to achieve with the right culture within the organisation and an appropriate relationship with the LSB. Therefore, there is an important role for the guidance in explaining how the right outcomes may be achieved.

26. However, in our opinion, the guidance is drafted in such a way that it may impede the generation of the right culture and relationships. This starts with a statement that an approved regulator must respond to the requests of the LSB within 10 days, and goes on to state that systems should exist for logging compliance matters, and prescribes eight elements of those systems.

[11] HL Deb (22 January 2007) vol. 688, col. 978

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27. The draft guidance does not clearly reconcile the requirements that:

    - '[e]ach **approved regulator** must respond' and
    - '[e]ach **approved regulator** must ensure that any issue in relation to compliance with these Rules … is reported in writing to the Legal Services Board' [emphasis added][12]

    with the expectation that 'the monitoring and responses to requests from the LSB for information will come directly from the **regulatory body** where they have primary responsibility' [emphasis added].[13] In fact, the guidance (pages 34 and 35) carries a whole section on notifying the board of non-compliance, which suggests that internal reporting systems are required so that the regulatory body does *not* need to communicate directly with the LSB.

28. Furthermore, the draft guidance states: 'The AR will therefore need to put in place a system for the internal reporting of issues arising under the rules.'[14] However, the approved regulator will not be able to inspect the records generated under such a system, and so there is no link between the expectations set out in the draft guidance and the desired outcomes.

Rule 16

29. Rule 16 (the 'saving provision') is particularly important, because it may help to overcome any challenges arising from the IGR not being sufficiently principles-based. The saving provision may enable the LSB to monitor compliance with the IGR with an appropriate focus on outcomes and assessed risk. It states that '[n]o approved regulator shall be in breach of these Rules if the action or omission, which would otherwise constitute the breach, is … carried out with the prior written authorisation of the Legal Services Board'[15].

30. The guidance will be particularly relevant to this Rule, and care must be taken to avoid the unintended consequence of restricting the situations in which the written authorisation of the LSB may be provided. For example, the draft guidance states: 'Each AR should note that authorisation is only likely to be given if compliance is **clearly impracticable**'[16] [emphasis added], and goes on to state: 'It should be noted that this discretion will be used sparingly. The starting point is that each AR must comply with each and every rule in the IGR which applies to it.'[17] We recommend that unnecessary limitations such as this are removed from the

[12] November 2018 consultation, page 28
[13] Proposed LSB Guidance on the IGR, page 32
[14] Proposed LSB Guidance on the IGR, page 34
[15] November 2018 consultation, pages 28 and 29
[16] Proposed LSB Guidance on the IGR, page 25
[17] Proposed LSB Guidance on the IGR, pages 38 and 39

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guidance, as they serve no purpose, but they impede flexibility and a risk-based approach. Overall, the guidance gives the impression that the LSB has not adopted a truly principles-based approach in its drafting of the IGR and guidance.

AREAS FOR SPECIFIC COMMENT

In this section, we respond to the specific questions asked by the LSB in its consultation paper.

Question 1: Do you agree that the proposed rules would enhance the independence of regulatory functions and improve clarity leading to fewer disputes and more straightforward compliance/enforcement? If not why not?

31. We do not believe that the drafting of these IGR and guidance will lead to fewer disputes. An effective, outcomes-focused set of Rules, founded on clear principles, would avoid the need to include Rule 14 (disputes and referrals for clarification).

32. While we acknowledge that the IGR must be drafted within the constraints of the Act, the ambition of the regulatory framework must surely be independent and objective decision-making in the public interest, rather than simply enhanced 'independence of regulatory functions'. The latter may fail to deliver the necessary outcome.

33. In our opinion, excessive detail in the guidance and lack of focus on clear objectives (largely as a result of being seen to deliver the requirements of the Act), mean that the proposed IGR and guidance, as drafted, would not improve clarity. We suggest that the LSB should articulate clear objectives, and the guidance might illustrate examples of good practice. But it should be made clear that there are often alternative means of meeting the objectives.

Question 2: Does the proposed guidance provide sufficient detail to help you to interpret and comply with the proposed IGR? Please provide specific comments on any areas of the guidance where further information would improve clarity.

34. We believe we have answered this question in our detailed comments above. In summary, we believe the proposed guidance is excessive, and would serve to constrain approved regulators and the LSB in delivering the required outcome of independent regulatory decision-making. In our opinion, the proposed guidance does not sufficiently take into account the circumstances of approved regulators

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whose members are not primarily involved in legal services, and which also have other oversight regulators.

35. Some approved regulators will be unsure of their ability to comply with the IGR, given the process of gaining authorisation under the saving provision, the possible frequency of such applications, and uncertainty about whether such an application would be successful.

Question 3: Is there any reason that your organisation would not be able to comply with the proposed IGR within six months? Please explain your reasons.

36. There will be a transition period of six months from the date of publication of the new IGR. After this period, the LSB will require a certificate of compliance from each approved regulator (and each separate regulatory body). Please refer to our comments above concerning the process of gaining authorisation under the saving provision, and the uncertainty around the LSB's willingness to approve ACCA's regulatory arrangements.

37. We have provided the LSB with a document that maps the proposed IGR and guidance to ACCA's existing arrangements, and we have met with the LSB to refine our understanding of the LSB's position and to further explain ACCA's arrangements to the LSB. The process of identifying areas where the saving provision may be relevant cannot take place until the IGR and guidance have been finalised.[18]

38. We believe that ACCA's current arrangements meet the principle of regulatory independence, in a way that focuses on the necessary outcomes, including the perception of third parties. However, we would expect to work closely with the LSB to discuss areas in which ACCA's arrangements might not comply with the prescriptive requirements of the final IGR and the Act, and any areas in which our arrangements might be enhanced. These areas may not be clear to all parties immediately, and so certification of compliance (within six months) is likely to be accompanied by the disclosure of areas where further discussion may be required.

[18] Page 16 of the consultation explains: 'The LSB has carried out an initial qualitative impact analysis to ascertain the work that **each approved regulator** and regulatory body would need to undertake during the six-month transition period and on compliance thereafter. **Each proposed rule** was examined and an initial assessment was formed of what, if anything, would be required to comply based on the LSB's understanding of the current arrangements in place within the approved regulators. The anticipated operational impact given how the bodies currently work was taken into account.' [emphasis added]

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Question 4(a): Beyond the usual resources allocated to compliance with the IGR what, if any, additional resource do you anticipate you will need: (i) to assess compliance with the proposed IGR and then to make changes to come into compliance, if any are required; and (ii) to comply with the IGR on an ongoing basis?

39. We have no further comments to make concerning the possible costs of compliance with the IGR, due to the current high levels of uncertainty.

Question 4(b): Do you agree with our assessment that the cost of compliance (which includes the costs of dealing with disputes and disagreements) will reduce under the proposed IGR?

40. We have no evidence to suggest that the costs of compliance will reduce under the IGR and guidance as drafted in the consultation. In fact, we have concerns that some areas of the proposed IGR might give rise to increased costs. Therefore, opportunities should be sought to remove requirements that are (or may appear to be) unnecessarily or unreasonably prescriptive. This would require legal regulators to focus on the necessary outcomes, including independent decision-making and oversight (in the public interest).

Question 5: Please provide comments regarding equality issues which, in your view/experience, may arise from implementation of the proposed IGR.

41. We believe that an unintended consequence of the IGR and guidance, as drafted, may be increased costs, which must be passed on to the regulated individuals and firms and ultimately to consumers. This would have a disproportionate negative impact on small practices and their clients. In addition to this issue, which may be seen as an equality issue, there may be a reduction in competition and diversity in the provision of legal services. Care must be taken to support *all* the regulatory objectives. In particular, stifling diversity and innovation in the legal services market would have a negative impact in terms of unmet legal need.

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CONCLUSION

42. According to the LSB, it would like 'rules and guidance to … provide clarity for every approved regulator and its regulatory body to decrease the number of independence-related disputes between them and referrals of such matters to the LSB for clarification or resolution'.[19] This is one of several assumptions within the consultation. The statement also illustrates the focus throughout the consultation on compliance with the IGR, rather than enhancing regulatory decision-making and outcomes.

43. The consultation refers to the 'challenging framework' of the Act concerning the IGR', and that the term 'approved regulator' refers to 'a disparate group of entities with a broad spectrum of structures'.[20] Care must be taken to ensure that the IGR deliver the spirit of the Act and the findings of the Clementi Review that preceded it.

44. The relationship between the approved regulator and the 'regulatory body' to which the regulatory functions are delegated is such that the approved regulator does not have an oversight role.[21] Instead the role is described as one of assurance – 'that regulatory functions are being discharged in accordance with section 28 of the Act'.[22] This may appear a rather contrived explanation of the relationship, which would be unnecessary if the LSB was suitably empowered (by its regulatory performance framework) to oversee the functioning of a body's regulatory arrangements. Alternatively, a single regulator of reserved legal activities may best provide the clarity required.

45. We emphasise again the impact of inconsistent drafting within the proposed IGR, where the use of the word 'influence' goes beyond the intention of the Act, which is to avoid 'prejudice'. This is particularly important in the context of Rule 1 (the 'pre-eminent Rule') as it might give rise to a challenge that the LSB is acting beyond its *vires*.

46. The LSB acknowledges that '[t]he Act does not create a framework in which a regulatory body is structurally separate from its representative body'[23]. The consultation goes on to state that the Act 'creates approved regulators which may have both representative and regulatory functions'.[24] There appears to be an acceptance that the new IGR should not undermine the past recognition of

[19] November 2018 consultation, page 5
[20] November 2018 consultation, page 6
[21] Page 6 of the consultation states that 'after delegation of regulatory functions, the approved regulator's role is one of assurance (not oversight)'.
[22] Ibid
[23] November 2018 consultation, page 3
[24] Ibid

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professional bodies as approved regulators. We anticipate that the fact that established approved regulators have arrangements and processes that have already been judged to be satisfactory will provide a sound basis for an approved regulator seeking one or more written authorisations from the LSB under the saving provision.

47. We are concerned that discussions with the LSB demonstrate how the IGR have been drafted with the existing structures of the AARs in mind. We believe this to be the reason that the LSB perceives the regulatory governance arrangements of ACCA, for example, to be difficult to understand. This is a clear indication that the IGR and guidance have not been drafted with a clear focus on fundamental principles and necessary outcomes.

48. Our response to this consultation is as an approved regulator of legal services only in respect of non-contentious probate. Given the low risk associated with the reserved element of this service, ACCA has often opined that probate should cease to be a reserved legal activity. (This has also been the LSB's own assessment in the past.) We believe that only those legal services that pose systemic risk should be reserved, and that a proportionate and risked-based legal regulatory framework is best achieved through a single regulator in respect of those activities. In the absence of this rationalisation, it is particularly important that regulatory arrangements are consistent with the level of risk associated with the reserves legal activities being provided.

49. We have met with the LSB on a number of occasions to explain ACCA's regulatory arrangements, including its governance and independent public interest oversight arrangements. Some of these meetings have been as a result of the current IGR consultation process, and others have been as part of the LSB's oversight of ACCA since the LSB approved ACCA's regulatory arrangements for probate activities in January 2018. In light of this learning, we would be very pleased to work with the LSB in developing an effective set of IGR that are principles-based and focused on achieving the right outcomes.

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APPENDIX 1: EXCERPTS FROM THE LEGAL SERVICES ACT 2007

Section 1 The regulatory objectives

(1) In this Act a reference to "the regulatory objectives" is a reference to the objectives of—

(a) protecting and promoting the public interest;

(b) supporting the constitutional principle of the rule of law;

(c) improving access to justice;

(d) protecting and promoting the interests of consumers;

(e) promoting competition in the provision of services within subsection (2);

(f) encouraging an independent, strong, diverse and effective legal profession;

(g) increasing public understanding of the citizen's legal rights and duties;

(h) promoting and maintaining adherence to the professional principles.

(2) The services within this subsection are services such as are provided by authorised persons (including services which do not involve the carrying on of activities which are reserved legal activities).

(3) …

Section 21 Regulatory arrangements

(1) In this Act references to the "regulatory arrangements" of a body are to—

(a) its arrangements for authorising persons to carry on reserved legal activities,

(b) its arrangements (if any) for authorising persons to provide immigration advice or immigration services,

(c) its practice rules,

(d) its conduct rules,

(e) its disciplinary arrangements in relation to regulated persons (including its discipline rules),

(f) its qualification regulations,

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(g) its indemnification arrangements,

(h) its compensation arrangements,

(i) any of its other rules or regulations (however they may be described), and any other arrangements, which apply to or in relation to regulated persons, other than those made for the purposes of any function the body has to represent or promote the interests of persons regulated by it, and

(j) its licensing rules (if any), so far as not within paragraphs (a) to (i),

(whether or not those arrangements, rules or regulations are contained in, or made under, an enactment).

(2) …

Section 28 Approved regulator's duty to promote the regulatory objectives etc

(1) In discharging its regulatory functions (whether in connection with a reserved legal activity or otherwise) an approved regulator must comply with the requirements of this section.

(2) The approved regulator must, so far as is reasonably practicable, act in a way—

(a) which is compatible with the regulatory objectives, and

(b) which the approved regulator considers most appropriate for the purpose of meeting those objectives.

(3) The approved regulator must have regard to—

(a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and

(b) any other principle appearing to it to represent the best regulatory practice.

Section 29 Prohibition on the Board interfering with representative functions

(1) Nothing in this Act authorises the Board to exercise its functions in relation to any representative function of an approved regulator.

(2) But subsection (1) does not prevent the Board exercising its functions for the purpose of ensuring—

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(a) that the exercise of an approved regulator's regulatory functions is not prejudiced by its representative functions, or

(b) that decisions relating to the exercise of an approved regulator's regulatory functions are, so far as reasonably practicable, taken independently from decisions relating to the exercise of its representative functions.

Section 30 Rules relating to the exercise of regulatory functions

(1) The Board must make rules ("internal governance rules") setting out requirements to be met by approved regulators for the purpose of ensuring—

(a) that the exercise of an approved regulator's regulatory functions is not prejudiced by its representative functions, and

(b) that decisions relating to the exercise of an approved regulator's regulatory functions are so far as reasonably practicable taken independently from decisions relating to the exercise of its representative functions.

(2) The internal governance rules must require each approved regulator to have in place arrangements which ensure—

(a) that the persons involved in the exercise of its regulatory functions are, in that capacity, able to make representations to, be consulted by and enter into communications with the Board, the Consumer Panel, the OLC and other approved regulators, and

(b) that the exercise by those persons of those powers is not prejudiced by the approved regulator's representative functions and is, so far as reasonably practicable, independent from the exercise of those functions.

(3) The internal governance rules must also require each approved regulator—

(a) to take such steps as are reasonably practicable to ensure that it provides such resources as are reasonably required for or in connection with the exercise of its regulatory functions;

(b) to make such provision as is necessary to enable persons involved in the exercise of its regulatory functions to be able to notify the Board where they consider that their independence or effectiveness is being prejudiced.

(4) …

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Schedule 1, paragraph 2 Definition of 'lay person'

(4) In this Schedule a reference to a "lay person" is a reference to a person who has never been—

(a) an authorised person in relation to an activity which is a reserved legal activity;

(b) a person authorised, by a person designated under section 5(1) of the Compensation Act 2006, to provide services which are regulated claims management services (within the meaning of that Act);

(c) an advocate in Scotland;

(d) a solicitor in Scotland;

(e) a member of the Bar of Northern Ireland;

(f) a solicitor of the Court of Judicature of Northern Ireland.

(5) For the purposes of sub-paragraph (4), a person is deemed to have been an authorised person in relation to an activity which is a reserved legal activity if that person has before the appointed day been—

(a) a barrister;

(b) a solicitor;

(c) a public notary;

(d) a licensed conveyancer;

(e) granted a certificate issued by the Institute of Legal Executives authorising the person to practise as a legal executive;

(f) a registered patent attorney, within the meaning given by section 275(1) of the Copyright, Designs and Patents Act 1988 (c. 48);

(g) a registered trade mark attorney, within the meaning of the Trade Marks Act 1994 (c. 26); or

(h) granted a right of audience or a right to conduct litigation in relation to any proceedings by virtue of section 27(2)(a) or section 28(2)(a) of the Courts and Legal Services Act 1990 (c. 41) (rights of audience and rights to conduct litigation).

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