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Our ref: ICAEW Rep 100/12

Mahtab Grant
Legal Services Board
7th Floor, Victoria House
Southampton Row
London WC1B 4AD

By e-mail : consultations@legalservicesboard.org.uk

Dear Mahtab

Will-Writing, Probate and Estate Administration

ICAEW is pleased to respond to your request for comments on your consultation document *Enhancing consumer protection, reducing regulatory restrictions: will-writing, probate and estate administration*.

Please contact me should you wish to discuss any of the points raised in the attached response.

Yours sincerely

Felicity Banks
Head of Business Law

T +44 (0)20 7920 8413
E felicity.banks@icaew.com



ICAEW REPRESENTATION

WILL-WRITING, PROBATE AND ESTATE ADMINISTRATION

Memorandum of comment submitted in July 2012 by ICAEW, in response to the Legal Services Board consultation document *Enhancing consumer protection, reducing regulatory restrictions: will-writing, probate and estate administration* published in April 2012

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INTRODUCTION

1. ICAEW welcomes the opportunity to comment on the consultation document *Enhancing consumer protection, reducing regulatory restrictions: will-writing, probate and estate administration* published by the Legal Services Board (the Board) in April 2012, a copy of which is available from this [link](#).

WHO WE ARE

2. ICAEW is a world-leading professional accountancy body. We operate under a Royal Charter, working in the public interest. ICAEW's regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the UK Financial Reporting Council. We provide leadership and practical support to over 138,000 member chartered accountants in more than 160 countries, working with governments, regulators and industry in order to ensure that the highest standards are maintained.
3. ICAEW members operate across a wide range of areas in business, practice and the public sector. They provide financial expertise and guidance based on the highest professional, technical and ethical standards. They are trained to provide clarity and apply rigour, and so help create long-term sustainable economic value.
4. This response reflects consultation with the ICAEW Business Law Committee which includes representatives from public practice and the business community. The Committee is responsible for ICAEW policy on business law issues and related submissions to legislators, regulators and other external bodies.

MAJOR POINTS

Intrusion into accountancy regulation

5. The Board has said it does not intend to intrude into the longstanding regulation of the accountancy profession. However the consultation proposals will achieve just that unless there is a clear delineation drawn between the newly reserved activities (and their ancillary services) and the same activities when undertaken by the regulated accountancy profession as part of routine accountancy practice.
6. Using reservation of service as a solution can (as here) carry substantial unintended consequences and as a general principle should be used only where other regulatory mechanisms are seen to have failed or cannot be improved. The former has not been demonstrated and the latter has not seem to have been adequately considered. We strongly suggest that further work is undertaken before a strategy is finalised.
7. We have written to the Board previously to highlight the difficult legal and conceptual analysis required by the Board when considering areas that overlap with professional services already provided by non law professionals, and refer the Board again to that correspondence¹.
8. We have made the point previously and would reiterate that for Applicable Approved Regulators (AAR) their existing regulatory arrangements in relation to accountancy practice should be deemed sufficient in relation to ancillary services, whether or not they also provide the core service².

¹ http://www.icaew.com/en/about-icaew/what-we-do/consultations-and-representations/representations/~/_media/Files/Technical/icaew-representations/2009/icaew-rep-84-09%20Regulatory%20independence%20-%20Proposed%20rules%20to%20be%20made%20under%20sections%2030%20and%2051.ashx

² http://www.legalservicesboard.org.uk/Projects/pdf/internal_governance_rules%202009_final_km.pdf

Compulsory drawing in of non law professionals into legal services regulation

9. The Legal Services Consumer Panel has stated that where non-legal businesses can demonstrate that they are already subject to equivalent regulation in their own sectors, it should not be necessary for them also to be regulated by a regulator in the legal services market³.
10. The Financial Reporting Council (FRC), and the Department for Business, Innovation and Skills (BIS) already oversee the accountancy professional bodies in their relevant professional areas covered by the Board proposals. This indicates the adequacy of the current regulatory procedures of the professional bodies such as ICAEW ICAS and ACCA. We set out a guide to ICAEW Chartered Accountants: their Practice, Regulation and Regulatory Risks in Appendix 1.
11. We are happy to discuss these issues with the Board, either with or without our colleagues from ACCA and ICAS.

YouGov and IPP Research

12. The Board has relied on research that does not address the position of professional accountants and as the Consumer Panel noted;

‘The YouGov consumer survey provides useful statistical information on the service provided by solicitors. The sample was not large enough to allow detailed analysis of service by other types of provider’⁴.
13. No clear definition of estate administration appears to have been used⁵. This term has very different meanings depending upon context. We understand that the Board is consulting with counsel on a definition of estate administration and we would be happy to provide input to those discussions.
14. This calls into question reliance upon the research results, and any resulting policy recommendations. As a result the Board;
 - does not appear to have a complete understanding of the full nature of the activities underpinning will writing, probate and estate administration, client profile and risks attaching thereto;
 - does not appear to have evaluated the full range of regulatory tools that exist and their appropriateness to meet business risk.
15. We believe considerable work is required with affected parties before the Board crystallises its proposals.

³ See http://www.legalservicesconsumerpanel.org.uk/publications/consultation_responses/documents/2012-03-19_LSB_PEAFinal.pdf - para 5.14

⁴ http://www.legalservicesconsumerpanel.org.uk/publications/consultation_responses/documents/2012-03-19_LSB_PEAFinal.pdf

⁵ This was confirmed to us by the IPP Researchers; further information is outstanding from the Board re YouGov but the same outcome is expected

RESPONSES TO SPECIFIC QUESTIONS

Question 1: Are you aware of any further evidence that we should review?

16. As stated above, we are not convinced that the research is adequate to form a basis for many of the proposals being made by the Board. This means that:
- The nature of the activities underpinning will writing and estate administration are unclear and;
 - There is no evaluation of existing regulatory tools and their appropriateness to meet the business risk.
17. We have set out in Appendix 2 some further research proposals that we suggest the Board should consider to help reach proportionate recommendations compliant with Board obligations under the Legal Services Act.

Question 2: Could general consumer protections and / or other alternatives to mandatory legal services regulation play a more significant role in protecting consumers against the identified detriments? If so, how?

18. A successful alternative to legal services regulation already exists in relation to ancillary services to will writing/ probate and estate administration – namely the regulated accountancy regime overseen by the FRC and BIS. Nevertheless, this is clearly an area where consumer protections can be enhanced and we are happy to work with the Board.
19. We trust there will be no positive interference by the Board into existing accountancy regulation without full consultation and discussion with the relevant regulatory bodies and oversight regulators.

Question 3: Do you agree with the list of core regulatory features we believe are needed to protect consumers of will-writing, probate and estate administration services? Do you think that any of the features are not required on a mandatory basis or that additional features are necessary?

20. We agree that the 'core regulatory features' are a suitable suite for solicitors and newly emerging specialist regulated service providers for will-writing and estate administration services.
21. However no evidence has been presented demonstrating they are necessary for regulated accountants practising under the oversight of a reputable professional body who provide non-reserved services as part of routine accountancy work. As stated above we welcome the Board's intention not to intrude into existing accountancy regulation in these areas.

Question 4: Do you believe that a fit and proper person test should be required for individuals within an authorised provider that is named as executor or attorney on behalf of an organisation administering an estate?

22. We do not think that the value of or need for this requirement has been demonstrated sufficiently to justify the additional costs to practitioners and ultimately consumers.
23. The general thrust of reforms of the regulation of legal professional services is towards entity regulation, and away from the regulation of individuals. To require a specific fit and proper test for named executors or administrators on behalf of the entity providing an estate administration service would introduce additional regulatory costs and moves against this trend.

Question 5: What combination of financial protection tools do you believe would proportionately protect consumers in these markets and why? Do you think that mechanisms for holding client money away from individual firms could be developed and if so how?

Financial protection tools

- 24.** It makes sense to impose the 'solicitor' type package of financial protection tools upon newly emerging regulated entrants.
- 25.** However the solicitor package should not be imposed upon regulated accountants already providing such services as part of routine accountancy practice to avoid intrusion into existing non-law professional services regulation that the Board states it wishes to avoid.

Holding client monies

- 26.** We doubt a successful mechanism could be developed (or indeed is needed) to hold client monies away from individual firms along the scale required, and it will just create yet another level for potential malpractice/ risk, and have attendant costs to be met ultimately by consumers.
- 27.** As far as regulated accountants are concerned, there are existing accounts arrangements for the holding of client monies and we are not aware of any issues arising.

Question 6: Do you agree that education and training requirements should be tailored to the work undertaken and risks presented by different providers and if so how do you think that could this work in practice?

- 28.** Skills appear to be lacking in the drafting of wills (which is a service not typically provided by our members) and a flexible and tailored approach is sensible.
- 29.** However our members and those of ACCA and ICAS already provide many of the activities those described as 'ancillary' to will-writing and estate administration as part of their routine professional work, and we again welcome the Board's intention not to intervene in these already regulated professional accountancy activities.

Question 7: Do you agree with the activities that we propose should be reserved legal activities? Do you think that separate reviews of the regulation of legal activities relating to powers of attorney and/ or trusts?

Will-Writing

- 30.** We note that will writing has caused considerable concerns and that reservation might be one response. However where it is undertaken by some chartered accountants it is subject to our oversight and should not require dual regulation.
- 31.** Where will writing is reserved , then services ancillary to will-writing should also be regulated.
- 32.** ICAEW welcome the Boards reassurance that it does not intend to restrict continued provision of ancillary services to will writing by regulated accountants.

33. We think that it is important to ensure that simple and cost effective services which may assist a lay person to construct their own will, using a will form are not unnecessarily restricted or increased in price.

Estate administration

34. Although the Board has reassured us it does not intend to interfere with existing accountancy regulation. we consider that major work is required, before the Board proceeds.
35. The research used justify the reservation of estate administration is flawed and insufficient in our view for the reasons given above. Nor has a clear definition been given of those services which are intended to be covered by the proposed reservation.

Probate Activities – the need for reservation at all

36. We disagree with the proposal to maintain unchanged the current reservation of probate activities (ie, the preparation of any papers on which to found or oppose an application for probate). As apparent from much of the research referenced by the Board, probate of itself is a low risk activity.
37. Instead we believe that probate activities should be treated as ancillary activities to will-writing and estate administration. That is, they should be treated as regulated activities where they are carried out by a provider authorised by a front line legal services professional body for will-writing or estate administration. Where they are carried out within the scope of the regulatory activity of an AAR, they should be treated as being outside the scope of mandatory legal service reservation.
38. Many ICAEW members already routinely prepare probate papers for a solicitor and frequently deal with the entire operation of probate and estate administration in partnership with their clients.
39. We see no reason why ICAEW member firms should continue to be prevented from carrying out the preparation of probate papers,(as well as their submission)which is frequently well within their current competence, and ICAEW's competence to regulate, without coming within the full reach of legal services reservation.

Powers of attorney and/or trusts

40. We understand why the Board has limited its consideration to will-writing and estate administration at this point.
41. The Board should be aware that the risks associated with some trusts (such as those set up for the protection of infants and vulnerable adults) can be matters of even greater consumer and regulatory risk than those associated with wills and estate management. We believe that the Board should return to consideration of the protection of consumers of trusts and powers of attorney as soon as possible after completion of the current round of consultations.

Question 8: Do you agree with our proposed approach for regulation in relation to “do-it-yourself” tools and tools used by providers to deliver their services? If not, what approach do you think should be taken and why?

42. We do not agree that the service of assisting in the use of a standard will form should be included in the will-writing reservation.

43. Any person accustomed to the completion of complex forms (including, for example, post office clerks, administrators, civil servants) would be likely to be more able to competently accomplish that task than an inexperienced settlor. But the Board intends to deny that service to settlers, except from an expensively regulated legal service provider or from individuals in a wholly personal capacity. We are not convinced that best serves those in most need of assistance.

Question 9: Do you envisage any specific issues relating to regulatory overlap and/or regulatory conflict if will-writing and estate administration were made reserved activities? What suggestions do you have to overcome these issues?

44. On the basis that any newly imposed legal services regulation:

- applies consistently across providers from the legal profession and new entrants to future reserved activities such as will writers and;
- does not impact upon existing regulated accountancy practice overseen by the FRC and BIS.

45. Then no problems requiring attention are foreseen at this stage.

Question 10: Do you agree that the s190 provision should be extended to explicitly cover authorised persons in relation to will-writing activities as well as probate activities following any extension to the list of reserved legal activities to the wider administration of the estate? What do you think that the benefits and risks would be?

46. We have already written to the Board seeking clarification on privilege and tax advice in the context of (inter alia) probate services. A considered response would be of benefit to consumers, practitioners and regulators alike.
47. Recommending extension of statutory privilege in such a manner, the Board will be granting advice privilege for tax and wealth planning to a wide and completely new category of non-lawyer. This will create potential confusion for HMRC, clients, regulators and advisors. Potential market distortions which will be exacerbated as MDPs start to form
48. The implication of this proposal by itself indicates the need for a wholesale review of the laws of professional privilege.

Question 11: Do you have any comments on our draft impact assessment, published alongside this document, and in particular the likely impact on affected providers?

49. We applaud the Board for its efforts to prepare a comprehensive assessment of the effects of their proposals. Nevertheless, we have a number of concerns, the most important of which are:
- The IA assumes that the costs on already regulated suppliers will be negligible. This is not the case if dual regulatory burdens are imposed upon regulated accountants and could lead to market distortions.
 - The IA assumes two possible outcomes for consumers – to receive a good professional service or a bad one. A comparison should also be made with the third one of not having obtained professional help when it would have been appropriate to do so.
 - Any increase in reservation of will-writing and estate administration will inevitably restrict the availability and increase cost of supply. The IA needs to take into account net damage done to 'consumers' who will have not sought advice due to increased

inconvenience or cost, where their beneficiaries have suffered as a result. There appears to be little acknowledgment at all of the interrelationship with the very extensive Law Commission work undertaken on insolvent estates.

- The Board does not appear to have given consideration to the fact that much estate administration of UK based estates is carried out in overseas jurisdictions, particularly for higher value estates. Additional regulatory restrictions or costs imposed in the UK may accelerate this trend, with a number of seriously disadvantageous effects in the UK. These would include disadvantages to the UK economy as a whole, as well as increased difficulties in the control of economic crime, tax evasion and the increase in undesirable tax avoidance. Settlers who arrange for their estates to be administered abroad will also put their inheritors outside the protections of UK regulation.

E felicity.banks@icaew.com

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APPENDIX 1 - THE PRACTICE OF ACCOUNTANCY AND ITS REGULATION

Chartered accountants typically have as their clients businesses and individuals with a sufficient level of wealth and financial complexity to benefit from professional advice on taxation, administration, regulatory requirements, and other matters tangential to their main business activities or personal financial needs. The aim of clients in consulting an accountant is likely to be to ease the achievement of their financial and business objectives less hindered by the complexity of the legal and regulatory environment. Clients typically contact their accountants at least annually, following tax and company filing requirements, and often far more frequently. This distinguishes accountants from lawyers who, for smaller clients at least, may only be consulted occasionally for assistance with specific life events or major transactional needs. The nature of this client relationship results in clients calling their account for advice in many circumstances, not least where they need assistance in ensuring that their will is well written and effective and that their estate is well administered. Such services are a part of accountancy practice, and should not attract additional (and unnecessary) regulatory costs or barriers merely because they also fall within the Board's intended definition of services related to will writing or estate administration.

As part of their wide-ranging and regular client service, chartered accountants will typically, when required, provide the following services:

- Advice on the tax considerations relating to will drafting;
- Preparing relevant HMRC papers in relation to estate administration
- Post death tax and financial planning
- Preparing estate accounts

These services are included within ICAEW's definition of public accountancy practice, when provided by our members in anticipation of reward, together with the preparation of any financial records, returns, statements or information and the provision of consultancy or advice concerning accounting, auditing, insolvency or taxation matters⁶. The activities are specifically included within the Board's list of activities included in ancillary services to will-writing and estate administration, but are already regulated as accountancy services. Besides regulatory requirements broadly equivalent to those imposed on solicitors (such as training, competence and Continuing Professional Development (CPD) requirements; client money and professional indemnity insurance requirements; ethical requirements for integrity and due care; and complaints handling requirements) our practicing members in the UK and EEA are also bound by our practice assurance requirements⁷, which include (besides paper based monitoring) periodic monitoring visits to assess compliance with the practice assurance standards⁸. These include standards on laws, regulations and professional standards; client acceptance and disengagement; competence; and quality control.

Chartered accountants in practice also typically provide their clients with a very wide range of business and financial advice, whether or not covered by our definition of accountancy services. Governmental recognition of this has been confirmed by the support of the Department for Business, Innovation and Skills for the launch of our Business Advice Service⁹. Whether or not our

⁶ See *Council Statement on Engaging in Public Practice*: <http://www.icaew.com/en/members/regulations-standards-and-guidance/practice-management/council-statement-on-public-practice>

⁷ <http://www.icaew.com/en/members/regulations-standards-and-guidance/practice-management/practice-assurance-regulations>

⁸ http://www.icaew.com/~media/Files/Members/Regulations-standards-and-guidance/PA_standards_guidance_final.ashx

⁹ <http://www.businessadviceservice.com/>

members have signed up to provide this particular form of service, they have proven competence in the needs of business – our core syllabus includes examinations in business strategy and in financial management, besides the general financial competence that our members are expected to employ. Though much general business advice may lie outside our definition of accountancy practice, these services will typically be integrated into a general accountancy practice, and so will be implicitly included within the scope of the practice standards. Whether or not this is true in all cases, all our members are bound by our core ethical requirements, our complaints and disciplinary arrangements and our CPD requirements, whatever services they are providing. As part of this continuing client relationship, chartered accountants will on occasion provide:

- Wealth management advice;
- Succession advice, on ways in which businesses can best survive and prosper on transfer to the next generation;
- Advice on legal means to give effect to the intentions of settlors (including advising on instructions to be given to will-writers);
- Providing advice on the administration of the estate.

Accountants who have provided services on income and capital taxation over a number of years are also in the best position of any professional service provider to collect details of the assets and liabilities in an estate.

As noted in our main response, ICAEW's regulation of its members is overseen by the UK Financial Reporting Council (FRC). The FRC has recently undergone a thorough review of its operations, ensuring that its activities are focussed according to the regulatory risks and concerns apparent in our profession. The fact that its focus has increasingly been drawn to larger business engagements, and in particular to the audit of public interest entities, is indicative of the lack of any actual or political concern over the risks to the individual or small business consumers of the services of chartered accountants. The adequacy of the regulatory procedures maintained over such engagements is demonstrated by the lack of proven consumer detriment. Any additional regulatory burdens which are imposed on chartered accountants continuing to provide services in accordance with their existing practice skills and business models would need to have an evidenced net benefit in terms of the regulatory objectives set out in the Act, or risk failing to optimise the public interest or that of consumers.

Accountants are fairly frequently also named by settlors as executors of their estate, following a long association and a high level of personal trust. We consider that as with all other professional services, the level of regulation should follow the regulatory risks. Where professional executors do not have control over estate assets, but restrict themselves to advising family or other lay executors over the completion of probate clearance papers, orderly settlement of estate liabilities and the preparation of estate accounts, then it is not necessary for any regulation, over and above that imposed by ICAEW to be necessary.

APPENDIX 2 - RESEARCH PROPOSALS

There are three principal issues arising as the research appears to have:

- not understood the full nature of the activities that underpin will writing and estate administration;
- not assessed the client profile and the differing risks attached to that market profile;
- not evaluated the regulatory tools at the Board's disposal and their appropriateness to meet the business risk.

As a result proportionality has not been and cannot be assessed properly, and without it, the justification and role of any regulation is highly questionable.

An interim consultation paper that is more comprehensively researched could be produced to address the following:

1. Defining the activity at risk

- Setting out a definition of what the Board understand the activities are which comprise the delivery of will-writing and estate administration
- Giving an analysis of the current activities (the core and so called ancillary services) that are conceived as falling within this definition
- Identifying the professionals/non-professional organisations that typically supply these services
- Identifying the existing protections given to the consumer in the delivery of each of these services.

2. Defining the risk to the client

- Defining the market in terms of size of estate and degree of IHT205 estates
- Setting out the extent that professionals act as executor or as advisor to executor
- Identify if the different tiers of estate tend to command a different type of professional advisor
- Identify the key risks to the consumer and whether these are scalable.

3. Evaluating regulatory tools

- Setting out the regulatory tools and protections that can be applied
- Identifying regulatory approaches applied in other regulated sectors in the UK
- Identifying regulatory approaches applied in similar areas of activity overseas
- Considering proportional deployment of such tools to meet the differing areas of risk in these product areas.

If these areas are addressed and considered, then a far more effective proportionate series of proposals, meeting most of the admittedly conflicting objectives of section 1 of the Legal Services Act can be produced upon which more rational arguments can be applied and moderated.

Features of an emerging paper properly assessing these factors would then include:

- Looking at the risk to consumers for small medium and large estates and whether these need a one size fits all regulation.
- Looking at compensating controls to minimise business risk – eg, if other non-law suppliers have quality assurance mechanisms that can be relied upon instead.

- Introducing a tiered approach to regulation; instead of just the extremes of restricted and non-restricted, interposing middle tiers of light touch and middle touch that may be applied by code and voluntary initiatives instead of direct legislation/regulation.
- Matching the risk approach with that of HMRC – eg IHT205 and IHT400 estates.