



## ICAEW REPRESENTATION

### WILL-WRITING, ESTATE ADMINISTRATION AND PROBATE ACTIVITIES

**Memorandum of comment submitted in November 2011 by ICAEW, in response to the Legal Services Board's Call for Evidence *Investigation into Will-Writing, Estate Administration and Probate Activities* published in September 2011**

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## INTRODUCTION

1. ICAEW welcomes the opportunity to comment on the Call for Evidence Investigation into Will-Writing, Estate Administration and Probate Activities published by the Legal Services Board (the Board) on 5 September 2011, 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 which obliges us to work 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 136,000 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

5. We congratulate the Board on the initiation of its first project to identify potential areas of legal services for consideration for reservation under the Legal Services Act (the Act) or other regulatory reform. We have seen the research on the deficiencies in will writing, and agree that it provides a strong rationale for regulatory action, for the protection of consumers. However, we do not think that the research of itself makes a strong case for reservation under the Act for will writing, nor for reservation or regulation of any of the other services under consideration under this call for evidence.
6. The Act strengthens the regulation of the legal profession, and removes certain professional restrictions which limited the diversity of the provision of legal services. Even in the presence of these restrictions, however, there are areas of need where clients have been and are able to obtain legal services from non-lawyers as well as lawyers. The scope of the Act should not be extended to encompass these areas, unless a clear case can be made, justifying the restriction in free market efficiencies and consumer choice that would be likely to result. This particularly applies to providers who are already adequately regulated by professional bodies or regulatory authorities other than the front line legal services regulators, to whom dual regulation under the Act would result in additional costs. These would inevitably be passed onto their clients and would distort competition by unfairly disadvantaging those suppliers and their clients, without any balancing advantage in consumer protection.
7. For example, many of our members and member firms have provided a wide range of professional services to private clients and small businesses, including trust and estate services, under a system of professional oversight which has not caused significant concern, and therefore no particular pressure for reform. Such lack of concern is a measure of the success of the existing system of professional oversight, not the reverse. If the Board recommends any 'improvements' to the regulatory system, which leads to increased burdens on professional firms (and hence their clients) which are currently adequately regulated, such action needs to be justified in terms of compliance with:

- the principles under which regulatory activities should be proportionate, and targeted only at cases in which action is needed; and
- the regulatory objectives, and in particular those relating to the promotion of consumer interests and promoting competition in the provision of legal services (including those provided by non-lawyers as well as lawyers).

## **RESPONSES TO SPECIFIC POINTS**

### **Will-Writing**

8. Will-writing is a service not generally performed by chartered accountants without specific additional qualifications or membership of more appropriate bodies. For this reason, our responses under this section are mainly taken from our experience generally of professional client relationships and the business environment.
9. The Board should take into account not only the damage that is done to beneficiaries by poorly drafted wills or other inadequate will-writing services, but also by the absence of a will by descendants of the intestate.
10. The Board's fundamental regulatory objectives include those intended to increase access to justice, by the consumers of legal services, and we take this to indicate (among other things) increased access to affordable will-writing services. Any action to increase the barriers to access by new entrants or new professional bodies should be kept to the absolute minimum consistent with the interests of clients. Nor should new requirements be introduced too quickly. Individuals already in this business (and their representative or professional bodies) should have the benefit of adequate transitional arrangements and be able to continue in practice and without any additional costs or restrictions which are not clearly necessary for the protection of consumers.
11. Nor should reservation be introduced, in an effort to address what is clearly an area of considerable concern, when an alternative regulatory solution would be preferable, allowing regulation for suppliers by their current regulators where these exist, without dual regulation. The evidence so far appears to indicate a level of competence which is no better among the existing reserved population of solicitors than it is among other suppliers - which is not a reason to conclude that reservation to lawyers would be in the interest of consumers. Other causes of concern, such as unethical sales practices, loss of wills, or lack of systems of redress could also be dealt with equally well by other systems of regulation. For example, we believe that will-writing carried out within banks would be better dealt with by co-operation or agreement with the FSA over common regulatory outcomes than by requiring banks to set up will-writing ABSs licensed under the Legal Services Act.
12. Were will-writing to become one of the services more frequently provided by our members, in the course of practice, we would require them to be carried out under our normal Code of Ethics, including our fundamental ethical principles. These include:
  - Competence – both initial and continuing, supported by our requirements for Continuing Professional Development;
  - Objectivity – only considerations relevant to the work in hand can be taken into account, which would make inappropriate cross-selling or similar activities count as misconduct;
  - Due care
13. These would become the basis for ensuring an appropriate professional service by our members and those within their firms, to their clients. Although not bound by many of the requirements laid out by the Act, these principles have resulted in professional services to individuals and small businesses as provided by chartered accountants and their firms, which have not led to major political concern, but rather have evolved in the interests of clients and their professional advisers.

## Will-writing - conclusion

14. In short, we suggest that will-writing should, in the future, be limited to firms or individuals who are subject to professional or regulatory requirements which impose standards of competence (both administrative and subject specific), integrity and the availability of redress. We do not consider that reservation under the Act should provide the only method of imposing this regulatory standard, especially where to do so would result in dual regulatory burdens on existing suppliers and their clients.

## Probate Services

15. The universal experience reported to us by our members is that where they already provide taxation services to a client, it would be well within their competence to carry on to complete and file the probate application form. The need to additionally contract the services of a solicitor to complete the reserved portion of the service adds unnecessarily to the expense borne by the client, with no added value.
16. The application for probate clearance marks a stage in the winding up of an estate where the involvement of a professional adviser may be particularly valuable. We are aware that (for example) HMRC value the involvement of a solicitor or professional accountant, in dealing with the inheritance matters, including applications for probate clearance. Clearly the interests of beneficiaries will be equally served by professional comfort that payments from the estate are not being made prematurely.

## Probate Services - conclusion

17. The application for probate clearance is a small but significant element of professional services required around matters of inheritance and succession. If the conclusion of the Board is in favour of increased regulation of estate administration or will-writing, then it might be anomalous to deregulate the probate application services which are part of the whole continuum of professional services in relation to succession planning and administration. However if this does not happen we believe that probate services should no longer be reserved.

## Estate Administration

18. The Board has not yet (to our knowledge) conducted significant research into the specific regulatory problems around estate administration, although at this stage of succession planning and administration both fraud and inefficiency are at their most likely to produce real and immediate loss to beneficiaries. We do not think that it should be considered by itself, as a side product of consideration of will writing, but rather should be part of a much larger project incorporating trust administration. To address such matters on a piecemeal basis is unnecessarily costly to both regulators and regulated, will be confusing and therefore unhelpful to consumers, and builds in unnecessary delay especially where changes to primary legislation are required.
19. Estate management is too closely allied with other trust management and fiduciary duties to be considered by itself. To regulate one without the other would cause consumer confusion, and a risk of public outcry over any future regulatory lack in relation to the areas which have not been addressed. For example, it seems unlikely that consumers will be able to easily distinguish between the administration of will trusts and the estates which set them up. To regulate estate, but not trust, management leaves some even more politically sensitive issues unaddressed, such as maladministration of trusts set up for vulnerable adults. Since these areas tend to be serviced by the same or similar service providers, they should be addressed at the same time in the same regulatory reform.

**20.** In our view, estate management should not be reserved under the Legal Services Act. This is because too much of this work is currently carried out by providers other than lawyers yet reservation under the Act is too focused on lawyers and unsuited to non-lawyers. This would result in the market being too damaged to serve the interests of consumers. The least costly regulatory solution which is effective for the protection of consumers should be used. For existing providers, who are already regulated to a satisfactory standard, this is unlikely to be reservation. To reserve these services would unnecessarily prejudice the consumers who have chosen those providers (as the ultimate bearers of the cost of dual regulation)

#### **Estate Administration – conclusion**

**21.** For these reasons, the whole topic of estate administration should be put on one side, and examined as part of a much larger project, and more clearly taking into account the Board's regulatory objective of promoting competition in legal services provided by both lawyers and non-lawyers, the wider public interest and the regulatory principle of proportionality.

**22.** In our view, consideration of the reform of regulation of estate administration should be deferred, until it can be considered in conjunction with equivalent services in the areas of trust administration and other fiduciary duties carried out by way of business.

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