Enhancing consumer protection, reducing regulatory restrictions: will-writing, probate and estate administration activities

Comments from ACCA
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General comments

1. In July 2003, Sir David Clementi was appointed to carry out an independent review of the regulatory framework for legal services in England and Wales. His terms of reference were:

   - to consider what regulatory framework would best promote competition, innovation and the public and consumer interest in an efficient, effective and independent legal sector;

   - to recommend a framework which will be independent in representing the public and consumer interest, comprehensive, accountable, consistent, flexible, transparent, and *no more restrictive or burdensome than is clearly justified*; and

   - to make recommendations by 31 December 2004[1].

   As acknowledged by the Legal Services Board on its own website, the recommendations of the Clementi Report,[2] in December 2004, included the following:

   - 'Setting up a Legal Services Board - a new legal services regulator to provide consistent oversight regulation of front-line bodies such as the Law Society and the Bar Council'

   - 'Statutory objectives for the Legal Services Board, including promotion of the public and consumer interest'.

   It is in the context of these terms of reference and emerging recommendations that our response below should be considered throughout.

2. The Board describes itself as 'the new, independent body responsible for overseeing the regulation of *lawyers* in England and Wales' (emphasis added). The general functions of the Board are wide-ranging, but are understood to reside within the boundary of 'legal activities'. Legal

[1] Sir David Clementi, 'Report of the Review of the Regulatory Framework for Legal Services in England and Wales', 2004
[2] Ibid

activities are defined in section 12(3) of the Legal Services Act 2007. Although it appears that bringing estate administration activities, for example, within the range of reserved legal activities would, in itself, bring those activities within the definition of 'legal activities', we believe that such activities do not conform to the activities described in section 12(3)(b). Therefore, at best, the reservation of certain estate administration activities would be seen as beyond the spirit of the legislation and, at worst, be open to challenge.

3. ACCA acknowledges the need for greater consumer protection, and is in favour of appropriate regulation of professional services. We also support the Board's aim of delivering 'the regulatory objectives through the principles of better regulation'[3].

4. The overriding obligations of the Board are clearly set out in legislation and acknowledged by the Board. However, the Board states that, in developing its proposed recommendations to the Lord Chancellor, '[o]ut of [the] eight objectives, protecting the interests of consumers had a particular focus'[4]. ACCA would advocate a more balanced regard for the regulatory objectives, and is concerned that improving access to justice and protecting and promoting the public interest have not received the prominence required by the Clementi Report and the Legal Services Act 2007.

5. The cover paper and consultation document cite among the reasons for amending the list of reserved legal activities that '[t]he level of protection for consumers and regulatory obligations for providers within this sector are currently determined by the type of provider delivering the service and not by the risks involved'[5]. However, the fact should not be ignored that, in practice, consumers derive confidence from dealing with well-regulated providers, and they are generally not well-informed about which services are reserved legal activities, and which are not. A well-regulated professional is subject to risk-based regulation, which pays due regard to the services being provided.

6. The executive summary to the provisional report states that '[t]he path laid down by Parliament in the Act is one of liberalisation of the legal services market by breaking the link between professional titles and the ability to

[3] Paragraph 33 of the provisional report
[4] Paragraph 21 of the provisional report
[5] Paragraph 34 of the provisional report

provide the reserved activities'[6]. There appears to be an unsupported assumption that this 'link' significantly impedes liberalisation. The aim of breaking it would be an inappropriate focus for the Board. In any event, inappropriate regulatory measures imposed upon those currently performing will-writing and estate administration services might result in a significant reduction in the number of highly-valued professionals performing that work.

7. The view of the Board with regard to promoting competition is, we believe, inconsistent with the understanding of competition held by the general public. For example, the Board asserts that 'reservation would create a level playing field among all providers thus allowing competition to operate more effectively'[7]. This is confusing the objectives of promoting competition and raising standards. It must be accepted that these objectives often conflict, and must be brought into balance in the public interest.

8. Other assertions in this area appear ill-founded, for example:

   '… as consumers receive higher quality services *at more competitive prices* their confidence will increase, resulting in greater numbers of purchases and growth of the market.'[8] (emphasis added)

   The Board has provided no evidence that increased regulation will result in more competitive prices. With this in mind, we draw the attention of the Board to ACCA's research, which suggests that in excess of 1,600 of its members have provided core estate administration services in recent years and, of course, there are many more accountants and other non-legal professionals who have supported their clients in this way.

   This data is expanded upon later in this consultation response. It demonstrates how a great many practitioners – many of them small practitioners in rural towns – would be required to either refrain from providing this service or be required to pass on additional costs of regulation to their clients.

[6] Paragraph 4 of the provisional report
[7] Paragraph 7 of the provisional report
[8] Paragraph 6 of the provisional report

Scope of reservation

9. The proposed scope of the reservation of estate administration activities would be likely to have a detrimental impact on the number of accountants (and other regulated professionals) who would be able to provide a much valued service to their clients for a reasonable fee. This problem is not eased by the restriction of the scope noted in paragraph 27 of the provisional report, which states: 'we continue to support individuals being able to act for themselves and also to provide free advice to help others'. This might result in a movement by consumers away from professionals to seek the involvement and advice of those who would not charge a fee. Apart from the risk that this could motivate somewhat opaque pricing structures (charging 'through the back door'), it is also likely to result in 'professional' services being provided by individuals who do not hold professional indemnity insurance cover and whom are not bound by a code of ethics.

10. As we have made clear in the past, it is in the public interest to exempt appropriately regulated accountants (and other professionals) from the full force of regulatory oversight of the Board. It is clear that, in the case of accountants, such oversight by the Board would overlap with oversight from the Financial Reporting Council (FRC)[9]. Exemption of appropriately regulated professionals (under the provisions of schedule 3 to the Legal Services Act, paragraph 9) would promote a stable supply of well-regulated services, while encouraging competition and an independent, strong, diverse and effective legal profession. Such exemption might, quite reasonably, require exempt professionals to be subject to a set of regulations issued by their professional bodies and approved by the Board.

[9] The FRC exercises oversight of ACCA, and other accountancy bodies, in respect of their activities as Recognised Supervisory Bodies (RSBs) and Recognised Qualifying Bodies (RQBs) in respect of audit. In doing so, ACCA's regulatory processes and procedures are reviewed annually, as are any proposed changes to ACCA's regulations in respect of audit services and general practice. Reviews of regulatory systems inevitably provide assurance regarding non-audit services also. The FRC has recently proposed formalising arrangements (by way of a memorandum of understanding) to permit it to focus on non-audit services as well as audit work.

11. We should like to make it absolutely clear that ACCA is in favour of the regulation of many will-writing and estate administration activities. However, the recommendations of the Board, if accepted by the Lord Chancellor, would risk many professionals (perhaps most notably accountants) becoming subject to unreasonable and unnecessary duplication of regulatory oversight, without the exemption proposed above. ACCA would have to carefully consider the public value in applying to be an approved regulator, together with the implications of its authorised members providing reserved legal activities within Alternative Business Structures. It would be very likely that, in future, fewer accountants would provide estate administration services, which would be to the detriment of consumer choice, competition and quality.

Research performed by ACCA

12. ACCA has conducted research to establish how many of its members in practice have recently performed core estate administration services. Members were asked the following question:

    In the past five years, have you acted as an executor of a deceased person's estate with your firm charging for your services?

    The results of the survey are published on the ACCA website at http://www.accaglobal.com/en/member/practising-information/ea-survey.html

13. 871 responses were received, and almost one in ten (9.3%) said that they had acted as executor for a client in recent years. If this result is extrapolated to relate to all ACCA members in practice in England and Wales, we might conservatively estimate that 1,600 members and their clients would be affected by the Board's proposals.

14. Of those who answered 'no' to the question above, many pointed out that they are currently named as executor in clients' wills.

15. Respondents repeatedly mentioned the benefits of the accountant's in-depth knowledge of the client, and the fact that the accountant is seen as a 'trusted adviser', due to the regular contact between them. Concern was expressed that, if accountants were no longer able to perform this work (or if regulatory costs made the work more expensive for clients), members of

the public might be discouraged from seeking any professional help, and this would not be in the public interest.

16. It was also posited that, if accountants could not act as executor for a deceased person's estate, lawyers might be inclined not to involve the accountant in any aspect of the estate administration. This would be a loss to the estate, and may present a range of risks.

17. Respondents frequently mentioned issues of choice, quality and cost in their responses.

18. We believe that the following comments from respondents illustrate well the feelings of many ACCA members in practice:

'I believe it is completely inappropriate for this type of work to be reserved for legal practitioners. We are ideally placed to carry out this work and have a far better working knowledge of a deceased client's affairs than an unrelated lawyer. We are also named as professional executors in a large number of wills and I believe our clients will be dismayed if we are not able to fully accept the appointment.'

'I see no point in restricting this service to the legal profession. Restrict it to relevantly regulated professionals by all means but surely the requirements of the work are equally the province of a qualified accountant as that of a solicitor.'

Probate activities

19. The provisional report appears unclear with regard to the reservation of probate activities. Probate activities would appear to be ancillary activities with the definition: 'the administration of an estate of a deceased person and legal activities provided ancillary to the administration of an estate'[10]. We should, therefore, not expect probate activities to be a separate reserved activity also.

20. The picture is further obscured by the following paragraph in the provisional report:

[10] Paragraph 22 ii of the provisional report

‘We think it likely that most consumers would view preparing the papers on which to found or oppose a grant of probate as a step within the wider process of administering an estate and would therefore wish to use a single provider to deal with the whole process … our preference, is that any regulator designated to authorise providers to carry out estate administration activities should also be designated to authorise providers to carry out probate activities – and vice versa. Due to the close alignment of the activities it is also our preference, as set out [in] the draft guidance that accompanies this Provisional Report, that each regulator has a single set of regulatory arrangements to cover both activities.’[11]

[11] Paragraph 31 of the provisional report

Specific questions

Arising from the provisional report

Question 1: Do you agree with the scope of the proposed reserved will writing activities and estate administration activities? Can the scenarios provided in Annex 1 of the Provisional Report be caught within the scope of the proposed new reservations? What are the likely impacts of the scope of the proposed activities as described?

21. We support the principles set out in paragraph 3 of Annex 1 (described as 'outcomes' in paragraph 32), which should underpin the policies and procedures of the Board. We also support the focus on outcomes and risk-based regulation, mentioned in paragraph 6 of Annex 1, which should have due regard for evidence of past failures in the provision of estate administration services.

22. We agree with the proposed scope of reserved activities. In particular, we believe that the need to reserve the core activity of will-writing is clear, in order to exclude those who may have insufficient knowledge of drafting. Generally, we agree with the Board that ancillary services, such as advising on the preparation of a will, obtaining background information, and tax-planning, do not need to be reserved activities where they are not performed in conjunction with the core activity. Presumably, the rationale for this is that professionals offering these services are usually well regulated, and have good relationships with lawyers (who carry out the core activity).

23. Estate administration is very different in nature and circumstances. At a time when the bereaved are at their most vulnerable, they must have access to a trusted adviser with whom they feel secure. The core activity of estate administration is often undertaken by accountants who are already subject to effective, proportionate oversight by the FRC.

24. We have concerns around the definition of 'ancillary' activities. However, of greater concern is the lack of exemption of well-regulated, talented professionals whose professional bodies are already subject to effective oversight. We are not aware of any proposals from the Board concerning how well-regulated professionals, such as accountants, may be exempted

from the full force of the Board's oversight – perhaps by way of a single set of regulations, as proposed in paragraph 10 above.

25. The likely impact of the scope of the proposed activities, without appropriate exemption, would be to impose a disproportionate regulatory burden on some professional bodies that will be obliged to apply to become approved regulators. Failure of the accountancy bodies, for example, to become approved regulators would result in a significant number of accountants being unable to act as executors of deceased persons' estates. This would be a great loss to consumers, particularly in rural communities where there are few professional firms. This is in direct conflict with the aims of the Clementi review.

26. The difficulties inherent in defining the scope of the proposed reserved activities are evident from the attempt to define the activities in paragraph 22 and also the following statement in paragraph 23 of the provisional report:

    'The Ministry of Justice will be responsible for how any recommendation that the LSB may make will be implemented should the Lord Chancellor accept the recommendation. This includes the definitions of the activities within the relevant statutory instrument.'

Question 2: What are your views on the options for implementation that we have described?

27. As we have already attempted to demonstrate in this response paper, we support the proposed reservation of core will-writing and estate administration activities. However, proportionate regulation is essential, and this would require appropriate exemptions for those professionals who are already appropriately regulated and subject to oversight, for example, by the FRC or the Financial Services Authority (FSA).

28. Reliance on voluntary schemes is flawed, although we would challenge the clarity of the Board's argument in this respect. The proposed report says 'the existing trade body schemes can still only claim partial coverage of the market. This results in a market where only some providers must bear a regulatory burden, thus distorting competition and also creating a lack of transparency for consumers regarding the protections they are entitled to'[12].

[12] Paragraph 50 of the provisional report

In fact, the use of voluntary schemes is a result of a free market in which members of such schemes perceive an opportunity to differentiate themselves from other players in the market. However, we believe that there is a strong argument for proportionate intervention, in order to improve transparency. The regulation of will-writing and estate administration provides consumer protection, because it removes from the market all those who have not submitted themselves to regulation of any kind.

29. We are not persuaded that consumer education is a futile pursuit. While it would be ambitious to rely on consumer education as the sole means of addressing consumer detriment, we believe that the Board has a role to play in this area.

30. Paragraph 7 of the draft report places a great deal of emphasis on creating 'a level playing field among all providers', although ACCA believes that the main driver throughout the process of shaping the regulatory structure should be upholding the public interest. In connection with this, we are not aware of any evidence to support the claim that '[l]egal services regulated providers are currently subject to the most stringent regulation to be found within the market for these activities'[13].

31. Turning specifically to the four implementation options explained on pages 29 to 32, we have nothing to add to the draft report, except to note that option 3 appears to have been ruled out too readily.

Question 3: Do you agree with the initial assessment of the consequential amendments that would likely be needed? Are there any other consequential amendments you consider would be necessary?

32. We do not propose to comment in detail on the review of the consequential changes to legislation at this stage. However, we note that the necessary amendment to Schedule 3 is only stated in respect of will-writing activities, and not in respect of estate administration. As we have made clear in this response paper, we firmly believe that certain professionals, who are already appropriately regulated and do not present a risk to consumer protection, should be exempted from oversight by the Board, particularly in respect of estate administration activities.

[13] Paragraph 7 of the provisional report

33. It appears, from appendix 2 to the provisional report, that estate administration activities (unlike will-writing) are to be incorporated into the list of reserved legal activities by amending the definition of 'probate activities', rather than by way of a separate activity. This would not appear to be an appropriate evolution of the list of reserved legal activities. It might be argued that the definition of 'probate activities' is already difficult to understand as a reserved legal activity, and that it should be 'estate administration activities' that are reserved, with probate being included as an ancillary activity.

Question 4: *To prospective approved regulators:* what legislative changes do you think will be required in order to implement regulatory arrangements for these activities (in line with the draft section 162 guidance)?

34. We have no comments directly in response to this question. However, we should like to emphasise that we are opposed to the proposed second tier of regulatory oversight that the Board would impose on a large number of well-regulated professionals currently performing estate administration activities for their clients.

Arising from the draft guidance

Question 5: *To prospective approved regulators:* Will this guidance help you to develop proportionate and targeted regulation for providers offering will-writing and or estate administration activities? What challenges do you think that you will face?

35. ACCA already has robust systems for regulating members and protecting consumers while, at all times, holding the public interest paramount. ACCA is also subject to independent oversight from the FRC, and is only concerned in its members being able to provide estate administration services, and not the core activity of will-writing.

36. Therefore, there is no public benefit from ACCA being subject to the full force of oversight from the Board, as this would create unnecessary regulatory overlap at the level of oversight. We note the contents of paragraphs 95 and 96 of the guidance, and consider it inappropriate that the Board should place the responsibility of addressing regulatory overlap wholly on potential approved regulators when the Board is best placed to

avoid unnecessary overlap by recognising the adequacy of current arrangements over appropriately regulated professionals.

37. More generally, the guidance is unhelpful because it is not set out in a concise, user-friendly manner. While we support the focus on outcomes, this is undermined in paragraph 20, which states 'we expect the focus to be on protecting and promoting the interests of consumers'. ACCA believe that the public interest is paramount, and the guidance is lacking in this respect. This weakness remains in paragraph 21, which deals wholly with 'consumer outcomes', and the reference to 'the broader public interest' in paragraph 24 does not appear to fit comfortably with the consumer focus.

38. Paragraph 30 states:

    'We do not anticipate being able to recommend designation where an application proposes to carry across existing arrangements and rule books designed for a different activity, range of activities or for holding a professional title. It must be demonstrated that all arrangements are appropriate, targeted at and proportionate for the activity(ies) being applied for and the associated risks'.

    This appears inconsistent with an outcomes-focused approach. In the case of core estate administration services, for example, fundamental ethical principles, as promoted by many professional bodies, are effective when combined with the consumer protection of professional indemnity insurance and regulations concerning the handling of clients' assets, complaints and disciplinary arrangements, etc.

39. The outcomes-focused approach appears to place a great deal of importance upon restitution on behalf of consumers. Best regulatory practice holds the public interest paramount. Therefore, where necessary, cases are brought to a Disciplinary or Appeal Committee by ACCA, and not by a complainant. Therefore, costs to the complainant are not an issue as foreseen in paragraph 46, and paragraphs 46 and 47 are wholly inappropriate – particularly with regard to ACCA and the other Chartered accountancy bodies.

Arising from the impact assessment

Question 6: Do you agree that having mandatory regulation for all firms in the market will improve consumer confidence?

40. As we have made clear, we support moves to enhance consumer protection by regulating the core activities of will-writing and estate administration. Mandatory regulation for all firms performing these core activities may improve consumer confidence, although many consumers might be unaware that these activities are currently unregulated in respect of many providers.

41. The Board must recognise that appropriate and effective regulation of many professionals providing these services already exists and, while consumer confidence in well-regulated professionals is important, the standard of service and effectiveness of regulation are *more* important. In addition, consumers will be confused if they have embarked on an estate-planning exercise with their accountant, but subsequently discover that the accountant cannot take up their appointment as executor. The client may feel coerced into nominating a lawyer to act as executor. This is likely to be difficult for the client to understand.

Question 7: What business impacts (both positive and negative) do you envisage will occur with the proposed reservation of will-writing and estate administration? How will any such impacts affect your business?

42. The impact assessment is extremely voluminous and much of its content has been the subject of previous consultations and responses. Its format does not aid objective assessment or comparability. For example, on page 97, accountants are described as 'mainly self-regulated'. ACCA is already an approved regulator for probate services and, in order to achieve this approval has demonstrated the independence of its regulatory and representative functions. (See also paragraph 10 above in respect of FRC oversight.)

43. Costs of regulation are inevitable, and the accountancy bodies (their members and their clients) already bear high costs of regulation, because the professional bodies perform their regulatory functions diligently, effectively and in the public interest. The excessive costs of regulatory overlap have been downplayed throughout the consultation and the impact assessment. On page 98, the impact assessment says the following:

'Dual-regulation could in theory create significant additional costs as a result of being subject to multiple sets of regulatory obligations, information costs and Ombudsman services. The proportionality of this is this is [sic] one of the biggest fears put to us by these providers on consultation. However, we expect these costs to be minimal.'

There is no justification for the final sentence, particularly as the Board appears to take no responsibility for minimising these costs. In our opinion, the Board should strive to avoid dual-regulation costs by exempting certain professionals and their professional bodies from oversight by the Board under certain circumstances. This approach would be consistent with that which the Legal Services Act adopts in respect of approved regulators' responsibilities. This is set out on page 98 of the impact assessment, which continues as follows:

'The Legal Services Act (at sections 52 and 54) provides statutory requirements for approved legal services regulators to demonstrate how they will avoid regulatory overlap and conflict if they propose to authorise providers who are also overseen by regulators in a different sector… In order to approve any body them [sic] to regulate these activities, we require them to must [sic] have identified any conflicts and unnecessary duplication with other regulators' arrangements and taken the necessary steps to address the issues. Therefore, additional obligations should only exist where it cannot be demonstrated that regulation of a provider in their home sector adequately addresses risks identified in relation to these activities and are targeted at proportionately filing [sic] the gaps.'

44. On page 99, the impact assessment says the following:

'Solicitors are clearly dominant in the market and comprise 86 per cent of estate and administration services purchased. The number of non-solicitors such as will-writers, accountants, banks and trust corporations who administer estates comprise a comparatively small part of the overall market. Therefore, the extension of reservation would not increase regulatory costs for a majority [of] firms as solicitors are already regulated as legal services providers and is likely to lower costs for low risk providers.'

It continues:

'Only a small minority of firms who carried out probate/estate administration practices were wholly outside the scope of any regulation, including voluntary codes and membership of professional bodies. It is this group that most of the impact(s) of reservation is expected to fall on. According to *YouGov* research, the estate administration market is made up of 86 per cent of solicitors and 14 per cent of non-solicitors. If around half of the non solicitors are wholly outside the scope of regulation, then about 7 per cent of firms (mainly independent estate administration companies and trust corporations) would be the primary firms affected by the extension of reservation to cover all estate administration activities.'

We are pleased to see the acknowledgement that only the 7 percent of firms that are 'wholly outside the scope of regulation' would be the primary focus of the extension of regulation. However, the benefit of regulating 7 percent of firms, while important, must justify the costs. If 50 percent of the non-solicitor firms are already appropriately regulated, the reservation proposals, as they stand, would disproportionately disadvantage professionals such as accountants, their clients and the general public.

Arising from the equalities impact assessment

Question 8: We are keen to understand the potential impacts of our proposals on equalities. Do you envisage any positive or negative impacts on equalities for either consumers and/or providers of will-writing and estate administration activities? Please provide details including any evidence that you are aware of?

45. We have no comments in response to this particular question. However, we believe that legal professional privilege should be extended to cover authorised persons in the proposed reserved areas. It makes no sense to consumers that it should cover services by lawyers, but not the same services performed by other professionals. Since the proposed newly reserved activities should only be conducted by persons engaged in regulated professions, this should be extended.

Question 9: Do you envisage any specific issues arising from the proposals to impact negatively on consumers at risk of being vulnerable? Would any of the proposals actually increase their risk of becoming vulnerable?

46. We have no comments in response to this particular question.

Concluding remarks

47. The report to the Lord Chancellor describes the Board's proposals as 'solidly built upon a foundation of comprehensive evidence and views from an array of stakeholders' and 'made in the wake of a full consultation'. However, to our knowledge, there has been no direct consultation with regulators providing oversight in other professions. We believe that there is a need for discussion between the Board and other bodies with regulatory oversight responsibilities, such as the FRC, the FSA and the Department for Business, Innovation & Skills. If, in fact, direct consultation has already taken place (or if it is proposed for the near future), we should be grateful to receive the relevant information, including a record of the outcome.

48. We note that the Board considers 'regulation is primarily needed to protect consumers against the risks in the access and control of the estate assets'[14]. We believe that the greatest risk in respect of estate administration is related to fraud. Fundamentally, we believe that the current proposals of the Board will impede the ability of well-regulated accountants to perform core estate administration activities. This presents a real risk that consumers will turn to unremunerated, unregulated individuals who lack ethical training and are not bound by ethical codes or regulations requiring professional indemnity or fidelity guarantee insurance.

49. Estate administration does not require high levels of specialist knowledge, although integrity and professionalism are prerequisites. Honesty cannot be completely achieved by any regulatory framework. However, professional bodies have codes of ethics and ethical training that their members must adopt.

50. ACCA is an approved regulator for probate services. Currently many accountants perform much of the work required in order to obtain probate, but are not authorised to prepare the papers on which to found or oppose a

[14] Paragraph 24 of the provisional report

grant of probate or letters of administration. We are concerned that an unintended consequence of the Board's proposals would be to prevent accountants who obtain authorisation for probate work from performing inheritance tax calculations, for example, because these would then be services ancillary to estate administration provided with the core activity of seeking probate. Therefore, it will be necessary to make clear that a probate application falls outside the definition of 'core estate administration activity'.

51. Similarly, an Alternative Business Structure might obviously contain a lawyer authorised for core estate administration activities and an accountant specialising in inheritance tax. It is assumed that, in such a firm, the inheritance tax work would be deemed to be ancillary to the estate administration for a particular client. Therefore, the accountant would be unable to perform the inheritance tax work without being authorised by an approved regulator. This would appear to defeat the purpose of Alternative Business Structures to a great extent, and so be contrary to the recommendations of the Clementi Review.

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