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

Comments from ACCA
July 2012

ACCA (the Association of Chartered Certified Accountants) is the global body for professional accountants. We aim to offer business-relevant, first-choice qualifications to people of application, ability and ambition around the world who seek a rewarding career in accountancy, finance and management.

Founded in 1904, ACCA has consistently held unique core values: **opportunity, diversity, innovation, integrity** and **accountability**. We believe that accountants bring value to economies in all stages of development, and we support our 154,000 members and 432,000 students throughout their careers, providing services through a network of more than 80 offices and centres.

www.accaglobal.com

General comments

We note that the Legal Services Board ('the Board') has conducted a section 24 investigation into the activities of will-writing, probate and estate administration, with a focus on areas in which consumers are lacking adequate protection. Members of ACCA provide some of the services that are currently being considered for reservation, and ACCA supports the Board's investigation. ACCA has a view to the public interest in everything that it does but, beyond that, seeks to provide public value in participating in consultations intended to enhance consumer protection, the regulatory objectives of the Legal Services Act 2007, and the principles of better regulation.

Therefore, in responding to this consultation document, the underlying objectives of ACCA are aligned with those of the Board, although we do not reach the same conclusions. The impact assessment issued with the consultation document provides a useful basis for our response, as it assists with visualising four discreet options. However, ACCA would advocate a hybrid solution – one not acknowledged within the consultation document. But first, we should state our agreement to the Board's approach of focusing its recommendations on two specific areas, namely:

(i) the preparation and drafting of a will and all ancillary legal activities, and

(ii) the administration of an estate of a deceased person (including the preparation of the papers on which to found or oppose the grant of probate or letters of administration) and all ancillary legal activities.

There would appear to be significant merit in regarding probate services as part of the service of estate administration. However, we believe that there is also considerable merit in allowing professionals who are already adequately regulated (such as members of the chartered accountancy bodies) to be exempt from regulation by the Board in respect of services ancillary to will-writing and estate administration. This should include the preparation and submission of papers on which to found or oppose the grant of probate or letters of administration. We say more about this under question 2 below.

We have some concern that the consultation paper throughout fails to acknowledge some significant differences between the ways in which accountants and lawyers are regulated. Also, some of the research conducted

would appear to suggest a misunderstanding of the nature of work of many accountants. This work may arise out of a close, ongoing relationship between accountants and their clients. In contrast, solicitors are more often engaged by consumers in respect of one-off assignments.

We acknowledge particularly the importance of improving the quality of will-writing, and note that this is already a reserved legal activity in Scotland. Further, we would support measures that might encourage consumers to engage competent professionals to provide a will-writing service, as the process of estate administration may be more complicated in cases of intestacy. Therefore, we support the proposal to make will-writing a reserved legal activity. However, the consultation document proposes to reserve legal activities ancillary to will-writing also. There is a danger that such a course of action would lead to large amounts of work traditionally performed by accountants becoming reserved legal activities, resulting in unreasonable and unnecessary costs to consumers and others, as well as a restriction in the market for such services.

This would not be in the public interest, and we do not believe that this is intended within the Board's proposals. This risk of disproportionate regulation may be avoided in one of two ways:

(i) by making clear that legal services ancillary to will-writing will only be reserved where they are provided in conjunction with the core will-writing service

(ii) by making accountants who are appropriately regulated exempt persons in respect of will-writing and ancillary services.

Option (i) presents significant problems with regard to drafting definitions of core will-writing activities and ancillary will-writing activities. Therefore, if it is decided to reserve will-writing services at all, we strongly recommend option (ii), and we believe that it would best serve to promote the regulatory objectives set out in section 1 of the Legal Services Act 2007.

Specific questions

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

It appears, from the consultation document, that the Board has made great effort to accumulate evidence, and we would be reluctant to suggest any further sources of information. However, we have concerns regarding the quality and interpretation of the evidence gathered. For example, research appears to have been conducted without a clearly understood definition of 'estate administration'.

From the research conducted, we would urge the Board to pay particular attention to those areas that indicate that those already subject to legal services regulation do not appear to be giving a quality service. For example, one third of probate applications fail.[1] This does not support the case for extending reservation to areas such as estate administration, but would suggest that an initial and proportionate response to the research would be to improve the quality of regulation within the current scope of reserved legal activities.

An important area in which the research conducted is lacking concerns the extent to which the services of accountants in areas that may be considered ancillary to will-writing and estate administration are valued by their clients.

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?

We should like to make it clear that, in the light of the evidence cited, we strongly support the intention of the Board to strengthen consumer protection in respect of will-writing and estate administration services. However, the public interest is undoubtedly best served by balancing the level of protection with cost to the consumer and access to these services. Consumers often have a close, on-going relationship with their accountants and, in many cases, the sound knowledge of the client that the accountant acquires is highly valued.

[1] The claim on page 85 of the consultation cites the MoJ 2004 survey, but the Consumer Panel's 2012 report on 'Probate and estate administration' would suggest that the situation has not improved.

Consumers currently have access to a wide range of professional and well-regulated services from their accountants. If accountants were unable to provide those services, those consumers might not seek any professional help at all.

Among the range of services that accountants provide are those leading up to the preparation and filing of documents on which an application for probate is founded. It may be vehemently argued that accountants are best qualified to perform this work, even though they are not permitted to submit the forms for which they have collated the relevant information. The knowledge and experience of accountants would strongly suggest that they have the competence to provide probate services in their entirety, and that probate services should not be a reserved legal activity when performed by suitably regulated accountants. Indeed, it is acknowledged in paragraph 65 of the consultation document that 'in most cases, this should be a fairly straightforward process'. The argument is strengthened by the evidence mentioned in the consultation document, which might be interpreted to imply that too many probate applications fail because lawyers fail to appreciate the importance of compiling and filing forms for which they have not been involved in collating the information.[2]

We firmly believe that, wherever professionals are subject to regulation by their professional body, and that regulation conforms with the principles of better regulation, and is subject to appropriate oversight, it is not necessary (and is, in fact, counterproductive) for them to be regulated by an approved regulator subject to oversight by the Board. We note that this would also appear to be the view of the Legal Services Consumer Panel.[3]

Clearly, there is an imposing argument against oversight of the regulation of accountancy services by a legal services regulator. This would neither replace nor enhance the standard of regulation in those areas. In fact, duplication of regulation gives rise to the risk of unnecessary complication, unreasonable cost, and even conflict between lead regulators. We should urge the Board not to consider overseeing the regulation of a wide range of accountancy services without first consulting the Financial Reporting Council ('FRC') and the Department for Business Innovation and Skills ('BIS').

---

[2] See pages 18 and 85 of the consultation document.
[3] Legal Services Consumer Panel, 'Probate and estate administration', March 2012, p. 21

It is important that measures taken to protect the public in the area of estate administration are proportionate, and we should like to highlight the statement in paragraph 49 of the consultation document that 'there is no strong evidence to suggest that there is wide incidence of technical errors causing detriment'. We acknowledge that certain aspects of estate administration may provide opportunity for fraud, and this appears to be the main case for making estate administration a reserved legal activity. However, it is questionable whether extended regulatory oversight would have an impact on incidences of fraud. We believe that this is best dealt with by decisive action through the courts.

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?

We note that, if the range of reserved legal activities is extended, existing legal services regulators will not automatically be recommended for designation as approved regulators in respect of the newly reserved activities. If the tests to be applied are to be robust and effective, this would give rise to a significant amount of work for the Legal Services Board soon after it starts to receive applications. The workload of the LSB would be more realistic if existing standards of regulation were significantly improved in the first instance.

The regulatory approach set out in the consultation document is very familiar to ACCA (and the other chartered accountancy bodies). ACCA's approach to regulation is outcomes-driven and risk-based, and has been adapted and refined over the years. The list of regulatory features in paragraph 123 would be supported by ACCA, as they all serve the public interest. However, we note that the requirement for professional indemnity insurance does not adequately address the issue of fraud in respect of estate administration for example. Practising members of ACCA are required to hold fidelity guarantee insurance that will provide cover in respect of acts of fraud. Neither does the list of features mention the need, on occasions, for the removal of authorisation to perform certain activities, in order to protect the public.

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?

ACCA believes that the benefits of performing such tests would be outweighed by the considerable costs of performing them – costs that approved regulators would be obliged to pass on to their members and to consumers. It is clear to members of ACCA who wish to apply for practising certificates that they must meet 'fit and proper' criteria, and if they dishonestly claim to do so, they risk effective disciplinary action. This approach meets the public interest test with due regard for proportionality. We also believe that, if any profession felt it necessary to routinely carry out criminal record checks on its members, this would, paradoxically, undermine confidence in the profession.

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?

ACCA believes that its regulations in respect of the holding of clients' money provide suitable protection for consumers. Many accountants do not hold significant amounts of clients' money. However, in some cases (such as insolvency work), it is possible for large sums to pass through client accounts, and ACCA's regulations provide for these situations also. Solicitors also have strict client account rules, albeit different to those of ACCA (and the other chartered accountancy bodies). There is no necessity to align these two sets of rules, and neither is there any benefit from bringing ACCA's client money regulations within the oversight of the Board.

Client money regulations should be viewed in conjunction with compensation requirements and, in the case of ACCA, fidelity guarantee insurance requirements. With this in mind, we see no reason to explore potentially complicated and expensive arrangements for holding clients' money outside of the firm.

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 this could work in practice?

Clearly, professionals authorised to provide legal services are required to meet the education and training requirements of their professional bodies, including continuing professional development. How those professionals control the quality of work performed within their firms is a matter of quality assurance and professional ethics that safeguard standards of competence and diligence.

This is certainly true of members of ACCA and the other chartered accountancy bodies. These bodies achieve the desired outcomes though a combination of technical and ethical standards and effective, risk-based monitoring. These regulatory procedures cover all areas of practice, including those that may be regarded as services ancillary to will-writing and estate administration.

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?

We agree that the objectives of this consultation process in respect of will-writing are best met by designating will-writing a reserved legal activity. However, this is not necessarily the case in respect of estate administration activities. Certainly, we believe that services ancillary to will-writing and estate administration should not be reserved where they are provided separately from the core activity (for example, by appropriately regulated accountants).

As paragraph 170 of the consultation document highlights, the reserved activity of probate is defined narrowly, and there is no confusion concerning the work that is reserved and that which may be performed (and is often performed) by other professionals, such as accountants. This gives a clear indication that will-writing and estate administration may also be narrowly defined, in order to protect consumers of those core services. However, we acknowledge that inefficiencies are apparent in respect of the division of probate related services. Therefore, if it is decided to reserve ancillary services to will-writing and estate administration, it is essential that members of the chartered accountancy bodies are exempted from oversight by the Board. This should include all core

and ancillary services, including the preparation of papers on which to found or oppose the grant of probate or letters of administration, and we should encourage the Board to discuss this matter thoroughly with the chartered accountancy bodies, in order to gain a better understanding of the activities of accountants and how they are regulated.

We believe that any research and consultation concerning the regulation of legal activities in relation to trusts and powers of attorney should be deferred until the regulatory principles arising out of the current consultation have been established.

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?

We believe that the public is better protected when they are made aware of the advantages of procuring legal services from regulated providers. Therefore, the Board has a responsibility to recognise and act upon opportunities to inform the general public about the role of the Board and the approved regulators. Although this course of action has been acknowledged in the draft impact assessment, we believe that it has not been given sufficient prominence, and could, in fact, form part of a hybrid solution.

We support the Board's intention not to interfere with consumers' choice of whether or not to seek professional assistance. However, available information concerning the benefits of engaging a professional should assist consumers in exercising that choice. Therefore, we support the Board's approach in respect of individuals performing their own will-writing or estate administration, or providing free advice in a personal capacity. We also support the proposed approach in respect of the tools used to provide these legal services, including 'do-it-yourself' tools.

However, we must reiterate our position – that professionals (including members of ACCA) who are adequately regulated should be exempt from oversight by the Board. If the Board concludes that it is not possible to achieve this within the requirements of the Legal Services Act, then it would be essential to ensure that ancillary services provided separately from the core will-

writing and estate administration services do not fall within the scope of the reserved activities.

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?

In its report on 'Probate and estate administration', published in March 2012, the Legal Services Consumer Panel stated that '… where non legal businesses can demonstrate 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 market.'[4] The chartered accountancy bodies are already subject to oversight by the FRC. This includes oversight of general practice activities, and these may include activities considered to be ancillary to will-writing and estate administration.

The current regulatory oversight arrangements in respect of the chartered accountancy bodies are effective, well-versed and respected. Any potential for regulatory conflict risks serious impediment to effective oversight as well as potential escalation of costs to be passed on to consumers. Even if the risk of regulatory conflict may be avoided, any regulatory overlap would be clearly contrary to the principles of proportionate and targeted regulation. The cost implications are discussed further under question 11 below.

We have set out already how these risks might be removed. To avoid complicated and possibly ineffective definitions of 'ancillary service' (and so differentiate them from the core services), we would urge the Board instead to seek a means of establishing a general principle to avoid regulatory overlap. Such a general principle should ensure that activities already subject to effective oversight should be exempt from oversight by the Board for competent professionals providing those services.

[4] See http://www.legalservicesconsumerpanel.org.uk/publications/consultation_responses/documents/2012-03-19_LSB_PEAFinal.pdf, paragraph 5.14

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

We note that the definitions of 'probate services' and 'estate administration' will have an impact on professional privilege with regard to section 190. This adds weight to the argument for a definition of 'estate administration' that should not be unduly complicated. This, in turn, would imply that the preferred means of avoiding duplication of regulatory oversight (and all the attendant costs and risks) would be to exempt those professionals, such as accountants, who are already appropriately regulated.

The question of whether professional privilege should then extend to those other professionals is one to be considered separately, with regard to competitive equality but, more importantly, with a view to the public interest.

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?

Although various options are included within the impact assessment, we believe that there are several potential impacts that have not been considered. In particular, we believe that the detrimental impact of dual regulation should not be underestimated. There is also a potential cost to consumers that might result from a restricted market for will-writing and estate administration services. This refers not only to the expense of acquiring professional services, but also the potential cost of not seeking those professional services.

Accountants often have close relationships with their clients whereby they have provided a wide range of services over a significant period of time. In addition to what might be termed 'mainstream accounting services' (or even within this category), there might be services that are deemed to be ancillary to will-writing or estate administration, and clients value the diversity of providers of these services. The nature of the relationship between the accountant and his client

means that it would not be exceptional for the client to call upon their account for a level of assurance that their will is effective or that their estate is being well administered. Therefore, such services are a traditional part of accountancy practice, and any additional regulatory burden will have a direct cost to the consumer, and should be resisted.

We suggest that options 1 to 3 in the impact assessment do not necessarily stand apart from each other, and that a hybrid solution may be the optimum. In order to establish such a solution, the approach might be to consider the options in reverse order. That is to say, there are benefits to option 3 but, to the extent that option 3 is inadequate, options 2 and 1 should be considered.

Paragraph 108 of the consultation document states: '… we consider that the starting point for intervention must be the reform of existing legal services regulation that applies to the majority of providers in these markets.' We strongly agree that such focus on existing regulation should be the starting point, such that enhanced standards within (and reputation of) the legal profession must, inevitably, drive up standards among unregulated providers.

Paragraph 198 of the consultation document states, somewhat casually, that '… reserving activities would not create a solicitor monopoly or restrict the delivery of services to existing authorised persons. Any organisation may be authorised if they meet the criteria of an appropriately designated approved regulator'. This ignores the fact that the costs to a professional body of achieving approved regulator status and submitting itself to oversight by the Board may be prohibitively high in relation to the number of practitioners that would seek authorisation. Nevertheless, if those practitioners were, as a result, prevented from providing the services in question, there would be a significant restriction in consumer choice and reduced diversity of supply.

The cost of regulating members as an approved regulator are multiplied in respect of accountancy bodies, as most of their members seeking authorisation will be in partnership with other accountants. In most cases, this will result in the firm requiring Alternative Business Structure ('ABS') status, and the professional body requiring recognition (and oversight by the Board) as a Licensing Authority.

It is possible for estates to be administered from overseas and, if consumers perceive an increase in the cost of estate administration services (due to additional regulation and a more limited supply), and if complex drafting is to

be avoided, there is a risk that overseas practitioners may respond aggressively to enter the market. Although this would create price competition, it is unlikely to be in the interests of consumers.

Conclusions

The Board recognises that there are significant differences between accountancy bodies that are approved regulators and the applicable approved regulators, whose members are lawyers. This consultation nevertheless omits to take account of the obvious differences in terms of regulatory structures. This could give rise to serious detriment to some consumers of 'legal services', who might find that their accountant is suffering regulatory oversight from two sources, and is obliged to pass on costs to consumers. Worse still, the client may find that their accountant is unable to provide the range of services that the accountant was previously relied upon to provide.

Care must be taken to ensure that the Board does not encroach on areas of regulation that are already regulated effectively and efficiently. There is a danger that the reservation (inadvertent or otherwise) of areas covered by experienced accountancy regulators would be seen as an inappropriate use of a recommendation to the Lord Chancellor under section 24. Such a recommendation must always support the regulatory objectives as set out within section 1 of the Legal Services Act 2007.

ACCA supports the Board's proposal to reserve will-writing, so long as an effective definition of 'ancillary services' can be constructed, and accountants who are appropriately regulated are permitted to continue to provide those ancillary services. We would only support the proposal to reserve estate administration services if 'ancillary services' could be similarly defined for the purpose of retaining the diversity of providers and promoting the regulatory objectives.

Fundamentally, any changes to the scope of regulation of legal services can only be justified by a clear public interest case. There is a clear public interest case against dual oversight of professional bodies in respect of will-writing and estate management services.

We perceive a high risk that the reservation of will-writing and estate administration services might bring within the regulation of legal services many

services that are currently provided competently and efficiently by accountants. More precisely, the risk is that consumers would be denied access to those cost-effective services from their accountants – trusted advisers with valuable background knowledge of their clients, including their clients' families and businesses.

We completely support the Board's position as stated in paragraph 89 of the consultation document, which asserts that consumers are best served by 'competition between diverse providers within a well regulated market place'.[5] But this in no way implies that it is necessary for regulatory oversight to come from a single source, nor that competition is the only benefit to be gained from the diversity of providers. As noted by BIS, 'Competitive, well-functioning markets give consumers choice on the price and quality of the goods they buy and stimulate businesses to innovate and become more efficient to meet changing consumer needs. This process drives long-term productivity gains and supports stronger economic growth'.[6] Moreover, as acknowledged in paragraph 90 of the consultation document, '… competition and liberalisation within legal services is an important part of tackling consumer detriment in this market. This is a key tenet of the Act. It is widely accepted that competitive pressure can raise standards as well as reducing prices within a market'.

We maintain that it is preferable to continue to permit even the core services of will-writing and estate administration to be performed by accountants who are regulated effectively by their professional body, subject to oversight by the FRC. The chartered accountancy bodies are all required to promulgate an ethical code that is based on fundamental principles, and their members have been familiar with those principles for a number of years. Therefore, it is instinctive for most accountants to refrain from undertaking work that they are not competent to perform.

ACCA would be willing to meet with the Board and, indeed, we would welcome the opportunity to discuss our concerns and recommendations at length.

[5] Consumer Panel, response to Legal Service Board discussion document 'Enhancing consumer protection, reducing regulatory burdens'
[6] Department for Business Innovation and Skills, 'Regulation and Growth', 2012, p. 12

29 LINCOLN'S INN FIELDS
LONDON WC2A 3EE
UNITED KINGDOM

T +44 (0)20 7059 5000
F +44 (0)20 7059 5050

www.accaglobal.com