



22 November 2012

Our ref: ICAEW Rep 175/12

Mr Michael Mackay
Legal Services Board
7th Floor Victoria House
Southampton Row
London WC1B 4AD

By email: consultations@legalservicesboard.org.uk

Dear Mr Mackay

Enhancing consumer protection, reducing regulatory restrictions: will writing probate and estate administration activities – September 2012

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

We have also sent Mr Kenny a letter on this consultation, a copy of which is in the Appendix to this response.

Please contact me should you wish to discuss any of the points raised in either the letter or the main body of our response.

Yours sincerely

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ICAEW REPRESENTATION

ENHANCING CONSUMER PROTECTION, REDUCING REGULATORY RESTRICTIONS: WILL WRITING PROBATE AND ESTATE ADMINISTRATION ACTIVITIES

Memorandum of comment submitted in November 2012 by ICAEW, in response to the Legal Services Board's cover paper and consultation document Enhancing consumer protection, reducing regulatory restrictions: will writing probate and estate administration activities published in September 2012

Contents	Paragraph
Introduction	1
Who we are	2 – 4
Major points:	
Extension of Reservation to Estate Administration	5 – 7
Consumer Detriments of Proposals	8 – 10
Impact Assessments and Cost Effective Regulation	11 – 13
Responses to specific questions	14 – 46
Professional Services provided under the oversight of the Financial Services Authority, the Financial Reporting Council and Others	Appendix

INTRODUCTION

1. ICAEW welcomes the opportunity to comment on the cover paper and consultation document *Enhancing Consumer Protection, reducing regulatory restrictions: will-writing, probate and estate administration* published by the Legal Services Board on 27 September 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 in practice provide an all-round business advisory, financial and wealth management service to clients who are most frequently the owners or managers of SMEs and individuals with relatively complex financial affairs. This includes the provision of advice and other services to ensure that family wealth and businesses can be passed to succeeding generations with the minimum of unnecessary burdens. Besides the benefits to individual clients, our members provide the public benefit effect of supporting the good management and growth of businesses of all sizes and hence the UK economy as a whole.
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

Extension of Reservation to Estate Administration

5. We welcome proposals for the regulation of will writing and estate administration. We also note that the LSB believes that the most appropriate and effective way of implementing this regulation, for lawyers and currently unregulated service providers, is through reservation under the Legal Services Act. We would support this outcome, in relation to lawyers and unregulated providers. However, we strongly disagree that this is the appropriate policy, especially for estate administration, when services are carried out by those providers who are already appropriately regulated, such as banks and chartered accountants.
6. Estate administration, as defined in the consultation document, goes far beyond any service which concerns the interpretation of the law, the drafting of legal documents or the settlement of legal disputes. Rather, it goes much further, into financial, management and administrative functions which are equally well (many might say much better) handled by the trust departments of banks or by chartered accountants. For that reason, we believe that the LSB would be vulnerable to a challenge of misapplication of its powers were it to insist upon recommending the reservation of an activity which may not be a legal activity, as defined by the Legal Services Act. Such a challenge could, at best, result in considerable delay to an otherwise highly desirable change in the scope of regulation. We therefore suggest that the LSB avoid the possibility of such a challenge, by omitting the services of otherwise regulated service providers from the scope of reservation.
7. There are a number of other aspects of the LSB's proposals where we believe that certain unintended consequences may occur, or where decisions taken now may affect the further development of the LSB's policies in the future. These are enlarged upon under Question 1 below.

Consumer Detriments of Proposals

8. Legal services reservation, as mandated by the Legal Services Act and implemented by the Legal Services Board, is focussed on the regulation of legal professionals and in particular on the strengthening of the protection of individual consumers, and particularly vulnerable consumers, in their direct relationships with lawyers and the law. This focus is inappropriately targeted when dealing with other professionals. Some characteristics of the regulatory risk profile associated with chartered accountancy practice is outlined further below, in paragraph 13.
9. This does not mean that vulnerable individuals will not be disadvantaged if chartered accountants perform their work inadequately, or are unable to provide their usual range of services. If the owners or investors in SMEs are poorly advised, this will prejudice the growth and ultimately the existence of their businesses and hence their ability to spread employment and other economic benefits. Vulnerable members of society are thus more likely to be disadvantaged through loss of employment as a result of poor or limited advice to local employers, than through their own relationship with a chartered accountant. In order to avoid such detriments, the LSB needs to take into consideration the effects of their policies outside the strict confines of legal services regulation, in order to properly comply with their obligations to protect and to promote the public interest as well as the interests of consumers.
10. At the time that these proposals come into force there will be many wills already written, where the testators choice of executor are frustrated, and estates which are in the course of administration (many take years to settle) where fundamental changes to the administration arrangements are needed. The current proposed arrangements may cause immense disruption at a time when consumers are particularly vulnerable as a result of terminal illness or a recent family bereavement. These individuals may not be vulnerable in the LSB's use of the term but be rendered vulnerable, as a result of these proposals, when they find their own or loved-ones' wishes (legitimate when put in place) to be completely ineffective.

Impact Assessments and Cost Effective Regulation

11. The impact assessments fail to take account of the unnecessary costs which will result from the dual regulation of alternatively regulated providers of estate administration services. Nor does it take account of the adverse social and economic effects of the market distortion which would result from additional costs experienced by accountancy practices and their clients. Many of the ancillary services listed in the consultation, such as inheritance tax advice, have for many years been provided predominantly by accountants whose existing regulatory arrangements have evolved to cover this area of practice.
12. We can see no evidence that the Better Regulation Executive of BIS has been consulted, though these proposals will impose additional and unnecessary burdens on both those businesses which are chartered accountancy firms and those which are their clients. Government policy consistently supports reducing burdens on business.
13. As noted in paragraph 3 above, accountants in practice typically provide an all-round business advisory, financial and wealth management service to their clients. Services are generally provided on a business model that results in considerably lower risks to their clients or other direct consumers of their services because:
 - Professional services are provided on a regular basis, often annually and across several generations of a family. Chartered Accountants are unlikely to want to jeopardise such relationships. In addition, the beneficiaries of an estate are likely to already know the accountant, and are unlikely to be dealing with a complete stranger. In these circumstances, the provision of a poor service is far less likely, as one is dealing with an already known and trusted business associate.

- Clients are typically individuals and businesses with sufficient substance to warrant a routine relationship with a trusted and familiar professional adviser whose focus is on ensuring that they comply with all their financial and administrative obligations, and on improving their business performance. These clients are not typically vulnerable, but on the contrary are generally well able to judge the value of the service they receive.
- Chartered Accountants do not typically keep high levels of client money, but on the contrary prefer to keep the balances on their client accounts as low as is consistent with client service.

As noted in paragraph 9, direct consumers of chartered accountancy services do not typically suffer from the detriments that have been identified by the LSB in their research, and which are their current objective for reform. This is confirmed by the very low incidence of Professional Indemnity Insurance claims in this area of practice. The proposals are poorly targeted, as they impact chartered accountancy practices and their clients. We do not think that their impact is justified.

RESPONSES TO SPECIFIC QUESTIONS/POINTS

Q1: 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?

Scope of Reservation: Alternatively Regulated Providers

14. We agree that the protection of vulnerable consumers is paramount. We support the mandatory *regulation* of these activities. However we do not support the scope of the proposed blanket *reservation* especially of estate administration activities.
15. A satisfactory alternative regulatory regime is already in place covering certain professional providers and their clients. Unfortunately neither the LSB's own research, nor the proposals drawn from it by the LSB, seem to take any account of existing non-legal services regulatory arrangements. Worryingly, nor does there seem to have been dialogue with affected regulators or oversight regulators (such as the FRC, HMRC and FSA) on the unintended implications for professional practice outside the legal profession and the impact upon their clients.
16. The LSB advised us it has not has any discussions of any depth with such regulators, and nor has it undertaken any research on the topic. This is the first significant occasion that the LSB has encroached into regulation of other professions, and the absence of such research or clear policy is perturbing.

Scope of Reservation: Legal Activities

17. We understand the LSB's reasoning, in justification of will writing and estate administration being added to the list of reserved activities and would, in principle, support this action provided that it is accompanied by a carve-out for those activities when carried out by providers who are already appropriately regulated. However, the LSB should be aware that they may be making proposals which are outside their authority. The core activity of estate administration (as defined by the LSB) involves many activities which are predominantly business, financial and administrative functions which we question come within the scope of the definition of 'legal activities' in the Legal Services Act. In these circumstances, the LSB may not have the power to recommend their reservation under Section 24 of the Act.
18. Most executors or other estate administrators who are non-law professionals subject to independent regulation have no responsibility for giving advice on the interpretation of the law

in relation to that core function. Nor do they have responsibility for any form of resolution of legal disputes. The provision of assistance in connection with the law is generally no more than any service provider will be responsible for – that is ensuring that the services that they supply are within the specified legislation relating to that activity. Car mechanics are responsible for ensuring that their clients leave their premises with vehicles that comply with the law. No-one would suggest that they are providers of legal services. Accountants or bankers providing core estate administration services ensure that their services enable their clients' affairs remain within the law. We question that that means that they are providing legal activities within the meaning of Section 12(3) (b) of the Legal Services Act any more than car mechanics. If this analysis is accurate then the Board does not have an appropriate basis on which to recommend its reservation.

- 19.** It is true that estate administration is a fiduciary activity, involving control over client assets, with a significant risk to consumers of maladministration or theft of those assets. However, this is also, or more, true of banks and investment service providers as well as a range of professional service providers. It is also true that estate administration comes within the scope of Section 1(2) of the Act as one of the 'services such as are provided by authorised persons (including services which do not involve the carrying on of activities which are reserved legal activities)'. Again, however, this does not thereby include it within the definition of legal activity. Rather it suggests an obligation on the LSB to promote competition with alternatively regulated service providers without the addition of unfair additional burdens.
- 20.** Will writing, being essentially the drafting of a legal document, is within most people's understanding of a legal activity. We have no strong objection to this activity becoming a reserved legal activity, though our remarks on the adequacy of alternative regulatory regimes apply in relation to this activity as to estate administration. However, we question the Board's assertion in paragraph 24 of provisional report that the core activity of will-writing is self-explanatory. Many of the services associated with will writing, including advice on will structure for succession and tax efficiency, advice on the inclusion or not of trusts and review of a drafted will are a part of many routine accountancy services and are much more appropriately regulated as such. It is essential that these are not inadvertently included within the definition of the core service of will writing, and would be better kept out of reservation, even where carried out by chartered accountancy practices which also provide the core service. We suggest that the LSB should also consider, and justify, its conclusions that this activity is validly included within the scope of Section 12(3) (b) of the Act.

Scope of Reservation: Professional Executorships for Fellow Professionals

- 21.** A further unintended consequence of the LSB's proposals will be the insistence that all professional executorships should be included, whether or not they are provided as a direct service for clients. Professional sole practitioners with even a modicum of forethought will need to provide for the future of their practice in the event of their death or incapacity, to avoid prejudice to their clients. Accountants, solicitors, surveyors, and other professionals need to have appropriate plans in place and are likely to have followed professional guidance that has been in place for many years. This is to appoint a trusted fellow professional as special executor in their wills to deal specifically with their practice upon death.
- 22.** The choice of special executor in these circumstances is dependent upon trust and personal relationships. There is no need for the special executor to be expert in estate administration, yet it appears he must be authorised for it to wind up or deal with a professional practice. Needless to say the consumers of such practices will suffer detriment if current appointments fail, and a search has to be made for a practitioner who is authorised and willing to run a practice he knows nothing about and report to beneficiaries who may have had no contact with him whatsoever. Besides the unnecessary delay, there is a severe danger of loss of client records and difficulty in accessing the funds held in the practice client account. The personal and business consequences could be catastrophic.

23. This proposal risks either or both of:

- Causing substantial delay and unnecessary expense as very large numbers of very small professional firms seek otherwise unnecessary licensing or authorisation from an existing licensing body, or even more expense and delay while their own professional bodies seek licensing status;
- Causing substantive detriment to the consumers of all the services of small professional firms, not only their legal services, as and when they cease business without appropriate provision for succession.

This represents a further example of the way in which the proposals of the Legal Services Board adversely affect well-established regulatory regimes of service providers outside the legal profession. It also results in a very adverse outcome for the consumers of all professional services.

Scope of Reservation: Legal Advice

24. The LSB's proposals in this consultation propose that a considerable extent of advisory services should be included within the scope of reservation, where they are carried out in conjunction with the core activities of estate administration or will writing. The LSB has also put on public record its intentions of examining whether the giving of legal advice should also become a reserved legal service. It is clearly vital that the policy outcomes in relation to advice on will writing and estate administration are consistent with the policy outcomes in relation to other areas of legal advice. But we cannot see any evidence of consideration of such issues either in this consultation or in earlier ones on this issue.

25. One particular example of this is in relation to advice on the completion of complex forms with legal effect. The LSB proposes that advice on the completion of will forms should be part of the core activity of will writing, but in our informal discussions with LSB staff working on the consultation on the regulation of special bodies/non-commercial bodies we were told that the LSB did not intend to include social and welfare advice involving (for example) assistance in completing social security applications within any future reservation of legal advice. We are unclear whether the LSB are intending to include the preparation of inheritance tax returns, or income tax returns to date of death, within the ancillary activities which will be reserved where the core service of estate administration is provided. All these forms raise similar issues, in that assistance on their completion could be considered as primarily an administrative matter though frequently an element of advice is given during the completion on how different elements will affect the interests of the client. The completion of tax returns are, of course, core activities of accountants, though not the only ones included within the scope of this consultation. We believe that:

- Before completing this project the LSB needs to develop a clear and consistent policy on the status of assistance in the completion of forms with legal effect; and
- It is inappropriate for the LSB to reserve as a legal service professional assistance in relation to the completion of forms which citizens would otherwise be obliged to, or entitled to, complete without any professional assistance.

26. We also consider that the LSB's policy on the application of Legal Advice Privilege in relation to the extended reserved service is unclear, and needs to be clarified before the implementation of this policy. Consumers will potentially be disadvantaged if they are unclear on the extent of the legal privilege to which they are entitled to benefit. In addition, any unwarranted inconsistencies or lack of clarity will damage fair competition in the provision of these services.

The Scenarios in Annex 1

27. The scenarios in Annex 1 fail to demonstrate that accountant providers will not be caught up in the proposals. The impact of the proposals upon wills already in existence and where estates are partially administered prior to 2015 is critical but appears not to have been considered either.

Impact upon Professions

28. We note that the LSB 'expect clear separation of representative and regulatory functions' And expects 'each applicant to be compliant from day one'. This may be a rather difficult outcome to achieve for non-law professional regulators (whose members undertake this work as part of routine business) who are themselves subject to oversight frequently on a basis structured in ways different to the legal profession.

29. In addition, the LSB does not appear to have considered the impact that its proposals may have on multi-national entities or those subject to internationally agreed regulatory standards. Both banks and professional accountants have to work within the confines of global regulatory requirements that the LSB has no authority to change. For the accountancy profession this includes compliance with the requirements of the International Federation of Accountants (IFAC) in relation to their universal Code of Ethics, as well as many other requirements including on training, quality assurance of the work carried out by its members, discipline and investigations.

Q2: What are your views on the options for implementation that we have described?

30. The option recommended (option 2) would first, bring unregulated providers within the scope of regulation, (which is generally welcomed and an understandable objective), and secondly, allow the LSB to proceed with its stated aim of improving the service given by the existing regulated legal services sector.

31. However it will also bring existing regulated professional providers into *legal services* regulation without considered and fundamental discussion with affected parties and their regulators. We suspect the full implications of the LSB's proposals have not been thought through where they move beyond the narrow areas of will writing and probate. This will not create the 'level playing field' the LSB desires, nor is it acceptable to say that all professionals will be placed upon an equal footing.

Q3: 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. The LSB have informed us that they do not consider that accountancy services provided by the accountancy profession to be part of their responsibilities. Nevertheless, these proposals would draw into legal services regulation a significant proportion of the routine wealth and succession management services which have been carried out by many professional accountancy practices of all sizes for many years, as part of their *accountancy* services. This is also true of many banks and other regulated financial services providers. We believe that a 'carve out' for regulated, non-law estate administration providers should be included in the changes proposed to the Legal Services Act. To treat these services as *legal services* will cause unnecessary confusion to consumers, risks disruption to their service provision and considerable additional unnecessary costs.

33. We note that no consequential amendment is proposed to the Legal Services Act to add estate administration to the list of reserved legal activities. Rather, an amendment is proposed to the definition of probate activities, presumably to extend this reserved activity to accommodate

estate administration. We do not think that it would be appropriate for this very substantial extension to legal services reservation to be included under a narrow and poorly understood (by consumers) legal categorisation.

Q 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.** This question will produce different answers depending on whether it is a new entrant to reservation/ regulation, such as will writers, or an existing participant such as chartered accountants. We cannot speak for the former. As one of the latter, ICAEW is already subject to its own professional oversight by the FRC. There is a comprehensive suite of targeted and proportionate regulatory arrangements already in place for estate administration which seems to be disregarded at the moment.
- 35.** Please see our previous comments and others throughout this paper. The LSB appears to have decided that it will press ahead with proposals that will require other professions to restructure and change their ways of working without full consultation with affected parties, including other high-level regulators and oversight regulators. This presents a huge philosophical, let alone organisational, challenge.

Q5: 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?

- 36.** We are pleased to see that the content of the Guidance acknowledges the better regulation principles, requiring front line regulators to take a risk-based outcomes-focussed approach to their regulatory activities. We trust that the LSB will take a similar approach. We also note that specific guidance in paragraphs 95 and 96 provide that approved regulators must address and minimise regulatory overlaps. The proposals overall, however, completely miss the initial and fundamental point that estate administration is already regulated elsewhere outside legal services regulation. A large part of the proposals themselves represent an unnecessary duplication.

Q6: Do you agree that having mandatory regulation for all firms in the market will improve consumer confidence?

- 37.** There is an important and crucial assumption embedded within this question. Mandatory *regulation* will improve consumer confidence, but mandatory *reservation* is not necessary to achieve this outcome in all cases. The use of the term regulation implies at least a passing acknowledgement that regulation elsewhere exists and has been taken into account. It does exist elsewhere, but has not been acknowledged in this consultation.
- 38.** The impact of mandatory reservation will disrupt the provision of services to, and confidence of, consumers who use alternative non-legal providers which is entirely the opposite of what is intended. We stress again that these areas are already subject to a complex regulatory regime which the LSB will disrupt. That will hardly improve consumer confidence for those individuals who thought their arrangements would be carried out as they wished.

Q7: 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?

- 39.** The businesses of many regulated providers will be adversely affected for the reasons stated above, in order to deal with issues identified by the LSB within the legal profession and unregulated providers. There will inevitably be regulatory overlap imposed by the legal service

oversight regulator upon existing non-law regulators. The assessment of this in the impact statement shows little grasp of professional practice outside the legal sector.

40. The sentiment expressed in the consultation that accountants, their regulators and their clients, will suffer little impact is not borne out by the practical implications of the LSB's stated proposals. We assume that this has occurred due to the formation of the scope of the LSB's proposals late in the policy formation process. The research results relied upon by the Board gave a serious under-estimate of the estate administration activities of professional accountants using the LSB's current definitions.
41. The business impacts of these proposals would include reduced consumer choice and damaged access to justice, as many providers have to increase their costs or withdraw from this market.

Q8: 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 of any evidence that you are aware of?

42. The impact assessments fail to take account of the unnecessary costs which will result from the dual regulation of alternatively regulated providers of estate administration services. Nor do they take account of the adverse social and economic effects of the market distortion which would result from additional costs experienced by those accountancy practices or their clients, which are SMEs.

Q9: 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?

43. Very vulnerable consumers in the conventional sense most frequently obtain their legal services (if any) from legal advice charities and other non-commercial providers. These proposals would bring many such entities within the scope of legal services reservation and hence regulation as soon as the current transitional exemption is removed. We are not aware of any work that has been, or is being, conducted to ensure that a regulatory regime will be available for such entities which will not cost a considerable amount, reduce their resources and hence the number of clients they can help. Vulnerable consumers are more likely to be prejudiced by having no legal service than an unregulated legal service.
44. In addition, consumers can become vulnerable very quickly when they are in an emotional state and who may find that their wishes (such as choice of executor) are ignored or incapable of being followed by virtue of these proposals. The immense strain placed upon consumers whose established wishes cannot be carried out when the proposals are introduced merits close scrutiny.
45. Conventional vulnerable consumers of legal services are also citizens with other needs and vulnerabilities. For example, the employees of many SMEs would become rapidly vulnerable if their employment were to be prejudiced by an upset to the succession planning of their employer. This could be caused either by the inability of an accountant to act for their employer, or by an unwarranted increase in costs.
46. We have also pointed out above the issues for sole practitioner professionals, their beneficiaries and clients, who may also find themselves severely prejudiced by the proposal in their current form.

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APPENDIX

Chris Kenny
Chief Executive
Legal Services Board

Dear Chris

Professional Services provided under the oversight of the Financial Services Authority, the Financial Reporting Council and Others

ICAEW notes the Legal Services Board's proposals in relation to will writing, probate and estate administration, and we will be responding comprehensively to the current consultation under separate cover. Suffice it to say here that we expect these proposals to draw a substantial proportion of our member firms into the scope of the Legal Services Act. Further, future work by the LSB on legal advice and other extensions of reservation could accelerate this trend.

ICAEW welcomes the principle of *regulation* of will writing, probate and estate administration.

However

ICAEW is concerned with the chosen mechanism, namely the *reservation* of these activities as legal services, without it appears adequate analysis of the existing regulatory mechanisms that exist.

Leaving aside for the time being the question of whether estate administration (an administrative and fiduciary service, that we find difficult to fit within the scope of section 12 (3) (b)) is in fact a legal activity, the evidence upon which LSB has relied itself admitted that it was insufficient to take account of other providers, and merely focuses upon those subject to legal services regulation or no regulation at all. We trust that the LSB will fully investigate and evaluate these areas and the unintended consequences for affected consumers and providers, as part of, and prior to, the implementation work it intends to undertake to achieve its deadline for 2015.

Key non-law regulated sectors which are likely to be drawn into legal services regulation, as a result of these proposals, include:

- Regulated professionals other than lawyers
- Banking in numerous aspects
- Finance and investment management
- Trust companies and corporations
- Litigation, court and expert work, carried out by these professionals acting as such.

These persons and their services do not seem to feature in the research. The proposals will directly impact upon them but the implications have apparently not been taken into account.

There is a fundamental philosophical question that appears to have overlooked *before* the proposals were drawn up. Namely the overall impact upon professional practice and regulation *per se* when an activity covers a number of professional spheres as here. The LSB appears to be inadvertently establishing itself as oversight regulator 'primus inter pares' in the area of estate administration, and we trust will have full discussions with other affected oversight regulators such as the FSA and FRC before crystallising its plans. Relevant Government Departments should also be consulted.

Yours sincerely

Felicity Banks
Head of Business Law