The Institute of Chartered Accountants of Scotland (ICAS) welcomes the opportunity to respond to the Scottish Executive on the terms of its Legal Profession and Legal Aid (Scotland) Bill [as introduced]. ICAS represents and regulates its members, the majority of its Rules of Professional Conduct bearing most specifically on those Chartered Accountants who provide professional services to the public. Those members are subject to a rigorous system of discipline and regulation, and to public oversight by the Financial Reporting Council in London.

This paper addresses one specific clause of the Bill: Section 42 (Offence for unqualified persons to prepare certain documents), inviting the Executive to accept the principle that the benefit of that clause should, in the public interest and for reasons of equiparation with the position which already obtains in England and Wales, extend its application to the Institute’s practising members and its scope to include the provision by practising Chartered Accountants of ‘grant of confirmation services’.

Practising Chartered Accountants would, in our submission, be able to satisfy (in the same way as those members or bodies referred to in Section 42) conditions precedent (those conditions envisaged by Sections 25 and 27 of the Solicitors (Scotland) Act 1990) to being entitled to provide ‘grant of confirmation services’.

ICAS’ SUBMISSION

The rights and obligations of members of The Law Society of Scotland (and members of the Faculty of Advocates) are broadly similar to those of members of The Law Society and the Bar Council. Both are regulated by statute and when government policy is drawn for the conduct of lawyers south of the border, equivalent measures (for obvious reasons) are introduced in Scotland.

The Executive will know that the terms of the Solicitors Acts and Solicitors (Scotland) Acts are couched in the same terms, in order to secure the same public policy objectives. The purpose of ICAS’ submission is respectfully to draw the Executive’s attention to an infelicity of expression in section 42 of the proposed Bill, which, if passed in its present form, would (a) have the effect of causing a serious departure in law and practice between the two legal jurisdictions, and (b) restrict access on the part of Scots and those living in Scotland to a broader range of professional service providers.

THE POSITION IN ENGLAND

Section 23 of the Solicitors Act 1974 made it a criminal offence for anyone other than a solicitor, barrister, or a notary public to take instructions for reward or to draft or prepare for reward the papers on which a grant of probate/letters of administration depend.

By virtue of Section 17(1) of the Courts and Legal Services Act 1990 the government’s objective for the development of legal services in England and Wales was described as:-

“……the development of legal services...(and in particular the development of advocacy, litigation, conveyancing and probate services), by making provision for new or better ways of providing such services and a wider choice of persons providing them, while maintaining the proper and efficient administration of justice.”.

In order to give effect to that objective, Section 55 of the 1990 Act ‘disapplies’ Section 23 of the 1974 Act, by providing that organisations which are granted status as ‘approved bodies’ by the Secretary of State for Constitutional Affairs are exempt from the criminal offence created by Section 23 and, in that way, allowing members of those bodies to provide probate services. [Though an Act of Parliament of 1990, Section 55 was not invoked till 2005, by Statutory Instrument.]
Any organisation may make application to the Secretary of State for Constitutional Affairs under Section 55 for authorisation to become an ‘approved body’. Provided applicant bodies can satisfy the criteria laid down in Schedule 9 to the 1990 Act (which are broadly similar to those given in Sections 25 and 27 of the Solicitors (Scotland) Act 1990), then they are given that status. ICAS is currently preparing an application under Section 55. The effect of a successful application will, of course, only relate to members’ rights in England and Wales.

THE POSITION IN SCOTLAND

The equivalent of the criminal offence established in England and Wales under Section 23 of the Solicitors Act 1974 is Section 32 of the Solicitors (Scotland) Act 1980, which is in the following terms:

“Offence for unqualified persons to prepare certain documents

32. (1) Subject to the provisions of this section and regulations 6, 11, 12 and 13 of the European Communities (Lawyer’s Practice) (Scotland) Regulations 2000, any unqualified person (including a body corporate) who draws or prepares—
(a) any writ relating to heritable or moveable estate; or
(b) any writ relating to any action or proceedings in any court; or
(c) any papers on which to found or oppose an application for a grant of confirmation in favour of executors,
shall be guilty of an offence.

(2) Subsection (1) shall not apply—
(a) to an unqualified person if he proves that he drew or prepared the writ or papers in question without receiving, or without expecting to receive, either directly or indirectly, any fee, gain or reward (other than by remuneration paid under a contract of employment); or
(b) to an advocate; or
(c) to any public officer drawing or preparing writs in the course of his duty; or
(d) to any person employed merely to engross any writ; or
(e) an incorporated practice.

(2A) Subsection (1)(a) shall not apply to a qualified conveyancer providing conveyancing services within the meaning of section 23 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.

(2B) Subsection (1)(b) shall not apply to a person who is, by virtue of an act of sederunt made under section 32 (power of Court of Session to regulate procedure) of the Sheriff Courts (Scotland) Act 1971, permitted to represent a party to a summary cause.

(2C) Subsection (1)(c) shall not apply to an executry practitioner or a recognised financial institution providing executry services within the meaning of section 23 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.

(3) In this section “writ” does not include—
(a) a will or other testamentary writing;
(b) a document in re mercatoria, missive or mandate;
(c) a letter or power of attorney;
(d) a transfer of stock containing no trust or limitation thereof.

(4) For the purposes of this section, “unqualified person” includes a registered foreign lawyer.”

There is, however, no Scottish equivalent of Section 55 of the 1990 Act. In our respectful submission to the Executive, there should be. We therefore make the following proposal for amendment of section 42 of the Bill:

PROPOSED AMENDMENT TO THE DRAFT LEGAL PROFESSION AND LEGAL AID (SCOTLAND) BILL

We have replicated the wording of the present text of Section 42 in blue below, and emphasised, with underlining, our proposed words of amendment.

“After Section 32(1)(c) (offence for unqualified persons to prepare certain documents) add
“(grant of confirmation services),”
“In Section 32(2) of the 1980 Act (offence for unqualified persons to prepare certain documents), after paragraph (e) add “; or”

(f) to a member of a body which has made a successful application under Section 25 of the 1990 Act but only to the extent to which the member is exercising rights acquired by virtue of that Act; or

(g) insofar only as subsection (2)(1)(c) is concerned, to a person who is a member of a body approved under Section 42A(3) and who has been registered by that body for the provision of grant of confirmation services.

[new Section 42A]

“(1) An approved body may only register a person for the provision of grant of confirmation services who is one of its members and who satisfies it:-

(a) that his business is, and is likely to continue to be, carried on by fit and proper persons or, in the case of an individual, that he is a fit and proper person;
(b) that he, and any person employed by him in the provision of grant of confirmation services, is suitably trained;
(c) that satisfactory arrangements will at all times be in force for covering adequately the risk of any claim made against him in connection with the provision of grant of confirmation services by him, however arising;
(d) that he is a member of, or otherwise subject to, a scheme which (i) has been established (whether or not exclusively) for the purpose of dealing with complaints about the provision of grant of confirmation services; and (ii) complies with such requirements as may be prescribed by regulations made by the Minister of Justice with respect to matters relating to such complaints; and
(e) that he has in force satisfactory arrangements to protect his clients in the event of ceasing to provide grant of confirmation services.

(3) In this section, “approved body” means a professional body which is approved by the Minister of Justice under regulations made by the Minister.”

CONCLUSION

ICAS respectfully asks the Executive to consider the basis of and reasons for its submission, the amendment offered in order to give effect to it, and to assimilate the Scottish and English contexts. We do not ask for an automatic concession as an ‘approved body’ but rather to cede to the Justice Department the right to adjudicate on that right. That is the position in England and Wales and we seek no more favourable a conclusion than that. It would be for us to satisfy the Department that protections (which should, in our view, be similar to or the same as those set out in Schedule 9 of the 1990 Act) for the public in the wake of our members providing these additional services are adequate and persuasive, as we believe them to be.

We look forward to engaging with the Executive on our response.