



Legal Services Board – Notice issued to the Lord Chancellor, Office of Fair Trading, the Legal Services Consumer Panel and the Lord Chief Justice under Section 24(3), 26(2) and Paragraph 9 of Schedule 6 to the Legal Services Act 2007

The Legal Services Board (“the LSB”) has decided, having made preliminary inquiries under Paragraph 4 of Schedule 6 of the Legal Services Act 2007 (“the Act”), to hold Section 24 and Section 26 investigations in respect of legal activities (within the definition at Section 12(3)¹), within the will-writing market and the often interrelated activities in the probate and estate administration markets.² This document gives notice of that decision to the Lord Chancellor, the Office of Fair Trading (“the OFT”), the Legal Services Consumer Panel (“the Panel”) and the Lord Chief Justice as required by Paragraph 9 of Schedule 6. This notice is deemed to have been given on and be effective from 28 July 2011. Paragraph 9 of Schedule 6 requires the LSB’s notification to give reasons for its decision to hold an investigation and a description (in general terms) of the investigation procedure set out in Paragraphs 10 to 17 of Schedule 6.

Background

A Section 24 investigation is defined in Schedule 6 as meaning an investigation held to determine whether or not the LSB should make a recommendation to the Lord Chancellor in respect of the activity for the purposes of Section 24 (recommendations and orders to extend the reserved legal activities). A Section 26 investigation is defined as meaning an investigation held to determine whether or not the LSB should make a recommendation to the Lord Chancellor in respect of the activity for the purposes of Section 26 (recommendations that an activity should cease to be a reserved legal activity).

The reserved legal activities are set out at Section 12 and Schedule 2 of the Act. They are the activities that Section 13 of the Act requires that only persons that have been authorised to do so by an appropriately designated approved regulator or an exempt person may undertake.³ Any person may undertake legal activities that are not on the list of reserved activities. They may do so irrespective of qualifications and experience and outside of legal services specific regulation, although general consumer protection and competition law will apply. Certain regulated legal services providers (for example, solicitors and barristers) will

¹ An activity which is a reserved legal activity within the meaning of this Act as originally enacted, and (b) any other activity which consists of one or both of the following—(i) the provision of legal advice or assistance in connection with the application of the law or with any form of resolution of legal disputes; (ii) the provision of representation in connection with any matter concerning the application

² By estate administration, broadly speaking, we mean the administration of the affairs and assets of a deceased person in accordance with statutory requirements and the provisions of any will that they may have made.

³ Definitions of exempt persons are set out at Schedule 3 of the Act with additional categories of exempt persons during transitional period defined at Paragraphs 13 and 18 of Schedule 5

remain regulated in the provision of these services by their approved regulator as a consequence of professional title based regulatory provisions.

No activities specifically relating to will-writing and estate administration services are contained within the existing list of reserved activities. Probate activities are already listed as reserved activities but are defined narrowly in Schedule 2 as 'preparing any probate papers for the purposes of the law of England and Wales or in relation to any proceedings in England and Wales'. 'Probate papers' are defined as 'papers on which to found or oppose grant of probate, or a grant of letters of administration'. The LSB determined to hold a Section 26 investigation together with a Section 24 investigation as we cannot pre-judge that the reach of reserved probate activities, as currently defined, will prove to be appropriate.

The LSB has not yet defined the specific activities within the will-writing, probate and estate administration markets which may need regulation or de-regulation. Defining the specific activities will form an early part of the Sections 24 and 26 investigations. There is no intention for the investigations to consider the regulation or restriction of individuals preparing their own will, with or without a paper based or an on-line DIY package. However, as our research indicates a high level of defects and poor quality outcomes in relation to self-completed wills the LSB will consider whether there are non-regulatory options that may assist individuals to prepare their own will. Furthermore, there is no intention for the investigations to consider regulating or restricting other persons providing a free advice service to individuals. However, the LSB will be mindful of potential issues around providers delivering one service without charge but then charging for connected services.

Reasons for decision to hold the investigations (explanation for the purposes of Schedule 6 Paragraph 9 (3)(a))

Starting Sections 24 and 26 investigations continues the process begun in 2010 when a will-writing trade organisation requested that the LSB recommend that will-writing be reserved. The LSB rejected the request for reasons including that the evidence was not available to underpin a robust decision. However, the LSB asked the Legal Services Consumer Panel ("the Panel") to provide advice about the provision and regulation of will-writing services. The LSB requested evidence about the problems, both current and potential, experienced by consumers wishing to write a will. The LSB asked for analysis of the size of each problem, its cause and the impact on the testator, executors and beneficiaries. The Panel was invited to consider whether existing consumer protections were capable of addressing consumer harm or whether new solutions were needed, including the advantages and disadvantages of various ways of regulating will-writing. The LSB's commissioning letter can be found at Annex 1.

Since then, the LSB has worked alongside the Panel to develop a greater understanding of the way the will-writing market operates and build up a broad and cohesive evidential base of problems that consumers face. In partnership with our co-sponsors, the OFT and the Solicitors Regulation Authority, we commissioned IFF Research to undertake original research. This was made up of three strands:

- a "shadow shopping" exercise which shadowed 101 real consumers getting wills from different providers with a panel of experts assessing the quality of the will that they received

- a retrospective survey of 500 consumers that have obtained a will in the recent past
- in-depth interviews with nearly 100 providers of will-writing services.

Other evidence collected includes the views of a wide range of stakeholders following the Panel's call for evidence; nearly 400 case studies submitted by consumers, lawyers and others; and data derived from complaints patterns.

The Panel published its report and recommendations on 14 July 2011. This document entitled "Regulating will-writing" along with supporting evidence is available on the Panel's web-site.⁴

The IFF Research report "Understanding the consumer experience of will-writing services" was also published on 14 July 2011 and can be found on the LSB's web-site.⁵

The Panel's report highlighted many problems faced by consumers when buying a will. This included evidence of poor-quality wills, questionable sales practices and lost wills where companies disappear without trace. The qualitative shadow shopping research demonstrated that too many wills, written by both solicitors and unregulated will-writers, failed to reflect what the client intended and made other basic errors. Further, the number of self-completed wills judged to have defects was particularly high. The Panel also highlighted that inherent features of will-writing services, such as consumers lack of knowledge to identify technical problems or assess whether additional services offered are necessary or represent good value for money, place consumers at risk of detriment. The Panel's primary recommendation was that will-writing be added to the list of reserved legal activities.

Given the examples of consumer detriment that have been reported, the evidence of defects and poor quality in the findings of the shadow shopping and the risks to consumers due to inherent features of the market, the LSB has determined that there is a clear case to review the need for statutory regulation and that the investigation should continue on a statutory basis. Although the scope of the Panel's report did not explicitly cover estate administration and probate activities, examples of consumer detriment that have been reported did extend to these closely associated services. Therefore, the Section 24 and 26 investigations will cover all three areas.

The LSB will now begin wider discussions so that we can determine whether reservation is appropriate and if so what regulatory arrangements should flow from that decision. Importantly, solutions will need to be targeted at the actual problems – it is clear from the results of the shadow shopping research - and the Panel's analysis – that the challenges are common to all providers and that granting a monopoly to solicitors is unlikely to be the answer. In the meantime, the LSB is asking the existing regulators and trade bodies whose members are active in these markets what steps can be immediately taken to raise standards across the market place.

4

http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/ConsumerPanel_WillwritingReport_Final.pdf

5

http://www.legalservicesLSB.org.uk/what_we_do/Research/Publications/pdf/lsb_will_writing_report_final.pdf

Schedule 6 investigation process (explanation for the purposes of Schedule 6 Paragraph 9 (3)(b))

Issuing this notice formally starts the “investigation period”. The investigation period runs for up to 12 months (Schedule 6, Paragraph 11(1)). This investigation period may be extended up to a maximum of 16 months in total after consultation with the OFT, the Consumer Panel and the Lord Chief Justice; reasons must be given for the extension (Schedule 6, Paragraph 11(2) to (5)).

The LSB must within the investigation period carry out such investigations as we consider appropriate for the purposes of enabling us to produce a provisional report in respect of the activity, and produce and publish such a report (Schedule 6, Paragraph 10(2)). A provisional report is a report stating whether or not the LSB is minded to make a recommendation that an activity should become a reserved legal activity for the purposes of Section 24 or an activity should cease to be a reserved legal activity for the purposes of Section 26 (Schedule 6, Paragraph 10(3)). A provisional report must also state the LSB’s reasons for being, or not being, minded to make the recommendation in question (Schedule 6, Paragraph 10(4)).

After publishing a provisional report, the LSB must determine whether to hear any further evidence (Schedule 6, Paragraph 14). In particular, we must exercise our own rules⁶ in a way that allows practitioners of the legal activity under investigation to make representations on the provisional report (Schedule 6, Paragraph 13). The LSB should consider this evidence specifically, and any other information that we consider relevant (Schedule 6, Paragraph 15).

The final reporting period commences on the date of publication of the provisional report and runs for three months, but may be extended by the LSB after consultation with the OFT, the Consumer Panel, and the Lord Chief Justice up to a maximum of five months in total (Schedule 6, Paragraph 17). Within that period, the LSB must publish a final report, and provide a copy to the Lord Chancellor (Schedule 6, Paragraph 16 (3), (4)). This report should contain: the LSB’s decision; reasons behind that decision; any recommendation to be made for the purposes of Sections 24 or 26 of the Act; and, if a Section 24 recommendation is to be made, what the LSB considers should be the wording of the relevant provision or order that will need to be made by virtue of Section 204(3) of the Act or under Section 208 (Schedule 6, Paragraph 16) in accordance with the recommendation.

Upon receiving a recommendation from the LSB, the Lord Chancellor may, by order, amend Section 12 or Schedule 2, so as to add any legal activity to list of reserved legal activities (Section 24(1), (2)). Where such a recommendation is made the Lord Chancellor must - within 90 days of receiving the LSB’s final report - consider the report, decide whether or not to make the relevant order and publish a notice of this decision. Where the Lord Chancellor decides not to make an order, the notice must specify the reasons for that decision.

If the LSB makes a provisional report recommending the reservation of a new activity under Section 24 (Schedule 6, Paragraph 10) then the Lord Chancellor may, by order, make provision enabling applications to be made, considered and determined in relation to bodies wishing to be authorised as Approved Regulators and/or Licensing Authorities in respect of

⁶ http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/schedule_6_rules.pdf

the provisionally recommended for reservation activity before it actually becomes a reserved legal activity (Section 25(1). The Lord Chancellor may modify, by order, the designation processes set out at Schedule 4 for Approved Regulator applications and Schedule 10 for Licensing Authority applications to facilitate this. The Lord Chancellor may also, by order, make provisions to enable applications for authorisation to carry on an activity which is a provisional reserved activity to be made, considered and determined. The LSB will therefore consider whether to make such a recommendation in the context of its final report.

The Lord Chancellor must consider any LSB recommendation that a reserved legal activity should cease to be reserved and, if he disagrees with the recommendation, publish a notice giving reasons (Section 26(3), (4)). If the Lord Chancellor agrees with a recommendation that an activity should cease to be a reserved legal activity, there is no procedure under the Act to implement such a recommendation and it would be for the Lord Chancellor to pursue this by other means (for example, further primary legislation or, possibly, a regulatory reform order).

Next steps

The LSB's Business Plan 2011/12⁷ states our intention to consult on the results of the investigations and the proposed solutions in quarter four of 2011/12. This will form the basis of the Sections 24 and 26 provisional reports stating whether or not the LSB is minded to make a recommendation to the Lord Chancellor. To assist this process the LSB will issue a call for further evidence seeking to identify the causes of the problems identified in the Panel's advice and IFF Research and the proportionate remedies that might be applied to address them.

**The Legal Services Board
28 July 2011**

7

http://www.legalservicesboard.org.uk/news_publications/publications/pdf/lbs_business_plan_11_web_final.pdf

Annex 1: LSB commissioning letter



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9 September 2010

Dear Dianne

Will writing

My Team recently asked the Consumer Panel if they would respond positively to a request from the Board to provide us with advice about the consumer interest in relation to the provision of will writing services. The Panel indicated that they would welcome the opportunity to do so. Since then, the Consumer Panel Manager, with the assistance of Panel members and members of my Team, has already begun planning this exercise. Steve also spoke on behalf of the Panel at the LSB's workshop of 26 July that brought together a range of organisations with different interests and experiences of the will writing industry. I am now writing on behalf of the Board to formally request the Consumer Panel's advice and suggest some parameters for the investigation.

The LSB would like the Panel to provide a broad and cohesive evidential base of all of the different problems, both current and potential, experienced by consumers wishing to write a will. We would like to understand how widespread each problem is, or could be, why it happens and what the impacts are on the testator and their beneficiaries. We would also like to understand whether existing consumer protections are capable of addressing the consumer harm or whether new solutions are needed, including what the advantages and disadvantages of various ways of regulating will writing may be for consumers.

The note annexed to this letter provides some broad context. Additionally, our joint scoping work has identified many actual or potential problems that the Consumer Panel will want to look at. These may include:

- Wills are of poor quality because they are either invalid or do not reflect the testator's wishes after taking account of their circumstances

- Unfair commercial practices, such as pressure selling tactics or when consumers are deliberately drawn by a low advertised price but the final price turns out to be much higher, i.e. “bait advertising”
- Cross-selling of related services, which may be unnecessary, unsuitable or expensive; one area of focus is naming the will provider as executor of the estate
- A lack of transparency on price and other issues so that consumers do not make informed choices or do not realise the consequences of their purchase decisions
- Problems related to storage of wills, charges for such storage, and their location by beneficiaries
- Consumers fail to make a will because of barriers to access, for example cost, lack of awareness and unnecessary jargon or complex English
- Fraudulent activity linked to wills or related services

It is obviously for the Panel to decide how it undertakes its work and determine the different evidence sources that you will explore. However, I know that you think, as does the Board, that original consumer research is needed to obtain a clear picture of what is currently happening in practice and therefore what the most appropriate protections might be. This would include a mystery or shadow shopping exercise looking at issues such as:

- How consumers shop around for wills
- What the consumer experience is like buying a will
- How the quality of wills produced varies between distribution channels
- How common cross-selling of other services when buying a will
- How firms selling wills approach the service and their marketing and selling techniques

The results of this research will provide an important springboard for the Panel's investigation and you will be eager for this research to be commissioned as soon as possible. We estimate that the cost of the research is likely to be in the region of £150,000. The LSB is committing £40,000 towards the cost but we need to secure further financial support from partners who share our enthusiasm to make this happen - we do not have the budget to fund the research alone. We have approached several organisations and will keep you informed of progress.

The Panel will want to consider its timetable for reporting to the Board, I recommend that you talk to our Chris Handford as you do so.

Yours sincerely

Chris Kenny
Chief Executive

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Annex 1: Context to the request for Consumer Panel advice on will-writing

Will writing is not currently a reserved legal activity and the writing of wills is not restricted to authorised lawyers - although many lawyers such as solicitors and barristers are bound by rules that mean that they are regulated even when carrying out legal activity that is not reserved. New legal services legislation in Scotland will shortly change this position north of the border by making will-writing a reserved legal activity that only lawyers will be able to undertake. There are increasing calls from some parties to introduce similar restrictions in England and Wales.

This is not a new issue and Parliament debated whether or not to add writing wills to the list of activities reserved to lawyers when introducing the Legal Services Act in 2007. They determined not to do so in the absence of any serious evidence of systemic failure. However, Parliament also suggested that this is an area that the LSB might want to look at again once established. In light of the developments in Scotland, concerns reported by a number of professional and trade bodies and anecdotal evidence of current consumer detriment the LSB has begun looking at the need for regulation in this area.

The LSB will not jump into recommending regulation that would restrict the type of providers that may deliver will writing services. We will only do so if there is compelling evidence of systemic failure and that existing tools cannot provide adequate protection for consumers in light of these failures. To recommend reservation we must also be sure that this is the most appropriate solution to the problems that are identified and that the benefits of reservation outweigh the disbenefits. This includes the potential for creating price or delivery barriers to individuals writing a will at all. It is in this context that we seek the Panel's advice.