

To:	Board	
Date of Meeting:	13 July 2011	Item: Paper (11) 49

Title:	Rationalising the scope of regulation
Workstream(s):	Workstream 3E: Improving access to justice – rationalising the scope of regulation
Introduced by:	Crispin Passmore, Strategy Director crispin.passmore@legalservicesboard.org.uk / 020 7271 0086.
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Status:	Protect

Summary:

This paper sets the scene in relation to the two areas that the Board is being asked to consider and to approve the Executive's next steps in relation to:

1. the review in to the regulation of the will-writing market;
2. the draft LSB discussion document "Enhancing consumer protection, reducing regulatory burdens: redefining regulatory boundaries".

Will-writing. We expect the Consumer Panel's report "Regulating will-writing" to be made available to the Board in advance of the 13 July meeting. The Panel has compiled a significant amount of evidence including: nearly 400 case studies from members of the public, lawyers and others; submissions to their call for evidence from a range of organisations; complaints data from the Legal Ombudsman; interviews with providers and a survey of 500 recent will purchasers. There has also been a "shadow shopping" exercise with 100 real consumers getting wills from different types of provider being shadowed and a panel of experts assessing the quality of the wills produced. This is currently over 70% complete - the final assessments are expected within the course of the week (w/c 4 July) and will be included in the Panel's final report. The Executive believes that given the examples of consumer detriment that have been reported, the evidence of imperfect quality in the findings of the shadow shopping results to date and the risks to consumers due to inherent features of the market, there is a clear case for the need for statutory regulation that needs to be answered.

We further believe that the investigation should be extended to include the indivisibly linked area of estate administration and probate activities. The Executive is not at this stage recommending whether statutory regulation is required or feasible, nor what any such regulation should look like. Rather we are recommending that further investigation should be progressed according to the statutory process set out in schedule 6 of Legal Services Act 2007 (**the Act**). We anticipate that the Consumer Panel will recommend this approach and the findings of their final report should provide the foundation for the investigation.

Legal Services Board: Enhancing consumer protection, reducing regulatory burdens: redefining regulatory boundaries – a discussion paper. This discussion paper sets out our proposed approach for making regulatory decisions, particularly with regards to reserving and deregulating legal activities. The paper sets out: the underlying issues with the scope and structure of existing regulation; the

effect of the Act and the tools it provides for making improvements; the outcome that we will try to achieve; the process that we will follow; the potential remedies and our current thinking on areas of legal services that we may prioritise for review over the planning cycle (2012-15).

Risks and mitigations

Financial: Low

FoIA: Initial assessment: All annexes – ss22(1) and 36(2).

Legal: Low

Reputational: High

Resource: Medium – can be managed within existing resource.

Consultation	Yes	No	Who / why?
Board Members:			Steve Green and Barbara Saunders (draft discussion document)
Consumer Panel:			Steve Brooker, Consumer Panel Manager

Recommendation(s):

The Board is invited:

- (1) to review the Consumer Panel’s advice on will writing (to be circulated prior to the meeting), and:
 - a. to agree to a formal s24 and s26 investigation covering will writing, estate administration and probate activities
 - b. if agreed, the project plan to be worked up over the forthcoming weeks with a view to consulting on the results of the investigation in Q4 2011/12
- (2) to agree to publish the attached discussion document on the Board’s approach to reservation and regulation more broadly:
 - a. after taking account of the Board’s comments and discussion
 - b. and after sign-off by the Chairman and the Chief Executive
- (3) to agree to issue a s120 request for a report from the Office of Legal Complaints setting out details of complaints that the Legal Ombudsman has received where the complainant has thought that they are purchasing a legal service from a lawyer covered by the Ombudsman scheme when in fact they are buying a service from an unregulated provider and therefore no such redress is available.

LEGAL SERVICES BOARD

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Rationalising the scope of regulation

Executive Summary

Recommendations

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Background / context

1. The structure and nature of regulation is heavily derived from an historical reliance upon restricted titles, professional self regulation and a very short list of activities and types of law that are reserved to certain lawyers. Rather than sweep this away, the Act transferred the prevailing regulatory structures into a new regime alongside the giving of wide ranging powers to the LSB to consider changes that will further the regulatory objectives.
2. The most pressing example of this (at least for the legal profession) has been will-writing. This is not a reserved activity, although around two-third of wills are written by solicitors. Parliament considered the matter but did not decide to reserve this to lawyers (be that via protected titles or authorised persons) through the Act.
3. The Board has a significant range of statutory functions that are very relevant to this issue. The decision to recommend extending reservation (or indeed to recommend removal of reservation) is the most obvious, but decisions on issues such as referral fees, thematic reviews on matters such as immigration and conveyancing, and approval of changes to regulatory arrangements are all

equally in need of an overarching narrative about how, why and what should and should not be regulated.

4. Over the next three to five years the Board can expect the legal market to change substantially: it is already beginning to do so. There is pressure to extend regulation to will writing and arguments to extend Ombudsman services to all individual consumers of legal services.
5. The Board has previously considered the strategic issues in some depth. When considering the business plan for 2011/12 (in May 2010), the Board began the process of looking beyond the current priorities and towards the regulatory structures that would support the LSB in promoting the regulatory objectives in the longer term.
6. In September 2010, the Board considered the emerging research on consumer outcomes (from Opinion Leader) and the academic treatise considering the economic rationale for the regulation of legal services (Drs Decker and Yarrow, Regulatory Policy Institute). These papers, especially when considered alongside the work by Professor Mayson reviewing the history of the reserved activities, highlighted the fact that the current structures are unlikely to be permanent or sustainable, let alone provide a solid foundation for considering further decisions. The Board considered and discussed further papers setting out developments in policy thinking in January and April 2011.
7. The key issue is not simply whether to reserve a particular legal activity or category of law to a defined class (or classes) of lawyer. That of itself does not set out how regulation should work; nor, since the passing of the Act, does it define which sorts of entities or people it should be reserved to. Instead of the reserved activities being reserved predominantly to those with specific titles (such as Solicitor, Barrister, Fellow of Legal Executive etc), the Act allows only for reservation to authorised person – i.e. a person authorised by an Approved Regulator (**AR**) under appropriate regulatory arrangements.
8. So, returning to will-writing, the Board could (if it thought the issue warranted it) decide to reserve such legal advice. It would however still need to decide what sort of regulation it wanted to see in place to overcome the risks or consumer detriments that had led it to conclude that regulation was required. Without such guidance, an AR may be tempted to put in place significant restrictions that are not warranted by the risk that led to reservation, or at the opposite end, not to have adequate safeguards to ensure that services are of the appropriate quality. Consistency will derive from clarity.
9. There is on the face of it an option to review all legal services in one go and decide how they should all be regulated. This could lead to a consistent approach to regulation so that consumers and providers alike were certain about the level of regulation and protection across all legal services. Parliament did not go down this route and the Executive considers that given that, it would be wrong for the Board to then do so.
10. There are more substantial reasons for rejecting such an approach. Legal services are not delivered in one market, but many. Substitution is low (a consumer is unlikely to decide that quality is too low or prices too high in conveyancing and choose to get a divorce instead) and that of itself shows us how different each service or market is. It does not take much to make clear that

the risk of consumer detriment varies quite markedly in different areas and the regulatory response will need to vary accordingly.

11. Even with the limited market information available we can already prioritise certain areas for regulatory investigation. The Board has already looked in detail at referral fees and quality assurance for criminal advocates and is beginning to look in more detail at both conveyancing and immigration. Will-writing has of course risen up our agenda. The regulatory responses in each case need to be tailored to the risks and issues that are identified.
12. Over time the risks also change. Greater consumer protection or competition law may reduce the need for incremental legal services specific regulation; increased competition in a market may improve quality and lower prices; and greater symmetry between consumer and provider may develop in certain markets. These sorts of factors mean that even over time the need for and shape of regulation is likely to vary. Even if it were practicable, therefore, the case for a one off fix of legal services regulation is weak.
13. On the other hand, when considering the specific risks and issues, and when deciding upon the appropriate regulatory response to a particular market, it is important that a consistent approach is taken and regulatory interventions are predictable. It would be wrong to continue the haphazard approach to reservation and regulation that the current list of reserved activities provides.
14. It is certainly arguable that the regulatory objectives on their own are enough to provide that consistency and guide to individual decisions. It is true that they must be the root. But they do not of themselves define how evidence should be collected and analysed; how different objectives should be balanced; nor what regulatory interventions should be deployed.
15. Similarly, we can rely to some degree upon the better regulation principles. But again they provide only a launch pad and a test of any proposals. They do not lead to any particular set of regulatory arrangements that are appropriate for particular risks or issues.
16. So the Executive considers that an overarching approach to regulatory decision making, especially the decision to extend or reduce the list of reserved activities, is required. That must build upon what is in place in the Act (regulatory objectives and better regulation principles) and, as importantly, must make it possible for the Board to consider and filter the many options for prioritisation. Finally, the approach must lead to more than a recommendation that reservation is required: there must be guidance on the nature of regulation that will best tackle the detriments and support the regulatory objectives.
17. In the attached discussion document (**Annex A**), we are building upon the ad hoc dialogue that has been commenced with stakeholders (particularly ARs and academics) about the regulatory philosophy that should shape the Board's approach to the statutory decisions that it has to make. There are three core elements for the Board to consider:
 - The process for assessing risks to regulatory objectives, in particular markets and sub-markets, and for making the consequent regulatory decisions
 - The priorities that the Board wishes to focus upon and the approach to developing that list

- The steps that the Board will take to use and embed this approach in its operations.
18. This is not (only) an arcane issue for regulatory nerds and gurus. The Board's priorities for its first phase were set with a strong and direct steer from Parliament through the Act. The issues covered in this discussion document are the foundations for the Board's next phase of modernising the legal services market so that it operates effectively for consumers and promotes more actively the regulatory objectives.

Process

19. As the Board will remember from Professor Mayson's work, the process for creating the current list of reserved activities bears little scrutiny. There was no clear vision against which to evaluate; no mapping of risks and issues that might cause detriment; and there was no process for gathering and assessing evidence. There is little from the current system that allows us to grow an approach to deciding whether to extend regulation to any other area of law or activity.
20. The discussion document sets out a robust but simple approach to extending reservation. It is captured in a flow chart on page 28 of the discussion document. It can be summarised as:
- a. **Identify and prioritise areas to be considered** based upon wide ranging intelligence or the request of an interested party¹
 - b. **Review initial evidence and define the issues** including the likely consumer detriments and other impacts on regulatory objectives
 - c. **Gather further evidence** and assess if prima facie case for investigation, this will include
 - d. **Assess the range of possible non-statutory interventions** including better enforcement of existing interventions from both regulators and general consumer law, voluntary codes and increased consumer education and empowerment
 - e. **Consider forms of regulatory arrangements** that are most likely to address the defined detriments in the absence of effective alternatives to statutory regulation
 - f. **Identify impacts** on providers, the broader regulatory framework (e.g. concerning professional privilege and the responsibilities of existing approved regulators) and the wider administration of justice
 - g. **Recommend reservation** under the Act (only where it is most proportionate response)
 - h. **Consider developing guidance** on the optimum regulatory arrangements most likely to address the defined detriments

¹ Schedule 6 requires that the Board undertakes at least "preliminary inquiries" if asked to investigate adding a new activity or removing an existing activity from the list of reserved activities if asked by the Lord Chancellor, the Consumer Panel, the Office of Fair Trading or the Lord Chief Justice. Any other party can request an investigation but the Board is under no obligation to take action if they do so.

- i. **Receive applications from potential ARs** (the Board is a regulator of last resort if there is no appropriate applicant (LSA s.62)).
21. This approach is consistent with how the Board has tackled the development of guidance on referral fees. The approaches to diversity and development of guidance to Licensing Authorities also follow a similar route in many respects. The transparent process will ensure that in future it will be clear to all stakeholders how a particular decision was made and conclusions arrived at. It will offer not a piecemeal solution but a strategic and consistent approach rooted in the regulatory objectives and a consumer focus.
22. The approach is rooted in the Decker and Yarrow research and applies the Treasury's Green Book general cost-benefit methodology to the regulation of legal services. It is designed to deliver the consumer outcomes drawn from the Opinion Leader research. And, of course, it will always be taken back to regulatory objectives and the Board's analysis of them in its paper published in April 2010.
23. The overriding theme of the document is that regulatory burdens should be minimised and consumer protections improved. These may lead to liberalisation in some areas (such as is already happening regarding ownership and external investment) or to greater intervention in others (such as greater access to the Legal Ombudsman service).

Priorities

24. The Board cannot definitively take potential priorities through the process set out in the paper until after the consultation has been concluded. Consultees may offer guidance and thoughts that shape and re-shape the approach and thus change the priorities.
25. However, the Executive has started to consider what priorities might be emerging. This has, of course, already happened in practice without the overarching strategic approach – the Board has prioritised and re-prioritised in its short life beyond the three core priorities of independence, complaints and ABS.
26. The issue of priorities is tackled more fully at page 44 of the discussion document. By setting out initial thoughts, it is expected that a greater number of stakeholders will engage: they will be better able to see how the Board plans to develop a rationale for the scope of regulation over the next three to five years.
27. The priorities are tentative at this stage in many cases. But in others we have already committed to action through our business plan.
 - a. Will-writing, estate administration and probate
 - b. Services delivered typically by special bodies
 - c. Immigration
 - d. Residential conveyancing
 - e. General legal advice
 - f. Corporate law (including banking and finance).
28. This is not a wish list of extending reservation. It is however a long list of areas that raise particular questions and may warrant at least an initial scoping of

potential detriments. One can see from the discussion document that the *initial* reasons for consideration are hypothetical to some degree and of course the evidence is limited: that is exactly why the process is as designed.

Will-writing

29. The Board has reviewed the significant evidence base that underpins the soon to be received Consumer Panel report and recommendations. This represents the first stage in the process set out in the discussion document – namely that the Board can now consider if there is enough evidence of consumer detriment and wider risk to the regulatory objectives.
30. There is no need at this stage to decide if regulation by ARs under the auspices of the Board is either required or feasible. It is in effect a gateway point; a moment to decide if having started the process by asking the Consumer Panel to gather evidence, consider and advise, we should move to the formal, statutory stage.
31. The Board has three options:
 - a. It could reject the advice and conclude that the evidence does not warrant further consideration. The Executive considers that this can be rejected summarily in light of the research findings and advice.
 - b. The Board could conclude that it would be wrong to start a s24 investigation using a methodology and approach that is about to enter discussion phase and consultation. The Executive considers that it is plausible to delay the decision until the methodology for tackling these sorts of issues is finalised: that is, after all, what the Board decided early in 2010 when it rejected a request to commence a formal investigation on will-writing. However, events have moved on as the weight of evidence of potential harm has grown.
 - c. The Board could decide that a formal s24 investigation is required based upon the evidence available. There is enough evidence of consumer harm and threat to regulatory objectives to warrant a more detailed examination of the facts, of the causes of any detriments and analysis of how regulation might be deployed to mitigate the risks.
32. The Executive believes that the case for an investigation is convincing. There are significant benefits to moving forward at this stage, whilst still discussing and refining the overall methodology. In particular, two factors are decisive. Firstly, the evidence that we have seen is significant and greater than the Executive anticipated in early 2010. Secondly, the approach outlined in the discussion paper has been developed alongside the will-writing work undertaken so far and as a case study it has proved invaluable to use a live example to identify the right questions and tests. That is likely to continue to be the case as we get to the heart of the matter and conclude if reservation is likely to tackle the problems identified and if so what sort of regulatory arrangements are most likely to be effective.
33. A further question arises at this stage about the scope of the investigation. The Consumer Panel's investigation to date has focused primarily upon will-writing. However, as the Board will have noted from the earlier discussion of that advice, it is difficult to extract will-writing from estate administration and in turn probate.

34. The formal investigation should, therefore, be scoped in such a way that allows these issues to be properly investigated. That does of course mean going back to some of the issues raised in the research and Consumer Panel advice to explore these wider issues more directly. It is likely also to involve a call for evidence from interested parties. That is the benefit of the approach set out in the attached discussion document – it ensures that potential issues and detriments are properly explored ahead of the formal investigation so as not to neuter it at the start.
35. This does not mean that the final recommendation will be the same in all three areas. It is simply that the interconnections between the three areas mean that each part should not be changed without careful exploration of the other areas. The Board will of course know that probate activities are already reserved and will note that the Act currently makes this reservation very narrowly. Schedule 2, paragraph 6 of the Act defines ‘Probate activities’ 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’.

Initial peer review feedback

36. The discussion document is being peer reviewed by two leading academics in this area: Professor Julia Black (London School of Economics and Political Science) and Professor Richard Moorhead (Cardiff Law School). Their feedback will be available by way of an oral update at the 13 July meeting, following meetings between the Executive and the peer reviewers in the intervening period.
37. We have, however, received some initial comments. The overall impression appears to be that the paper is coherent and plausible, but many challenges remain. Some key emerging themes are set out below:
- a. **The public interest:** there is a strong focus in the paper on regulation to protect the consumer interest and less focus on the broader public interest
 - b. **Evidence-based decisions:** the paper strongly supports an evidence-based approach to decision making. Does this provide the Board with enough flexibility in areas where there is incomplete evidence and in light of wider public interest considerations?
 - c. **Title vs. activity-based regulation:** the tensions and interplay between regulation by title compared to regulation by activity are complex and we should be clear of the scenarios, particularly in relation to the role of the professions going forward, that we are asking for comment on
 - d. **Authorisation of entity vs. authorisation of the individual:** is the weight of discussion on this subject within the draft paper set at the right level?
 - e. **Ambition of approach:** should we explicitly raise in more detail questions about the opportunities for and limitations of a principled approach to regulation where all legal advice is regulated or that the Legal Ombudsman’s jurisdiction is expended through voluntary complaints schemes to cover all legal advice?

Potential questions on which we will be seeking views

- a. Do you agree with our diagnosis of the weaknesses of the existing system?
- b. Do you agree with our proposed processes for assessing whether to amend the list of reserved activities in future?
- c. Do you have any comments on how we propose to undertake the S24 and s26 investigation into will-writing, probate and estate administration activities?
- d. Do you have any comments on our proposals for other areas to investigate, including proposed additions and deletions, and suggestions on relative priority?
- e. Do you agree with our proposal that areas should be examined 'case-by-case', rather than through a general recasting of the boundaries of regulation? If not, what form should a more general approach take?
- f. Do you consider that specific action may be needed to ensure that more legal services activity can unequivocally be included within the remit of the Legal Ombudsman and, if so, how can this be best achieved?
- g. Do you have any comments on our discussion of separate business rules and, in particular, how they might be framed so as to improve consumer protection without discouraging innovation?
- h. Do you wish to comment on the implications of our approach for professional privilege?
- i. Do you have any comments on the approach taken to definition of what regulatory interventions may be appropriate in different cases?
- j. Do you have any comments on how the LSB should approach approval of ARs and LAs in relation to newly reserved activities?
- k. What do you see as the benefits and downsides of regulating through protected titles such as solicitor or barrister?
- l. Should there be a consistent approach to the allocation of title to authorised person? If so, should the title be linked to the activities that they are authorised to undertake or the principal AR that authorises them, or both?

Next steps

38. The discussion document to be published, subject to the Board's agreement, by the end of July.
39. We intend to issue a s120 request for a report from the Office of Legal Complaints setting out details of complaints that the Legal Ombudsman has received where the complainant has thought that they are purchasing a legal service from a lawyer covered by the Ombudsman scheme when in fact they are buying a service from an unregulated provider and therefore no such redress is available. In his response to the Board's discussion document, "Developing Regulatory Standards", the Ombudsman has reported an increasing number of cases where this has happened as the legal services market has developed and produced new delivery models. The Ombudsman has also raised concerns as a

matter of public record through various press contributions. A s120 request would formally and robustly set the parameters for obtaining relevant intelligence from the Ombudsman which will prove invaluable in helping the Board understand developing issues around the scope of regulation and help us make decisions on areas to prioritise for review going forward and make clear that we regard the input from the Ombudsman as having a unique status in the inputs to our decision-making. The Act specifies that s120 reports must be published, which has the added benefit of maintaining the public profile in relation to this important issue.

40. A formal investigation into will-writing, estate administration and probate activities will be commenced and the statutory notices produced to alert Lord Chief Justice, OFT, Consumer Panel and Lord Chancellor. As a matter of good practice, letters will be sent to ARs' regulatory and representative arms and to other interested parties, including all those that responded to the Consumer Panel's call for evidence.
41. A detailed project plan, including a communications plan, will be produced ahead of formally launching the investigation, and therefore the Board is asked to delegate the actual start of the investigation to the Chief Executive, so long as it is completed ahead of the next Board meeting. We would aim to host a seminar in September to which a broad range of interested parties will be invited. The seminar will focus on:
 - a. Defining the specific activities which may need regulation or de-regulation
 - b. Seeking information and guidance in relation the new areas being brought into the investigation
 - c. Discussing optimum regulatory arrangements should the review conclude with the Lord Chancellor making an order for one or more activities to be reserved.
42. In September, the Board will be asked to consider its strategic priorities for the next three years and how those broad priorities translate into priorities for regulatory investigation (as well as other areas of its work such as developing and assuring regulatory standards and regulatory decision making).
43. In November, the Board will have preliminary analysis of responses to the discussion document. This will shape the business plan for 2012/13, which will itself also serve as a strategic plan for the next three years.

06.07.2011