

To:	Legal Services Board	
Date of Meeting:	10 July 2013	Item: Paper (13) 48

Title:	Regulatory scope: cost and complexity; will-writing	
Workstream(s):	Workstream B (see Business Plan 2013/14)	
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Status:	Unclassified	

Summary:

The purpose of this paper is to set out a proposed response to the decision of the Lord Chancellor and the Government not to accept the Legal Services Board's Section 24 recommendation that will-writing activities should be made a reserved legal activity and become subject to mandatory regulation. It is the Executive's view that this decision impacts not just on the will-writing project but also our wider work on the cost and complexity of regulation and reviewing the regulation of general legal advice to individual consumers. This paper covers all three areas.

Recommendation(s):

The Board is invited:

1. to agree the recommended next steps for will-writing
2. to agree formally to stop the project to review the regulation of general legal advice for individual consumers
3. to note and comment on the update on the cost and complexity workstream

Risks and mitigations

Financial: N/A

Legal: N/A

Reputational: N/A

Resource: N/A

Consultation	Yes	No	Who / why?
Board Members:	x		Steve Green, Barbara Saunders
Consumer Panel:	x		Elisabeth Davies
Others:			

Freedom of Information Act 2000 (Fol)

Para ref	Fol exemption and summary	Expires
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LEGAL SERVICES BOARD

To:	Legal Services Board		
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Will-writing next steps

Context

1. On 13 February 2013 the Legal Services Board (“the LSB”) published its final report “Sections 24 and 26 investigations: will-writing, estate administration and probate activities”. The report contained the recommendation that the Lord Chancellor amends the list of reserved legal activities at Section 12 of and Schedule 2 to the Legal Services Act 2007 (“the Act”) so as to add will-writing activities.
2. The LSB is committed to liberalising the legal services market to stimulate growth and improve outcomes for consumers, the public and providers. This was the first time that the Board has made a recommendation to bring new legal activities within the scope of the Act. The Board will recall that it did not take this step lightly. It did so having concluded that the high test that it had set itself for proposing new regulation, i.e. that there must be a compelling case to do so underpinned by appropriate evidence, had clearly been met. It is in this context that the Board also decided not to recommend the regulation of estate administration.
3. Our two year investigation found comprehensive evidence that the will-writing market is working contrary to the interests of the consumers who use these critical services. Significant consumer detriment was found as a result of:
 - a. inappropriate practices by unregulated providers leading to the sale of products which are not needed, are unsuitable or offer poor value for money
 - b. poor quality advice and/or drafting leading to invalid and ineffective wills
 - c. inadequate arrangements for the safe keeping of wills among unregulated providers leading to wills not being available when required
 - d. absence of effective redress mechanisms leaving consumers of unregulated providers unable to put things right or obtain compensation where/when things go wrong

- e. dampening of competition because of lack of trust in the unregulated sector, which restricts its growth
 - f. false consumer confidence with consumers mistakenly believing that all providers are regulated.
4. The Board concluded that proportionate regulation would provide a cost-effective mechanism for addressing the identified detriments without imposing significant additional costs/burdens on the majority of providers.

Decision

5. The Lord Chancellor's decision notice (Annex 2) agreed with our analysis that there is consumer detriment in the will-writing market and that the reservation of will-writing activities could address this detriment. However, the Lord Chancellor rejected our recommendation for the following reasons:
- a. he did not think that It had been demonstrated that reservation is the best solution
 - b. he did not think that alternative measures had been sufficiently exhausted
6. The decision notice suggests that "to ensure that the costs/burdens of increased regulation are not imposed unnecessarily, further efforts should be made to see if such [*alternative*] measures could be made more effective, before resorting to reservation¹". The notice suggests the following measures:
- a. more targeted guidance for the legal profession and strengthening of existing regulation of authorised persons in this area combined with voluntary regulation schemes and codes
 - b. greater efforts to educate consumers on the different types of provider and their respective protections and options for redress
 - c. greater use of existing consumer protections.
7. This is a similar position as the previous Government took when rejecting calls for will-writing to be included as a reserved legal activity within the 2007 Act². The Government acknowledged at that time that "improvements must be made in the control of quality and standards of will writing and related services in order to protect consumers"³. However, its preferred option was to give a final chance to try to achieve this through voluntary regulation and consumer

¹ <https://www.gov.uk/government/publications/decision-notice-extension-of-the-reserved-legal-activities>

² It was also noted that robust evidence of significant and widespread consumer detriment had not been compiled at that time

³ See White Paper, *The Future of Legal Services: Putting Consumers First*, 2005, p.79

education. It was suggested that the LSB could return to this at a later date if real evidence of continued consumer detriment emerged.

8. Given the decision reached, it is important that the Board asks itself whether it made the right recommendation. We think that it did. The evidence for the conclusion that proportionate regulation surpasses anything that has led to the reservation of any item on the existing list of reserved legal activities. All of the actions suggested in the Lord Chancellor's notice were considered and rejected as viable options by the Board during the investigation. The reasons why and accompanying analysis were set out within the Final Report and Impact Assessment that were submitted to the Lord Chancellor. A summary is set out below:

- a. **Costs/ burdens:** The proportionate regulation that the Board proposed would not impose significant additional costs/burdens on the majority of providers. Most good unregulated businesses will already be compliant with the majority of the proposed requirements. Providers belonging to voluntary schemes are already required to meet comparable minimum standards and have in place a comparable range of consumer protection requirements⁴. Our proposals were supported by the main trade bodies representing the unregulated sector as well as bodies representing consumers and charities; and existing legal services professional and regulatory bodies⁵. The Law Society's initial response to the decision was to again emphasise that consumers will only be guaranteed regulatory protection if they use a solicitor, demonstrating the perceived competitive advantage that the existing pattern of uneven regulation provides⁶.
- b. **Voluntary schemes:** Voluntary schemes have already been established and promoted within this market. Following the decision not to include will-writing activities as reserved legal activities in the Act, the Government promoted membership of the Office of Fair Trading's Consumer Codes Approval Scheme⁷. This has not prevented unacceptable levels of consumer detriment within the unregulated sector. Despite the promotion of these schemes, coverage remains limited⁸. There is no requirement to join a scheme, so unscrupulous and incompetent providers can practice unfettered. Non-compliant

⁴ Our best analysis shows that approximately 2% of wills are written by firms not subject to mandatory regulation in the legal sector or another professional services sector or are not members of a voluntary regulation scheme run by one of the two main will-writing trade bodies.

⁵ E.g. SWW Questionnaire, November 2012, A survey of Society of Willwriters ("SWW") members (the largest will-writer trade body) showed that more than two-thirds of their members agreed that there were business benefits to be had from regulation

⁶ <http://www.lawsociety.org.uk/news/press-releases/law-society--consumers-remain-at-risk-from-cowboy-will-writers/>

⁷ This role has now been taken on by Trading Standards Institute (TSI)

firms may exit a voluntary scheme at any time to escape facing enforcement action and continue practicing⁹. The bodies running the schemes themselves had concluded that the schemes are proving insufficient to protect consumers in these markets¹⁰. In a recent press release, the Institute of Professional Willwriters' Chairman re-emphasised his view:

The IPW has had a voluntary code, now recognised by the Trading Standards Institute, for four years yet only 20% of the unregulated willwriting sector are IPW members and therefore comply voluntarily with the code. I can't see this proposal making any impact in the market.

- c. **Consumer education:** Enhanced consumer education combined with increased provision of practical market information may help some consumers make better informed choices. However, given the infrequency of purchase in this market, appropriately educating all consumers would likely be impossible and, at best, prohibitively costly. Past and current efforts to improve consumer understanding of the risks within the will-writing process and the different protections among regulated and unregulated providers have had only limited success as research shows that most consumers still believe that all providers of will-writing services are regulated¹¹.
- d. **Existing consumer protections:** With many problems the only option for remedy and/or redress in the absence of regulation is through private action. Many consumers feel unable to pursue this option due to the potential or perceived risk of high legal fees. The fact that problems are commonly not discovered until after death also presents particular barriers in this market. Enforcement of consumer legislation around poor sales practices is predominantly down to local Trading Standards Services and subject both to local decisions on priorities and resource constraints. Further, enforcement action does not usually include remedies that benefit individual consumers – especially where the offender has no realisable assets¹². It is however noted that the

⁹ The new TSI Consumer Codes Approval Scheme core criteria says that “failing to follow the terms of an approved code whilst claiming to be a member is a criminal offence for which a trader could be fined or imprisoned”. No further detail is provided.

¹⁰ Institute of Professional Willwriters and Society of Willwriters:

http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/submissions_received_to_the_consultation_on_enhancing_consumer.htm

¹¹ For example - In the past DirectGov, Citizens' Advice (and previously Consumer Direct), Which! and charities such as Age UK all provide consumer guidance relating to will-writing and the risks of using unregulated providers and Law Society and organisations within the charitable sector have run many educational campaigns.

¹² OFT data indicates that where criminal prosecution takes place and convictions are secured, compensation is rarely awarded e.g. OFT's Annual Report for 2011/12, LATSS made 1860 prosecutions under consumer law in

Draft Consumer Rights Bill recently published by BIS does contain proposals to improve the effectiveness and efficiency of consumer law enforcers. It also includes proposals to better provide redress for consumers¹³. Implementation and operational details, including potential timescales, are not yet known.

9. Given this analysis, we are disappointed with the decision the Lord Chancellor together with the Government and the reasons that they provided. However, it is their decision to take in the light of wider political objectives/ drivers than delivering the regulatory objectives having regard to the better regulation principles alone. It is not recommended therefore that the Board challenges the decision. However, we must decide what action the we should now take in relation to will-writing activities.

Proposed way forward – authorised persons

10. Strengthening the regulation of authorised persons is squarely within the remit of the LSB. The Board will recall that the investigation found quality issues with solicitors writing wills as well as unregulated providers (the other detriments identified were much less common in solicitors). Reserving will-writing activities would have placed an explicit responsibility on the Solicitors Regulation Authority specifically in relation to this activity, which does not currently exist. Improving existing regulation of solicitors writing wills was one of the main outcomes that the Board's proposal to regulate will-writing was designed to achieve. This would mean greater targeting of that regulation at the risks within this specific market. Had the Lord Chancellor accepted our recommendation, each regulator wishing to regulate the new reserved activity would have had to demonstrate to the Board that its regulation was proportionate and fit for purpose specifically relating to will-writing activities. We would have issued Section 162 guidance setting out how we would expect regulators to approach the regulation of these activities and the minimum protections required.
11. We have previously indicated that we may issue the draft section 162 guidance that was consulted on to existing approved regulators, even if the Lord Chancellor did not accept our recommendation. Upon reflection we do not think that this is justifiable. Asking regulators to develop a specific set of requirements for all firms writing wills would be akin to asking them to treat will-writing activities as reserved legal activities, even though the Government have decided that they should not be. We have argued in other areas, most obviously in relation to the Separate Business Rule, that regulators should not substitute their own decisions about what should and should not be regulated

2011/12 which resulted in just under £1million fines and just under £100,000 compensation (This is all prosecutions, not just relating to legal services or will-writing)

¹³ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/206373/bis-13-916-draft-consumer-rights-bill-governemnt-response-to-consultations-on-consumer-rights.pdf

when Governmental or Parliamentary decisions have been clear.¹⁴ Therefore, we should not here display this behaviour ourselves.

12. At the same time, we have clear evidence of consumer detriment relating to solicitors writing wills. It does not seem compatible with the regulatory objectives or our duties under S4 of the Act to ignore this finding.

13. Therefore, we recommend writing to the relevant regulators setting out our position on regulating non-reserved activities in the context of the will-writing investigation. We should say that:

- a. the Government has decided that will-writing should not be a reserved legal activity and they must not substitute that decision for their own
- b. the extent that their regulation should grip non-reserved activity delivered by authorised persons should be driven by an evidence based analysis of risk
- c. if there is evidence that services are consistently showing consumer detriment then regulation must satisfactorily mitigate those risks
- d. risk profiling is ordinarily done at the firm rather than activity level and most of the detriments that we found with will-writing and estate administration were about firm behaviour, and are unlikely to be exclusive to will-writing e.g. careless drafting, poor customer services, holding on to client money too long and non-transparent sales practices¹⁵.

14. Therefore, it is not appropriate for regulators to develop a set of rules and regulations specific to will-writing as if it were a reserved activity. We would be especially concerned with any proposals to introduce requirements for new and specific qualifications for individuals, as opposed to ensuring that firms have proper arrangements to ensure ongoing competence across their workforce. However, we do expect regulators to demonstrate that they have reviewed our investigation evidence and used this to inform their risk profiling and then focus regulatory oversight on the riskiest firms in this market. It is proposed that we ask the relevant approved regulators to provide details of the actions that they have taken and are planning to take. This may be supported by a roundtable event, probably early in the New Year, to discuss and challenge proposed actions.

¹⁴ See for example:

http://www.legalservicesboard.org.uk/news_publications/latest_news/pdf/20130130_letter_chris_kenny_to_antony_townsend.pdf

¹⁵ Similar investigations have not been undertaken in other areas so there is no comparable evidence base.

Proposed way forward – unregulated sector

15. The Government and Lord Chancellor have decided that they are happy for unregulated providers, not subject to statutory oversight by approved regulators and the LSB, to operate in this market. This level of risk has been accepted. We will not attempt to over-ride or bypass this decision.
16. We will speak to Ministry of Justice officials about any plans that they have to take forward measures to improve voluntary schemes/codes and enhancing consumer education. The LSB, with the support of the Legal Services Consumer Panel, may legitimately play a role¹⁶ in such activity, although it will inevitably take a lower priority than our core statutory duties or priorities in relation to improving regulator performance. This would most likely be through bringing together industry stakeholders and market participants in a roundtable to communicate the outcome of our investigation, either as part of the event noted in 14 above or separately.
17. We can encourage the industry to respond by exploring ways to improve the coverage and effectiveness of existing voluntary schemes/codes, which are rightly industry led. In relation to consumer education, it is proposed that we provide details of our investigation findings to existing consumer information outlets such as Citizens Advice, Which! and charities such as Age UK. These actions align with those that the Board agreed in relation to estate administration activities. It would be hard to justify the LSB expending resource in monitoring progress or delivering improved outcomes in the unregulated sector, particularly given our analysis that such measures are unlikely to prevent the consumer detriment we have identified. However, we may wish to review the impact of any measures taken in the context of the wider review of legal services regulation (please see below).
18. We are aware that the Office for Legal Complaints (“the OLC”) are planning a consultation on the potential value of a voluntary scheme for consumers of will-writing services¹⁷. We will engage with the OLC as their plans emerge.

Cost and complexity of regulation

19. The Lord Chancellor’s decision notice said that he would consider whether it might be appropriate to bring will-writing within the scope of a simplified regulatory structure if that is the outcome of the Ministry of Justice’s current review of the legal services regulatory landscape. In a separate letter to David Edmonds, the Lord Chancellor said he thought that the evidence “does not adequately demonstrate that reservation is necessary, in particular to the *breadth recommended...*”. He goes on to say that further efforts should be

¹⁶ The Board does have the authority under Section 163 of the Act to “enter into arrangements with any person under which the Board is to provide assistance for the purpose of improving standards of service and promoting best practice in connection with the carrying on of any legal activity”.

¹⁷ <http://www.legalombudsman.org.uk/downloads/documents/publications/Annual-Report-2012-13.pdf>

made to see if alternative measures can be made more effective “before resorting to reservation as recommended *or in a more limited form*”. This indicates that part of the reluctance to regulate is due to the way that reservation currently operates and the weight of regulation that is attached to it. This brings a sharp focus to our the cost and complexity project and the objective of finding long-term, risk targeted and proportionate, alternatives to reservation as the tool for delivering regulation.

20. The Ministry of Justice has issued a call for evidence in relation to their review, which we have been invited to respond to (Annex 1). The closing date is 2 September. Providing a full response to the call for evidence with proposals for a simplified regulatory system is now the first priority for the cost and complexity project. The approach will be broadly as set out in the paper that the Board noted at its April meeting. However, the plan now will be to complete a broad review by September. A second stage will then be to develop the analysis and underpinning evidence base; and to develop and cost the options for change.

21. The key outputs that we are developing to inform our submission to the Ministry of Justice call for evidence are outlined below:

- a. risk framework : what are the risks that legal services regulation should be protecting against and how do these play out across the Oxera market segmentation¹⁸
- b. regulatory tool-kit: what are the appropriate / proportionate/ targeted tools for regulators to address these risks?
- c. authorities : which tools need legislative underpinning, what can be achieved through regulators’ codes etc?
- d. simplification: given the above, what can be stripped out of existing legislation & regulatory arrangements?
- e. option development: what are the options for bringing about change?

22. A further important component to be developed is analysis of the role and duties of the Board and what would need to change for the role to no longer be needed. This may include, for example, properly independent front-line regulators and greater consistency of regulation across the regulators.

General legal advice

23. The Executive has undertaken preliminary work in relation to reviewing the regulation of general legal advice for individual consumers. However, given the Lord Chancellor’s rejection of our will-writing recommendation, it is

¹⁸ <https://research.legalservicesboard.org.uk/news/marketsegmentation/>

unthinkable that the broad church of general legal advice could ever meet their test for becoming a reserved legal activity, as the Government currently interprets it. In this context, it is therefore recommended that we formally stop the project and stop referencing a review general legal advice for individual consumers. This would present a positive message to Government. More importantly it would address the misleading and potentially destabilising impression held by many providers of general legal advice – notably in special bodies and non-legal professions - that we have spoken to that we are looking to reserve these activities. The written ministerial statement calling for evidence in relation to the legal services regulatory framework and the LSB's cost and complexity project provides a more appropriate vehicle to tackle broad issues of what should be regulated and how it should be regulated.

Probate activities

24. The will-writing decision also raises a question about whether the Board's decision not to recommend that probate activities be removed from the list of reserved legal activities should be revisited. The decision was reached because:

- a. we do not have the evidence of the likely impacts on consumers of removing probate activities from reservation, particularly access to the Legal Ombudsman
- b. we have not analysed, nor sought views on, the marginal cost of regulation for probate activities
- c. the Probate Service is currently working on revising the Non-Contentious Probate Rules and we do not yet know the outcome¹⁹.

25. This reasoning remains true. Therefore, we again think that the Board's decision was the correct one. However, we also note that on the face of it, the case for probate activities being reserved is weak, far weaker than for will-writing. This will be borne in mind as we undertake our review of what is regulated and how it is regulated through the cost and complexity project.

Recommendations:

26. The Board is invited:

- a. to agree recommended next steps for will-writing
- b. to agree to formally stop the project to review the regulation of general legal advice for individual consumers
- c. to note and comment on the update on the cost and complexity workstream

¹⁹ http://www.legalservicesboard.org.uk/Projects/pdf/20130211_final_reports.pdf

Chris Handford

20 June 2013

Annex 1



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5 June 2013

REVIEW OF THE LEGAL SERVICES REGULATORY FRAMEWORK CALL FOR EVIDENCE

The complexities of the current legal services regulatory landscape have been raised with Ministers by a number of different stakeholders and through the Red Tape Challenge, and Ministers have asked officials to undertake a review, looking at what could be done to simplify the regulatory framework, and reduce unnecessary burdens on the legal sector, whilst retaining appropriate regulatory oversight. This review will encompass the full breadth of the legislative framework, covering at least 10 pieces of primary legislation and over 30 statutory instruments. We are also open to comments on the interaction between the legislative framework and the detailed rules and regulations of the approved regulators, licensing authorities and of the Legal Services Board and Office for Legal Complaints, although we recognise that these are not owned by MOJ.

We will now be taking this work forward, starting with this initial 'call for evidence' from stakeholders, which we will use to identify ways in which the framework might be simplified. The outcome of this stage in the review will be a report for Ministers in the Autumn, proposing next steps. While the details will depend on the analysis of the evidence provided, this report may include proposals for changes to the wider statutory framework, including to primary legislation, on which we may seek to consult more generally and which would take time to implement. In addition, it will consider where it might be possible to make changes more rapidly, within the existing statutory framework.

We are seeking views from a range of stakeholders across the legal services sector including, the representative and regulatory arms of each of the approved regulators and licensing authorities, and those applying to be approved regulators/licensing authorities, the Legal Services Board, Office for Legal Complaints, Legal Services Consumer Panel, Office of Fair Trading, consumer bodies, legal academics and the judiciary. We will also be seeking views from persons providing legal services, through the Ministry of Justice and Red Tape Challenge websites, in addition to the contributions from representative bodies.

We would be interested in hearing from the listed stakeholders about concerns with and ideas for reducing regulatory burdens and simplifying the legal services regulatory framework. We would be interested in ideas covering the overall legislative framework, and any specific provisions or aspects within it, whilst retaining appropriate regulatory oversight. I would ask that you respond by **2 September 2013**, to the email or postal address above.

In addition, we would be happy to meet with stakeholders, to discuss the review and views and ideas for reducing the burden. If you are interested in meeting with us, please contact me on 0203 334 4568, or at jenny.pickrell@justice.gsi.gov.uk, to arrange a suitable time.

Jenny Pickrell
Legal Services Policy



DECISION NOTICE RE: EXTENSION OF THE RESERVED LEGAL ACTIVITIES

On 13 February 2013, The Legal Services Board (LSB) published its final report, "Sections 24 and 26 investigations: will-writing, estate administration and probate activities". In that report, the LSB recommended that the Lord Chancellor makes an order amending Section 12 of and Schedule 2 to the Legal Services Act 2007, bringing will writing activities within the definition of reserved legal activities under the Act.

Having considered the report containing the recommendation, the Lord Chancellor has decided not to make an order under section 24 of the Act in respect of will writing activities for the reasons set out below.

The evidence provided in the Report indicates that there is consumer detriment in the will-writing market, and that reservation of will writing activities as defined in the recommendation could address this detriment. However, it does not adequately demonstrate that reservation is the best solution, or that alternative measures have been sufficiently exhausted in seeking to address this detriment. To ensure that the costs/burdens of increased regulation are not imposed unnecessarily, further efforts should be made to see if such measures can be made more effective, before resorting to reservation. For example, there could be more targeted guidance for the legal profession and strengthening of existing regulation of authorised persons in this area, combined with voluntary regulation schemes and codes of practice for non-authorised providers. There could also be greater efforts made to educate consumers on the different types of provider and their respective protections and options for redress, as well as greater use of existing consumer protections.

Separately, work is ongoing to consider how the legal services regulatory landscape might be simplified and reduce any unnecessary burdens on the legal services sector, and as part of this review the Lord Chancellor will consider whether it might be appropriate to bring will-writing within the scope of legal services regulation. It would not be beneficial to add to the complexity of the regulatory landscape in advance of the outcome of this work.

A handwritten signature in black ink, appearing to read "Chris Grayling".

Chris Grayling MP, Lord Chancellor and Secretary of State for Justice
14 May 2013