To:	Legal Services Board		
Date of Meeting:	12 September 2012	Item:	Paper (12) 58

Title:	Investigation into regulation of will-writing, probate and estate administration – provisional report
Workstream(s):	Strategy development and research
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Status:	Protect

Summary:

In April 2012 we consulted on the Board's provisional recommendations on the regulatory approach to will-writing and estate administration activities as part of our statutory sections 24 and 26 investigations. The consultation closed on 16 July.

We have considered the responses to the consultation and developed and refined our proposals in light of the responses.

The Executive is now coming to the Board with next set of documents for discussion and decision. The key decision is whether the Board is minded to recommend that the Lord Chancellor reserve will-writing and estate administration activities.

If the Board agrees, we propose to refine and publish key documents annexed to these papers for a short six-week consultation. The publication of the Provisional Report is a formal step within the Act's Schedule 6 process.

Recommendation(s):

The Board is invited to:

1. Review and agree, subject to revision, the summary of feedback to the April consultation and the LSB's response;

2. Determine that it is minded to recommend that the Lord Chancellor amend the list of reserved activities to add will-writing and estate administration activities;

3. To review and agree subject to revision four papers for a 6-week consultation:

    - Provisional report – setting out that the Board is minded to make the above recommendations and the reasons why;

- Draft impact assessments;
- Draft equalities impact assessment; and
- Draft section 162 guidance for prospective regulators of the new activities.

4. To consider and agree provisions in relation to receiving written and oral representations in relation to the provisional report.

Risks and mitigations	
Financial:	
Legal:	Some risk: The outcome may be that some currently unregulated providers will have to cease practicing or face new regulatory burdens in order to do so which may impact upon their livelihood – set clear evidence based rationale for the need for reservation and assess the impacts including compatibility with ECHR
Reputational:	Significant: this is the first time the Board has undertaken investigations into whether to recommend that the list of reserved activities be reserved and the approach to regulating any newly reserved activities
Resource:	Can currently be managed within existing resource – keep under review including in relation to legal resource

Consultation	**Yes**	**No**	**Who / why?**
Board Members:	**x**		Steve Green and Barbara Saunders
Consumer Panel:	**x**		Steve Brooker, Panel Manager
Others:			

Freedom of Information Act 2000 (FoI)		
Para ref	**FoI exemption and summary**	**Expires**
Annex 1 Annex 2 Annex 3 Annex 4 Annex 5	Intended for future publication (s22, FoIA)	N/A

LEGAL SERVICES BOARD

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What are we asking the Board?

1. To review and agree subject to revision the summary of feedback to our April 2012 consultation and the LSB's response (**Annex 1)**.

2. To determine that the Board is minded to recommend that the Lord Chancellor amends the list of reserved legal activities at Section 10 and Schedule 2 to the Legal Services Act 2007 to:

    - Add will-writing and activities provided ancillary to the writing of a will;
    - Amend the probate activities reservation to include the wider process of the administration of an estate of a deceased person and activities provided ancillary to the administration of the estate.

3. To review and agree, subject to revisions, the following papers for publication and six-week consultation:

    - A Provisional Report, which is a formal step in the investigation process set out at Schedule 6 to the Act. The Provisional Report must state whether or not the Board is minded to recommend that the list of reserved activities is amended and the reasons for its decision (**Annex 2)**
    - Draft Section 162 guidance for prospective approved regulators for consultation to help them develop their regulatory arrangements. The draft guidance is based around the approach to regulation and minimum protections set out in the April consultation paper (**Annex 3)**
    - Updated impact assessment (**Annex 4)**; and
    - Preliminary equalities impact assessment (**Annex 5)**.

4. To agree a technical Schedule 6 requirement about receiving representations:

    - Schedule 6 to the Act requires that the Board must determine if and to what extent further evidence should be heard or received. We are proposing a 6-week consultation on the documents set out in paragraph 3.

- Our Schedule 6 rules state that representations and evidence must be received within two months of the Board publishing the Provisional Report – “or within such other time as the Board may specify”. We invite the Board to agree to a streamlined six week consultation. We believe that this reasonable given the extensive consultation that has already been undertaken.

- We invite the Board to confirm that the position set out in our Schedule 6 rules in relation to receiving oral representations remain and should be adhered to. The rules specify that we ordinarily expect evidence to be provided in written format. The Board will not normally accept oral representations or evidence unless the particular circumstances of the representing person or complexity of the issue merit an exception in an individual case. Requests are considered on a case-by-case. We have not so far received any requests to make oral representations during the investigations.

Context

5. The LSB has already taken substantial steps to improve legal services regulation and liberalise the legal services market in line with the Act. Delivering regulation that is independent of inappropriate professional or provider influence is being achieved through the separation of regulation from professional bodies. The introduction of alternative business structures enables greater contestability and innovation across the whole market. And the improvement of complaints handling with legal services, including the introduction of the Legal Ombudsman, will improve customer experience and confidence as well as providing the sort of feedback that supports a more responsive and competitive market.

6. A relentless focus on improving the quality of regulation in legal services is at the heart of the LSB work programme. To realise the full potential of the Act, in areas such as will-writing and estate administration where there is evidence of consumer detriment arising from a combination of inconsistent achievement of proper standards of work and lack of contestability in the market, The LSB’s focus should be on achieving better regulation to support innovation and competition and achieves consistent consumer protection, thereby improving consumer confidence to choose and use legal services.

7. This is the first time that the Board may recommend that new legal activities are brought within the architecture of the Act and the overview of the LSB. It sets a precedent for how we use our power to assess the scope and nature of regulation in defined areas of law.

8. There is substantial and robust evidence for the Board to base their decisions upon. We are drawing to the final stages of an investigation that was started

in September 2010. The Board has reviewed the evidence and directed the investigation at each key stage along the way. The Board concluded in March that evidence supported the case for:

- Will-writing and estate administration activities to be reserved predominantly on consumer protection grounds;
- Requiring that the connected regulation must be proportionate, risk based and flexible so as not to unnecessarily close the market to any existing providers offering a good service or require them to unnecessarily change their business model; and
- Existing regulation being improved and therefore existing approved regulators being required to apply for designation as approved regulators and, where relevant, licensing authorities for any newly reserved activities.

9. We do not believe that any response to the April consultation gives cause for the above positions to change fundamentally, although the following paragraphs explore potentially helpful refinements of the underlying detail necessary to implement the change.

Consultation responses

10. We received 44 responses to the consultation. The vast majority were supportive of the substance of our proposals. Support was received from:

- Bodies representing the interests of consumers plus a number of individual consumers;
- Existing legal services professional bodies and regulatory bodies; and
- The main trade bodies representing the unregulated sector.

11. Constructive feedback and views were provided about the detail of the proposals. This has been considered and where appropriate reflected in the Provisional Report and draft guidance.

12. Please see the attached draft document "Summary of feedback to the consultation paper and LSB response" at **Annex 1.** A link to all published response was distributed to all Board members by e-mail on 10 August. Hard copies of all responses will be available to view at the 12 September Board meeting.

Key areas of challenge:

Providers regulated in other sectors

13. The main challenges came from groups representing non legal services providers who deliver some will-writing and estate administration (or closely associated) services. These bodies include the British Bankers Association (BBA) and bodies representing accountants - Institute of Chartered Accountants in England and Wales (ICAEW), Association of Chartered Certified Accountants (ACCA), and Institute of Chartered Accounts in Scotland (ICAS). These bodies argue that their members are already subject to satisfactory regulation in their own sectors meaning that their clients are not at risk. They are therefore seeking to minimise the impacts of reservation on their members through exemptions from any legal services regulation. A number of these groups argued that the case for regulating estate administration was weaker than that for will writing and should not be a reserved activity.

14. Whether or not the Board recommends that these activities are reserved must be based on compatibility with the regulatory objectives and the better regulation principles. This calls for an assessment of the detriments suffered by consumers, whether intervention is required to protect consumers and whether alternatives to reservation could provide the appropriate protections. The decision should not be based on the position of providers. However, consideration must be given to how regulation should be applied to different types of provider in the context of the above tests.

15. Against this background, our current conclusion is that the absence of a consistent base for regulation of the activities across the various categories of providers would risk perpetuating the current consumer confusion in the market. Hence, we do not accept the need for a “carve out” for accountants or banks, any more than we accept the case for the continuation of the SRA’s current model. However, we have clarified in the Provisional Report that ancillary services such as inheritance tax advice will only be caught within the proposed reservations if they are provided in conjunction with either of the core services of writing a will or administering an estate. If non-legal regulated providers do not offer either of these core services then any related services they may provide would not fall within the remit of legal services regulation. We thereby aim to reassure providers and their representatives that the approach to regulation will be proportionate to and targeted at the risks within these markets, taking into account protections that already exist within other sectors and not seeking to duplicate them where they are sufficient to meet the right regulatory outcomes.

Passporting of existing approved regulators:

16. It has been argued by representatives, regulators and members of the solicitors and notarial professions that their existing regulatory arrangements are already satisfactory and that they should be automatically approved in respect of will-writing and estate administration.

17. It is our view that existing regulators should be required to apply for designation. The regulation of existing lawyers in relation to these activities should face the same first principles test, against the regulatory objectives and better regulation principles, as that of providers entering legal services regulation for the first time.

18. We have reached this view having considered the evidence gathered during our investigation (including the shadow shopping exercise, complaints data compiled by the Legal Ombudsman, individual case studies and opinions expressed by other respondents). This evidence suggests that existing regulation as currently operated is not sufficiently protecting consumers. We remain of the view that there needs to be a lesser reliance on detailed generic rules and entry requirements and a greater focus on, and better targeting of, risk-based monitoring and supervision, to safeguard the delivery of good outcomes for consumers. Although approved regulators could change practice without reservation occurring, risks to consumers arising from an unregulated sector whose members do not meet the generic title based requirements of the ARs would remain.

19. It is our view that to "grandfather" existing regulators would represent a backward step for the Act's aim of de-regulation and liberalisation to promote competition. Solicitors have called for a level playing field with all non-lawyer providers being subject to the same regulatory costs as they are. We do not believe that the solution to this uneven playing field can be to require all providers to meet the most onerous requirements currently imposed unless, of course, this is proven to be a targeted and proportionate response. A proper designation process for existing regulators ensures consistency and means that the problems of complexity arising from different statutory bases, which have been evident in handling rule change applications in other contexts, can be avoided.

20. We therefore expect existing regulators to review their existing rule books with a view to greater targeting and proportionality of regulation at the risks within these markets. In particular there is likely to be liberalising opportunity in relation to existing regulated providers especially if the only reserved legal activities they undertake are will writing and/ or estate administration, or if they have a distinct department that only undertakes this type of work. This is particularly important in the context of the Solicitors Regulation Authority, the Council for Licensed Conveyancers and ILEX Professional Standards having

all expressed their interest in regulating currently un-regulated estate administration providers[1] that do not undertake wider legal activities.

21. Where a provider undertakes a range of activities beyond will-writing and estate administration, wider obligations targeted at and proportionate to the wider risks may of course apply. Wider qualification and entry requirements may be required to hold a professional title but we would expect subsequent monitoring and supervision to be targeted at and proportionate to the activities that such firms actually undertake – not those that they could be theoretically authorised to do.

Key issue - Implementation and transitional provisions:

22. One of most difficult issues to resolve is the setting of appropriate implementation arrangements if the new activities are reserved. We must balance the need for swift implementation to protect consumers from the detriments identified with allowing the market time to adapt.

23. The Act dictates that only providers that have been authorised by an approved regulator for the relevant activities on the day that the statutory instrument is laid reserving new legal activities may practice those activities. We are proposing that reservation cannot take full effect until:

- There is at least one approved regulator and licensing authority designated with regulatory arrangements that allow for the authorisation of all the different providers currently active within these markets and the capacity and capability to effectively regulate them; and

- Providers are authorised in sufficient numbers to ensure access to justice, consumer choice and competition.

24. This is because we must avoid the unintended consequence of closing the market to non-lawyer providers with different business models because of an absence of a suitable regulator to authorise them to undertake the newly reserved activities. In our view, this would not be in the public or consumer interest and would negatively impact upon competition and access to justice.

25. There are a number of options that we are currently considering. For more details on this point please see paragraphs 56 – 74 of the Provisional Report. We will ask for feedback on the pros and cons of each option as part of our forthcoming consultation. However, the implementation plan cannot be decided upon until the Lord Chancellor makes his decision and Ministry of Justice (MoJ) determine their preferred course of action.

[1] POST MEETING NOTE: This should read unregulated will-writing providers rather than unregulated estate administration providers.

Key risk - Minister does not accept recommendations

26. A key risk with this project is that the Lord Chancellor decides not to implement our proposed recommendations to amend the list of reserved legal activities. Reasons for this could include:

    - He is not convinced by the evidence we have compiled;
    - The recommendations do not fit with wider Government policy;
    - A lack of Government resource or Parliamentary time; or
    - He wishes to try other options before mandatory regulation.

27. We have worked to mitigate this risk by:

    - Ensuring we have a robust evidence base;
    - Working closely with MoJ economists and their legal and policy teams to ensure that our expectations are fully understood and met.

28. We will also consider whether a refined version of the draft section 162 guidance at Annex 3 should be issued to the existing approved regulators of these activities, irrespective of if and when there is change to the list of reserved activities.

29. If the case for reservation is rejected, we may also wish to consider the implications of that decision, and the standard on which it is made, for probate and other currently reserved activities. It is at least arguable that the level of detriment involved in the specifically reserved parts of the probate and conveyancing processes and the administration of oaths is rather less than that involved in will-writing and estate administration.

Ministry of Justice

30. We have established a joint project board with MoJ officials. This brings together key people to discuss, plan and, where appropriate, agree strategic issues related to the delivery of the proposals that will-writing and estate administration become reserved legal activities and identify and manage the associated risks. The remit includes:

    - Discuss and understand policy and legal positions in relation to the interpretation of the 2007 Act and how this affects decision making;

- Identify, plan and agree the processes and likely timeframes involved to take forward the necessary work relating to any regulatory and legislative change;

- Manage associated risks and issues strategically; and

- Ensure plans are focused on realistic timeframes with an element of contingency for any deliverables and that the quality of underpinning work needed to support the LSB recommendation(s) is a paramount consideration.

Next Steps

31. Subject to Board agreement and revisions we aim to publish the documents at the end of September for a six week consultation ending in early November. We also intend to publish a short covering consultation paper to accompany these documents and draw together the questions we are seeking views on.

32. Following the close of the 6 week consultation period and review of the responses received the Board will be asked to consider whether it remains minded to make recommendations to the Lord Chancellor that will writing and estate administration should be included within the list of reserved legal activities

33. Our aim is to ask the Board to make its final recommendations at its January meeting. Any recommendations would be put to the Lord Chancellor shortly afterwards. The Lord Chancellor must decide whether or not he will make an order to implement our recommendations within 90 days of them being put to him.

34. We continue to discuss the longer implementation timetable with MoJ officials. Our working plan is that activities would be reserved and applications from prospective approved regulators and licensing authorities would begin to be received at the beginning of 2014. The aim is for full implementation to then be possible before the middle of 2015.