

To:	Board	
Date of Meeting:	28 January 2010	Item: Paper (10) 04

Title:	Institute of Professional Willwriters' application under s24 LSA 2007
Workstream(s):	Access to justice
Presented by:	Crispin Passmore, Director of Strategy and Research crispin.passmore@legalservicesboard.org.uk / 020 7271 0086
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Status:	Protect

Summary:
<p>The Institute of Professional Willwriters (IPW) has written to LSB making a request under s24 of Legal Services Act 2007 ('the Act') that we hold an investigation into making 'will or other testamentary instrument' a reserved legal activity.</p>

Risks and mitigations	
Financial:	N/A
FoIA:	N/A – decision will be published.
Legal:	Potential for JR managed by being open and transparent about the action to be taken and by having it as a work plan objective to develop criteria and methodology for this year.
Reputational:	Reputation more likely to be damaged by addressing this issue before criteria and methodology are in place.
Resource:	If the Board does not accept the recommendation of the Executive, this risk will be managed by altering the priority of other work.

Consultation	Yes	No	Who / why?
Board Members:		✓	Application arrived last week
Consumer Panel:		✓	Informal discussion with Steve Brooker
Others:	N / A.		

Recommendation(s):
<p>The Board is invited:</p> <ol style="list-style-type: none"> 1) to decline to hold a s24 investigation at present; 2) to publish a short note setting out the position outlined in this paper; and 3) to write separately to IPW.

LEGAL SERVICES BOARD

To:	Board		
Date of Meeting:	28 January 2010	Item:	Paper (10) 04

Institute of Professional Willwriters' application under s24 LSA 2007

Executive Summary

Recommendation(s)

1. The Board is invited:
 - 1) to decline to hold a s24 investigation at present;
 - 2) to publish a short note setting out the position outlined in this paper; and
 - 3) to write separately to the OFT and IPW.

Issue

2. The Institute of Professional Willwriters (**IPW**) has written to LSB making a request under s24 of Legal Services Act 2007 (**'the Act'**) that we hold an investigation into making 'will or other testamentary instrument' a reserved legal activity.

Background

3. Under s24 of the Act, a person may make an application to LSB requesting that an investigation be undertaken with a view to LSB recommending to the Lord Chancellor that he make an order extending regulation to additional legal activities. Schedule 6 of the Act prescribes who may make an application, how applications made by different persons must be processed, prescribes time limits for handling such investigations in certain cases and who may or must be asked for advice in certain cases. The attached flow chart summarises this process (**Annex 1**).
4. Will writing is currently an unreserved legal activity. It is closely linked to probate work that is reserved. There has been a long campaign by some will writers to extend regulation. There are at least three associations or membership bodies that speak for mainly unregulated will writers. Solicitors undertaking will writing are regulated.
5. Those in favour of further regulation of will writing include Lord Hunt: "*I recommend that the SRA and the professional body of the Law Society should discuss with the LSB the possibility of extending the edges of the regulatory "net" to cover will-writing and all probate work. This must be done, if at all, according to transparent and published criteria that can be applied to the entire regulatory "net"*". In a recent meeting with the Consumer Panel, we understand that the current Minister, Bridget Prentice MP, also expressed some support for an early look at this issue, although noting that her personal view was that the balance of evidence was against the extension of will writing as a reserved activity.

Our current proposals

6. It is important that we develop an approach, methodology and criteria for s24 and s26 (which allows for the ending of regulation of a legal activity) before deciding if any particular activity should be regulated or unregulated. We have committed in our draft Business Plan to starting this work in 2010/11, with a view to consulting on an approach in Quarter 3. This will take 3 months to complete with a subsequent 6-8 weeks to publish a decision document. We know that The Law Society will be very positive about this approach, seeing it as well aligned with its desire to better define and protect the 'solicitor brand'.
7. This work is likely to prompt significant and substantial debate and response. Responses are likely to deal with the case for broadening the scope to cover will writing and possibly other specific areas, as well as on the general approach per se. It is unlikely that we will have finalised our position until well into Quarter 4 of 2010/11. This will allow us to commence, of our own volition, an investigation into any area of legal activity (with that choice informed by the wider consultation) confident that we could apply criteria to the evidence that the investigation harvests and reveals. The draft Business Plan does indicate that we will undertake an initial review of the regulatory frameworks for claims management and immigration and asylum.
8. We will firm up our proposed timeline in the final version of the Business Plan and include specific reference to the areas to which we currently expect to apply the finalised methodology and criteria once they have been developed, consulted on and published.

The application

9. The application is made by IPW (www.ipw.org.uk). IPW admits will writers who have passed an exam (or are passported as ILEX or solicitors), maintain CPD and have at least £2 million public indemnity insurance per will written.
10. IPW's website states:

"The aims and objectives of the Institute are set out in full in the [IPW Constitution](#) but to précis the objectives, they are as follows :-

1. To promote the importance of making a Will to the general public.
2. To promote the Institute and the services of its Members.
3. To ensure that the services provided by its Members are delivered professionally, ethically and competently.
4. To make representation to Government on legislative matters which affect Members of the Institute and their clients.

The Institute also campaigns for it to be compulsory for all Willwriters to be part of a regulatory regime for the protection of the general public and to help give the sector and IPW members wider recognition and credibility."

11. In its application, IPW notes the position set out in the draft LSB Business Plan, commenting that it does “*not expect any investigation to commence until such criteria have been established*”.

Risks

12. The clearest risk is that a person authorised under paragraph 3 of Schedule 6 of the Act (i.e. the Lord Chancellor, the OFT, the Consumer Panel or the Lord Chief Justice) makes a similar application that we undertake either a s24 or s26 investigation. We would then need to follow the appropriate process. This risk could be managed most effectively by setting out, at the time that we finalise our Business Plan, a general position on currently unreserved legal advice, highlighting that we will develop an approach before the end of 2010/11. This will allow us to state that we will be minded to refuse a s24 application in advance of these criteria being confirmed. We could draw this to the attention of the Lord Chancellor and other persons authorised to make an application to us under paragraph 3 of Schedule 6 of the Act.
13. In practice, we have no reason to believe that such an approach is likely, at least in the short-term, from any of the defined bodies. The issue does not as yet feature highly on the Consumer Panel’s agenda, the judiciary have evinced no interest in the subject, there is not sufficient political head of steam for this issue to lead ministers to consider a referral and our understanding is that the OFT is considering its own study of the market, which we would encourage them to do. The OFT Board will be considering whether to approve in principle the decision to investigate the market further at its meeting in early March. We are planning to meet OFT later this month to discuss the issue further.
14. There is also a risk of legal challenge by way of a judicial review of a decision to refuse to hold an investigation, but this is considered to be a low risk given our stated intention to address the issue at an appropriate pace.

Recommendation

15. Given our intention to address this issue as part of our work programme, we have three options:
 - 1) We agree to hold an investigation now. No time limits would apply to this application. We proceed without criteria and develop a methodology and criteria as part of the investigation that applies only to this issue. There are clear dangers of inconsistent decision-making if we do this and there are some practical resourcing issues which would make progress difficult until the final tranche of appointees take up post in March.
 - 2) We agree to hold an investigation but place it on hold until we have developed the methodology and criteria. In effect, placing it on hold for at least a year.
 - 3) We decline to hold an investigation at this time on the grounds that we are not in a position to hold a competent investigation until we have developed a methodology and criteria that have been widely consulted and, ideally, until OFT has completed a wider study looking at what consumer detriment exists in the market place. We might ally this with a public call on OFT to pick up the baton.

16. An alternative approach of simply refusing to hold an investigation on the grounds that it is not a priority issue would be incompatible with our position of wanting to address will writing and the approach to reviewing the scope of regulation more generally. In last year's Business Plan, we indicated that we would ask the Consumer Panel to consider the issue of will writing and would expect to consider the case for change in light of the Panel's advice during 2010/11. In many ways there is little difference between options 2 and 3. Either would be acceptable to the Executive. However, on balance, we consider that it is preferable to be clear, open and transparent in our response and not to have an application sitting idle for around 12 months.
17. The Board is therefore invited to decline to hold an investigation at present. The decision to decline the request would be on the grounds that LSB is currently consulting (through our draft Business Plan 2010/11) on a work programme that makes the request untimely and unnecessary. The issue of determining whether or not an activity should be reserved or unreserved is an important part of the draft work programme. We will address the request once the Board has agreed an approach and criteria for determining whether LSB should recommend that an activity should become a reserved activity

Next Steps

18. If the Board is content with this approach, we will:
 - put a short note based on this paper on LSB's website, making our position clear to all stakeholders and dealing with the issue in similar terms in the finalised Business Plan;
 - write to the OFT with some degree of publicity
 - write separately setting out our position to IPW.

18.01.10