

To:	Board	
Date of Meeting:	28 March 2012	Item: Paper (12) 14

Title:	Investigation into the regulation of will-writing, probate and estate administration services – initial proposals and draft impact assessment for consultation
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:

In January the Board considered and commented on the Executive's analysis of the detriment and impacts experienced by consumers of will-writing, probate and estate administration services. The Board agreed with the Executive's analysis that regulatory reform is needed to protect consumers and deliver the regulatory objectives aligned to the principles of better regulation.

The Board agreed that the Executive should develop two key proposals for consultation:

1. **Improving the effectiveness of the existing legal services regulation that applies to the majority of providers delivering these services.** This would mean much more targeted, risk-based monitoring and supervision of regulated businesses to identify and address the detriments that we have found. This would, however, be accompanied by stripping away as many barriers to entry and restrictions on how businesses may organise themselves as is possible. . We consider that this will also promote normal competitive pressures within the largest part of the market.
2. **Recommending that the list of reserved activities be extended to include will-writing and estate administration activities.** This will stretch regulation to ensure that appropriate consumer protections, including access to redress, are in place no matter who delivers the service.

The Board asked the Executive to work on the basis that guidance will be issued setting out its expectations of any existing or new regulator of reserved will-writing and estate administration activities. We propose consulting on the following minimum protections:

- a. A strategy and early action for consumer education
- b. A mandatory register of authorised providers
- c. Authorisation gateway checks including a fit and proper person test for ownership and control
- d. Appropriate financial protection arrangements especially where a provider has access to other people's money including indemnity insurance or work from regulators and financial institutions to avoid the need to hold other people's money
- e. An outcomes based code of conduct with appropriate emphasis on sales practices
- f. A requirement that providers have an appropriately trained workforce
- g. A risk based supervision strategy that targets regulatory action to protect consumers
- h. An enforcement strategy that incentivises and encourages compliance, deters non-compliance and punishes transgressions appropriately
- i. Arrangements to ensure each provider has an appropriate in-house complaints process
- j. Bringing all three activities within the jurisdiction of the Legal Ombudsman

Beyond these minimum protections, regulatory arrangements should allow providers flexibility to develop their business model and demonstrate to the authorising approved regulators (ARs) and licensing authorities (LAs) that they can deliver good outcomes for consumers in these markets and how they will guard against risk of this not happening. This should form the basis of authorisation decisions and subsequent level of monitoring and supervision for the provider. Moves towards authorisation by activity and regulation focused more on the entity and less on individuals' qualifications must be accelerated to achieve this.

We would like to draw attention to three areas that we have developed following non-executive director input:

1. **Third party complaints:** The person who commissioned will-writing services has often died by the time that deficiencies come to light or in case of estate administration, the service is used. At paragraph 146 we propose that ARs / LAs should address the issue of beneficiaries' right to complain about a provider and at paragraph 147 highlight the Ombudsman's forthcoming work to review the position relating to third party complaints more widely.
2. **Transitional provisions.** At paragraphs 169- 177 we have proposed that any new reservation should not take full effect before there has been opportunity for the criteria below to be met. We have asked for views on whether additional consumer protections are needed in the intervening period and if so what form they should take.
 - a. ARs and LAs designated with regulatory arrangements that allow for the authorisation of the different types of provider currently active within these markets.
 - b. Different types of providers to undertake activities in sufficient numbers to ensure access to justice, consumer choice and competition and is maintained.

3. **Regulatory overlap:** At paragraphs 178 -181 we have stressed the requirement for prospective ARs and LAs who are proposing to authorise providers who are also overseen by regulators in a different sector to demonstrate that they meet the sections 52 and 54 requirements around preventing regulatory conflict and unnecessary duplication of regulatory provision. We have stressed the need to ensure that there are effective arrangements between regulators and ombudsmen in different sectors around complaints – including around third party complaints.

Following comments from the Board in January:

1. Paragraph 91 draws the government review of the consumer landscape into our analysis especially in relation to the imminent withdrawal of Office of Fair Trading oversight of voluntary code schemes into our analysis of the need for regulation. We will update before publication if the final document appears.
2. Paragraph 108 include a recommendation that providers should inform consumers of the Probate Service's £15 will storage facility especially if being offered or recommended will-storage facilities involving on-going costs.

We would like to draw the Board's attention to the analysis about LeO voluntary jurisdictions set out in the draft consultation paper. At paragraph 148 we state that we do not believe that voluntary jurisdictions will offer a long-term alternative to reservation in these markets for two reasons:

1. Access to redress is only one of the required protections against detriments identified in these markets
2. Although many good providers may welcome this option, unscrupulous targeting the most vulnerable consumers are unlikely to opt-in

At paragraph 177 we ask a specific question about whether LeO schemes may have a role to play as a transitional provision before reservation takes effect or whether development costs would outweigh the benefits.

We are involved in on-going discussions with economists at the Ministry of Justice about the draft impact assessment. We will ensure that the final version is as closely aligned to their expectations as is possible and any significant issues raised are addressed.

Recommendation(s):

The Board is invited to:

- a) Review and comment on the draft consultation paper at **Annex A**
- b) Review and comment on the draft impact assessment at **Annex B**
- c) Delegate approval of the final consultation and impact assessment taking in Board comments to the Chief Executive and Chairman – for publication in early April

Risks and mitigations			
Financial:	Low		
Legal:	Medium		
Reputational:	High		
Resource:	Medium – can be managed within existing resource.		
Consultation	Yes	No	Who / why?
Board Members:	X		Barbara Saunders, Steve Green
Consumer Panel:	X		Secretariat

Freedom of Information Act 2000 (Fol)		
Para ref	Fol exemption and summary	Expires
Annex A	Intended for future publication (s22, FoIA)	
Annex B	As above	

19.03.2012