To:	Legal Services Board		
Date of Meeting:	28 November 2012	Item:	Paper (12) 75

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

Summary:

In September 2012 the Board determined to publish for consultation a Provisional Report under the Legal Services Act 2007 (the Act) Schedule 6 process. The report stated that the Board was minded to recommend that the Lord Chancellor makes will-writing and estate administration reserved legal activities. The report was accompanied by draft guidance for prospective regulators and impact assessment documents. The consultation closed on 8 November 2012.

The purpose of this paper is to update the Board on the Executive's emerging thinking following an initial review of the consultation responses received to date and reflecting discussions with stakeholders during the consultation exercise. The Board is being asked to comment, rather than make any decisions at this point. In particular, the Board is invited to discuss and comment on developments in relation to estate administration activities.

The Board will be asked to make its final decisions in relation to the regulation of will-writing, probate and estate administration at its January meeting. The aim would then be to make any recommendations to the Lord Chancellor shortly afterwards.

Recommendation(s):

The Board is invited to discuss and comment on the emerging thinking set out within this document.

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 – this is being kept under review including in relation to legal resource

Consultation	**Yes**	**No**	**Who / why?**
Board Members:	**x**		Steve Green and Barbara Saunders – early draft shared
Consumer Panel:		**x**	
Others:			

Freedom of Information Act 2000 (FoI)		
Para ref	**FoI exemption and summary**	**Expires**
N/A	N/A	N/A

LEGAL SERVICES BOARD

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Investigation into regulation of will-writing, probate and estate administration – interim post consultation update

Background

1. In September the Board determined to publish a Provisional Report under the Legal Services Act 2007 (the Act) Schedule 6 process. This set out that the Board was minded to recommend that the Lord Chancellor amend the list of reserved legal activities to include:

    a. Will-writing and legal activities provided ancillary to the writing of the will

    b. The administration of an estate of a deceased person and legal activities provided ancillary to the administration of an estate

2. The provisional report also set out that the Board was not minded to recommend that probate activities should cease to be reserved legal activities.

3. The provisional report formed part of a four paper package. The other papers were a draft impact assessment, a draft equalities impact assessment and draft section162 guidance for prospective regulators of the new activities.

4. The package was published on 27 September 2012 for a six week consultation period, which closed on 8 November. This was the final consultation for the investigations. We will be returning to the Board in January with full analysis of the responses and review of the assertions made within them. At this stage the Board will be asked to make its final decisions in relation to the regulation of will-writing, probate and estate administration. The aim would then be to make any recommendations to the Lord Chancellor shortly afterwards.

Purpose of this paper

5. The purpose of this paper is to update the Board of the Executive's emerging thinking following an initial review of the consultation responses received to date and reflecting discussions with stakeholders during the consultation exercise. The Board is being asked to comment, rather than make any decisions at this point.

6. It should be noted that we are still awaiting late submissions from stakeholders including the Solicitors Regulation Authority, Bar Standard Boards and the Institute of Chartered Accountants of England and Wales and Association of Certified Chartered Accountants. We have also requested market and regulatory information from the three main accountancy bodies and are awaiting responses from two of them.

Emerging thinking

7. We remain of the view that the case for will-writing to be made a reserved legal activity remains very powerful. There is wide consensus and support for this position.

8. The case for reserving estate administration *(and possibly maintaining the status quo for probate activities)* remains more finely balanced and requires further consideration. We have more work to do updating assessments of the consumer detriment and the range of protections available (including non-regulatory protections and reservation) and on our cost-benefits analysis.

9. This view has been influenced by:

    a. Work to define the legal activities that should be reserved to protect against the likelihood of the key risks and detriments identified arising in practice and the tools available for preventing them for doing so

    b. Further information received about the market including survey data relating to the "unregulated" sector and information about providers regulated in other sectors and the potential impacts of reservation

    c. Representations from affected providers – especially those regulated in other sectors

    d. Discussions with officials, with responsibilities relating to assessing the impacts of regulation and implementing the principles of better regulation in practice, from the Better Regulation Executive of the Department for Business Innovation and Skills and the Ministry of Justice

Context

10. The Board determined that reserving estate administration was desirable to address the following problems and resulting detriments uncovered by the LSB investigation:

    a. <u>Fraud, delays in releasing client money and lack of financial protection for clients in the unregulated sector</u> – there are wide concerns reported across stakeholders about risks involved with providers having full control of estate assets. The investigation found some examples of

proven criminal activity. The Solicitors Regulation Authority's risk strategy marks theft and serious overcharging in this area as high risk. Charities and individuals have reported that they have experienced suspected fraud, theft and poor financial practice. However, we have been unable to find evidence to quantify either the frequency or value of detriment caused.

b. Shortfall in service issues: survey information and Ombudsman complaints data and case studies indicate that a significant minority of consumers are dissatisfied with the service that they receive. Delays, failure to follow instructions and not providing information to beneficiaries were commonly reported service issues.

c. Costs and pricing issues: excessive costs, poor value and deficient costs information were the most frequent causes of complaint within a sample of Legal Ombudsman data. Survey information indicates low customer satisfaction scores in these areas.

d. Fragmentation caused by the existing probate reservation: a secondary issue is that there is concern that having only the application for probate reserved from the estate administration process results in fragmentation in both the delivery of services and consumer protections.

11. We have found significantly less evidence of detriment in estate administration than will-writing and that we have found is more reliant on anecdote and case studies than for wills. Given the lower likely frequency of the most serious problems, research with the methodological strength of the shadow shopping exercise used in our work on wills, is not possible in this area

12. Survey information indicates that 70% of estates are straightforward[1] and that around 50% of estates are administered without professional help. The investigation did not find any strong evidence that there is wide incidence of technical errors causing detriment as there was with will- writing. This is reflected by the draft Section 162 guidance published alongside the provisional report:

> "It is unlikely that we will approve arrangements that specify that specialist qualifications will be required to administer most estates or complete probate applications, given that these are activities that thousands of lay people successfully complete on their own every year" (paragraph 69)

[1] YouGov,The use probate and estate administration services, Jan 2012 - . straightforward is defined by[1] not containing identified features such as estates over inheritance tax threshold, family trusts/ life interests, main beneficiaries under 18, foreign assets, agricultural interest etc

13. There is little evidence of poor sales practices at the estate administration stage. Concerns around the costs and pricing of estate administration services often relate to terms agreed by the testator at the time that the will was written and over which beneficiaries have little power to renegotiate. However, Solicitors for the Elderly did highlight their members reporting a growing problem of unclear referral arrangements from organisations involved in the immediate post- death processes such as closing accounts and making funeral plans to estate administration companies.

14. Detriment caused by missing wills due to insufficient storage safeguards is an issue for providers of will-writing storage services (although the problems will come to light at the estate administration stage).

What has the latest consultation changed?

15. Unlike will-writing there is no commonly understood definition of estate administration. Our key concerns centre on vulnerability to fraud and delaying the release of funds to benefit the administrator. Although the existence of regulation may act as some deterrent to dishonest entrants to the market, it is questionable whether regulation is really effective at preventing this behaviour – particularly criminal activity. Would the obligations imposed by the Act be proportionate to or sufficiently targeted at these problems we have identified? Balanced against this consideration, there are consumer protection benefits in having, for example client account requirements, easier access to redress in the event of fraud and arrangements to safeguard client money held by a failing business.

16. New market information highlights the small size of the unregulated sector in relation to the specified core legal activities of estate administration - "collecting, realising and distributing estate assets". Our previous consumer research indicated that solicitors hold around 86% of paid for services. It is now clear that the remainder of the market is mainly made up of accountants, banks or subsidiary trust corporations (regulated in other sectors) and a small number or large independent trust corporations (largely unregulated). In total the proportion of the market that is made up of unregulated (in any sector) providers is understood to be less than 5%. This is compared to the will-writing market where a large number of mainly small independent will-writing companies (unregulated) are believed to make up about 12% of the market.

17. Other, smaller firms, do carry out estate administration activities but few appear to provide the types of service that would be captured by the proposed regulation. New survey data undertaken by the two main will-writing trade bodies highlights the small proportion of unregulated will-writers that are involved with "collecting, realising and distributing estate assets". A survey of its members undertaken by the Society of Will Writers (SWW), the largest trade body with membership of approximately 800 firms, indicated that 43% of

respondents provide estate administration services. However, a majority of these offer advice services only. Only 14% of those providing estate administration services reported that they "administer the estate, including collecting and distributing the estate assets". A member survey by the Institute of Professional Willwriters (IPW), which reports a membership of approximately 200 firms, indicates that approximately 29% of respondents provide estate administration services[2]. This is not broken down between advice only and administration of the estate but is most likely to be in similar proportions to SWW. Therefore, most consumers use providers regulated - either in the legal service sector or other sectors – for the estate administration activities that would be captured by reservation.

18. Bodies representing banks and accountants have made representations challenging the proportionality of reserving estate administration. The main arguments put forward are:

    a. Estate administration is an integral part of professional practice in their sectors (as a financial service / accountancy service) and is not an activity that should require authorisation and regulation under the Legal Services Act

    b. In this context, the regulatory protections that we say are needed to target the risks identified already exist – for example: fit and proper person tests, client account provisions, financial protections, complaints and redress mechanisms including (for financial service providers, but not accountants) access to an independent Ombudsman

    c. The burdens and costs of dual authorisation in the legal services and home sectors, including putting in place mechanisms to manage regulatory duplication, are higher than the LSB has estimated and are disproportionate given the limited evidence of detriment occurring, particularly within their sectors. It is claimed that potential negative impacts on competition, consumer choice and cost of services has been underestimated.

19. Bodies representing independent will-writers, that do undertake estate administration, have also claimed that the indicative costs and impacts are likely to be higher than estimated. One particular aspect of concern is compensation arrangements, where the need to develop a capital base for a new scheme for currently unregulated providers points to the need for high initial contributions, despite limited evidence of likelihood of the funds being called upon. The IPW reports that they have been unable to find an affordable option that would place bearable financial burdens on providers.

[2] POST MEETING NOTE: The IPW has clarified that its survey included will-writing companies which are not IPW members.

20. BRE and MoJ officials have expressed a clear view that statutory legal services regulation is unlikely to be implemented before non-regulatory options have been fully considered and preferably tried. This reflects Regulatory Policy Committee guidance. We are confident that voluntary self-regulation has been established and promoted in relation to will-writing but has not been successful at stopping detriment. This is not the case with estate administration – where there are no equivalent trade bodies or voluntary schemes specifically for firms specialising in estate administration. This may partly be because the parliamentary debates in the passing of the Act were focused on will-writing and not estate administration. It is our view that voluntary schemes and / or agreements stand a better chance of success in the estate administration than will-writing market given the smaller number of larger firms generally operating in the unregulated sector for estate administration.

21. A final consideration is the impact of reserving will-writing (and probate remaining reserved). Will-writing and will storage is often the gateway for accessing clients for estate administration services. Therefore, reserving will-writing will deny providers unwilling to engage with regulation the key gateway point for attracting clients for estate administration. We believe that this could exclude the most unscrupulous from the market.

22. Clients of an authorised person / entity for will-writing will be afforded some protections in relation to any legal activity that they purchase – including estate administration services. For example, owners of the firm will have been assessed as being fit and proper persons and access to the Ombudsman attracts to the authorised person/ entity rather than specific reserved legal activities. Authorised persons / entities are required to adhere to the professional principles, including acting in the best interest of their clients. Therefore, regulators will likely require ethical sales practices / clarity of terms for connected services such as estate administration.

23. Furthermore, where an approved regulator identifies particular characteristics within a firm that raises particular risk warnings for clients in relation to connected activities, conditions could be placed on the firm's practicing licence in relation to those activities. This though, would not mean blanket provisions for estate administration activities for persons and entities authorised for will-writing activities. If it is the Board's view that the risks are such to require regulatory oversight in every instance, it should recommend that regulation of estate administration activities is required in its own right.

Range of options

24. It is therefore becoming clear that the analysis of the estate administration market is beginning to diverge markedly from that of will-writing, both in the evidential base for the nature and volume of risk and hence in terms of the

possible responses. We are therefore exploring a range of options in more detail.

1) Non- statutory option: This may include reliance on general consumer protections. This may be supported by greater provision of consumer information and the promotion of voluntary agreements / schemes. The Legal Ombudsman is considering the scope for a voluntary ombudsman service for providers of these services, although early implementation is unlikely given the need both for jurisdiction over Claims Management Companies to bed down and for there to be proper Parliamentary process for any scheme. [In respect of will-writing, the non-statutory option has been tried and found wanting, but it is not clear that this would necessarily be the case here].

2) Reliance on protections by virtue of being an authorised person particularly if will-writing activities are reserved: This may bring additional protections and reduce the aggregate risk across the market. However, as set out in paragraph 23 advocating "regulatory creep" to protect consumers of unreserved activities is not a desirable outcome. This goes against the clear LSB view in relation to ABS licensing. If it established that the risks in relation to the scale and likelihood of risks in individual cases and across the market are such that regulatory protections are required in all instances – the Board should recommend regulation. [In will-writing, the larger numbers involved and the proven scale of poor practice makes this a non-viable option]

3) Reservation exempting providers regulated in other sectors: There is precedent within the Act for making particular classes of "accredited persons" as exempt persons in relation to specific reserved activities using Schedule provisions. For example, a member of the Central Association of Agricultural Values or RICS is exempt in relation to Reserved Instrument Activities "if dealing with a farm business tenancy under the Agricultural Tenancies Act 1995". This would reduce costs on providers regulated in other sectors. However, it raises questions of assessing which bodies may have appropriate protections and how the LSB forms a view on the adequacy of those arrangements, both initially and on an ongoing basis – and indeed whether the LSB has a locus to do so, not least because Sections 52 and 54 of the Act provide mechanisms for minimising unnecessary regulatory duplication and cost. [The pros and cons are likely to be broadly similar in relation to will-writing, although given the evidence base of the existence of broadly comparable problems, the case for a consistent regime is proportionately stronger].

4) Reservation: This is the most interventionist option with the largest breadth of impact. To recommend reservation, it should first be established that this option is likely to deliver the regulatory objectives through the

principles of better regulation. Best practice requires evidenced demonstration that costs are proportionate in light of the benefits and intervention is targeted at the identified detriments. The decision must be made in light of all evidence including consideration of representations made following publications of the Provisional Report.

Next steps

25. We will undertake further analysis of the representations and market / regulatory information – including the late submissions and the targeted evidence requests to accounting bodies. We will update assessments of the consumer detriment and the range of protections available (including non-regulatory protections and reservation). We will also continue development of the benefits and costs analysis.

26. We will return to the Board in January with full analysis and recommendations. Arguments are likely to remain finely balanced.