

To:	Legal Services Board	
Date of Meeting:	30 January 2013	Item: Paper (13) 02

Title:	Investigation into regulation of will-writing, probate and estate administration	
Workstream(s):	Strategy development and research	
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Introduced by:	Crispin Passmore, Strategy director Alex Roy, Head of Development and Research	
Status:	Protect	

Summary:
<p>The Board is at the final stage of its sections 24 and 26 investigations into the regulation of will-writing, probate and estate administration activities. The Board is now asked to make its final decisions about whether or not to recommend that the Lord Chancellor amends the list of reserved legal activities at section 12 of and schedule 2 to the Act to include will-writing and estate administration activities (or exclude probate activities).</p> <p>The Board, in deciding its approach to assessing the boundaries of legal services regulation, set itself a high test for introducing new regulation. It determined that there must be a compelling case underpinned by appropriate evidence. It determined that this is a core governing principle for any review of regulation.</p> <p>Having considered all the evidence the Executive considers that:</p> <ul style="list-style-type: none"> • This test is met for will-writing activities • This test is not met for estate administration activities • A similar test is not met for removing probate activities

Recommendation(s):
<p>The Board is invited to:</p> <ol style="list-style-type: none"> 1. Review and agree, subject to revision, the summary of feedback to the responses to the September consultation on the provisional reports and associated documents (Annex 1) 2. Having considered the views and representations submitted in response to consultation:

- Decide to recommend that the Lord Chancellor amends the list of reserved legal activities at Section 12 of and Schedule 2 to the Legal Services Act 2007 to add will-writing activities
 - Decide not to recommend that the Lord Chancellor amends the list of reserved activities to include estate administration activities
 - Decide not to recommend that the Lord Chancellor amends the list of reserved activities to remove probate activities
3. Review and agree, subject to revisions flowing from its discussion agreed by the Chairman and Chief Executive, the following papers to be given to the Lord Chancellor and published on the Board’s website:
- A final report document covering each of the three investigations into will-writing, probate and estate administration activities. This will set out each of the above decisions and the reasons why each has been made. The will-writing activities report will include the recommendation and a statement of the consequential and transitional provision which in the Board’s opinion will need to be made (**Annex 2**)
 - An impact assessment for will-writing and estate administration activities (**Annex 3 and Annex 4**)

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. However, significant planning will be needed for implementation should Ministers agree any recommendation.

Consultation	Yes	No	Who / why?
Board Members:	x		Steve Green and Barbara Saunders
Consumer Panel:		x	Views received on emerging thinking set out in November Board meeting (letter from Chair 4/1/13 – available on request)
Others:			

Freedom of Information Act 2000 (Fol)		
Para ref	Fol exemption and summary	Expires
Annexes 1-4	Exemption FoIA s22 - Information intended for future publication	

LEGAL SERVICES BOARD

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Investigation into regulation of will-writing, probate and estate administration activities

Context

1. In September 2012 the Board produced a provisional report stating that it was minded to recommend to the Lord Chancellor that the list of reserved legal activities be amended 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 and associated papers¹ were published on 27 September 2012 for a six week consultation period, which closed on 8 November. This was the final consultation for the investigations. This exercise also provides opportunity for affected practitioners to make representations under paragraphs 13 and 14 of schedule 6 to the Act.
4. The Executive presented an interim paper to the Board in November 2012. This set out emerging thinking following an initial review of the consultation responses and reflecting discussions with stakeholders. This raised doubts about whether the tests for reserving estate administration activities had been met and whether regulation would, in any event, be any effective tool in deterring criminal behaviour in the market.
5. We received 25 responses to the consultation. Please see the attached draft document "Summary of feedback to the consultation paper" at **Annex 1**. All published responses are published on the LSB web-site http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/submissions_enhancing_consumer_protection.htm. Hard copies of all responses will be available to view at the 30 January Board meeting. Rather than

¹ As 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.

respond “blow by blow” to the points made, we have signposted to where the issue is addressed in the decision document.

6. Our recommendations have been informed by our work to date, evidence and feedback from all consultations including representations from affected practitioners and their representatives. We have undertaken analysis of the costs and benefits of different options. The Board must now make final decisions in relation to the reservation of will-writing, probate and estate administration.

Post consultation position

Will-writing

7. We remain of the view that the evidence for will-writing activities to be made a reserved legal activity remains substantial. It is a proportionate and necessary intervention and consistent with the regulatory objectives. There is wide support for this position.

Estate Administration

8. A recommendation to reserve estate administration activities must be based on evidence of detriment and, as important, a clear case that regulation imposed through the mechanism of reservation can be shown to deal cost effectively with the actual detriment identified. We have concluded that this test has not been met.
9. We have reached this conclusion for the following reasons:
 - a. It is widely accepted that characteristics of the estate administration market present opportunity and incentive for fraud. The detriment can be severe. This is the main justification given for regulation. However, in aggregate the evidence does not compellingly demonstrate systemic fraudulent or dishonest practices or other problems causing significant consumer detriment within the unregulated sector.
 - b. Moreover, regulation is unlikely to be effective at managing vulnerability to fraud. While the existence of regulation may act as some deterrent to dishonest entrants to the market, regulation cannot prevent this behaviour – particularly criminal activity. 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. However, the obligations imposed by the Act are not clearly proportionate to or sufficiently targeted at the risks that we have identified. The worst case is that there would be a significant burden on ethical providers with little or no impact on the potentially criminal. In

aggregate the evidence does not demonstrate that the benefits would justify the costs on this basis.

- c. The market share held by unregulated estate administration providers appears to be small, particularly in relation to the core legal activities of estate administration specified in the provisional report - “collecting, realising and distributing estate assets” (see paragraph 16 in the November Board Paper). Therefore, a vast majority of consumers are already afforded a level of regulatory protection. The majority already have access to an independent Legal Ombudsman and compensation arrangements. Of those that do not, some, perhaps many, have access to the Financial Ombudsman. Additionally, the Legal Ombudsman continues to explore the development of a voluntary scheme.
 - d. A final consideration is the impact of reserving will-writing (should this happen following the recommendation to be made to the Lord Chancellor). 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. Further, regulatory protections such as suitability tests, requirements to adhere to the professional principles, act in the best interests of the client and access to the Legal Ombudsman apply to an authorised person not the activities that they undertake.
10. We accept that the argument is finely balanced and note in particular that a failure to recommend reservation will not tackle Consumer Panel concerns about confusion at the boundary of reserved activities. However, wherever the boundaries of regulation are drawn there will be challenges in ensuring that consumers are aware of the protections they have in any transaction. Some level of consumer detriment in this market, including incidence of fraud and theft, is likely to remain regardless of whether or not regulation is introduced.
11. We propose that non-statutory actions may provide a proportionate way to help the market work well for consumers and the opportunity for different providers to put in place codified safeguards against risks within this market to reassure prospective consumers. We recommend that the following steps are taken:
- a. Voluntary agreements. Work with key stakeholders to explore the development of voluntary agreements/ schemes. Since the November Board meeting we have held constructive discussions with

stakeholders such as the British Bankers Association, the Society for Trust and Estate Practitioners and the Institute of Professional Willwriters who have agreed to explore options. The Legal Ombudsman (LeO) is very interested in developing a voluntary jurisdiction that would be open to providers of estate administration activities with a first consultation expected later this year. We understand that LeO is contacting a number of larger Trust firms to gauge interest as part of their development work. We have had initial discussions with the Trading Standards Institute that has taken over responsibility for the Consumer Codes Scheme². As a next step we may facilitate a wider workshop / roundtable with interest parties, as well as continuing with discussions on an individual basis.

- b. Consumer information. Work with regulators and industry bodies to ensure that appropriate information is available for consumers at the point of purchase. This should include information about the potential risks within estate administration activities and how to protect against them. If will-writing becomes a reserved activity, LSB guidance will be that regulators should require authorised will-writers to provide such information to consumers. Work may also be undertaken by organisations that consumers may turn to for information when engaging with estate administration activities to improve information for consumers. Outlets could include Gov.uk, Citizens' Advice, Which! and charities such as Age UK.

Other suggestions: Consider lobbying for changes outside of our direct remit, such as the other non-statutory measures identified by the Legal Services Consumer Panel³. These included fraud prevention measures, policy on renouncing executorships and simplification of the probate application process.

12. It is our view that we should remain open to reviewing the case for reserving estate administration activities at a later date if circumstances change. This would be more likely if:

- a. There were significant changes in the market exposing consumers to greater risk
- b. There was new evidence that a greater number of consumers are suffering significant detriment than our current assessment indicates

² The Trading Standards Institute (TSI) represents Trading Standards professionals in the UK and overseas. Its Consumer Codes Approval Scheme is a successor to the Office of Fair Trading's Consumer Codes Approval Scheme and will be launched in April 2013. See <http://www.tradingstandards.gov.uk/extra/news-item.cfm/newsid/981>

³ http://www.legalservicesconsumerpanel.org.uk/publications/consultation_responses/documents/2012-03-19_LSB_PEAFinal.pdf

- c. It was shown that statutory regulation was likely to be effective at managing the detriment identified and non-statutory voluntary agreements / schemes had proved to be ineffective.

Probate

13. Our investigations were primarily focused on the case for extending reservation to cover estate administration. Existing probate activities were considered in that context. We have not fully considered the impacts of removing probate activities from the list of reserved legal activities. We do not have evidence of how the market would likely react to the removal of probate activities or of how important regulation is in incentivising ethical practice and minimising risk in this area. We do not have evidence of the likely impacts on consumers of removing probate activities – and in particular how important protection such as the availability of the ombudsman; the provision of professional indemnity insurance and the securing of compensation arrangements are to consumer confidence.
14. On this analysis we are therefore of the view that, although there may be room for doubt about whether one would recommend probate to be reserved afresh were that not currently the case, the case for removal of the probate reservation has not been made. As with estate administration, it is our view that we should remain open to reviewing the case for probate activities should circumstances change. This includes any change resulting from the Probate Service's current review of the non-contentious probate rules. This is likely to see a shift away from swearing oaths in favour of statements of truth. The review may also consider tightening rules allowing probate to be granted to an attorney appointed by a lay executor / administrator. This practice is currently being used by some estate administration providers to allow them to control estate assets when not an appointed executor themselves.

Ministry of Justice (MoJ)

15. We have kept the joint Project Board members abreast of our developing analysis. Current intelligence is that government retains a strong preference to avoid legislative regulation wherever possible (although no detailed consideration has yet been given to will-writing activities specifically). Officials are developing their detailed plan for obtaining a decision from the Lord Chancellor within the 90 day period specified in Schedule 6 to the Act. This includes prior scrutiny of the impact assessment by the Regulatory Policy Committee (RPC), the Reducing Regulation Committee (RRC) and the Home Affairs Committee (HAC). The Executive has worked closely with Ministry of Justice economists to ensure that the impact assessment is presented in a manner to allow for this to progress on the quickest possible timetable. MoJ

officials will develop a legislative timetable should the Lord Chancellor accept the recommendation to reserve will-writing activities

Next steps

16. Should the Board agree the Lord Chancellor will be given copies of the final reports and associated documents as described above on page 2 of the cover paper. The reports will be published on the Board's website. The statutory Schedule 6 timetable requires these actions to be completed no later than 26 February 2013. There is no scope to extend this deadline. As stated above the Lord Chancellor has 90 days to determine whether or not to accept the recommendation. Key milestones on the fastest possible timetable include :
 - a. By 25/01/2013 - MoJ Chief Economist to have reviewed and signed-off LSB will-writing impact assessment (oral update will be provided to the Board)
 - b. By 15/03/13 – RPC clearance obtained (unless red flagged)
 - c. By 25/03/13 – Lord Chancellor agrees submission to RRC and HAC
 - d. By 26/4/13 – Clearance from RRC and HAC
 - e. By 10/05/13 – Lord Chancellor decision
17. Should the Board agree the Executive will progress the non-statutory measures for estate administration activities set out in paragraph 11 above.
18. The Executive will update the Board at its 23 May meeting.

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