Mr Michael Mackay
Legal Services Board
7th Floor, Victoria House
Southampton Row
London WC1B 4AD

1 November 2011

Dear Sirs,

Call for evidence: Investigation into Will-Writing, Estate Administration and Probate Activities

The Society of Scrivener Notaries is pleased to submit the following evidence and comment as part of the Legal Services Board's consultation on whether will-writing, estate administration and probate activities should be made reserved legal activities.

1. The Legal Services Act 2007 and the classification of reserved legal activities.

1.1 "Reserved legal activities" and "approved regulators" (ARs) were created by the Legal Services Act 2007 ("the Act"). The definition of each of the reserved legal activities is set out in Schedule 2 to the Act and there is no need to reproduce them fully here. It is, however, worth noting that there is an asymmetry in the scope of each of the reserved legal activities. Rights of audience and reserved instruments are a broad field, probate activities (as currently defined) and administration of oaths are less so.

1.2 There are other subtle differences between the activities. The majority of them are implicitly focussed on a particular verb or its object: the administration of oaths, [exercising] rights of audience etc. However, "notarial activities" looks to its subject i.e. the activities that are performed by a notary. The implications of this are considered in more detail from paragraph 2.2 onwards.

1.3 At this stage it must be noted that the boundaries between areas of legal activity are not as clear as might be assumed. A client's file may involve a mix of multiple activities: the complex translation of a foreign-language will (non-reserved), administration of an oath (reserved), submission of the papers for the grant (reserved), executorship and liquidation of the estate (non-reserved in theory, reserved if a conveyance under English law is involved). Classifying legal activities is therefore anything but straightforward. The difficulties are detectable in the LSB's own call for evidence, which asks respondents whether they agree with a proposed definition of will-writing.

1.4 Any decision to add, remove from or alter the list of reserved legal activities must be taken with the utmost care so as to avoid compromising the Regulatory Objectives of the Act. To date, the LSB has approved applications from existing ARs to add additional

activities to their jurisdiction, but this would be the first time that the Board has considered an addition to the list of reserved activities itself.

2. Notarial activities, wills and estate administration

2.1 Having drawn attention to the problems of classification, we turn to the overlap between the historical activities of notaries and the contemporary approach to analysing them.

2.2 The statutory definition of notarial activities is *"activities which, immediately before [31 March 2009], were customarily carried on by virtue of enrolment as a notary in accordance with section 1 of the Public Notaries Act 1801."*

2.3 Parliament's reference to history requires us to turn to the academic works. The following definition is often used: *"A notary public is a legal officer appointed by the Court of Faculties, whose general role it is, amongst other matters, to draw, attest or certify, under an official seal, documents which are intended for use in other jurisdictions. A notary may also prepare wills or other testamentary documents ...."*[1]

2.4 A fuller definition can be found in the leading academic work on notarial practice: *"A notary public in England and Wales may be described as an officer of the law appointed by the Court of Faculties whose public office and duty it is to draw, attest or certify under his official seal, for use anywhere in the world, deeds and other documents, including wills or other testamentary documents ...; to authenticate such documents ... whether by means of issuing a notarial certificate as to the due execution of such documents or by drawing them in the public form..."*[2]

2.5 We feel it is unnecessary to illustrate the point further by producing examples of handwritten (and typewritten) notarial wills from the 19th century onwards, but with this and the points made at 2.3 and 2.4 in mind, it should be clear that will-writing and its related services have formed part of a notary's activities long before the current definition of "reserved legal activities" was approved by Parliament.

2.6 With the notarial profession, the scrivener notaries continue to practise as a discrete branch and are required to be proficient in at least two foreign languages and familiar with the principles and practice of foreign laws.[3]

2.7 It is sometimes argued the "notarial" aspect of will-writing is confined to witnessing the signature of the testator. The document may have been written by a third party (or even by the testator himself). Whilst this is true to a certain degree[4], the logical extension of this argument is unconvincing and unattractive. Notaries are often asked to attest wills in public form that have been prepared by a third party, who may or may not be legally qualified in a given jurisdiction. Would it be considered acceptable for a practitioner to argue that only the attestation of the will is a reserved legal activity, with the contents being "unregulated"? We doubt that such a defence would be admissible in any negligence action, misconduct hearing or before the Legal Ombudsman.

2.8 Taking all of these points and the statutory definition of notarial activities into consideration, we may conclude that provided the "will-writing" is performed by the notary, then it is a notarial activity and a reserved legal activity within the meaning of the Act.

2.9 We therefore have an ambivalent attitude towards the prospect of will-writing being made a reserved legal activity. Whilst we welcome initiatives that are likely to produce an increase in standards and a more effective market, we do not want to see a reinvention of the wheel as far as our own profession is concerned.

3. Will writing considered

3.1 Notwithstanding the points made at 2.8 and 2.9, the following observations on the substance of will-writing may be helpful.

3.2 We welcome the LSB's decision to commission a study to support the policy analysis. The IFF Research report, produced by ("the IFF Report") is an impressive piece of data collection and analysis, and the statistics themselves make interesting reading. Of particular note are the relatively high levels of consumer satisfaction. The principal area of weakness appears to be "DIY" wills, although the unwillingness of consumers to regard their will as being a "high value" matter is inevitably going to have an effect on the nature of the market.

3.3 There is one area which the IFF Report does not consider and that is the effect of foreign law on will making. It seems remarkable that in a sample of 102 "mystery purchases" and a survey of 500 consumers, nobody seems to have anything other than an English domicile, and no assets outside the jurisdiction of England and Wales. Cross-border estates are common enough, and likely to become even more so, having regard to employment trends, second home ownership, population movements, changes in social attitudes etc. Indeed, one could argue that those with foreign assets, relations etc. are *more* likely to need to make a will than those who only have a "domestic" estate, where the matrimonial home passes under a joint tenancy, leaving the surviving spouse in pole position.

3.4 It is a significant omission that the research did not consider the impact of foreign law. We therefore presume, that in asking for evidence into how best to protect consumers of will-writing services, the LSB was referring to wills made under English law.

3.5 The market is more complex than this. Having regard to their function and consumer demand referred to at para. 3.3, notaries (and scrivener notaries in particular) are required to take a broader view in order to provide consumers with the level of advice and service they require. A sample of case scenarios serve to illustrate the point:

3.5.1. The married couple AA and BB are French citizens who have moved to England within the last 12 months and are celebrating the arrival of their first child. AA made a handwritten will under French law, as he owns a share in the family home in France. Do they require (a) a revision of AA's French will (b) English wills (c) new English and French wills or (d) something else?

3.5.2. PD made an English will some years ago leaving everything to her husband AD, including a holiday home in Italy. PD is now concerned that the "statutory shares" of Italian succession law will partly override the terms of her will. Should she amend her English will or make a separate Italian will? It may be that the best advice is to do nothing. If this is the case, should the provision of that advice be classed as a reserved legal activity?

3.5.3 AK is a Polish citizen who has just completed a divorce. She has assets in the UK and Poland. She has no idea what her plans are, but would like to "make a paper in her

own language" so that her family know that her young child is provided for. What options are open to her?

3.6 English law is not always the only option or even the appropriate choice. In at least two of three scenarios outlined above, it would be possible for the client to make a will under their "home" law that would be admissible to probate in England & Wales under the domestic rules of private international law[5]. The will may be drawn and certified up by a notary, or it may be a handwritten will, dated and signed[6]. If the client chooses to make a handwritten will under foreign law and in a foreign language, should the provision of such advice for fee, gain or reward be classed as a reserved legal activity?

3.7 If so, should the core elements of the regulation be different to "purely domestic" wills? Should it include a regulatory assessment of language proficiency, for example?[7]

3.8 The complexities do not generally arise (as far as notaries are concerned) in practice because of the assumption that where any of these activities are undertaken *qua* notary, then they are "notarial activities", as defined by the Act. We think it unlikely that the Master of the Faculties or Legal Ombudsman would dissent from this position, as it affords a proven degree of protection to consumers.

4. Estate administration considered

4.1 As far as estate administration is concerned, we note that the LSB has not conducted formal research into the implications of broadening the scope of "probate activities". The Call for Evidence refers to "initial work" having identified 5 main areas of risk, although no further details are given and we are unable to comment on the appropriateness of the methodology used.

4.2 Unlike will-writing, respondents do not have the benefit of being able to consider the LSB's proposed definition of estate administration. Nevertheless, many of the points made regarding will-writing will apply to estate administration too, and even more so in many cases. For example:

4.2.1. F died intestate leaving assets in Spain. His next-of-kin wish to grant a power of attorney under Spanish law to enable the estate to be disposed of. Should drafting such a power of attorney be a reserved legal activity?

4.2.2. With reference to the Italian scenario outlined at 3.5.2, the client now requires a certificate of law confirming that his deceased wife had freedom of testation under English law. Should the drafting of this certificate be a reserved legal activity?

4.2.3. G and H are Polish citizens currently resident and working in London. They have been alerted to the fact that they are potentially liable for the debts of a relative's insolvent estate. They wish to seek advice and assistance as to how they may avoid this liability. Should the provision of advice to them be a reserved legal activity?

4.2.4. With reference to the French scenario outlined at 3.5.1, if probate were required in England of a handwritten will under French law, should the provision of advice and assistance be made a reserved legal activity?

4.2.5 The translation of a will (into or from English into another language) may be critical in determining how an estate is distributed. Issues of sentence construction and interpretation can be crucial to the service received by consumers. Does the provision of legal translation constitute estate administration? If so, should the provision of such services be made a reserved legal activity?

4.3 As suggested at 3.8 above, the complexities do not arise in practice (as far as notaries are concerned) because of the assumption that where any of these probate-related activities are undertaken *qua* notary, then they are "notarial activities" as defined by the Act.

5. The "core elements" considered

5.1 Having regard to the existing protection available to consumers of notarial activities, we turn to the "core elements" proposed in the Call for Evidence.

5.1.1 **Education** – We agree that providers should have to pass formal exams or equivalent qualifications. Wills and probate are a requirement of the Notaries (Qualifications) Rules 1998.

5.1.2 **Office holders** – We disagree with the proposal that providers should be required to appoint a Head of Legal Practice and a Head of Finance and Administration. These two offices were created in the Act for alternative business structures (ABS) and it is not appropriate to attempt to import them into practices which, for a variety of reasons, wish to remain within the traditional environment of combined practice and ownership. We also think it is unrealistic to assume that one wills provider requires (and can support) two compliance officers.

We accept that there is a risk of fraud, although this is in relation to the retention and management of client funds. For this reason, we welcome the appropriate level of accounting regulation to ensure that consumers are protected.

5.1.3 **Conduct rules** – We do not accept the premise that practitioners have an incentive to mislead consumers. However, we do agree that providers should be required to follow a set of concise and jargon-free rules. The relevant text applicable to notaries is the Notaries Practice Rules (2009).

5.1.4 **Ensuring ongoing competence** – We accept that there should be on-going training requirements. Notaries are already subject to regulation in this respect.[8]

5.1.5 **Monitoring compliance** – The presumption that consumers have a lack of expertise is slightly patronising given the volume of free information that is available to the public. How would a "mystery shopping" programme be likely to improve public awareness? We do not support this proposal as we anticipate a potentially disproportionate burden on Approved Regulators. It would result in increased costs for practitioners and consumers, without producing any measurable increase in public awareness.

However, if there is a noticeable increase in the number of misconduct allegations or service complaints reaching Approved Regulators or the Legal Ombudsman then there would be scope for considering further investigation.

5.1.6 Redress – These proposals are a feature of our regulatory environment. As has been explained elsewhere, we believe that wills produced by notaries already are within the jurisdiction of the Legal Ombudsman.[9]

5.1.7 Discipline – We agree with this proposal. As far as notaries are concerned, we are content with the sanctions contained within existing regulations made by the Master of the Faculties.[10]

5.2 The LSB asked practitioners to consider whether alternatives exist to statutory regulation, such as voluntary self-regulation and accreditation schemes. The Board may wish to note the qualification scheme applicable to scrivener notaries, which requires practitioners to demonstrate an aptitude/proficiency in foreign languages and law[11]. Whilst the scope of the additional qualification reflects a niche market, it is nevertheless a notable example of how practitioners can evolve their own forms of accreditation in order to improve services to consumers.

6. Enforcement issues – unlawful conduct of reserved legal activities by unauthorised persons

6.1 Before making any recommendation to the Lord Chancellor, we believe that the LSB should consider the way in which breaches of the Act's provisions on the unlawful conduct of reserved legal activities are prosecuted.[12]

6.2 Designating new reserved legal activities will not result in greater protection for the consumer unless procedures are in place for dealing with "bogus" practitioners. Such procedures will need to have the confidence of both consumers and practitioners if the regulatory objectives of the Act are to be respected.

We look forward to continued dialogue on these issues, which are of importance to consumers and practitioners alike.

Yours sincerely,

Jonathan Coutts

Secretary
Society of Scrivener Notaries

[1] Halsbury's *Laws of England*, 5th edition (2009), vol. 66, para 1412
[2] *Brooke's Notary*, by N P Ready, 13th edition (2009), page 21.
[3] Scriveners (Qualifications) Rules (1998) http://www.scriveners.org.uk/resources/Scriv+Qual+Rules.pdf
[4] Certain U.S. states require wills to be witnessed. The witnesses then sign an affidavit in the presence of the notary.
[5] Wills Act (1963), s. 1.

[6] The internal law of France, Spain, Poland, Italy, for example, allows for either option.
[7] See Rule 9 of the Notaries Practice Rules 2009.
[8] Notaries (Continuing Professional Education) Regulations 2010
[9] s. 2.7 of the Scheme Rules in fact allows the Legal Ombudsman to hear complaints even if the matter does not relate to a reserved legal activity.
[10] The sanctions are detailed in the Notaries (Conduct & Discipline) Rules 2011.
[11] See note 3 above.
[12] Legal Services Act (2007), s. 14-17