BSB consultation response to LSB consultation 'Enhancing consumer protection, reducing regulatory restrictions: will-writing, probate and estate administration activities

Enhancing protection

1. The BSB notes the evidence cited in the LSB's consultation paper about the consumer detriment caused by inadequate levels of service and shares the LSB's concerns. We agree that the protection for consumers should be increased. Although there is some evidence (based on a small sample of solicitors) of quality issues in relation legal professionals already subject to regulation, we believe that the key risks for which there are no current remedies primarily arise in relation to services being provided by those who are not qualified and regulated to the same extent as barristers and other legal professionals. Additional regulation, through reserving activities, should focus on the area of greatest risk. This means it is disproportionate to require changes to the arrangements that all current Approved Regulators have in place, although we broadly agree that the proposed activities should be reserved.

2. We also note that the LSB's intends:

   - Recommending to the Lord Chancellor that the list of reserved activities be extended to include will-writing and estate administration activities; and

   - Improving the effectiveness of the existing legal services regulation that applies to the majority of providers delivering these services, where it is not working well for consumers.

3. While we agree with the LSB's objectives, we believe the suggested implementation is in some respects disproportionate, for the reasons discussed below.

Services provided by barristers

4. Some barristers may provide probate services but this is certainly a minority practice area. Barristers are prohibited from handling client money and managing client affairs which means they are unlikely to offer the broader range of services that may generally accompany probate. The impact for barristers of the proposals on these types of service could be relatively minor. Nonetheless, we believe the numbers of barristers doing probate could potentially increase in the future, with the advent of entity regulation and the possibility of using a third party payment provider (which would be separately regulated by the FSA to mitigate risks). The BSB would therefore expect to continue to authorise probate activities and we are not persuaded that the risks are such that we would need to be separately authorised to do so, given our existing regulatory arrangements.

5. However, we do not agree with the proposal that providers should have to be authorised to undertake both probate and estate administration together and we think there should be an option for barristers to be authorised to undertake probate only. Barristers would be unable to undertake estate administration or hold client money, so concerns about the vulnerability of assets to fraud would not apply.

6. Barristers do not currently provide estate administration services due to the ban on holding client money and managing clients' affairs, though they may provide advice which is related such services.

7. The BSB does not routinely collect information about barristers' practices at the level of detail that would be revealing for the relatively small number engaged in this type of activity. The Chancery Bar Association (ChBa) has shared its evidence with us on the numbers of practising barristers who are regularly instructed in drafting wills. We understand that approximately 400 Chancery barristers draft wills on a regular basis and for a proportion of this number will drafting amounts to a significant part of the work done by a proportion of those barristers. The proposals will therefore affect a significant minority of practising barristers. However, we do not believe that the case has been made that the clients of these barristers are either receiving a poor service, or are being subjected to any risks arising from the services which they do not receive, which could justify an increase in regulation.

8. It is likely that a number of employed barristers provide will drafting services and we expect barristers who are employees of law firms which do private client work will also be involved in will drafting.

9. The ChBa has highlighted the main scenarios where barristers are instructed to draft wills. The ChBa will provide further explanation in its consultation response, but in summary these are:

    - Solicitors, or other professionals, instruct barristers to draft wills
    - Barristers draft wills in the course of applications to the Court of Protection (an important area not mentioned in the consultation)
    - Barristers draft will precedents for solicitors

10. We believe the risks arising from these forms of referral work are mitigated by the instructing solicitor or the Court having a role in checking the quality of the drafting and ensuring it meets client needs. In the third example, we believe the greatest risk lies in a solicitor making use of the precedent inappropriately.

11. Barristers who are authorised to undertake direct access work are also able to provide will writing services directly to clients, but our understanding is that there are few practitioners providing these services. The risks associated with providing services direct to the consumer are therefore limited, and in any event are mitigated by the BSB's existing regulatory arrangements.

12. We understand that the nature of will drafting by practising barristers often tends to be more complex, or draws on greater expertise in complex legal principles, than in other sections of the market. This reflects the more general role of chancery barristers as experts in their field to whom drafting work is often referred when it requires an especially high level of skill and specialist legal knowledge.

13. Furthermore, because the majority of will drafting is carried out on a referral basis, there is an added layer of protection provided by the instructing solicitor.

14. For these reasons, we do not believe that the same risks attach to will drafting by barristers as those risks resulting in other areas of the market. This is also borne out by a lack of complaints to the BSB in relation to will drafting services. We also note the ChBa's evidence that it is not aware of any reported cases of a successful professional negligence claim in respect of a will drafted by a barrister.

Regulation proportionate to the risks

15. The BSB believes that the proposals, so far as they would impact on the regulation of the Bar, are not proportionate to the risks posed by practising barristers. We also believe that the BSB's regulatory arrangements already in place are sufficient to meet the intended regulatory outcomes discussed in guidance for prospective regulators.

16. We note that the consultation states that bodies 'wishing to be approved as regulators in respect of the newly reserved activities will have to demonstrate how their arrangements are fit for purpose in relation to those specific activities'. However, we believe that the outcomes listed in the guidance are substantively met by the higher-level rules in the BSB's Code of Conduct.

17. We question the need for the BSB to apply to the LSB for authorisation to regulate will-writing and probate services because the activities are already substantively regulated as part of the BSB's existing arrangements, although we would expect to monitor and improve our arrangements over time base on emerging evidence.

Definition of will writing

18. We note that, at paragraph 24, it is stated that the LSB is proposing to regulate only 'the core legal activities of either will-writing or estate administration and any legal activities provided to consumers alongside these core activities as part of that service and which the consumer is likely to believe is the same activity'.

19. We believe it is important that the definition of will writing is restricted to include 'related activities' only when undertaken at the same time as will writing rather than to include related activities which are done separately from will writing. If this is not done, there is a risk that, for example, the definition could arguably include advice on trust law. There may also be other advice provided by barristers about the application of the law which should not require authorisation as a will drafter, so long as they are competent in other respects to provide that advice.

Unregistered barristers

20. The BSB has considered the position of unregistered barristers who may provide the services under discussion. We have concluded that it would not be desirable to extend our regulatory regime so as to authorise unregistered barristers to undertake these activities. Although we regulate unregistered barristers to a limited extent, we do not authorise them to undertake any other reserved legal activities. We envisage that unregistered barristers might wish to seek authorisation from another regulator to undertake these sorts of activities.

Appeals

21. The consultation suggests that all appeals relating to these activities should go to the First-tier Tribunal. This proposal would be incompatible with the current regulatory arrangements of the BSB, in which disciplinary appeals are heard by the Visitors to the Inns of Court. There would be no value in having different appeal arrangements for this type of activity alone and we would recommend consistency with Approved Regulators' existing appeal arrangements. We note that the LSB intends to undertake a wider piece of work in due course to review appeal arrangements overall across the Approved Regulators. We suggest this issue might be revisited as part of that project.

Specific comments on the guidance

22. Paragraphs 65 and 66 of the guidance in the annex seem to imply that the ARs are expected to concentrate on the entity's ability to do the work and not on the qualifications of the person doing or supervising the work. This appears to overlook the requirement that any reserved activity may only be undertaken by an individual who is personally authorised to do it.

Answers to specific questions in the guidance

Question 1: Do you agree with the scope of the proposed reserved will writing activities and estate administration activities? Do the scenarios provided in **Annex 1 of the Provisional Report** clarify when activities will and will not be caught within the scope of the proposed new reservations? What are the likely impacts of the scope of the proposed activities as described?

We agree with the scope of the reserved activities with one exception. We would disagree with paragraph 31 in the consultation paper: "*we think it likely that most consumers would view preparing the papers on which to found or oppose a grant of probate as a step within the wider process of administering an estate and would therefore wish to use a single provider to deal with the whole process"*. We think that is an example of element of probate that might be undertaken by (for example) a barrister even though they would not be permitted to do the wider estate management activity and it may be that a consumer (perhaps via a referral from another professional) would want to have a barrister do the preparation of the papers and we see no reason why the barrister would have to be separately authorised as an estate administrator to do that. Consumers should of course have the option of a 'seamless' service from providers who offer the full range, but that does not mean providers should be obliged to offer the full range of services (or be authorised so to do the full range). We therefore would not agree with the proposal that providers would have to be authorised to do both reserved activities (probate and estate administration) together. Barristers would not currently undertake estate administration more generally, nor would they be able to hold client money, so concerns about vulnerability of assets to fraud do not apply and the risks in permitting them to continue to provide probate services would be low and in any case mitigated by our existing regulatory arrangements.

Apart from that objection, we would agree with the scenarios outlined in Annex 1. Barristers should continue to be able to advise clients in the ways that they currently do as long as they are not directly undertaking the reserved activity at the same time.

Question 2: What are your views on the options for implementation that we have described? What do you think would be the likely impacts of each?

We note that at para 55 the LSB says: "*the approved regulators will also need to be prepared to change their current regulatory arrangements in order to be able to regulate new classes of providers"*. That should not mean ARs have to consider each and every possible provider – we should be able to tailor our regime to a particular niche in the market that is relevant to our current regulated community and our capacities and capabilities.

Our main objections would be the need to apply for authorisation to do estate administration in order to continue to regulate probate, and the need to go through a possibly disproportionate approval

procedure to be able to regulate will writing when we are already able to do so. A combination of grandfathering arrangements (with an undertaking that we will review them based on evidence over time) and allowing new entrants as regulators may be a way of expediting the introduction of any new reservation in a proportionate way. Given that existing ARs are now subject to the Regulatory Standards Framework this will over time ensure that regulatory arrangements in this area are appropriate.

Question 3: Do you agree with the initial assessment of the consequential amendments that would likely be needed? Are there any other consequential amendments you consider would be necessary?

Subject to the comments above, we have nothing substantive to add.

Question 4: To prospective approved regulators: what legislative changes do you think will be required in order to implement regulatory arrangements for these activities (in line with the draft section 162 guidance)?

We do not envisage any legislative changes being necessary. In relation to the draft guidance, we reiterate our comment that appeals arrangements should for the time being be consistent with the Approved Regulators' existing appeal arrangements.

Question 5: *To prospective approved regulators:* Will this guidance help you to develop proportionate and targeted regulation for providers offering will-writing and or estate administration activities? What challenges do you think that you will face?

The Approved Regulators are reviewing all of our regulatory arrangements over the next few years in the light of the Regulatory Standards Framework (and clearly this guidance is compatible with that, but we discuss elsewhere the possible disproportionality of certain aspects of the proposed implementation.) The suggestion that we should use the General Regulatory Chamber for appeals would mean significant changes to our regulatory arrangements for one are of practice and a case has not been made to justify that.

Question 6: Do you agree that having mandatory regulation for all firms in the market will improve consumer confidence?

Yes

Question 7: What business impacts (both positive and negative) do you envisage will occur with the proposed reservation of will-writing and estate administration? How will any such impacts affect your business?

We discuss elsewhere the potential disproportionality of requiring the BSB to be separately authorised to regulate an area in which it already regulates when we are already undertaking a substantial programme of regulatory improvement work.

Question 8: We are keen to understand the potential impacts of our proposals on equalities. Do you envisage and positive or negative impacts on equalities for either consumers and/or providers of will-writing and estate administration activities? Please provide details including of any evidence that you are aware of?

We are not aware of any evidence, but believe there may be a generally positive impact on vulnerable clients because they will be better protected (which would justify any negative impact on those being regulated). Negative impact may arise if small chambers or sole practitioners showing disproportionate numbers of practitioners with protected characteristics are affected by any changes.

Question 9: Do you envisage any specific issues arising from the proposals to impact negatively on consumers at risk of being vulnerable? Would any of the proposals actually increase their risk of becoming vulnerable?

No on both counts.