Legal Services Institute

November 2012

ENHANCING CONSUMER PROTECTION, REDUCING REGULATORY RESTRICTIONS: WILL-WRITING, PROBATE AND ESTATE ADMINISTRATION ACTIVITIES

Response to consultation by the Legal Services Board

1. The nature of this response

This response is submitted on behalf of the Legal Services Institute and addresses the policy and public interest issues raised by the discussion document.

2. Introduction

2.1 General

The Institute welcomes and supports the Legal Services Board's (LSB) decision to recommend extensions of the scope of the reserved legal activities to include will-writing and estate administration. This is consistent with our earlier conclusions in our paper[1], *The Regulation of Legal Services: What is the Case for Reservation?*

The approach we adopted in that paper to the issue of reserving legal activities is that reservation must be shown to be in the public interest[2]. This led us to advance the proposition that regulation by reservation can be justified to secure either, or both, of two goals:

(1) the public good, including advancing the primary regulatory objectives; and

(2) protecting the consumer.

[1] Available at www.legalservicesinstitute.org.uk.

[2] Cf. Mayson (2011) *Legal services regulation and 'the public interest'* (Legal Services Institute, London): available at www.legalservicesinstitute.org.uk.

In relation to the second goal, we do not advance consumer protection as a generic justification for reservation. In our view, reservation is in the public and consumer interest in circumstances where, *as a result of legal advice or representation*, detriment to the consumer's (a) liberty, (b) physical, mental, emotional or social well-being, or (c) property, could arise, and for which compensation after the event would not represent an adequate or reasonable remedy. These matters are fundamental to someone's ability to participate fully in society as an equal citizen (which we regard as a key component of the public interest[3]).

The issue for both goals, in essence, becomes for us one of a distinction between 'assurance' and 'insurance'. Regulating to 'assure' competence before the event is to us often preferable to regulating only for complaint or compensation after it. This is a particular dimension of 'credence' goods and services, where the consumer is rarely in a position to assess quality or utility until after consumption. Of course, before-the-event 'assurance' will never eliminate all poor service or incompetence, and so both 'assurance' and 'insurance' might be required. Our concern here is to identify circumstances in which reliance on after-the-event 'insurance' should not be the only or principal response of a 'decent' society.

Where reservation is justified in the public interest, we would not restrict reserved legal activities only to those who hold broader legal qualifications. We see no reason in principle why, as now, the LSB should not approve a new regulator with powers only in respect of one reserved legal activity. The issue of whether a broader legal understanding or experience is necessary[4] in the context of that activity is one to be weighed in the Board's assessment of whether to recommend approval of the new regulator (cf. paragraph 13 of Schedule 4 to the Legal Services Act 2007). Nor would we simply attach the authority to conduct a reserved legal activity to a professional qualification. We would suggest that the specific right to practise such an activity is granted as a separate authority in relation to each activity (say, by way of one or more endorsements to a practising certificate) when an approved regulator is satisfied that the practitioner's competence has been suitably demonstrated and is manifestly current.

Further, we would suggest that, where the public interest justifies reservation, any issue taken to an adviser by a client that involves an activity that is reserved to an authorised person should require that the adviser's terms of business or letter of retainer state:

(i) that this element of the client's instructions must be performed by an authorised person; and

(ii) give the name and accreditation of the authorised person(s) who will be responsible to the client for that element of the work (in many firms, this could fall to the person who designated as the client partner or matter partner[5]).

[3] See Mayson (2011) *Legal services regulation and 'the public interest'* (Legal Services Institute, London), paras 5 and 6: available at www.legalservicesinstitute.org.uk.

[4] This must be 'necessary', rather than 'desirable': one could always argue that it is desirable and sensible (and even rational) for a consumer to seek advice from a practitioner with the broadest possible knowledge and experience. But that *desirability* is not a matter for regulation: the *necessity* to regulate arises from a proper application of the need to avoid consumer detriment as described rather than a broader disadvantage arising from consumers' foolishness, short-sightedness or penny-pinching.

[5] The designated person would not necessarily be the Head of (or Compliance Officer for) Legal Practice, since this individual need be authorised in relation to only one of the firm's reserved activities; for any given client, this individual's authorisation might not be the one for which notification is required.

2.2 Will-writing activities

We proposed in our paper on reservation that a strong case could be made for reserving will-writing activities. We wrote (at paragraph 3.3.1.2):

> Our proposal is not based on broad consumer protection issues – such as pressure (door-step) selling or cold calling, inappropriate bundling or pricing of services, misleading advertising, and the like – which can be covered by other approaches and for which reservation could very easily be argued to be a disproportionate and unnecessary response. Rather, our view is that reservation is justified on the basis that, as a result of unregulated provision, detriment to the consumer might be caused by incompetent, inadequate or biased advice or an invalid will or one that does not properly give effect to their intentions. This detriment is well illustrated in the Consumer Panel's report, and might also arise, for example, from: the adviser failing to address the tax consequences of testamentary dispositions resulting in avoidable or higher-than-necessary tax liabilities to the estate; the adviser failing to consider the legitimate claims of some potential beneficiaries, resulting in post-death disputes and cost to the estate; or the adviser failing to ensure a valid execution (when, for example, the attestation is witnessed by a beneficiary). Given that many failures of advice and representation in these circumstances will only come to light when the clients have died and can no longer articulate or clarify their intentions, or execute a valid will, after-the-event compensation is not, in our view, an adequate or reasonable remedy and will almost certainly involve the estate in some cost and inconvenience.
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> Although it would be possible to regulate against the inappropriate 'bundling' of estate administration into will-writing engagements, reservation gives rise to an alternative approach. By bringing will writing into reservation to authorised persons, the professional principles in section 1(3) of the 2007 Act and an approved regulator's conduct rules will come into play (cf. paragraphs 1.9 and 2.4.1.3). Rather than regulating separately against inappropriate bundling or charging, authorised persons who provide will-writing and estate administration services would be obliged to act in the best interests of the client and could therefore be called on to justify to a regulator any bundling of services or charges made. Given that such an issue is only likely to arise after the testator's death, there will always be an element of retrospective remedy. The advantage of reservation is to provide some assurance to the testator that such inappropriate action is less likely with regulated providers and that his or her executors and beneficiaries will have some recourse.

We believe that the LSB's proposals for the reservation of will-writing activities address the concerns we expressed and meet the objectives we identified.

2.3 Probate and estate administration

The current reservation of the preparation of papers for the grant of probate or letters of administration is in our view the most contentious of the current reservations and so more difficult to justify. We believe that the current reservation is inappropriately drawn, and proposed in our reservation paper that a strong case could be made for the extension of probate activities in the public interest of consumer protection to the broader process of estate administration. We wrote (at paragraph 3.3.2):

> We can see no reason based on public good for reserving simply the preparation of probate papers. Under the current reservation, the only part of the entire process of dealing with an estate that is reserved to authorised persons is preparing papers on which to found or oppose a grant of probate or of letters of administration. But there are numerous tasks and processes that must be completed during the administration of an estate. Amongst these are activities that appear more obviously open to abuse than that which is reserved, such as collecting the assets due to the estate, releasing monies to pay any debts, or preparing the estate accounts. From a consumer protection viewpoint, it is

difficult to account for these steps in the probate process not being reserved to authorised persons, while the preparation of papers to apply for a grant of representation is.

Although problems might arise in relation to contentious probate, or estates involving foreign assets, we are not convinced that these, by themselves, represent a strong enough argument to support reservation. In these circumstances, a sensible executor or administrator would probably seek professional advice. The strongest reason for any probate reservation lies, in our view, in the protection of the estate's assets from maladministration or misappropriation by someone carrying out estate administration for reward. It is a consumer protection justification.

Again, we believe that the LSB's proposals for the reservation of probate and estate administration activities address the concerns we expressed and meet the objectives we identified.

3. Responses to the Consultation Questions

Question 1: Do you agree with the scope of the proposed reserved will-writing activities and estate administration activities? Can the scenarios provided in Annex 1 of the Provisional Report 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 proposed reservations, and with the principle that ancillary activities should only be included within the scope of each proposed reservation when they are provided alongside the core activities of either will-writing or collecting, realising or distributing estate assets.

We agree with the reasoning in the scenarios provided in Annex 1. The nature of connected services will need elaboration in the context of the continuing exemption in respect of activities that are not performed for or in expectation of any fee, gain or reward.

The LSB's proposed approach to the regulation of will-writing, probate and estate administration activities should assist with consumers' understanding of when and how they are protected – namely across all activities provided when they seek either or both of a will-writing or estate administration service.

Question 2: What are your views on the options for implementation that we have described?

We agree that the number of orders required by the process in Option 1 could be seen as an inefficient use of Parliamentary time, and any delays to full implementation caused by this would result in a longer period during which consumers remain unprotected in respect of providers of will-writing and estate administration services who currently outside the scope of regulation. Option 2 requires fewer orders, though as with Option 1, consumers would be similarly unprotected during the transitional period.

Although Option 3 would provide transitional protection for consumers, we agree with the concerns raised by the LSB about the restriction of competition in the market, and in particular with bodies being granted special rights to regulate services when they have not yet shown themselves to meet the relevant criteria set by the LSB. Option 4 would operate against the LSB's aim of improving the effectiveness of existing regulation and appears to us to be inconsistent with the intention of the Legal Services Act in relation to the extension of reserved activities.

We believe (and therefore agree with the LSB) that Option 2 would be the most appropriate course to take. In comparison with Options 1 and 3, it would tie up less LSB resource, allowing more time for the Board to secure the criteria set out in paragraph 62 as quickly as possible. We believe that this would best protect and promote the public and consumer interest in the better regulation of will-writing, probate and estate administration services.

We also endorse the criteria in paragraph 62 as a sensible approach to identifying a transitional period as well as the circumstances in which potential distortions in the regulated market might best be avoided.

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?

We have no observations to make on this.

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 have no observations to make on this.

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 you will face?

We have no observations to make on this.

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

Public confidence in this area has been negatively affected by a number of stories in the media of unscrupulous, incompetent or careless providers. A submission by the Law Society to the Legal Services Consumer Panel stated that 61% of survey respondents thought that all will-writers were already regulated[6]. The research referred to by the LSB in paragraphs 15, 16 and 36-40 of the consultation document show that the concerns are well-founded. Mandatory regulation could improve consumer confidence, though at a broader level this will have to be supplemented with making consumers aware of the regulatory changes if the full benefits of improved consumer confidence are to be realised.

[6] Legal Services Consumer Panel (2011) *Regulating Will Writing*, para 3.31.

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?]

Providers of will-writing and estate administration services who are not currently regulated would be able to bring themselves within the regulatory framework and then compete on a level footing with regulated providers, in terms of protection and perceived quality offered to clients. This might, however, come at some increased cost to consumers as the newly regulated providers seek to recover the cost of regulation.

Similarly, currently regulated providers (such as solicitors, whose will-writing and estate administration activities are presently regulated by virtue of their professional title and individual and entity regulation by the SRA) should face a reduced risk of being undercut on price by non-regulated firms who do not have to pass the costs of a regulatory burden on to their customers.

All consumers – whether of currently regulated or unregulated providers – should benefit from the regulators' attention to will-writing and estate administration as reserved legal activities, and the better protection offered to all consumers of these services. We would anticipate that increased public confidence in consistency of providers and quality of services and protection across the market would result in greater numbers and better quality of wills being written, and therefore of growth in the will-writing and estate administration market.

Question 8: We are keen to understand the potential impacts of our proposals on equality. Do you envisage any positive or negative impacts on equality 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 do not have evidence of any impacts on equality beyond that provided by the equalities impact assessment.

We would anticipate that consumers of will-writing, probate and estate administration services from providers in the currently unregulated part of the market will benefit from the minimum protections being introduced. If it is true that currently unregulated providers tend to charge lower prices than those who are regulated, then it might follow that consumers of their services might more often be from poorer economic backgrounds. If so, people from such a background who could afford to purchase a service after the proposed reforms would experience the positive impacts of having mandatory minimum standards attached to their providers' services. On the other hand, there is also the possibility that other consumers might be priced out of the market if providers pass the costs of regulation on to them.

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?

As stated in our response to Question 8, it is possible that some consumers who are already vulnerable because of social or income inequality, might consider themselves to be priced out of the market for will-writing services if prices in the previously unregulated sector rise to cover the costs of regulation. Indeed, it might be that vulnerable consumers who already had a will written by unregulated providers fail to carry out a necessary update of their wills (following, say, marriage,

living with a new partner, or the birth of a new child) because they now consider the cost to be beyond them.

The Legal Services Institute

The Legal Services Institute was originally established by The College of Law in November 2006. Its principal objectives are to:

(a) seek a more efficient and competitive marketplace for legal services, which properly balances the interests of clients, providers, and the public;

(b) contribute to the process of policy formation, and to influence the important policy issues, in the legal services sector and, in doing so, to serve the market and public interest rather than any particular party or sectional interest;

(c) alert government, regulators, professional bodies, practitioners and other providers, and the wider public, to the implications of these issues; and

(d) encourage and enable better-informed planning in legal services by law firms and other providers, government, regulators and representative bodies.

The Institute seeks to form and convey independent views that it believes reflect, support and promote the public interest rather than the preferences or views of other interested parties.

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