Solicitors Regulation Authority

Legal Services Board consultation:

Enhancing consumer protection, reducing regulatory restrictions: will-writing, probate and estate administration activities

Response from the Solicitors Regulation Authority

November 2012

Contents

Introduction

The Solicitors Regulation Authority (SRA) is the independent regulator of solicitors, the firms in which they practise and all those working with them. We are also a licensing authority for alternative business structures (ABS). We regulate in the public interest.

We support the Legal Services Board's (LSB) proposal to expand the list of reserved legal activities to include will-writing and estate administration activities. As stated in our July consultation response, this is a necessary step to secure the public interest and protect the interests of consumers. We do not intend to repeat what was said in our previous response. This response is therefore, limited to the questions that have been set out in the current consultation document.

Our responses to the consultation questions

Arising from provisional report

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 broadly agree with the scope of the proposed reserved activities and hope that the recommendations, if approved, will allow for consumer interests to be protected. The scenarios in Appendix 1 of the Provisional Report appear to describe correctly activities that will be caught or not caught within the scope of the proposed new reservations. Where certain activities (applicable to SRA regulated providers) are not caught within the proposed reservations, we are of the view that some activities will still however, be regulated through our current regulatory framework.

We believe that the scope of the proposed new reservations will have the effect of providing effective protection to consumers. We agree that the proposals will provide an opportunity for all providers to be regulated on an even footing and promote fair competition between businesses providing services in this area.

Where a provider is able to demonstrate that consumer interests are at the heart of their business, we are of the view that the impact on those providers will be minimal in that should be able to demonstrate a level of competency that satisfies regulatory requirements. It is envisaged that existing providers who are not able to demonstrate compliance and a satisfactory level of competency will be forced to make changes to their business models which in turn should have a positive impact on consumers.

We are concerned that there are potentially serious risks to consumers in relation to activities related to trusts and powers of attorney and recommend that the Legal Services Board (LSB) request the Legal Services Consumer Panel (LSCP) to carry out research to establish whether there is consumer detriment being caused by the provision of either.

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 agree that options 1 and 2 would be appropriate. We suggest that Option 1 should be followed on the basis that this is the route contemplated by Parliament when passing the Legal Services Act 2007.

We agree that Option 3 based on requiring oversight by authorised or non-authorised providers is unsuitable as it would provide consumers with assurance based on regulation that is not properly overseen.

We consider that the impact of option 1 or 2 to be minimal on the SRA. We are satisfied that we are able to demonstrate that we are a competent and credible regulator and that how we have evolved as a regulator demonstrates our commitment to achieving the regulatory objectives as set out in section 1 of the Legal Services Act 2007.

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 agree with the initial assessment of the consequential amendments needed.

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 are concerned that future approved regulators of currently unauthorised will writers and estate administrators will lack fundamental regulatory powers needed to regulate them in certain situations. These are powers given by the Legal Services Act 2007, in relation to licensed bodies including,

- Section 93 - requiring the provision of information, including a power in section 94 to apply to high Court for enforcement of a notice;
- Section 95 - imposing financial penalties
- Section 99 - disqualification of individuals
- Section 102 and Schedule 14 - powers of intervention

Intervention powers in particular are essential in situations where client papers and large amounts of client monies may be held by a service provider involved in administering estates and when a regulator may need to step in case of insolvency, suspected dishonesty or other emergency to protect the interests of clients.

Regulatory powers will also be needed in the case of providers of will writing and estate administration services in circumstances where concerns as to their conduct are brought to the attention of an approved regulator. For example, where businesses place improper pressure on clients into buying unneeded "discounts" off the future costs of estate administration or giving the impression to clients that they have no choice but to appoint an employee of the business as executor.

It is our understanding that to provide appropriate powers to regulators as set out above, would require primary legislation to the extent that such powers affect the rights of third parties and/or the jurisdiction of the courts.

In principle a regulator could amend its requirements to give itself additional powers in relation to those which fall within the current regulated community. However the regulator

could not acquire rights over documents or monies belonging to clients simply by amending its rules in respect of documents or monies held by third parties simply by amending its rules.

It follows that a regulator, in relation to the newly regulated community of will writers and estate administrators, simply by amendments to its rules could not:

1. compel them to disclose information or documents to which a third party has rights of possession or which are otherwise privileged or confidential; or

2. acquire new intervention powers which are equivalent to those in Schedule 14 of the Legal Services Act 2007; or

3. give the High Court a wider jurisdiction than that which it would have in any event. This would mean that , it cannot give the High Court powers to enforce the disclosure of documents and information equivalent to Section 94 Legal Services Act 2007 or to enforce the actions required by an intervention direction.

Instead, any powers that regulators require which may impact on the rights of third parties such as clients and banks, need to be granted by legislation. We are of the view that this would need to be secured by primary legislation rather than by means of an Order under section 69 of the Legal Services Act 2007 as it goes beyond modifying the functions of an approved regulator as it also has an effect on the powers of the High Court and the rights of third parties.

Questions arising from the draft guidance

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?

We are concerned that the draft guidance for existing regulators at paragraphs 29 to 32, fails to take into account that some of the existing wider arrangements and handbook were written with the activities of will writing, probate activities and estate administration in mind as well as a wider range of reserved legal services. We do not agree that in all cases it will be inappropriate to carry across existing arrangements.

Requiring all approved regulators to target their regulatory arrangements and rulebooks to particular types of activity conflicts with the general principles of outcomes-focused and risk based regulation. Ultimately it could lead to a proliferation of different sets of regulatory requirements for each area of legal practice. This in our view, could lead to less flexible regulatory requirements for practitioners.

We consider that our mandatory Principles, rules and Code of Conduct are likely to be appropriate for regulating will writing and estate administration without major amendments save for the addition of new indicative behaviours dealing with this area of practice. In addition, our current supervision and enforcements strategies are outcome-focused and risk-based and demonstrate that we will take enforcement action which is targeted, proportionate and transparent.

We will however, as part of the process consider what regulatory arrangements and outcomes are needed in order to satisfy the LSB's concerns.

Questions arising from the impact assessment

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

Yes, although the extent of the improvement in confidence may be limited as research shows that many consumers currently assume that all firms in the market are already subject to mandatory regulation.

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 reiterate our previous comment in response to question 1, which is that providers who are unable to demonstrate competencies in delivering a quality service to clients or compliance will be forced to make changes to their business model. This will hopefully protect consumers from practitioners who are unable to provide a competent and professional service and promote competition amongst those who strive to deliver excellence.

Questions arising from the equalities impact assessment

Question 8: We are keen to understand the potential impacts of our proposals on equalities. Do you envisage and [sic] 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 agree with your assessment that there is unlikely to be any direct or indirect discrimination within the meaning of the Equality Act as a result of the proposal and are not aware of any specific evidence relating to this other than that referred to in your equality impact assessment.

However, if the effect of reservation is to remove some unscrupulous providers from the market, it has the effect of protecting more vulnerable consumers including those who may lack mental capacity.

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?

The proposals will increase protections for all consumers and we do not anticipate negative impacts on consumers at risk of being vulnerable.