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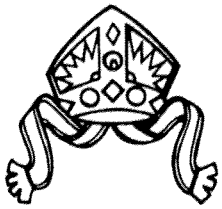
PETER F.B. BEESLEY, LL.B., Joint Registrar
HOWARD J. DELLAR, B.A.,M.A., Joint Registrar
STEPHEN J. BORTON, Chief Clerk



1 THE SANCTUARY
WESTMINSTER
LONDON SW1P 3JT
Please Note:
DX 145940 WESTMINSTER 4

www.facultyoffice.org.uk Email: faculty.office@1Thesanctuary.com
Tel: 020 7222 5381 Ext.7168 (Notaries Public) Fax: 020 7222 7502
Office hours: 10am - 4pm Monday - Friday

Our Ref: 7126/HJD/NDT/HC

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

8 November 2012

Also sent by email: consultations@legalservicesboard.org.uk

Dear Sirs

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

On behalf of the Master of the Court of Faculties, I am writing in connection with the above-mentioned consultation.

As indicated in our response to the consultation of 23rd April 2012, we agree, in broad terms, that will-writing and estate administration activities ought to be included in the list of reserved legal activities and that probate activities should remain in that list. We do, however, have some reservations with the current proposals which we will deal with under the relevant specific questions asked as part of the current consultation.

With these opening comments in mind, we now turn to deal with the specific questions raised in the consultation.

1. We note that the proposal with regard to will-writing is limited to the actual provision of the will itself and that you are not proposing to regulate the provision of preliminary advice which does not result in the drawing up of a will nor the provision of tax advice provided, again, that this does not lead to the drawing up of a will by, or on behalf of, the provider. We broadly support this approach.

   However, we remain concerned, as highlighted in our previous consultation response, that the proposal oversimplifies the definition of will-writing as in your assertion that "we believe the core activity of will-writing to be self-explanatory". As we have previously mentioned, will-writing has long formed part of the definition of notarial activities, themselves a regulated activity, and notaries public are regularly involved in writing wills which are partly or wholly intended to deal with assets in jurisdictions outside of England and Wales. The market is, therefore, more complex, and therefore the definition of will-

writing is necessarily more complex than might at first appear, with practitioners in these areas needing to have the ability to consider whether English Law is the only option, or even the correct choice. There are situations where a consumer may need to make a will in their "home law" that would be admissible to Probate in England and Wales under the domestic rules of Private International Law. It is not clear whether the proposed definition of "will-writing" is intended to cover all wills which are drawn by professionals operating in England and Wales but which are intended to take effect either partly or wholly in other jurisdictions.

The scenarios provided in Annex 1 of the provisional report do clarify some aspects of when activities will and will not be caught within the scope of the proposed new reservations but, as outlined above, not all. It is therefore vital that careful additional consideration be given to more clearly defining the impact which the proposals would have on regulated practitioners within England and Wales advising on and drawing up wills intended for use both here and abroad.

The definition of estate administration activities and linking this definition to providers of probate activities is welcomed. It would, therefore, be logical in our submission for all the existing regulators of probate activities to be approved for the regulation of estate administration activities.

2. We accept that the inclusion of will-writing and estate administration activities as reserved legal activities will require additional approved regulators to be designated under the LSA 2007 and fully support this development. However, where, as in the case of notaries public, will-writing and, to some extent, estate administration activities, have formed part of a notary public's work under the broader heading of "notarial activities" as defined elsewhere, it would be an unfortunate and inappropriate outcome if existing providers of such services were to find they were no longer authorised to carry out an activity which they have carried out for very many years and, since the implementation of the 2007 Act, have been statutorily authorised and regulated to undertake. Any proposal which prevented a notary public from continuing to undertake such activities would be as anti-competitive as restricting new entrants into the market.

   Notaries public are, perhaps, unique in this area in that the reserved legal activity of notarial activities is widely defined and, in our submission, already includes the provision of will-writing. Whichever option is considered for implementation, must take this into account.

   Whilst we understand the LSB's reluctance to accept option 4, further consideration must be given to a combination of this option and provisions to permit other Approved Regulators to enter the market.

3. We agree with the initial assessment and the consequential amendments that will likely to be needed. There are missing acts, relating specifically to public notaries, which do not appear in your list of those not requiring amendment (eg. The Public Notaries Acts of 1801 and 1843).

4. We do not believe that any legislative changes specific to the activities of public notaries will be required. Public notaries are already specifically regulated to undertake probate

activities and the extension of this activity to include estate administration activities should be a matter of definition.

As argued above, the definition of notarial activities, which is also a reserved legal activity, already encompasses will-writing and specific amendments are therefore not required. In this connection, we therefore consider that the Master of the Faculties is already an Approved Regulator for the purposes of will-writing and the amended legislation should reflect this. Accordingly, whilst accepting that there may be a need for minor consequential amendments to our existing rulebook, we do not consider that substantive changes will be required in order to add the specific additional provisions of will-writing and estate administration to the existing headings of notarial activities and probate activities which public notaries are already authorised and regulated to undertake.

5. We are grateful to the LSB for the draft section 162 guidance for prospective Approved Regulators. The guidance will certainly assist in identifying any area of the existing regulatory regime for public notaries undertaking will-writing or estate administration activities which need to be reviewed and, possibly, revised. However, as alluded to above, the existing regulatory regime to which notaries public are subject and for which approval has been provided, already envisages that public notaries undertake these activities under the definition of notarial activities.

   The notarial profession is, perhaps, unique in that all of the 870 or so public notaries practising in England and Wales are regulated as individuals rather than as part of larger entities and it is therefore the individual notary who is responsible for the provision of services which they offer. Whilst there may be some consequential amendments required to the rulebook to take into account the broader and specific definition of will-writing and estate administration activities as regulated activities, we do not consider that these will be substantial in nature given, as we have said, that notaries already undertake these roles in a regulated capacity. In this connection we would refer you to the specific requirements for all entrants to the profession to hold recent academic qualifications in Wills, Probate and Administration and/or to be able to demonstrate current up to date experience in practice (c.f. paragraph 10 of Schedule 2 to the Notaries (Qualification) Rules 1998 http://www.facultyoffice.org.uk/Notaries4.16.html).

6. We agree that having mandatory regulation for all providers of will-writing services and estate and probate administration activities in the market should improve consumer confidence. It is clearly unacceptable that providers who purport to provide the same services are able to operate currently to different standards and, in some cases, no standards. Consumers may be paying for a service which they think is appropriately regulated or which is being provided by an appropriately qualified and regulated professional but which in fact is being provided by an unregulated and unqualified individual where no redress for inadequate or negligent advice is available.

   However, this confidence will only be maintained if appropriate and robust enforcement against individuals who continue to provide such services without being regulated or licensed is enshrined in the amended legislation and carried out. There is already an existing lacuna in the provisions of the 2007 Act which, whilst providing for reserved legal activities, does not contain any (or appropriate) provision for action to be taken by an appropriate body against persons purporting to undertake activities as a regulated entity or

individual but who are not so qualified or regulated. We do not believe that it is adequate to rely on the perceived common law rights of Approved Regulators or licensed bodies to take action against individuals who are purporting to be members of such a regulated or licensed community but are not. It is not, in our view, an appropriate use of a Regulator's resources (which are, after all, provided by the legitimately regulated community) to pursue actions against unregulated or unlicensed individuals or bodies. Consideration must be given to this aspect if consumer confidence is to be maintained in the regulated and licensed sectors.

7. This question is, presumably, aimed at individuals or entities undertaking will-writing or estate administration activities and is not really a question for existing Approved Regulators to deal with. However, we hope that by driving out unregulated and unqualified providers from the market place, businesses providing quality, regulated services will benefit in the longer term from additional business created by enhanced consumer confidence.

8. We agree that the proposals do not represent a risk of direct or indirect discrimination within the meaning of the Equality Act. By eliminating unregulated and unqualified providers, the general standard of provision of will-writing and estate administration services should be improved and thus a more even distribution of quality services should be provided to consumers. There will always be issues surrounding the affordability of quality legal services but the provision of "an equal playing field" for all providers of services within the will-writing and estate administration section will ensure the quality of the service provided and, competition on a level playing field may address some of the affordability issues. We do not agree wholly with the view that increased competition, resulting in cheaper prices will necessarily provide an improved service to consumers. However, the aim of removing unregulated and unlicensed providers from areas as important as will-writing and estate administration can only benefit standards and, therefore, the consumer.

9. We have no additional comment to make.

We confirm that we are content for this submission to be published on your website in accordance with your standard policy.

Yours faithfully

H J DELLAR
Joint Registrar