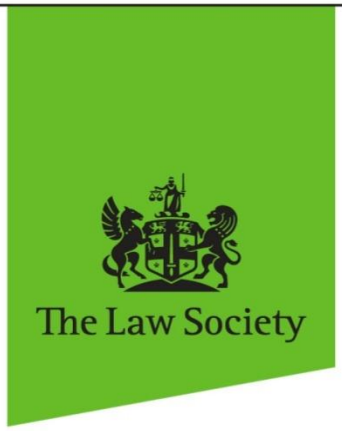

Legal Services Board consultation Enhancing consumer protection, reducing regulatory restrictions: Will writing, probate and estate administration activities

Response of the Law Society of England and Wales

November 2012

THE LAW SOCIETY'S RESPONSE

Introduction

The Law Society is the representative body for over 145,000 solicitors in England and Wales. We welcome the opportunity to respond to the Legal Services Board's (LSB) consultation on will writing, probate and estate administration activities.

In preparing this response, we have sought the views of the Law Society's Wills and Equity Committee, Rules and Ethics Committee and the Private Client Section. These groups comprise specialist practitioners who have considerable experience in all areas of wills, probate, estate administration and ancillary matters.

We support in principle the LSB's decision to regulate will writing and estate administration services. It is clear from the LSB's investigations there is evidence showing that many consumers are not adequately protected at the time a will is written or an estate is administered and that regulation is the appropriate means of addressing this.

However, we have significant concerns with the LSB's proposed approach. We are concerned that the LSB's approach to competition may lead to an unnecessary reduction in the consumer protection available. It seems to us that there is a real danger that the approach advocated by the Board may lead to a plethora of regulators and a rush to the bottom at the expense of expertise and high standards.

We note the guidance on existing regulators' current arrangements. We agree with the LSB that the fact that a regulator may be successfully regulating one activity does not mean that its arrangements can be automatically ported across to will writing. The proposals could be read as going further than this and suggesting that existing regulators of will-writing should create new arrangements. While it may be appropriate for the regulators to consider whether any changes are needed in the light of recent developments, we do not believe that it would be appropriate for significant changes to be made. The LSB approved these arrangements within the last eighteen months and we believe that they comply with the bulk of the requirements set out in the guidance. We do not believe that this need delay authorisation or require significant changes to their regulatory approach. It is disappointing that, as a result of this there may well be a delay in implementing these proposals. Even aside from the delay while other regulators are approved, we believe that these proposals need further work across a number of aspects.

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?

Proposed scope

We agree that any new reserved activities should include:

- Will writing and legal activities provided ancillary to the writing of the will; and
- The administration of an estate of a deceased person and legal activities provided ancillary to the administration of an estate.

However, the reserved activities should capture all activities, including preparing powers of attorney and trusts, that the consumer may be offered or provided in connection with the preparation of a will or when an estate is being administered.

This is likely to be particularly important because of the incentives for referral arrangements that will arise following reservation. When an activity becomes regulated there is an incentive for referral fees to be used to provide regulated providers with work captured by unregulated providers and for unregulated providers to undertake and charge for (possibly through the referral fee) unreserved work done in connection with the will. An analogous situation occurs at present in respect of personal injury work where many claims handlers undertake significant investigatory and other preparatory work prior to selling the claim to the solicitor. Such work may be wasteful or inadequately performed. The Society's view is that the scope for such activity should be limited as far as possible through a wide definition of reserved activities. In the light of the LSB's recent decision, we accept that referral fees in this area are unlikely to be prohibited but it is essential that there should be full transparency.

Allied to this, we have received anecdotal evidence from solicitors that some unregulated providers are preparing probate papers and then getting the executors of an estate to give them a power of attorney so that the unregulated provider can deal with the probate registry and gain control of administering the estate. There are considerable dangers to consumers of giving a power of attorney to an organisation for the sole purpose of obtaining a grant of probate on their behalf. In many cases organisations will promote this method as the 'norm' and do not usually highlight to the consumer that alternatives are available. Further, the power of attorney may not be adequately explained to the consumer, who at the point of signing could be in a vulnerable position. We believe these organisations should be regulated and that the extraction of a grant of probate through an attorney by an organisation should fall within the scope of the proposed legal activities. It is vital that this activity is prevented through the new regulatory arrangements.

We would also note that the area of estate administration is becoming increasingly complex with increased levels of contentious probate disputes, and estates involving overseas matters which may include questions of domicile, complex tax issues and foreign property. This needs to be kept in mind when considering the extent of regulation and the level of expertise needed by those undertaking estate administration activities.

We note that the consultation document states that 'drafting the will and making subsequent amendments' should be captured under the reserved activity. We agree and furthermore it should be made clear that this applies to any provider drafting amendments to the will, even if that provider did not prepare the original draft.

We agree that the proposed scope of reservation should extend to any 'checking' or 'advice' service that may be provided in relation to do-it-yourself tools, including online software packages, even if there is no further fee involved. This should apply to any intervention, such as reading over the document or providing suggested amendments for reward.

As outlined in our previous consultation response in July 2012, we believe that the reserved activity should cover commercial providers offering services for free, for example as part of a wider package. The scenarios dealing with cases where there is expectation of further services or products being sold appear to be intended to cover this, but we believe there is still uncertainty in relation to bodies, such as trade unions or banks, who may offer to prepare a will for free as part of the individual's membership or bank account package. These services should be covered by regulation even if there is no direct or even timely connection between any reward and the service provided.

We are disappointed that there are currently no plans to undertake a review of either powers of attorney nor trusts. As we outlined in our response in July 2012, the proposed scope for reservation should also include these. When a power of attorney or trust is created it places the attorney or trustee in a unique position of trust where that person has control over another's financial and/or health and welfare affairs. This is such an important area for consumers that these services should be reserved and only undertaken by authorised people for reward. However, we do not wish to prevent individuals from preparing a power of attorney nor family members assisting individuals where there is no reward for doing so. We would urge the LSB to consider undertaking a review of these activities as has occurred with will writing and estate administration activities.

Scenarios

The following comments are in relation to the proposed scenarios set out in Annex 1.

Scenario 1 – we understand that it is not intended that the scope of reservation capture providers who purely provide advice services and not activities otherwise within the scope of statutory regulation. However, we think that this scenario is potentially much more complex than is suggested here and that, in principle, it is wrong for providers to be regulated for only part of their activities. There is a distinction between a consumer who receives some very general advice and perhaps some leaflets where no fee is paid and a consumer who receives some detailed advice on which they rely (for example, if it were to the effect that no change was needed to existing arrangements) irrespective of whether a fee is paid. In our view, if a provider is regulated to provide such services, then advice in connection with such services (whether or not actually paid for by the consumer) should be regulated at least to the extent that there is clarity by disclosure about where liability lies and the consequences of poor advice or treatment.

There is also the possibility of 'free advice services' or brochures provided to vulnerable customers being followed up through a referral scheme, it is therefore important that the risks

associated with referral arrangements are taken into account when determining the regulatory scope.

Scenario 3 - we believe that the response should also clarify that the provider preparing the actual will would also be regulated.

Scenarios 3 and 4 – it needs to be clear that how the product is sold, including the information provided to the client and transparency of the sale, will determine how the activity is regulated.

Scenario 4 - is a situation where a referral fee may be paid. Payment of referral fees has caused issues in other areas of law and the LSB should consider how it will prevent this occurring in this area of law should it be regulated.

Scenario 6 – we believe that this is a difficult area. We agree that one of the major risks associated with estate administration is the loss of client money. However, it is not the only risk. By not regulating in this area the LSB may leave a gap in regulation and allow some estate administration firms to avoid regulation.

Scenario 8 - we feel it would be beneficial for this statement to go further and say 'This is conditional on the consumer buying estate administration services *or any other service or product* from the provider'. For example, other services may include a funeral bond or even travel insurance where a free will is provided in connection with the sale of these products.

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?

Considerable evidence has been gathered showing that many consumers are not adequately protected at the time a will is written or an estate is administered. We, therefore believe that any proposed action should be taken immediately to prevent consumers from suffering significant harm. Under the Board's preferred option it is likely to take 2 years from the time that any recommendation is made to the Lord Chancellor before full regulation is in place. We feel this is unacceptable given the overwhelming evidence of consumer detriment which has been produced.

As we said in our previous consultation response in July 2012, the Solicitors Regulation Authority (SRA) should be passported as an approved regulator for will writing and estate administration activities. The LSB has only recently approved the SRA's move towards outcome-focused and risk-based regulation, which are key elements of the proposed regulatory approach for will writing and estate administration services. To impose another hurdle on solicitors who are already regulated is an unnecessary bureaucratic hurdle. It would also appear that the SRA's arrangements would comply with the draft guidance for regulators.

Prior to the introduction of Alternative Business Structures (ABS), it might have been argued that option 4 was inappropriate because, in effect, the SRA and, possibly, the Chartered Institute of Legal Executives (CILEX) were the only bodies practically able to regulate wills and the sort of people who could be regulated were limited. With the arrival of ABS it is now much

easier for non-solicitors to be regulated and to own and manage firms, subject to having an authorised person as the Head of Legal Practice (HOLP). In our view, it ought to be possible for unregulated firms to appoint a HOLP and seek regulation by the SRA. This would ensure that they had persons with appropriate skill, regulatory supervision and duties to ensure compliance by the firm and a suitable regulatory environment. Moreover, we see no obvious consumer advantage to a regulatory regime where there are many regulators regulating a single activity; this is likely in practice to create pressures leading to a rush to the bottom and considerable consumer confusion. We would, therefore, urge consideration of Option 4 which could be achieved relatively quickly within 9 months to give unregulated firms the chance to convert to ABS.

The other options will lead to significant delays, further damage to consumers and uncertainty. We agree that option 2 is more appropriate than option 1 and that option 3 is unacceptable for the reasons stated in the paper.

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?

At this time we are not aware of any other consequential amendments which will be required.

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)?

At this time we are not aware of any additional legislative changes.

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 have concerns about the LSB's proposed section 162 guidance. While we agree with the outcomes for consumers suggested by the LSB, we believe that the approach taken in the guidance by the LSB will mean that some will not be met, including those on:

- Consumers receive good quality advice and services;
- Authorised providers act in the best interest of each client; and
- Consumers are deservedly confident that their advisors are regulated appropriately and effectively.

Existing regulators

We are not clear what the LSB intends by its approach to existing regulators. We note that it is envisaged that all regulators will have to apply to be designated to regulate these services. We agree that the guidance is appropriate for those regulators who do not currently regulate will writing services. We also agree that it is reasonable for existing regulators of will writing services

to review the provisions to see whether or not there are any particular rules which are inappropriate.

We recognise that, in guidance of this sort it is inappropriate for the LSB to provide comments on the arrangements of individual regulators. However, we note that the LSB has recently approved the SRA's new regulatory arrangements. These new arrangements appear to us to comply with the bulk of the requirements in the guidance. We would, therefore, find it very surprising if, having undertaken a review, an application by the SRA for approval of arrangements which are similar to the existing rule book, were to be regarded as unacceptable.

In particular, the mere fact that the SRA regulates solicitors for a wide variety of legal services in addition to will writing does not, it appears to us, require it to provide a set of rules applying only to will writing. This is likely to be a wasteful use of resources and be confusing to firms and to clients. In our view, the LSB would need to show strong evidence that there were problems with the existing arrangements before refusing its approval.

The suggestion that, where a firm ring fences will writing and probate activities, these would be subject to different and less stringent regulation will lead to consumer confusion and a loss of confidence in regulation. The Legal Ombudsman (LeO) has highlighted the confusion raised when consumers are referred from a regulated entity to a non-regulated entity. This proposal is likely to cause similar confusion. We accept that the risk profile of a firm might mean that it requires less intensive supervision, but it should not mean that clients get a poorer service or receive less protection. Given that one of LSB's stated aims is to increase consumer confidence it should be clear that clients will receive a properly regulated service regardless of the legal activity that is being supplied.

Risk identification framework

We agree that regulation should be risk based but the risk should be calculated on a range of factors not just predicated on the formal categorisation of a type of work. Nor should risk based regulation mean that a totally different scheme of regulation is applied to each activity carried out by a legal services provider. Such a system will mean added expense for providers and greater complexity and risks for consumers when their matter involves more than one activity. Given that the outcomes sought for consumers are similar across the different legal activities, we would expect continuity and consistency between regulation of different activities albeit with some minor differences to take account of differing risks. This model of regulation is already in place for solicitors.

Regulation should not just 'bite' on reserved activities. Research has consistently indicated that clients do not understand the differentiation between reserved activities and other legal work. Clients will expect that any work carried out in a solicitors firm will be regulated regardless of its reserved status. Failure to so will result in consumer confusion and a loss of confidence in the regulatory system.

Appeals

The Law Society has previously stated, in the context of the development of the ABS regime, its view that appeals regarding the SRA's decisions, in respect of solicitors and their firms, are best considered by the Solicitors Disciplinary Tribunal. The tribunal is independent and has the relevant expertise to consider appeals made by solicitors. Other regulators should be able to set up equivalent bodies and we do not believe that it is necessary to set up a new body to hear such appeals.

Minimum protections

We would urge the LSB to ensure that universal minimum protections apply to all those who undertake reserved activities to ensure that consumers are fully protected. We believe the protections offered by solicitors achieve this and that a two tier system would be confusing to consumers.

We agree that clients should be told the risks and benefit of any services they purchase. However, we have concerns over some of the risks that the LSB has identified. We are aware that some firms, generally specialist will writing firms, sell probate or package of probate and administration and other services at the time a will is written. These services are often used a considerable time after the date at which they were sold. This brings the risk that the company or its successor will no longer exist and thus will be unable to provide the service that the client has paid for. We believe that many clients will assume that they will be protected when they buy a product from a regulated entity and that explaining the risks to clients will not be sufficient. Should a large company selling these types of services fail, consumers will expect to get their money back. If this does not occur then there are likely to be consequences for the reputation of the sector.

The LSB envisages a situation whereby firms may only be able to do work of limited complexity because of the level of training of staff. However, this does cause issues where probate packages are sold. If a client has paid for a firm to carry out the probate work at a time when their needs were simple (and thus within the firm's capabilities) and upon their death the probate work is now more complicated and beyond the competence of the firm, the package would be rendered worthless. In this case it is not clear what protections would be available and to whom.

Appropriately trained workforce

We agree that an entity needs to demonstrate the appropriate combination of knowledge, skills, behaviours, systems and controls to deliver good quality services. While we accept that there is no single qualification that should be undertaken by all will writers / probate service providers, we believe that a firm permitted to provide these services should have people qualified to undertake the full range of will and probate services and to supervise effectively those who are qualified and those who are not in relation to all aspects of the service provided and all sales made to the consumer. A narrowly focused training programme is likely to mean that providers miss aspects of a matter which is outside their narrow range of expertise and therefore give the wrong or inappropriate advice or omit to give advice when they should (e.g. in relation to a

relevant linked probate or divorce). It is difficult to see how those without a broad base of legal knowledge will be able to provide good quality advice.

We do not believe that there should be a differentiation between those drafting 'simple' and 'complex' wills. Often it will not be clear at the start of a retainer whether a matter will be simple or complex. Basing training and qualification requirements on the complexity of work undertaken presupposes that a provider who is only capable of dealing with simple wills or estates would, if faced with work that is outside his or her expertise, have sufficient knowledge to be able to recognise this in the first place or identify underlying needs that may not be obviously present. It is essential that a firm providing any of these services has the capacity to provide advice on the full range of the law (domestic and international) engaged and of how it applies in particular circumstances and how the whole process works. Professional skill is required to be able to identify the options and best choices for the client before the work is undertaken and then to deal with any complexities.

Similarly, setting lower standards for firms that use will writing software does not appear to be an evidence-based approach. While software can reduce the capacity for human error, mistakes can still occur if those using the software do not understand the product design, characteristics and limitations, and intended output.

Cross-border issues in relation to wills and succession are becoming increasingly common and it is essential that practitioners have an understanding of how to advise such clients, including directing them to an expert in cross jurisdictional matters where appropriate.

Sales practices

We are concerned that the LSB is supporting a move to allow firms to "cold call" consumers. We believe that there are significant problems with "cold calling" as demonstrated by the experience of the Claims Management Regulator. We believe that such calls risk bringing this area of work into disrepute by putting pressure on consumers to take particular products or instruct providers that may not be suitable for them. We do not believe that cold calling supports the outcomes suggested by the LSB in this area and are unclear what the LSB intend to achieve by allowing this type of marketing.

We are also concerned about referral and cross-selling arrangements, for example by banks and funeral directors, where the consumer is not given adequate information, and in some cases lead to believe they must use a particular provider, to enable them to make an informed choice as to whom they are able to use to prepare a will or administer an estate. This is likely to be a particular problem when the work is reserved. It is very likely that referral fees will be demanded on such occasions and it is essential, at the very least, that there should be proper transparency around these, particularly since they will provide an incentive for aggressive sales tactics. The Law Society retains its view that such fees should not be permitted.

There is no evidence that permitted forms of advertising and marketing are inadequate to enable consumers to access the market of providers.

Client money

We agree that strict rules should be in place to protect client money and ensure it is kept separate from the firm's money. The SRA's Accounts Rules meet the LSB's requirements and comparable protections should be in place across all approved regulators, anything less will provide inadequate protection to consumers who may be making decisions when they are vulnerable.

Compensation arrangements

Compensation arrangements will need to be determined by each approved regulator. However, clients must be fully protected for situations where errors or fraud occurs. In relation to complaints and negligence, LeO's experience suggests it will be important to ensure that the regulatory net is cast wide enough to ensure that consumers have the protection that is intended by these reforms.

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

We agree with this in principle. Firstly, the regulation put in place must be robust and tackle the failures in the market. Secondly, the regulators must be properly accountable for their performance and transparent in their polices. Thirdly, regulators must be shown to have the long term resource, appetite and capacity to properly enforce.

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?

Assuming that the SRA is authorised to regulate will writing and probate activities, we do not envisage a major direct impact for our members as they are already trained and regulated to carry out the proposed new reserved activities. However, if a parallel set of regulations for these new activities are put in place alongside the current overarching regulation as suggested in the LSB's proposals this will have a negative impact, causing additional regulatory burden.

There will inevitably also be a concern if a multiplicity of different regulators are permitted. Unless there is consistency in the regulatory approach and uniform standards there is a real danger that will writers will flock to the regulator whose arrangements are cheapest and least onerous. This will affect the business models of those solicitors who provide a service which is of a high standard and, therefore by contrast more expensive, as it fully understands and deals with the risks inherent in this work. There is a real danger of proliferating disputes and litigation if lower standards are encouraged and of misselling if the regulatory boundaries are incorrectly set.

If these activities are reserved, it will become an offence to provide them for gain or personal reward. This will need to be enforced. The LSB will need to consider how this will be achieved and the cost and impact of doing this.

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 specific evidence that these proposals will lead to a negative impact but note that the assessment is overly simplistic, focusing on the possible overall benefits of regulation rather than the potential impact on those with protected characteristics.

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?

If regulatory standards are low and yet people rely on a regulatory badge when choosing which provider to use then vulnerable people will be at a greater disadvantage than they are currently. The compliance and enforcement regime from all providers of reserved activities must be consistent, robust and effective otherwise the regulatory framework will be meaningless.