

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

7 November 2012

Dear Sirs,

Consultation: “Enhancing consumer protection, reducing regulatory restrictions: will-writing, probate and estate administration activities” – Legal Services Board publication – autumn 2012

The Society of Scrivener Notaries is pleased to submit the following response to the Provisional Report and Impact Assessment published by the Legal Services Board (LSB) on the future regulation of will-writing, probate and estate administration.

The Society of Scrivener Notaries is supportive of the LSB’s desire to improve regulation in the area of will-writing and estate administration, but has reservations about the strategy adopted given that the existing regulatory arrangements for notaries are proven to be working well.

We have already expressed these reservations at earlier stages in the consultation and do so again here.

Question 1: Do you agree with the scope of the proposed reserved will writing activities and estate administration activities?

From reading sections 24 and 25 of the Provisional Report one senses that the authors have continued to struggle with a definition of the scope of either activity: *“We are 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”.*

The thoughts and feelings of the consumer seem to be a rather vague measure for defining where the law begins.

Examples in the form of “Scenarios” are set out in Appendix 1 to the Report. Some of the Scenarios are straightforward in themselves - persons providing advice or outsourcing legal services should indeed be regulated. However, there are difficulties in determining just where the boundaries should be marked. Taking Scenario 1 as an example:

“Scenario 1: A consumer seeks advice about the legal instruments available to him to distribute his estate after his death in the manner he wishes. The consumer does not purchase any further services from the provider as he wishes to take time to consider the options open to him. Should this activity be regulated under the proposed new reservations?”

No [says the LSB] because the advice given is not provided ancillary to one of the core activities of creating a will or administering an estate”.

So if a consumer is charged for advice and that advice is NOT to make a will and rely on a jurisdiction’s intestacy law then no reserved legal activity is performed?

What would the position be if the advice were provided to a third party, i.e. “What is my entitlement in the estate of X?”

The omission of foreign law from the Provisional Report and Impact Assessment is noted once again, even though this will continue to be a major factor in consumer needs¹.

At section 31 the Report considers the subject of estate administration.

“..... our preference, is that any regulator designated to authorise providers to carry out estate administration activities should also be designated to authorise providers to carry out probate activities – and vice versa”.

By the same logic, all the existing regulators of probate activities should be approved for the regulation of estate administration activities. (Presumably the LSB does not believe that the existing regulators of probate activities are inadequate?).

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?

As far as notaries are concerned, the evidence does not support the claim made in the Report that consumers are consistently getting a poor deal.

We draw your attention to the Legal Ombudsman’s published data on the volume of complaints made against Authorised Persons. What conclusions should be drawn from the fact that the number of complaints made against notaries is (effectively) nil?²

The Master of the Faculties (MotF) is able to provide the LSB with data regarding the number of allegations of misconduct made against notaries. What conclusions can be drawn from the fact that number of misconduct complaints made against notaries is tiny?

The LSB should accept that notaries carrying out will writing and estate administration activities are already regulated to the LSB’s expectations, insofar as they are carrying out these activities as notaries. Reservation of these activities should not result in a “Year Zero” for our profession, in which the Approved Regulator is required to design a new set of rules that would replicate existing arrangements.

¹ It is remarkable that neither document contains a single reference to “foreign law” in 150 pages. Our earlier evidence given to you suggests that the personal affairs of a huge proportion of consumers are subject to foreign law concepts of domicile, habitual residence, mental capacity, freedom/restriction of testation etc.

² The issues are considered further in the LSB publication *Market impacts of the Legal Services Act 2007 - Baseline Report (Final) 2012*.

If the LSB chooses does recommend either of Options 1 or 2, what arrangements does it have in place to ensure that the smaller Approved Regulators do not face a disproportionate burden? The Impact Assessment claims that the bulk of the cost of reservation will fall primarily on the sector that is not currently regulated. The suggestion is even made that the only additional costs would be the Levy paid towards the running costs of the Legal Ombudsman. Such claims seem implausible when set against the LSB's stated view that the existing Approved Regulators have much work to do. Applications by existing Approved Regulators (for an extension of their remit) are very likely to result in additional costs that will ultimately be passed onto practitioners.

A failure to ensure a smooth transition to the a new regime may result in practitioners becoming "stateless" as they shop around to find a Regulator. Consumers may well find that they are confronted with firms which are regulated by multiple regulators for various activities. Such a confusing outcome is hardly desirable.

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 comment to make.

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)?

The Faculty Office will no doubt be making a response on behalf of the Master of the Faculties as Approved Regulator.

In advance of any bilateral dialogue between the LSB and the MotF in connection with the guidance set out in Annex 2, that there should be (as a matter of courtesy) an acknowledgement that the existing regulatory arrangements for notaries have the advantage of being (a) compliant with the requirements of section 21 of the Legal Services Act 2007 and (b) uniform – as required by the LSB itself (page 43 of the Provisional Report).

We look forward to working with the Legal Services Board and the Master of the Faculties in addressing these issues.

Yours sincerely,



Jonathan Coutts

Secretary
Society of Scrivener Notaries