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By post and 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.

In general terms, we share the Legal Services Board's concern that there is an industry offering will-writing and estate administration services to consumers who are both unregulated and, probably, uninsured, thereby providing little or no protection or means of re-dress for the consumers of those services. We would, however, point also to the significant body of properly qualified, regulated and insured individuals and entities within the existing legal profession and regulatory framework that carry out will-writing and probate and estate administration activities.

In particular, the reserved legal activity of "notarial activities" as defined in the Legal Services Act 2007 (LSA 2007) includes the activities that are performed by a notary and may be defined as "...a duty to draw, attest, or certify under his official seal, for use anywhere in the world, deeds and other documents, including wills or other testamentary documents...: to authenticate such documents...whether by means of issuing a notarial certificate as to the due execution of such documents or by drawing them in the public form..." (*Brookes Notary by N P Ready 13th Edition (2009), page 21*). Whilst accepting therefore, that will-writing and probate and estate administration activities are not, per se, reserved legal activities, it is clear from the above that they do fall within the scope of notarial activities which of themselves, are a reserved legal

activity reserved to notaries public appointed and regulated by the Master of the Court of Faculties. No doubt the SRA/Law Society will make a similar point as regard solicitors.

It is clear, then, that the area of will-writing and estate administration activities is not currently completely unregulated and notaries, with others, are already properly qualified, insured and regulated in carrying out these activities thereby protecting and promoting public interest, and protecting and promoting the interests of consumers. It is noted, however, that the Master of the Court of Faculties was not included in the survey of regulatory protections and regulated and unregulated firms included at page 14 of the Impact Assessment and Market Picture released with the consultation.

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

1. We are not aware of any particular further evidence that should be reviewed. We would, however, draw your specific attention to the responses to the original consultation which were submitted on behalf of the Society of Scrivener Notaries and the Notaries Society as part of the original call for evidence.

2. We agree that it is inappropriate for unregulated and uninsured persons to be providing services which clearly fall within the broad definition of legal services and in particular, the areas of will-writing and probate and estate administration services. However, in guarding against these risks, care must be taken not to apply a broad brush, one size fits all, approach to regulation and to note that there are already substantial parts of the market which are properly qualified, regulated and insured to carry out these services. General consumer protections are probably not sufficient to protect the market and we would certainly agree that general protections are not appropriate for the majority of legal services, hence the enhanced regulation which is required for providers of the current reserved legal activities. Noting the regulatory objective of promoting competition in the provision of services in the legal sector and encouraging an independent, strong diverse and effective legal profession, we would not seek to be seen to try and restrict appropriately qualified, regulated and insured individuals from undertaking will-writing and probate and estate administration services but would broadly welcome the inclusion of these services as reserved legal activities which would then provide both adequate protection to the consumer and a level playing field for those regulated individuals who are already undertaking this work under the auspices of their existing approved regulators.

3. We note the list of core regulatory features which the LSB believe are needed to protect consumers of will-writing, probate and estate administration services. We do have some

concerns as these seem to go above and beyond the current scope of regulation for other legal activities within the legal sector. For example, there is no current "fit and proper person test for ownership and control" of existing legal entities. In practice, as all public notaries are, by definition, individual office holders, this would adversely impact on the notarial profession as each individual would need to pass such a test to obtain authorisation to, effectively, continue to do what they already do as part of their notarial function. This exceeds the principles of better regulation. Provided that the "mandatory register of authorised providers" would automatically include those legal professionals (and in our case, all notaries who are listed on the Roll of Notaries authorised to practise and holding a current practising certificate) who are already regulated by Approved Regulators carrying out these activities we would be content for such a register to exist. We do not believe that a quite separate authority should control inclusion on such a register. As indicated in our opening comments, will-writing and probate and estate administration services have always formed part of a notary's core functions and it would be inappropriate and unnecessary to restrict or prevent notaries from carrying out these activities or to make them register separately to enable them to continue to carry out these activities.

4. Again, we have some concerns over the "fit and proper person test" which, for the reasons outlined in 3 above would adversely impact the notarial profession given that all notaries are by definition, individuals and personally qualified and regulated. We do accept that unqualified individuals employed by legal entities ought, perhaps, to be subject to such tests but properly qualified, regulated and insured individuals do, in our view, already offer the appropriate level of consumer protection.

5. We agree that an appropriate combination of financial protection tools should be in place for all individuals who are undertaking probate and estate administration activities and that the stringent accounting procedures which are already applicable to those regulated individuals within the existing regulated legal sector should be replicated for all new entrants and any individuals undertaking this work. It is clearly inappropriate for unregulated and uninsured individuals to be handling clients' money. However, we do not believe that it would be practical, cost effective, efficient or sensible for clients' money to be held separately under the control of a financial institution rather than the provider. Appropriate client account rules such as those already in existence for the majority of the regulated legal sector, combined with the requirement for professional indemnity and fidelity insurance should be sufficient to protect the consumer against negligence, or the relatively few unscrupulous or fraudulent individuals offering those services.

6. We agree that all individuals offering legal services ought to be properly qualified. All individuals applying to be admitted as notaries public in England and Wales are required to have appropriate degree level (level 6) legal qualifications in core legal modules. In particular, all applicants for entry to the notarial profession in England and Wales are required to provide evidence that they have up to date legal qualifications and/or experience in business law and practice, conveyancing law and practice, and probate administration and wills. These three core heads of qualification are essential to the work of a notary and, we believe, essential to the proper protection of the consumer. We therefore agree that similar education and training requirement should be required and properly tailored for all individuals applying to be able to offer will-writing and probate and estate administration activities. In addition, Continuing Professional Education in these core areas should also be required. The Notaries (Continuing Professional Education) Regulations 2010 already require all admitted notaries to obtain at least 6 hours CPE in notarial activities annually and any notaries who undertake conveyancing (reserved instrument activities) and/or probate activities (as currently defined in the LSA 2007) are required to undertake at least 6 hours in either or both of those additional core areas which they undertake *qua notary*. It would be disproportionate to require any more stringent ongoing supervision or continuing education. We are not aware of any other legal or other professionals who are required, for example, to undertake regular examinations to ensure their skills remain up to date. It is important, however, to ensure that appropriate and targeted Continuing Professional Education is undertaken to ensure, so far as possible, that practitioners remain up to date in both law and practice to ensure that they continue to provide the highest possible standards of service to consumers.

7. As can be seen from our responses above, we agree, in broad terms, that will-writing and estate administration activities ought to be included in the list of reserved legal activities. However, difficulties arise in isolating definitions of these activities. Will-writing, at first glance, would appear to be an easily defined activity. However, as indicated in the definition of notarial activities referred to above, notaries public are regularly involved in writing wills which are partly or wholly intended to deal with assets in jurisdictions other than England and Wales. As noted in the Society of Scrivener Notaries' response to the call for evidence, it is a significant omission that the IFF report research did not consider the impact of foreign law. As noted, the market is more complex and therefore the definition of will-writing is similarly 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 therefore very important that the definition of what constitutes will-writing, probate and estate administration are carefully thought through, consulted upon and clearly defined. The

definition of probate and estate administration activities will present event greater challenges. At what point does general advice and guidance to a consumer client on the processes involved in probate and estate administration (for which a fee may be charged) become the proposed regulated activity?

We are concerned to note paragraph 171 of the consultation which appears to indicate the LSB favours ambiguity in the proposed legislation. It is vital that both consumers and the regulated community are able to readily identify exactly what is being regulated. It is essential that this is clear in the legislation if the five principles of better regulation – proportionality, accountability, *consistency*, *transparency* (our emphasis) and being properly targeted are to be maintained. We do not believe there is any point in creating additional reserved legal activities which are in any way unclear as to their extent or effect.

In this connection, we would also re-state our general concern that there is little point in creating reserved legal activities or additional reserved activities, for which criminal penalties exist for any person or entity undertaking them but who is not authorised to do so, unless or until appropriate and clearly defined and legislated arrangements are in place for prosecution of such individuals or entities by the police or other designated authority.

8. We agree that providers of "do-it-yourself" tools and other tools used by providers to deliver their services ought to be regulated. It seems to us that there is little difference in the protection required for consumers between those who choose to ask a professional to write their will for them and those who use professionally prepared do-it-yourself tools to prepare their own wills. It would be unacceptable to permit persons who market such tools in expectation of fee, gain or reward to be exempted from regulation when those who provide a personal, face-to-face, service are subject to such regulation. Difficulties would ensue, of course, where providers of such services are based out of the jurisdiction and this is again, something, which the LSB will need to consider in drafting proposals and particularly with regard to enforcement.

9. As indicated in our opening comments, there is already a substantial body of legal professionals who are regulated in the provision of all the core legal activities by Approved Regulators under the LSA 2007. It would be wholly inappropriate and disproportionate to require those individuals to apply to a separate regulator for regulation of one part of their core service provision. However, in the same way that there is currently more than one regulator of individuals or entities carrying out reserved instrument activities (vis. the Master of the Faculties, SRA, and CLC), we do not see any difficulty with any of the current Approved Regulators or indeed any new entrants to the market applying to be Approved Regulators for any additional reserved legal activities which may be added to the existing list.

It would, in our view, be appropriate for the existing Approved Regulators who already regulate professionals who are currently undertaking will-writing and probate and estate administration activities to be authorised under any amended legislation to continue to regulate those professionals in that activity; this would, of course, include public notaries regulated by the Master of the Court of Faculties, who, as already stated, carry out will-writing, probate and estate administration activities as part of the definition of notarial activities already existing within the LSA 2007. We do not think it proportionate that the bar should be set any higher (or lower) for Approved Regulators in will-writing and probate and estate administration activities than exists already for AR's of existing regulated legal activities within the regulated legal sector.

10. As a consequence of extending the list of reserved legal activities, if this is what it is decided to do, it does seem that the s.190 legal privilege provisions should be extended to explicitly cover authorised persons in relation to will-writing activities as well as the proposed extended probate and estate administration services.

11. We have no additional comments to make on the impact assessment which has not already been covered above.

We confirm that we are content for this submission to be published on your website.

Yours faithfully

H J DELLAR
Joint Registrar