Response to LSB Consultation on Will-Writing, Probate and Estate Administration Activities

Question 1: Are you aware of any further evidence that we should review?

No. However, the wide range between the figures quoted by the Law Society survey and the OFT for the proportion of wills written by solicitors (as reproduced in the Impact Assessment) does at least demand caution in trying to isolate the causes of the problems that the consultation paper is seeking to address.

Question 2: Could general consumer protections and/or other alternatives to mandatory legal services regulation play a more significant role in protecting consumers against the identified detriments? If so, how?

Consumer protections on their own are not an alternative to proper statutory controls over authorisation, regulation and redress. Nevertheless, a code of conduct which is focused on will-writing, probate and estate administration could serve a useful function, either as a voluntary interim measure pending the full changes contemplated in the discussion paper or as part of a fully reformed system.

For example, the IPW has a Code of Practice for its members. Although written without the sophistication of (say) the SRA Code of Conduct, it does have the very powerful advantage that it is aimed primarily at the consumer rather than the practitioner. It is, in fact, a useful model of what true outcomes-focused regulation might look like in this context.

An industry-wide code which is appropriately advertised could be an effective force for change by making the consumer aware of the appropriate norms. For example, such a code could prohibit the taking of payment in advance of death for estate administration services. It might also include a voluntary submission to the jurisdiction of the Legal Ombudsman in advance of that submission becoming mandatory for all authorised providers.

Such a code could also serve to level the playing field among providers who may be overseen by a variety of statutory regulators. This in turn would facilitate competition on price, service delivery and efficiency. Such competition is, after the need to address consumer detriment, one of the chief aims of the proposed reforms. One implication is, of course, that higher-level codes of individual regulators (such as the SRA Code of Conduct) would need to give place to such a code within their own systems.

Question 3: Do you agree with the list of core regulatory features we believe are needed to protect consumers of will-writing, probate and estate administration services? Do you think that any of the features are not required on a mandatory basis or that additional features are necessary?

Section 4 of the discussion paper describes how the LSB might give guidance to existing or future regulators on how to regulate but is much less clear on measures that might actually redress the kind of consumer detriment described earlier in the discussion paper. The case for making will-writing, probate and estate administration services into reserved activities is overwhelming but there is a danger that the process of reform will become bogged down in considering and giving approval to the rulebooks of the regulators rather than addressing the needs of consumers. This can best be done through a consumer-friendly code of conduct of the kind discussed above. It is certainly correct that regulators should be encouraged to develop rational systems for authorisation and supervision of their regulated community (so that, for example, regulators target their resources according to the risk profile of providers). However, the need to develop a code of conduct that is accessible to consumers is not given the urgency that the detriment identified in the background papers demands.

Clearly, such a code cannot be made truly effective until the regulatory mechanisms are there to ensure that it is made applicable to all providers. However, if the LSB were to produce or commission a draft code at the same time as announcing a target date for the making of will-writing, probate and estate administration services into reserved activities, there would then be a strong impetus for existing and would-be regulators to present focused and coherent applications for approval in a timely fashion. Practitioners would also know what is likely to be expected of them in terms of service delivery ahead of time.

Question 4: Do you believe that a fit and proper person test should be required for individuals within an authorised provider that is named as executor or attorney on behalf of an organisation administering an estate?

We understand this question to be asking whether only such fit and proper individuals should have the ability to have the conduct of an executorship or attorneyship even though an authorised provider is the named executor or attorney. If that is correct, then the answer is yes.

Conversely, the default of one individual within an authorised provider should not automatically lead to the authorised provider as a whole being placed on a blacklist of any kind, although there may well be management and control issues to be examined by the appropriate regulator.

Question 5: What combination of financial protection tools do you believe would proportionately protect consumers in these markets and why? Do you think that mechanisms for holding client money away from individual firms could be developed and if so how?

There is no question that all authorised providers of estate administration services should not be subject to rigorous standards over the holding of client money. Further, there is no reason why these standards should not be broadly the same across the industry. Such controls could be backed up by a combination of reporting requirements, disciplinary processes and mandatory insurance, much as they already are in the regulated sector. However, there needs to be coherence in the way that these three elements fit together. Authorised providers can bargain for insurance to protect against their failure to meet known standards, but to look upon insurance as a way of filling a vacuum is merely to choose to face the spear rather than the sword. For example, the cost of persuading insurers to provide cover for the consequences of

things done long ago by an unregulated provider is likely to be very high indeed – a cost which will need to fall somewhere. Similarly, to ask consumers to buy insurance for shoddy workmanship is both inefficient (as individual warranties on consumer products always are) and ethically questionable (because it implies that some consumers could opt out of buying insurance in a market where – as the consultation paper repeatedly states – they do not know the risks). In any event, the recent débacle of payment protection insurance suggests that insurers and financial institutions cannot always be relied upon to act in the interests of their customers.

It is not at all clear what advantage lies in making financial institutions responsible for client funds, apart from making financial institutions richer by adding layers of fees which would need to be paid by the consumer. In practice in the regulated sector it is nearly always a financial institution that actually holds client money. Many of them already have established estate administration departments that compete with other providers. To give them a mandatory role in somehow supervising all estate administrations would reduce competition and ultimately choice for the consumer. Logically, it would be necessary to give financial institutions a similar role in all ongoing trust arrangements, many of which are managed by lay people themselves. Dishonesty by an authorised provider arises in a small number of cases and the solution needs to be proportionate to the problem.

Currently, the cost of entry into the unregulated sector (including the voluntary trade associations) is very significantly below the cost of entry into the regulated sector. The costs of authorisation, compliance and insurance are a major burden on regulated providers. If will-writing, probate and estate administration services are to be made reserved activities the new regime should be forward-looking (rather than seeking to resolve historic problems) and one that tends to reduce barriers to entry rather than introduce new distortions.

Question 6: Do you agree that education and training requirements should be tailored to the work undertaken and risks presented by different providers and if so how do you think that could this work in practice?

There is of course value in having training that is specific to the work undertaken. However, there is currently no shortage of "badges" which professionals may seek in order to identify themselves as specialists, most notably 'TEP' and perhaps the proposed new Law Society accreditation scheme. These badges may indeed represent a considerable investment of time and money on the part of the holder. However, it is unrealistic to expect all people in a firm to need to be qualified to that level. In any case the consumer is only able to take the "badge" for what it is: a qualification built on learning but which does not necessarily guarantee a good service. From the point of view of the regulator, specifying a particular kind of qualification is inevitably in tension with a focus on outcomes. An industry-wide code of conduct of the kind mooted above would be more effective in raising awareness of what to expect on the part of the consumer and driving change on the part of the provider.

Question 7: Do you agree with the activities that we propose should be reserved legal activities? Do you think that separate reviews of the regulation of legal activities relating to powers of attorney and/ or trusts?

The broad approach to the categories of will-writing, probate and estate administration services is the right one. In principle, it would seem appropriate to include also the preparation of powers of attorney and the administration of trusts within the ambit of regulation too. It is not clear from the discussion paper why this approach has not been taken. The LSB will need to be satisfied that the more limited scope of regulation it proposes will not push the unscrupulous operator into adjacent territory.

Question 8: Do you agree with our proposed approach for regulation in relation to —do -it – yourself‖ tools and tools used by providers to deliver their services? If not, what approach do you think should be taken and why?

The approach indicated is the right one, provided that 'expectation of fee, gain or reward' is not limited to payment for the immediate service but also includes the anticipation of selling further services such as powers of attorney, will storage, life assurance or funeral plans or selling the contact details of the consumer to a third party. Furthermore, it is important (as the consultation document appears to confirm) there should be no exemption for membership organisations (whether or not they are primarily commercial) who provide services to their fee-paying members.

Question 9: Do you envisage any specific issues relating to regulatory overlap and / or regulatory conflict if will-writing and estate administration were made reserved activities? What suggestions do you have to overcome these issues?

The principle that different types of provider should be capable of being authorised to provide will-writing, probate and estate administration services entails a wider range of regulators than are currently able to authorise such activities. However, there is the potential for a confusing landscape to emerge in which the consumer has even less certainty than now over what different kinds of authorisation mean, especially when overlaid with some of the "badges" that some practitioners will hold and others will not. From the point of view of the consumer, an industry-wide code of conduct of the kind already described could be a unifying feature of this landscape.

Question 10: Do you agree that the s190 provision should be extended to explicitly cover authorised persons in relation to will-writing activities as well as probate activities following any extension to the list of reserved legal activities to the wider administration of the estate? What do you think that the benefits and risks would be?

This question raises important issues as to the nature and purpose of legal professional privilege. These issues would benefit from wider and deeper consideration than this response is able to provide.

Question 11: Do you have any comments on our draft impact assessment, published alongside this document, and in particular the likely impact on affected providers?

Our experience suggests that the difference in the cost of entering the statutorily regulated sector versus the self-regulated sector is considerably greater than suggested by the impact assessment. In part this may be due to the ability of trade associations to negotiate block policies of insurance which cover a relatively narrow set of activities provided by a reasonably homogenous group of firms. It may also be due to the history of the regulated sector which has evolved into a layer cake of representational and regulatory functions, all of which have to be paid for. Therefore one of the advantages

of classifying all will-writing, probate and estate administration services as reserved activities is the prospect that some regulators will specialise in this area while insurers too will assess risk more accurately, leading to a more efficient market for providers. A fall in costs for providers currently in the regulated sector will ultimately benefit the consumer.

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