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

The Society of Trust and Estate Practitioners (STEP) is the worldwide professional body for practitioners in the fields of trusts and estates, executorship, administration and related issues. STEP members help families secure their financial future and protect the interests of vulnerable relatives. STEP promotes the highest professional standards through education and training leading to widely recognised and respected professional qualifications. STEP internationally has over 17,500 members, with more than 6,500 members in the UK. Over 4,500 students worldwide are currently studying for STEP qualifications and in the UK STEP supports an extensive regional network providing training and professional development.

STEP is pleased to be given the opportunity to comment on the discussion document "Enhancing consumer protection, reducing regulatory restrictions: will-writing, probate and estate administration activities". STEP supports the LSB's broad conclusion that action is needed to protect consumers in the will-writing, probate and estate administration areas. STEP also supports both the focus on an outcomes based approach in designing regulatory structures in this area and the intention to establish structures which focus on authorisation and regulation by activity.

We give below our detailed answers to the specific questions in the discussion document.

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

No

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?

We agree with the Legal Services Board's conclusion that statutory regulation of will–writing, probate and estate administration is needed to protect consumers. A well designed statutory regulatory framework should also be able to deliver additional benefits to consumers by encouraging competition, but most of the identified detriments can only realistically be tackled by mandatory legal services regulation. Many segments of the legal services market are characterised by a large number of relatively small scale businesses and in reality statutory regulation is the only way of delivering effective control. Moreover most of the general protections offered to consumers focus on 'after the event' rights of redress. As the Legal Services Board has rightly identified, these redress mechanisms are not relevant or appropriate in areas such as will-writing and estate administration.

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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?

The four key elements of the regulatory menu laid out in paragraph 115 are broadly appropriate but we would also identify measures to ensure that all authorised organisations have adequate capital commensurate to the value of the work they undertake as an important mechanism for protecting consumers from financial failure on the part of regulated service providers. This of course should sit alongside provision for adequate insurance cover and the like to ensure financial redress and other after service protections.

Care will be needed in applying the regulatory menu to relatively narrow areas such as will-writing and estate administration. In regards to education and training requirements it is important to ensure that these are appropriate to the services being offered to the consumer. One potential source of problems under the current regulatory framework is that some of those offering will-writing services have a broad legal qualification but little practical experience or training in the specific area of will-writing and estate administration. In addition, while the consultation document rightly recognises that in the case of simple wills and estates relatively limited expertise is needed, it is important that even someone typically handling relatively simple cases has sufficient knowledge to recognise potential complicating factors when they arise.

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?

Yes. Those involved in will-writing and, particularly, estate administration, are often handling substantial sums of money at a time when families and other beneficiaries are particularly vulnerable. It is therefore appropriate and proportionate they should be subject to a rigorous fit and proper person test of the sort outlined in paragraph 130.

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?

We would see a requirement to keep client moneys protected and in clearly identified separate accounts to distinguish them from the funds of the service provider as an essential starting point. Indemnity insurance is also a norm in most areas of professional activity and, while there are occasionally market capacity issues in the provision of such insurance, it still provides an important layer of a consumer protection, especially when combined with a period of run-off cover.

The experience of compensation schemes in other sectors, such as financial services, suggests that they will always be controversial. They force market participants to compensate consumers for shortcomings in their competitors. Any scheme which requires market participants in one market sector to compensate

consumers in another sector (perhaps traditional solicitors having to pay compensation after the failure of a major ABS) will be even more contentious. Such compensation schemes are integral, however, to the effective functioning of an ombudsman scheme and therefore an important protection for consumers.

We would note that some of the costs quoted for establishing compensation arrangements seem to assume a worryingly high failure rate on the part of service providers. This highlights the need for strong and consistently applied capital adequacy provisions, ensuring that all authorised organisations have adequate capital commensurate to the value of the work they undertake. A regulatory framework which sets consistently high standards here will limit claims on any compensation scheme and minimise costs to market participants.

We support the Legal Ombudsman's statutory powers to direct a provider to pay compensation being increased to £50,000.

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?

We have previously highlighted the importance of the work the LSB is doing as part of its Legal Education and Training Review. An activity focused approach, with approved regulators standing ready to accept any professional who meets the relevant standards of training and competence in a specified activity, would seem to be an essential requirement if the legal services market is to meet fully the aspirations of the better regulation initiative and enjoy the full benefits of competition.

As we noted in our response to Question 3, we agree that education and training requirements should be tailored to the work undertaken and risks presented by different providers and the services being offered to the consumer. Too broad a qualification allied with little practical experience in the area of will writing can leave the client exposed to poor advice and practice. Equally too narrow a qualification can leave the client at risk of potential problems and complications not being addressed. While the consultation document rightly recognises that in the case of simple will and estates relatively limited expertise is needed, it is important that even someone typically handling relatively simple cases has sufficient knowledge to recognise potential complicating factors when they arise.

In terms of how an effective system might work in practice, there are many examples in other sectors (ranging from financial services to medicine) of providers investing in systems to ensure that services are provided by staff appropriately trained to fit the needs of each particular client. Key to effective implementation of such an approach is usually careful initial screening and assessment of the client's needs to ensure that they are handled by the appropriate staff. Providers should therefore be required to demonstrate to regulators the strength and robustness of their systems in this area.

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 (are needed)

We agree that regulation should be introduced to cover the preparation and drafting of a will and all ancillary legal activities, the administration of an estate of a deceased person (including the preparation of the papers on which to found or oppose the grant of probate or letters of administration) and all ancillary legal activities. The indicative listings given of activities that might comprise will-writing and estate administration also appear to cover most of the major areas we would consider appropriate.

We do not believe that that separate reviews of the regulation of legal activities relating to powers of attorney and/ or trusts are needed at this stage. We have seen no evidence to suggest that legal activities in these areas are resulting in significant consumer detriment as a result of not being reserved. In the case of powers of attorney, there are cases of abuse, but the relatively new arrangements surrounding LPAs and the OPG's role as guardian have provided additional safeguards compared with the original EPA arrangements and it seems sensible to see how the new arrangements work over time before taking further action. We would also note that there is consensus support for the Office of The Public Guardian's policy of encouraging a significant rise the number of citizens putting power of attorney arrangements in place. The OPG is currently developing a digital process for applying to register powers of attorney to assist delivery of this objective. If at the same time the LSB were to attempt to give reserved status to this sphere of activity, it may well in practice hamper the OPG's digital strategy and serve to discourage people from arranging lasting powers of attorney.

Similarly trusts are currently widely created by professionals from a range of backgrounds such legal services, accountancy or with trust specific qualifications such as those offered by STEP. They can also be created by individuals with no professional background whatsoever. This diversity reflects the fact that trusts can be created in a very wide variety of circumstances. We have, however, seen no evidence to date that there are any significant problems in the trusts sector in terms of either abuse or consumer harm.

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?

STEP agrees that it is not the role of regulation to prevent consumers exercising their legitimate choice as to whether or not to seek professional assistance. Those with relatively simple affairs can often draft a usable will themselves with the help of some research. Those with more complex affairs, however, are usually best advised to seek professional advice. We also support the principle of individuals in a personal capacity being able to provide free advice to help others.

With respect to DIY kits and software, STEP believes that the companies who produce software and forms to produce DIY wills need to be held to account for the quality of their product. STEP research has indicated that our members have detected major flaws in the software used by one online company regarding

Protective Property trusts, which, in their opinion, will cause hundreds of wills to fail[1]. Whereas we agree that regulated providers should not be able to delegate indemnity responsibility to the provider of software or forms, those who are writing their own will, but using commercially supplied software or materials to do so, should have a right of recourse if a faulty product results in unintended consequences.

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 consultation document notes the interest of some of the accountancy professional bodies in work in this area. In addition, we would note that many will writers work within banks and private client financial advisers already regulated by the FSA. Many of these entities will also already employ solicitors and others currently subject to legal services regulation. Regulatory overlap in itself is thus not an insuperable problem, although it is desirable that there should be a liaison mechanism in place between legal services and financial services regulatory bodies to ensure that there are no inconsistencies in regulatory requirements of the sort that might impose unduly onerous burdens on some regulated entities or of the sort that might create regulatory gaps.

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

The issue of extending legal privilege to all those providing will-writing and estate administration should these activities be reserved is complex. If change is to be considered here we would suggest that it should be the subject of separate careful study and consultation. The need for a level playing field between solicitors and others in this area argues strongly for such an extension in privilege. The argument raised in paragraph 206 regarding potentially reducing the evidence to the courts on certain circumstances would seem to apply equally to solicitors and others currently enjoying legal privilege. The alternative route would be to deny legal privilege in the context of will-writing and estate administration to everyone, including solicitors. It easy envisage such a strategy itself creating fresh problems in the context of disputes linked to a range of events of which will-writing or estate administration were only one element.

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?

We are concerned that the impact assessment is based on a historic and static analysis of the market which is already becoming out of date and fails to make any assessment of how regulation might alter the dynamic development of the market. In part this may well reflect that the regulatory proposals are not sufficiently clearly defined to allow a thorough assessment of likely market impact.

[1] STEP — 'Cowboy will-writing, incompetence and dishonesty in the UK wills market', January 2011.

In terms of the rapidly changing market, a growing number of firms, both large and small, offer will-writing and estate administration as just one element of a broad package of services offered to their clients. Several such firms have been growing very rapidly indeed and have extremely ambitious market share targets. As these firms gain scale many who currently sub-contract out activities to SRA regulated entities are looking to move these activities 'in-house'. If the boundaries of reserved activities are expanded many may opt to be regulated by the SRA as an ABS, but this would require a significant improvement in what is reportedly currently proving to be a lengthy and cumbersome approval process. Others may opt for other regulatory options but this will depend on how high the regulatory hurdles are. The impact assessment discusses the likely impact of lower regulatory hurdles on 'solicitor firms' (which we assume to mean traditional legal services providers) but says little about the potential impact of lower regulatory hurdles on non-traditional suppliers - most of which are not currently associated with organisations such as IPW or SWW.

In terms of costs, it is difficult to be precise without knowing exactly what standards will be expected of regulators, but we are surprised at the conclusion that most non-solicitor organisations have membership rules which "are deemed fit-for-purpose compliance arrangements" and thus will incur little or no additional cost beyond extending the coverage of the Legal Ombudsman Service. To meet legitimate public expectations of effective regulation we think it likely that the industry will in reality have to invest much more in areas such as authorisation gateway checks, on-going compliance monitoring and ensuring on-going CPD than many of the non-solicitor bodies are currently incurring.

STEP

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