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Mr Mahtab Grant
Legal Services Board
7th Floor, Victoria House
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11 July 2012

Dear Sirs,

Consultation: the LSB's provisional recommendations on the future regulation of will-writing, probate and estate administration

The Society of Scrivener Notaries is pleased to submit the following response to the LSB consultation on the future regulation of will-writing, probate and estate administration.

Q.1 Are you aware of any [evidence we should review other than that referred to in the Consultation]?

The LSB has relied extensively on research conducted by a third party. Whilst that research has collected interesting data we regret that it shows negligible awareness of the work carried out by notaries. We are not aware that any site visits or interviews were conducted. The omission is significant, as it would have enabled the LSB to appreciate that the existing regulatory arrangements for notaries already provide the regulatory outcomes sought.

A further omission is that the impact of foreign law (outlined in our evidence submitted to you in November 2011) is not discussed in the Consultation document, even though this will continue to be a major factor in consumer needs.

Q2. Could general consumer protections and/or other alternatives to mandatory regulation play a more significant role in protecting consumers? If so, how?

Notaries are already subject to mandatory regulation in relation to will-writing and estate administration, where those activities are been carried on as part of a notarial practice. It is therefore difficult for us to speculate as to whether there are beneficial alternatives.

Q.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?

We do not understand some of the language used at paragraph 123, although we agree with most of the features.

We are concerned that the LSB believes (at paragraph 116) that reservation "does not automatically mean that the [LSB] will recommend that any of the existing legal services regulators .... should be designated as an approved regulator". References are made to the robust tests that applicants would need to undergo – also at paragraph. 116.

We would like the LSB to accept that notaries regulated by the Master of the Faculties are already regulated to the LSB's expectations, **insofar as they are carrying out these activities as notaries.** Practitioners are subject to a register, gateway checks, a code of conduct, insurance arrangements, the Legal Ombudsman's jurisdiction etc.

We do not accept the premise that reservation should result in a "Year Zero" for our profession, in which the regulator is required to design a new set of rules that would replicate the existing arrangements. As far as notaries are concerned, has the Legal Services Board received any evidence at all to suggest that consumers requiring will-writing/estate administration services feel that the sector is unregulated or inadequately regulated?

Q4. Do you believe that a fit and proper person test should be required for individuals within an authorised provider that is named as an executor or attorney on behalf of an organisation administering an estate?

No. Why should a client's freedom of choice be restricted? An employer remains liable for the actions of an employee under existing law.

The Consultation proposes a "fit and proper test" for owners and managers of "authorised providers", including CRB checks, checks against disciplinary action. The Consultation does not define what the threshold for disqualification should be or whether such checks need to be repeated at regular intervals – paragraph 130.

If the representative wishes to delegate his authority would the substitute (potentially resident in a foreign country) be required to pass a "fitness" test too? How long would that take?

Q5. What combination of financial protection tools do you believe would be proportionately protect consumers in these markets and why?

Notaries do not hold client monies to an extent that is comparable with other legal professionals. Existing regulatory arrangements provide sufficient protection for consumers.

Q6. Do you agree that education and training requirements should be tailored to the work undertaken and risks presented by different providers etc.?

Yes. Please note the arrangements set out in the Notaries (Qualification) Rules (1998) as made by the Master of the Faculties.

Q7. Do you agree with the activities that we propose should be reserved legal activities?

The LSB appears shy about providing an answer to this question. At paragraph 171 the preference is for ambiguity: *"legislation should not try to specify every activity that a provider may undertake in relation to will-writing, probate and administration."* Why not?

At paragraph 173 the buck is passed to practitioners. *"The onus should be on [the practitioner] to judge whether activities fall within the definitions in the first instance".* The Consultation document reminds us that the unlawful exercise of a reserved legal activity is a criminal offence. Is it for practitioners now to determine the boundaries of the law? How is uncertainty going to benefit consumers?

Q8. Do you agree with our proposed approach for regulation in relation to "DIY" tools and tolls used by providers to deliver their services?

We do not think that buying such services over the internet is a substitution for proper advice.

However, we accept that a certain sector of the market will only ever want a cheap, "no frills" service. Whether the LSB can reasonably hope to produce a high standard of regulation for the budget sector of the legal services market is doubtful.

Q9. Do you envisage any specific issues relating to regulatory overlap and regulatory conflict if will-writing and estate administration were made reserved legal activities? What suggestions do you have to overcome these issues?

Yes. We draw your attention to the evidence submitted by us in November 2011. We have already provided detail of the particularities of notarial work, and the overlapping functions that notaries already carry out.

As far as notaries are concerned, these difficulties can be avoided by an acceptance from the Legal Services Board that the statutory definition of "notarial activities" includes *"activities which, immediately before [31 March 2009], were customarily carried on by virtue of enrolment as a notary in accordance with section 1 of the Public Notaries Act 1801."*

The LSB should then recognise that notaries' clients requiring will-writing and estate administration services have always enjoyed a high standard of protection (and which now includes the benefit of the Legal Ombudsman's jurisdiction). It would therefore be inappropriate and wasteful to re-invent a regulatory wheel.

Q10. Do you agree that the s190 provision should be extended to explicitly cover authorised persons in relation to will-writing activities .... following any extension to the list of reserved legal activities?

We have no opinion.

Q11. Do you have any comments on our draft impact assessment, published alongside this document, and in particular the likely impact on affected providers?

The LSB is worried (and unhappy) about the will-writing industry beyond the traditional legal professions and wants to see it regulated. Reservation would (in their view) achieve this without causing too many difficulties for the traditional legal professions.

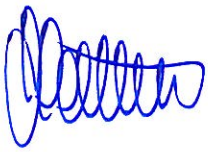
We welcome the intention, but the proposed recommendation will create a regulatory tangle and this is not represented in the Impact Assessment

There are several passing references to notaries in the Impact Assessment, although the authors forgot to include the Master of the Faculties in the table entitled "survey of regulatory protections". The authors of the Impact Assessment gloss over the costs at paragraph 19: *"The costs of [reservation] would fall mainly to those firms who are currently outside the scope of all regulation"*. This statement is contradicted by the main Consultation document, which assumes (at paragraph 192) that existing regulators have much to do in order to put their house in order.

Any recommendation for reservation must include an acknowledgement of the statutory definition of a notary's function as well as the proven regulatory arrangements in place for notaries.

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

Yours sincerely,



Jonathan Coutts

Secretary
Society of Scrivener Notaries