LEGAL SERVICES BOARD

Sections 24 and 26 investigations: will-writing, estate administration and probate activities

Final reports

13 February 2013

Contents

Covering paper to the final reports

Introduction

1. The Legal Services Board (LSB) simultaneously began three investigations under sections 24 and 26 of the Legal Services Act 2007 (the Act) in July 2011. The purpose of the section 24 investigations was to enable the LSB to form a view on whether or not we should recommend that the Lord Chancellor should amend the list of reserved legal activities at section 12 of or schedule 2 to the Act to add will-writing activities and/or estate administration activities. Probate activities are already reserved legal activities. The purpose of the section 26 investigation was to enable the LSB to form a view on whether or not we should recommend that probate activities should cease to a reserved legal activity in the context of the section 24 investigation of estate administration activities.

2. Reserved legal activities may only be undertaken by individuals and entities that have been authorised and are regulated by an appropriately designated approved legal services regulator[1].

3. The purpose of this document is to meet our duty under schedule 6 of the Act to publish a final report in respect of each of our three investigations. This follows the publishing of a provisional report covering each investigation for consultation in September 2012[2].

4. This document is made up of four parts:

    - Cover paper: this sets out the relationship between the three areas under investigation, the background to the investigations and details of the evidence that has been collected. A summary of each of our recommendations is also included.

    - Chapter 1: The final report for the section 24 investigation into will-writing activities

    - Chapter 2: The final report for the section 24 investigation into estate administration activities

    - Chapter 3: The final report for the section 26 investigation into probate activities

[1] Unless undertaken by an exempt person as defined at schedule 3 of the Act with additional categories of exempt persons during transitional period defined at Paragraphs 13 and 18 of schedule 5

[2] http://www.legalservicesboard.org.uk/what_we_do/consultations/open/pdf/will_writing_consultation_document_27_sep_12.pdf

Context

5. Will-writing, probate and estate administration are the key stages of the process that ensures that a person's estate (property, money and possessions) is distributed correctly when they die.

6. The will is the document that sets out how and to whom a person wants their estate to be distributed. Where there is not a valid will the rules of intestacy will apply[3].

7. The grant of probate (where there is a valid will) or letters of administration (where there is not a valid will) provide the legal authority for a personal representative (executor where there is a valid will or administrator where there is not) to access and control the estate assets[4]. Probate is not always needed for example where the estate is very small or when all property/bank accounts etc are held in joint names with the surviving spouse or civil partner. Each year there are around half as many grants of probate/letters of administration as there are registered deaths[5].

8. Estate administration involves administering the estate either in line with a will or the intestacy rules. Key steps include:

   - identifying all assets and liabilities in the estate and the intended beneficiaries
   - assessing the value of the estate and paying any inheritance tax
   - applying for a grant of probate/letters of administration where necessary
   - realising, collecting and distributing estate assets against liabilities and then to beneficiaries.

9. Individuals may write their own will or may pay a professional to write it for them. Our research indicates that professionals write approximately 85% of all wills[6]. A will normally specifies who will be the executor (s), who is eligible to be granted probate and who will be responsible for administering the estate. Where a professional executor (s) is named in a will, the fees, terms and conditions are determined by the testator (although usually paid from estate assets)[7]. This will often be the same provider who has written the will. An executor cannot be forced to renounce or retire their position. A lay person may administer the estate (as executor or administrator), and may seek professional help at any stage in the process or not at all[8].

---

[3] This means that the estate will be distributed to the deceased's next of kin in the order set out in legislation: https://www.gov.uk/wills-probate-inheritance/if-the-person-didnt-leave-a-will

[4] Where is no valid will the deceased's next of kin in the order set out in legislation will have the option of acting as the estate administrator

[5] http://lawcommission.justice.gov.uk/docs/inheritance_and_trustees_powers_bill__impact_assessment.pdf

[6] Legal Services Consumer Panel, Regulating will-writing, July 2011

[7] Consumer research indicates that professional estate administration services had been pre-arranged in 18% of cases.

[8] Consumer research indicates that in 46% of estates a lay person administers the estate without help. Overall with 36% of estates, paid services were commissioned by a lay person dealing with the estate - half the time to take care of everything, one third of the time to arrange the grant of probate but with the lay person then

Summary of recommendations

10. **Will-writing activities:** the LSB recommends that the Lord Chancellor amends the list of reserved legal activities so as to add will-writing activities. The provisional report[9] said that the LSB was minded to recommend the reservation of will-writing activities. In our view, "will-writing activities" should be defined so as to include advice upon, and subsequent preparation and drafting of a will or codicil.

11. **Estate administration activities:** the LSB has decided not to recommend that the Lord Chancellor amends the list of reserved activities to include estate administration activities. Estate administration activities means the administration of an estate of a deceased person, with particular focus on realising, collecting and distributing estate assets. This is a change to the position set out in the LSB's provisional report.

12. **Probate activities:** the LSB has also decided not to not to make a recommendation that the Lord Chancellor amends the list of reserved activities to remove probate activities. Probate activities are defined as preparing any papers on which to found or oppose a grant of probate or letters of administration[10]. This confirms the position of the LSB in its provisional report.

13. The final report for each investigation within this document provides further details about and the reasons for the LSB's decisions.

Evidence base

14. In September 2010 the LSB asked the Legal Services Consumer Panel (the Panel) to provide advice on the consumer interest in relation to the provision of will-writing activities, and also on whether existing consumer protections were capable of addressing any harms identified. This was in light of extensive calls for action to protect the public against detriment allegedly being caused by unregulated will-writing companies. This included from providers, consumers of will-writing services, the media and Parliamentarians of all parties. It followed the passing of legislation to make will-writing a reserved activity in Scotland. The LSB's formal investigation started in July 2011 and was extended to include probate and estate administration activities as the Panel highlighted links across the three activities and some examples of consumer detriment across all (although the Panel did not look at probate and estate administration in detail).

15. The September 2012 provisional report for each investigation and the associated impact assessments drew on a comprehensive evidence base including:

---

administering the estate themselves and the remainder to help the lay person administering the estates as and when needed.

[9] http://www.legalservicesboard.org.uk/what_we_do/consultations/open/pdf/will_writing_consultation_document_27_sep_12.pdf

[10] Schedule 2 to the Act

- a will-writing shadow shopping exercise (101 real consumers were shadowed having their wills written with the end product being quality assessed by a panel of experts)[11]
- consumer and business surveys and interviews[12]
- the Panel's independent reports *Regulating will- writing*[13] and *Probate and estate administration*[14]
- analysis of Consumer Direct and Legal Ombudsman complaints data
- calls for evidence including the submission of over 400 case studies and the views of providers, consumers and other stakeholders[15]
- stakeholder workshop and meetings
- formal consultation[16]

16. The provisional report itself was published for consultation. This was the final consultation for the investigations. This exercise also provided the opportunity for affected practitioners to make representations under paragraphs 13 and 14 of schedule 6 to the Act. In reaching our final decisions/recommendations we have considered these consultation responses, representations and further discussions with stakeholders[17]. We have had regard to each of the regulatory objectives[18]. Out of those eight objectives, protecting and promoting the interests of consumers; protecting and promoting the public interest; improving access to justice and promoting competition have proved particularly relevant to these investigations.

17. This document should be read alongside our summary of responses document for the last consultation and updated impact assessments for the will-writing and estate administration investigations , all of which are published alongside this document[19].

Next steps

18. A copy of the final reports and associated documents have been given to the Lord Chancellor. Section 24 of the Act provides that the Lord Chancellor must consider the final report in relation to will-writing activities, as a recommendation has been made to add the activity to the list of reserved legal activities, and decide whether or not to make an order in respect of the activity. Section 24 provides that the Lord Chancellor must make his decision within 90 days of being given a copy of the

[11] IFF, Understanding the consumer experience of will-writing, July 2011
[12] Ibid
[13] Legal Services Consumer Panel, *Regulating Will Writing* , July 2011: http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/ConsumerPanel_WillwritingReport_Final.pdf
[14] Legal Service Consumer Panel, Probate and Estate Administration, March 2012: http://www.legalservicesconsumerpanel.org.uk/publications/consultation_responses/documents/2012-03-19_LSB_PEAFinal.pdf
[15] One call for evidence relating to will-writing undertaken by the Panel in September 2010 and a second undertaken by LSB in September 2011.
[16] April 2012: http://www.legalservicesboard.org.uk/what_we_do/consultations/open/pdf/will_writingcondoc_final.pdf,
[17] Including reviewing the analysis of the wider evidence base in light of the responses and representations made.
[18] Legal Services Act 2007, Part 1
[19] http://www.legalservicesboard.org.uk/what_we_do/consultations/index.htm. We have not produced an impact assessment for the section 26 investigation because there is limited evidence to draw upon.

report and publish a notice of that decision. If the Lord Chancellor decides not to make an order, the notice must state the reasons why.

Chapter 1: Will-writing activities - final report

Executive summary

19. The LSB recommends to the Lord Chancellor that will-writing activities should be made a reserved legal activity under the Act.

20. If accepted, all bodies wishing to be approved as regulators and licensing authorities in respect of will-writing activities will have to apply to the LSB for designation[20].

21. Our proposals are predicated upon three main principles:

- ensuring that proportionate protections, including access to redress, are in place for all consumers irrespective of who provides their service
- making competition more effective between all different types of will-writing providers so that the market works well for both consumers and businesses
- improving the existing legal services regulation that applies to the majority of providers in these markets.

22. The path laid down by Parliament in the Act is one of liberalisation of the legal services market. Greater competition is encouraged by allowing different types of provider to deliver the reserved activities alongside traditional legal services providers with professional titles. Our proposals are another step along that path by allowing currently regulated and unregulated providers to compete on an equal footing, both in terms of the reassurances that they can offer prospective consumers and the obligations that they face. In developing these proposals we have had regard to both the regulatory objectives and the better regulation principles.

23. Our investigation has found significant information and power asymmetry between providers and consumers which prevent the market from working effectively. The investigation has found that widespread consumer detriment arises as a result of:

- inappropriate sales practices by unregulated providers leading to the sale of products which are not needed, are unsuitable or offer poor value for money
- poor quality advice and drafting leading to invalid and ineffective wills by unregulated and regulated providers
- inadequate arrangements for the safe keeping of wills among unregulated providers leading to wills being unavailable when required

[20] Readers are referred to schedules 4 and 10 to the Act and our accompanying rules and guidance including:
http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/Qualifying_Regulator_status/20110328_Rules_for_applications_Approved_Regulator_Qualifying_Regulator_designation_1_April.pdf
http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/designating_la_rules_v2_june_2011_final.pdf
http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/abs_guidance_on_licensing_rules_guidance.pdf
http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/supplementary_guidance_on_licensing_rules.pdf

- absence of effective redress mechanisms leaving consumers of unregulated providers unable to put things right or obtain compensation where/when things go wrong

- dampening of competition because of lack of trust in the unregulated sector, which restricts its growth

- false consumer confidence with consumers mistakenly believing that all providers are regulated.

24. We have considered the following alternatives to reservation: voluntary self-regulation, enforcement of existing consumer protections, enhanced consumer education and improving existing legal services regulation. Many elements of these arrangements are already in place and, even if further promoted, we consider that they are unable to address the problems found, either individually or in combination. We consider reservation is now necessary to protect consumers and improve competition in the market.

25. We expect that regulation will enhance the effective operation of this market to benefit both consumers and businesses. All consumers will benefit from minimum safeguards irrespective of who delivers the service. This is expected to significantly reduce the problems our investigation has identified. The guarantee of minimum safeguards is likely to provide more consumers with confidence to make purchasing decisions based on the way services are offered by different providers and their price. It is expected that with greater consistency in providers and higher quality services at competitive prices consumer confidence in the market will rise, resulting in a greater number of purchasers and growth.

26. A majority of wills are written by solicitors. Solicitor regulation includes a range of obligations to safeguard against risks across the full range of legal activity that a solicitor is theoretically authorised to undertake rather than just the risks in the work that they actually undertake. This has not been effective at consistently achieving good outcomes for consumers of will-writing services. Our research has shown issues with the quality of wills and customer service being provided by solicitors as well as unregulated will-writing companies.

27. Given this assessment, existing approved legal services regulators will not be automatically approved in relation to will-writing activities on the basis of their current regulatory arrangements. Each will have to demonstrate how their arrangements are proportionate and fit for purpose in relation to these specific activities. Better risk targeting should provide greater opportunity and incentive for providers to innovate to ensure good outcomes for consumers and maximise their profitability. As requirements are adjusted to target actual risks, firms, or departments within firms, that are considered low risk and offer only will-writing and closely associated activities can expect lower on-going regulatory costs. The LSB considers this process of regulatory reform of current arrangements to be of equal importance in securing benefits for consumers and stability for the sector as the proposed extension of coverage.

28. We anticipate that the following benefits will be delivered:

- protection for consumers against identified detriments, improved consumer confidence leading to more people writing wills

- reduction in problems requiring resolution by a court, Probate Service or Her Majesty's Revenue and Customs
- support for sector growth by enhancing the operating environment for reputable providers
- better targeting of legal services regulation.

29. We are supported in this proposal by bodies representing both consumers and charities; existing legal services professional and regulatory bodies; and the main trade bodies representing the unregulated sector. Significantly more evidence has been amassed in support of the reservation of will-writing than has been collected for any of the other reserved legal activities; either now or at the time that each of them became reserved.

Background

30. The LSB, in deciding its approach to assessing the boundaries of legal services regulation, set itself a high test for proposing new regulation. We determined that there must be a compelling case to do so that is supported by appropriate evidence. In the case of will-writing activities, we consider that this test has been met. There is comprehensive evidence of wide and severe consumer detriment that intervention is needed to address. It has been shown that proportionate regulation is likely to cost-effectively address the identified detriments. Our proposal is supported by a wide range of stakeholders including: bodies representing both consumers and charities; existing legal services professional and regulatory bodies; and the main trade bodies representing the unregulated sector.

31. The LSB has taken substantial steps to improve legal services regulation and liberalise the legal services market in line with the Act. Delivering regulation that is independent of inappropriate professional or provider influence is being achieved through the separation of regulation from professional interests. The introduction of alternative business structures enables greater contestability and innovation across the whole market. And the improvement of complaints handling for legal services, including the introduction of the Legal Ombudsman, is beginning to improve customer experience and confidence as well as providing the sort of feedback that supports a more responsive and competitive market.

32. Our investigation has found evidence of consumer detriment arising from a combination of inconsistent achievement of proper standards of work and lack of consumer driven competition in the market. We consider that this recommendation to reserve will-writing activities, supported by the LSB's continued focus on achieving best regulatory practice, will correct this failure and deliver the regulatory objectives set out in the Act.

33. Effective regulation will protect and promote the consumer interest by safeguarding consistent minimum standards. We consider that it will further the public interest and the rule of law by increasing public confidence in the provision of this activity - the detriments in which have been widely reported in the media. A lack of consumer confidence may be resulting in fewer consumers purchasing services, constraining potential market growth and potentially reducing access to justice. Finally, we expect that consistent regulation will promote effective competition between different types of provider. Consumers are likely to be more confident in choosing and using legal services.

Recommendation

34. We recommend that the Lord Chancellor amends the list of reserved legal activities at section 12 of and schedule 2 to the Act so as to add "will-writing activities". These should include:

- preparing and drafting any will or codicil and any subsequent amendments

- providing advice relating to the preparation of a will or codicil and any subsequent amendments

- advising on and overseeing the execution of a will or codicil.

Reasons for recommending amending the list of reserved legal activities to include will-writing activities (basis for intervention)

35. The level of protection for consumers and regulatory obligations for providers within this sector are currently determined by the type of provider delivering the service and not by the risks involved. Solicitors and some other regulated legal service providers are regulated in respect of all the legal work they perform. Some providers are regulated through requirements of professional membership in other sectors – such as accountants and banks. However, will-writing is not on the list of reserved legal activities at section 12 and schedule 2 to the Act. This means that anybody can enter the market and deliver these services to the public. Those that do may operate totally outside the scope of legal services regulation.

36. Our investigation has found consistent and compelling evidence that many consumers are receiving a poor service resulting in financial loss, practical issues and emotional harm. Basic protections are needed for all consumers. Reservation is needed to ensure these protections are binding for all firms: to reduce the risk of rogue and unscrupulous firms entering the market and to ensure that regulation is consistent.

37. Our impact assessment indicates that the overall annual cost of our proposals will be in the region of £600,000. Our assessment indicates that the annual turnover for will-writing, and its related markets of probate and estate administration, for solicitor firms, is around £1.07b[21]. This represents a marginal investment to make the market work better for consumers and businesses alike.

38. There are certain features in the market for will-writing activities that provide barriers to the effective functioning of the market. These market failings require correction through regulation. A key issue is significant asymmetry in information and hence power between providers and consumers. Consumers rarely use these types of services. Few consumers can learn from past experience. Many consumers lack the knowledge to be able to identify shortfalls in quality or judge the necessity or value of money of different products and services that they are sold. Further, the Legal Services Consumer Panel highlighted that these types of services are often delivered at a time of emotional vulnerability for consumers[22].

39. We found evidence of both widespread quality and service issues occurring in these markets as well as unfair practices. The shadow shopping exercise provides strong evidence that a significant proportion of wills written are unlikely to achieve what the testator wants and/or contain unclear causes that will create problems

[21] Analysis of Solicitors Regulation Authority entity Turnover Data 2010.
[22] Legal Services Consumer Panel, *Regulating Will Writing* (2011: London) available at: http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/ConsumerPanel_WillwritingReport_Final.pdf. See also Humphrey et al *Inheritance and the Family: Attitudes to Will-making and Intestacy* (August 2010)

when it comes to administering the estate[23]. Another particular problem with unregulated providers of will-writing activities is instances of lost wills, exacerbated by the fact that 60% of independent will-writing firms close within their first four years of operation[24]. LSB research and surveys suggest that many consumers are being sold products and services which are often unnecessary, inappropriate or ineffective and that represent poor value[25]. Evidence indicates that some unregulated providers utilise unfair sales practices such as advertising at low prices which turn out to be much higher in practice and pressuring consumers into buying additional services (eg on-going support and storage, executor services or lifetime trusts) at the time that the will is written. An offer of a cheap will is often used as "bait".

> A Citizens Advice Bureau (CAB) in the East Midlands saw a 71 year old widower who owned an estate worth approximately £111,000. He was cold called by a will-writing firm offering a will for only £65. The client accepted. When a representative subsequently visited he was informed there was a £1400 fee payable for 'legal support in signing off the form', which could be paid alternatively as £250 plus 60 monthly payments of £27.25 (totalling £1,885). The representative also said that upon death there would be a fee of at least £5000 for probate and solicitors, but the £1400 fee payable now would cover these future costs.

40. Despite a high proportion of the wills purchased during the shadow-shopping exercise having been found by the expert assessors to be defective and/or containing unnecessary features, customer satisfaction levels were high among the shadow shoppers[26]. This emphasises the inability of many consumers to discern the quality or value they are receiving.

> A solicitor saw a married client whose will purported to leave life insurance policies in trust. It was only discovered after the husband's death that the trust in the will was invalid as it failed to provide for any beneficiaries. This may end up costing the widow or her estate many thousands of pounds in inheritance tax.

41. The current situation within this market is causing a number of negative impacts on businesses providing will-writing activities. The media attention on consumer detriment in this area is likely to be undermining confidence among consumers, which may be resulting in fewer people writing wills and below optimum customer numbers. Good quality unregulated providers are finding themselves tainted by association with unscrupulous unregulated providers. Bodies representing such

---

[23] IFF Research, *Understanding the Consumer Experience of Will-Writing Services* (July 2011) available at: http://www.legalservicesboard.org.uk/what_we_do/Research/Publications/pdf/lsb_will_writing_report_final.pdf

[24] Institute of Professional Willwriters, *Investigation into Willwriting Call for Evidence from the Legal Services Consumer Panel* (2011: Halesowen) at p20

[25] Legal Services Consumer Panel, *Regulating Will Writing* (2011: London) available at: http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/ConsumerPanel_WillwritingReport_Final.pdf, IFF Research, *Understanding the Consumer Experience of Will-Writing Services* (July 2011) available at: http://www.legalservicesboard.org.uk/what_we_do/Research/Publications/pdf/lsb_will_writing_report_final.pdf

[26] IFF Research, *Understanding the Consumer Experience of Will-Writing Services* (July 2011) available at: http://www.legalservicesboard.org.uk/what_we_do/Research/Publications/pdf/lsb_will_writing_report_final.pdf

providers inform us that they are unable to effectively compete with solicitors despite often offering cheaper pricing options and a more flexible service because of a lack of consumer confidence. It seems to us that the market in this sector is not working to the extent that competition between providers is focused upon the badge of regulation versus no badge of regulation, rather than service and cost.

42. As a consequence, we consider that action is needed to improve competition, protect consumers and promote their and the wider public interest. Taking action will also protect the many ethical and robust businesses in both the regulated and unregulated sectors, whose business opportunities, reputation and livelihood may be threatened by failures elsewhere in the marketplace which jeopardise business and consumer confidence.

Non-statutory options

43. Before the LSB reached the conclusion that will-writing activities should become a reserved legal activity we considered the alternatives to mandatory regulation that are currently available within the market. Underpinning this assessment was the test of compatibility with both the regulatory objectives and better regulation principles.

44. Foremost among these alternatives are voluntary schemes and self-regulation of the type already employed by the existing will-writing trade bodies. The previous Government decided against including will-writing as a reserved legal activity in the 2007 Act. The Government acknowledged at that time that "improvements must be made in the control of quality and standards of will writing and related services in order to protect consumers"[27]. However, it was preferred to give one final try to achieve this through voluntary regulation and consumer education. It was suggested that the LSB could return to this at a later date if real evidence of continued consumer detriment emerged. Subsequently the Government promoted membership of the Office of Fair Trading Consumer Codes Approval Scheme[28]. This resulted in one of the trade bodies, the Institute of Professional Willwriters (IPW), obtaining initial approval for its code in 2008 and full approval in 2010. Our evidence shows that pursuing this option has not prevented unacceptable levels of consumer detriment across the market. The inherent weakness is that non-compliant providers may exit such arrangements at any time and escape facing enforcement action[29]. Further, despite their promotion in recent years, trade body schemes still only claim partial coverage of the market. We note that the bodies running the voluntary schemes themselves have concluded that they are proving insufficient to protect consumers in these markets[30]. The LSB agrees with this conclusion.

45. Second, we have considered whether enhanced consumer education could alleviate the detriments within the market for these types of activities. However, we have concluded that, while this type of strategy combined with increased provision

[27] "The Future of legal services: putting consumers first", Department for Constitutional Affairs, October 2005.
[28] The Trading Standards Institute is taking over responsibility for the Consumer Codes Scheme – this will be launched in April 2013. See http://www.tradingstandards.gov.uk/extra/news-item.cfm/newsid/981
[29] Readers are referred to the case study in text box 3, above
[30] Institute of Professional Willwriters and Society of Willwriters: http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/submissions_received_to_the_consultation_on_enhancing_consumer.htm

of practical market information (eg costs of activities, types of protection available) may help at least some consumers to make better informed choices, it would not of itself sufficiently tackle key problems such as poor quality wills. It is possible that some service issues and inflated costs could be reduced through better informed consumers but this type of education is difficult to achieve given that consumers in this market are often one off purchasers. Making it mandatory for providers to provide information to consumers may help but this itself would only be enforceable through some form of binding regulation. The most unscrupulous providers are unlikely to agree and adhere to this on a voluntary basis. Increased consumer education would do nothing to address the absence of effective redress mechanisms for consumers of unregulated providers. We consider that much of the benefit of such a policy would be felt by those consumers who can already access information to inform their choices, but would not trickle down to vulnerable consumers who, in reality, are in most need of assistance.

46. Third, the LSB has considered the option of relying upon general law and the enforcement of existing consumer protection legislation. We consider that this option provides insufficient protection in this market. Outside of regulation, consumers have limited options for remedying errors and seeking redress when they receive a poor service, which usually involves taking private action through the civil courts. However, private action is often seen as costly, risky, complex and slow, which acts as a deterrent for many consumers in seeking private redress[31]. Poor sales practices may breach existing consumer protection legislation but this is insufficient as consumers often do not have a private right of action. This means that individuals cannot pursue enforcement action against companies. This places a heavy reliance on public authorities and particularly Trading Standards Services. It is unrealistic to expect each local trading standards office to have sufficient resource to prioritise consistently problems in this market. Further, enforcement action does not usually include remedies that benefit individual consumers – especially where the offender has no realisable assets. The significant information asymmetry between providers and consumers highlighted above and problems commonly not being discovered until after death present particular barriers in this market.

47. Finally, we have considered focusing efforts primarily on improving raising standards of the existing regulation of solicitors and other lawyers, who write a majority of wills. Regardless of the Lord Chancellor's decision following our recommendation to reserve will-writing activities we will continue broader work to improve existing regulation across the legal services market. We intend to issue section 162 guidance to help approved legal services regulators better target their general practice requirements in relation to will-writing activities. However, in the absence of making will-writing activities a distinct reserved legal activity, it is unlikely that this would be prioritised by the regulators. It will do nothing to prevent incompetent and unscrupulous providers from providing services to the public outside of regulation – with the resulting consumer detriment found by this investigation. The opportunity will be missed to create market growth through increased consumer confidence and better competition between different types of provider on an equal footing.

[31] See for example University of Lincoln, Lincoln Law School, 2008: Representative Actions and Restorative Justice, www.bis.gov.uk/files/file51559.pdf

48. Each of the mechanisms described in paragraphs 44 to 46 above are already in operation within this sector, and are not preventing the significant consumer detriment we have found evidence of. The uneven playing field among providers is detrimental to competition and it is possible that reduced consumer confidence is leading to less of these services being accessed, raising issues of access to justice. We have reluctantly concluded that the alternatives available to mandatory regulation cannot effectively address the detriment currently being caused by the provision of these activities. Nor do they provide sufficient disincentive to prevent unethical entry.

Principles of intervention

49. Our proposal to recommend the reservation of reserved will-writing activities is designed to enhance consumer protection in conjunction with improving competition in the market. Intervention is predicated on achieving the following outcomes:

- **Ensuring that appropriate protections, including access to redress, are in place for all consumers irrespective of who provides their service**. This will make it difficult for unscrupulous or poor quality providers to practice unchecked and escape from appropriate regulatory standards. Regulation should offset imperfections in the market and provide a safety net for consumers who are infrequent purchasers and lack the knowledge to identify whether a service is needed or is of the required standard.

- **Making competition more effective between all different types of will-writing providers so that the market works well for both consumers and businesses.** As provided for by Parliament within the Act, this means allowing different types of provider to deliver reserved activities alongside traditional legal services providers with professional title. This also means ensuring that regulation is flexible enough to work for all good providers, whether or not they are traditional legal services providers, without requiring them to make unnecessary changes to their business models or the way that they operate. This should encourage competitive pressure between, and innovation by, all providers to drive improvements for consumers in both service and price.

- **Improving the existing legal services regulation that applies to the majority of providers in these markets.** This means more risk-based monitoring and supervision to make regulation more effective at delivering good outcomes to consumers. Regulation will be better targeted on actual risks presented by providers with different business models rather than the theoretical risks presented by any solicitor authorised to undertake a full range of legal activities by virtue of their professional title. This may result in reduced on-going costs for many and greater opportunity to innovate to maximise competitiveness.

50. Each of these outcomes is essential to delivering the regulatory objectives through the principles of better regulation. We consider that appropriately set regulation of the newly reserved activities will significantly reduce the identified detriment,

support the effective operation of the market and improve competition above a baseline of appropriate consumer protections.

Characteristics of regulation

51. Reservation would not provide a monopoly for traditionally recognised legal services professionals. We intend for the regulation applicable to will-writing activities to be a step change from historical models of legal services regulation. We consider that the best way to deliver the regulatory objectives and principles of better regulation is by the approved regulators setting a clear set of outcomes, to which each provider will be held accountable to deliver for their clients. There should be a sufficient degree of flexibility to allow providers to demonstrate how their arrangements will deliver the outcomes set by their regulator. The LSB's view is that regulation should always be applied at the level least restrictive of competition with obligations demonstrably targeted at and proportionate to potential risks to desired outcomes.

52. Each regulator wishing to be approved to regulate these activities will be required to demonstrate that their regulatory arrangements are proportionate and fit for purpose specifically in relation to will-writing activities. This includes existing legal services regulators. This will be tested at the point of application to be a regulator of will-writing activities and on an on-going basis. We expect that approved regulators will continue to collect evidence over time of risks in the markets for will-writing in order to ensure that their regulatory requirements remain proportionate.

Benefits and impacts of intervention

53. We expect that regulation will enhance the effective operation of this market to benefit both consumers and businesses. All consumers will benefit from minimum safeguards irrespective of who delivers the service. This is expected to significantly reduce the problems our investigation has identified. The guarantee of minimum safeguards is likely to provide more consumers with confidence to make purchasing decisions based on the way services are offered by different providers and their price. As consumers receive higher quality services at competitive prices their confidence is likely to increase, resulting in greater numbers of purchasers and growth of the market. Competition on an equal regulatory footing is likely to encourage solicitors to innovate to compete with currently unregulated providers with different service models and cheaper price options, bringing benefits back to consumers. This is important in a sector that National Endowment for Science, Technology of the Arts research has described as one in which "there is relatively little investment in accessing or creating the knowledge for innovation, and in which the source of potential new ideas is largely internal[32]".

54. We reject the analyses put forward by some commentators that position regulation and competition in opposition to one another. This view is overly simplistic. We agree with David Llewellyn that:

> The purpose of regulation is not to replace competition but to enhance it and make it effective in the marketplace by offsetting market imperfections which potentially compromise consumer welfare. Regulation and competition are not in conflict.

[32] Stephen Roper, Chantal Hales, John R. Bryson and Jim Love, *Measuring sectoral innovation capability in nine areas of the UK economy*, Report for NESTA Innovation Index Project, November 2009

> Regulation has the potential to enhance consumer welfare both by reinforcing the degree of competition, and by making it more effective in the market place[33].

55. A majority of wills are written by solicitors. Solicitor regulation includes a range of obligations to safeguard against risks across the full range of legal activity that a solicitor is theoretically authorised to undertake rather than just the risks in the work that they actually undertake. This has not been effective at achieving good outcomes for consumers of will-writing services. Our research has shown issues with the quality of wills and customer service being provided by solicitors as well as unregulated will-writing companies. Given this assessment, existing approved legal services regulators will not be automatically approved in relation to will-writing activities on the basis of their current regulatory arrangements. Each will have to demonstrate how their arrangements are proportionate and fit for purpose in relation to these specific activities. Better risk targeting should provide greater opportunity and incentive for providers to innovate to ensure good outcomes for consumers and maximise their profitability. As requirements are adjusted to target actual risks, firms, or departments within firms, that are considered low risk and offer only will-writing and closely associated activities can expect lower on-going regulatory costs. Benefits may include more focused training requirements, lower insurance costs and lower reporting and supervision requirements.

56. The greatest impacts in terms of cost are likely to be felt by those businesses currently falling outside all forms of regulation, as they will be subject to a minimum quality standard for the first time. However, a majority of those outside existing legal services regulation are already signed up to voluntary schemes of regulation so will face fewer new obligations.

57. Our proposal to reserve will-writing activities is supported by a majority of businesses and their representative bodies from whom we have had feedback in both the currently regulated and unregulated sectors. Many members of voluntary schemes in the unregulated sector believe that regulation will improve their competitiveness[34]. We note that some of these providers have already chosen to become alternative business structures to receive the benefits of regulation[35].

---

[33] Llewellyn, D. *The Economic Rationale for Financial Regulation*, FSA Occasional Papers Series: 1 (1999: London) at p23.

[34] SWW (largest trade body for unregulated will-writers) Questionnaire, November 2011 – more than two-thirds of respondents thought there would be business benefits resulting from regulation

[35] For example, Parchment Wills & Legal Services Ltd received its ABS license in May 2012. The owner of the company has been quoted as saying she went into business with a solicitor in order to 'level the playing field' and for the 'great opportunity to do what I always wanted to do and offer more services, particularly reserved services'. See Legal Futures, *Pioneer calls on will-writers to become ABSs and level playing field with solicitors* (25 May 2012) available at: http://www.legalfutures.co.uk/latest-news/pioneer-calls-on-will-writers-to-become-abss-and-level-playing-field-with-solicitors

Statement of Provision

Scope and definitions

58. It is our view that the scope of the reserved activity should be drawn in such a way that will encompass what we have found most consumers consider to be will-writing activities. No definition should be so narrowly drawn as to encourage service providers to avoid authorisation, whilst delivering services that most consumers would consider a will-writing activity. We have seen this behaviour in practice in relation to the existing reserved probate activities[36]. Intervention that imposes regulatory costs on many, while being easily avoided, would not be proportionate, targeted or consistent. Care should be taken in drafting the definition of the reserved legal activities to avoid this scenario.

59. It is not the LSB's responsibility to undertake the statutory drafting. Drafting legislation to capture a series of activities is challenging. As with any legislative provision there is no form of words that can offer absolute certainty as to its impact in every possible factual situation. Whether or not a provider is considered to be carrying out a reserved legal activity will turn on the facts in each case.

60. We continue to support individuals being able to act for themselves and also to provide free advice to help others. We propose an exemption from regulation for individuals acting for fee, gain or reward. Where consumers use a self-completion aid, such as a do it yourself will-writing pack, both the activity of the consumer and the publication of the pack or software itself will fall outside the scope of the proposed new reservations. In this scenario we do not believe the average consumer would think they had purchased a will-writing service. However, if a checking service is provided in addition to the self-completion, we intend that this will fall within the scope of the new reserved activity. We will remain alive to any emerging evidence of detriment being caused by where this boundary is drawn.

61. We have set out a series of scenarios at Annex 1 to this chapter. These illustrate our view of the activities that should and should not be captured by the scope of the proposed new reserved legal activity.

Implementation

62. The Act provides that only those providers who have already been authorised by an approved regulator or licensing authority may conduct a reserved legal activity[37]. Therefore, where providers have been previously conducting an activity which then becomes a reserved legal activity, provision needs to be made to ensure that consumers can still benefit from these services without placing providers at risk of performing a reserved legal activity without being authorised to do so.

63. The Lord Chancellor will be responsible for deciding how to implement our recommendation to reserve will-writing activities should the recommendation be accepted. However, it is our view that transitional provision should strike an appropriate balance between swift implementation in order to address the

[36] Defined as preparing and drafting papers on which to found or oppose the grant of probate but not including related advice.

[37] Or are exempt from this requirement

identified consumer detriment as soon as possible, and allowing sufficient time for the market to adapt.

64. Section 25 of the Act sets out a structured process to develop the necessary momentum to ensure a smooth transition to full implementation. We do not anticipate that additional transitional provisions will be required. This mechanism allows bodies to apply to the LSB to be approved as regulators and licensing authorities for the newly reserved legal activity and for successful applicants to authorise providers before restrictions come into effect. All prospective regulators and licensing authorities will have to demonstrate that they meet the LSB's schedule 4 and schedule 10 tests including of probity, capacity and capability. All will have to show that their regulatory arrangements are proportionate and fit for purpose specifically in relation to will-writing activities. The existing approved regulators will not be passported through this process. We expect that all will have work to do in order to demonstrate that they meet the requirements. Some approved regulators will need to be prepared to change their current regulatory arrangements in order to be able to regulate new classes of providers.

65. We propose that reservation should take practical effect within two years of the date that Parliament passes the necessary legislation, should the Lord Chancellor accept the LSB's recommendation. This should allow sufficient time for:

- at least one approved regulator and licensing authority to be designated (including provisional designation) with regulatory arrangements that allow for the authorisation of the different providers currently active within these markets and the capacity and capability to regulate them, and

- providers to be authorised in sufficient numbers to ensure that access to justice, consumer choice and competition is protected.

66. This transitional provision should avoid the unintended consequence of closing the market to any existing type of provider because of an absence of a suitable regulator to authorise them to undertake the newly reserved activities. In our view, this would not be in the public or consumer interest and would also negatively impact on competition and access to justice.

67. This section 25 process is set out below:

- under section 25 (1)(a) the Lord Chancellor may make an order to enable the LSB to receive, consider and determine applications under schedule 4 approved regulators and schedule 10 licensing authority (in relation to a provisionally reserved activity, as if it were a reserved activity

- the Lord Chancellor may also make orders enabling provisional designation orders to be made in respect of a provisional reserved legal activity, as if the activity were a reserved legal activity

- individual applications for provisional designation may then be submitted by prospective approved regulators and licensing authorities and considered by the LSB. Following a recommendation from the LSB, the Lord Chancellor can provisionally designate successful applicants by order

- an order will be necessary to enable provisionally designated approved regulators/licensing authorities to receive and determine applications for authorisation from providers to carry on an activity that is a provisional reserved legal activity

- to the extent needed, once a provisional reserved legal activity becomes a reserved legal activity, the Lord Chancellor can also make an order for the purpose of enabling persons to be deemed authorised to carry on the new reserved legal activity by a relevant approved regulator in relation to the activity for a period specified in the order.

68. If the Lord Chancellor accepts our recommendation, and once the transitional provisions are clear, the LSB will also need to ensure that the Legal Ombudsman has plans in place to be ready to receive complaints about the newly reserved activity including making any necessary amendments to scheme rules.

Consequential provisions

69. In our opinion, provisions set out at Annex 2 will need to be made by virtue of section 204(3) of the Act or in an order under section 208 of the Act (power to make consequential provision, transitional provision etc) if an order is made under section 24. It is likely that other provisions will need to be made, and that further provisions will be identified, as work to implement develops should the Lord Chancellor accept our recommendation to reserved will-writing activities.

Legal professional privilege

70. If the Lord Chancellor accepts our recommendation, whether will-writing advice is to be privileged and how this might be achieved will need to be determined. Consumers of advice provided by solicitors and barristers enjoy legal professional privilege at common law, for all types of legal work. Section 190(2) of the Act provides for privilege to extend to other types of authorised persons but only in relation to specified legal activities. Section 190(4) provides for privilege to extend to the clients of licensed bodies in relation to those same activities, in certain circumstances. These provisions result, as a matter of statute, in any communication, document, material or information being privileged from disclosure as if the authorised person/licensed body had at all material times been acting as their client's solicitor. At present section 190 already extends to clients of all authorised persons delivering existing reserved probate activities (and also the wider estate administration when they are provided in relation to probate activities). It seems to us that it would be logical for the effect of the section 190 provisions to be extended to all authorised persons/licensed bodies in relation to will-writing activities, should these become a reserved activity. This would be consistent with the Act's liberalisation of the market for legal services by breaking the link between professional titles and the delivery of the reserved activities. It would also be consistent with the position relating to the current reserved probate activities and would ensure that all consumers of will-writing advice by an authorised person would benefit from privilege. However, this is a decision for the Lord Chancellor and for Parliament. We appreciate that there are wider public policy considerations

in light of the Supreme Court's judgement in the recent case of R (on the application of Prudential plc & Another) v Special Commissioner of Income Tax & Another.

Annex 1 – Scenarios relating to will writing which illustrate where activities should or should not be captured by reservation

In the event that will-writing activities are made a reserved legal activity each provider whose business model is set up to provide will-writing activities will need to be authorised. With that in mind we have compiled a set of scenarios to illustrate situations where we think a provider will require authorisation and some which ought not to fall within the reserved legal activity.

***Scenario 1**:*

A provider offers advice regarding tax arrangements and trusts to consumers, this advice is provided in a form that could be used by a professional to inform the drafting of a will. If a consumer wished to have a will written the provider would not be able to fulfil this request and would advise the consumer to seek further assistance elsewhere.

Would the provider need to be authorised?

No. On these facts, this provider's business does not appear to be structured to offer the preparation, drafting or production of a will or advice on the preparation, drafting or production of a will.

Scenario 2:

A provider offers advice regarding tax arrangements and trusts to consumers. If a consumer wished to have a will written the provider will offer to produce a will for them.

Would the provider need to be authorised?

Yes. This provider offers a will-writing service, and the package of services provided here would fall under the heading of 'will-writing activities.' The activities undertaken therefore fall within the scope of the proposed new reserved legal activity.

Scenario 3:

A provider advertises services using the heading, ‘call now for help reducing your inheritance tax bill!’ While he is providing the inheritance tax advice to a consumer, the provider also recommends that the consumer has a will written to give effect to their wishes. The consumer agrees and receives a will from the provider. Unbeknown to the consumer, the provider outsources the drafting of the will.

Would the provider need to be authorised?

Yes. We feel it necessary to consider how each consumer would view their particular situation. In this scenario, the consumer will rightly think they have received a will-writing service from their provider falling under the heading of will-writing activities. The activities undertaken therefore should be within the scope of the proposed new reserved legal activity. Furthermore, we consider that the provider should be accountable for all of the will-writing activities undertaken in this scenario. It is up to the provider to choose whether or not they will rely solely on the assurances of the outsourced provider regarding the quality of the outsourced will-writing activities. However, the provider that has the direct relationship with the consumer should not be able choose to off load his or her regulatory responsibility for any part of the reserved activities onto the outsourced provider.

Scenario 4:

A provider advertises services using the heading, ‘call now for help reducing your inheritance tax bill!’. While they are providing the inheritance tax advice, the provider also recommends that the consumer has a will written to give effect to their wishes. The consumer agrees. The provider states that he does not offer a will-writing service, but he can refer the consumer to a will-writer. The consumer proceeds to get their will written by the named will-writer.

Would the provider need to be authorised?

In this scenario the will-writer (not the initial provider of inheritance tax advice) would need to be authorised, as the person drafting the will. If the will-writer is operating as a separate business from the inheritance tax provider, the tax adviser would not require authorisation in respect of the proposed new reserved activity.

Scenario 5:

A provider offers advice regarding tax arrangements and trusts to consumers. The advice offered is in sufficient detail that the provider expects clients to be able to draft their own will.

Would the provider need to be authorised?

The advice is being offered to assist consumers in the preparation, drafting and production of their will, going beyond simply the provision of advice on tax and trusts. It is advice upon the preparation of the will. For this reason, this provider should need to be authorised in respect of the proposed new reserved activity.

Scenario 6:

A woman assists a number of her neighbours with the drafting of their wills. The woman does not receive any form of payment at the time of drafting the wills on the condition that the neighbours agree that in return they will each leave the woman a sum of money in their will.

Does the woman need to be authorised?

Yes. Where a person acts in expectation of any fee, gain or reward to provide the reserved activity of will-writing they will fall within the scope of regulation.

Annex 2 – possible consequential amendments to the Act and other relevant legislation

Act	Section	Title (if any)	Impact/Change required
Legal Services Act 2007	Section 12	Reserved Legal Activities	The addition of 'will-writing' as a reserved legal activity in s12(1).
	Section 190	Legal Professional Privilege	Consideration will need to given to whether will-writing advice was to be privileged and whether this is a consequential change or substantive change that would require primary legislation
	Schedule 2	The Reserved Legal Activities	A paragraph needs to be added to define 'will-writing'
	Schedule 2, paragraph 6	The Reserved Legal Activities: Probate Activities	The paragraph will need to be amended or replaced in order to widen the definition of 'probate activities'.
	Schedule 3	Exempt persons	A paragraph needs to be added to define any 'exempt persons' for the purposes of carrying on will-writing.
	Schedule 4, Part 1	Approved Regulators: Existing Regulators	Identifying the approved regulator(s) for will-writing activities
	Schedule 5, Part 1	Authorised Persons: Continuity of Rights	It will need to be determined which, if any, current service providers should be temporarily exempt from authorisation/treated as authorised for the transitional period.
	Schedule 5, Part 2	Authorised Persons: Rights during transitional period	A paragraph will need to be added to this Part of Schedule 5 to set out the rights of any service providers who are exempt under Part 1.
	Schedule 24	Index of Defined Expressions	The addition of a reference to the definition for 'will-writing' and (possibly) 'estate administration' to the extent it is made a defined expression separate from 'probate activities'
Solicitor's Act 1974			No change required.
Administration of Justice Act 1985			No change required.
Courts and Legal			No change required.

Services Act 1990			
Bills of Exchange Act 1882			No change required.
Administration of Estates Act 1925			No change required.
Taxes Management Act 1970	Section 20B		Probably no change required – relates to privilege which is extended elsewhere, as long as will-writers become a 'legal representative' and it is intended they should have privilege.
Fair Trading Act 1973	Section 29		Probably no change required – relates to privilege which is extended elsewhere, as long as will-writers become a 'legal representative' and it is intended they should have privilege.
There are a number of near identical provisions in other acts to those in the Acts above. There is a policy consideration as to whether privilege should be extended to will-writers generally. If privilege is either generally extended or not extended at all, there is no issue. The issue is in the event there is a 'pick-and-choose' approach. The main issue highlighted in the LSB paper (enclosure D) was evidence before courts. That is dealt with at s122 of the SCA 1981 (see below). It may be that this is the only exception to be made. It is difficult to see a rational basis for removing (or keeping) privilege in any other specific circumstances.			
Senior Courts Act 1981	Section 122	Examination of person with knowledge of testamentary document	This gives the court the power to impel an individual with knowledge of the making of a will to give evidence. There is currently no mention of legal professional privilege. Query whether there needs to be reference to legal

			privilege being included or excluded.
Wills Act 1937			No change required.
Wills Act 1963			No change required.
Wills Act 1963			No change required.

Chapter 2: Estate administration activities – final report

Executive summary

71. This final report sets out the Legal Services Board's conclusions in respect of its investigation under section 24 of the Act into the reservation of estate administration activities. Estate administration activities are not currently within the list of reserved legal activities within section 12 of and schedule 2 to the Act. The LSB has decided not to recommend that estate administration activities are made a reserved legal activity following its investigation.

72. We have reached the conclusion for the following reasons:

- in aggregate the evidence does not compellingly demonstrate systemic fraudulent or dishonest practices or other problems causing significant consumer detriment within the unregulated sector

- while providing some deterrent to dishonest entrants to the market and some consumer protection benefits, regulation is unlikely to be effective at managing vulnerability to fraud. This is a criminal rather than regulatory issue. The penalty to the honest provider could be far greater than the deterrent effect to the potential criminal

- the market share held by unregulated estate administration providers appears to be small, particularly in relation to the core legal activities of estate administration specified in the provisional report - "collecting, realising and distributing estate assets"[38]

- if will-writing activities are made a reserved legal activity the opportunity for providers of estate administration services unwilling to engage with regulation to attract clients would be reduced

73. We accept that the argument is finely balanced and a decision not to recommend reservation will not tackle concerns raised about confusion at the boundary of reserved activities if probate activities and will-writing activities (should this happen following the recommendation to be made to the Lord Chancellor) are reserved activities but estate administration activities are not.

74. We expect that some level of consumer detriment in this market will remain including incidence of fraud and theft. It is our view that this level of consumer detriment would remain regardless of whether regulation is introduced or not.

75. We have identified policy initiatives other then reservation that could help raise service standards and help the market work well for consumers.

76. We will remain open to reviewing the case for estate administration activities to be a reserved legal activity should circumstances change.

[38] The core legal activities set out in the provisional report: http://www.legalservicesboard.org.uk/what_we_do/consultations/open/pdf/will_writing_consultation_document_27_sep_12.pdf

Recommendation

77. The LSB has decided not to recommend that estate administration be made a reserved legal activity. Estate administration activities are not currently a reserved legal activity. We will not propose regulation for any activity unless there is a compelling case to do so, supported by appropriate evidence. In the case of estate administration, we do not consider that this test has been met.

78. We have changed our position from that set out in the provisional report which stated that the LSB was minded to recommend that the Lord Chancellor should make estate administration a reserved legal activity. The risks in this market are significant, though evidence of actual detriment arising is less common. On balance in our provisional report, we decided that the risks justified the cost of reservation and regulation employing targeted interventions. Further review of the evidence has led us to reverse this opinion.

Case for regulation

79. It is widely accepted that characteristics of the estate administration market present opportunity and incentive for fraud and other dishonest practices. This is the main justification given for the regulation of estate administration activities. The service provider is often named as executor of an estate within a will, which provides them with the legal authority to control the estate assets. As such, the provider of estate administration services, and the consumer, are difficult to distinguish. The provider controls the information about the contents of the estate and how the deceased individual intended for them to be distributed. There are wide concerns reported across stakeholders about unregulated providers being able to control estate assets.

80. Theft and fraud are criminal offences. Victims may in theory be able to reclaim the assets they were entitled to following a conviction. However, it has been reported that in many cases this does not happen as the perpetrators often no longer have the assets or money to fulfil any obligations. The investigation found some examples of proven criminal activity. There are non-trivial incidences of fraud in the solicitor sector. The SRA has highlighted estate administration fraud in its risk index[39]. There were 94 probate related compensation claims from people who felt that they have suffered financial loss due to a solicitor's dishonesty or failure to account for monies received reported by the SRA in their 2011 performance report[40]. Further evidence relating to the unregulated sector mainly consists of anecdote and case studies reporting charities and individuals experiencing suspected fraud, theft and poor financial practice. We have been unable to find evidence to quantify either the frequency or value of detriment caused.

81. Beyond fraud and dishonest practices, survey information, Legal Ombudsman complaints data and case studies indicate that a significant minority of consumers are not satisfied with the service that they receive[41]. For example, only 68% of participants in a YouGov consumer survey stated that they were satisfied with the

[39] http://www.sra.org.uk/sra/strategy/risk-framework/risk-index.page

[40] http://www.sra.org.uk/reports/:

[41] http://www.legalservicesboard.org.uk/what_we_do/consultations/open/pdf/will_writingcondoc_final.pdf

service they received[42] . Delays, failure to follow instructions and not providing information to beneficiaries were commonly reported service issues. Issues with excessive costs, poor value and deficient costs information were also commonly reported.

82. The detriment suffered by individuals can be severe. Inheritances may not be paid, costing beneficiaries vast sums of money, to life changing effect. Estate administration is a high cost service – the mean cost is £1,700 but this can vary significantly. For example, in approximately one fifth of cases the costs exceed £3,000. The provider's actions can affect multiple people, who are intended beneficiaries, who since they are not the client of the business have little power to control events and manage the risk that they face.

Why we are not recommending reservation

83. It is our view that a recommendation to reserve estate administration activities must be based on evidence of widespread detriment and, as important, a clear case that regulation imposed through the mechanism of reservation can be shown to deal cost effectively with the actual detriment identified. Reservation is the most interventionist option with the largest breadth of impact. We have concluded that this test has not been met. This is for the following reasons:

- in aggregate the evidence does not compellingly demonstrate systemic fraudulent or dishonest practices or other problems causing significant consumer detriment within the unregulated sector

- regulation is unlikely to be effective at managing vulnerability to fraud. While the existence of regulation may act as some deterrent to dishonest entrants to the market, regulation cannot prevent this behaviour – particularly criminal activity. There are consumer protection benefits in having, for example, client account requirements, easier access to redress in the event of fraud and arrangements to safeguard client money held by a failing business. However, the obligations imposed by the Act are not clearly proportionate to or sufficiently targeted at the risks that we have identified. The worst case is that there would be a significant burden on ethical providers with little or no impact on the potentially criminal. In aggregate the evidence does not demonstrate that the benefits would justify the costs on this basis

- the market share held by unregulated estate administration providers appears to be small, particularly in relation to "collecting, realising and distributing estate assets"[43]. Therefore, a vast majority of consumers are already afforded a level of regulatory protection. The majority already have access to the independent Legal Ombudsman and compensation arrangements. Of those that do not, some, perhaps many, have access to the Financial Ombudsman. Additionally, the Legal Ombudsman continues to explore the development of a voluntary scheme. Consumer research indicated that solicitors hold around 86% of paid for services. It is now clear that the remainder of the market is mainly made up of accountants, banks or subsidiary trust corporations (regulated in other sectors) and a small number of large independent trust corporations (largely unregulated). In total the

[42] The Legal Services Consumer Panel report on probate and estate administration included examples of thefts ranging in value from £30k to £400k.
[43] Provisional report definition of core estate administration activities

proportion of the market that is made up of providers unregulated (in any sector) is understood to be less than 5%. This is compared to the will-writing market where a large number of mainly small independent will-writing companies (unregulated) are believed to make up about 12% of the market.

- a final consideration is the impact of reserving will-writing (should this happen following the recommendation made to the Lord Chancellor). Will-writing and will storage is often the gateway for accessing clients for estate administration services. Therefore, reserving will-writing will deny providers unwilling to engage with regulation the key gateway point for attracting clients for estate administration. We believe that this could exclude some of the most unscrupulous from the market. Further, regulatory protections such as suitability tests, requirements to adhere to the professional principles including acting in the best interests of the client and access to the Legal Ombudsman apply to an authorised person and not the activities that they undertake.

84. Bodies representing accountants have made representations challenging the legality and proportionality of reserving estate administration activities. Legality is challenged on the basis that it cannot be considered a legal activity at all. We do not accept this point, which is in any event undermined by further argument that has been put forward that estate administration activities should be reserved but that accountants should be exempt from the requirement to be authorised. Proportionality is challenged primarily on the basis that accountants are already appropriately regulated and the risks related to estate administration are being managed effectively. We accept that general practice regulation of accountants does offer some consumer protection. However, we have not seen evidence that the professional bodies of accountants profile risks relating to estate administration activities or how different accountants manage these risks and then target regulation accordingly. We have concluded that, on balance, reservation is not the most proportionate or targeted response to risks in this market in light of all the points set out in the bullets above and not on the basis of representations put forward by the accountancy bodies or any other professional or representative bodies.

85. Overall the case for reservation is finely balanced. A failure to recommend reservation will not tackle concerns raised about confusion at the boundary of reserved activities if probate activities and will-writing activities (should this happen following the recommendation to be made to the Lord Chancellor) are reserved activities, but estate administration activities are not. However, wherever the boundaries of regulation are drawn there will be challenges in ensuring that consumers are aware of the protections they have in any transaction.

86. We expect that some level of consumer detriment will remain in this market, including some incidence of fraud. It is our view that some level of consumer detriment would remain regardless of whether regulation is introduced or not.

Suggested actions

87. We have concluded that statutory intervention is not an appropriate response to the detriments identified and would not be proportionate in this market. However, we have identified other non-statutory policy initiatives that could be beneficial in

helping to raise standards, making the market work well for consumers and improving consumer confidence.

Voluntary agreements

88. It is our view that services for consumers can be improved through voluntary agreements/schemes, with providers being encouraged to put in place codified safeguards against risks within this market to reassure prospective consumers. The LSB intends to facilitate work by key stakeholders to explore the development of voluntary codes/schemes with unregulated providers[44]. This may include:

- the British Bankers Association and the big four retail banks that deliver estate administration activities developing codified standards and protections relating to their work in this area[45]

- the three main accountancy bodies[46] and the Financial Reporting Council[47] identifying any improvements that should be made to their market information and regulatory arrangements to manage risks relating to estate administration

- holding discussions with the Financial Services Authority/Financial Conduct Authority and the Financial Services Ombudsman about financial services providers of estate administration activities

89. The Legal Ombudsman is committed to exploring how best to use the provisions in section 164 of the Act to create a voluntary jurisdiction if this would fill gaps in access to free and fair redress for consumers of legal services. A first consultation is expected in 2013[48].

90. Voluntary regulatory schemes have been established by the bodies representing will-writers, in particular schemes have been set up by the Institute of Professional Willwriters (IPW) and the Society of Will Writers (SWW), the first of which has obtained OFT approval for its consumer code. Joining voluntary schemes has been promoted by the industry itself, as well as the Government, most recently as a result of parliamentary debate during the passing of the Act. However, voluntary schemes have not prevented the problems in the will-writing market evidenced through our investigation, due to incomplete coverage across firms and an inability to enforce voluntary codes among a dispersed population of practitioners. Voluntary schemes have not, in the past, been developed for estate administration activities. We consider that they have a greater chance of success for estate administration activities as fewer, larger firms operate in this market when compared to will-writing. With fewer, larger providers, and those providers relying on brand and reputation, it is likely that voluntary schemes will have a greater chance of success in tackling the risks we identified in our investigation.

[44] Section 163 of the Act provides the LSB authority to "enter into arrangements with any person under which the Board is to provide assistance for the purpose of improving standards of service and promoting best practice in connection with the carrying on of any legal activity"
[45] Royal Bank of Scotland, Lloyds Banking Group, HSBC and Barclays.
[46] ICAEW, ACCA and ICAS
[47] The oversight regulator for the Accountancy bodies
[48] http://www.legalombudsman.org.uk/downloads/documents/publications/LeO_bus_plan_2012_final_280312.pdf

Enhanced consumer information

91. The LSB will facilitate work with regulators and industry bodies operating voluntary schemes to ensure appropriate information is available for consumers at the point of purchase[49]. This should include information to help consumers to make informed choices between services and providers based on clear, useful information about the services that will be provided. This should also include information about the potential risks within estate administration activities and how to protect against them.

92. We will provide details of our investigation findings to organisations that consumers may turn for information when engaging with estate administration activities. They may reflect the findings in the guidance that they provide. Outlets could include GOV.uk, Citizens' Advice, Which! and charities such as Age UK.

Working with Probate Service and HMRC

93. We welcome work in recent years by the Probate Service and Her Majesty's Revenue and Customs to simplify the probate application process for lay personal representatives and to provide practical guidance to both them and other interested beneficiaries. This is likely to be a driver for continued increase in personal probate applications and lay personal representatives undertaking the subsequent estate administration themselves. We will share the results of the investigations with these bodies.

Looking forward

94. It is our view that we should remain open to reviewing the case for reserving estate administration activities at a later date if circumstances change. This would be more likely if:

- there were significant changes in the market exposing consumers to greater risk
- there was new evidence that a greater number of consumers are suffering significant detriment than our current assessment indicates
- a decision to keep will-writing unreserved led to a spread in equivalent levels of poor practice from that area into estate administration
- it was shown that statutory regulation was likely to be effective at managing identified detriment and non-statutory voluntary agreements/schemes had proved to be ineffective.

[49] Should will-writing be made a reserved legal activity this will be included within LSB guidance to prospective regulators

Chapter 3: Probate activities - final report

Executive summary

95. This final report sets out the LSB's conclusions in respect of its investigation under section 26 of the Act into the reservation of probate activities. Probate activities are currently on the list of reserved legal activities and the LSB has decided not to make a recommendation that that these activities should cease to be reserved legal activities following its investigation.

96. We have reached this conclusion because we do not have evidence to demonstrate that probate activities ceasing to be reserved would support the regulatory objectives. In particular we do not have evidence of how the market would be likely to react nor how important regulation is in incentivising ethical practice and minimising risk in this area. We do not have evidence of the likely impacts on consumers of removing of probate activities from the list of reserved legal activities.

97. We will remain open to reviewing the case for probate activities ceasing to be a reserved legal activity should circumstances change, or as part of any general simplification review, of the Act.

Recommendation

98. The LSB has decided not to recommend that probate activities cease to be a reserved legal activity a result of our section 26 investigation. Probate activities will therefore remain a reserved legal activity. This maintains the position set out in the LSB's provisional report for this investigation.

Reasons

99. Our investigation of probate activities was shaped by our investigation into estate administration activities. Our investigations were primarily focused on the case for extending reservation to cover estate administration. Many consumers and stakeholders view preparing the papers on which to found or oppose a grant of probate as a step within the wider process of administering an estate. In this context, and as set out in the notice given to the Lord Chancellor and others[50] when starting the investigations, the LSB determined to hold a section 26 investigation together with a section 24 investigation as we could not "pre-judge that the reach of reserved probate activities, as currently defined, will prove to be appropriate".

100. We have not sought to consider independently the full impact of removing probate activities from the list of reserved legal activities in their own right (separated from the wider activities of estate administration). We have determined not to recommend that estate administration be added to the list of reserved legal activities. We do not recommend removing probate activities from the list of reserved activities as we do not have evidence of how the market would likely react to the removal of probate activities or of how important regulation is in incentivising ethical practice and minimising risk in this area. We do not have evidence of the likely impacts on consumers of removing probate activities from reservation – and in particular how important protection such as the availability of the Legal Ombudsman; the provision of professional indemnity insurance and the securing of compensation arrangements are to consumer confidence. We have not attempted to analyse, nor sought views on, the marginal cost of regulation for probate activities.

101. Further, we are mindful that the Probate Service is currently working on revising the Non-Contentious Probate Rules and looking at procedures in order to simplify the process for consumers[51]. It is understood that the review is considering form design and whether the requirement to swear an oath in relation to the content of the probate papers remains necessary. It is likely in our view that any developments may further support consumers in handling probate themselves, beyond the current substantial numbers that already do so. It is understood that the review may also consider rules allowing probate to be granted to an attorney appointed by a lay executor/administrator. This practice is currently being used by some estate administration providers to allow them to control estate assets when not an appointed executor themselves. Overall, the outcome of this work may have

[50] The Office of Fair Trading, the Legal Services Consumer Panel and the Lord Chief Justice

[51] A working group was set up to review the Non-contentious Probate Rules 1987 in 2009: http://www.judiciary.gov.uk/media/media-releases/2009/news-release-2109

a significant impact on the merits, or otherwise, of probate activities being reserved.

102. We note that the investigation identified problems with probate activities being the only reserved legal activity within the wider estate administration process. Several stakeholders have suggested that probate activities should be removed from the list of reserved legal activities. Analysis of available evidence and consultation indicates that most consumers and stakeholders view preparing the papers on which to found or oppose a grant of probate as a step within the wider process of administering an estate. Many would therefore wish to use a single provider to deal with the whole process. Our investigation has found that the narrow scope of the existing probate reservation is resulting in fragmentation of service which in turn risks causing delays and increased cost. Consistency in reserved status between probate and estate administration may solve this problem. Within this analysis the investigation has found that the risks to consumers are greater in estate administration (where they have access to estate funds) than they are specifically within probate However, we do not conclude that this of itself warrants the removal of reservation in the absence of robust evidence that the consequences would not have wider detrimental impacts.

Looking forward

103. We remain open to reviewing the case for probate activities to cease to be reserved legal activities at a later date if circumstances change, subject of course to on-going assessment of resources and priorities. This would be more likely if:

- the outcome of the Probate Service work set out in paragraph 101 once concluded indicates that the merits, or otherwise, of probate activities being reserved have changed
- there was evidence of significant changes in the market, for example, as the result of the reservation of will-writing activities should this happen
- the case for reserving estate administration activities is again reviewed
- there is a general simplification review of the Act.