

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

Cover paper and consultation document

This Consultation Document may be of interest to:

Approved legal regulators

Providers of legal services

Legal representative bodies

Legal advisory organisations

Other third sector organisations

Consumer groups

Law schools/universities

Legal academics

Members of the legal profession

Accountancy bodies

Potential new entrants to the will writing, probate or estate administration markets

Think tanks

Political parties

Government departments

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Introduction

1. The Legal Services Board (LSB) launched investigations under sections 24 and 26 of the Legal Services Act 2007 (the Act) in July 2011, in order to form a view on whether the list of reserved legal activities at section 12 and schedule 2 of the Act should be amended to include will-writing and estate administration activities [or exclude probate activities]. The inclusion of activities on that list means they may only be undertaken by individuals and entities authorised and regulated by an approved legal services regulator.
2. We published a consultation document entitled “Enhancing consumer protection, reducing regulatory restrictions: will-writing, probate and estate administration activities” on 23 April 2012. This set out the results of our investigations and the LSB’s proposals for action as a result. The investigations have shown that many consumers are not adequately protected at the time a will is written or an estate is administered. In our consultation document we proposed that action needed to be taken to protect consumers and promote their and the wider public interest. We published two key proposals:
 - **Recommending to the Lord Chancellor that the list of reserved activities be extended to include will-writing and estate administration activities; and**
 - **Improving the effectiveness of the existing legal services regulation that applies to the majority of providers delivering these services, where it is not working well for consumers.**
3. The consultation document included our analysis of the type of regulation needed to target proportionately the detriments and risks that the investigation identified. This proposed an outcomes and risk-driven approach to regulation and also set-out a list of core minimum regulatory features that we considered needed to ensure an acceptable level of consumer protection.
4. We are grateful for the many high quality responses that we received. We have reviewed all of the responses received and have developed and refined our proposals in light of those responses and of discussions that we have had with stakeholders. We are now publishing a further set of documents for a six-week consultation.
5. The LSB remains committed to the core proposals and the suite of documents are therefore a draft blueprint for action.
6. This set of documents include:
 - A Provisional Report, which is a formal step in the investigation process set out at schedule 6 to the Act. The Provisional Report must state

whether or not the Board is minded to recommend that the list of reserved activities is amended and the reasons for its decision (**Annex 1**)

- Draft section 162 guidance for prospective approved regulators to help them develop their regulatory arrangements. The draft guidance is based around the approach to regulation and minimum protections set out in the April consultation paper (**Annex 2**)
 - Impact assessment (**Annex 3**)
 - Equalities impact assessment (**Annex 4**).
7. This cover paper and consultation document draws together these four substantive documents and the questions that we would particularly welcome views on. The consultation is open for six weeks, closing on 8 November 2012. This represents a final consultation opportunity for interested parties, including affected practitioners.
8. Alongside these documents for consultation we have also published a summary of feedback to the April consultation and the LSB's response in Annex 4. All documents have been published on the LSB's website:
<http://www.legalservicesboard.org.uk>.

Provisional Report

9. The publication of a Provisional Report following a section 24 or 26 investigation is a statutory duty placed on the LSB by schedule 6 to the Act. In line with our obligations under schedule 6(10) the Provisional Report states that we remain minded to recommend that the Lord Chancellor amends the list of reserved legal activities to include will-writing and estate administration activities and the reasons for these recommendations.
10. In addition, the Provisional Report outlines the basic principles upon which we are advocating intervention. It continues by looking at the benefits of regulation and the impacts upon businesses that intervention in these markets would have. The report also outlines some of the other regulatory options that have been considered and concludes by discussing the options for implementation of the LSB's proposals.
11. We would like to highlight the following areas that have been developed following our previous consultation:
- Clarification about the scope of the proposed new reserved legal activities and the circumstances in which we would expect service providers to be captured (see paragraphs 21– 27 of the Provisional Report) and practical scenarios to illustrate this (Annex 1 of the Provisional Report)

- Consideration of implementation options including transitional provisions (paragraphs 59 – 75 of the Provisional Report)
- An initial review of consequential amendments to the Act and other relevant legislation that may be necessary to implement the proposed changes to the reserved activities (**Annex 2 of the Provisional Report**)

Questions arising from the provisional report

12. **Question 1:** Do you agree with the scope of the proposed reserved will writing activities and estate administration activities? Can the scenarios provided in **Annex 1 of the Provisional Report** be caught within the scope of the proposed new reservations? What are the likely impacts of the scope of the proposed activities as described?
13. **Question 2:** What are your views on the options for implementation that we have described?
14. **Question 3:** Do you agree with the initial assessment of the consequential amendments that would likely be needed? Are there any other consequential amendments you consider would be necessary?
15. **Question 4:** *To prospective approved regulators:* what legislative changes do you think will be required in order to implement regulatory arrangements for these activities (in line with the draft section 162 guidance)?

Draft guidance

16. Final guidance would be issued under section 162 of the Act. This allows us to give guidance:
- about the operation of the Act and any order made under it;
 - about the operation of any rules made by the Board under the 2007 Act;
 - about any matter relating to the Board's functions;
 - for the purpose of meeting the Regulatory Objectives;
 - about the content of licensing rules; or
 - about any other matters about which it appears to the Board to be desirable to give Guidance.
17. The purpose of the draft guidance is to assist bodies considering applying to be designated as an approved regulator and/ or licensing body for newly reserved will-writing and/ or estate administration activities. It sets out how the LSB expects regulators to approach the regulation of these activities and the minimum protections that we expect to be provided. The draft guidance addresses areas such as enforcement, financial protections and the requirement for an appropriately trained workforce. The LSB will have regard to the extent to which

an approved regulator has complied with this guidance when exercising its functions.

18. The draft guidance builds on the approach to regulation and list of minimum protections proposed in the April consultation. This develops that analysis with subsequent refinement into a practical document to assist prospective regulators.

19. We would like to highlight the following areas that have been developed following consultation:

- Information about setting outcomes for regulation (**paragraphs 18 – 24 of the draft section 162 guidance**)
- A section on arrangements for appealing regulatory decisions (**paragraphs 48 – 50 of the draft section 162 guidance**)
- Clarification over proposals for authorisation gateway checks including a fit and proper person test for owners and managers of authorised providers (**paragraphs 58 – 61 of the draft section 162 guidance**)

Questions arising from the draft guidance

20. **Question 5:** *To prospective approved regulators:* Will this guidance help you to develop proportionate and targeted regulation for providers offering will-writing and or estate administration activities? What challenges do you think that you will face?

Impact assessment

21. The impact assessment outlines the expected impacts of reservation on both consumers and regulated, self-regulated and non-regulated providers. It explores the evidence upon which our proposals are based. Further, it explains the eight regulatory options we have considered, namely:

- Reservation and proportionate regulation
- Do nothing
- Voluntary schemes
- Consumer education
- Provider education
- Compulsory membership of professional bodies
- Improve existing regulation
- Partial regulation – reserve only will-writing

22. For each of these eight options the advantages and disadvantages are explained in relation to the detriment being caused by the provision of will writing and estate administration services. The impact assessment also outlines which of the eight options we consider to be appropriate to our aims of protecting consumers from

detriment and ensuring that the regulation of will-writing and estate administration is fit for purpose, effective and consistent.

23. The impact assessment also sets out our analysis of the likely costs and benefits of our preferred option along with possible impacts on consumers and businesses.

Questions arising from the impact assessment

24. **Question 6:** Do you agree that having mandatory regulation for all firms in the market will improve consumer confidence?
25. **Question 7:** What business impacts (both positive and negative) do you envisage will occur with the proposed reservation of will-writing and estate administration? How will any such impacts affect your business?

Equalities impact assessment

26. The equalities impact assessment assesses the proposed policy reforms in accordance with the LSB's statutory obligations under the Equality Act 2010. In line with the public sector duty imposed by section 149 of the Equality Act, we have considered the proposed changes in relation to discrimination, harassment, victimisation, equality of opportunity and fostering good relations. Overall we do not expect any groups to be disproportionately negatively affected or for there to be a significant adverse impact on the statutory equality characteristics.

Questions arising from the equalities impact assessment

27. **Question 8:** We are keen to understand the potential impacts of our proposals on equalities. Do you envisage any positive or negative impacts on equalities for either consumers and/or providers of will-writing and estate administration activities? Please provide details including of any evidence that you are aware of?
28. **Question 9:** Do you envisage any specific issues arising from the proposals to impact negatively on consumers at risk of being vulnerable? Would any of the proposals actually increase their risk of becoming vulnerable?

Next steps

29. If, following the close of this consultation, we remain of the view that will-writing and estate administration should be reserved legal activities we will make these recommendations to the Lord Chancellor. Our aim is to publish our decisions in a final report in February 2013. The report would also contain our views on the transitional and consequential provisions that will need to be made if the Lord Chancellor were to accept any recommendation that we make.
30. The Act allows the Lord Chancellor 90 days to decide whether or not to accept the recommendation and publish a notice of that decision.

31. We cannot be certain when activities would become reserved should the Lord Chancellor accept any recommendations made by the LSB. This will depend on the Ministry of Justice's preferred implementation plan – we are consulting on options – and on the Department's priorities and broader parliamentary timetabling, which may be subject to change. The statutory orders required must be debated by both Houses of Parliament.

How to respond

32. Views on our proposals by any interested are welcome by 5pm on 8 November 2012 – this provides 6 weeks for interested parties to respond. This consultation will be the LSB's last consultation in relation to these investigations before publishing our final decisions.
33. We would prefer to receive responses and representations electronically (in Microsoft Word or pdf format), but hard copy responses by post, courier or fax are also welcome.
34. Responses should be sent to:
- Email: consultations@legalservicesboard.org.uk
- Post: Michael Mackay
Legal Services Board
7th Floor, Victoria House
Southampton Row
London WC1B 4AD
- Fax: 020 7271 0051
35. We propose to publish all responses to this consultation on our website unless a respondent explicitly requests that a specific part of the response, or its entirety, should be kept confidential. We may record and publish the identity of the respondent and the fact that they have submitted a confidential response.
36. We are also happy to engage in other ways and would welcome contact with stakeholders during the consultation period. Please contact Chris Handford by e-mail: chris.handford@legalservicesboard.org.uk or telephone: 020 7271 0074.
37. This exercise also provides opportunity for affected practitioners to make representations under paragraphs 13 and 14 of schedule 6 to the Act. The LSB has issued rules in relation to making written and oral representations under Schedule 6. These can be found on the LSB's website: http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/schedule_6_rules.pdf. The Board has specified that all representations must be received by the deadline of 5pm on 8 November 2012. This provides six weeks from the publication of the provisional report. This is less than the standard two months set out in the Schedule 6 rules. We believe that this is reasonable given the extensive consultation already undertaken during the course of these investigations. Requests to make oral representations will be considered on a case by case basis as set out in the schedule 6 rules.

Complaints

38. Complaints or queries about this consultation process should be directed to Michelle Jacobs, Consultation Co-ordinator, at the following address:

Michelle Jacobs
Legal Services Board
7th Floor
Victoria House
Southampton Row
London WC1B 4AD

Or by e-mail to: michelle.jacobs@legalservicesboard.org.uk

Glossary of terms

| | |
|------------------------------------|---|
| AR or approved regulator | A body which is designated as an approved regulator by Parts 1 or 2 of schedule 4, and whose regulatory arrangements are approved for the purposes of the LSA and which may authorise persons to carry on any activity which is a reserved legal activity in respect of which it is a relevant AR |
| Authorised Person | A person authorised to carry out a reserved legal activity |
| Consultation | The process of collecting feedback and opinion on a policy proposal |
| Consumer Panel or the Panel | The panel of persons established and maintained by the Board in accordance with Section 8 of the LSA (2007) to provide independent advice to the Legal Services Board about the interests of users of legal services |
| Impact Assessment | An assessment of the likely impact of a policy on cost, benefits, risks and the likely or actual effect on people in respect to diversity |
| LSB or the Board | Legal Services Board – the independent body responsible for overseeing the regulation of lawyers in England and Wales |
| LSA or the Act | Legal Services Act 2007 |
| Regulatory arrangements | The rules and regulations that make up the conditions of authorisation and practice for authorised persons |
| Reserved Legal Activity | Legal services within the scope of mandatory regulation by the Approved Regulators |

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Provisional Report

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Executive summary

1. This provisional report sets out the Legal Services Board (the LSB)'s intention to recommend to the Lord Chancellor that the following should be made reserved legal activities under the Legal Services Act 2007 (the Act):
 - i. Will-writing and legal activities provided ancillary to the writing of a will; and
 - ii. The administration of an estate of a deceased person and legal activities provided ancillary to the administration of an estate

We propose to recommend that probate activities remain reserved.

2. We do not intend that activities, such as the provision of inheritance tax advice, will be caught within the scope of these reservations unless those activities are provided in conjunction with the core reserved legal activities of will-writing and estate administration. All bodies wishing to be approved as regulators in respect of will-writing or estate administration will have to apply to the LSB for designation as licensing authorities and/or approved regulators¹.
3. Our proposals are predicated upon four main principles:
 - keeping the market open to all types of will-writing and estate administration providers;
 - ensuring that proportionate protections, including access to redress, are in place for all consumers irrespective of who provides their service;
 - providing the opportunity for all providers to be regulated on an even-footing to support a fair and competitive market for both consumers and businesses; and
 - improving the existing legal services regulation that applies to the majority of providers in these markets.
4. The path laid down by Parliament in the Act is one of liberalisation of the legal services market by breaking the link between professional titles and the ability to provide the reserved activities. Our proposals are another step along that path by levelling the playing field between currently regulated and unregulated providers. In developing these proposals we have had regard to both the regulatory objectives and the better regulation principles.
5. Our investigation found evidence of unacceptable levels of consumer harm being caused by the provision of these activities. Detriment is being caused by issues with service and quality, and also by features inherent to the market such as

¹ 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/201103_28_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

information asymmetry between consumers and providers. Research has uncovered problems with both regulated and unregulated providers. For this reason, we do not wish to simply broaden the scope of existing legal services regulation to encompass these two activities. Moreover, we have not assumed that any of the existing approved regulators will be automatically approved in relation to will-writing and estate administration on the basis of their current rule books. Bodies wishing to be approved as regulators in respect of the newly reserved activities will have to demonstrate how their arrangements are fit for purpose in relation to these specific activities.

6. We expect the outcomes experienced by consumers to be inextricably linked to those felt by businesses: as consumers receive higher quality services at more competitive prices their confidence will increase, resulting in greater numbers of purchases and growth of the market. To achieve this we expect to see a different, flexible type of regulation being applied that is outcomes focused and based upon the risks posed by each individual provider. A sharper focus on risks will provide the flexibility required to allow providers to innovate and ensure good outcomes for consumers.
7. The alternatives to reservation that we have considered include the use of self regulation, enforcement of existing consumer protections and enhanced consumer education. Many elements of these arrangements are already in place and, even with further development, we have found them lacking, both individually and in combination. We consider reservation is now necessary to combat the inequalities that totally unregulated competition would allow. In addition to combating consumer detriment, reservation would create a level playing field among all providers thus allowing competition to operate more effectively. Legal services regulated providers are currently subject to the most stringent regulation to be found within the market for these activities. We do not intend for that regime to be effectively copied over to other types of providers. Rather, those law firms that only offer will-writing and/or estate administration activities, or law firms that have a specific department providing only those activities, should experience liberalisation of their regulatory regime as requirements are adjusted to reflect the risks posed by the provision of only these activities.
8. These proposals are built upon the basis of significant quantitative and qualitative research, advice from the Legal Services Consumer Panel, two full rounds of consultation and views received from a wide range of stakeholders through ongoing engagement. We are supported in these proposals by bodies representing both consumers and charities; existing legal services professional and regulatory bodies; the main trade bodies representing the unregulated sector. Significantly more evidence has been amassed in support of the reservation of will-writing and estate administration activities than has been collected for any of the other reserved legal activities, either now or at the time that each of them became reserved.
9. The impact assessment published at the same time as this report considers alternative options to reservation in more detail. More broadly, however, it is clear that consumers are suffering detriment in these markets. If competition functioned effectively within legal services unaided by regulation, the Act would exist only to dictate that legal services regulation should be abolished. Similarly, if self-regulation was a satisfactory option, Parliament would not have made the

separation of regulatory and representative functions within the professional bodies a priority for the LSB. Regulation is needed to overcome existing barriers to the market, and competition within it, operating effectively.

10. A key facet of our approach is that we will not regulate any activity unless there is a compelling case to do so that is supported by appropriate evidence. In the case of will-writing we believe that the shadow shopping study provided clear evidence of a need for intervention.
11. We consider that the impacts felt by businesses will be symbiotic with those experienced by consumers. The guarantee of minimum safeguards will increase consumer confidence, with a greater number of purchases being the logical result. This in turn will grow the market. The liberalising effects of more risk focused regulation will allow existing regulated legal services providers greater room to innovate and become more competitive, which in turn brings the benefits back to consumers.

Next steps

12. This document is published alongside an updated impact assessment, an equality impact assessment and draft guidance under section 162 of the Act. We invite views on the contents of any or all of these documents within the six week consultation period that commences on the date of publication. The closing date for the receipt of views is 8 November 2012. We have also published the summary of feedback in relation to our 23 April consultation and the LSB's response².

² Legal Services Board, Enhancing consumer protection, reducing regulatory restrictions: will-writing, probate and estate administration activities- Summary of feedback to the consultation and LSB response (2012: London) available at: http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/index.htm

Introduction

13. The purpose of this document is to meet the LSB's duty under schedule 6 of the Act to publish a Provisional Report in respect of our investigations into will-writing, estate administration, and probate activities. The former two areas were considered under section 24 of the Act in relation to a possible extension of the existing reserved legal activities. Probate activities were considered under section 26, which gives the LSB the power to recommend the cessation of existing reserved activities.
14. The Act dictates that this report must outline whether we are minded to make recommendations to the Lord Chancellor in relation to our investigations, and also the reasons for these decisions. As this document is designed specifically to meet our statutory obligations, we are aware that it does not look like a normal consultation paper. However, we welcome views on any of its contents during the consultation period of 6 weeks from the date of publication of this report. In particular, we would draw attention to the consideration of implementation and transitional provisions set out in paragraphs 59 – 77.

Background

15. This report is the latest stage in the LSB's investigation into will-writing, probate and estate administration activities. In September 2010 the LSB requested that the Legal Services Consumer Panel (the Panel) 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. The Panel instituted a call for evidence³ and commissioned independent research⁴ (together with the LSB, Solicitors Regulation Authority and Office of Fair Trading), both of which informed the report⁵ it submitted to the LSB in July 2011. The LSB acted on the Panel's advice by opening a statutory investigation into will-writing, probate and estate administration activities. The first consultation paper produced by the LSB⁶ as part of this investigation on will-writing was informed by:

- A shadow shopping exercise;
- Consumer and business surveys;
- A call for evidence including views of a wide range of stakeholders and nearly 400 case studies;
- Data derived from complaints patterns; and

³ Legal Services Consumer Panel, *Investigation into Will Writing Call for Evidence* (2011: London) available at: http://www.legalservicesconsumerpanel.org.uk/ourwork/will_writing/documents/Call_for_Evidence_Will-writing_201009.pdf . For submissions to the Panel's call for evidence see:

http://www.legalservicesconsumerpanel.org.uk/ourwork/will_writing/Willwritingsubmissions.html

⁴ 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/lscb_will_writing_report_final.pdf

⁵ 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

⁶ Legal Services Board, *Enhancing consumer protection, reducing regulatory restrictions: will-writing, probate and estate administration activities* (2012: London) available at:

http://www.legalservicesboard.org.uk/what_we_do/consultations/open/pdf/will_writingcondoc_final.pdf . Initial impact assessment available at: http://www.legalservicesboard.org.uk/what_we_do/consultations/open/pdf/willwritingcon_imapct_assessment_final.pdf

- The Panel's report *Regulating Will Writing*⁷.
16. The evidence collected in relation to estate administration, and within that, probate, included:
- Consumer and business surveys;
 - A call for evidence, stakeholder workshop and interviews; and
 - Views from a range of stakeholders including members of the public, consumer groups, charities, Ombudsmen, providers and professional bodies.
 - Data derived from complaints patterns; and
 - The Panel's report *Probate and Estate Administration*⁸.
17. We consider our proposals to be solidly built upon a foundation of comprehensive evidence and views from an array of stakeholders. These proposals are being made in the wake of a full consultation, that was run between 23 April and 16 July 2012, and that was itself based on the evidence detailed above. We were pleased to note that the vast majority of respondents to that consultation felt our evidence base was thorough. The proposals made in the consultation were supported in responses from a wide range of stakeholders including existing legal services professional and regulatory bodies; the main trade bodies representing the unregulated sector; and bodies representing both consumers and charities.
18. The LSB has already 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 with 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.
19. A relentless focus on improving the quality of regulation in legal services is at the heart of the LSB work programme. To realise the full potential of the Act, in areas such as will-writing and estate administration where there is evidence of consumer detriment arising from a combination of inconsistent achievement of proper standards of work and lack of contestability in the market. The LSB's focus should be on achieving better regulation to support innovation and competition and achieves consistent consumer protection, thereby improving consumer confidence to choose and use legal services.
20. This report should be read alongside our Summary of Responses to Consultation and LSB Feedback, our Impact Assessment and our Draft Guidance⁹.

⁷ Legal Services Consumer Panel, *Regulating Will Writing* (2011: London) available at: http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/ConsumerPanelWillwritingReport_Final.pdf

⁸ Legal Services Consumer Panel, *Probate and Estate Administration* (2011: London) available at: http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/ConsumerPanelWillwritingReport_Final.pdf

⁹ http://www.legalservicesboard.org.uk/what_we_do/consultations/index.htm

Proposed recommendations

21. In developing our proposed recommendations we have had regard to each of the regulatory objectives. Out of those eight objectives, protecting the interests of consumers had a particular focus during this development due to the nature of the detriment identified. We also consider that these recommendations will further the public interest and the rule of law by increasing public confidence in the provision of these activities, the detriments in which have been widely reported in the media. A lack of consumer confidence may be resulting in fewer services being consumed, which could raise issues of access to justice. Finally, we expect regulation to facilitate improved competition within this sector above a baseline of minimum standards.

Section 24 investigations: activities related to will-writing and estate administration

22. We are minded to recommend to the Lord Chancellor that the following should be made reserved legal activities under the Act:

- i. Will-writing and legal activities provided ancillary to the writing of a will, such as:
 - taking instructions and obtaining background information;
 - drafting the will and making subsequent amendments;
 - providing advice relating to the preparation of a will and subsequent amendments – for example, advice about tax, wealth management or the legal instruments available to give effect to the consumer’s wishes; or
 - advising on and overseeing the execution of a will.
- ii. The administration of an estate of a deceased person and legal activities provided ancillary to the administration of an estate.

23. This constitutes two separate recommendations being made under section 24 of the Act. We do not intend to recommend, under section 26, that probate activities should cease to be reserved. The Ministry of Justice will be responsible for how any recommendation that the LSB may make will be implemented should the Lord Chancellor accept the recommendation. This includes the definitions of the activities within the relevant statutory instrument. Our proposals set out the activities that our investigation has led us to conclude should only be undertaken by providers subject to appropriate regulatory oversight.

24. We are proposing to regulate only the core legal activities of either will-writing or estate administration and any legal activities provided to consumers alongside these core activities as part of that service and which the consumer is likely to believe is the same activity¹⁰. We believe the core activity of will-writing to be self-explanatory. We take the core activity of estate administration to centre upon the legal authority to collect, realise and distribute estate assets. We consider regulation is primarily needed to protect consumers against the risks in the access and control of the estate assets.

¹⁰ Please see Section 5 of our April consultation “Enhancing consumer protection, reducing regulatory restrictions: will-writing, probate and estate administration activities” for further detail of the rationale for this approach.

25. We do not intend for the proposed reservation of will-writing to bring service providers that do not write wills within the scope of legal services regulation. Similarly, we do not intend for the proposed estate administration reserved activity to bring within legal services regulation service providers that do not collect, realise and distribute estate assets. For example, it is our view that no reserved activity will be performed where a consumer obtains advice about how to limit inheritance tax after their death but the provider does not write the will (or outsource the writing of the will) that would give effect to the advice. Similarly, where a consumer obtains help completing the estate accounts once an estate has been administered, but the provider does not collect, realise or distribute estate assets or prepare the papers upon to which to found the authority to do so, it is our view that this service would fall outside the scope of the new reservation. Advising an executor on legal issues related to the administration of an estate would also not be considered the performance of a reserved activity. To further illustrate this point we have set out a series of scenarios at Annex 1. These clarify circumstances in which in our view activities should and should not be captured by the scope of the proposed new reserved activities.
26. Our investigations have considered the different problems and resultant harms experienced by consumers seeking professional help to write a will or administer an estate. The scope of the proposed new reserved activities is not intended to include every service available to consumers in relation to a death. These recommendations are made in line with the LSB's general principle of choosing the regulatory tool that is least restrictive of competition while still delivering the policy objective. A key facet of this principle is that we will not regulate any activity unless there is a compelling case to do so that is supported by appropriate evidence.
27. We would like to emphasise that we continue to support individuals being able to act for themselves and also to provide free advice to help others. We note that the existing reservation of probate activities carries an exemption for individuals not acting in expectation of fee, gain or reward¹¹. We agree with a number of respondents to our initial consultation that this exemption should apply to the proposed new reservations and propose making a consequential amendment to the 'exempt persons' provisions contained within schedule 3 to the Act. Where consumers utilise 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 reservations. We judge this approach to be in line with the principle described in the preceding paragraph. We have seen evidence of both high and low quality self-completion aids. We will remain alive to any emerging evidence of detriment being caused by where this boundary is drawn.

Activities related to trusts and powers of attorney

28. We have received considerable pressure from some stakeholders to recommend that activities related to powers of attorney and the setting up and administration of trusts are included within the scope of the reserved legal activities. This pressure

¹¹ Legal Services Act 2007 at schedule 3(4)(4)

was particularly felt from solicitors and groups representing that profession. We currently have no plans to undertake a review of either of these areas. These are different legal activities from those we propose to reserve, with separate and different sets of risks. Further, the arguments to reserve these activities were not supported by convincing evidence of consumer detriment being caused by the provision of either.

29. We remain open to receiving evidence in relation to these two areas on an on-going basis and will consider a separate review should evidence of systemic detriment to the regulatory objectives come to light.

Section 26 investigation: probate activities

30. As a result of our section 26 investigation we are not minded to recommend that probate activities should cease to be reserved legal activities. There has been some suggestion that probate activities should be removed from the list of reserved legal activities. Those respondents who put forward that viewpoint viewed probate activities as a predominantly administrative task. We would contend that numerous other reserved legal activities could also be broken down into a series of relatively simple tasks, with examples perhaps being conveyancing and the administration of oaths. However, the LSB's focus will always be directed towards the outcomes generated by any given activity, and the risks created therein. The provision of estate administration activities creates significant risks for both consumers and third parties. With this in mind, we consider that estate administration should be a reserved activity and within this gaining the authority to provide estate administration activities (or to oppose this), which at the moment is covered by the probate reservation, should only be performed for gain by persons to whom appropriate protections attach.
31. We think it likely that most consumers would 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 and 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. This in turn causes increased delays and cost. Therefore, our preference, is that any regulator designated to authorise providers to carry out estate administration activities should also be designated to authorise providers to carry out probate activities – and vice versa. Due to the close alignment of the activities it is also our preference, as set out the draft guidance that accompanies this Provisional Report, that each regulator has a single set of regulatory arrangements to cover both activities.

Question 1: Do you agree with the scope of the proposed reserved will writing activities and estate administration activities? Do the scenarios provided in **Annex 1 of the Provisional Report** clarify when activities will and will not be caught within the scope of the proposed new reservations? What are the likely impacts of the scope of the proposed activities as described?

Principles of intervention

32. Our proposals are predicated on enhancing consumer protection in conjunction with liberalisation of the market. The objectives for intervention are the reduction of regulatory restrictions on existing regulated providers while also increasing the spread and the effectiveness of controls. 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. Intervention is predicated on achieving the following outcomes:

- **Keeping the market open to all types of will-writing and estate administration providers.** As provided for by Parliament within the Act, this means breaking the link between professional title and authorisation of reserved activities. 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.
- **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.
- **Providing the opportunity for all providers to be regulated on an even-footing to support a fair and competitive market for both consumers and businesses.** This means regulation being targeted at the problems identified and set no higher than is required to protect against them. This will allow 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. This will also mean reducing regulatory restrictions on how businesses may organise themselves, innovate and maximise their competitiveness.

33. Each of these outcomes is essential if we are to deliver the regulatory objectives through the principles of better regulation. We consider that appropriately set regulation of the newly reserved activities will protect consumers, support the effective operation of the market and improve competition above a baseline of appropriate consumer protections.

Reasons for recommending amendments to the list of reserved legal activities (basis for proposals)

34. 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 and most estate administration activities¹² are 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. The regulatory protections enjoyed by consumers using regulated providers are therefore not mandatory. This is distorting the market.
35. There are certain features inherent in the market for will-writing, estate administration and probate that provide barriers to the effective functioning of competition and consumer detriment results. These market failings require correction through regulation. A key issue is the asymmetry in information and hence power between providers and consumers. Consumers rarely use these types of services, and so lack the knowledge to be able to identify any failings. Both the shadow shopping exercise and individual case studies showed a tendency for services to be needlessly complicated.
36. Shadow shoppers also reported providers that were more interested in selling services than tailoring those being bought to individual needs. Despite this, and the fact that a high proportion of the wills purchased during this exercise were found to be defective in some way, customer satisfaction levels were high among the shadow shoppers¹³. This indicates an inability of consumers to discern the quality levels they are receiving. Information asymmetries can result in shortfalls in service levels, such as poor quality wills that are unclear or fail to deliver the testator's intended outcome. The Panel highlighted that these types of services tend to be delivered at a time of emotional vulnerability¹⁴ for consumers. In addition, prices for these types of services, particularly estate administration, vary widely. YouGov research found that while 51% of consumers paid less than £1000 for estate administration, 18% paid over £3000. The presentation of pricing structures can also be confusing for consumers, which can be any combination of fixed fees, hourly billing or a proportion of the estate¹⁵. The survey showed 25% of respondents reporting that they felt costs were not clearly explained. Only 56% reported that services received were good value for money and 56% that were subject to additional cost felt this was fair¹⁶.

¹² The Act reserves one small part of the estate administration process - probate activities. These are defined as preparing any papers on which to found or oppose a grant of probate or letters of administration.

¹³ 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/lrb_will_writing_report_final.pdf

¹⁴ Legal Services Consumer Panel, *Regulating Will Writing* (2011: London) available at: http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/ConsumerPanelWillwritingReport_Final.pdf. See also Humphrey et al *Inheritance and the Family: Attitudes to Will-making and Intestacy* (August 2010)

¹⁵ YouGov *The Use of Probate and Estate Administration Services* (January 2012) available at http://www.legalservicesboard.org.uk/news_publications/latest_news/pdf/yougov_research.pdf

¹⁶ Ibid

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.

37. Our investigation has found consistent and compelling evidence that consumers are not being adequately protected at the point of their will being written or an estate being administered. We found evidence of both quality and service issues in these markets. Problems with quality tended to relate to wills. The shadow shopping exercise provides strong evidence of wills that were unclear and/or would not deliver the testator's wishes¹⁷. Estate administration providers were more likely to garner complaints about service than technical competence. YouGov found only 68% of consumers were satisfied with the service they had received¹⁸, while the Legal Ombudsman (LeO) consistently reports consumer frustration with its lack of jurisdiction over estate administration. Other particular problems with will providers included instances of lost wills, exacerbated by the fact that 60% of independent will-writing firms close within their first four years of operation¹⁹, and the sale of services and features which frequently can be unnecessary²⁰, such as ongoing support or lifetime trusts.

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.

38. In relation to estate administration, key concerns centred on the vulnerability of assets to fraud and delays and the widespread incidence of such problems²¹. There have been documented failures to prevent proven wrong doers from setting up businesses in these markets. We are also concerned about failures to safeguard consumer money and other assets, especially when providers have legal authority to control estate assets, and failures to deliver effective redress when things go wrong and to provide access to the Legal Ombudsman. Problems

¹⁷ 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/lisb_will_writing_report_final.pdf

¹⁸ YouGov *The Use of Probate and Estate Administration Services* (January 2012) available at http://www.legalservicesboard.org.uk/news_publications/latest_news/pdf/yougov_research.pdf

¹⁹ Institute of Professional Willwriters, *Investigation into Willwriting Call for Evidence from the Legal Services Consumer Panel* (2011: Halesowen) at p20

²⁰ 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/lisb_will_writing_report_final.pdf

²¹ See for example 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, Society of Trust and Estate Practitioners *Cowboy Will Writing* (2011: London) available at <http://www.step.org/pdf/Will%20Writing%20Report.pdf>

of the types highlighted here are likely to result in diminished consumer confidence in these important legal processes.

In July 2012 a woman offering estate planning and will-writing services was jailed for fraud after stealing just over £108,000 from 3 separate estates. The Institute of Professional Willwriters (IPW) had refused her membership application as she could not provide sufficient information to enable IPW to perform a CRB check. However, lack of regulation meant she could continue to operate in the market, despite already having a previous conviction for dishonesty involving an elderly victim's building society account.

39. Our section 26 investigation into the reservation of probate activities found that its narrow scope was preventing non-authorised providers from offering a seamless service. The resulting fragmentation was the cause of increased delays, cost and opaqueness for consumers over the safeguards that are available to them. In our view, consumers see the application for probate as part of the wider activity of administering an estate.
40. The current situation within this market is causing a number of negative impacts on businesses providing will-writing and estate administration activities. The media attention on consumer detriment in this area is undermining confidence among consumers, which may be resulting in fewer people seeking help and a reduction in customer numbers. On the one hand good quality unregulated providers are finding themselves tainted by association with unscrupulous unregulated providers. Yet, on the other hand, regulated providers find that due to the regulatory burden they are under they have little freedom to innovate and cannot compete on price with unregulated providers. It seems to us that the market in this sector has been distorted to the extent that competition between providers is focused upon the badge of regulation versus no badge of regulation, rather than over service and cost.
41. Therefore, 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.

Benefits of intervention

42. We anticipate that the following benefits will be delivered:
 - supported sector growth by enhancing the environment for reputable providers to operate in;
 - improved and more effective legal services regulation plus reduced restrictions on how businesses may organise themselves, achieving maximised competitiveness and positive outcomes for consumers;
 - protection for consumers against identified detriments, improved consumer confidence leading to more people writing wills; and
 - reduced deficiencies requiring resolution by a court, probate service or Her Majesties Revenue and Customs resource.

Impacts on business

43. We consider that regulation will enhance the effective operation of these markets to the benefit of both consumers and businesses. As other regulatory mechanisms have proven to provide insufficient protections,²² reservation is now necessary to combat the inequalities that competition alone would allow, identified above at paragraph 32.
44. Reservation will create a level playing field for competing businesses, allowing competition to operate more effectively in the relevant markets. This means ensuring that providers cannot act outside of regulation. It also means liberalising the regulation of currently regulated legal services providers to allow a greater freedom to innovate and compete on service and price. We do not intend for the most restrictive regulatory regimes operating within this sector simply to be carried over to apply to the new reservations. We consider that regulation must work for different types of businesses presenting different risks. Some of those already regulated may experience a reduction in costs, as a sharpened focus on risk will result in regulation being applied more proportionately to those providers judged to pose a low level of risk.
45. We consider that the impacts felt by businesses will be symbiotic with those experienced by consumers. The guarantee of minimum safeguards will increase consumer confidence, with a greater number of purchases being the logical result. This in turn will grow the market. The liberalising effects of more risk focused regulation will allow existing regulated legal services providers greater room to innovate and become more competitive, which in turn brings the benefits back to consumers.
46. 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 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. Regulation has the potential to enhance consumer welfare both by reinforcing the degree of competition, and by making it more effective in the market place²³.
47. The greatest impacts in terms of possible enhanced regulation 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.
48. Our proposals are supported by a majority of businesses and their representative bodies from whom we have had feedback in both the regulated and unregulated sectors. Many members of voluntary schemes in the unregulated sector believe that regulation will improve their competitiveness. They argue that not having the badge of regulation increases the difficulty of attracting more sophisticated clients

²² See following section 'Other Regulatory Options' for more detail on this point

²³ Llewellyn, D. *The Economic Rationale for Financial Regulation*, FSA Occasional Papers Series: 1 (1999: London) at p23.

despite facing comparative compliance costs for their voluntary schemes. We note that some of these providers have already chosen to become ABS to receive the benefits of regulation²⁴.

Other regulatory options

49. Before the LSB reached the conclusion that will-writing and estate administration should become reserved legal activities 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.
50. Foremost among these alternatives are voluntary schemes and self-regulation of the type already employed by the existing will-writing trade bodies. Despite one of these trade bodies, the Institute of Professional Willwriters (IPW), receiving OFT Consumer Code Approval Scheme recognition they still consider that they suffer from the inherent weakness that non-compliant providers may exit such arrangements at any time and escape facing enforcement action²⁵. Further, despite their promotion in recent years, the existing trade body schemes can still only claim partial coverage of the market. This results in a market where only some providers must bear a regulatory burden, thus distorting competition and also creating a lack of transparency for consumers regarding the protections they are entitled to. We note that the Panel has concluded voluntary self-regulatory schemes provide insufficient protection for consumers in these markets²⁶, as have the bodies running the voluntary schemes themselves²⁷.
51. The previous Government decided against including will-writing or estate administration 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”²⁸. 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 OFT’s Consumer Codes Approval Scheme. This resulted in the IPW obtaining initial approval in 2008 and full approval in 2010. Our evidence shows that pursuing this option has not prevented unacceptable levels of consumer detriment across the

²⁴ 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>

²⁵ Readers are referred to the case study in text box 3, above

²⁶ Legal Services Consumer Panel, *Regulating Will Writing* (2011: London) at pp 66-68. Available at: http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/ConsumerPanel_WillwritingReport_Final.pdf

²⁷ 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

²⁸ “The Future of legal services: putting consumers first”, Department for Constitutional Affairs, October 2005

market. IPW members account for only a minority of the unregulated sector, and a smaller proportion than the trade bodies that have not yet achieved OFT approval. As set out above, issues of enforceability remain.

52. Secondly, we have investigated 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 of practical market information (e.g. 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 or fraud during estate administration. 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 constitutes a form of regulation. Another fundamental concern of equivalent access to redress for all consumers would also not be helped by increased consumer education. We consider that much of the benefits 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.
53. Third, the LSB has considered the option of relying upon the enforcement of existing consumer protection legislation. We consider this unacceptable due to the lack of a private right of redress available to obtain compensation and other remedies. It is also unrealistic to expect each local trading standards office to have sufficient resources to consistently prioritise complaints they receive related to these types of activities. In addition, we note the consultation response received from a trading standards officer voicing support for mandatory regulation as she considered that having recognised standards would assist with the enforcement of existing consumer protections.
54. Each of these mechanisms is already in operation within this sector, and is not preventing the significant consumer detriment we have found evidence of. Further, 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 are therefore confident that the alternatives available to mandatory regulation cannot address the detriment currently being caused by the provision of these activities.

What will regulation look like?

55. We intend for the regulation applicable to will-writing and estate administration to differ from historical models of legal services regulation. It will be sufficiently flexible to adapt to the needs of a range of providers. It will not be a simple extension of the reach of the existing approved regulators. There should be a sufficient degree of flexibility within the regulatory framework to allow providers to demonstrate how their arrangements will deliver the outcomes set by their regulator. The approved regulators will also need to be prepared to change their current regulatory arrangements in order to be able to regulate new classes of providers.

56. The regulatory measures proposed will be outcomes focussed rather than consisting of prescriptive rules. A sharper focus on risks will provide for the required flexibility as well as facilitating the achievement of better outcomes for consumers. Furthermore, it will allow for a reduced regulatory burden on providers deemed to be low risk.
57. We expect that approved regulators will continue to collect evidence over time of risks in the markets for wills and estate administration in order to ensure that their regulatory requirements remain proportionate. Further, approved regulators should be mindful of the Act's requirements to act in a way that is compatible with the regulatory objectives, including promoting competition, having regard to the better regulation principles and best regulatory practice. 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. Hence, we will first allow competition a chance to work before concluding that mandatory regulation response to a specific risk was the only proportionate response.
58. In line with the requirements of the Act, all bodies wishing to be approved as regulators in respect of will-writing or estate administration will have to submit their proposed regulatory arrangements to the LSB for approval. This includes regulators of providers currently offering these activities.

Implementation

59. 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. 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 the services without placing providers at risk of performing unauthorised activities.
60. The Ministry of Justice will be responsible for how any recommendation that the LSB may make to reserve new activities will be implemented should the Lord Chancellor accept the recommendation. However, alongside any recommendation the LSB will make a statement of the provisions which in our opinion will need to be made to facilitate implementation. This will include proposed transitional provisions. Our proposed plan will aim to strike an appropriate balance between swift implementation in order to address consumer detriment as soon as possible, and allowing sufficient time for the market to adapt.
61. The objectives include avoiding the unintended consequence of closing the market to any existing type of provider. This includes for non-lawyer providers 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. The objectives also include ensuring that all regulation delivers the regulatory objectives and better regulation principles and will effectively target identified consumer detriment.
62. We propose that reservation should take practical effect only when:
 - there is at least one approved regulator and licensing authority 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 are authorised in sufficient numbers to ensure that access to justice, consumer choice and competition is maintained
63. We estimate that it may take at least two years from the time that any recommendation is made to the Lord Chancellor for these criteria to be met. This is an estimate only and is dependent upon the approach adopted for implementation and the speed with which prospective approved regulators and licensing authorities can demonstrate that they meet the schedule 4 and schedule 10 designation criteria. This includes that their regulatory arrangements make appropriate provision for those that they intend to authorise, having regard to the better regulation principles and standards of better regulation. They must demonstrate that they have obtained any internal or legislative authorities required to give effect to components of their regulation.
64. We set out in the table below the LSB's current thinking about possible implementation options and analysis of the pros and cons of each as we see benefit in seeking views from interested parties at this stage. At the same time we intend to discuss implementation options with Ministry of Justice officials including

a full assessment of vires under the Act. Any approach considered to be outwith vires will be ruled out.

| Options: | Pros: | Cons: |
|---|---|--|
| <p>1: LSA section 25 process for provisional designation as approved regulators and licensing authorities.</p> <p>Outcome - any individual or entity may undertake will-writing or estate administration activities until such time as the criteria at paragraph 58 above are met.</p> | <ul style="list-style-type: none"> • Meets key objectives and criteria set out in paragraphs 57 – 58 above. • Follows clearly structured process set out in the Act • Provides a transparent process • Provides certainty for the market | <ul style="list-style-type: none"> • No further consumer protections until new reserved legal activity comes into force • Risk of incentivising unscrupulous providers within the unregulated sector to accelerate activities to maximise profit in the period between an announcement and implementation of reservation • Complex process with many stages • High number of affirmative orders required, while government policy is to reduce numbers of such statutory instruments • Will require significant amount of limited parliamentary time • Implementation is likely to take longer than other options due to complexity of process and orders required for each stage of designation and authorisation • Cost to taxpayer is likely to be higher than other options because of the length and complexity of process |
| <p>2: Non-section 25, transitional process</p> <p>Outcome - any individual or entity may undertake will-writing or estate administration activities until such time as the criteria at paragraph 58 above are met.</p> | <ul style="list-style-type: none"> • Meets key criteria set out in paragraphs 57 – 58 above. • Will achieve the same outcome as s25 • Will likely lead to faster implementation than s25 reducing length that consumers remain unprotected (or are at greater risk if unscrupulous providers “make hay while the sun shines”) • Less complex and more easily deliverable than s25, requiring less orders • Cost to tax payer will be lower than s25 option | <ul style="list-style-type: none"> • No further consumer protections in transitional period • Risk of incentivising unscrupulous providers within the unregulated sector to accelerate their activities to maximise profit in the period between an announcement that activities will be reserved and implementation • Does not follow clearly structured process set out in the Act • Transparency around the provision is that created by the LSB rather than codified in the Act • Certainty for market created only by the LSB |
| <p>3: Non-section 25, transitional process requiring some oversight of non-authorised providers</p> <p>Outcome – Individuals and entities that are subject to oversight by specified bodies may undertake the newly reserved activities until</p> | <ul style="list-style-type: none"> • Differs from options 1 and 2 in that it provides some additional consumer protection, such as oversight of a non-approved regulator/ licensing authority regulator or membership of a trade body | <ul style="list-style-type: none"> • Market restriction and reduced competition and possibly consumer confidence based on membership of bodies that do not yet meet the criteria required by the Act to deliver regulatory objectives and better regulation principles e.g. regulatory arrangements make appropriate provision, separation of regulatory and representative functions, requirements around first –tier |

| | | |
|--|--|---|
| the criteria at paragraph 58 above are met. | | complaints and access to the Ombudsman etc <ul style="list-style-type: none"> • No improvement to existing legal services regulation in transition period • Detracts resource from delivering statutory regulatory oversight that will be effective in protecting consumers and delivering the wider regulatory objectives |
| 4: Grandfathering of existing approved regulators and licensing authorities | <ul style="list-style-type: none"> • Quickest way of ensuring some authorised providers in place for newly reserved activities • Resource savings for existing approved regulators and licensing authorities and those that they authorise | <ul style="list-style-type: none"> • Does not meet key criteria set out in paragraphs 57 - 58 • Does not improve existing regulation to tackle consumer detriment found in the regulated sector • Embeds regulation not tested against the regulatory objectives and better regulation principles in relation to these activities • Embeds inconsistent and complex regulatory framework • Provides a clear competitive advantage to regulated providers based on historical position • Restricts market and consumer choice • Cannot be seen to deliver the principles of better regulation |

How would each of these options work?

Option 1:

65. Section 25 sets out a clear process:

- 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 (ARs) and Schedule 10 licensing authority (LAs) 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 ARs and LAs 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 ARs/LAs 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.

66. The section 24 order amending the Act to add the reserved legal activity would not come into force until the criteria at paragraph 58 above have been met.
67. All orders are affirmative and must be debated by both Houses of Parliament.

Option 2:

68. The Lord Chancellor may make an order under section 24 reserving a legal activity but with transitional provisions protecting anyone who conducted the new reserved legal activities without authorisation. The transitional period would need to be formally brought to an end, by a further order of the Lord Chancellor. The LSB would not seek to end the transitional period until it was confident that the criteria above at paragraph 58 are met.
69. During the transitional period, approved regulators and licensing authorities (and existing non-approved regulators/licensing authority trade bodies) can develop and submit designation applications. The LSB will consider applications and make recommendations to the Lord Chancellor for designation, as appropriate.
70. During the transitional period, those entities and individuals who were authorised to conduct the existing reserved probate activity immediately before the coming into force of the order will be allowed to perform the newly reserved probate activities.

Option 3:

71. The Lord Chancellor would make an order under section 24 reserving the new legal activity but with enhanced transitional provisions (see the table above). As with Option 2, the transitional period would be ended by a further order of the Lord Chancellor only when the criteria at paragraph 58 (above) are met. However, during the transitional period those performing the newly reserved legal activity would need to satisfy certain criteria to benefit from transitional protection.
72. During the transitional period, approved regulators and licensing authorities (and existing non-approved regulators/licensing authority trade bodies) can develop and submit designation applications. The LSB will consider applications and make recommendations to the Lord Chancellor for designation, as appropriate.
73. During the transitional period, those entities and individuals who were authorised to conduct the existing reserved probate activity immediately before the coming into force of the order, as well as those who were members of prescribed associations or regulated by other bodies, will benefit from transitional protection enabling them to perform the newly reserved probate activities.
74. The prescribed associations and bodies could include:
 - Professional bodies and regulators in other service sectors e.g. the Institute of Chartered Accountants of England and Wales, Institute of Chartered Accountants of Scotland, Association of Certified Chartered Accountants, Financial Services Authority etc.

- Will-writing and estate administration trade bodies with self-regulatory schemes e.g. Institute of Professional Will-writers, Society of Will-Writers, Society of Trust and Estate Practitioners.

Option 4:

75. This would require a consequential/supplementary provision within the section 24 order reserving will-writing and estate administration activities, to deem existing approved regulators and licensing authorities designated.

Conclusions on implementation:

76. We discount option four because it does not meet our objectives for a managed implementation process. In our view it would be prejudicial to the regulatory objectives for the following reasons:

- It would provide a competitive advantage to existing regulators and the providers that they oversee.
- It would do nothing to tackle consumer detriment found within the regulated sector. It would embed regulation that has not faced the same tests against the regulatory and better regulation principles, as that of providers entering legal services regulation for the first time.

We also rule out option three because it would restrict the market and provide a level of assurance to consumers based on being overseen by bodies over which we do not have statutory purview and that have not been assessed as having in place the basic requirements of legal services regulation – and in many cases are known to not yet meet the criteria.

77. We believe that either of the remaining two options (option one and option two) would meet our objectives for a managed implementation process. We prefer option two because it would be more efficient and would deliver the objectives to a faster timetable. Inevitably any transition would ideally be accompanied by consumer education to mitigate risks arising during this period to a limited extent. We invite views on this assessment and the options for a managed implementation more widely.

Question 2: What are your views on the options for implementation that we have described? What do you think would be the likely impacts of each?

Consequential provisions:

78. The LSB's statement of the provisions which in our opinion will need to be made to facilitate implementation must include consequential amendments to the Act and other relevant legislation that may be necessary. We have

undertaken an initial assessment which is set out at **Annex 2**. We welcome feedback.

Question 3: Do you agree with the initial assessment of the consequential amendments that would likely be needed? Are there any other consequential amendments you consider would be necessary?

Question 4: To prospective approved regulators: what legislative changes do you think will be required in order to implement regulatory arrangements for these activities (in line with the draft section 162 guidance)?

Glossary of Terms

| | |
|--|---|
| ABS | Alternative Business Structures. From October 2011 non-legal firms will be able to offer legal services to their customers in a way that is integrated with their existing services. Or law firms will be able to develop their portfolios to compete across wider areas compared with their existing experience. |
| AR or approved regulator | A body which is designated as an approved regulator by Parts 1 or 2 of schedule 4, and whose regulatory arrangements are approved for the purposes of the LSA and which may authorise persons to carry on any activity which is a reserved legal activity in respect of which it is a relevant AR |
| Authorised Person | A person authorised to carry out a reserved legal activity |
| Consultation | The process of collecting feedback and opinion on a policy proposal |
| Consumer Panel or the Panel | The panel of persons established and maintained by the Board in accordance with Section 8 of the LSA (2007) to provide independent advice to the Legal Services Board about the interests of users of legal services |
| Impact Assessment | An assessment of the likely impact of a policy on cost, benefits, risks and the likely or actual effect on people in respect to diversity |
| LSB or the Board | Legal Services Board – the independent body responsible for overseeing the regulation of lawyers in England and Wales |
| LeO | Legal Ombudsman - The single organisation for all consumer legal complaints |
| LSA or the Act | Legal Services Act 2007 |
| Principles of Better Regulation | The five principles of better regulation, being proportional, accountable, consistent, transparent and targeted |
| Regulatory arrangements | The rules and regulations that make up the conditions of authorisation and practice for authorised persons |
| Reserved Legal Activity | Legal services within the scope of mandatory regulation by the Approved Regulators |

Appendix 1 – Scenarios to illustrate where activities should or should not be captured by reservation

79. The scenarios in this annex reflect the LSB's policy intentions. However, it is the responsibility of the Ministry of Justice to draft the necessary orders, and up to the courts to interpret their wording.

Question: The scenarios reflect what the LSB considers policy in this area should be. Do you have any comments on this?

80. *Scenario 1:* A consumer seeks advice about the legal instruments available to him to distribute his estate after his death in the manner he wishes. The consumer does not purchase any further services from the provider as he wishes to take time to consider the options open to him.

Should this activity be regulated under the proposed new reservations?

No, because the advice given is not provided ancillary to one of the core activities of creating a will or administering an estate.

81. *Scenario 2:* A consumer responds to an advertisement he sees saying 'call now for help reducing your inheritance tax bill!'. While he is receiving the inheritance tax advice, 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.

Should this activity be regulated under the proposed new reservations?

Yes. The advice here is provided in conjunction with the creation of a will. It therefore would fall within 'activities provided ancillary to the writing of a will' of the proposed new reservation.

82. *Scenario 3:* A consumer responds to an advertisement he sees saying 'call now for help reducing your inheritance tax bill!'. While he is receiving the inheritance tax advice, 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.

Should this activity be regulated under the proposed new reservations?

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 and an ancillary service from their provider. We therefore consider that the provider with which the consumer has a direct relationship, being the provider that gave the advice and oversaw the execution of the will, should be regulated for all activities provided under the proposed new will-writing reservation.

83. *Scenario 4:* A consumer responds to an advertisement he sees saying 'call now for help reducing your inheritance tax bill!'. While they are receiving the inheritance tax advice, the provider also recommends that the consumer has a will written to give effect to their wishes. The consumer agrees. Their provider states that he does not offer a will-writing service, but he can give the names of one or two will-writers he

knows of. The consumer proceeds to get their will written by one of those named will-writers.

Should this activity be regulated under the proposed new reservations?

In this scenario the will-writer would be regulated, as the person drafting the will. In our opinion the consumer would not consider that they had received will-writing services from the provider of inheritance tax advice. As that advice did not culminate in that provider writing a will, the provision of advice would not be regulated.

84. *Scenario 5:* An individual is a long standing client of a certain accountant. At one of their regular meetings the pair discusses how the individual's estate could be distributed after his death. They also discuss what should be contained within the individual's will to ensure that his wishes after enacted. No will is written on this occasion, but the individual intends to get one written soon using the advice as the basis for its content.

Should this activity be regulated under the proposed new reservations?

No. As has been highlighted above, the simple provision of advice, even where it is in relation to a will or an individual's estate, will not fall within the scope of the new reservations unless it is provided in conjunction with the actual writing of a will or administration of an estate.

85. *Scenario 6:* A consumer engages a provider to collect the details of the assets and liabilities in an estate, and of the intended beneficiaries.

Should this activity be regulated under the proposed new reservations?

No. This activity is not being provided ancillary to the actual administration of an estate, which, as explained above at paragraph 21, we judge centres upon the legal authority to collect and distribute estate assets. A key outcome we wish to achieve with the reservation of estate administration is the protection of estate money from misappropriation. In this scenario the provider does not exercise control over any assets, and so does not pose a risk to the estate monies.

86. *Scenario 7:* A consumer engages a provider to collect the details of the assets and liabilities in an estate and of the intended beneficiaries. Once this has been completed, the provider also collects the assets, pays the relevant liabilities and distributes the remaining assets.

Should this activity be regulated under the proposed new reservations?

Yes. In this scenario the provider has control of estate assets, and so we judge that his actions should be regulated. Having the authority to access to estate funds is a key point we would expect stakeholders to bear in mind when considering the extent of regulation.

87. *Scenario 8.* A consumer engages a provider write a will. There is no charge for the will. This is conditional on the consumer buying estate administration services from the provider.

Should this activity be regulated under the proposed new reservations? Yes.

Where a provider is being recompensed to provide the reserved activities of either will-writing or estate administration they will fall within the scope of regulation.

Crucially, the provider is not charging for writing a will but this is still in expectation of reward, which will be realised through a connected service.

88. *Scenario 9:* An individual is acting as the executor of an estate. He is not expecting payment for this activity.

Should this activity be regulated under the proposed new reservations?

No. We continue to support the right of individuals to act for themselves, or to help others without expectation of fee, gain or reward.

89. *Scenario 10:* An individual is acting as the executor of an estate. The firm with whom he is a fee-earner intends to invoice the estate for services rendered during its administration.

Should this activity be regulated under the proposed new reservations?

Yes. Where a person is being recompensed to provide the reserved activities of either will-writing or estate administration they will fall within the scope of regulation. Crucially, the individual has done the work in anticipation of the reward.

90. *Scenario 11:* A woman assists a number of her neighbours with the drafting of their wills. The neighbours agree that in return they will each leave the woman a sum of money in their will. The woman does not receive any form of payment at the time of drafting the wills

Should this activity be regulated under the proposed new reservations?

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

Appendix 2 – Initial review of consequential amendments to the Act and other relevant legislation that may be necessary to implement the proposed changes to the reserved activities

| 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 | The definition of probate activities would need to be changed, and consideration given to whether will-writing advice was to be privileged. |
| | Section 190 | Legal Professional Privilege | Consideration needs to be given as to whether the scope of privileged ‘probate services’ will match the new ‘probate activities’ definition. If it does, subsections 1(d) and (6) need amendment. If it does not, so that there are ‘probate services’ which are not reserved legal activities, then subsection (6) alone will need amendment. |
| | 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 |

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|--|--------------------|---|--|
| | | | 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 Services Act 1990 | | | No change required. |
| 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 | | | |

| | | | |
|---|-------------|---|--|
| <p>not extended at all, there is no issue. The issue is in the event there is a 'pick-and-choose' approach.</p> <p>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.</p> | | | |
| 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. |

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

Draft guidance for prospective approved regulators and
licensing authorities

Introduction

The provision of guidance

1. Section 162 of the Legal Services Act 2007 (the Act) allows the Legal Services Board (the LSB) to give guidance:
 - About the operation of the Act and any order made under it
 - About the operation of any rules made by the Board under the Act
 - About any matter relating to the LSB's functions
 - For the purpose of meeting the regulatory objectives
 - About the content of licensing rules
 - About any other matters about which it appears to the LSB's to be desirable to give guidance.
2. Guidance under section 162 may consist of such information and advice as the LSB considers is appropriate. The LSB will have regard to the extent to which an approved regulator or licensing authority has taken into account guidance when exercising its functions.

Purpose of this document

3. This document sets out the LSB's section 162 guidance to approved regulators and licensing authorities on their approach to regulation and regulatory arrangements for reserved will-writing activities and their regulatory arrangements for reserved probate and estate administration activities.
4. This guidance should be read by any organisation considering applying to the LSB to be an approved regulator and/or licensing authority able to authorise providers to undertake will-writing, probate or estate administration activities²⁹. This includes any existing approved regulator and/or licensing authority that is considering applying to add will-writing, probate or estate administration to the reserved activities that it is designated to regulate. We will consider the appropriateness of each applicant's initial set of regulatory arrangements as part of the application process.
5. This guidance also applies to any changes that an approved regulator or licensing authority once designated may wish to make to its regulatory arrangements in relation to will-writing, probate or estate administration activities.

²⁹ It is for the Lord Chancellor to determine whether to designate new approved regulators and licensing authorities or to extend the reach of existing approved regulators and licensing authorities to new reserved legal activities. He may only do so following a recommendation by the LSB – please see Schedule 4 and Schedule 10 to the Act.

6. We think it likely that most consumers would 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 and hence would wish to use a single provider to deal with the whole process. Our preference is that any regulator designated to authorise providers to carry out estate administration activities should also be designated to authorise providers to carry out probate activities – and vice versa. Due to the close alignment of both activities and will-writing it is also our preference that each regulator has a single set of regulatory arrangements to cover all three activities. To ensure consistency we expect any approved regulator or licensing authority currently authorised to undertake probate activities to review their regulatory arrangements against this guidance.
7. The document covers the outcomes that we expect regulation to achieve, the expected approach to regulation that shapes authorisation, supervision and enforcement as well specific protections that we expect to see to address systemic problems that we have identified in these markets.

Background

8. This guidance is aimed to help approved regulators and licensing authorities to develop regulation targeted at and proportionate to the detriments and risks that our investigations identified. Markets and the risks within them change over time. We expect approved regulators and licensing authorities to demonstrate that their proposed regulation is based on an assessment of risks based on best evidence at the time their application is made.

Application of the guidance

9. It is not the role of the LSB to prescribe in advance detail of how each approved regulator or licensing authority must regulate. It is the responsibility of any existing and would-be approved regulator or licensing authority to design regulation in the light of their risk-based assessment of their regulatory community and the work that providers that they regulate undertake, so as to avoid risks that are prejudicial to the regulatory objectives of the Act, the better regulation principles and standards of regulatory practice
10. However, in order to satisfy the LSB that it has appropriate regulatory arrangements, we expect each applicant to demonstrate that it has taken into account this guidance (or any subsequent or replacement guidance). This applies to both existing approved regulators and licensing authorities and any new bodies applying to be approved regulator and / or licensing authority for the first time.
11. Any applicant that departs from this guidance will need to be able to justify its approach. We expect the applicant to establish evidence to support why its proposed approach is appropriate

Beyond this guidance

12. The Act and the LSB set out broader requirements and expectations for approved regulators and licensing authorities. There are a series of other important documents that provide detail of these requirements and expectations. It will be of help to any prospective approved regulator and/or licensing authority to also carefully consider their contents.

13. The process for being designated as an approved regulator and for an existing approved regulator to be designated for new reserved legal activities is set out in Schedule 4 to the Act and in our associated rules³⁰. Part of this process is to consider overall the applicant's competence, capacity and capability.

- Rules for Approved Regulator and Qualifying Regulator designations:
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

14. The process for being designated as a licensing authority and for an existing licensing authority to be designated for new reserved legal activities is set out in Schedule 10 to the Act and in our associated rules³¹. Similarly, part of this process is to consider overall the applicant's competence, capacity and capability.

- Rules for applications to be designated as a Licensing Authority:
http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/designating_la_rules_v2_june_2011_final.pdf

15. This is supported by guidance to licensing authorities on the content of licensing rules:

- Guidance (and supplementary guidance) to licensing authorities on the content of licensing rules:
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

³⁰ Rules for Approved Regulator and Qualifying Regulator designations:
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

³¹ Rules for applications to be designated as a Licensing Authority:
http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/designating_la_rules_v2_june_2011_final.pdf

16. A particular challenge for bodies seeking to become legal services regulators for the first time will be the requirement for there to be clear separation of representative and regulatory functions³². We expect each applicant to demonstrate that it will be compliant from day one. Further details of the independence requirements, the LSB's Internal Governance Rules and compliance regime can be found here:

- Internal governance rules:

http://www.legalservicesboard.org.uk/Projects/independent_regulation/2011_round_of_compliance_certificates.htm

17. We have set out our guidance on the constituent parts of good regulation and criteria against which the LSB will assess a regulator's performance:

- Developing Regulatory Standards:

http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/20111214_regulatory_standard_v11.pdf

³² Paragraph 13(2)(a) and 13(3) of Schedule 4

Guidance for prospective regulators

Outcomes

18. We expect regulatory arrangements to centre on a clear set of outcomes that each provider delivering will-writing, probate and estate administration activities will be held accountable for delivering. We expect codes and handbooks to be outcomes focused with reliance on detailed rules only in those cases where the outcomes can be achieved in only one way.
19. We expect each approved regulator and licensing authority to set out its proposed outcomes for the activity or activities to which its application relates³³. We expect each approved regulator to demonstrate how its regulatory arrangements will support the outcomes and how they will monitor whether the outcomes are being achieved.
20. It is for the approved regulator or licensing authority to determine and justify the outcomes it sets out. However, we expect the focus to be on protecting and promoting the interests of consumers. Consumer outcomes for will-writing, probate and estate administration services are likely to be similar to those for legal services as a whole but should be tailored to meet specific risks within will-writing, probate and estate administration activities.
21. We consider that the following consumer outcomes may be appropriate:
 - Consumers receive appropriate information and advice which enables them to make an informed decision about whether and how to use will-writing, probate and estate administration services. This should include information about the potential risks in will-writing, probate and estate administration transactions and any related services provided alongside them
 - Consumers can make comparisons and informed choices between services and providers of will-writing, probate and estate administration services based on clear, useful information about the services that will be provided and their costs
 - Consumers receive good quality advice and services
 - Authorised providers act in the best interest of each client

³³ Applications in this context includes both designation applications under schedule 4 and schedule 10 and also changes to regulatory arrangements under schedule 4

- Authorised providers act with integrity and promote and maintain adherence to the professional principles
- Consumers' confidence in the owners, persons that hold a significant interest in and employees of entities authorised to undertake will-writing, probate and estate administration activities is at least as high as for other authorised providers/law firms and is equally justified.
- Consumers are deservedly confident that their advisors are regulated appropriately and effectively
- Consumers are aware of the opportunity to complain, and their complaint is treated seriously and handled promptly, fairly and effectively
- Consumer money and assets are protected, with risks of consumers' money being lost by the provider minimised
- Consumers have an appropriate level of assurance that recompense is available where a consumer suffers detriment caused by the provider as a result of negligence or dishonesty (fraud and theft)
- A range of authorised providers deliver examples of innovative and flexible ways of providing accessible and good value services.

22. We expect that each applicant to be able to demonstrate how it has taken this list of outcomes into account when setting its outcomes for the activities that it is applying for.

23. In setting outcomes, approved regulators and licensing authorities should also refer to the Opinion Leader Report "Developing measures of consumer outcomes" from 2011³⁴. This report was developed by working with consumers and providers of legal services, as well as other interested parties. It details outcomes that consumers generally expect from their providers of legal services.

24. In setting outcomes, we further expect each approved regulator and licensing authority to look beyond consumer expectations alone. We expect each applicant to demonstrate that it has taken into account the broader public interest and the other specific regulatory objectives.

Underpinning requirements

25. Each applicant must demonstrate that its regulatory approach and regulatory arrangements are compatible with the regulatory objectives³⁵ of:

³⁴ http://www.legalservicesboard.org.uk/what_we_do/Research/Publications/publications.htm

³⁵ LSA 2007, Section 28(2)

- Protecting and promoting the public interest
- Supporting the constitutional principle of the rule of law
- Improving access to justice
- Protecting and promoting the interests of consumers
- Promoting competition in the provision of services
- Encouraging an independent, strong, diverse and effective legal profession
- Increasing public understanding of the citizen's legal rights and duties
- Promoting and maintaining adherence to the professional principles

26. Each applicant will be able to demonstrate how its regulatory approach and regulatory arrangements have regard to the better regulation principles and standards of better regulatory practice³⁶. This requires that regulation is targeted at, and proportionate to, evidenced risks within the reserved legal activity(ies) that it is seeking designation to regulate (i.e. will-writing activities, probate activities estate administration activities or a combination of these activities).

27. Each applicant must demonstrate that its regulatory arrangements will be likely to deliver appropriate consumer protection for the reserved legal activities that they are seeking designation to regulate (i.e. will-writing activities, probate activities estate administration activities or a combination of these activities).

Existing regulators

28. We expect existing approved regulators and licensing authorities to demonstrate that their regulation meets the acceptance criteria and is consistent with this guidance from a first principles basis.

29. We will expect existing or prospective regulators and licensing authorities of will-writing, probate or estate administration activities to demonstrate that they have reviewed their wider arrangements and rulebooks with a mind to removing any existing ineffective, inappropriate, disproportionate or unnecessarily restrictive obligations for providers of the relevant activity(ies).

30. We do not anticipate being able to recommend designation where an application proposes to carry across existing arrangements and rule books designed for a different activity, range of activities or for holding a professional title. It must be demonstrated that all arrangements are appropriate, targeted at and proportionate for the activity(ies) being applied for and the associated risks.

³⁶ LSA 2007, Section 28(3)

Therefore, we do not anticipate being able to recommend designation where an application proposes to address risks relating to will-writing, probate or estate administration by simply carrying across, without amendment, existing arrangements or adding additional arrangements relating specifically to these activities to an otherwise unaltered approach.

31. We expect each applicant to demonstrate that the monitoring and supervision of providers will be targeted at and proportionate to the activities that the provider undertakes. We expect that where a provider limits itself to providing will-writing activities, probate activities, estate administration activities or a combination of these activities only, the obligations it faces will be targeted at and proportionate to the specific risks presented. Similarly, where a provider has a ring-fenced department or subsidiary providing will-writing activities, probate activities, estate administration activities or a combination of these activities only, we expect the obligations which that department or subsidiary faces will be targeted at and proportionate to the specific risks presented.
32. Where a provider undertakes a range of activities beyond will-writing, probate and estate administration, wider obligations targeted at and proportionate to the wider risks may of course apply. Wider qualification and entry requirements may be required to hold a professional title but we would expect subsequent monitoring and supervision to be targeted at and proportionate to the activities that they undertake – not those that they could be theoretically authorised to do.

Regulatory framework

33. It is our view that the outcomes- driven framework for regulation set out in the LSB's document "Developing Regulatory Standards" is most likely to deliver the regulatory objectives, the better regulation principles and best regulatory practice for will-writing, probate and estate administration activities. We expect each applicant to demonstrate that it has embedded each of the four constituent parts and has the capacity and capability to deliver them. We expect this to be demonstrated specifically in relation to the activity(ies) that it is applying for and the providers they will be regulating.
34. The four constituent parts are:
 - An outcomes-driven approach to regulation that gives the correct incentives for ethical behaviour and has effect right across the increasingly plural and diverse market
 - A robust understanding of the risks to consumers associated with legal practice and the ability to profile the regulated community according to the level of risk

- Supervision of the regulated community at entity and individual level according to the risk presented
- A compliance and enforcement approach that deters and punishes appropriately.

35. Further detail of our expectations of all approved regulators and licensing authorities is set out in the Developing Regulatory Standards document³⁷. We do not define exactly how an approved regulator or licensing authority must deliver each constituent part; the LSB will expect each approved regulator to explain, with evidence, how its arrangements will deliver each aspect.

Outcomes focused

36. In essence we expect regulatory arrangements to provide flexibility for the entity, within justified guidelines set by the approved regulator or licensing authority, to demonstrate to its regulator that its business model would achieve the specified outcomes and how it would guard against the risks of this not happening.

37. We expect decisions about authorisation, the level of monitoring, inspection and supervision that the practitioner can expect to ordinarily be set at the provider level based on an analysis of the level of risk to delivering these outcomes that they would present. High risk providers should expect a higher level of monitoring and supervision; low risk providers should expect less monitoring and supervision. We therefore expect regulation to focus on the entity rather than relying predominantly on the qualifications of the individuals that undertake the work and supervise others.

38. We expect further regulatory obligations only where it can be demonstrated that they are needed to deliver the regulatory objectives, target identified risks or meet legislative requirements. We expect approved regulators and licensing authorities to adopt the least restrictive and least onerous option for delivering their objectives.

Risk identification framework

39. We expect each approved regulator and licensing authority to demonstrate that it has in place an overarching risk identification framework and the capability and capacity to profile the risk presented by each regulated entity (and where appropriate individual). Each approved regulator or licensing authority should be able to demonstrate that it has developed an effective risk based supervision strategy which it has the capability and capacity to successfully deliver.

40. We expect each approved regulator and licensing authority to demonstrate how it will gather and maintain sufficient information and understanding about the risks

³⁷http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/20111214_regulatory_standard_v11.pdf

within different work undertaken and different business models. Each must demonstrate that it will have sufficient information and understanding about existing or proposed work plans and organisational structures of their providers. We expect each approved regulator and licensing authority to demonstrate that it can profile its regulated community and regulated activities by risk and group accordingly.

Supervision and enforcement strategy

41. We expect each approved regulator and licensing authority to demonstrate that it has credible supervision and enforcement arrangements.
42. We expect each applicant to demonstrate that it can quickly identify developing risks and to respond quickly and effectively to them. We consider that approved regulators as well as licensing authorities³⁸ should seek to resolve issues of non-compliance informally at first (unless non-compliance is so serious as to require immediate action). We expect each applicant to demonstrate that its regulatory arrangements facilitate this.
43. We expect each applicant to demonstrate that its regulatory arrangements make provision for a full range of sanctions. We expect each approved regulator and licensing authority to clearly set out its enforcement policy and processes for all types of enforcement action, both formal and informal. We expect approved regulators and licensing authorities, without fettering their discretion, to set out the circumstances in which they are likely to take action. We expect each approved regulator and licensing authority to set out the criteria it will apply in deciding to impose sanctions and the factors it is likely to take into account when deciding whether to impose a sanction and deciding the sanction.
44. Our guidance to licensing authorities on the content of licensing rules is likely to also provide a strong foundation for approved regulators, as developing or reviewing enforcement arrangements in relation to any new reserved activities³⁹. Close attention should be paid to the text on the scope of the enforcement regime and also the need to take into account better regulation principles and have regard to the Regulator's Compliance Code.

Illustrative examples of indicators that may influence risk rating and supervision requirements for will-writing, probate and estate administration activities may include:

- Volume and impact of work undertaken – providers undertaking very low volumes of a work in these areas, sometimes referred to as “dabblers”, may indicate risk of not having the sufficient experience and/or not keeping skills and knowledge up to date. High volumes of work with small numbers of trained fee earners may also indicate risk. High volumes of work, if aligned

³⁸http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/abs_guidance_on_licensing_rules_guidance.pdf

³⁹ Ibid

with weak systems, may potentially mean higher impact detriment.

- Complexity of work undertaken – We do not believe that a high level of knowledge or expertise is needed to prepare a simple will or administer an estate with simple financial and personal circumstances (although there is a need to recognise when complexities arise). However, this is not necessarily the case when more sophisticated wealth management planning is being sought or when particular complications arise such as owning property in a foreign jurisdiction.
- Confidence in software – There is sophisticated software available to providers in this market that will reduce the risk of human error, for example, by ensuring that precedents are updated, required detail is not omitted and clauses do not contradict each other. Providers will need to be able to demonstrate on what basis they place assurance in such products.
- Holding client money– Controlling other people’s money, for example, as an executor or attorney, presents particular risks.
- Internal controls – Quality control and internal supervision mechanisms to check output for mistakes and ensure that work is allocated according to the level of expertise required. Research indicates that businesses that undertake small amounts of work are less likely to have tailored internal quality control systems in place⁴⁰.
- Outsourcing – Whether parts of the process are outsourced and if so who to.
- Sales practices – Whether cross-selling is a key feature of a business model, how marketing is undertaken, the extent of any “cold-calling” activity, referral links and whether products are sold in the home.

Appeals

45. The LSB has published guidance on the types of decisions that should have a right of appeal⁴¹. We consider that it is important that decisions concerning restrictions on trade or livelihood can be appealed to an independent body. We expect each approved regulator and licensing authority to set out clearly the regulatory decisions that may be appealed and the process for doing so, including where there will be right of appeal to an independent body.

46. We anticipate that a wide variety of entities will be authorised to conduct will - writing, probate, estate administration or combination of these activities. Many of these are likely to be small businesses including traditional law firms, existing will -writing companies and new entrants. In order to ensure appropriate scrutiny of regulatory decisions, it is essential that market participants are not deterred from

⁴⁰ IFF, Understanding the consumer experience of will-writing services, July 2011

http://www.legalservicesboard.org.uk/what_we_do/Research/Publications/publications.htm

⁴¹http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/supplementary_guidance_on_licensing_rules.pdf

making appeals because they are likely to have to pay the regulator's costs if they lose. Having one body to hear all appeals concerning the regulation of will-writing, probate, estate administration or combination of these activities will help to provide consistency of regulation across all approved regulators/licensing authorities by enabling a body of case law to build up to inform future regulatory decisions and appeals. That in turn should improve decision making by regulators, helping to increase their efficiency and reduce costs. It should also reassure consumers and market participants that there is a level playing field, thus helping to improve confidence in the market.

47. Our strong view is, therefore, that it is highly desirable for there to be one appellate body for appeals that affect individuals and entities conducting will writing and/or estate administration and probate, and that this should be the First Tier Tribunal of the General Regulatory Chamber. The Tribunal has to power to award costs in cases where it considers that a party has acted unreasonably in bringing, defending or conducting the proceedings; that will act as a safeguard for approved regulators/licensing authorities against unmeritorious appeals.

Regulatory arrangements

48. Each applicant must demonstrate that its regulatory arrangements make appropriate provision for effective and appropriate consumer protections for the activities that it is seeking designation to regulate (i.e. will-writing activities, probate activities, estate administration activities or combination of these). It must do so in relation to each component of regulatory arrangements specified at section 21 of the Act for approved regulators and section 83 for licensing authorities. These are:

- Authorisation arrangements
- Practice rules
- Code of conduct
- Disciplinary arrangements
- Qualification regulations
- Indemnification arrangements
- Compensation arrangements
- Licensing rules
- Other related rules or regulations and any other arrangements, other than those made for the purposes of any function the applicant has to represent or promote the interests of persons regulated by it

- Other related rules

49. It will be the responsibility of prospective approved regulators and licensing authority to shape the detail of the regulatory arrangements and justify them.

50. We expect each applicant to demonstrate that their arrangements are targeted at and proportionate to the risks identified in relation to the particular activities and employing the least restrictive way of addressing them. We expect each applicant to demonstrate that all of the arrangements that will apply to an authorised provider the activity(ies) meet the approval criteria.

Avoiding unnecessary expansion of regulation

51. We expect regulation to bite only on reserved activities. Where wider risks are identified, for example in relation to the way a provider undertakes a connected activity; we would normally expect this to be addressed by conditions placed on individual providers. This approach is more likely to be consistent with the principles of better regulation than blanket obligations and restrictions across all providers based on possible risks presented by some.

Minimum protections

52. We have identified specific features that we believe regulatory arrangements must contain to deliver consumer outcomes in these markets and target systemic risks and detriments identified within these markets.

A strategy for consumer information that will help them choose and use legal services

53. We expect each approved regulator and licensing authority to demonstrate that its regulatory arrangements include an effective strategy to support the following outcomes:

- Consumers receive appropriate information and advice which enables them to make an informed decision about whether and how to use services. This should include information about the potential risks in will-writing, probate and estate administration transactions and any related services provided alongside them.
- Consumers can make comparisons and informed choices between services and providers based on clear, useful information about the services that will be provided and their costs.

Explaining risks

54. We expect each approved regulator and licensing authority to consider requirements for providers to explain potential risks within will-writing, probate and estate administration transactions that will assist consumers to make an informed decision about whether to purchase the service. Examples of potential risks that we have identified include:

- Naming a professional executor or granting powers of attorney to a provider may give an individual full control of the estate
- Paying for or making a binding contract for estate administration services at the time that the will is written rather than at the time that they will be used, which could be decades later, presents a risk that the provider may no longer be operating and may restrict the ability of other executors to discharge their duties in the way most appropriate for the substantive wishes of the testator
- Absence of explanation of the need to update a will when wishes or circumstances change and how to go about doing so
- Where a will is stored by the provider, a client not knowing where (a) the will is being stored and how it can be accessed (b) what would happen to it if the provider closed, and (c) what charges are being levied for the storage service

- Payments involving credit agreements and payment in instalments may result in a significantly higher overall cost compared to one-off payments.

Registers of authorised providers

55. We expect approved regulators and licensing authorities to maintain up-to-date information about whom they have authorised to deliver reserved legal activities and the conditions of licences that have been granted. We expect registers of authorised providers to be made available to consumers in an easily accessible format and, where suitable, to bodies providing choice tools such as comparison sites.

Complaints and quality indicators

56. We expect approved regulators and licensing authorities to encourage transparency about complaints and other quality indicators – such as experience and specialism in these specific markets. This is not an issue exclusive to will-writing, probate and estate administration activities. The LSB has issued separate papers about these issues that are relevant to the legal services sector as a whole⁴².

Sharing information between regulators

57. We expect approved regulators and licensing authorities to demonstrate that their arrangements make provision to share information about entities and individuals that have had their authorisation to provide will-writing, probate or estate administration activities suspended or revoked to be shared between regulators.

Authorisation gateway checks including a fit and proper person test for ownership and control

58. We expect each applicant to demonstrate how its regulatory arrangements will support the following outcome:

- Consumers' confidence in the owners, persons that hold a significant influence and employees of entities authorised to undertake will-writing, probate and estate administration activities is at least as high as for other authorised providers/law firms and is equally justified.

59. We expect each applicant to demonstrate that its arrangements include an appropriate fit and proper person test for each owner and person that holds a significant influence in an authorised provider. We expect fit and proper tests to extend, where relevant, to authorised role holders within a firm.

⁴² Please see:

<http://www.legalservicesconsumerpanel.org.uk/ourwork/PriceComparisonWebsites.html>,
http://www.legalservicesboard.org.uk/Projects/workforce_development/index.htm#quality

60. We expect each applicant to demonstrate that its arrangements include a suitability test for any individual authorised person for the activity(ies) being applied for.

61. For clarity, we expect each approved regulator and licensing authority to demonstrate that these tests will offer equivalent protections for consumers as the tests for providers of other reserved legal activities and to justify any differences. For existing approved regulators and licensing authorities this will require comparison with their existing arrangements for providers of other reserved activities. We expect organisations applying to be an approved regulator and/or licensing authority for the first time to demonstrate that they have reviewed the arrangements of existing approved regulators and/or licensing authorities and demonstrate that their arrangements will offer equivalent provision or justify differences.

A requirement that providers have an appropriately trained workforce

62. We expect each applicant to demonstrate how its regulatory arrangements will support the following outcomes:

- Consumers receive good quality advice and services
- A range of authorised providers deliver examples of innovative and flexible way of providing accessible and good value services.

63. We expect authorisation and qualification arrangements to provide that each entity demonstrates that it has the appropriate combination of knowledge, skills, behaviours, systems and controls to consistently deliver good quality advice and services.

64. We expect authorisation and qualification requirements to focus on the entity rather than just the qualifications of individuals within the entity. In general, we expect arrangements to allow the entity to demonstrate to the authorising approved regulator or licensing authority that it has an appropriately trained workforce (and measures to ensure that skills and knowledge are kept up-to-date). This will depend on the range and complexity of the work that the provider proposes to do and the range of controls that they will have in place. We expect authorisation and qualification arrangements to be flexible enough to facilitate this.

65. We do not think that it is appropriate for will-writing, probate or estate administration activities to be restricted to categories of individual defined by set qualifications or professional title. We do not believe that there can be a set formula of qualifications and training that an approved regulator or licensing authority could say that each entity must have in relation to will-writing, probate and estate administration activities.

66. We would normally expect licensing authorities to set out the skills and knowledge that they believe is required to perform particular activities. This will likely include the ability to identify characteristics that indicate that a matter is beyond the competence of the provider. We expect tailoring for different activities and different levels of complexity. For example, the required skills and knowledge for drafting wills for simple circumstances will be different to those for providing a range of estate planning advice for clients with complex circumstances. The requirements for administering an estate will be different again and for completing probate applications different again.
67. We expect that qualification and authorisation arrangements will offer multiple routes for an entity to demonstrate that it has the required skills and knowledge for the work that it undertakes. Where appropriate education and training are specified, we will expect approved regulators and licensing authorities to consider a range of training options which may be amended as new education and training products and providers emerge.
68. The flexible approach to authorisation and qualification arrangements that we expect should allow for a full range of mechanisms of skills and knowledge to be taken into account. For example, an entity may have tailored software that assists with drafting a will and robust training on how to use the software. Entities may outsource part of the will-writing process to an external specialist. We do not believe that there can be a set formula of qualifications and training that an approved regulator or licensing authority could say that each entity must have.
69. It is unlikely that we will approve arrangements that specify that specialist qualifications will be required to administer most estates or complete probate applications, given that these are activities that thousands of lay people successfully complete on their own every year.

Protection around sales practices

70. We expect each applicant to demonstrate how its regulatory arrangements will support the following outcome with a particular emphasis on sales practices:
- Authorised providers act in the best interest of each client
 - Authorised providers act with integrity and promote and maintain adherence to the professional principles
71. We do not expect a “permissions based” approach to sales practices. In particular, we do not consider that there should be a blanket ban on direct marketing of will-writing, probate or estate administration services. We expect arrangements to require providers engaged in direct marketing to demonstrate how they will ensure that their approach does not impinge on the specified consumer outcomes. The use of direct marketing by a provider is then likely to

feed into a provider's risk profile and may impact on the level of supervision and monitoring they may expect from their regulator.

Arrangements to ensure each provider has an appropriate in-house complaints process

72. We expect each applicant to demonstrate how its regulatory arrangements will support the following outcome:
- Consumers are aware of the opportunity to complain, and their complaint is treated seriously and handled fairly and effectively.
73. The LSB has issued guidance on first-tier complaints handling under section 112(2) of the Act⁴³. We expect each applicant to demonstrate how its regulatory arrangements have taken this guidance into account.
74. We expect each applicant to demonstrate that it has considered whether and, if so, how the in-house complaints processes should apply to third party complainants specifically for will-writing, probate and estate administration activities. For existing regulators, this should include addressing any consequences that change may have on compensation arrangements.
75. We will expect each applicant to demonstrate that they have considered any potential benefits of aligning the position adopted by the Legal Ombudsman in accepting complaints from beneficiaries in certain circumstances. This is set out in the Legal Ombudsman's scheme rules⁴⁴.
76. We will expect each applicant to justify the approach that it chooses to take.

Legal Ombudsman

77. Most consumers of authorised providers delivering reserved legal activities have a right of access to the Legal Ombudsman if they have a complaint about the provider's service that is not adequately resolved by the provider itself. We expect each approved regulator and licensing authority to demonstrate that they have appropriate arrangements for managing their interaction with the Ombudsman and for ensuring the providers which they regulate deal with the Ombudsman in an open, timely and co-operative manner.

Appropriate financial protection arrangements

78. We expect each applicant to demonstrate how its regulatory arrangements will support the following outcomes:

⁴³http://www.legalservicesboard.org.uk/Projects/pdf/10_05_24_Isb_signposting_requirement_and_guidance_Decision_document.pdf

⁴⁴http://www.legalombudsman.org.uk/downloads/documents/publications/OLC_Scheme%20rules_v1_201104-1_FINAL.pdf

- Consumer money and assets are protected, with risks of consumers' money being lost by the provider minimised
 - Consumers have an appropriate level of assurance that recompense is available where a consumer suffers detriment caused by the provider as a result of negligence or dishonesty (fraud and theft).
79. For an applicant's indemnity and compensation arrangements to be judged appropriate, we expect two further tests to be met:
- They should be proportionate to the problems identified
 - They should not act as an unnecessary barrier to entry – especially for small businesses.
80. In setting its financial protection arrangements, we expect each applicant to demonstrate that it has identified the risks to consumers face, has considered the financial protections available, has determined the level of risk that is available and has adopted proportionate financial protections to maintain risk at that level.
81. We expect each applicant to demonstrate that it has considered their proposed arrangements in the context of particular detriments identified in these markets. These include:
- Providers risking the safekeeping of consumers' money, for example by using it for business purposes or delaying the release of estate money for an unnecessarily long period to benefit the business
 - Providers becoming insolvent and closing while holding estate money or having taken payment in advance for estate administration services that are not then delivered
 - Providers misappropriating money
 - Providers causing detriment through negligent work, in particular drafting wills that are invalid or would not deliver what the testator intended
 - Providers causing detriment through poor service such as overcharging or failing to carry out estate administration activities as instructed or in a timely manner
 - Problems not coming to light until many years after the service was purchased.
82. It may be helpful for applicants to consider the following financial protections that may combine to protect proportionately against the risks and detriments.

Informing client of risks

83. Applicants may wish to set guidelines for providers to inform consumers that services are not risk free and make them aware of the possible risks that may arise within different activities and transactions and the potential compensation that may be available.

Appropriate systems and procedures to safeguard consumers' money and/or to avoid a provider holding client money

84. We expect arrangements to require that providers keep client money separate from their own and to prohibit consumer money being used for business purposes.
85. Where a provider holds consumer money, we expect regulatory arrangements to establish appropriate requirements around the return or distribution of consumer money. We expect arrangements protect consumer money against business liabilities upon a provider closing. We expect applicants to consider guidelines around paying interest on money held by providers and providers not holding on to money for longer than is necessary.

Professional indemnity insurance (PII)

86. We expect each applicant to demonstrate how authorised entities and persons will be appropriately indemnified against claims made against them. We expect minimum requirements for an appropriate level of consumer protection that reflects the risks posed by the activities or type of client of the provider. Consistent with our guidance for licensing authorities, a tiered or tailored approach to the level of cover required based on risks presented by different types of provider will be necessary.
87. We expect requirements to be flexible enough to allow for the development of new policies that may better suit businesses in a changing market while still providing appropriate protections for consumers. We expect that approved regulators and licensing authorities may provide guidance on the types of arrangements that they would find acceptable but would also consider alternatives to those arrangements if they were proposed by a provider.
88. Negligence and other issues relating to will-writing are often not discovered until after the testator has died. This could be years or even decades after the service was provided and by which time providers may have closed. This potentially presents a gap that may leave some consumers exposed. We expect each applicant to demonstrate that it has considered how this issue may affect the outcomes its sets and what, if any, steps are needed to address the issue.
89. Beyond acknowledging that consumers will face a level of risk, we have identified three possible solutions – individually or in combination:

- Consumers having the option to purchase individual transaction insurance. Approved regulators may wish to explore this option with insurers.
- Insurance run-off cover. Regulated providers are usually required to purchase run-off cover for a six year period after closing. Approved regulators may wish to investigate opportunities for run-off cover to be extended (either by the provider or with the consumer purchasing extended insurance themselves) and will need to consider the appropriate duration of any such cover.
- Compensation arrangements (as set-out below).

Compensation arrangements

90. We require each applicant to demonstrate that it has appropriate compensation arrangements for the activity(ies) that they are applying for. We will expect applicants to demonstrate that their arrangements are an efficient way of meeting their objectives. We expect an appropriate balance between reducing risk faced by consumers and the cost of the mechanisms that reduce risk. Eliminating risk from transactions through regulation is rarely an affordable option.
91. Compensation arrangements usually offer protection to consumers in certain circumstances where indemnity insurance will not cover a claim. Arrangements often involve a group of providers contributing to a shared pot of money from which payments may be made to compensate consumers on a discretionary basis. Alternatives may include an approved regulator or licensing authority taking out its own insurance policy as alternative to maintaining a compensation fund.
92. We expect each applicant to demonstrate that it has considered whether requirements around compensation arrangements should be different for different types of provider depending on the risks of the work that they undertake. For example, the compensation arrangements that apply to a provider that holds client or estate money may be different from those for a provider that does not. This would reflect the different risks involved. If an approved regulator or licensing authority proposes that it is appropriate not to require compensation arrangements in some circumstances, evidence based reasoning that takes account of risks to consumers must be provided.

Financial institutions taking responsibility for safe-keeping consumer funds

93. An alternative approach to protect against the risks of providers holding consumers' money may be for regulators and financial institutions to work together to develop arrangements where financial institutions rather than providers are responsible for the safe-keeping of funds. Mechanisms for money to be held away from individual firms may offer a high level of consumer protection at lower cost than compensation arrangements.

Storage of documents and exit arrangements

94. We expect each approved regulator and licensing authority to have regulatory arrangements requiring that, where a will-storage facility is offered by a provider, wills are kept safe and processes ensure that wills may be easily located and retrieved. Arrangements should make provision that clients' wills and client files are protected and clients notified of the change should a provider cease to exist or to offer its services.

Regulatory overlaps and conflicts

95. We expect each approved regulator and licensing authority to set out details of how it will comply with the provision required by sections 52 and 54 of the Act around preventing regulatory conflict and unnecessary duplication of regulatory provision if they propose to authorise providers who are also overseen by regulators in a different sector.
96. This includes how they will interact with other regulators (including any Memoranda of Understanding). We expect each approved regulator and licensing authority to have identified any conflicts and unnecessary duplication with other regulators' arrangements and the steps they have taken to try to address the issues.

LSB September 2012