

Meeting: Legal Services Board

Date: 4 June 2020

Item: Paper (20) 30

Title: Reserved activities

Authors / Presenter/ Introduced by:

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Introduction: Purpose of the paper

1. This paper sets out the rationale and proposed high-level approach for LSB reviewing the reserved activities as a key early project in the next strategy period.

Recommendations

2. The Board is invited to:
 - **Agree** to authorise the executive to develop proposals for carrying out a review of the reserved activities starting in the 2021-22 business plan year.

Timing

3. The Board's agreement to the recommendation would enable the executive to further develop its thinking on the scope of a possible review and approaches. We propose holding exploratory discussions with Ministry of Justice officials and others with a view to securing the resources necessary ready to begin a review early in 2021-22, should the Board subsequently decide to carry out this work.
4. We are mindful of Covid-19 considerations. LSB would only conduct internal background preparations in the remainder of 2020-21, so there would be no burdens on stakeholders during the crisis. As explained below, the statutory timetable means implementation of any changes would be some years away.
5. Our exploratory work should be strategically aligned with the CMA's progress review, which is likely to cover these issues. During its review the CMA will revisit the recommendations it made to government on legislative reform but we do not expect it to make any new substantive analysis of the reserved activities.

6. The LSB's draft strategy for the sector and 2021-22 business plan will be subject to public consultation following the Board's 2 December meeting. We suggest that the Board considers these issues again at its September away day ahead of deciding whether to include the project in next year's draft business plan. The Board would be invited to make a final decision on carrying out a review of the reserved activities at the same time as finalising the strategy and business plan, at its meeting in March 2021.

Background / context

7. Under section 12 of the Legal Services Act 2007 ('the Act') there are six reserved legal activities that can only be provided by authorised persons (individuals or entities). Schedule 2 makes provision about what constitutes each of those activities. The six activities are:
 - the exercise of a right of audience
 - the conduct of litigation
 - reserved instrument activities
 - probate activities
 - notarial activities
 - the administration of oaths
8. These activities were in statute before the Act. They were 'passported' into the Act and were not the subject of detailed assessment by Sir David Clementi in his review. However, the Act includes provision for the list of reserved activities to be added to over time. Under section 24 the Lord Chancellor may, by order, add legal activities, but only on the LSB's recommendation. The Board may under section 26 make a recommendation to the Lord Chancellor for the removal of a reserved legal activity. However, the Lord Chancellor cannot remove an activity by order, instead he would need to pursue this via primary legislation.
9. The LSB can make recommendations to the Lord Chancellor after carrying out a s24 or s26 investigation. The Act sets out detailed procedural requirements in relation to these investigations (see **Annex A**). Should the Lord Chancellor accept a recommendation, he will make a draft order to be laid before and require approval of, Parliament. There would then need to be a transitional period before the Order comes into effect. This is not least because one or more current or new approved regulators would need to be authorised to regulate any newly reserved activities. Therefore, s24 and s26 investigations are significant undertakings and considerable time would elapse before any changes are implemented and result in benefits for consumers and providers.
10. The LSB has carried out only three s24 and s26 investigations done at the one time, in relation to the related legal activities of will-writing, probate and estate

administration. In 2013, the then Lord Chancellor did not accept the LSB's recommendation that will-writing be added to the list of reserved activities. While accepting evidence of consumer detriment, he concluded that self-regulatory solutions had not been exhausted (reflecting the then coalition government's wider position on regulatory reform).

11. There is a shared understanding about the issues with the reserved legal activities (see paragraph 15), which have been acknowledged for some years. The LSB highlighted these in its vision for legislative reform in 2016. The CMA acknowledged them in its market study, although it concluded that the impact of reservation on competition in the sector is currently limited in practice. Professor Stephen Mayson has considered these issues in detail as part of his review of legal services regulation. However, while there is a shared view about the issues with the current arrangements, there are likely to be mixed views as to whether a review of the reserved activities is timely and even less consensus on the correct boundaries of regulation and how these should be drawn in future.
12. It has been apparent for some time that the government has no plans for major legislative reform to the legal services regulatory framework. Indeed, on 18 May the Justice Minister confirmed this in Parliament. In this context, the Board has indicated that it wishes to explore, as part of developing a new strategy for the sector, and to aid longer-term Covid-19 recovery, what further reform is possible using LSB's existing legislative powers. Specifically, in its consultation response document on the draft business plan for 2020/21, the Board said it may be timely to use its powers to recommend changes to the list of reserved activities.
13. The reserved activities are one possible area of reform. In 2016 the LSB published a vision for legislative reform. An analysis of progress against this vision document and scope for possible further work is provided in **Annex B**.

Rationale for a review

14. The reserved activities are of vital importance since they define the scope of regulation. Correctly drawn, the reserved activities should ensure that regulation is risk-based and does not unnecessarily impede competition. Only those holding a professional title, or an ABS license, can carry out these activities. This in turn attaches requirements on providers such as codes of conduct, qualifications, professional indemnity insurance and access to the Legal Ombudsman. The current approach of some of the regulators is that, once a provider is authorised for one or more of the reserved activities, all non-reserved legal activities of that provider are then also consequently regulated.
15. The problems with the reserved activities are well-rehearsed and include:
 - It is widely accepted that the current list of reserved activities is an 'accident of history' and there has been no recent, evidence-based assessment of the benefits or risks created by those activities. In its final

report of the 2016 market study, the CMA indicated that the justifications for each activity being reserved was stronger for some than for others.

- Associated to this there is a 'regulatory gap' since providers wishing only to provide non-reserved legal activities to the public, and who are not otherwise authorised or licensed for reserved work, cannot be brought within the scope of sector-specific regulation. In its market study, the CMA expressed concern that such providers cannot in principle compete in the provision of reserved legal activities. Given these providers often operate at lower cost this may have knock-on consequences for access to justice.
- The reserved activities do not contemplate the implications of artificial intelligence and other technologies for legal services regulation.
- The regulatory framework is not aligned with consumer expectations, supported by research conducted by LSB and others, that all providers of legal services are subject to some form of regulation.
- Some of the reserved activities are narrowly or vaguely defined, causing confusion and enabling providers to 'game' the system or find creative workarounds that make the regulatory boundaries porous.

16. Even so, there are disbenefits and risks in carrying out a review, including:

- There is a view that the model of reserved activities is an inherently flawed basis for legal services regulation. Adding to the list of reserved activities could therefore 'bake in' these flaws across a wider portion of the market.
- Developments in substitutive technologies are still at an early stage and it may be too soon to seek to redraw regulatory boundaries with these in mind. In his paper for LSB's technology project, Professor Noel Semple concluded that the present regime remains capable, for the time being, of responding to the challenges presented by developments in technology.
- Uncertainty about the future scope of regulation could unsettle the market and/or deter investment at a time when the sector is in flux as a result of Covid-19 and the UK's exit from the EU.
- The Lord Chancellor may, following consideration of a recommendation from the Board, decide not to accept it.

17. Building on the first point, any future review of the reserved activities should be approached as part of a broader vision of change that can be achieved within the parameters of the Act. As set out above, the approach of some regulators to apply the full panoply of regulatory requirements to all legal activities is a matter of choice. The Act provides scope for regulators to authorise providers holding other professional titles or operating in the unregulated market, raising issues around the future institutional landscape. There is scope to set up voluntary arrangements relating to both regulatory standards and consumer redress.

18. Therefore, alongside any alterations to the reserved activities, we would wish to explore parallel reforms to the regulatory arrangements of existing regulatory bodies. Should we wish to add to the list of reserved activities, we would not wish to create new monopolies for existing authorised persons or a proliferation of new regulators. We would also need to consider wider external developments, such as possible statutory reforms to consumer rights and redress.
19. On balance, the executive considers that the benefits of a carrying out a review of the reserved activities outweigh the risks. However, the case is stronger for carrying out a comprehensive review of the whole market rather than examining individual activities – see paragraph 22. Over time, the regulatory system is falling ever further out-of-step with the evolution of the market. It is important that the regulatory framework is as fit for purpose as it can be to support the sector to recover from the Covid-19 pandemic, maintain its international competitiveness following EU exit and deliver wider consumer and public interest outcomes.

Key components of a review

20. Our underlying objective should be to secure public confidence in regulation that appropriately balances consumer protection and competition considerations. There should be no preconceptions about whether there is currently too many or too few reserved activities, but instead a rigorous and objective assessment against a clear analytical framework supported by the best available evidence.
21. It is evident from the analysis above that, as well as considering the merits of whether specific activities should be reserved, the review needs to address some big underlying related regulatory issues where a series of considerations need to be balanced and stakeholders are likely to hold different viewpoints.
22. An early decision will need to be made on whether to look at one or more legal activities individually or undertake a comprehensive review of the whole market.
 [REDACTED]
 [REDACTED]
 [REDACTED] While possible individual candidate activities for review can be imagined, our initial preference is to look at the market in the round.
23. These are complex issues and changes to the market may have significant consequences for the stakeholders affected. Therefore, it is important that we carefully examine the costs and benefits of different options and understand the likely impacts on different audiences. The evidence base should include data on consumer detriment and providers, draw on economic analysis and legal advice, and there should be a significant level of public and stakeholder engagement.
24. Carrying out a comprehensive review would be a substantial undertaking that would require an increase to our existing budget to cover additional staffing, expert advice and evidence collection. Given a significant element of the review

costs would relate to the unregulated sector this potentially raises fairness issues for levy payers. Added to this, we are mindful of economic pressures on the profession due to Covid-19. Therefore, we consider there is a case for part of the costs to be met through grant-in-aid and we will explore this further in our discussions with Ministry of Justice officials.

Next steps

25. Should the Board accept the recommendation, we will take forward discussions with the Ministry of Justice and others, including the CMA. We will return to the Board as part of discussions on the emerging strategy and next business plan.

Annexes

Annex A – Summary of statutory provisions

Annex B – Progress against 2016 legislative vision document

Risks and mitigations	
Financial:	None at present. Should the Board wish to conduct a review, a more detailed budget will be worked up.
Legal:	[REDACTED]
Reputational:	Reflecting the benefits and risks outlined in paragraphs 15 to 16, many stakeholders are likely to welcome a review, but others not. This would be a high-profile project and presents opportunities for engagement with a wide group of stakeholders.
Resource:	Additional staffing resources, including potentially secondments, would be required to carry out a review.

Freedom of Information Act 2000 (Fol)		
Para ref	Fol exemption and summary	Expires
22, 2 nd and 3 rd sentences	s42 – legal professional privilege	N/A
Legal risk mitigation box	s42 – legal professional privilege	N/A

Annex A – Summary of statutory provisions

Adding or removing reserved legal activities

Under section 24 of the Act, the Lord Chancellor may, by order, amend section 12 or Schedule 2 so as to add any legal activity to the activities which are reserved legal activities. An order under s24 may be made only on the recommendation of the Board. The Lord Chancellor has up to 90 days to consider and publish a notice giving a decision after receiving the Board's recommendation. Should the Lord Chancellor disagree with the Board's recommendation, the notice must state the reasons for that decision.

Under section 26 of the Act, the Board may recommend that an activity should cease to be a reserved legal activity. The Lord Chancellor must consider any recommendation made by the Board and if he disagrees must publish a notice with reasons. There is no specified timeframe for a decision and the Lord Chancellor has no power under the Act to remove a reserved legal activity from section 12/Schedule 2. If he agrees, he will have to pursue the recommendation by other means e.g. primary legislation.

(Section 25 of the Act deals with designating approved regulators and licensing authorities in relation to reserved activities and is not covered further here.)

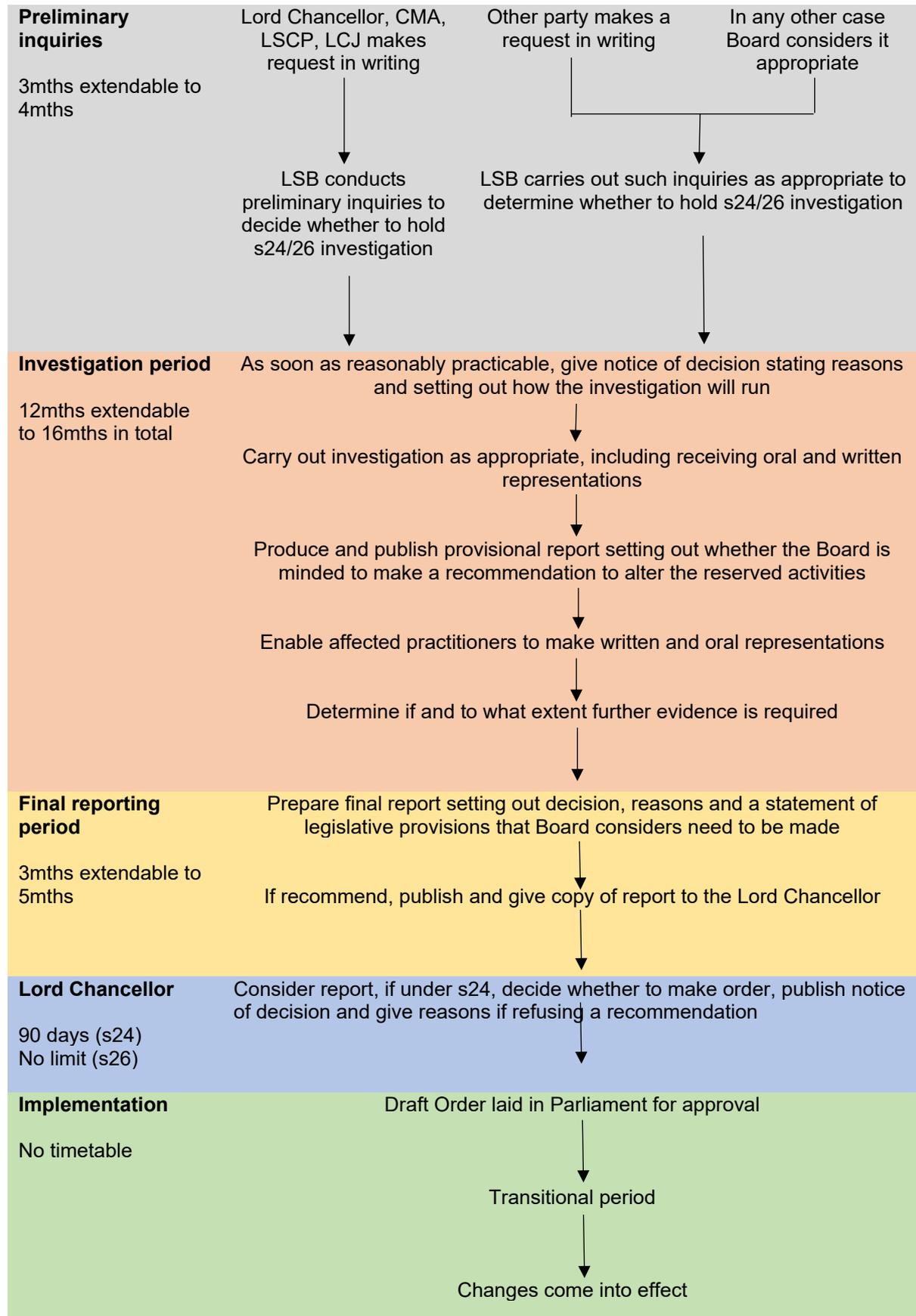
Procedures and timescales

Schedule 6 sets out the processes that must be followed and associated timescales.

The LSB can make recommendations to the Lord Chancellor of its own volition after carrying out an s24 or s26 investigation. However, anyone can request that the Board hold s24 and s26 investigations. Where this request is made by the Lord Chancellor, Lord Chief Justice, CMA or LSCP, the Board is obliged to carry out preliminary inquiries, which may progress to a formal s24 or s26 investigation.

A simplified overview of the process is provided in the flow chart overleaf. Note that the timetable envisages a period of 18-25 months for LSB to start and complete its work, which involves requirements to notify and consult with parties. This does not include preparatory work in advance of commencing the formal processes.

Simplified flowchart



Annex B – Progress against 2016 legislative vision document

The table below identifies progress against the LSB’s vision for legislative reform published in 2016. In general terms, we were influential in persuading the CMA to recommend that the Ministry of Justice review the legislative framework and have since engaged with the Mayson Review. More specifically, the document made proposals in six areas and our activities against these are set out below.

It is, of course, possible that we would arrive at a different vision for reform if we were to look at these issues afresh now. Further, at the time the Board decided that consumer redress arrangements should be excluded from the vision exercise.

Heading	Proposal	What we have done	What we could do
Regulatory objectives	“Safeguarding the public interest by protecting consumers and ensuring the delivery of outcomes in the interests of society as a whole”	Refreshed document on how we interpret the existing regulatory objectives	We cannot change the regulatory objectives
Scope of regulation	Those activities for which an independent review determines regulation is necessary on grounds of risk to the regulatory objectives	Monitored developments in unregulated market Encouraged regulators to take full market overview approach to Legal Choices Approved rule changes so more transparency for consumers on who is/isn’t regulated	Conduct a review of the reserved activities (Board paper in June) Pursue approach agreed by Board in April 2020 Regulators are creating single online register as part of Legal Choices
Focus of regulation	Primarily on activity, with regulation of providers only for specific high risk activities. Regulation	Links to scope of regulation	Conduct a review of the reserved activities

	should not be based on professional title		
Independence	Independent both of the professions and government and accountable to Parliament.	Completed a review of and revised IGRs to maximise the degree of independence possible within the LSA Taken enforcement action against The Law Society for breach of the current IGRs	Conclude current consultation and enforce the new IGRs. Encourage ARs to go further than required, e.g. institutional separation
Consumer representation	An independent sector-specific consumer voice and a general duty to consult and engage with consumers	Maintained the LSCP More broadly, stepped up our engagement approach, e.g. evidence sessions with grassroots and national consumer groups to support the strategy	Maintain the LSCP More broadly, set up the public panel jointly with the LSCP and continue to develop our engagement approach
Structure of regulation	A single regulator covering the whole market	Started review of contingency planning for regulator exit	Complete review of contingency planning for regulator exit Use soft and hard levers to gradually rationalise the institutional landscape