Solicitors Regulation Authority

SRA response

"Enhancing consumer protection, reducing regulatory restrictions: will-writing, probate and estate administration activities", Legal Services Board consultation

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Introduction

The Solicitors Regulation Authority (SRA) is the independent regulator of solicitors, the firms in which they practise and all those working with them. We are also a licensing authority for alternative business structures (ABS). We regulate in the public interest the SRA welcomes this opportunity to comment on the future approach to the regulation of will-writing, probate and estate administration services.

Summary of our position

We believe that the LSB and approved regulators need to focus on the following issues to ensure effective regulation of the will-writing market.

Bringing strong and credible consumer protection measures across the whole market for will-writing, probate and estate administration services — including appropriate requirements for professional indemnity insurance and compensation arrangements, in order to provide the security and reassurance that we believe is essential for consumers who access any legal service.

Appraising and re-evaluating the competence of individuals who provide will-writing, probate and estate administration services, considering the extent to which all individuals who provide these services should be required to demonstrate a particular level of competence and, if so, how this might be best achieved. The current Legal Education and Training Review (LETR) will encompass relevant issues. The SRA will also work with other stakeholders, including expert practitioners, representative bodies and training providers.

Thematically reviewing consumer vulnerability within the will-writing, probate and estate administration sector as a means of better understanding how firms and individuals provide these services, how consumers experience them and the types of outcome clients receive, and then addressing any problem areas through proportionate regulatory response.

Developing advice and guidance for consumers of will-writing, probate and estate administration services; the SRA supports consumers by, for example, providing advice and resources via our website (www.sra.org.uk/consumers) [https://www.sra.org.uk/consumers/] , through our Contact Centre, and through working collaboratively with organisations in the not-for-profit and third sectors.

Publishing advice, warnings and alerts to practitioners — we publish on our website warnings to highlight specific concerns in order to make clear the SRA's expectations and to raise standards. The SRA considers this to be a key tool in ensuring, for example, that practitioners who provide will-writing and related services are alerted to issues which may present a risk to clients. We are currently planning to publish a warning highlighting the risks of "dabbling" in areas of work where practitioners are insufficiently competent.

Analysis

1.

The SRA supports the Legal Services Board (LSB)'s proposal to expand the list of reserved legal activities to include will-writing and estate administration services. This is a necessary step to secure the public interest. Consumers of these services require the protections which only modern, targeted and proportionate regulation in the public interest can provide.

2.

The SRA has indicated that our preferred policy approach would be to move away from a system of legal services regulation based on the narrow foundation of a defined list of reserved legal activities, to one founded on a broader-based approach of the proportionate regulation of all legal activities. However, it is recognised that such fundamental reform is not capable of implementation rapidly, and that the need for the regulation of will-writing and estate administration is of sufficient priority for it to be achieved by an extension of the current basis of regulation.

3.

The SRA will work with stakeholders to develop an effective, proportionate, flexible regulatory framework for these services which will serve the interests of both consumers and the broader public. We will also continue working with stakeholders, including those currently regulated by the SRA, to assure standards. We will continue to monitor the risks presented by this market, in the context of the broader range of risks we must address, and take appropriate steps where particular risks to the achievement of the Legal Services Act 2007's regulatory objectives are identified.

4.

The SRA notes the LSB's assessment that existing legal services regulators will need to apply to be designated to regulate any new reserved activities and demonstrate that their regulation is fit for purpose. The LSB advocates this approach because it considers:

(a) regulators currently place too great a focus on controlling entry through general education and training requirements that are not targeted at the risks in this market; and

(b) there is little by way of ongoing risk based monitoring and supervision to ensure that good outcomes are being delivered to consumers.

5.

With regard to (4a): our view is that the SRA does not place too great an emphasis on this aspect of regulation, which forms part of a range of regulatory tools. The mechanisms for the training and entry of individuals to authorised status have largely pre-dated the very significant changes that have been made by the SRA to our regulatory approach over recent years. (See, for example, the key move to entity based regulation)

6.

This is why the SRA has, with other regulators, established the Legal Education and Training Review (LETR) to ensure that qualification, and requirements for ongoing training, are appropriate, risk based and outcomes focused.

7.

For the avoidance of doubt, should the SRA regulate individuals and entities undertaking only the new reserved activity of will-writing and estate administration (in addition to continuing to regulate solicitors undertaking this activity), it is not the case that relevant approved individuals in this area would be required to qualify as solicitors. It is inevitable that approval mechanisms for relevant individuals would be more precisely focused on the reserved activity to be undertaken. Similarly, it will be necessary to consider how any new arrangements impact on the scope of activity that an individual may be approved to undertake by virtue of their qualification as a solicitor.

8.

We are continuing to develop a risk framework which covers the risks to the Act's regulatory objectives, including those posed by will-writing and estate

administration. We will use this framework to direct our supervisory resource.

9.

Risk based regulation inevitably means that not all regulated entities and individuals will receive the same level of attention at any particular time, or that such attention as is devoted will be apparent to third parties. The SRA's responsibility is to focus our finite resources on those areas that, at any time, present the greatest risk to the achievement of the Act's regulatory objectives. The SRA is satisfied that, in the context of the very wide range of different individuals, firms and activities we regulate and the wide range of risks we identify, assess and monitor on a daily basis, we take appropriate action, using the whole range of the available regulatory tools, in this area. We see no reason to doubt that this would still be true were will-writing by non-solicitors to be included in our remit.

The public interest: competition and regulation

10.

In our November 2011 response [https://www.sra.org.uk/sra/consultations/consultation-responses/enhancing-consumer-protection-reducing-regulatory-restrictions/] to the LSB's consultation "Enhancing consumer protection, reducing regulatory restrictions", we set out our views concerning the roles played by competition and regulation in achieving benefits for consumers and for the ultimate public interest. The SRA concluded that, in the case of legal services, there is no dichotomy between competition and regulation and there is an overwhelmingly strong case for the regulation of all legal services within the framework provided by the Legal Services Act 2007, including the regulatory objectives, professional principles and the better regulation principles. The key task is to ensure that the nature of any regulatory intervention is targeted, appropriate and proportionate through the use of the full range of regulatory tools, and only applied where intervention is required in the public interest.

11.

Where will-writing and estate administration are concerned, it is clear that, for example, if a will is badly drawn then the original consumer who purchased the service, may never know and where the will has been obtained through an unregulated entity, the means of redress from those affected will be limited. This is particularly concerning given that there is a widespread false belief held by consumers that all legal services (including will-writing services) are currently regulated1. Will-writing, probate and estate administration services have a particular impact on the wider public interest which goes beyond the interests of the contracting consumer —

they also impact on third parties, including the beneficiaries and the testator's family.

[1]July 2011, IFF Research - consumer experiences of will writing

12.

The SRA concluded that these failings will not be resolved simply by greater competition but that what is required is effective regulatory interventions that address consumers' real problems with legal services. The SRA is capable of delivering such regulation across a wide range of legal activities, including will-writing, probate and estate administration services.

The SRA's approach to regulation

13.

Our Handbook provides the basis for the regulatory functions which the SRA undertakes in the public interest. These cover the full spectrum of regulation, including:

education, training and qualification –the SRA sets the standards for qualification, monitors organisations that provide legal training, and sets requirements for continuing professional development (CPD);

risk identification and assessment–the SRA uses risk identification and assessment to inform all our work, from the development of our regulatory arrangements through to the authorisation and supervision of individuals and entities, and enforcement action;

authorisation–the SRA approves and authorises both individuals and entities to provide legal services;

supervision–the SRA undertakes proactive, proportionate and targeted risk-based supervision of the individuals and entities we regulate; and

enforcement–the SRA takes preventive, proactive and proportionate action to mitigate unacceptable risks, including issuing fines, closing down firms and prosecuting cases at the SDT (our powers include striking a solicitor's name from the roll, ordering suspensions from practice and issuing fines).

14.

Clients, and certain third parties, who are dissatisfied with the service supplied by those regulated by the SRA may seek redress via the Legal Ombudsman.

15.

These regulatory safeguards apply to will-writing, probate and estate administration services provided by those regulated by the SRA community (both entities and individuals), and to other services which they offer.

Risks

16.

The SRA identifies, monitors and assesses emerging risks which affect clients and the general public interest across the legal services market, including will-writing, probate and estate administration services sector. We use that information to take appropriate, supervisory and enforcement action.

17.

We appreciate that the nature of certain sectors of the legal services market can mean that consumers who use those particular services may be especially vulnerable. The primary risk, which applies across the whole range of consumer-oriented legal services provision, is that of asymmetry of information. Generally, consumers are not in a strong position to assess the quality of legal services providers and of the services they receive. In addition, and specific to these services, there are potentially higher risks associated with certain (but not all) consumers who require will-writing, probate and estate administration services. Any increased vulnerability might be attributed to the nature of each client's personal circumstances - e.g. possibly suffering from illness; the elderly; or recently bereaved.

Requirements on providers

18.

Consumers seeking will-writing, probate or estate administration services from SRA-regulated firms and individuals are entitled (as are all other clients) to receive appropriate outcomes. Our framework provides the regulatory mechanisms to ensure that this happens.

19.

Our approach allows the firms and individuals we regulate, flexibility to manage the risks which relate to their practice and to each individual client. For example, SRA Principle 4 requires solicitors (and all those who work with them) to act in the best interests of each client; and Principle 5 sets down a requirement to provide a proper standard of service to their clients. This includes an expectation they will exercise competence, skill and diligence to take into account the individual needs and circumstances of each client for whom they work.

20.

Chapter 1 of our Code of Conduct contains the key requirements concerning client care. Some of these are particularly relevant to will-writing and related services. For example, there is a requirement (Outcome 1.1) that clients are treated fairly. This requirement is supported by indicative behaviour 1.9, which provides that solicitors etc. should refuse to act where a client proposes to make a gift to the solicitor or to a connected person, unless the client takes independent legal advice. A solicitor was recently fined £20,000 by the Solicitors Disciplinary Tribunal (SDT) for non-compliance.

21.

Indicative behaviour 1.28 meanwhile warns against the dangers of acting for a client when there are reasonable grounds for believing that the instructions are affected by duress or undue influence, and the need to be satisfied that the instructions represent the client's wishes. The SDT has recently banned a solicitor from practice where the solicitor had taken advantage of his clients.

22.

Chapter 7 of the Code of Conduct contains requirements concerning the management of businesses. For example, there is a requirement (Outcome 7.6) that firms train individuals working in the firm to maintain a level of competence appropriate to their work and their level of responsibility. Outcome 7.8 then requires firms to have a system for supervising clients' matters, to include the checking of the quality of work, by suitably competent and experienced people.

23.

It should be noted that solicitors (and those with whom they work) must also have regard to the public interest — for example, they are bound by the requirements of Principle 1, to uphold the rule of law and the proper administration of justice, and Principle 2, to act with integrity. These requirements may be particularly pertinent to will-writing, probate and estate administration services, e.g. ensuring that personal representatives administer an estate in accordance with the terms of a will, or in accordance with the rules on intestacy.

Clarity for consumers

24.

Research with consumers shows us that members of the public tend to believe, wrongly, that all providers of legal services are regulated. The SRA believes that all consumers of legal services should enjoy broadly equivalent protections, and that current arrangements within the will-writing sector do not achieve this outcome. For example, if the business of a currently unregulated will-writer /estate administration service provider were to fail, customers of that business would be unable to benefit from powers such as the SRA's to close down firms in an orderly way and restore documents and funds to those entitled to them.

25.

If it were determined that will-writing and estate administration services were to become reserved legal activities, the SRA is well positioned, and would welcome the opportunity, to extend our regulatory reach to those providers which are currently unregulated. We are confident that by working closely with our stakeholders we can operate a proportionate, flexible regulatory scheme for all providers of these services and, crucially, one that is firmly in the public interest.

The LSB's concerns

26.

In the consultation paper the LSB sets out various concerns regarding the capacity of existing legal services regulators for regulating will-writing and related services.

27.

We have reviewed these concerns and are confident that we currently implement coherent, evidence-based approaches to manage risks to consumers, and to the public interest, in the provision of will-writing and related services, in the context of our wider risk-based regulation of providers of legal services. The scope of our supervision and enforcement work depends on our assessment of the totality of risks identified across all regulatory activities, and the prioritisation of resources against those risks.

Our responses to the consultation questions

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

No.

Question 2: Could general consumer protections and / or other alternatives to mandatory legal services

regulation play a more significant role in protecting consumers against the identified detriments? If so, how?

The SRA considers that if consumers are to benefit from an appropriate level of protection, and the general public interest in the rule of law is to be properly secured, there is no alternative to mandatory legal services regulation. Will-writing and estate administration services should become reserved legal activities for the reasons set out above.

Question 3: Do you agree with the list of core regulatory features we believe are needed to protect consumers of will-writing, probate and estate administration services? Do you think that any of the features are not required on a mandatory basis or that additional features are necessary?

The SRA agrees that existing regulation is not effectively preventing consumer detriment in this market and welcomes the LSB list as a step to addressing this. We believe that we possess the necessary experience and expertise to continue to act as regulator for those we currently regulate in this market, and we have the capability to extend our reach to the currently unregulated sector.

We will continue to work with stakeholders to assure standards — for example by refining our approach to risk assessment and authorisation, supervision and enforcement activities. The SRA's regulatory approach already reflects the four components mentioned in paragraph 122 of the consultation paper, and is outcomes-driven. We assess risk when we determine our priorities, our supervision activities with entities and individuals who work in them, and through our compliance and enforcement approach, where we address (where appropriate) non-compliance and make use of credible deterrents.

The SRA believes that all such features of our regulatory regime are essential components of any regulatory framework for legal services which is fit for purpose, and would enable a regulator to comply with the Legal Services Act's regulatory objectives.

Question 4: Do you believe that a fit and proper person test should be required for individuals within an authorised provider that is named as executor or attorney on behalf of an organisation administering an estate?

We support this proposal. It is an essential public protection that all persons involved in the provision of these legal services are suitable to do so.

Question 5: What combination of financial protection tools do you believe would proportionately protect

consumers in these markets and why? Do you think that mechanisms for holding client money away from individual firms could be developed and if so how?

We strongly support the LSB's proposal that the regulatory arrangements should ensure there are appropriate financial protections against detriments identified in the markets for will-writing, probate and estate administration services. We agree that protections should minimise the risk of clients' money being lost or misused by the provider, and that they must ensure that recompense is available when a client suffers financial detriment because of poor quality work, dishonesty or theft by the provider.

The SRA also agrees that approved regulators' arrangements should be proportionate to the risks, and that they should be necessary, so as to avoid, for example, acting as an unnecessary barrier to entry to the market. The SRA is mindful of - and supports - the obligations set out in the Legal Services Act in this respect (the regulatory objectives and the principles of better regulation)

The SRA agrees that the key risks/detriments could include: misuse of client money (including theft) by providers; insolvency of providers; poor quality work and poor service. The SRA also considers a failure to apply an ethical approach to the service to be a key risk.

In terms of the specific areas of interest highlighted by the LSB:

Clients acknowledging level of risk - No service can be entirely risk-free and one of the key purposes of regulation is to protect the interests of clients, especially where the client may be vulnerable. Proper public protections are particularly important when reserved legal services are to be supplied. Many clients who need wills and estate administration services are vulnerable. Vulnerable, clients are not best equipped to be able to assess levels of risk and should not be asked to do so, if this would result in a diminution of the protections to which they would ordinarily be entitled

Appropriate systems and procedures to safeguard other consumers' money — the SRA agrees that, as is the case with those we currently regulate, all providers of reserved legal services should be required to separate client money from the service provider's money. Regulators should have properly enforceable powers to intervene in a business and return funds to clients upon, e.g. insolvency of the service provider; and that appropriate guidance should be issued by regulators concerning factors such as the payment of interest. The SRA also considers that all service providers should be subject to appropriate principles requiring ethical behaviour.

Professional indemnity insurance (PII) — the SRA strongly supports a requirement that all service providers (like our currently regulated

community) should be subject to appropriate PII cover, including run-off cover.

Compensation arrangements - We consider that all clients should be able to benefit from adequate compensation arrangements regardless of the nature of the service provider. The precise nature of any scheme may vary depending on the circumstances, but the existence of an adequate compensation scheme is a key component of any regulatory scheme aimed at protecting clients' interests.

Financial institutions taking responsibility for safe-keeping consumer funds — the SRA is currently examining a range of possible mechanisms for holding client money away from individual firms in the context of our ongoing review of conveyancing services. This includes examining the practices which have been adopted in certain overseas jurisdictions. Once the SRA has completed this work and has evaluated the possible range of options, including the relevant risks each option presents, we will be able to form a view as to which option might be appropriate for conveyancing services. We will also be able to assess whether a particular option (or a modification of it) might also be appropriate for firms which offer will-writing, probate and estate administration services.

Question 6: Do you agree that education and training requirements should be tailored to the work undertaken and risks presented by different providers and if so how do you think that could this work in practice?

We agree that education and training requirements should be tailored to the work undertaken and to the risks presented by different providers. We have asked the Legal Education and Training Review to examine this issue and identify recommendations.

Question 7: Do you agree with the activities that we propose should be reserved legal activities? Do you think that [there should be] separate reviews of the regulation of legal activities relating to powers of attorney and/ or trusts?

The SRA agrees that the proposed activities should be reserved legal activities. It will, however, be essential that there is clarity as to the scope of these services.

There are considerable risks concerning the provision of services relating to powers of attorney and trusts, and we consider that it is firmly within the public interest that these services should also become reserved legal activities.

Question 8: Do you agree with our proposed approach for regulation in relation to "do-it-yourself" tools and

tools used by providers to deliver their services? If not, what approach do you think should be taken and why?

We support the proposed approach.

Question 9: Do you envisage any specific issues relating to regulatory overlap and / or regulatory conflict if will-writing and estate administration were made reserved activities? What suggestions do you have to overcome these issues?

We do not believe there are any insurmountable difficulties at play here. The SRA can build on our experience of regulating legal disciplinary practices and ABSs, and would call on the collaborative working relationships we have with other regulators and agencies, which are supported by appropriate memoranda of understanding.

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

It is crucial that there is clarity around the issue of whether a consumer benefits from legal professional privilege in any given circumstance. The SRA believes that clients receiving services from all authorised persons should benefit in this way as wills can be disputed and there would be a significant impact on the consumer were this not to be the case.

Question 11: Do you have any comments on our draft impact assessment, published alongside this document, and in particular the likely impact on affected providers?

We have no specific comments.