

Enhancing consumer protection, reducing regulatory restrictions

The Society of Trust and Estate Practitioners (STEP) is the worldwide professional body for practitioners in the fields of trusts and estates, executorship, administration and related issues. STEP members help families secure their financial future and protect the interests of vulnerable relatives. STEP promotes the highest professional standards through education and training leading to widely recognised and respected professional qualifications. STEP internationally has almost 17,000 members, with over 6,500 members in the UK. Over 4,500 students worldwide are currently studying for STEP qualifications and in the UK STEP supports an extensive regional network providing training and professional development.

STEP is pleased to be given the opportunity to comment on the discussion document “Enhancing consumer protection, reducing regulatory restrictions”. STEP supports the broad approach to regulatory issues adopted in the report. We agree that the current pattern of reserved and unreserved work is unsatisfactory and needs recalibrating as the legal services market develops and evolves. We also agree that reservation as currently employed runs the risk of creating professional monopolies that do not best serve consumer interests.

We believe, however, that regulatory strategy in legal services also needs to address the issues that are likely to emerge with increasing frequency where the provision of legal services of various forms overlaps with the provision of professional services in other regulated areas. As the legal services market changes it will be important to ensure that the regulatory regimes in different, but adjacent, markets for professional services neither construct artificial barriers to the provision of professional services in ways that best suit consumer needs nor leave regulatory gaps which leave consumers unprotected. While we recognise that this is not an issue the Legal Services Board can address in isolation from other regulatory supervisors, it should be recognised that this issue is becoming increasingly urgent. The need for action both reflects the likely emergence of ABSs in the legal services market, potentially offering consumers a wide range of professional services ‘under one roof’, and also the regulatory changes being introduced elsewhere. Of particular relevance are the changes in the regulatory structures surrounding financial advice being introduced via the FSA’s Retail Distribution Review and the changes HMRC are currently consulting on regarding the possible regulation of tax agents.

We give below our detailed answers to the specific questions in the discussion document.

Question 1: What are your views on the three themes that we have put at the core of our vision for the legal services market? If different, what themes do you believe should be at the core of our vision?

The three themes identified as being at the core of your vision of the legal services market – i.e. that consumer protection should be appropriate to the particular market, that regulatory obligations should be set at the minimum level to be effective and that regulation should follow better regulation principles – represent a useful framework for considering the regulation of the legal services market.

The acknowledgement that consumer protection and redress should be appropriate for the particular market under consideration is particularly welcome. There may well be areas where setting the regulatory bar too high may result in consumer detriment by raising costs to the point where consumers of more modest means do not have access to regulated legal advice, a consideration that reinforces the conclusion that regulatory obligations should be at a minimum level to deliver the regulatory objectives. Within the principles of better regulation the need for proportionality is clearly an important issue. Going forward, however, it seems likely that in the legal services context targeting of regulatory initiatives will be an important issue both in terms of identifying problems areas in an increasingly fluid market and devising effective remedies that have minimal unintended consequences

Question 2: What is your opinion of our view that the purpose of regulation is to ensure appropriate protections and redress are in place and above this there are real competitive and cultural pressures for legal services to deliver the highest possible standards with a range of options for consumers at different prices? If different, what do you consider that the role of regulation should be?

It is important that competitive pressures be allowed to deliver to consumers a range of options in terms of service, costs and delivery mechanisms within a regulated market structure that ensures standards that consumers can rely upon for competence and good business practice. To deliver that objective, regulatory structures will need to be regularly reviewed to ensure that they remain fit for purpose as the legal services market evolves and that regulatory barriers are not blocking market innovations that might deliver net gains to consumers.

Question 3: In light of the changing market do you think that specific action may be needed to ensure that more legal services activity can unequivocally be included within the remit of the Legal Ombudsman and, if so, how can this best be achieved?

The right to redress via the Legal Ombudsman can be an important ‘backstop’ solution for consumers who have suffered harm. Extending the Ombudsman scheme in isolation is unlikely, however, to represent an effective response to the issues currently surfacing in the legal services market. Without some form of reservation, widening the remit of the Ombudsman would not in our view be sufficient to ensure that consumers could be confident they were dealing with a competent advisor committed to professional standards with robust procedures regarding, for example, retention of records and adequate indemnity insurance. Moreover in some key markets,

such as will writing, serious damage may occur long before anyone is in a position to make a complaint and the Ombudsman may in reality have little power to resolve the difficulties created by a wrongly drafted will.

It has been suggested that members of some of the various professional bodies operating in currently unreserved areas might voluntarily opt in to the Ombudsman scheme. This may be a useful development, but it remains to be tested how well consumers would recognise the additional protections this offered them. It is therefore questionable whether, without further regulatory intervention, extending the Ombudsman's remit in isolation would produce a significant shift in the market away from those operating in these markets without membership of any recognised professional bodies.

Question 4: What are your views of our diagnosis of the weakness of the existing system and the problems within it?

We agree with the Legal Services Board's conclusion that the existing system is poorly understood by consumers. This may be deterring many consumers from accessing legal services at all or resulting in consumers accessing legal services in ways that are sub-optimal. Not only are professional qualifications often poorly understood, but there are also difficulties in shopping around in a market where consumers find it difficult both to assess quality and hard to establish in advance likely costs.

There is also a risk of consumer confusion being compounded by a growing pattern of cross-selling of financial services and legal services of various forms. There are numerous precedents in other areas (most prominently, recently, payment protection insurance) suggesting that consumers need particularly strong protections when a poorly understood product is sold as an incidental when purchasing another product. Thus, for example, the growing indication that products such as wills, powers of attorney, etc., are being widely marketed and sold as part of a 'general review' of a client's financial situation should be an area of particular concern to regulators and closely monitored.

Question 5: What do you see as the benefits and downsides of regulating through protected title such as solicitor and barrister?

Many consumers, particularly among those groups who currently rarely access legal services, are likely to have a poor understanding of exactly what titles such as 'solicitor' and 'barrister' mean and what reassurance can be safely drawn from dealing with someone with one of these titles. In part this reflects the incoherence of the current regulatory arrangements - most consumers, for example, would be unlikely to know that only a solicitor can undertake probate work but that will writing and estate administration can be undertaken by anyone. Another issue, however, is that current titles are not well suited to consumer needs - a solicitor with long experience in the property market but no experience of mental capacity issues may be ideal for a consumer looking to move house but not necessarily well qualified to give the best advice to someone concerned about securing long term protection and financial security for their severely handicapped child.

There is therefore a strong case for moving towards activity based regulation of individuals and entities, but this need not necessarily imply a separate regulator for each area of activity. It is easy to envisage a situation in which a general legal services regulator grants a licence to an individual to practice in only a limited area and that this designated area of operation becomes as important for consumers as any other professional descriptors e.g. the public begin look for “solicitor, wills & estates”, as distinct to “solicitor, property”. This would not in any way devalue the worth of general solicitors or other legal practitioners as long as there was a clear understanding as to when an issue would need to be passed on to someone with more specialist knowledge.

Question 6: What are your views on whether there should be a consistent approach to the allocation of title to authorised persons? What are your views on whether the title should be linked directly to the activities that a person is authorised to undertake or linked to the principal approved regulator that authorises them?

As we indicated in our response to Question 5, the most important function of any title given to an authorised person should be to give a clear indication to consumers of the level of competence of an individual and their specialisation, if any. In these circumstances it is clearly desirable that individuals supervised by differing regulators but broadly qualified to similar levels and specialising in similar areas have the same or similar titles. Regulated persons should, however, also be required to prominently display which approved regulator authorises them.

Question 7: What are your views on our proposal that areas should be examined “case-by-case”, using will-writing as a live case study, rather than through a general recasting of the boundaries of regulation? If you disagree, what form should a more general approach take?

While the “case-by-case” approach is a sensible and proportionate initial strategy to the assessment of appropriate regulatory boundaries in the legal services market, it may well be that at some point a more general review of regulatory boundaries will become appropriate. Two issues may warrant such a general review. First, the pace of change in the legal services market could accelerate further, creating severe challenges for a basic regulatory structure that was constructed in very different circumstances. Second, the research base established in case-by-case studies could identify features of broad applicability which raise the risk of consumer detriment and require more wholesale changes. Indeed it might well be helpful to commit at this stage to examining the case for a more general review in, for example, five years’ time to assess how ABSs and other developments have shaped the market and the implications for regulatory boundaries.

Question 8: What are your views on our proposed stages for assessing if regulation is needed, and if it is, what regulatory interventions are required?

We have some concern that the approach outlined to assessing if regulation is needed may be much more effective in widening the regulatory net in legal services than deciding that some areas can be removed from the regulatory net or regulated with a lighter touch than is currently the case. Areas where poor practice is producing unduly high levels of consumer complaints will no doubt be brought to the Legal Services Board’s attention by various bodies. Areas where

regulation is having the effect of unduly limiting the market may however, produce relatively few complaints while producing significant consumer detriment by effectively denying consumers access to legal services at reasonable cost. Comparison with legal services developments in other jurisdictions could therefore play a valuable role in indicating areas that could potentially be safely opened up to greater competition or lighter regulation.

As we have noted earlier, we also feel that as the market in broader professional services – legal, tax, accountancy and financial – develops and possibly converges, there may be a strong case for proactively examining, perhaps in conjunction with other relevant regulators, if regulatory structures in particular areas remain optimal.

Question 9: What are your views on the implications of our approach for professional privilege?

The issue of professional privilege is a complex one. The importance of privilege and impact it has on competitive positions in the marketplace will vary from market segment to market segment within the broader legal services market and we think a case-by-case approach is appropriate on this issue.

Question 10: Do you believe that any of the current reserved legal activities are in need of review? If so, which activities do you think should be reviewed and why?

STEP has not undertaken any formal work in this area and has no evidence to offer at this stage.

Question 11: What are your views on our analysis of the regulatory menu and how it can be used?

While in principle there is a strong case to support the Legal Services Board's stated preference for non-statutory options as opposed to statutory regulation, in practice many segments of the legal services markets are characterised by a large number of relatively small scale businesses and in reality statutory regulation is the only way of delivering effective control. In particular, as the example of will writing demonstrates, voluntary codes from various professional bodies can only have a limited effect in an environment where there is no statutory bar to anyone setting up a business that is not subject to such codes.

Looking at the sorts of regulatory tools that it might be appropriate to employ, in the majority of cases where consumers use legal services the issue is sufficiently important to them to warrant a general presumption that there should be a strong emphasis on preventative tools ensuring that providers are competent and committed to maintaining specified standards. In the case of will writing, for example, while the fees paid for the writing of a will are often relatively modest, the consequences of a mistake need to be measured not just in financial terms but also in terms of a human cost to families which can be enormous. We would also note that wills, like most areas of legal services, are not a 'product' that many people purchase regularly so it is difficult for a consumer to learn from experience regarding the quality of a provider. Finally, strong preventative regulation would play a key role in building confidence among those who currently underuse legal services.

We agree, however, that there is need to avoid a regulatory menu that is so expensive to implement that it risks the effective creation of professional monopolies. This highlights the importance of developing optimal standards for applicants for approved regulatory status that balance the need to protect consumers against the risk of excessive regulatory costs deterring entrants to the market. It also highlights the need for the Legal Services Board to ensure that it has a strategy in place to ensure that the fixed costs of regulation do not impede diversity of delivery in the market place. As the Smedley report highlighted, there is a danger that the legal services market could see a very limited number of major regulators focused on the established players within the legal services market alongside a plethora of small, possibly sub-scale and unsustainable, regulators focused on market niches and new market entrants. One solution would be to ensure that regulators recognise a range of professional qualifications where these are of provably equivalent standards and do not impose restrictions on forms of business model unless these provably risk consumer detriment.

Question 12: Do you have any comments on our thoughts on other areas that might be reviewed in the period 2012-15, including proposed additions or deletions, and suggestions on relative priority?

As we noted earlier, consideration should be given to how legal services regulation interfaces with regulation (or the lack of it) in adjacent areas to legal services such as financial advice and tax advice. We would also suggest that the Legal Services Board should commit to a broad review at some point in the future of the working of the legal services market in the wake of the development of ABSs and other regulatory innovations.

Question 13: Do you have any comments on the approach that we have adopted for reviewing the regulation of will-writing, probate and estate administration?

STEP broadly welcomes the approach the Legal Services Board has adopted to reviewing the case for regulation of will-writing and related areas. In many respects, however, the most challenging aspects of the process lie ahead as a model for optimal regulatory arrangements is developed which both protects consumers and, very possibly, moves a currently unregulated market onto a regulated basis. Achieving this with minimal market disruption will require careful planning and effective communication with a wide range of market participants.