

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

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 over 17,500 members, with more than 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: will-writing, probate and estate administration activities”. As we have noted in our responses to previous consultations in this area, STEP supports the LSB’s broad conclusion that action is needed to protect consumers in the will-writing, probate and estate administration areas. STEP also supports both the focus on an outcomes based approach in designing regulatory structures in this area and the intention to establish structures which focus on authorisation and regulation by activity.

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

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?

We agree that it is sensible to extend regulation to will writing, probate and estate administration. We also agree that the activities of probate and estate administration are closely enough linked both in the minds of most consumers and in the business models of many service providers that regulators should be required to have a single set of regulatory arrangements to cover both activities.

In terms of the various scenarios provided, it is clearly desirable that consumers should be free to act for themselves if they wish and we would also acknowledge the importance of those who provide free advice to others. STEP is therefore supportive of the principle of only bringing those who are acting in expectation of fee, gain or reward.

Potentially more problematic is the issue of regulation only extending to the actual writing of a will or the administration of an estate rather than the provision of advice on these two issues. It is easy to envisage circumstances in which unscrupulous service providers avoid regulation by providing extremely detailed 'advice' and instructions to the client so that the client appears to be the actual will writer or estate administrator. Assessing the correct regulatory boundaries in these circumstances is clearly difficult and we would suggest that this issue is one that should be kept under active review by both the LSB and regulators as the new arrangements come into place.

Assessing the likely impacts of the new arrangements is extremely difficult at this stage given the lack of any solid detail about how the new regulatory structures will work. The commitment to ensure that all bodies, including existing approved regulators, will have to demonstrate that their arrangements are fit for purpose specifically in relation to will writing, probate and estate administration is welcome. However, we are disappointed that more work has not been done at this stage on addressing the issue of potential regulatory overlap for participants in these markets. As we noted in our response to the previous consultation, regulatory overlap is unlikely to be an insuperable problem but it is essential that careful thought is given to how reputable providers of will writing and estate administration services from non-traditional law firm environments such as financial services and accountancy will fit into any new regulatory regime.

We note the Consultation comments that it will be for each regulator to address the problem of regulatory overlap. Our concern would be that in practice this will result in potential service providers having insufficient details to assess the implications for their businesses until late into the transition to the new regulatory regime. This in turn makes it very difficult to make any serious advance assessment of the overall impact of the scope of the current proposals on the market and the provision of advice in these areas.

For traditional and non-traditional legal services providers alike a key issue is likely to be the extent to which any separate regulatory environment for will writing, probate and administration will in practice require them to set up separate legal entities to conduct will writing, probate and estate administration services. The Consultation appears to suggest (paragraph 31) that service providers will indeed probably be required to set up "ring fenced" operations of some form. For a small solicitor or accountancy practice, or financial adviser operating under FSA regulation, with possibly only a single practitioner specialising in estate administration, this could clearly pose significant practical difficulties. It is therefore essential to explore at an early stage if common systems using existing regulatory requirements in areas such as compensation arrangements and indemnification arrangements could be agreed.

Question 2: What are your views on the options for implementation that we have described?

STEP strongly supports the view that it is essential to ensure that existing reputable providers of will writing and estate administration services are not locked out of the market when the new regulatory regime is implemented by a lack of a suitable regulatory authority. We thus welcome the commitment to ensure that reservation will only take practical effect when there is an approved regulator in place with arrangements that allow the authorisation of the different providers currently active within the market and sufficient

numbers of service providers from a range of backgrounds have been authorised to ensure the continued smooth functioning of the market.

We note the indicative timetable for new regulation to be achieved of two years after a recommendation to the Lord Chancellor. This may well be optimistic given the slow pace of practical change in legal regulation to date and the need noted above to ensure that, in an area where there are very large numbers of practitioners who are likely to be already regulated in some form or another by other regulators, the varying regulatory regimes relate to each other in an effective and efficient manner. Given the uncertainties here we agree that Options 1 and 2 described in paragraphs 64 and 65 of the Consultation document are the preferable alternatives and accept the LSB's conclusion that Option 2 will provide a more efficient mechanism for implementing regulatory change.

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?

Others are better qualified than STEP to comment in detail on Annex 2. We believe, however, that there will be a need to define "estate administration" alongside "will writing" and "probate". We would also note that the extension of legal privilege to those who may come from a non-traditional legal services background has, in other contexts, proved controversial. In addition it should be borne in mind that, with regard to tax issues, Annex 2 refers to "will writers" but it is estate administration that is the more relevant activity in this context.

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)?

See our responses to question 3.

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?

STEP does not rule out seeking to become an approved regulator but clearly the most significant challenge for any potential regulator will be implementing a full and relatively onerous regulatory framework in a way that is economically sustainable and does not limit access to professional services by driving up costs to levels which consumers find unaffordable. Our preferred approach is therefore a collaborative approach with other prospective regulators.

Whether singly or in conjunction with others, however, a further challenge for regulators will be to inform practitioners of the new regulatory structures and help them prepare for the new environment. Those practitioners who have been previously unregulated could need particular assistance in this context and might find the two year timetable alluded to in paragraph 63 demanding.

All regulators and regulated business will also have to tackle the issue of consumer education regarding the new system and the promotion of the benefits it should bring to consumers. We support the LSB's approach of focusing on activities rather professional titles, but without consistency across the broad will

writing, probate and estate management sector there is clearly a risk that consumers will be confused as to how to judge if practitioners are knowledgeable and well qualified to offer the services they need.

Finally we would note that many of the regulatory objectives drafted by the LSB are, inevitably, extremely broad. Assessing the appropriate weight to apply to such broad objectives as, for example, “increasing public understanding of the citizen’s legal right and duties” may be constitute a difficult judgement for regulators primarily focused on a relatively narrow element of the broader legal landscape.

Question 6: Do you agree that having mandatory regulation for all firms in the market will improve consumer confidence?

Yes, subject to the caveat we raised in our response to question 5 regarding the need to inform consumers of the new regulatory environment, the new protections it provides and what they should look for when choosing a regulated service provider.

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?

With over 50% of those dying in England & Wales still failing to make a will, STEP would hope that one benefit of the proposed reservation will be reinforced consumer confidence and therefore greater demand for professional will writing services. We would also hope to see a greater focus among service providers on training and competence.

Some service providers, particularly currently unregulated providers, will probably face some increase in costs. But the scale and impact of those cost increases is difficult to predict without greater detail on how businesses will need to re-configure themselves to fit the new regulatory environment. For example, paragraph 31 of the Consultation Document seems to suggest that where providers offer a range of services beyond will writing, probate and estate administration, it is envisaged that they will establish a ring-fenced subsidiary to conduct will writing, probate and estate administration. For some, such as many solicitor providers, such ring fencing might well permit lower overall regulatory costs going forward, but for many non-solicitor providers, particular those currently part of another (non-legal services) regulatory regime, the costs of setting up a ring fenced operation to cover will writing, probate and estate administration could be significant and, particularly for smaller organisations, imply considerable practical difficulties.

Question 8: We are keen to understand the potential impacts of our proposals on equalities. Do you envisage and 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?

We are not aware of any evidence on this issue.

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?

A well regulated environment for will writing, probate and estate administration should provide much stronger protections for vulnerable consumers. The only increase in risk in this area will come if regulatory costs are such that the cost of accessing such services rises to levels which exclude those on modest incomes from the market place.

STEP

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