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Dear Crispin,

Executive working paper on will-writing, estate administration and probate

Thank you for sharing the LSB's latest thinking on the justification for reservation of will-writing, estate administration and probate. I hope it will be helpful to set out the Panel's latest views having read your working paper.

Will-writing
The Panel is pleased that the executive's view continues to be that the case for reserving will-writing 'remains very strong'. We have previously set out the reasons for this course of action at some length and do not repeat them here, except to note the strong support for regulation across a wide range of stakeholders.

Estate administration
The Panel's view is that the consumer case for reserving estate administration also remains very strong. We set out the reasons for this in our March 2012 paper and we continue to stand by our analysis. Below, we respond to some of the key points in the working paper which have led the LSB to depart from its original analysis.

The small market share among unregulated estate administration companies appears to be a key factor in the LSB's current thinking. This was also a factor in the Panel's original analysis, but we consider reservation remains justified since:

- In considering the risk of detriment, the LSB must consider the severity of detriment to individual consumers as well as the overall scale of detriment. This is a high cost service – the mean cost is £1,700 while 18% of work costs over £3,000. Of course, fraud can cost the beneficiaries vast sums of money. As well as financial detriment, the high emotional impact – stress, ill health and fractured personal relationships – should be an important consideration. Another factor is the multiple individuals who may suffer detriment due to the actions of a single provider – the beneficiaries can exert little control over the situation to manage the risks they face
- A consequence of removing the separate business rule for solicitors – a change that the LSB seems determined to effect despite the risks to consumers – could be a significant expansion of the unregulated market. This is because a logical step for

solicitor firms would be to place estate administration (and other non-reserved) work into a separate business and thus outside the scope of regulation
- Our evidence increasingly suggests that being regulated helps businesses to compete with solicitor firms as consumers see legal work as high risk and wish only to deal with providers that offer the protection of regulation. Therefore, reserving estate administration could actually widen the diversity of suppliers as well as meeting the demands of solicitors for a more level playing field. Our evidence also suggests that competition is not working effectively despite the absence of regulation, e.g. just 11% of consumers shop around for estate administration work despite an apparent wide distribution of fees; some solicitors charge an hourly rate in addition to a percentage of the estate, thus removing all risk of unpaid additional work should the matter take longer to complete than expected
- We are unconvinced that the regulators of financial services businesses and accountants will prioritise the estate administration activities of their members given this represents a relatively small proportion of their total activities. This also raises issues around avoiding consumer confusion, especially given assumptions about existing regulation – a consistent approach based around the activity, rather than the professional background of the individual, would aid consumer understanding (even if estate administration was not reserved, authorised persons would still be regulated at the very least through the Legal Ombudsman's jurisdiction)

A second factor in the LSB's thinking is that it has found significantly less evidence of detriment in estate administration than will-writing. The Panel has previously acknowledged this, but we would make the following points in response:

- The amount of fraud – perhaps the main justification for reservation – is unknown because data is not collected by the authorities. This is very different from there being hard evidence of minimal incidence of fraud. Everyone agrees that inherent characteristics of the market mean there is a high risk of fraud, plus there is data suggesting non-trivial incidence of probate fraud among solicitors
- Levels of consumer detriment due to shortfalls in service are quantified based on Legal Ombudsman complaints data and survey evidence. The YouGov survey suggests that only 68% of consumers are satisfied with the service they received. Satisfaction levels for providers other than solicitors is even less at 58%
- The nature of the estate administration market means that definitive evidence of consumer detriment will always be hard to come by – the LSB has to make its best judgement based on the available evidence, but must also be careful not to draw false conclusions based on the absence of existing evidence

A third set of factors in the LSB's thinking are that regulation may be ineffective in managing vulnerability to fraud, the costs of regulation and the increased chances of success for self-regulation in estate administration compared to will-writing. However, we would make the following points in response:

- Background checks on new entrants may help to mitigate the risks of fraud, but we agree that fraud is difficult to prevent given the nature of the process. Nevertheless, the main justification for reservation is the availability of redress for victims of fraud through access to compensation funds or similar arrangements

- The difficulties faced by small trade associations in establishing compensation arrangements are acknowledged. However, this in part reflects the rather fragmented membership base of those organisations who may wish to become approved regulators. There is the real prospect that existing approved regulators could widen their membership to currently unregulated providers, which would enable the entire regulated community to share the costs in a more sustainable way. In addition, regulators are actively exploring alternatives to current financial protection regimes which do not involve firms directly holding client money, thus reducing the risks of fraud and hence the costs of managing these risks
- The costs of financial protection will be passed on to consumers. Whilst it is in the interests of consumers to minimise such costs, the Panel's forthcoming research on risk, and the emerging findings of the Opinion Leader Research contingent valuation study commissioned by the LSB, suggest that consumers much value compensation schemes and are willing to pay what is necessary for this protection. Moreover, in this case the costs of regulation are spread across the beneficiaries and are deducted from the value of the estate – therefore, they are less directly felt and more widely distributed than in other types of legal work
- The absence of any trade association in this sector means the Panel does not share the LSB's confidence in the prospects of success for self-regulation. We also remain of the view that the likely beneficial impact of other alternatives to regulation – consumer education and enforcement of general consumer law – is limited

Finally, the paper argues that the impact of reserving will-writing (should this happen) would act as a brake on consumer detriment in estate administration because will-writing and will storage is often the gateway for accessing clients for estate administration services, thus unscrupulous providers would be excluded. Whilst recognising this argument has some force, we would comment that:

- This does not help lay executors who seek professional help from unregulated providers after the death (i.e. the provider is not named in the will). As consumer education messages generally advise consumers not to name professional executors in their will, numbers of people in this situation are likely to increase
- There is great scope for consumer confusion if will-writing is regulated but estate administration is not, especially given the close linkages between the two activities, as our research indicates that consumers expect all legal work to be regulated. We note here that removal of the separate business rule would add to this confusion as a provider could be regulated when preparing a person's will, but not when administering their estate (except they would fall within the Legal Ombudsman's jurisdiction as Section 128 of the Act means all authorised persons are within scope whether or not the act or omission relates to a reserved activity)

Probate

The Panel has not had the opportunity to consider the benefits and drawbacks of de-regulating probate, but we agree that the implications of such a step need to be fully considered before making such a recommendation. We note that the LSB would need to consider both founding and opposing a grant of probate, i.e. the current reservation involves both contentious and non-contentious work and thus overlaps with litigation and rights of audience (reserved activities). However, the narrow scope of the existing probate reservation remains unsatisfactory – for the

reasons of fragmentation and confusion identified in the paper – so this is an issue which should be addressed, in an evidence-based way, in the near future.

Range of options for estate administration (including probate)
The Panel's clear preference is Option 3 – reservation without exemptions – for the reasons set out in our earlier submissions and this letter.

We agree that Option 2 – reservation exempting providers regulated in other sectors – is unattractive as we are unconvinced that other regulators will make this a priority for their supervision work. The LSB's procedures for authorising approved regulators should mean that providers will only be subject to regulation which is proportionate to the risks.

Should the LSB proceed with Option 1 – non-statutory option – we would call on the Board to pursue the following steps in relation to estate administration:

- The option of reservation should not be closed off; a formal request should be made to the relevant authorities to record incidence of probate fraud
- Work with the Legal Ombudsman on an accelerated timetable to establish the voluntary jurisdiction built into the Legal Services Act
- Actively to facilitate a self-regulatory infrastructure rather than hope this emerges of its own accord, using its powers under Section 163 of the Act to 'enter into arrangements with any person under which the Board is to provide assistance for the purpose of improving standards of service and promoting best practice in connection with the carrying on of any legal activity'
- Consider the other proposals for non-statutory measures identified in the Panel's March 2012 submission, including fraud prevention, consumer education, policy on renouncing executorships and simplification of the probate application process. Often this would involve leadership by others, rather than the LSB's own resources

I hope these comments are helpful and look forward to learning the Board's final conclusions on these issues following its January meeting.

Yours sincerely

Elisabeth Davies
Chair