

Protecting consumers of will-writing, probate and estate administration services: Workshop hosted by the Legal Services Board - 19 October 2011

Attendees:

Chair: Alex Roy (*Legal Services Board*)

Presentation: Chris Handford (*Legal Services Board*)

Delegates: Alison Robinson (*Legal Ombudsman*) Amy McCann (*Law Society*) Andrew Barnes (*PALS*) Arjun Singh-Muchelle (*British Bankers' Association*) Ian Watson & Gemma Burnett (*ILEX Professional Standards*) Brian McMillan & Nick Honeyman Brown (*Society of Will Writers*) Dafydd Evans (*Financial Ombudsman*) Felicity Banks & Imelda Moffat (*Institute of Chartered Accountants in England and Wales*) Gus Ghataura (*ILEX Professional Standards*) Ian Barton (*Association of Corporate Trustees*) Ian Waters (*Association of Chartered Certified Accountants*) Jennifer Margrave (*Solicitors for the Elderly*) Mark Pratt (*Office of Fair Trading*) Mike Tester (*Ministry of Justice*) Paul Sharpe (*Institute of Professional Willwriters*) Richard Moorhead (*Cardiff Law School*) Richard Silver (*Solicitors Regulation Authority*) Scott Devine (*Society of Trust and Estate Practitioners*) Steve Brooker (*Legal Services Consumer Panel*) Susan Marks (*Citizens Advice*) Susanne Levy (*Remember a Charity*) Victoria Swan (*Council for Licensed Conveyancers*)

Purpose:

- To bring together and learn from a range of organisations with different interests, expertise, experience and viewpoints relating to the provision of will-writing, probate and estate administration services. Including groups representing consumers, different types of provider, regulators, ombudsman schemes, third sector organisations and academics.
- To provide an update on the LSB's formal investigation into whether changes need to be made to the scope and nature of legal services regulation for activities relating to will-writing, probate and estate administration. The update covered the following areas:
 - LSB approach to reviewing regulation and the importance of evidence
 - Problems identified so far
 - Initial analysis of possible causes
 - The range of possible solutions
 - The need to build a clearer picture of who is active in the market, doing what work and the regulatory obligations / protections that are already in place
- To provide an opportunity for discussion and knowledge sharing to develop the LSB's work going forward.
- To encourage organisations to respond to the LSB's call for evidence taking into account the framing provided in the LSB update presentation and the workshop discussions.

Workshop structure:

Delegates split into two break-out groups for the workshops. Discussions were kept fluid but were built around the following topics:

1. Identifying problems

- Consumer problems – groupings, frequency and causes
- When and how are problems spotted
- What are the impacts
- Finding evidence
- Can negative impacts be put right?

2. Considering protections

- What are the answers?
- What protections are already there and are they effective?
- What else is needed – regulatory protection and what sort?
- Pros, cons and costs
- Defining the activities that may need regulation or deregulation

Summary:

The LSB presentation of problems and potential consumer detriment was comprehensive. Drawing and evidencing an accepted picture of the frequency, impact and causes is much more difficult – especially for probate and estate administration services as a mystery shopping exercise cannot be undertaken in the same way as was done for will-writing. Grouping problems is not straightforward. Consumers undergo a complete experience and can be subject to numerous problems along the way. They do not necessarily see lines between different stages, different activities and different parties in the process. A particular feature of this market is that the person who suffers is often not the person that originally bought the service.

The importance of building up as full a picture as possible of the consumer experience from start to finish was highlighted. However, obtaining hard data on problems relating to probate and estate administration was thought to be particularly difficult as many problems are either never discovered or are put right informally without generating a formal record (with serious fraud or theft following which the offending provider disappears is an obvious exception). It is beneficiaries that sign off estate accounts with no further checks. It was agreed that consumer surveys and complaints data analysis was necessary especially given barriers to undertaking mystery shopping. There were mixed views about whether decisions around regulation should be made based on the potential for detriment, consumer case studies and consumer expectations if hard evidence of systemic and frequent actual detriment was not forthcoming.

It was reported that probate and estate administration is about process and requires good administration skills; although many highlighted that specialist knowledge may be required in certain circumstances. Problems often relate to customer service. The lack of protections around handling client money (although some emphasised that this will not stop an intent thief) is seen as a primary concern.

There were mixed views about the need for legal services specific regulation and of what activities. Many believed that there should be a whole service safety net for consumers but there was no agreed view of what that should look like. Common views were that as a minimum there might be:

- Gateway checks on providers past conduct
- A mandatory license and ability to strike off bad practitioners

- Some method of protecting against sloppiness
- Redress mechanisms when things go wrong were
- Continuity arrangements in case businesses close

It was acknowledged that protections exist outside of legal services regulation and that building a clearer picture of who is active in the market, doing what work and the obligations / protections that are already in place was important. Trade associations and regulators across all sectors active in these markets were encouraged to provide information to assist with this (see slides 8, 21 and 22). This is to include information to help determine how regulation works in practice and whether it is effective. It was widely acknowledged that if regulation is to serve a purpose it must be effective. The need to raise regulatory standards where it does exist was a common theme across discussions.

It was also stressed that consumers should not be expected to navigate different regimes themselves.

Other views put forward included:

- The likely rise in on-line provision of legal services in the near future will provide further regulatory challenges
- Recent changes to power of attorney arrangements may be a source of problems going forward
- Unnecessary jargon and complexity is a barrier to consumer protection
- Will-writing, probate and estate administration are all complex areas and understanding the interaction of different types of law is essential
- The narrowness of the reserved activity in relation to probate is of limited value – it restricts competition and raises costs unnecessarily
- By restricting competition the current narrow reservation around probate does have the benefit reducing access to clients by providers of unknown character
- Lost wills is a significant problem that could be solved by a national wills database
- Issues stem from one man bands setting up with no previous experience and without having first worked within an organisation that provides appropriate training and guidance
- Estate administration is about process and therefore undertaking enough cases to be properly familiar with the process is important to quality of service and ability to accurately predict costs
- Fixed fees encourage a fast service and hourly rates a slow service
- Competition plays an important role in providing consumers with a good service and prices may be coming down in the unregulated space as result of competition
- Increases in DIY probate applications may be down to:
 - Better information being available
 - People being more cost conscious
 - People dying later so beneficiaries are often retired and have time to administer the estate themselves
- You can protect against sloppiness in four ways - potential effectiveness of each will depend on specific circumstances:
 - Quality marks
 - Regulatory interventions such as investigating and publishing complaints
 - Mystery shopping
 - Accreditation schemes e.g. BS 5750 or LEXCEL

- Empowering consumers through education is a vital protection
- We can learn from negative licensing regimes such as the scheme for estate agents
- Financial services regulation deals with products and not services and is unlikely to cover the relevant activities

Suggested sources of evidence:

- HMRC risk profiling criteria around inheritance tax
- Probate service
- ABI – claims history information
- Institute of Legacy Management
- Financial services regulators and ombudsman

Background:

The LSB oversees the regulation, by approved front-line regulators, of people authorised to undertake reserved legal activities. Reserved legal activities are activities that may only be undertaken by providers that are authorised to do so by an approved legal services regulator. Any person may undertake legal activities that are not on the list of reserved activities. They may do so irrespective of qualifications and experience and outside of legal services regulation.

Certain regulated legal services providers (for example, solicitors and barristers) will remain regulated in the provision of these services by their approved regulator as a consequence of professional title based regulatory provisions. Providers in this market who pre-dominantly operating in other sectors may be subject to regulation by other service sector regulators. Other providers may be members of voluntary regulatory schemes operated by trade associations.

No activities specifically relating to will-writing and estate administration services are contained within the existing list of reserved activities within the Legal Services Act 2007. Probate activities are already reserved but are defined narrowly as “preparing any probate papers...on which to found or oppose grant of probate or grant of letters of administration”.

The Board has responsibility under the 2007 Act to review the legal services market and make recommendations to the Lord Chancellor about whether activities should be added to or deleted from the list of reserved activities.

There has been a longstanding debate about whether greater regulatory protections in relation to will-writing activities. Last year the Board asked the Legal Services Consumer Panel to provide advice about problems experienced by consumers wishing to write a will and whether new regulatory protections were needed. They published their report earlier this year recommending that will-writing be added to the list of reserved legal activities.

On the basis of this report and its underpinning evidence Board concluded that it should begin a formal statutory investigation to identify what changes there may need to be to regulation. The Panel did not review probate and estate administration but did highlight the close association with will-writing and examples of consumer detriment including estate administration theft and fraud. We are aiming to publish provisional recommendations about all three areas in the first half of next year.