

To:	Board	
Date of Meeting:	25 January 2012	Item: Paper (12) 03

Title:	Investigation into the regulation of will-writing, probate and estate administration services
Workstream(s):	Workstream 3E: Improving access to justice – rationalising the scope of regulation
Introduced by:	Crispin Passmore, Strategy Director crispin.passmore@legalservicesboard.org.uk / 020 7271 0086.
Author:	Chris Handford, Project Manager chris.handford@legalservicesboard.org.uk / 020 7271 0074. Luke Mcinerney, Regulatory Associate, luke.mcinerney@legalservicesboard.org.uk / 020 7271 0058 (Annex A, Summary of responses)
Status:	Protect

Summary:
<ol style="list-style-type: none"> 1. The Section 24 and 26 investigations into will- writing, estate administration and probate activities formally commenced in July 2011 after the Board received the Legal Services Consumer Panel’s report and the executive’s advice. 2. The investigation has found evidence of consumer detriment in these areas <ol style="list-style-type: none"> a. Quality b. Sales practice c. Missing wills 3. These impact on consumers individually and collectively by way of : <ol style="list-style-type: none"> a. Direct financial detriment b. Financial detriment to beneficiaries c. Emotional detriment d. Decreased consumer confidence 4. Problems exist across the regulated (solicitor) and non (sector specific) regulated sectors. 5. The range of possible regulatory interventions include voluntary codes and ombudsman schemes, OFT approval, better enforcement of current law (by trading standards and OFT), better competition, sector specific regulation. 6. Extending the current way we regulate is not the answer; but nor is leaving things as they are. 7. Our expectation based upon current evidence and analysis is that the case for reservation of additional activities is likely to be made but that current models of regulation within the legal sector are not effective. They are not the most appropriate models for meeting the regulatory objectives through the principles of better regulation. If new activities are reserved, any organisation wishing to regulate the activities will have to apply to the Board under the Schedule 4 approval process. This applies to existing ARs and the existing unregulated trade

associations. We will likely issue guidance indicating that we will only approve regulators that can provide the fundamentally different way of regulating which will be required.

8. There is much to do to work up the detail and develop cost / benefit work and assess impacts. We are seeking Board approval on the direction of travel in preparation of bringing before it in March detailed proposals for consultation that will form the basis of the Provisional Report required by the Schedule 6 investigation process.
9. Considerations around probate and estate administration are analogous but the evidence base is still being developed. Please see **paragraphs 34 – 37**. Our aim is, however, to complete the work in the same timeframe.

Recommendation(s):

The Board is invited to:

- a. Note and comment on the summary of evidence and analysis (a summary of the call for evidence responses at **Annex A**, list of key sources of evidence and analysis at **Annex B**, table of problems/analysis at **Annex C**)
 - i. note the analysis of detriments and impacts
 - ii. note the conclusion that the current way of regulating will writing is not effective
 - iii. note the conclusion that non sector-specific regulation is not effective
- b. Ask the executive to continue working up proposals for consultation to be brought to the March Board
- c. Ask the executive to plan on the basis that recommending reservation accompanied by guidance for applicant ARs is a strong possibility
- d. Ask the executive to plan on the basis that transitional arrangements would be required in this context

Risks and mitigations

Financial: Low

Legal: Medium

Reputational: High

Resource: Medium – can be managed within existing resource.

Consultation	Yes	No	Who / why?
Board Members:	X		Barbara Saunders, Steve Green
Consumer Panel:	X		Discussion with Secretariat throughout (but not specifically on draft paper)

Freedom of Information Act 2000 (Fol)		
Para ref	Fol exemption and summary	Expires
Main paper: paragraph 5	S36 includes provisional analysis of on-going investigation to allow for free and frank Board debate	
Annex A: paragraphs 31, 32, 35 and 37	S41 provided to the Board on the understanding that it would be kept confidential	
Addendum	S36 intended to promote a free and frank exchange of views for the purposes of deliberation by the Board	

LEGAL SERVICES BOARD

To: Board	
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Investigation into the regulation of will-writing, probate and estate administration services

Recommendations

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Conclusions:

Problems and detriments:

1. We believe that it has been established that many consumers of will-writing services are at risk and are experiencing detriment in practice in three main areas:
 - a. Quality - shadow shopping research provides strong evidence of widespread incidence of wills being drafted that would fail to deliver what the testator wanted or which contain unclear clauses that would lead to difficulties administering the estate. One in five wills drafted by both solicitors and independent will-writers failed. There was no single cause and failure was reported across both complex and simple wills.
 - b. Sales practices – the purchase of unneeded services and features was prominent within the case studies provided. Evidence shows that a high number of surveyed consumers felt pressured into buying additional services or felt that sales practices were not transparent. For example, our consumer survey data¹ showed that one third of

¹ “Understanding the consumer experience of will-writing services”, IFF Research, July 2011

participants purchased additional services² and of these, one quarter felt pressure to do so. The proportion that felt pressured differed markedly between consumers of will-writing companies (36%) and solicitors (17%).

- c. Missing wills – trade body registration data indicates that many independent will-writing companies close within the first years of opening. Case study data and anecdote, including from the Probate Service indicate that a lack of enforced arrangements for orderly closure has led to problems locating the will in a significant minority of cases.
2. Case studies have highlighted significant negative impacts resulting for consumers and their beneficiaries, including:
 - a. Direct financial detriment: consumers pay significant amounts for unnecessary, inappropriate, ineffective and overpriced services and products. There are examples of fees for additional services totalling thousands of pounds even when the estate is modest. For example, one case study indicated that 10% of the gross estate was eaten up by fees but with no explanation of this being provided up front. Another indicates fees totalling over £1,000 for preparing a will for an estate valued at approximately £14,000.
 - b. Financial detriment to beneficiaries: more often, detriment is experienced by the intended beneficiaries who do not receive the legacy that was intended for them or face costs and delays trying to put right errors or clarify ambiguities. This includes charities as well as individuals. Delay can have a serious impact on dependents.
 - c. Emotional detriment: there is strong propensity for emotional detriment particularly with family relationships being put under pressure as result of uncertainty of intention created by defects or ambiguity within a will. This comes through strongly in the case studies and the analysis of a sample of Legal Ombudsman (LeO) complaints data.³
 - d. Consumer confidence: Although decisions should not be based on media influence, the impact on consumer confidence in this sector and on the rule of law more widely of the continued media attention on examples of unregulated “rogue providers” causing consumer detriment must be a consideration.
 3. We therefore believe that action is needed to protect consumers within the will-writing market and promote their interests. It is in the public interest to take steps to ensure the wider confidence in the legal system in an area where people often come into contact with the system for the first time, at a time of distress and where often they were not the purchaser of legal services themselves but the results can have a life-changing impact on them. We believe that solutions must

² This figure excludes executor services

³ Consumer Panel interim response to LSB call for evidence:

http://www.legalservicesconsumerpanel.org.uk/publications/consultation_responses/documents/2011-10-31_LSB_WillwritingProbateEstateAdmin.pdf

have a focus on preventing problems from happening rather than just redress. Reasons for this include: the propensity for information asymmetry in this area, the severity of consumer detriment, problems often not being discovered until after the consumer has died and the difficulty in then remedying problems without considerable cost and delay.

Can non- statutory interventions solve the problems?

4. We accept the Consumer Panel’s analysis that non-statutory interventions are unlikely to prove adequate in this area:
 - a. General consumer protections: The Consumer Panel has provided convincing analysis of the shortcomings in the ability of existing consumer protection to provide adequate redress in these areas where there is an absence of regulation. This includes the time and cost involved in pursuing quality problems through the courts and the limited private rights of action for breaches of consumer protection regulations relating to poor sales practices. In any event, we believe that prevention is as important, if not more important than accessible redress options in this market, given the difficulty of ensuring proper redress as discussed in paragraph 3.
 - b. Voluntary schemes: When Parliament decided not to add will-writing to the list of reserved activities at the time that the Legal Services Act; encouraging effective self-regulation through voluntary licensing schemes run by trade bodies was promoted as an alternative to reservation. Progress has been made but remains insufficient. Despite the promotion of voluntary schemes in the past few years and one trade body gaining Office of Fair Trading (OFT) Consumer Code recognition, the schemes still only have partial coverage of the market. Significantly trade bodies themselves have highlighted weaknesses in their schemes– particularly around enforcement with providers walking away rather than complying. Some of the worst offenders identified in the non-regulated sector are not members of any recognised voluntary scheme. Several have previous criminal or regulatory histories that would have been exposed should they have passed through any compulsory gateway checks. It should also be noted that the main voluntary schemes provide sufficient exit and succession planning requirements to guard against wills going missing but the partial coverage and enforceability mean that issues remain.

5. [REDACTED]

Can competition provide the answer?

6. We believe that competition and further market liberalisation going forward is an important part of the solution. Competition improves markets for consumers and is a key tenet of the Legal Services Act 2007 (the Act).
7. There is of course already a degree of diversity in this market with different providers delivering different types and combinations of services in different ways, with different business models, delivery methods and pricing. Non-solicitor providers account for up to one-third of the market⁴. Independent will-writing companies, financial services providers including banks and building societies, charities and affiliate organisations are all active within the market. Some focus on writing wills alone, others offer a range of connected services to consumers. Some providers undertake all work in-house, others work in partnership with lawyers and / or by using technological solutions.
8. There are a range of self-completion options for consumers. Technology plays a key role in this market – not only in terms of providing a consumer facing delivery option but also being used behind the scenes by providers. Many providers use software packages to generate wills based on the instructions provided by consumers.
9. Research shows that consumers value the choice and shop around in this field more than in many others, particularly based on price and flexibility of services (such as by telephone and face to face in the home). The IFF consumer survey and the shadow shopping results indicate that around 35% of consumers shop around before selecting a provider to write their will. The Consumer Panel's Tracker Survey suggests that this compares to 20% who shop around across legal services more widely. The most common reason will-writing survey participants gave for choosing a non-solicitor will-writing company was the value for money being offered. Of those that considered but decided against using a solicitor, 61 % gave solicitors being too expensive as a reason (compared to 40% that considered but rejected a will-writing company). Results suggest that there are cheaper options for simple wills available within the current unregulated sector. For example, the IFF research shows that those that those using will-writing companies were more likely to pay under £50 for their will (16%) than those using solicitors (6%) – this figure rises to 62% for self-completion. This finding is consistently supported by anecdotal evidence. Further, convenience of delivery was quoted as influencing choice of provider by over half of the shadow shopping sample.
10. Further liberalisation is happening with the implementation of Alternative Business Structures (ABS). Smaller (often sole trader solicitors or 2-4 partner solicitor firms) remain the largest supply side group to individual consumers. ABS does not of itself provide a new gateway for new entrants into the will writing and related products market. It does enable them, for the first time, to have solicitors or other authorised persons as the client facing or brand enhancing element. Similarly it will allow these new entrants to sell legal services alongside reserved legal services such as conveyancing and thus building client facing relationships that endure across common legal problems

⁴ "Understanding the consumer experience of will-writing services", IFF Research, July 2011

11. It is widely accepted that competitive pressure can raise service standards as well as efficiency within a market. It is worth noting in this context that the shadow shopping exercise showed that wills written by solicitors were more likely to fail when they were classed as straightforward in nature. It has been suggested that carelessness and lack of familiarity as a result of dealing with only low volumes were likely to be causes. Competition as much as regulation is likely to address these problems.
12. We need to protect against any interventions that will stifle competition. Intervention will have failed if it results in good providers with alternative structures to leave the market, unnecessarily change the way that they operate or stifles greater liberalisation going forward – especially if the ultimate price is higher prices, less flexibility and ultimately fewer consumers making wills. This would potentially reduce access to justice.
13. In this context we should not consider the benefits of liberalisation in terms of ABS and alternative to solicitor delivery options alone. As the market is still dominated by solicitors, we believe it is in the consumer interest to also liberalise existing regulation to facilitate greater innovation and promote competition within the solicitor profession itself.

Why is anything else needed then?

14. Our analysis at this stage of the investigation indicates that greater liberalisation should be underpinned by the hard floor of consumer protection that can only be provided by statutory regulation. This is in tune with our approach to ABS where there has been no removal of regulation.
15. We do not think that greater competition alone can provide the solution. The competition that exists now has not prevented problems and consumer detriment from happening.
16. Consumers are often unsophisticated and unable to judge quality. As set out in paragraph 9 many consumers do shop around in this market based on cost and convenience. However they are unlikely to appreciate the trade-offs that they may be making that could leave them exposed to harm (and without effective redress). Research has shown that consumers do not understand the differences between regulated and unregulated providers and believe that all services are underpinned with the same level of protections.⁵ Case studies indicate that this is common.
17. Further, most technical errors within wills are not spotted until after the testator has died. The shadow shopping exercise showed that most consumers were satisfied with the service that they received despite a high number of the wills being judged as failing. Those that received poor quality wills did not realise there were problems.
18. Unsophisticated consumers are also less likely to be able to judge the necessity or value for money of services offered. Although consumers may shop around based on an initial cost estimate for a will they are susceptible to buy additional features at extra cost that may not be needed or pay above the market rate for

⁵ See Steve Brooker, Legal Services Consumer Panel Manager, The consumer's role, Legal Services Board, Understanding the economic rationale for legal services regulation -A collection of essays, March 2011 for a summary of research

services. The evidence suggests that this is happening in practice. Case studies include examples of some providers, particularly within the unregulated sector, operating sales practices seen to be preying on consumers' lack of knowledge and confidence. Shadow shoppers reported examples of providers showing a greater interest in selling than tailoring services to their needs. It was indicated that techniques involved playing on their conscience and playing up the potential consequences of not purchasing additional services.

19. As Decker and Yarrow and others have made clear one of the fundamental outcomes that effective regulation can achieve is to provide a safety net against detriment stemming from information asymmetry.

But regulation isn't working where it is in place?

20. The headline grabbing feature of the will-writing research was that the wills written by solicitors within the shadow shopping sample were just as likely to fail on quality grounds as those written by unregulated providers. This has raised challenges, particularly from other service sectors and colleagues at the OFT, about the ability of statutory regulation to protect against the problems in this area.
21. This finding may highlight a shortfall in provider behaviour based on a lack of competition as referenced in **paragraphs 6-13**. It also highlights problems with the current regulatory architecture and the regulatory approaches operated by the SRA - the regulator of solicitors who hold the lion's share of the market.
22. Existing regulation is focused in the wrong place i.e. controlling entry through high entry hurdles to the profession for individual practitioners and setting rules to attempt to set a level of uniformity in standards that must be met, but then very little by way of on-going risk based monitoring and supervision to ensure that good outcomes are being delivered to consumers.
23. Further, the general legal practice model means that entry can be gained with little training on the drafting of wills or associated services and providers may only "dabble" in the market. Therefore, although most consumers assume that solicitors are experts, the level of training, experience and frequency of delivering services vary massively.
24. The net result is that access to the valued solicitor brand recognised by consumers may be achieved but still poor quality services can be delivered relatively unchecked. Currently the main strengths of the regulation appears to be the after service provisions around access to redress through guaranteed access to LeO, PII and compensation fund, and removing rotten apples rather than providing effective prevention. The trade association voluntary schemes provide greater obligations around demonstrating market specific training and experience up-front as well as around undertaking focused on-going training.

What is the answer?

25. The challenge facing the Board therefore is to oversee regulatory protections that will be effective, work for the different types of businesses presenting very different risks, are proportionate and will not create unnecessary barriers or restrictions.

26. Our developing thinking is that any recommendation to reserve must be accompanied by guidance requiring flexible regulation ruthlessly targeted on outcomes rather than prescriptive rule books. ARs should tailor their regulatory oversight to address the diverse business models and services provided and the different risks that these entail. This will require sophisticated risk profiling and corresponding monitoring / supervision provisions.
27. This fits squarely with the vision set out in the Board's Developing Regulatory Standards work. However, it may further push prospective ARs wishing to regulate in this area faster than they may organically progress. It is likely that only regulators that are competent and capable at the time of application would be considered not those promising to develop their ability moving forward. We do not believe that existing regulators are yet demonstrating this capability. This also means that implementing the right solution for will-writing will take time and transitional arrangements will be required.

So what would this involve?

28. Guidance setting out the expectations about the regulatory arrangements of any AR applicant would likely include the following features.
29. **Entity regulation:** regulation will need to have greater emphasis on the entity and how they operate rather than the qualifications of individuals. The entity would be held to account for the outcomes achieved for clients. There may also be underpinning requirements set for individuals undertaking certain work where the regulator has determined that work requires it, but this would not be the starting point for all work. Regulation will bite at the point where the consumer thinks they are buying the service, for example, if a bank outsources the writing of the will the bank will, be held responsible for the results.
30. **Risk management:** Our paper "Enhancing consumer protections, reducing regulatory restrictions" set out a regulatory menu ranging from preventative to remedial tools⁶. It argued that this menu should be used flexibly as deciding the appropriate mix of tools will be a matter for particular circumstances such as types of client and risks of activities being undertaken.
31. There would be certain underpinning requirements that all ARs would apply to all businesses in each area such as statutory requirements around complaints and access to LeO. The outcomes set by an AR would likely be consistent across all providers it oversees. Beyond this the onus would be on the correct level of protection depending on the risks presented by the particular organisational structure and work undertaken. The protections in place for each area must combine to achieve an overall acceptable score. A firm will get a risk rating and the firm's systems and processes to mitigate will be looked at. The level of monitoring, inspection and supervision that the practitioner can expect is based on an analysis of the level of risk that they present.

⁶ The menu splits into four main categories:

Entry and licensing arrangements including education and training

On-going requirements including training, supervision, risk systems and IT systems

Outcomes and rules plus monitoring, supervision and compliance

After service protections and provisions including complaints provisions and financial protections

32. Some illustrative examples of factors within this market that may influence risk ratings will include:
- a. Volume of work undertaken – we have highlighted concerns raised over “dabblers” in paragraphs 11 and 23
 - b. Complexity of wills undertaken – there is little difficulty or particular expertise needed to prepare a simple will for simple financial and personal circumstances (although there is a need to recognise when complexities arise). This is not necessarily the case when more sophisticated wealth management planning is being sought or when particular complications arise such as owning property in a foreign jurisdiction
 - c. Quality of software – there is sophisticated software available to providers in this market that will reduce the human error element of writing wills, for example, by ensuring that precedents are updated, required detail is not omitted and clauses do not contradict each other
 - d. Internal controls – quality control and internal supervision mechanisms to check output for mistakes and ensure that work is allocated according to the level of expertise required
 - e. Outsourcing – whether parts of the process are outsourced and if so who to
 - f. Sales practices – whether cross-selling is a key feature of a business model, how marketing is undertaken, referral links and whether products are sold in the home
33. This flexible approach is most likely to be effective, proportionate and targeted at the risks. It provides a method that could work, for example, for a sole practitioner delivering complete wealth management advice services, including the drafting of a multi-faceted will to facilitate the estate planning element. And equally to a large provider, mainly delivering simple, low cost, wills using advanced technology to automate much of the process.

Probate and Estate Administration:

34. The emerging picture in relation to probate and estate administration indicates that there are four main areas of concern:
- a. Fraud, delays in releasing client money and lack of financial protection for clients: there are wide concerns reported across stakeholders about risks involved with providers having full control of estate assets with no provision of redress in the unregulated sector when money is stolen or lost. There are some examples of proven criminal activity. The SRA risk strategy marks theft and serious overcharging in this area as high risk. Charities and individuals have reported that they have experienced suspected fraud, theft and poor financial practice. Anecdotally many stakeholders have said that they believe low-level fraud is commonplace, for example half of members surveyed by the

Society of Trust and Estate Practitioners⁷ reported having experienced suspected fraud. However, quantification is difficult. There is little hard data around frequency and value. It should be noted that providing financial protections including redress is a key outcome of regulation across many service sectors.

- b. Service issues: satisfaction levels from emerging survey information⁸, LeO complaints data and case studies indicate that service issues particularly around delay, failure to follow instructions and not providing information to beneficiaries are common. There is little evidence at this stage to suggest that there is wide incidence of technical errors causing detriment as was the case with will-writing.
- c. Costs and sales: inconsistent pricing, lack of transparency over costs and the level of service that has been purchased was prominent within the information received. Excessive costs and deficient costs information was the largest cause of complaint about estate administration services within a sample of LeO data that has been analysed. Impacts are compounded by the poor bargaining position of the end user and a failure to shop around. There are reports of unclear referral arrangements to estate administration companies who then quickly approach confused relatives asking them to sign powers of attorney and probate and estate administration instructions.⁹
- d. Fragmentation: there is concern that having only the application for probate element of the estate administration process as a reserved activity results in fragmentation in both the delivery of services and consumer protections that raises costs.

35. The detriments are analogous to those highlighted in relation to will-writing. There are often multiple beneficiaries impacted. Beneficiaries have the disadvantage of being unsighted as to what the client intended and on the detail of estate assets and liabilities and their value. Not being the client themselves also adds issues in relation to redress particularly in the non-regulated sector. LeO scheme rules do explicitly include beneficiaries within scope.

36. We are still building our evidence base in relation to probate and estate administration. In particular we have consumer and business surveys in the field and the Consumer Panel will be submitting a report, including recommendations, following their February meeting. We are awaiting information from HMRC as a key player within the estate administration process, from the Probate Service with further information about their forthcoming consultation on the non-contentious probate rules and from the Crown Prosecution Service about fraud.

⁷ STEP, Probate Fraud, What is it and what should be done about it, 2005

⁸ Draft headline figures from in-field YouGov consumer survey

⁹ Submission from Solicitors for the Elderly, individual case study, stakeholder discussions.

37. If it is concluded that action is needed to protect consumers and meet the wider regulatory objectives, similar considerations around solutions as set out in the analysis in this paper in relation to will-writing will apply.

Next steps:

38. Conclusion of consumer and business surveys about the probate and estate administration markets and analysis of evidence to reach a more informed viewpoint. We will also develop the costs benefits analysis and impact assessment work for all three areas under review to inform proposals.

39. If direction of travel is agreed, we will work up a communication plan for the next stage of stakeholder engagement. This will work on the basis that recommending the regulation of will-writing, and possibly estate administration (including probate), is the most likely outcome from the investigation.

40. We will develop a realistic implementation timetable in discussion with Ministry of Justice officials about the commencement process and the timing of our recommendation to the Lord Chancellor (within the constraints of the Schedule 6 timetable)

41. We will also work through various outstanding legal issues including;

- a. precisely defining activities that may need regulation
- b. consider how extension of reserved impact may impact on legal professional privilege
- c. consider obligations to reach decisions about probate estate administration independently and to the same level of proof as will-writing (as opposed to putting significant weight to the three being linked activities)

and then return to the Board in March with proposals for consultation.

16.01.2012

Summary of responses to the LSB call for evidence about will-writing, probate and estate administration (draft)

Overview

1. In September 2010 the Board asked the Consumer Panel to provide advice about the problems and resulting harms experienced by consumers wishing to write a will. The Consumer Panel published its advice on 14 July 2011¹⁰. The Consumer Panel recommended that will-writing should be made a reserved legal activity, but its review did not cover estate administration and probate activities. On 5 September 2011 the LSB issued its call for evidence which sought views on both the Consumer Panel's report and recommendations and also on problems relating to probate and estate administration and what stakeholders thought the potential solutions should be¹¹. This is the first time that the LSB has sought information in relation to probate and estate administration activities. This summary provides a high level overview of the key responses. The LSB has published the full responses on its website¹².
2. There was broad consensus among respondents for the Consumer Panel's assessment of the problems in the will-writing market including the identified consumer detriments. In relation to probate and estate administration, many respondents across stakeholder groups raised concerns about the potential for fraud and loss of client money. Concerns were raised about the lack of protections including access to redress in the unregulated sector. The significant consumer detriment that results was highlighted. Respondents, however, noted that it is difficult to quantify evidence relating to fraud. Many respondents including providers and professional associations in the market believe that low-level fraud and loss of client money is widespread but often goes undetected and unreported. Beyond issues around financial protections, respondents focused on problems relating to service quality and costs.
3. There was broad, but not universal, support for the recommendation that will-writing should be subject to statutory regulation no matter who provides the service. This included support from trade bodies representing providers within the unregulated sector. Some respondents suggested that reservation was not the only way to ensure higher standards and quality, pointing instead to alternatives to reservation such as training and certification schemes. Some respondents pointed out that quality issues were also present among solicitor-regulated providers, indicating that it is not only confined to unregulated providers and suggesting that legal services regulation is not currently effective.
4. Most respondents agreed that some additional form of regulation or intervention is needed to reduce the risk of potential consumer detriment resulting from the commercial activities of unregulated providers. Several respondents indicated that there should be regulatory consistency across the three areas under investigation, and especially between probate and estate administration. It was argued that having

¹⁰ http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/ConsumerPanel_WillwritingReport_Final.pdf

¹¹ http://www.legalservicesboard.org.uk/news_publications/latest_news/pdf/call_for_evidenc_5.pdf

¹² http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/submissions_received_to_the_call_for_evidence.htm

only the probate application as a reserved activity is unnecessary, leads to confusion, and fragments service provision resulting in higher costs.

5. Concern was expressed from some parts of the market that any new regulation within the three areas under investigation should not be solicitor-centric and should be flexible enough to provide for different types of businesses and delivery routes. Some respondents argued that many providers who mainly operate in other professional sectors are already subject to adequate regulatory and professional oversight and that they should be left alone. Concerns around duplicating regulation of businesses that are subject to obligations outside of legal services regulation were raised – especially from the accountancy and financial services sector.

Summary of responses

Do you agree with the Panel's assessment of the problems in the will-writing market and resulting consumer detriments? Are you aware of any key problems and detriments that have not been identified or evidence that any problems and detriments identified are not as significant suggested or are worse?

6. Respondents generally agreed with the Consumer Panel's assessment of the problems in the will-writing market, as well as the identified consumer detriments. Respondents pointed out that will writing, unlike other legal activities, is unique in that most mistakes are not identified until the death of the primary client, making remedy more difficult. The Law Society highlighted that while the Consumer Panel usefully identified 400 case examples of significant consumer detriment, that in addition to this, mis-selling of trusts by various service providers remains a concern, as does the lack of succession planning for unregulated providers.
7. However, ILEX Professional Standards notes that while the regulated will writing community is open to significant errors that can have 'a detrimental impact on consumers', it does not suggest compelling evidence of systemic market failure warranting reservation. They do state that the evidence indicates a real need to raise standards and to create appropriate safeguards. Also, the British Banker's Association (BBA) believes that there is no substantial evidence of consumer detriment in the will writing, estate administration and probate services market where these services are provided by banks.
8. The Society of Will Writers (SWW) does not agree fully with the Consumer Panel's assessment of the problems. But nonetheless the SWW regards that the size of the will writing profession has increased to the point that some form of regulation is needed, departing from the previous approach of self-regulation. The SWW point out that some of the problems encountered seems inflated beyond the actual number of 'problem firms'.

Do you agree with the Panel's assessment that will-writing should be a reserved legal activity? Do you agree with Panel's assessment that alternatives to statutory regulation - such as consumer information, enforcement of existing legislation and voluntary self-regulatory schemes are unlikely to protect against the identified problems and detriments?

9. The question of making will writing a reserved legal activity elicited a mixed response. The Law Society viewed reservation as a useful tool for an otherwise complex activity which requires knowledge of wider areas of the law and in providing

advice on difficult family and financial situations. Also, that to ensure will writers meet a set of compulsory standards which are enforced is the most appropriate way of protecting consumers. Likewise, the Society of Trust and Estate Practitioners (STEP) also agreed that will writing should be a reserved legal activity including the 'core elements' outlined by the Consumer Panel.

10. The Notaries Society of England and Wales also support the panel's assessment that will writing should be a reserved legal activity and similarly agree with the core elements which the Consumer Panel believes are needed and should be considered.
11. The SWW took the view that the expansion in the numbers of providers invariably means that some form of regulation is necessary for will writers. The SWW supports regulation in the form of licensing for will writers, as is currently being introduced in Scotland.
12. EPOQ agrees that the case for reservation has been established but that any form of regulation needs to be inclusive and therefore transferable across all distribution channels. EPOQ makes the point, however, that the Panel's recommendation that online services should not fall within the scope of regulation would create an artificial demarcation between different forms of services. This would result in increasing the inconsistency of regulation within the market.
13. In terms of alternatives to statutory regulation, the BBA suggest that in order to address any harm in the will writing market will writing staff – qualified or not – have to be adequately trained, experienced and supervised. The Association of Chartered Certified Accountants (ACCA) agreed that there are problems with will writing and that there are alternative means of improving standards and protecting the public through improving the quality of legal services regulation. The ACCA suggested that the LSB assist professional bodies to educate consumers in the advantages of using a professional who is regulated effectively. ACCA also raised the issue that the existing reservation for probate activities tends to confuse consumers as to what is, and what is not reserved, and has the additional negative effect of adding to costs for consumers as the process is not straight forward. ICAEW made the same point. BBA and ICAEW argue that the case that there is a problem with services delivered by their members has not been made and that their existing professional and regulatory requirements are proving effective.

Evidence submitted regarding fraudulent activity

14. In general respondents did not provide quantified evidence regarding fraudulent activity. Rather, respondents generally pointed to the difficulty in identifying fraud and, once identified, in successfully pursuing the matter due to the inconspicuous nature of estate fraud. For example, one respondent noted that the difficulty of identifying fraud arises especially in relation to Trusts where accounts do not have to be produced on a regular basis. However, the ever-present risk of fraud was highlighted by numerous respondents and some anecdotal evidence was provided as to consumer detriment caused by fraudulent activity by providers.
15. The Society of Scrivener Notaries suggested that there exists a risk of fraud in will writing and that this tends to occur in relation to the retention and management of client funds. Law Wizard Ltd also noted the risk of fraud and identified the preparation of probate papers as one area susceptible to fraud, along with the risk of fraud during the valuation and distribution of the estate and the handling of client money. The occurrence of fraud by executors was a particular concern to charities. The People's Dispensary for Sick Animals (PDSA) indicated that a number of cases of fraud have occurred where professionals acting as or for executors have

misappropriated estate funds. They argue that because there is no mechanism for ensuring transparency, the risk of fraudulent activity increases.

16. Few commentators quantified possible levels of fraud. Only STEP provided figures in relation to fraud and they claimed that estate fraud in the UK in 2005 cost between £100m-150m. STEP also cited anecdotal experience of the approach to estate fraud in that police investigators lack the expertise to investigate claims of fraud and that charities are regarded as „soft targets’, fraudulently being excluded from bequests.
17. While the responses do not allude to systematic fraudulent activity occurring across the market, it was clear that respondents were well aware of fraud occurring, though its level and actual instances were difficult to ascertain due to detection problems.

Evidence submitted regarding errors in the will document

18. Respondents provided anecdotal evidence concerning errors. Most evidence related to poor service and quality standards and usually occurred as omissions including incorrect financial deductions. Such omission and mistakes lead to wills being deficient for purpose and the Solicitors for the Elderly pointed out that they have evidence of quality problems occurring. ILEX submitted evidence that some wills are deficient because of the insertion of inappropriate precedents which are irrelevant and inconsistent.
19. Institute of Legacy Management (ILM) submitted that issues around judging capacity, undue influence and duty to provide for a child are sometimes ignored by will writers, causing significant consumer detriment. According to the Liverpool Law Society the low value gained from wills may make some will writers attach not sufficient attention to individual cases resulting in errors and subsequent difficulty in obtaining redress for consumers.
20. In terms of the significance of this problem for the market, both Which? and Trust Inheritance Ltd reached similar conclusions regarding the proportion of deficient wills due to errors. They claim that around one quarter of wills were defective because of errors and that this led to considerable detriment for consumers.

Evidence submitted regarding service issues such as unnecessary delays

21. The respondents’ evidence pointed to areas of unnecessary delays. Firstly, delays occurred because of a deficiency in the level and quality of services by providers. An example given of this includes delays caused through badly drafted enduring powers of attorney. Secondly, delays occurred due to process issues such as not being able to retrieve a will from a will writing firm that has ceased trading.
22. The OFT¹³ submitted evidence regarding unnecessary delays occurring. They gave an example of a solicitor retiring and their work not being passed on, thereby causing delay and detriment. The ACCA provided an example of delays occurring when an estate administrator has to approach a lawyer to file the documentation for a grant of probate. This can lead to delays in the service for the beneficiaries.

Evidence submitted regarding overcharging

¹³ POST MEETING NOTE: subsequent to the meeting it was identified that reference to OFT should in fact be Legal Ombudsman

23. Respondents provided relatively detailed accounts of clients being overcharged for will writing and estate administration services, suggesting that this is an area of particular concern and focus. Individuals and firms submitted information on overcharging such as the anecdotal evidence provided by Pavillion Row Ltd in which they related the story that a client of another firm was charged £10K for a deed of variation, but that amount was lowered to £5k when the client requested a breakdown in fees and invoice.
24. Solicitors for the Elderly noted that overcharging was a particular concern in the case of vulnerable older people. They argued that misrepresenting solicitors' fees at the point of administration and bullying tactics at the point of emotional distress, as well as charging for renouncing probate were all examples that they had encountered. In a similar argument, the Devon Law Society mentioned that it was aware of firms advertising a low price for a basic will as a form of marketing tool and which, in turn, can be used as a way to oversell other services. These additional services, often represented as necessary, include storage of legal documents and can amount to more than the initial „saving' of the low priced will.

Evidence submitted regarding the process of handling a person's estate after death

25. Most of the responses received focused on the estate administration process and tended to highlight shortcomings. For example, the SWW provided a list of responses regarding shortcomings of solicitor-regulated will writers. The National Consumer Federation made reference to clients who were persuaded to set up a complicated trust for beneficiaries which was not necessary and on their death the company offered to assist the administrator to work through the documents, for a fee.
26. Irwin Mitchell suggested that the commission, sale and preparation of will writing should be within scope of regulation because of the evidence put forward by the Consumer Panel as to the consumer detriment in these areas. Storage of the wills should also be within scope because it is important that the client understands the costs involved in storage, as well as the benefits and risks so that they can make an informed decision to store the will with the will writer or make separate arrangements.
27. Pavillion Row Ltd submitted that it was unacceptable that people appoint professional executors without being made aware that family members will not be able to remove them easily. The Devon Law Society echoed this point and added that in many cases will writers do not keep proper records of the instructions leading to problems if a will requires rectification or if there is a potentially valid claim on the estate, such documents are key to putting right the problems.

Supply-side evidence submitted

28. On the supply side, various respondents outlined the types of providers offering wills writing services. STEP viewed the market as expanding in relation to supply and that it is characterised by a large number of small scale businesses and that statutory regulation is the only way of exerting effective control. Trust Inheritance Ltd submitted that the independent sector provides around 150,000 wills per annum, two thirds of which are written by the top 12 largest will writing firms.
29. The Law Society related that a demarcation between online services on the one hand and other methods of service delivery on the other is not possible. Some specialist firms deliver online services direct to consumers, but also facilitate the provision of online services by law firms, will writers, banks, insurance companies and other

institutions to their customers, so that online services are already an integral feature of many services delivered through other distribution channels.

30. Irwin Mitchell noted that, in terms of supply, there is a lack of clarity as to who is the client from the point of view of suppliers. Where the firm is appointed as Executor they are effectively acting for themselves and although they have a general duty to act in the best interest of the beneficiaries of the estate, the beneficiaries are not clear on their rights of redress or the right to complain in the event of any deficiency or services problem.
31. According to ██████████¹⁴ the fees for suppliers on probate ranged from £1,500 to £4,320 on a straight forward case, while quotes ranged from £300 to £1080 for a grant of probate.

Demand-side evidence submitted

32. Respondents provided a diversity of evidence relating to issues on the demand side. ██████████¹⁵ suggested that only about 1% of consumers shopped around when looking of will writing services. A Which! Survey undertaken to inform their response also indicated that consumers are not shopping around. The Financial Service Ombudsman noted that one of the key problems facing consumers is that they often do not know when a solicitor is being used, and at what point in the transaction a consumer may, or may not, be used.
33. Other evidence submitted focused on problems faced by consumers when seeking will writing services. For example, the Professional Association of Legal Services (PALS) suggested that adverse advice is sometimes given to consumers regarding tax implications in drafting wills. STEP outlined certain questionable practices that exist regarding referral practices for will writing which include free wills on the proviso of subsequent work and will writers refusing to renounce as executors, as well as executors persuaded by will writers to employ a connected company for advice. Likewise Irwin Mitchell noted that many providers offer estate administration services but often it is not clear to the consumer exactly what the service entails. Some of those providers are appointed executors and some are not, instead advising the executors. It is unclear what estate administration means to the consumer and what consumers are paying for and what the difference is when there are professional executors appointed and when there are not.

Evidence concerning regulators

34. The Society of Scrivener Notaries submitted that regulators (including the LSB) need to consider the effect of foreign law on will making as cross-border estates are increasingly a common feature in client's estates.
35. Other comments focused on the issue of the lack of regulation among will writers and the potential risk this poses to consumers, as well as associated redress issues. One individual submission pointed out that he cannot get redress because there is no recourse to an official regulator and therefore no access to complaints handling processes. ██████████ suggested whether will draftsmen could be included in the list of professions subject to the powers and authority of the LeO, and

¹⁴ POST MEETING NOTE: subsequent to the meeting it was identified that information attributed to an individual solicitor firm - that had submitted a response on a confidential basis - should have been attributed to Which?

¹⁵ See footnote 14 above.

whether will draftsmen would be required to hold an appropriate level of professional indemnity insurance.

Any additional evidence outside the scope of the preceding.

36. One respondent raised the issue concerning the jurisdiction of complaints handling and that the LCS could not investigate against the Co-operative because they only investigate solicitors. And that LeO can only investigate if the solicitor in charge of the probate team at the Co-operative had conduct of case.
37. [REDACTED] believes that a STEP certification of will writers is the most cost effective solution to the concerns highlighted by the LSCP report and would address many of the material concerns about quality and service provision. STEP added that it is important to avoid a regulatory menu that is expensive to implement and one which risks the creation of professional monopolies.
38. The Law Wizzard Ltd added that regulation should be broad, modern and dynamic and the LSB should carefully consider about how on-line firms fit within the regulatory regime. And that further thinking is needed before any steps are taken to regulate the on-line probate services.

We would welcome information about the size and characteristics of the market including the different types of organisations undertaking will-writing, probate and estate administration services, the mix of these services offered and common referral links between different types of organisations in relation to the different services.

39. In terms of will writing activity respondents generally agreed that it was the largest will writing firms (top 10-12) that provided two thirds of the 150,000 will per annum in the independent sector. Trust Inheritance stated that members of the Institute of Professional Will Writers wrote around 15,000 wills per annum, accounting for 10% of the wills written by the independent sector.
40. While no estimate was attempted at the overall size of the market, STEP estimated that in 2005 figures for fraudulent activity relating to will writing and estate administration was between £100-150m, though anecdotal evidence suggests that because of detection problems this is likely to be a low figure. The figure given for fraudulent activity indicates a much larger total figure for the overall size of the market.
41. Various respondents mentioned the operation of referral services in the market. However, much of the evidence centred on questionable practices regarding referral practices for will writing including free wills on the proviso of subsequent work, etc. This appears to be a relatively well known issue among the respondents.
42. Also, respondents noted that bequests via wills were a crucial funding component for charities. The People's Dispensary for Sick Animals said that bequests contributed over 70% of their net income, derived from approximately 1,700 new legacies each year and remained a core revenue stream for the charity.

Summary of Sources

17 March 2011	<u>Understanding the economic rationale for legal services regulation</u>	The LSB commissioned research to identify the economic rationale for regulation of legal services markets and the legal service profession.
22 June 2011	<u>The smaller approved regulators: a research report</u>	An independent research report by Nick Smedley into the capacity and capability of the smaller approved regulators to meet the requirements of the Legal Services Act 2007, with analysis and recommendations
14 July 2011	<u>Understanding the consumer experience of will-writing services</u>	An independent research report by IFF research exploring the consumer experience of will-writing services, applying shadow shopping techniques to analyse the quality of wills produced.
14 July 2011	<u>Regulating will-writing</u>	The Consumer Panel's report to the Legal Services Board on will-writing.
24 November 2011	<u>Voluntary quality schemes in legal services</u>	The Consumer Panel's report to the Legal Services Board on voluntary quality schemes in legal services