

**LEGAL SERVICES BOARD: INVESTIGATION  
INTO WILL WRITING, ESTATE  
ADMINISTRATION AND PROBATE ACTIVITIES**

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**A RESPONSE BY THE INSTITUTE OF LEGAL EXECUTIVES (ILEX)**

**And**

**ILEX PROFESSIONAL STANDARDS (IPS)**

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This response represents the joint views of the Institute of Legal Executives (ILEX) an Approved Regulator under the Legal Services Act 2007 (the Act), and ILEX Professional Standards Limited (IPS), the regulatory body for 22,000 members of ILEX.

Both ILEX and IPS are committed to the regulatory objectives and the principles of good regulation as set out in the *2007 Act*. Both organisations wish to emphasise that higher professional standards are achieved through engagement with the profession and the involvement of members.

This response follows evidence from Legal Executive lawyers specialising in probate and will writing. The call to evidence was separately considered by ILEX and IPS. With no difference of opinion in respect of the findings from respondents and the conclusions thereof, a joint response is tendered. For the purpose of this consultation, “we” is used to mean both ILEX and IPS unless the context suggests otherwise.

## **Introduction**

1. ILEX and IPS welcome the opportunity to provide a response to the Call for Evidence in respect of the Legal Services Board’s (LSB) investigation into will writing, estate administration and probate activities pursuant to section 24 and Schedule 6 of the Legal Services Act 2007 (the 2007 Act).
2. At the outset, a well-drafted will must manifest exactly the client’s instructions in a clear and unambiguous way to (i) minimise the possibility of disputes arising following death; and (ii) be clear so that the client (the testator) can understand it. A well-drafted will must also satisfy basic tests

to be capable of obtaining probate. There is, however, an inherent inequality of bargaining power between the provider of will writing services and the recipient. Whilst regulation can rebalance this inequality of bargaining power, it is imperative that reservation is considered as a proportionate response following careful analysis of all the available evidence.

3. The call for evidence under s24 of the 2007 Act endeavours to cover will writing, estate administration and probate activities. The evidence from ILEX members is mostly confined to the activity of will writing and related ancillary services. For example, sale practices and indiscriminate increases in costs from those advertised. Evidence from respondents relating to estate administration and probate activities was limited.

### **Methodology**

4. In gathering the views and evidence contained in this submission, ILEX contacted by email 1593 Legal Executive lawyers and members practising in the key areas above and asked them to furnish us with evidence of poor practice in both the regulated and unregulated sector. 24 members responded. Amongst other things, members were asked for evidence of the following:

- Poor quality drafted wills – wills that are not valid, or do not reflect the client’s wishes, or include errors;
- Dishonest practices - wills advertised as ‘cheap’ finally becoming significantly more expensive than the advertised price, inappropriate selling techniques such as attending a client’s home without invitation, or being invited to attend a client’s home but refusing to leave until a contract is signed or a fee is paid for the visit, or other pressure-selling techniques;

- Storage Problems - Being unable to locate a will, wills being unprotected and/or kept in inappropriate places, significant and/or ongoing charges for storage of the will. Also, any problems with transfer of work after insolvency or for other reasons;
  
  - Executorships - Charging clients a significant upfront fee to guarantee a discounted executor fee, Will drafters naming themselves as executor without explaining this to the client, problems arising out of an unregulated Will writer being named as an executor;
  
  - Lack of information – Not providing the client with full and frank information about the services being provided and the charges for those services, not providing the client with the information needed to make an informed decision about services.
5. In addition to the above email, a call to evidence by ILEX was placed on our website.
6. The anonymised case studies represent our efforts to reasonably and fairly express the views of the respondents at the coalface who see first hand any consumer detriment. The views expressed in the verbatim examples are those of the respondents and not those of ILEX or IPS. We cannot check the accuracy of the verbatim statements used as to law or fact. They should be seen as indicative of the issues and not as presenting standard industry practice.

**Summary:**

- The evidence adduced by members mainly focuses on the unregulated sector.
- There is evidence that the regulated will writing community is also open to significant errors that can have a detrimental impact on consumers.
- Almost all of the respondents gave case examples of consumer detriment in the unregulated will writing sector.
- Several respondents gave examples of consumer fees increasing significantly from those advertised and of poor customer care standards generally.
- The evidence appears to be consistent with the Consumer Panel's findings that there is a real need to raise standards across both the regulated and unregulated sectors.

7. The above findings do not suggest compelling evidence of systemic market failure warranting reservation. That said, the evidence does indicate a real need to raise standards and to create appropriate consumer safeguards. There is also concern amongst self-employed respondents that reservation may preclude them from undertaking will writing as an activity notwithstanding that they are regulated by ILEX Professional Standards (IPS).

8. The remainder of this response will address the key questions raised by the call to evidence in light of the evidence submitted by our members. Evidence from respondents in respect of estate administration and probate activities was limited. Therefore, the bulk of this response addresses the issues in relation to will writing and related ancillary issues that have caused concern to the respondents.

**Do you agree with the Panel's assessment of the problems in the will writing market and resulting consumer detriment?**

9. Practitioner and membership evidence gave examples of the following consumer detriments:

**Inappropriate Precedents**

10. Use of inappropriate precedents (using large chunks of irrelevant clauses) was a problem highlighted by some respondents. Verbatim comments were as follows:

*“There was a clause in the will about professional executors being able to charge for the work, even though they have appointed each other and their children none of whom were lawyers. There was also a clause about treasurers of charities being able to sign to accept gifts although they had not left gifts of any description to charities. Also the attestation clause of these particular Wills were incorrectly worded, Mrs X was down as Testator and Mr X was down as Testatrix. The body of the will gave gifts to children and grandchildren even though this couple were childless and had wanted to leave gifts to other relatives (nieces and nephews) and their children and some close friends”*

**Taking instructions over the phone**

11. Two respondents gave evidence of the problems of taking instructions over the phone and simply posting the will for clients to sign.

**Home Made Wills**

12. “Use of home made wills, which have been subsequently invalidated for various reasons. Verbatim comments as follows:

*During my employment, I was occasionally presented with cases of 'home made' Wills. These generally utilised the form available from [retailer removed] and where the testator followed the guidance on the form, the result was a valid Will. Occasionally, the 'home made' Will turned out to be invalid as the strict rules of due execution had not*

*been followed. In other instances, the result was a partial intestacy or problems of construction due to the lack of clarity or possible double meaning of words used to express the gift”*

### **Poor Will Drafting**

13. Almost 50% of respondents gave example of poor will drafting. These also included errors in drafting by the regulated will writing community. Examples included, amongst other things, where the contents fail to give adequate provision and where the body of the will neglects to consider certain outcomes. Verbatim comment as follows:

*“I am responding to your request for information about poor will writing and have come across quite a number of examples from will writers however I have also come across some awful errors made by qualified solicitors!*

*Examples of both unregulated will writers and qualified solicitors:*

- *“Creating a life interest in a half share of the property and forgetting to sever the joint tenancy whether the property is registered or not.*
- *Creating a life interest in a property and specifically describing the property but not allowing for any other property subsequently owned by the deceased.*
- *Completely mixing up specific gifts and residue for the wrong people so that the residuary beneficiaries received a gift and vice versa*
- *Leaving the estate to the grandchildren rather than the deceased’s children contrary to the instructions given. Grandchildren were minors.*
- *Forgetting to gift the proceeds of a life policy to redeem a mortgage resulting in the proceeds falling to residue and going to minor children from a first marriage*
- *Incorporating clauses that made no sense whatsoever”*

14. Another respondent stated the following:

*“the will was badly hand written on a Will Form. The Will writer bequeathed the half share of the property held as beneficial joint tenants to the husband (when this was not necessary)”*

### **Pressure Tactics**

15. Respondent feedback reinforces the Consumer Panel’s evidence of poor sales practices that unreasonably exerts pressure on consumers to purchase products and services through unfair pressure sales. Verbatim comments were as follows:

*“hard sell tactics where (particularly elderly) clients are so confused and eager to get rid of the representative that they sign/agree to anything just to get them to leave”*

*“I was recently contacted by a lady who had been visited by a firm of Will writers at home. Her husband and herself had been lured in by the prospect of them having their wills prepared for £49 (including VAT) for the pair. However, once they had appointed Executors to act in the event of the second death, and decided where their estate was to go when neither was around any more, the Wills cost in excess of £300 plus VAT”*

16. In addition to the above, respondent evidence also suggests incidents of up front payments of several thousand pounds; not severing a joint tenancy and inserting the company as default executors.

17. The evidence appears to be consistent with the Consumer Panel’s findings that there is a real need to raise standards across both the regulated and unregulated sectors.

**Should will writing be reserved legal activity?**



18. It is clear that standards need to be raised across the whole sector. That said, there is no guarantee that reservation will solve all of the problems identified in relation to will writing and this needs to be balanced with the cost, burden and effectiveness of regulation.

19. Whilst the evidence is compelling based on the risk to consumers due to the inherent features of will writing; the potential severity of harm; including vulnerability of the client base; it falls short of compelling evidence of systematic market failure. In a Westminster Hall debate on will writing in February 2008, Bridget Prentice, the then Minister of Justice, observed:

*“There is always a possibility that mistakes will be made in will writing, but regulation would not necessarily rectify those problems, and there is no evidence that lack of regulation causes those mistakes. Solicitors, who are regulated, can often make mistakes in will writing, and we are concerned that the cost of regulation might restrict competition and impose unnecessary burdens on providers and costs on consumers. That was the view of the NCC in its report, “Finding the will”, which was published in September 2007.*

*Not everyone wants to go to a solicitor or even to a professional will writer. Some choose a do-it-yourself pack because of cost or accessibility. What is most important from the consumer’s point of view is the need to know that, whatever option they choose, it is the right one for them. They need to be aware of the pros and cons of all the options available to them”<sup>1</sup>.*

20. The nature of the evidence appears to suggest that preventative measures are required to address the problems rather than remedial ones. However, regulation short of reservation must be considered as a very real option. Reservation which is not properly thought through can have unintended consequences which may defeat its aims, or even leave consumers worse

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<sup>1</sup> HC Deb 19 February 2008 cc64-5WH

off than they were before. More generally, regulation and reservation will incur costs passed on to the market and impact on competition. It is important to consider whether the likely benefits of regulation and or reservation will outweigh these impacts on the market.

21. ILEX and IPS are not convinced that alternatives to regulation, in particular consumer information and enforcement of existing legislation, would deal with the quality problems as evidenced by the findings of the Consumer Panel.

**What do good providers of will writing services currently do to protect against problems and ensure that consumers receive quality services?**

22. We are not in position to address the above question save for reiterating that all regulated members of ILEX who are regulated by IPS are obliged to act in the best interests of the client and follow the Code of Conduct espousing 9 principles setting out the standards expected of all members.

**If will writing was to be a reserved activity, what specific activities should be included within scope of the reservation?**

23. In the event that will writing is to be reserved, we agree with the Consumer Panel's recommendation that the scope of reservation should include the commission, sale and preparation of will-writing and related services for fee, gain or reward.

**Protection and Core Principles**

24. We agree that preventative measures are more important than remedial measures. The Membership evidence of the number of poorly drafted wills is compelling and consistent with the findings of the Consumer Panel. However, a poorly drafted will may not always adversely affect the outcome for the beneficiaries of a will: although it may incur additional costs and anxiety to the beneficiaries and those administering the will.
25. Relatedly, we agree with the Consumer Panel's observation that because quality problems are normally only discovered when the client has died,

the financial and personal harm that beneficiaries suffer can be severe, and beneficiaries have limited remedies available to them, thus prevention is more important than cure, which would invariably add to cost.

26. In the event that will writing does become a reserved activity, we agree with the “core elements” as identified by the Consumer Panel. As a matter of clarification, are we to assume that the “core principles” would apply to reservation and not merely regulation? An activity can be regulated in the same way as the *Compensation Act 2006* (applying to management companies) or the regulation of immigration services but fall short of reservation for the purposes of the *2007 Act*. It seems that the core elements would only be applicable for reservation purposes.

27. As mentioned earlier, reservation is not panacea. There can be no guarantee that reservation will solve those problems identified in relation to will writing and this needs to be balanced with the cost, burden and effectiveness of regulation. There is always a possibility that mistakes will be made in will writing, but reservation would not necessarily rectify those problems. There is no evidence that lack of reservation causes those mistakes. The Consumer Panel evidence and our membership evidence suggests that standards need to be raised across the market and targeted at the unregulated and regulated communities. We are concerned that the cost of reservation might restrict competition and impose unnecessary burdens on Approved Regulators, providers and ultimately costs on consumers.

ILEX/IPS

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