

**Legal Services Board – Call for Evidence on its Investigation into Will Writing,
Estate Administration & Probate Activities**

November 2011

Response by Irwin Mitchell

- As a major National firm providing a wide range of legal services to consumers of all kinds, Irwin Mitchell has taken an active interest in the post Legal Services Act (LSA) regulatory reforms and, as a supporter of the general thrust of the LSA reforms of the legal services market, has responded to the majority of consultations since the first report by Sir David Clementi.
- This response and our earlier response to the Consumer Panel's call for evidence takes account of our responses to earlier LSB consultations (i) "Wider access, better values, strong protection" and (ii) "Alternative business structures and approaches to licensing".
- We support regulation of Will writing because we strongly believe, as is evidenced in the Consumer Panel report, that non regulated will writing activities have been to consumer detriment.
- We are aware of bad practice and unethical behaviour. Regulation is the only way to police such activities because there is no redress under general law. There are also concerns over the levels of service and the appropriateness of the services sold, for which there is no redress for consumers and no formal complaints process without regulation. The consumer is exposed.
- The regulation of will writing does not remove mistakes that can be made within a will and the problems that can potentially arise after death. However, regulation would provide a framework for proper and easy redress, reduce the likelihood of such mistakes happening and ensure that adequate insurance provisions are in place.

Q1. 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 as suggested or are worse?

- In our response to the Consumer Panel and as highlighted above, we provided evidence in relation to consumer detriment from non regulated activities. We believe there are problems for consumers in relation to the quality of Wills produced, questionable sales practices employed by some non regulated firms and Wills which are 'lost' after death or the fact that the firm h which prepared the Will no longer exists
- One of the most significant difficulties in this area is that the consumer is likely to be unable to detect a problem, as for example, they may not realise that the Will contains a technical defect. It is therefore of key importance for consumers that there is proper redress available should the Will prove to be ineffective in certain respects or invalid following death.
- One other area in which there is evidence of consumer detriment is in relation to the lack of clarity on costs. Head-line pricing and cross sales of unnecessary products shows that there is a need to require that all operators set out their costs, and the services being provided for those costs, clearly and transparently.

Q2. Do you agree with the Panel's assessment that will writing should be a reserved legal activity? Do you agree with the 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? Do you think that assessed accreditation schemes and

quality marks specific to this field would benefit consumers either as a supplement or alternative to statutory regulation?

- We are in support of regulation for will writers and in our response to the Legal Services Board's consultations on Alternative Business Structures said "We add that we are strongly in favour of Will writing being brought within the list of reserved legal activities if it would otherwise remain unregulated as an unreserved activity as at present".
- We agree with the Panel's assessment that alternatives to regulation do not provide the necessary consumer protection. The current level of self-regulation has not worked and consumers are in any event unaware of the lack of regulation. General consumer and criminal law will not assist because the harm is often caused in a way which is not criminal for example when mis-selling or inappropriate advice is given. The damage caused by a badly drafted will is significant, both financially and emotionally and is particularly difficult because the problem comes to light after the testator has died. It is then impossible to seek clarification of the testator's wishes, and reliance on the instructions/notes taken/made at the time is the only source of help. A failure properly to reflect the consumer's wishes can result in significant contentious probate litigation which can have a serious impact on the costs of winding up an estate.
- Accreditation schemes and quality marks could provide reassurance for the consumer that they were dealing with a firm that abides by certain codes of conduct but the usefulness of those schemes/quality marks would be dependent on what lay behind that in terms of regulation and sanction. It could be a useful supplement to regulation but would not in our view be sufficient on its own.

Q3 What do good providers of Will writing services currently do to protect against problems and ensure that consumers receive a quality service?

- Consumers should be confident that their wills are written by trained and competent individuals who understand the law and that the will produced will reflect their wishes. Good providers currently offer the following:-
- Professional indemnity insurance, which provides redress where mistakes are made, at premiums that provide an incentive to "get it right".
- A clear and transparent retainer. If the consumer has a proper retainer with the will writer, they will have a clear understanding of what services they can expect and what redress is available.
- Clear and transparent term of business which set out to the consumer what services are being provided, at what level and timescale, what costs are involved, what level of protection they have, who will be responsible for drafting the will and whether there are any allied products included or added on and if so, sufficient information to assess whether these are in the consumer's best interest.
- Clear and transparent costs information so that the consumer is clear what costs are associated with the will and in what circumstances increased costs may be incurred. For example once instructions are taken it can become clear that the testator's estate is more complex requiring a more complicated will.
- Clearly explained complaints mechanisms, with access to the Legal Ombudsman.
- Adequate training and supervision to ensure competence with a proper system of continuing professional development in place.

- Independent checking of the drafted Will by another competent person –we do not believe that it is sufficient for t the person who took the instructions to check the Will, a second pair of eyes is needed.
- A plain English commentary given with the draft Will so that clients understand the effect of the Will and are able more easily to spot any defects.

Q4 If Will writing was to be a reserved activity what activities should be in the scope of reservation? The Panel has suggested that the scope of regulation should include the commission, sale, and preparation of will writing and related services for fee, gain and reward?

- We agree that the commission, sale and preparation of Will writing should be within scope because of the wealth of evidence put forward by the Consumer Panel as to the consumer detriment in these areas.
- We suggest that storage of the Will should be within scope because it is important that the client understand 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. That would ensure transparency of the arrangements for the benefit of the consumer.

Q5 What specific protections are needed for each problem and detriment that has been identified? Do you agree with the core elements that the Panel believe are needed? Do you think that any of the 'core elements' are not required on a mandatory basis or that there are other protections that are also required?

- We have set out in our response to Q3 how a good provider currently gives the consumer protection against problems and we believe these areas should be the main area of any reservation or regulation.
- All Will writers should be subject to oversight regulation by the LSB to ensure that frontline Regulators in turn are able to ensure that all Will writers are covered by:
 - Professional indemnity insurance
 - A complaints process
 - A Code of Conduct/Professional obligations
 - Training & Competency framework
 - Clarity on costs

Will writers should be regulated by having proper professional indemnity insurance, training and competence requirements and professional obligations/codes of conduct so that it is clear that they must act in the client's best interest. This will include the need for independence and primacy of the consumer's interest without having inappropriate relationships with other bodies (funeral providers may be an example) selling services that they do not need or desire. Consumers should be clear about the costs of the service and what they are receiving for that price so that there is no unfair advantage between Will writers.

Q6 What impacts do you think regulation might have on consumer protection, competition, access to services, cost of services and the administration of justice?

- As long as regulation is proportionate, the overwhelming need for a level regulatory playing field for will writers far outweighs the risk of ignoring consumer detriment.

- Most Will writers are Solicitors are already regulated and this does not restrict access to services or have a particular influence on costs. Those unregulated firms who offer head line pricing are often found to be more expensive than Solicitors who are already regulated.
- A properly regulated sector would be provide reassurance to consumers of the value of will writing services and should result in the overall benefit to society and individuals/families of wills being written in greater numbers. Increased competition should also be a feature post the advent of ABSs in October 2011/early 2012.
- The *Legal Services (Scotland) Bill*, which passed through the Scottish Parliament on 6 October 2010 provides for the regulation of Will writers. This will shortly make Will writing a reserved legal activity that only authorised lawyers are able to undertake.
- If the view has been taken in Scotland to regulate the will writing industry, then it is difficult to see why the situation should be any different in England and Wales. The same issues were considered in consultation in Scotland and the sensible outcome was regulation of the sector.

Probate and Estate Administration

Q1 What are the key outcomes for consumers that we should aim to achieve?

- Probate and Estate Administration is a wide and varied field. Dealing with a deceased's affairs can and does incorporate dealing with the entire range of circumstances that the deceased was involved with before their death and can include the most complex of scenarios.

- Consumers should be aware of exactly what services they are purchasing, both the Testator at the time of making the Will when considering the choice of Executor and by lay Executors/beneficiaries when deciding whom to instruct to deal with the estate following death. This should include a clear explanation (and therefore enable understanding) for the consumer on why estate administration assistance is needed and moreover that it is appropriate to their circumstances
- Consumers need to be confident that they are receiving a proper service with proper recourse and with a robust complaints process. This should apply even where the consumers are the beneficiaries of the estate and the firm is acting as Executor (in effect its own client)
- Consumers need to know that the estate is being dealt with by competent and experienced individuals who are properly trained and whom they are certain are acting in their best interests. This will include the need for independence and primacy of the consumer's interest without having inappropriate relationships with other bodies.

Q2 What are the existing problems experienced by consumers of probate and estate administration services (testators, executors and beneficiaries)? What are the causes? What are the consequences? What evidence if there of consumer harm?

- It is our view that most consumers generally do not appreciate what Probate is or why it is required and how obtaining Probate is different to Estate administration and what is offered for both levels of service. This leads to much confusion amongst Consumers.
- Many providers offer Estate Administration services and it is not clear to the consumer exactly what that entails. Some of those providers are appointed Executors and some are not, but are 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.
- Costs for probate and estate administration vary greatly and there is no clear view on how these costs should be charged. Whilst there needs to be some flexibility to reflect the individual complexities and circumstances of each case, the Law Society's Practice Note in this area gives suggestions of charging mechanisms but concludes by saying the costs should be 'reasonable'.
 - Specific services issues with estate administration include, a failure to keep clients up to date, a lack of costs information, failure to adequately provide an indication of timescales for estate administration and or to manage the expectations of clients in relation to timescales
 - Specific errors in the Estate Administration process include lack of proper accounting, incorrect distributions, late submission of tax returns and penalties/interest or failure to claim appropriate tax reliefs
 - Regrettably there is also evidence of fraudulent activity within this field as it is relatively easy for funds to be misappropriated whilst under the control of another party purportedly acting on behalf of the client. If such action were taken by a Solicitor, the Consumer is protected through the mechanisms of SRA regulation e.g. indemnity insurance/the Compensation Fund. That would not necessarily be the case in the unregulated sector as there are no statutory protections at present. There is lack of clarity as to who is the client. Where the firm is appointed as Executor they are effectively acting for themselves and although 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 right to complain
 - Badly drafted Wills – These result in the following types of litigation;
 - (i) Administrative errors which require rectification;
 - (ii) Claims under the Inheritance (Provision for Family and Dependents) Act 1975;

- (iii) Failures in execution which result in negligence claims
- (iv) Failures to consider the capacity of the testator in accordance with the golden rule in *Kenward v Adams*

Q3 To what extent are avoidable problems with the process of probate and dealing with a person's estate after death a consequence of a poorly drafted Will or there not being a will? To what extent are problems a direct result of actions taken while administering the estate?

- As set out in our response to Q2, poor drafting or failure to take into account all the circumstances at the time of preparation of a Will can be a significant contributing factor to complications in the estate following death and can increase costs for the consumer. In addition, if there is an intestacy, that can lead to disputes where had there been a Will the matter would have been dealt with amicably. The typical example is the failure by unmarried partners to make a will making provision for the remaining partner on their death.
- There are still issues arising as a result of actions taken while administering an estate. We have evidence of an unregulated estate administration company purportedly dealing with the entire estate but on transfer of the file to ourselves found that some assets had not been investigated or collected. This would be to the consumer detriment as they would not realise that there were other assets to claim. There is a strong element of trust in the service provider to collect, retain and administer the estate and the consumer is largely reliant on what the service provider tells them about the content of the estate.

Q4 How and at what stages of the process are problems normally discovered? How and how easily can problems be put right and detriments reversed?

- Problems arising from poorly drafted Wills or on intestacies are generally discovered immediately following death. In a majority of cases providing there is access to the testator's intentions (the original Will file) the matter can be put right by an application to the Court to rectify the Will so that it contains the intended clauses.
- There are some cases however which cannot be put right after death and may lead to a potential negligence claim against the Will writer. This demonstrates why it is very important that Will writers are regulated and carry appropriate professional indemnity insurance. We dealt with a case in which the Judge held that the Will was invalid on the basis that the deceased did not have testamentary capacity. The costs of the litigation could not be recovered from the negligent will writer as he had no assets or indemnity insurance

Q5 What do good providers of probate and estate administration services currently do to protect against problems and ensure consumers receive a quality service?

- Ensure adequate professional indemnity insurance which provides redress where mistakes are made both to prevent badly drafted Wills being a problem at Probate and to rectify any defects in the estate administration.
- A clear and transparent retainer and clarity on costs so that the Executor/beneficiaries are absolutely clear on what they are asking the firm to provide and what that service costs.
- If the clients are Executors, ensure that their role and responsibilities are adequately explained and where the firm is assisting them to administer the estate clearly setting out what the firm is responsible for and what the Executors remain responsible for.

- Ensuring the terms of business set out what level of protection the clients have, who will be responsible for dealing with the estate and whether there are any referral arrangements with other organisations and what are the terms of that arrangement.
- Clearly explained complaints mechanisms.
- Adequate training and supervision to ensure competence with a proper system of continuing professional development in place.
- Ensuring adequate checks are made of asset providers and all appropriate enquiries made of creditors.
- Independent checking of key stages of the estate administration process by another competent person – it is not sufficient to rely on the person who is dealing with the estate, for example, on distribution of the estate.
- A detailed communication plan and an estimate of timescales to complete the estate

Q6 Are self regulation and general consumer and criminal law capable of addressing consumer harm? Do you think that assessed accreditation schemes and quality marks specific to this field would benefit consumers either a supplement or alternative to statutory regulation?

- No, for the reasons set out below.
- It is important that providers act on a level playing field and that consumers are aware of differences between level of services before making a decision about which provider to use for estate administration services.

- Self regulation may assist but ultimately does not address the need, as above, to ensure that consumers know exactly what they are paying for and why and how to compare offers of services. General consumer and criminal law can assist, for example, in pursuing a negligence claim against the firm who prepared a Will but only to the extent that firm has any resources or indemnity cover. Criminal law may ensure prosecution of the fraudulent estate administrator but will not necessarily retrieve the misappropriated funds for the consumer.
- As mentioned earlier, the damage caused by a badly drafted will is significant, and can result in significant contentious probate litigation which can have a serious impact on the costs of winding up an estate.
- Accreditation schemes and quality marks could provide reassurance for the consumer that they were dealing with a firm that abides by certain codes of conduct but the usefulness of those schemes/quality marks would be dependent on what laid behind that in terms of regulation and sanction.

Q7 If providers of probate and estate administration services were regulated what form of regulation should this take and what are the core elements that should be included within the regulatory system? What specific harm would each core element protect against?

- We would expect the core elements to be essentially the same as for the regulation of Will writing with specific emphasis on professional indemnity insurance, discipline and sanction of offenders, monitoring compliance and transparency on costs and level of services (which is already incumbent on Solicitors in the terms of engagement letter)

Q8 What impacts do you think regulation might have on consumer protection, access to services, the cost of services and the administration of justice?

- We do not believe there would be a detrimental effect on cost or access to probate and estate administration services by regulation. Moreover it would be far clearer for the consumer to understand what Probate and Estate Administration is, why it is required and compare offers/service levels between providers.

Q9 How effective is the regulation of the existing reserved activity of preparing papers on which to found or oppose a grant of probate or letters of administration? How does this regulation work in practice and what benefits does it bring for consumers and how does it impact on the way that providers organise themselves to deliver services?

- When applying for Probate, the Solicitor is acting as an Officer of the Court and effectively verifying the identity and entitlement of an individual(s) to the office of Executor or Administrator on behalf of the Court. Given the role of Executor/Administrator involves collecting in funds and assets belonging to the deceased and holding that money on trust for the beneficiaries, it is vitally important that the correct person who is entitled to that position is named on the Grant. We strongly believe that this should remain a reserved activity for that reason
- Reserving the preparation of Probate papers does not prevent the Executor or Administrator once appointed from administering the estate in a way that would cause consumer detriment. We have set out examples earlier but the key areas are distributing the estate incorrectly and failing to locate or identify the full assets. The Consumer (as beneficiary) may be unaware that they had suffered loss as a result.
- Many unregulated providers employ in house Solicitors to ensure that applications for Probate are made by a Solicitor but the statutory protections are not available to the Consumer who is not the solicitor's client because of the restrictions placed on the in house solicitor by the Solicitors Code of Conduct.

Conclusion including size and characteristics of the market

- We believe the Estate Administration market is disparate. It is our view that generally consumers have no real concept of what Estate Administration is , nor what it involves, nor even what level of service they need.
- We believe the market is split into
 - High Street bank trust corporations (who tend to only offer the full “end to end” administration service)
 - Solicitors
 - Independent Trust corporations (which are unregulated unless they are solicitors practices)
 - Unregulated probate practitioners/organisations
- It is our view that the market is polarising into two camps. At the top end, there is the full service offered by the High Street Banks. Recently those Banks have come under criticism due to the perceived high cost of estate administration services. ‘Probate brokers’ have led this criticism on the basis that they can find a cheaper solution. However, it is important to note that quite often the services being compared are not like for like. Banks’ administration models are fully inclusive and of the highest quality standards. Other perceived cheaper services may not be of the same level or quality.
- At the other end of the market, there is a push towards operating an ‘as cheap as is possible’ model. The level of service would differ entirely from that on offer at the other end of the market and it is not clear that Consumers understand the differential in service offered.
- The OFT investigations (and the subsequent Law Society Practice Note) into appointments of professional Executors said that where a firm wishes to appoint itself as Executor, there must be transparency given to clients on pricing of Estate Administration services, there must be a requirement to explain the

service and its appropriateness to the client and ensure it is in their best interests and that they should understand that a professional Executor may not be needed i.e they may make an informed choice as to whom they appoint as Executor. Regulation of the Estate Administration providers market would ensure that decision was easier to make as it would be clear what standards were expected of Executors and what the Testator would be ultimately paying for.

- It is our view that the market needs a clear offering that is easily understood and communicated to the consumer at the level they need. Regulating the marketplace would ensure a level playing field for providers and a much clearer basis for consumers to assess what level of service is required. In keeping with the aims of the Legal Services Act, the Consumer should be able to receive sufficient information to enable them to obtain the services they want, at the price they want, in the way they want them, safe in the knowledge that they are appropriately protected if a mistake is made.