

NCF

THE NATIONAL CONSUMER FEDERATION

1st November 2011

Michael Mackay,
Legal Services Board
7th floor, Victoria House
Southampton Row,
London, WC1B 4AD

Dear Mr Mackay,

Re: Will-writing, estate administration and probate activities

The National Consumer Federation is a registered charity and the UK's grassroots voluntary consumer organisation, representing local consumer groups nationally and campaigning to improve consumer rights for everybody.

Since the early drafting of the Bill NCF has argued that will-writing should be designated a reserved activity within the provisions of the Legal Services Act. We are pleased, therefore, that the Legal Services Board has started a formal investigation into how best to protect consumers from possible detriment caused by inadequate or negligent service - or fraud, in this important legal sector. We have assumed that estate administration and probate services would be encompassed in any will-writing regulatory system which we maintain should be included in the Act with a new Authorised Regulator.

Our concerns about this legal service are set out in our response to the Consumer Panel's call for evidence on will-writing and we attach here a copy of our submission to the Panel of November 2010. We commend the Panel's subsequent report in July 2011 which we find comprehensive and a solid basis for a recommendation to the Lord Chancellor that will-writing be a reserved activity. We note that although the report is focussed on will-writing it does cite consumer detriment both real and potential arising from failures in estate administration and probate services.

We would not want to prevent anyone wishing to write their own will and name family members or friends to administer their estate unpaid from doing so. In our view this should be excluded from regulation. It is the will-writing market where the service is provided 'for payment, gain or reward' (Panel report) where we believe the potential for harm arising from problems such as those listed on page 2 of your discussion paper, should be addressed, and, as stated above, the best way to do this is to include the work of all who are paid for will-writing, estate administration and probate services to be regulated under the provisions of the 2007 Act.

In our view, borne of experience in consumer representation, the Panel is correct in stating that a mix of existing regulation and self-regulation will not provide the necessary protection for consumers, nor do we have confidence that quality marks and assessed accreditation schemes are a satisfactory alternative to statutory regulation. We attach below a brief commentary on quality marks and accreditation schemes for legal services, which we forwarded to members of the Consumer Panel team following an informal meeting on the subject at the Panel's offices.

We agree the 'core elements' for a regulatory scheme identified in the Panel's report. We would want to be assured that the set of conduct rules include detailed conditions on consumer information. There should be, for example, a requirement that all service providers supply clients with leaflets, worded appropriately, explaining the processes of will-making, estate administration and probate, and that all charges and fees are made clear to the client before the contract is made. Consumer protection rules on cold calling and contracts made in the home should be stipulated (rather than implied) in the conduct rules.

The process of administering estates and granting probate should be less problematic if the regulatory scheme for will-writing is well structured and implemented. The Consumer Panel's report identifies cases of consumer detriment from inadequate, negligent or fraudulent estate administration and probate work. (See, for example, pages 36 to 39 and 43 to 57 and also section 8 on Fraud of the report). Further evidence of the problems experienced by consumers as a result of bad or fraudulent work, the causes of those problems and details of the consequences and resulting harms experienced by beneficiaries, can be found on the Legal Ombudsman's website. Evidence is also available from previous legal services complaints bodies, CAB records, the OFT and Authorised Regulators.

Beneficiaries of a will look for an efficient, fast service avoiding complications and inflated costs but they are rarely in a position to judge whether or not the service is fast and efficient or whether needless complications have inflated the costs.

In our response to the Consumer Panel we cited the case of Mrs R who had been encouraged by a firm offering will-writing services to set up a trust - at a cost to her of £2,500, for an otherwise simple will dividing her estate equally between her children. She was persuaded to do so even though her estate did not breach the inheritance tax threshold. The lady has since died and the family friend administering her estate found the lengthy Trust documents so confusing that he contacted the company (which was still operating) for clarification. They offered to assist - for a fee. The administrator then wisely contacted the local Probate Office and was advised to ignore the Trust documents altogether. The beneficiaries are relieved that the family friend, with previous experience in administering estates and working without fee, gain or reward was able to get grant of probate efficiently and speedily.

The National Consumer Federation urges the Legal Services Board to recommend to the Lord Chancellor that will-writing, estate administration and probate activities be reserved under the provisions of the Legal Services Act 2007.

Yours sincerely,

Hugh Jenkins Secretary NCF

Attached: Notes on Quality Marks & Accreditation schemes (06.09.2010)

NCF response to the LSB Consumer Panel investigation into will-writing
(November..2010)

NATIONAL CONSUMER FEDERATION

RESPONSE TO THE CONSUMER PANEL OF THE LEGAL SERVICES BOARD'S CONSULTATION ON THE POSSIBLE INCLUSION OF WILL WRITING AS A RESERVED ACTIVITY.

The National Consumer Federation is a registered charity and the UK's grassroots voluntary consumer organisation, representing local consumer groups nationally and campaigning to improve consumer rights for everybody.

Our aim is to help consumers at the grass roots help themselves and to educate and inform them to the wider public benefit, with reference to the key guiding principles of choice, information, representation, access to goods and services, quality, fairness, safety and redress.

Since the inception of the Legal Services Act we have been in favour of the inclusion of will writing within its regulatory framework as a reserved activity. It is our view that the need for regulation of will-writing within the uniform provisions of the Act has become more urgent in recent years as estates have increased in value and many family structures have become more complex. Furthermore, there has been a mushrooming over recent years of unregulated companies offering will-writing services, some advertising on the internet and elsewhere at 'teaser' prices as low as £60.

We do not accept that numbers of known and documented cases of consumer detriment alone should determine whether or not will-writing should be a reserve activity. As with a conveyance, problems arising from a misconceived or fraudulent will may not become apparent for many years and many, if not most of the new entrants into the will-writing market were not in existence even ten years ago. Research estimates unregulated will-writing companies currently prepare 7% of all wills. It is probable that this proportion will increase as marketing opportunities and techniques expand over the media and the internet.

Whereas it is possible that over regulation and restricted entry could lead to increased costs, less choice and complacent, uncompetitive providers lacking motivation to improve client care, these possible downsides, which in any event may be checked by other provisions in the Legal Services Act such as Alternative Business Structures, are outweighed by the more probable consumer detriment from a growing, unregulated will-writing market with confusing styles of provision and varied levels of consumer protection - with some providers self regulated and some not regulated at all. Where no satisfactory complaints and redress service is in place the consumer (or more likely the executor or beneficiary of the will) must fall back on existing criminal and consumer protection laws, which, given the nature of the service, may not provide effective, economical protection.

Will-writing requires a measure of skill. Even a quite modest estate these days may require careful consideration so far as inheritance tax is concerned, having regard, in particular, to the value of houses. The law in this area is quite complicated. A will cannot be corrected after the death and there can be very unhappy family disputes arising from a poorly drafted will.

The risk of ambiguity in the will is quite high, as is the risk of not getting the testator's wishes right. Will-writing is more than just setting down the apparent wishes of the testator. A real understanding of their situation, their wishes in life and their obligations is required.

There are competent unregulated will-writers and incompetent regulated providers of will-writing services. There are rogue traders in all areas of the marketplace, particularly where the client cannot have sufficient expertise to protect their own interests, - not only legal services. Regulation does not of itself guarantee a trouble-free service but a will-writing service within the authority of the Act would provide clarity in the market and set certain valuable safeguards: a unified code of good practice (the OFT has made a start on this with the Institute of Professional Willwriters); training and monitoring requirements and the bedrock protection of the complaints and compensation provisions of the Legal Ombudsman.

The regulations should and can be designed to protect clients not only from misleading or incorrect advice and careless drafting but also from exploitation, for example naming the will-writer as executor at a 3% or more charge on the estate. They should be drawn-up with significant consumer in-put and offer straightforward cost-free redress to clients, executors and beneficiaries should things go wrong. A single code, monitored at proportionate cost and applying to all who are licensed to offer will-writing services should provide the clarity consumers require in an opaque, complex legal services market.

Our brief survey of will writing experience has revealed instances of unsatisfactory service, for example:

1. Mrs R, recently widowed, was encouraged by a company offering will-writing services to set up a trust at a cost of £2,500 for an otherwise fairly simple will dividing her estate equally between her children. She was persuaded to do so even though her estate did not amount to the £650,000. Inheritance tax threshold applicable in her case. She believed that the threshold was £325,000. It is not clear whether or not she was misled - the will was drafted not long after the rule was introduced simplifying inheritance tax thresholds for married couples and civil partners - but it is clear that a trust was not appropriate in her case and that she was put to unnecessary expenses.

2. Seeing the consequences of the unexpected and untimely death of his brother intestate, Mr J contacted a local firm of solicitors to draft mirror wills for him and his wife. The paralegal from the firm who came to their house for a free-of-charge but lengthy interview, became confused and so confused Mr and Mrs J that they lost confidence and decided to decline the firm's services. Two years later they still do not have wills. They say that they have not had the time to invest in another attempt and cannot be certain another firm picked at random or even by word of mouth will not also prove a disappointment. However, our survey has had the beneficial effect of prompting them to put this important task higher on their 'to do' list!

3. Mr and Mrs P, NCF members, have a good report of using solicitor services. Mrs P writes, "My husband and I wrote simple wills with a solicitor some 35 odd years ago. We recently checked with a local solicitor that all was still in order re house ownership and asked about the necessity to update names and addresses. He advised us it was in order, did not need changing and we could attach a note ourselves re the names and addresses. He did not charge. I would be wary of using a will writing service myself - as with house conveyancing I use a professional so if something goes wrong I can sue."

NCF has not had reports from members who have used a will-writing company but several like Mrs P above have expressed the view that they would not use one. Some have written their own wills having used the guidance available from the CAB, WHICH? and on-line advice as well as the forms available from W H Smiths and others, and this freedom to act for oneself must be maintained if and when will-writing becomes a reserve activity.

To summarise: NCF recommends the inclusion of will-writing under the Legal Services Act as a reserved activity. We do not consider reports of current consumer detriment from the will-writing market should determine the outcome of the Consumer Panel's investigation. Given developments in this market and the long-term potential hazards, it is our view that the Panel's recommendations should be based on a realistic assessment of potential detriment. Will-writing as a discrete reserve activity under the provisions of the Act will include, of course, the Legal Ombudsman service and should guarantee that providers of the service are trained and monitored. Consumers should have a significant input in the drafting of the regulations governing will-writing to ensure that the objective of the Act – to "put consumers first" - is maintained.

Anne Thomas

on behalf of the Legislation Committee of NCF

November 2010

NOTES ON QUALITY MARKS AND ACCREDITATION SCHEMES.

Any aid to choice for consumers of legal services should be welcome for the reasons we discussed at our meeting: this is a market where the ordinary consumer is considerably disadvantaged when selecting a service provider - possibly more so than in any other important service.

The question is whether a Quality Mark will provide the benefit required and, even if it looks likely it would, whether the benefit merits the cost.

If the overriding objective of establishing a Quality Mark it is to benefit consumers there are several issues to consider . Here are a few that come to mind in no special order:

- How much investment is required to establish a Quality Mark that consumers will *easily* recognise and *justifiably* trust?
- Who will issue the Quality Marks? - The LSB, the ARs, the MoJ, OFT?
- Who will determine the standards and regulations?
- How will performance be monitored and how often?
- Who will pay for establishing, assessing and monitoring?
- Who will sign up for accreditation?
- Will there be one Mark covering all legal services, or different Marks for different services or one mark differentiated for the different legal services covered by the Act?
- Would lawyers with Quality Marks charge more and create a second-class service for consumers priced out of the “first class”?
- The standards set for a Quality Mark in particular areas of law will include standards all lawyers in that area should observe, as well as standard conduct that all lawyers should follow. For example providers of legal services should actively seek feedback through end of contract consumer surveys (ideally on-line) showing a clear demonstration of their commitment to their clients.

Lawyers in most fields have long been required to undergo lengthy training and adhere to regulatory rules. Whether their performance has always been effectively monitored and assessed for adherence to the rules, and whether those rules directly address the concerns of consumers is less certain, although it is clear that both the SRA and the BSB have shown awareness of this issue in recent years: the Bar Standards Board has established a Quality Assurance Committee and the Solicitors Regulatory Authority has its Lexcel scheme. The CLC has a Compliance Department to monitor that profession.

However, If we take the Lexcel scheme as an example of a prototype Quality Mark for the legal profession we note that although the scheme claims to be flexible - only specifying standards, the assessors are required to check in detail *procedures* considered necessary to produce the standard of performance deemed good by the legal profession. The approach we would prefer is one centered on *outcomes* for clients – on what clients would consider to be good client care.

A look at the advantages the Law Society identifies for solicitors who meet the standards set by Lexcel explain why we may have reservations about a Quality Mark scheme that is not

based on the consumer experience - one that lists in detail the desired outcomes for *clients* of legal services. That puts consumers first. This is the list of advantages claimed for lawyers: -

“Achieving Lexcel means you will be recognised for offering a client excellence [sic] service which will benefit *you* in a number of ways: (our italics)

- Increased profitability
- Better risk management
- Improved management efficiency
- *Enhance client care*
- Fewer mistakes
- Support with compliance
- More impactful marketing

Read more about the benefits.”

We accept that consumers should benefit from better risk management, improved efficiency and fewer mistakes but those benefits must be judged by a decrease in stress and costs for the consumer - not merely in more free time and profit for the provider. It may be that somewhere the Lexcel website lists in detail the benefits for clients (other than the very vague “enhance client care”). If so it is not very visible and a look at the regulations that are assessed by the mushrooming teams of ‘independent’ assessors gives little encouragement that improved client care outcomes are foremost in their thoughts.

Car servicing is often a problem for consumers. Although usage is more frequent, as with legal services drivers cannot always know if the service has been satisfactory and as with legal services, bad service can have very serious outcomes. September’s WHICH? this year looks at the attempt to raise standards in garage servicing by the introduction of several codes of conduct - with their Quality Marks - including the OFT approved Bosch code. The majority of drivers welcome accreditation schemes for garages but none of the schemes impressed according to the WHICH? survey, with Bosch being the best of a bad bunch and also the most expensive.

To conclude:

Consumers prefer others more expert to vet and badge service providers particularly in markets like legal services.

The occasional and varying use consumers make of legal services means any attempt at an individual market survey by them will be far too chancy and unlikely or impossible to produce a clear, satisfactory choice.

If introduced, Quality Marks should be hard to get and susceptible to being removed.

We like the OFT scheme - both in terms of process and ensuring public awareness. A Quality Mark for legal services could adapt the approach to the legal market.

Quality Marks awarded by an independent authority - possibly the LSB (or even the LSB Consumer Panel?) according to very carefully set criteria will (could?) be worth the investment.

Quality Marks will take time to establish and performance will need to be vetted and monitored - so we're talking delay and ongoing expense.

Codes should be drawn up by teams which include significant consumer representation.

Further comments:

Our experience with Quality Marks teaches that it takes time and an enormous effort (and cost) first to establish and then to maintain awareness among consumers, however, an increasingly internet-literate public could get the message on what standards to expect and benefit from a guidance checklist more effectively through the web. The internet could also assist in monitoring code practice.

The internet is having a radical influence on the ability of consumers to monitor (police) goods and services but they do need reliable information and guidance. Our preference is for the LSB Consumer Panel to draw up information and guidance in an easily digestible form and make it widely available regardless of whether or not Quality Marks are introduced.

Every firm or chambers - not just those awarded Quality Marks, should be required to make clients aware of the guidance on first contact, with sanctions for failure to do so.

National Consumer Federation

06.09.2010