CALL FOR EVIDENCE: INVESTIGATION INTO WILL-WRITING, ESTATE ADMINISTRATION AND PROBATE ACTIVITIES

The Society of Trust and Estate Practitioners (STEP) is the worldwide professional body for practitioners in the fields of trusts and estates, executorship, administration and related issues. STEP members help families secure their financial future and protect the interests of vulnerable relatives. STEP promotes the highest professional standards through education and training leading to widely recognised and respected professional qualifications. STEP internationally has almost 17,000 members, with over 6,500 members in the UK. Over 4,500 students worldwide are currently studying for STEP qualifications and in the UK STEP supports an extensive regional network providing training and professional development.

STEP is pleased to be given the opportunity to comment on the discussion document "*Call for evidence: Investigation into will-writing, estate administration and probate activities*". STEP generally supports the findings of the Legal Services Consumer Panel (LSCP) report "*Regulating Will Writing*" and much of the evidence we provided to the LSCP was cited throughout the report. We agree that both will-writing and estate administration should be subject to some form of reserved status including the "core elements" outlined by the LSCP. We also agree that reservation as traditionally applied runs the risk of creating professional monopolies that do not best serve consumer interests.

We give below our detailed answers to the specific questions in the discussion document.

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

STEP agrees broadly with the LSCP's assessment of the problems in the will-writing market and the resulting 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 has been suggested or are worse?

With respect to the identification of detriments and their significance or otherwise, one difficulty is that problems with wills drafted recently will often not surface for some considerable time. It is therefore notable that STEP members in the USA have reported a dramatic rise in recent years in the number of cases involving disputed wills. This rise is widely attributed to a period of rapid expansion in commercial will writing services using staff with limited qualifications in the US market 20 or so years ago. Given this, there is a strong argument to suggest that problems in the

Society of Trust and Estate Practitioners
Artillery House (South)
11-19 Artillery Row
London SW1P 1RT
United Kingdom

Tel: +44 (0)20 7340 0500
Fax: +44 (0)20 7340 0501
Email: step@step.org

will-writing market are generally under-reported and are subject to time-lags.

Do you agree with the Panel's assessment that will-writing should be a reserved legal activity?

STEP agrees that will-writing should be a reserved legal activity including the "core elements" outlined by the LSCP (Education, Office Holders, Conduct rules, Ensuring on-going competence, Monitoring compliance, Redress and, Discipline).

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?

While in principle there is a strong case to support the Legal Services Board's stated preference for non-statutory options as opposed to statutory regulation, in practice many segments of the legal services markets are characterised by a large number of relatively small scale businesses and in reality statutory regulation is the only way of delivering effective control. Will-writing provides a strong example that voluntary codes from various professional bodies can only have a limited effect in an environment where there is no statutory bar to anyone setting up a business that is not subject to such codes.

Looking at the sorts of regulatory tools that it might be appropriate to employ, in the majority of cases where consumers use legal services the issue is sufficiently important to them to warrant a general presumption that there should be a strong emphasis on preventative tools ensuring that providers are competent and committed to maintaining specified standards. In the case of will writing, while the fees paid for the writing of a will are often relatively modest, the consequences of a mistake need to be measured not just in financial terms but also in terms of a human cost to families which can be enormous. We would also note that wills, like most areas of legal services, are not a 'product' that many people purchase regularly so it is difficult for a consumer to learn from experience regarding the quality of a provider. Finally, strong preventative regulation would play a key role in building confidence among those who currently underuse legal services.

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 agree with the Legal Services Board's conclusion that the existing system is poorly understood by consumers. Not only are professional qualifications often poorly understood, but consumers can have little idea of what protection they have when using various types of advisor. If assessed accreditation schemes and quality marks specific to will-writing were to increase the understanding of consumers in these areas, they could be a useful supplement to statutory regulation. We would, however, see them as unlikely to be wholly effective as a substitute for statutory regulation.

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

Under the current regulatory arrangements STEP believes that professional will-writers should be suitably qualified and be able to demonstrate that they have maintained their expertise via appropriate CPD arrangements in areas relevant to will writing. These arrangements should apply equally to lawyers and non-lawyers alike.

If will-writing was to be a reserved activity what specific activities should be included within the scope of the 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 or reward.

STEP agrees with the Panel's suggestion that the scope of regulation should include the commission, sale and preparation of will-writing and related services for fee, gain or reward.

What specific protections are needed for each problem and detriment that has been identified? Do you agree with the "core elements" (as set out above) 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?

STEP agrees that will-writing should be a reserved legal activity including the "core elements" outlined by the LSCP (Education, Office Holders, Conduct rules, Ensuring on-going competence, Monitoring compliance, Redress and, Discipline).

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

We agree that there is need to avoid a regulatory menu that is so expensive to implement that it risks the effective creation of professional monopolies. This highlights the importance of developing optimal standards for applicants for approved regulatory status that balance the need to protect consumers against the risk of excessive regulatory costs deterring entrants to the market. It also highlights the need for the Legal Services Board to have a strategy in place to ensure that the fixed costs of regulation do not impede diversity of delivery in the market place. As the Smedley report highlighted, there is a danger that the legal services market could see a very limited number of major regulators focused on the established players within the legal services market alongside a plethora of small, possibly sub-scale and unsustainable, regulators focused on market niches and new market entrants. One solution would be to ensure that regulators recognise a range of professional qualifications where these are of an equivalent standard and do not impose restrictions on forms of business model unless these provably risk consumer detriment.

<u>Probate and estate administration</u>

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

STEP believes that those who administer estates professionally should be regulated to ensure minimum standards of competence and behaviour and to give the public protection in form of negligence insurance.

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 is there of consumer harm?

There are concerns in the professional advisory community and the charity world that fraud is a significant problem in the administration of estates. STEP commissioned a report on this matter in 2005 and conducted a survey of its UK members. Nearly half of its members had come across suspected cases of fraud or theft from an estate. Moreover, the RNIB estimated that in the UK in 2005 estate fraud amounted to between £100-150 million. Anecdotal experience of the police approach to estate fraud is that the police often do not have the expertise to investigate such claims, and that estate fraud is usually very difficult to detect.

Frank Nesbitt, a former Fraud Investigator within the Northumbria Police Economic Crime Unit, is now a specialist in estate fraud. He commented to us that "Fraud during the administration of an estate by unregulated providers is all too possible. Charities become the soft easy target for those determined to exclude them from their rightful bequest and fraudsters will make all manner of intriguing underhand and illegal efforts to forestall or steal that which the Will has declared they must do. The most likely area for such a fraud to occur is in the actual administration of the estate."

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?

There is an absence of hard data on this topic to definitively state what proportion of the problems occur due to poor wills and what proportion are due to the incompetent or fraudulent administration of an estate.

Anecdotal evidence suggests that while poorly drafted wills are playing a role, the large majority of consumer problems regarding wills are not about errors in the drafting, rather they result from dishonest or incompetent handling of an estate after the person's death.

A recent case of estate fraud in Scotland makes the point that estate administration requires tough regulation. Michael Karus, 48, embezzled £413,052.81 to pay off his own debts while acting as executor of the estate of the late Edith Hampton, who died aged 89 in Edinburgh in 2003.

Detective Sergeant Colin Aiken of Lothian Borders Police, Specialist Fraud Unit has stated many cases of estate fraud, such as that of in the Karus case "have revolved around the handling of assets of a deceased person and failure to implement that person's will."

How and at what stages of the process are problems normally discovered?

Probate fraud is a hidden problem which often only comes to light by chance or when a more serious crime is being investigated. Beneficiaries are very unlikely to suspect they have been

subject to a fraud. This is because transparency is denied to the beneficiary, and access to information is often managed by the fraudsters themselves.

When cases of estate fraud are uncovered by family members and other beneficiaries, it is usually after they receive much less from an estate than they expected. Often in these cases there is nothing left in the estate at all.

How and how easily can problems be put right and detriments reversed?

Under the current regulatory regime, in estate fraud cases involving lawyers who are members of a Law Society, the victims are generally covered by the Solicitors Compensation Fund. However, a non-lawyer acting as an estate administrator is not regulated and would not necessarily be covered by any compensation fund. In these circumstances the detriments resulting from an estate being emptied are rarely fully reversed.

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

Issuing a grant of probate is currently a reserved legal activity and as such is protected by all of the associated mechanisms which come from using a solicitor, including the availability of a compensation fund for redress against fraud.

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 as a supplement or alternative to statutory regulation?

This section of the legal services markets is characterised by a large number of relatively small scale businesses and we believe that, in reality, statutory regulation is the only way of delivering effective control. Accreditation schemes can only have a limited effect in an environment where there is no statutory bar to anyone setting up a business that is not subject to such schemes.

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?

As is the case with will-writers, STEP believes that those who administer estates professionally should be regulated to ensure minimum standards of competence and behaviour and to give the public protection in the form of negligence insurance and continuity arrangements.

All those administering estates need to be suitably trained and subject to a guarantee fund. They should also be required to maintain their expertise by undertaking on-going CPD as the laws of succession are ever changing and a practitioner must keep up-to-date with these developments.

STEP would hence argue that the "core elements" outlined by the LSCP with respect to will-writing are also appropriate for the regulation of estate administration (Education, Office Holders, Conduct rules, Ensuring on-going competence, Monitoring compliance, Redress and, Discipline).

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

We agree that there is a need to avoid a regulatory menu that is so expensive to implement that it risks the effective creation of professional monopolies. This highlights the importance of developing regulatory standards that are appropriate to particular market segments.

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, what benefits does it bring for consumers and how does it impact on the way that providers organise themselves to deliver services?

Some have argued that the regulation of the grant of probate is in itself enough to cover problems with estate administration. However, it is known that some non-lawyer estate administrators exploit this by means of using a solicitor to undertake the grant of probate before bringing the rest of the estate administration process back in-house.

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 in relation to the different service.

Our report which was submitted as evidence to the LSBCP earlier this year found several questionable referral practices being adopted. These included:

- Free wills offered on proviso of subsequent work: Some IFAs have set up what is described as a complimentary will-writing service to try and keep the investments with the IFA, and have subsequently scrapped the will-writing business due to reoccurring problems with the wills that had been written.
- Will writers refusing to renounce as executors: Will writers have made enormously complex wills, appointed themselves as executors and trustees and have refused to renounce after the death when asked to, resulting in significant costs to the estate.
- Self-appointed trustees: Will writers commonly take a power of attorney to take out grant of probate, which could leave a vulnerable person open to exploitation; will-writing companies have appointed company owners as trustees of life interest trusts of property (or asset preservation trusts); clients have been forced into transferring their property (sole proprietor) into the joint names of themselves and a trust company as tenants in common.
- Breaking the self-dealing rule: Executors have been persuaded by will writers to employ a connected company for advice with the companies then working together so that both the

adviser and the executor personally benefit, to the detriment of the beneficiaries and in breach of the self-dealing rule and the executor's fiduciary duty.

STEP - 28/10/11