



The Institute of Paralegals

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BY EMAIL

Dear Chris,

**Re: Call for Evidence: Will Writing**

This is our response to the Panel's final call for evidence.

*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 suggested or are worse?*

A1: we agree with the Panel's assessment to a degree. We do think that at least some of the problems arise because the non-solicitor will writing market is extremely new and, inevitably, is going through a period where short-term opportunists vie with the truly-professional for market share. This would in and of itself decline over time, especially with the inevitable development of such market-based consumer protection mechanisms as [www.Checkaprofessional.com](http://www.Checkaprofessional.com) (the planned professional services offshoot of the highly successful [www.checkatrade.com](http://www.checkatrade.com)). Also the work of relevant trade bodies such as the Society of Will Writers and us will also inevitably bring more discipline to the market.

We acknowledge this will not address immediate needs and problems, but we feel it important to differentiate between a clear market failure and a market which has not yet had time to develop but which is going in the right direction. This question is going to arise every time the regulated legal service providers face competition from the unregulated, and we believe it clouds the picture to label the situation as market failure without deeper consideration.

We also note that even solicitors have troubles with will writing because it can be extremely difficult. A more logical response would be to codify and simplify the law relating to wills as much as possible so that the problems caused by complexity are removed at source. We do not hold out much hope that this solution will be implemented.

*Setting Standards & Promoting Professionalism*

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*Q2: 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? 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?*

A2: No, will writing should not be a reserve legal activity if that means adding it to the current monopoly list enjoyed by the seven regulated branches of the legal sector. Yes will writing should be a reserve activity if that means a wider, light-touch regulatory system is put in place such as that run by the Ministry of Justice's Claims Management Regulation Division.

**Our preferred approach is to have the MoJ set the market entry/license maintenance requirements and part of those requirements are that practitioners belong to either an approved trade body such as us or the Society of Will Writers or a regulator.**

We agree with the Panel's assessment that alternatives to statutory regulation are unlikely to protect against the identified problems and detriments - but, let's be honest, statutory regulation is not going to solve this problem either! Solicitors have had 450 years of regulation and are currently so heavily regulated that firms are going out of business, and solicitors' firms of all sizes have to seriously look at whether they can afford to carry on doing day to day work for ordinary members of the public.

In a rolling attempt to improve standards solicitors have an extremely long, arduous and extremely expensive education regime - so expensive that it is socially divisive.

Despite the heavy regulation and the intense education there are persistently high levels of complaints about solicitors doing will writing (and indeed generally).

We do not wish to appear cynical about the benefits of regulation, however like one of Oscar Wilde's characters who upon being accused of cynicism retorted "my dear, I'm not cynical, I merely have experience - they amount to the same thing" we are very alive to the likely reduction in access to legal services which will be felt by the poorer elements of society. It is tough enough for them already and it would be extremely regrettable if they were effectively cut out of access to yet another legal service because the cost of will writing regulation meant that the prices charged by will writers had to rise to solicitor-type levels.

This is not an idle point. The cost and burden of regulation has made professional indemnity insurance unaffordable for an increasing number of solicitors. Those who can afford it have to factor it into their charges (along with 101 other regulatory fees and charges). This has a direct impact on costs to the client.

We have a corporate member who until last year was a solicitor with a sole practice. His professional indemnity insurance as a solicitor in his last year of practice was £38,000. As a paralegal law firm (our term for a commercial legal service provider who is not regulated under the Legal Services Act 2007) he is getting his professional indemnity insurance through us for just £428. Clients will benefit.

When regulated legal practitioners call for a level playing field what we suspect they would really like is the lessening of the regulatory burden on them so they can compete commercially with paralegal law firms. We also suspect that they do not think the burden will be lessened, and so what we believe they are asking for by default is the imposition of an equally heavy regulatory burden and accompanying costs on will writers so that they cannot afford to offer competing will writing services at a price which undercuts them. It could quite easily be argued that when will writing was a solicitor monopoly it was a failed, moribund market. Will writers have re-energised it and made it much more accessible. Taking it back to its failed, moribund state would not be progress.

We stress in making these comments that we impute no bad motives to solicitors or their representatives. We think that they are being forced to compete with unregulated legal service providers with both hands tied behind their backs, and real steps need to be taken to lessen the cost of the regulatory burden on them - for everybody's benefit.

*Q3: what do good providers of will-writing services currently do to protect against problems and ensure that consumers receive a quality service?*

A3: we believe one of the main drivers of poor service is that too many will writers work on a commission basis. Much has been written in other sectors, especially regarding independent financial advisers, about how that form of remuneration inevitably leads not only to mis-selling and sloppiness, but it also actively attracts short-term opportunists out to make a quick buck. We think that is what happened with will writing.

We also think there is insufficient training.

*Q4: 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.*

A4: we believe that the scope of regulation approach adopted by the Ministry of Justice for claims management companies under the Compensation Act 2007 works very well. It is broad enough to stop people abusing the system on technicalities, but very clear and easy to understand.

As a general comment, regulation is only half the story - it is the stick. To create a good service culture one also needs the carrot - which is professional recognition/pride. The pursuit of professionalism will be best served by regulating the entirety of the process.

However there should be scope to allow regulated entities to undertake at least some of the activities rather than requiring each individual practitioner to be individually registered and regulated. By our estimates, 44% of all fee earners in the solicitors' profession are paralegals who have, in reality, no regulation at all (bar "do not hire" notices in extreme circumstances). If paralegals can do virtually all of the current regulated activities provided they are monitored by a solicitor ("monitored" being nowadays a very loose and flexible term!) Then the same right should be extended to will writing businesses.

*Q5: 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?*

A5: the protection we would like to focus on in this answer is the protection of the individual client and his/her opportunity to seek legal advice even if he/she does not earn a great deal of money.

There is a regrettable approach taken by some that it is better that people cannot afford legal advice than, Heavens forbid, they run the risk (as opposed to certainty) of getting poor advice/assistance from their legal adviser. We see this every day in the court system, where so many people cannot afford a solicitor that they are turning to paralegal law firms even though the law says such firms have no rights to conduct litigation/have rights of audience.

The problem is so bad that numerous judges turn a blind eye to these prohibitions and let paralegal law firms regularly represent clients.

It is a disgraceful moral scandal that people are regularly being denied the right to take action or defend themselves in court just because they cannot afford a solicitor, and that some practitioners regularly defend that cruel exclusion on the basis that they are actually defending the rights of the excluded.

Our concern is that the same problems will occur with will writing if it is placed into the current Legal Services Board regulatory framework.

We think highly of the Board and the regulators. However as the situation with solicitors is showing, having the best of intentions is insufficient defence against the general flow towards ever more and more detailed regulation.

This brings us to our second protection issue - the protection of the rights and views of organisations such as ours who are not Legal Services Act regulators.

Despite many assurances to the contrary in the set-up phase, we have seen that the Legal Services Board in practice is very inward-looking. We fear the no doubt wholly inadvertent creation of a de facto cartel where the existing regulators work so hand in glove with the Board that their views, needs and agendas overly influence the Board, and when it comes to deciding who will be the regulator(s), existing regulators will inevitably be in pole position to exploit opportunities to the detriment of those organisations who are not given the opportunity to have an on-going dialogue with the Board.

We do appreciate that the very nature of the Legal Services Act makes the constant interaction between the Board and regulators necessary, inevitable and even essential. What worries us is the continuing lack of interest display by the Board in hearing the views of, engaging with or working with anyone outside that charmed circle.

The playwright Tom Stoppard wrote that "Democracy is not in the voting, it's in the counting of the votes", similarly regulation is not just in writing the rules, but who gets to interpret and carry them out: we fear the emergence of a closed shop where the only views really heeded are those coming from a particular perspective.

Q6: 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?

A6: we have concerns about the ability of commercial organisations generally to honour long-term contracts to look after estates, etc. - especially where payment is taken sometimes many years in advance! There is obviously however a demand for such services since they seem to be purchased in ever-increasing numbers. At least with regard to the safe storage of wills, rather than introduce heavy regulation to force individual companies to comply, we would prefer the creation of a national depository akin to the Land Registry (but on a simpler, smaller basis). This could be paid for by a small tax on wills.

Q7: 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?

A7: if the will writing industry has done one thing it is to significantly increase the number of people creating wills. Presumably your research has shown that the problems caused by poor will writing manifestly and significantly outweigh the problems caused by not having a will in the first place? If it does not, then how do you know regulation will not result in fewer wills being written and therefore the number of problems actually increasing as a result of regulation? We refer you back to the stagnant middle-class market as it was before the deregulation of will writing.

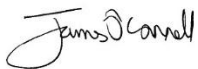
Q8: are self-regulation and general consumer and criminal law capable of addressing consumer harm? Do you think that assessed accreditation schemes and quality marks specific to this field would benefit consumers either as a supplement or alternative to statutory regulation?

A8: in our experience, the wealthy suffer problems with wills written by solicitors. Disproportionately the poorer elements of society suffer problems with wills written by will writers. We do not need to rehash the argument about how the current regulatory scheme acts to stop almost everyone except the rich being able to stand up for their rights in court. Also in our experience, the police are simply not interested in taking action and nor are Trading Standards other than in the most exceptional of cases. The current protections simply don't work.

Q9: what impacts do you think regulation might have on consumer protection, competition, access to services, the cost of services and the administration of justice?

Q10: it all depends on what regulation entails. Light MoJ style regulation encompassing flexible, consumer-orientated and low-cost organisations such as ourselves and the Society of Will Writers could give very effective regulation without pushing up the costs so much that they deter access and hinder the development of innovative services. The sheer number of people using will writers instead of solicitors shows that the public very much wants their services. The aim of any regulation should therefore be to allow the service to continue as much as possible as is, and at the same charging level, whilst seeking to limit the worst excesses. To do anything else is to yet again make legal services “open to all, like the doors of the Ritz”.

Yours sincerely

A handwritten signature in black ink that reads "James O'Connell". The signature is written in a cursive, slightly slanted style.

James O'Connell  
Chief Executive