



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

The Society of Will Writers and Estate Planning Practitioners (SWW) is the largest professional trade body representing the will-writing profession and represents members world-wide and established in 1994.

The SWW promotes the highest professional standards to maintain the standards and ethics within the will-writing profession through training and education.

The SWW welcomes this opportunity to respond to this call for evidence and to participate in the further process in the ongoing investigation into will writing, estate administration and probate activities.

In its recent report the Legal Services Consumer Panel recommended that will writing should be made a reserved legal activity -and the SWW support a move toward soft touch regulation.

The report highlighted consumers potentially faced many problems. These included poor quality wills, questionable sales practices and lost Wills. The report also highlighted that too many Wills, written by both solicitors and will writers, failed to reflect what the client intended and made other basic errors.

The panel also highlighted that one of the features of consumers using professionals to write their Wills was the consumers lack of knowledge to identify technical problems or assess whether additional services offered were necessary or represented good value for money. It is felt that this lack of knowledge on the part of the consumer could place consumers at risk.

In general the SWW supports the findings of the Legal Services Consumer Panel report, Regulating Will Writing, although the SWW's initial reaction was that much of the 'evidence' provided was outdated and inconclusive as the SWW has done much over the past



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seventeen years to address many of these concerns which can have an adverse effect on the consumer.

The SWW operates a strict Code of Practice which all SWW Members are required to adhere to; the Code is currently before the Office of Fair Trading (OFT) under their code approval scheme CCAS and the SWW is awaiting Stage One Approval for its Code.

In response to the panel's suggestion we agree that will writing and estate administration in particular should be subject to some form of 'soft touch' regulatory scheme including the 'core elements', the SWW's response is as follows:

Education – the SWW support a call for all providers of wills and estate planning services to be subject to compulsory education, ongoing training and formal examinations.

However In order for providers of will writing services to pass formal examinations or hold equivalent qualifications we first have to know who they are and the extent of their skills and qualifications.

In order for this information to be available, will writers should be required to be licensed before being authorised to write wills for gain.

Office holders – the SWW are not convinced that fraud is rife within the will writing profession. The high risk of fraud or theft comes from the practice of providing probate and estate administration services, the practice of holding client money on account with no accountability is in my view negligent on the part of governments past and present.

The SWW has attended many workshops debating the future of will writing and the problems within the industry and on every occasion it has been suggested that one way to resolve some of the problems associated with fraudulent practices would be to regulate estate administration.

Conduct rules - regulation itself will not solve all the problems of poor sales practices, there is sufficient legislation in place designed to safeguard consumer. However it is our experience that publicly funded bodies such as Trading Standards, established to protect the consumer from poor sales are, in many ways, failing the consumer.



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It obviously goes without saying that all providers of will writing services should be required to follow a set of rules in the form of a code of practice that has been approved, and one such approval would be the OFT CCAS scheme but this will only be enforceable through the licensing of will writers, as on its own it lacks any 'teeth'.

The SWW is currently awaiting Stage One Approval from the OFT for stage one approval under the CCAS scheme of its own Code of Practice.

Ensuring ongoing confidence - given concerns about quality and regular changes to the law and taxation, members of the SWW are required to maintain an annual 16 hours CPD and are encouraged to take ongoing training. Through its academic body, The College of Will Writers, SWW members are given the opportunities to develop their skills and further education. The SWW further supports this training regime by providing technical help and advice to both members and consumers alike.

However this only applies where the will writer is a member of a trade body, such requirements are ignored by will writers who practice outside. Licensing of will writers will ensure that the consumer can be confident in the knowledge that the person or persons they are dealing with are fully accredited.

Redress – the SWW vigorously supports the view that all providers of will writing services need to be fully insured and ideally contributing to an indemnity fund and it would be preferable for all providers of will writing services and will writing services themselves to fall within the jurisdiction of the Legal Ombudsman (LeO).

Discipline - where providers of will writing services are found to be guilty of misconduct, under a licensing regime they would be subject to a wide range of sanctions including suspension of licence and ultimately withdrawal of their licence effectively taking away their right to practice. Members of the SWW can find themselves subject to various sanctions such as suspension of their membership or expulsion from the SWW. However this does not prevent them from continuing to trade in future.

Evidence required

The LSB has called for further evidence to help them determine how best to protect consumers.



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Evidence

The Society has for the past 17 years been a staunch supporter of self-regulation and has followed the NCC in the past and the OFT in their support of self-regulation. However the SWW feels that as the industry has grown so have the problems and without some form of statutory intervention, these problems will continue to grow and the 'rogue element' will see will writing as an easy option and the consumer, through a lack of knowledge of what is required when making a will or agreeing to estate administration, as an easy target.

A South West based will writing company that featured heavily in the recent BBC Panorama programme, left the SWW in 2004 due to the numbers of complaints against the company and their failure to resolve these issues. Having left the SWW the company were still free to trade as they always had done but without any recourse for their actions and the SWW were powerless to do anything about it. The SWW still receives calls from aggrieved clients of this company some seven years on.

A Devon-based company were expelled from the society in 2007. They sold consumers 'probate help services' for £3500 payable in advance of their death, and when questioned as to what protection was in place to ring fence this money in order to be in a position to provide these services in years to come, their attitude was "new business funded the old, so ring fencing of funds was not a consideration". The company were investigated by the local Trading Standards Office following a number of complaints they had received from clients of the company and with our evidence were found unfit. The director subsequently transferred the business into his wife's name and continued to trade.

A Kent-based firm were removed as members in 2010 due to the SWW receiving a high number of complaints; most of these complaints were regarding the service the company had failed to provide. Despite all the best efforts of the SWW's complaints handling department, the company refused to acknowledge the problem. The company still trades today, although it is believed, under a new name.

A North East based company, with a country wide network of consultants trading both in England and Scotland had their membership suspended in May 2011 due again, to a high proportion of complaints received at the SWW's head office. The company on being notified



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of the suspension resigned their membership. The company still trades today and the SWW still receive complaints.

A Lincolnshire-based company was put into receivership in October 2011 after several hundred files were deposited outside the offices of another will writing company based in Doncaster. The SWW retrieved these files and has sought to resolve most of the problems but not before hundreds of elderly and vulnerable people have lost many thousands of pounds paid to this company for services that had never been provided. This company had not been a member of any trade association but the proprietor has been banned from holding a directorship for 11 years and has a string of failed companies behind him, and the named director was a practicing solicitor until his death in April 2011.

Below are the SWW's answers to the specific questions contained in the discussion document.

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?

The SWW is not sure that it is in full agreement with the panel's assessment of the problems; however we believe that the size of the will writing profession has increased to the point that some form of regulation/intervention has become inevitable. An example is the Minster Legal Services situation: there is in fact only one person behind this fraudulent company, but by recruiting many consultants nationally who are basically innocent of the company's activities it gives the company the appearance of presenting a greater problem than it is in reality.

The Society supports and welcomes some effective form of licensing for will writers. The licensing would incorporate a criminal offence of offering will writing services for gain unless the person was licensed. This form of licensing is currently being introduced into Scotland.

The SWW firmly believes that a move to licensing would provide a quick and effective solution as it provides improved regulation; also the cost effect of the change would not be



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prohibitive and would not impact on the cost of making a will to the consumer including the cost of other associated documents such as lasting powers of attorneys.

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 identify 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.

The SWW has for many years supported self-regulation as a credible method of regulating will writers, however we no longer believe that self-regulation can deal with the problems that the panel has identified. We think that an assessed accreditation scheme such as is proposed, including the CCAS scheme and the introduction of licensing present a more robust form of regulation than self-regulation. Without licensing the CCAS scheme on its own is not sufficiently robust to deal with will writers who are not even prepared to submit to self-regulation. Only by the introduction of statutory intervention would consumers benefit from a controlled regulatory environment.

However increasing the regulation of will writers is only part of the solution to the problems. Consumer education has an important role to play; the consumer needs to obtain a better understanding of the will. They need more knowledge of the will document and a better understanding of the information they need to provide when giving instructions for the drafting of their will.

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

A good supplier of will writing services has sound knowledge, maintains CPD, maintains regular relevant training, has a PII policy which is kept in-force at all times, has in place a complaints procedure (that all consultants and staff are fully conversant with) and ensures that his staff and consultants are properly trained and in turn maintain their own CPD. All active will writers should belong to a recognised trade body, such as the SWW, and take advantage of the training opportunities on offer.



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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.

The areas of activity that make up will writing that need to be included within the scope of regulation are;

Training (including minimum requirements);

Consultant activities;

Drafting of documents;

Procedures for attestation;

CPD;

Approved PII policy;

An approved complaints procedure, (by their trade body).

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 mandate replaces or that there are other protections that are also required?

The problems in regulating will writers using self-regulatory structures arise as a result of the inability of a trade body to impose a worthwhile sanction on a practitioner providing will writing services should they commit a serious breach of a Code of Practice. If licensing is introduced in a form that makes the writing of wills for gain a criminal offence unless the will writer has been licensed, we believe that this restriction represents a serious sanction for will writers. If a will writer commits a serious breach of a Code of Practice, and is de-licensed, then continuing to write wills for gain without a license is a criminal offence. Thus for most practitioners losing their licence to write wills for gain is likely to be a serious sanction, dissuading them from further practice and therefore providing the sought-after protection for the consumer. Inevitably if licensing is introduced the disciplinary procedures,



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which lead to de-licensing, will need to be robust; as the act of de-licensing causing the loss of an income could easily provoke a legal challenge by the will writer to that decision.

What impact do you think regulation might have on consumer protection, competition, access to services, the cost of services and Administration of Justice?

The effect of botched regulation on the market is likely to have a detrimental effect and increase the cost of supplying wills to the consumer. It would also be likely to reduce the supply of wills and general advice about wills to the public as will writing firms could be driven out of business. The same effect has been experienced within financial services due to the over-regulation practised by the FSA. The effects of ill-conceived regulation can last for many years and once the status quo has been disturbed it is difficult to re-adjust the balance between effective regulation and consumer protection and a sector containing profitable companies able to meet the demand for its products.

It has taken many years for the public to take note of the need for a will and today there are signs that more people are putting their affairs into order. We do not want to see regulation introduced that effects the balance between will writers and consumers and potentially dismantles years of good work by will writing firms.

Probate and estate administration

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

The SWW believes that any person or company that provides estate administration should be regulated. What other profession allows other parties to hold clients money with no accountability.

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?

Fraud or theft of estate funds appears to be on the increase. In 2010 the director David Nash and his 'legal adviser' Nicholas Butcher (a former solicitor who was earlier imprisoned for fraud) were jailed for three years for stealing over £400,000 from estate funds in



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particular they targeted the elderly and vulnerable estates. However theft from death estates is carried out across all professions including solicitors, family members, friends and carers.

*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?*

A poorly drafted will, DIY wills, on-line wills, incorrect information from the client, complex family arrangements, failure to disclose information at the drafting stage are all avoidable problems but regulation itself will not solve these.

Unfortunately the SWW does not have any figures or stats to support this argument.

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

In the case of poor drafting, the problem will not become apparent until the will is submitted for probate. There are various ways a problem can be remedied, Deed of Variation or application to the Court for rectification are two, neither are easy or cheap, and rely on the rules and the cooperation of the Court and the beneficiaries, so may not be successful.

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

Solicitors: Many are 'GP's' in law whilst others are specialists in the field of probate; their authority/regulation to provide Probate and ES for gain comes from the Law Society and the SRA. Training and qualifications gained through the College of Law, CLT and other training bodies.

Trust Corporations: TC's (such as the SWW Trust Corporation and including banks) get their authority from the Lord Chancellor under the Public Trustee Act 1906 as amended and the Supreme Court Act 1981 and are subject to strict rules. Most TC's will have either an in-house or affiliated solicitor or solicitors and the team will comprise of a qualified general



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manager, qualified case managers with LLB, LPC and STEP Diploma as a minimum, with accounts managers and an admin team.

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 filed would benefit consumers either as a supplement or alternative to statutory regulation?

Statutory regulation in the field of probate services and estate administration is the only way forward, with quality marks and assessed accreditation schemes supporting this.

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

Any one offering probate and estate administration services needs to be properly educated, trained and experienced in order to best protect the interests of the consumer.

Practitioners should be required to maintain a minimum annual CPD requirement, hold a suitable PII policy and the consumer should have proper recourse through LeO when things go wrong and there should be an indemnity fund which all practitioners contribute to.

In a similar way as the SWW supports a licensing scheme for will writers so we feel such a scheme could be applied to estate administration practitioners. The SWW introduced earlier in 2011 a requirement that where any SWW member providing these services in addition to will writing is registered with the SWW and the fact recorded along with their qualification and experience. A registration number is given to the member to show that he is approved and meets the standards required.

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

Regulation, if introduced sensibly, will enhance consumer protection, it should improve competition as it would create a more level 'playing field'; however over-regulation, or regulation for the sake of regulation could increase costs to the detriment of consumer choice.



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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?

It is the SWW's view that the current level of regulation, the preparation of the papers is not enough and does not go far enough to protect the consumer. It is the actual estate administration process that needs statutory regulation.

Further information

Whilst finalising the SWW's response, the Society of Trust and Estate Practitioners (STEP) published their response to this call for evidence.

Whilst in principle the SWW agrees with many of the comments STEP make, the SWW does feel that their reference to evidence which they supplied to the LSBCP earlier this year to be particularly scathing of will writers in general.

And it is light of these comments that the SWW feels that it should respond; at least on behalf of its members.

- Free wills on proviso of subsequent work do not necessarily mean wills of poor quality. In fact the majority of Independent and Tied financial advisers look to will writers for the production of their wills and related documents. The SWW has no information on what STEP refer to as 'reoccurring' problems with the wills that have been written;
- Will writers refusing to renounce as executors. Again the SWW has no evidence to support this claim. We do however receive a number of questions each year from families where the solicitor/STEP member has refused to renounce their position, even though they are appointed and joint executors with family members;
- The SWW has no recent evidence of will writers or will writing firms self-appointing themselves as executors/trustees without the testator's agreement. There have been incidences in the past, where this has occurred most are in prison, and some of these 'will writers' have been solicitors;
- The SWW does not believe that by a will writer offering their clients the services of a connected company they are in breach of the self-dealing rules. In a commercial world it is



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common practice for one company to offer the services of another that they may be associated with. Providing the advice and recommendation is in the client's best interest it should not be seen as detrimental to the consumer.

The Society of Will Writers and Estate Planning Practitioners

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Existing obligations / protections?

Membership of the Society of Will Writers

Entry E&T

All applicants are required to provide proof, such as certificates of achievement, of any stated qualifications and/or education standards. Simple written statements of personal achievement are not acceptable to the applications committee and applications will be held pending receipt.

All other applicants are required to attend an initial two day training course during the first few months following their application/acceptance and sit the examination. The SWW through its academic arm provides regular monthly introductory courses as well as distance learning courses at introductory level, so there is usually no unnecessary period of waiting.

Alternative training sources: Providing the course/provider is recognised by the SWW the applicant will be admitted into the SWW on successful completion of their course.

Any member who fails to attend a course following his/her acceptance into the SWW would not have their membership renewed at the end of their first year

Background checks

Every applicant has to provide two references from people who have known them for at least two years, and preferably as more than just an acquaintance.

Where the SWW receives an application from a person stating they are or were a solicitor then the applications section will apply to the Law SWW for a reference.

Where the SWW receives an application from a person stating they are a member of or have been a member of another profession or as a professional, the applications section will carry out such investigations as they deem appropriate to assist in their selection.

The applications section will also check with Companies House where the applicant is a director and also carry out a bankruptcy check in some cases. The SWW does not see bankruptcy as a bar from membership as a will writer/estate planner. However where the applicant offers estate administration as part of their service then bankruptcy checks will be made. Where a member offers trustee services or is a registered consultant with the SWW Trust Corporation then a CRB check is required and CRB checks on members/applicants who are providing probate and estate administration services directly to their clients will also be required in the near future.



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All applicants are required to detail experience, time served, criminal convictions, bankruptcy on their application form and failure to answer any of these questions will result in the application being rejected or delayed.

CPD

All SWW members are required to complete a minimum of sixteen hours structured CPD each year.

To assist members in achieving this, they can obtain up to 75% of their annual CPD requirement on-line. The SWW provides monthly CPD on-line Q&A sessions which are education based. This will range from specific topics such as a debate on capacity supplied complete with study material and a ten question session to test their understanding of the subject.

The SWW supports currently 20, local branches or groups around the country to give all members easy access to additional training and education. This figure is set to rise to 24 during 2012.

Quality indicators

The SWW does not at this time have in place quality indicators of SWW members wills and documents. But the SWW does have in place indicators highlighting the quality of the members CPD and training etc.

Code

The SWW has a robust Code of Practice, which is currently before the Office of Fair Trading under the CCAS scheme for Stage One approval.

All members are required to sign up to the Code and are renewable annually at their membership renewal.

The Consumer can ask to see a copy of their Certificate of Renewal Code Agreement.

Client account

There is currently no requirement for a member of the SWW who only provides wills and associated documents to their clients to hold monies in a client account.

Where the member provides estate administration services then the member must hold client funds in a client account.



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A recent revision of the Societies Code of Practice now requires all members, whether they directly provide estate administration services or not, where they provide services which are to be supplied at the time of death and a fee has been taken in advance either in part or in full settlement, then this fee must be held in a clearly designated client account

Risk profile

When selecting the order in which members are to be subjected to a Compliancy check we carry out a controlled risk assessment to choose the order of member checking. We also have further risk checks in place to decide whether a member is suitable for an on-site audit check or a desk-top check. The process that we use for the selection of members is to apply a risk profile based upon certain parameters, for example the number of complaints and length of time with the SWW.

Compliancy audit checks are carried out quarterly and annually on members.

Quality checks

The SWW does not as yet have in place a system for checking members wills, however it is planned for the future under the recently introduced Compliancy audit checks.

System checks

The audit to be carried out by Compliancy Services checks out each member's system procedures against the SWW Code of Practice. Systems are assumed to include all aspects of the Code of Practice applying to the SWW member's practice and Compliancy Services are contracted to report to us the member's success and failures against the yardstick of the Code of Practice. Where member standards fall below the required level, the SWW will arrange for remedial action to be taken by the member and subsequently checked by Compliancy Services.

Complaints mechanism

The SWW supports a strong complaints policy. Consumers who have a genuine complaint need to make a complaint in writing, either by way of letter, email or through the SWW's web site where a form is provided.

The client is acknowledged immediately upon receipt and advised that it has been entered into the SWW's complaints procedure and that we will advise the client in due course.

The member against whom the complaint has been made is advised of the complaint and given 7 days to resolve the issue without further address.



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Failure to resolve the complaint to the satisfaction of both parties will mean the complaint will enter into the official complaints procedure and the member will incur an investigation charge of £150.

Where it is impossible to resolve the dispute, the SWW has offered the complainant the 'ad hoc' arbitration services of IDRS. However on recent review of our Code this is being replaced with the specialist services of a registered arbitrator. In line with OFT guidelines the cost to the consumer is no more than other channels of dispute resolution or recourse.

PII

All SWW members are required to maintain in force at all times a Professional Indemnity Policy whose minimum wording complies with the SWW's requirements. Each year, at membership renewal, all members are required to provide proof of their PII policy annually.

Compensation

The SWW has a small indemnity fund ('the Fund') which all members have contributed to. This fund is to ensure that a member fail to complete the contract through illness, bankruptcy or death the Fund is a means for the SWW to appoint the works to another member with no financial loss to the client.

This scheme is to be enlarged during 2012 and is being written into the Code of Practice as standard for all full members as a guarantee to all clients of SWW members.

Ombudsman

There is currently no ombudsman service available to the will writing sector.

Sanctions

SWW members are required to work to and abide by the Code of Practice in force at the time and published by the SWW. The SWW has a clear disciplinary procedure and failure to comply with any part of the Code or failure to comply with a directive or finding by the SWW will result in suspension of membership and/or expulsion.