Enhancing consumer protection, reducing regulatory restrictions: will-writing, probate, and estate administration activities

Consultation on scheme rules.

Response from

The Institute of Professional Willwriters
Trinity Point
New Road
Halesowen
B63 3HY

Tel 0345 257 2570 Fax 08456 442043
www.ipw.org.uk
office@ipw.org.uk

Institute of Professional Willwriters
PROFESSIONAL • ETHICAL • COMPETENT

OFT
Approved code

Question 1: Do you agree with the scope of the proposed reserved will writing activities and estate administration activities? Can the scenarios provided in **Annex 1 of the Provisional Report** be caught within the scope of the proposed new reservations? What are the likely impacts of the scope of the proposed activities as described?

The case for maintaining reservation of probate activities is the least convincing, compared to the cases for introducing reservation in Willwriting and in Estate Administration. The probate process on which to found a grant of probate is largely an administrative process which the consultation paper acknowledges. The consultation paper points out (chapter 30) that other administrative activities are reserved activities and cites conveyancing and the administration of oaths as examples. What is important here is the risk to consumers. Clearly there is potential risk to consumers when a conveyancing transaction goes wrong and that makes for a compelling argument for reservation of conveyancing, despite it being an administrative activity. Whether there is a risk to consumers from the administration of an oath largely depends on the purpose of the oath but we point out that there are many cases where the administration of an oath has negligible risk to a consumer and therefore the benefit to consumers of the continued reservation of this activity is questionable.

Ultimately the process on which to found a grant of probate is checked by the Courts Service and by HMRC and therefore the risk to consumers must be infinitesimally small. The same cannot be said for opposing a grant of probate which is likely to involve litigation, the outcome of which would pose a risk to consumers if carried out improperly. From a 'risk to consumers' perspective, we therefore question the wisdom of the proposal that the same regulatory arrangements cover both probate and estate administration. The risks posed by the two activities are very different and therefore the same regulatory arrangements would not be proportionate.

Unhinged regulatory requirements for probate and estate administration allows regulation to be proportionate for each of the activities, it allows a new market to be created for the acquisition of probate only. Executors and administrators of estates of deceased persons would be able to obtain low cost help to deal with the low risk but more immediate post death process of obtaining probate (or letters of administration) on their behalf. They would then able to deal with the longer term and high risk aspects of estate administration themselves at their own pace - such as the collection and disposal of assets.

The Consultation paper makes the point (chapter 31) that 'most consumers would view preparing the papers on which to found or oppose a grant of Probate as a step within the wider process of administering an estate'. While we are not sure that this is true and, as suggested above, it need not be true, we agree that if Willwriting and Estate Administration were to become reserved, it would be illogical to have an unregulated 'hole' in the whole process with probate being unregulated. That hole would likely become a loophole in which the regulated services either side of Probate (Wills and Estate Administration) could be provided.

Our conclusion is that if Willwriting and Estate Administration become reserved activities, then Probate should remain reserved. But if Willwriting and/or Estate Administration were not to become reserved then there is little to justify the case for Probate remaining as a reserved activity.

We do not have any issues about the proposals for reservation of Willwriting and Estate Administration activities and we support the scope of the reservation of these activities and believe that they will be a major step forward in removing the customer detriment that has been highlighted in the LSB and Consumer Panel investigations. We agree that all other options, including voluntary schemes, have been tried and have been proven to have failed to address issues within the sector.

We are aghast that trust work has escaped the proposed regulatory net – we believe that the issues of consumer detriment that apply to Will-making also present themselves in the creation of trusts. Furthermore, this omission creates a glaring loophole in the attempt to head off consumer detriment in the provision of key legal services to consumers. It is likely that cowboy Willwriters will re-invent themselves as cowboy trust advisors and carry on operating outside of the regulatory net. This may already have started to happen, as reported in the Daily Mirror in July:

http://blogs.mirror.co.uk/investigations/2012/07/first-a-warning-to-australia.html

The IPW has received reports of this firm failing to honour cancellation periods having taken fees amounting to several thousands of pounds, over-selling the benefits of a trust and using high pressure sales tactics (including cold calling) on its customers, who by definition, are elderly and/or vulnerable.

The failure to bring trust work within the scope of reservation must be seen as an opportunity missed and it is an understatement to say that we are disappointed that, as has happened with Willwriting, that having identified detriment, consumers will have to suffer further detriment through the sales and marketing of trusts before a process is carried out to do something about this.

While there is opportunity for consumers to suffer detriment through the creation of an LPA, the registration process provided by the Office of the Public Guardian (OPG) should identify problematic LPAs and there is a process to deal with abuse under an LPA through the OPG and the Court of Protection. In our experience issues with LPAs usually result from shortcomings in the legislation creating them, as defined in the Mental Capacity Act 2005 (MCA). Such issues should be resolved by revisiting the MCA, not by the implementation of regulation on the providers of LPA drafting services.

Question 2: What are your views on the options for implementation that we have described?

We have two points to make:

1) A transitional process that relies on the pace of the sector to sort itself out runs the risk of being a transitional process that will last forever. Large sections of the unregulated sector have already proven that they are not very good at voluntarily signing up to regulatory regimes. We suggest that a deadline is set. Two years is mentioned in the Consultation, which to us seems achievable. However we expect regulators to be 'twiddling their thumbs' for 22 months of that two year period before facing an avalanche of applications for approval in month 23. The transitional process therefore needs to have the flexibility to be extended to deal with applications for approval submitted to regulators before the deadline but not approved by the regulators by the deadline.

2) Secondly, as we discuss in our response to Question 7 later, we believe that the implementation of regulation is going to add a burden to providers – especially those who currently operate in the unregulated sector. It should be expected that some of these providers will exit the sector ahead of a regulatory deadline. A survey of unregulated Willwriters (both IPW members and non IPW members) carried out by the IPW between May and July 2012 indicated that 25% of providers would exit the sector if regulatory costs were greater than £250pa and a further 33% if the costs were greater than £500pa. The clients of these providers run the risk of being severely disadvantaged if their provider disappears without an orderly handover of client files and papers to someone. The problems caused

for consumers by disappearing providers has already been highlighted as an issue in the unregulated sector and the transitional process should not work to aggravate this issue.

We therefore favour Option 3 to provide some degree of management of unregulated firms that exit the sector during the transition period. We accept that there is a danger that consumers could buy services from such firms in the mistaken belief that they are already regulated. But we suggest that provided that such firms are not able to make any claim to be regulated until such time that they became an Approved Provider, then the consumer would be making decisions to use an unregulated provider based on the same information as they would if the firm truly was unregulated under the process outlined in Options 1 and 2.

Question 3: Do you agree with the initial assessment of the consequential amendments that would likely be needed? Are there any other consequential amendments you consider would be necessary?

We have only been able to carry out limited research on this matter in the time provided but we are not aware of any legislation other than that listed in Appendix 2 that is likely to need amendment as a result of the proposals.

Question 4: *To prospective approved regulators:* what legislative changes do you think will be required in order to implement regulatory arrangements for these activities (in line with the draft section 162 guidance)?

We have only been able to carry out limited research on this matter in the time provided but we are not aware of any legislation other than that listed in Appendix 2 that is likely to need amendment as a result of the proposals.

Question 5: *To prospective approved regulators:* Will this guidance help you to develop proportionate and targeted regulation for providers offering will-writing and or estate administration activities? What challenges do you think that you will face?

Overall we are disappointed with the lack of clear direction provided in the guidance. There is far too much use of vague terminology such as 'appropriate' for the guidance to have any real meaning. The failure to provide a clear steer on education requirements is an example. The vagueness of the guidance opens up the opportunity for different regulators to race to the top (gold plating) or to race to the bottom. Neither can be of benefit to consumers. No doubt the guidance will be firmed up by precedent as regulators submit their schemes to the LSB for approval and they find out by experience what is 'appropriate' and what is 'not appropriate'.

This observation also applies to the development of schemes for Approved Regulators. While much is touted about 'Outcomes Focussed Regulation' we suspect that the additional resource required of both the regulator and the regulated that will be an inevitable consequence of 'one to one' debates and investigations with individual firms about how they have met 'Outcomes' will add a significant cost burden to consumers who will ultimately pay the price of the regulatory scheme.

Question 6: Do you agree that having mandatory regulation for all firms in the market will improve consumer confidence?

Yes – most consumers assume that commercial providers of legal services are already regulated so the proposals give the consumers what they already think that they already have. In that sense failure to regulate runs the risk of reducing consumer confidence in a whole range of legal services, not just Wills and Estate Administration.

Regulation is increasingly gaining a poor reputation following clear and obvious failures – the banking and financial services sectors are obvious examples and we would point to the regulation by title in legal services as being a similar failure. The failure of any regulatory scheme to be able to target and to address the obvious issues is a real threat to its success. The challenge will be for regulators of Wills and/or Estate Administration providers to deal with these issues effectively using 'Outcomes' as their only tool.

Question 7: What business impacts (both positive and negative) do you envisage will occur with the proposed reservation of will-writing and estate administration? How will any such impacts affect your business?

We made the point in our last submission that we feel that the idea that regulation can be delivered to the current unregulated sector without significant additional cost is wishful thinking.

The IPW runs a voluntary regulatory scheme and arguably its requirements are not very far away from what might be required of a regulatory scheme. However the full cost of running the IPW is not reflected in its membership fees as these are subsidised by a variety of activities such as delivery of training and commercial sponsorship arrangements. Management of the organisation is provided by a team of practitioners who provide their services at nominal or no cost. Clearly a regulatory scheme would need to be separated from these financial influences and potential conflicts of interest and that means that even if the IPW were able to replicate its existing voluntary scheme in a regulatory world, it is inconceivable that it would be able to do so at anything like the level that its membership fees currently stand at.

We also predict that further resources would be required by both the regulator and the regulated to manage a regulatory regime that is vague and without clear direction.

Practitioners are therefore likely to see a significant increase in their regulatory burden and some may need further training – depending on what level of education turns out to be 'appropriate'. This will exhibit itself in increased cost for consumers and reduced choice for consumers as some providers exit the sector.