Evidence

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

Response to the Legal Services Board

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Introduction

The Citizens Advice service provides free, independent, confidential and impartial advice to everyone, about their rights and responsibilities. It values diversity, promotes equality and challenges discrimination. The service aims:

- to provide the advice people need for the problems they face; and
- to improve the policies and practices that affect people's lives.

The Citizens Advice service is the largest independent network of free advice centres in Europe, providing advice from over 3,000 outlets, including GPs' surgeries, hospitals, community centres, county courts and magistrates' courts, throughout Wales, England and Northern Ireland.

Citizens Advice Bureaux in England and Wales assisted two million clients with nearly seven million problems in 2011/12, including 4,436 on making a will and the effects of intestacy. Having already provided evidence to the Legal Services Board's consumer panel as well as the OFT on these issues, we welcome the opportunity to respond to this consultation.

General comments

Citizens Advice welcomes the proposed introduction of regulation for will-writers and probate service providers. We have long argued that a statutory system is needed for the regulation of will writing and probate activities and that this could achievable through minor changes to the Legal Services Act 2007. There is a strong economic case for regulation - the value of property and complexity of families means that a good system for regulating will-making and probate are vital. Some 70 per cent of UK households are owner occupiers and families are often complex in terms of inheritance, including divorce, re-marriage, long and short term partnerships and children born into one household but living in another. Yet 27 million people in the UK have not made will, according to Consumer Focus' 2009 research - around a half to two thirds of the UK adult population.

Yet within the market for will writing and probate services, there is evidence of over-pricing, inappropriate marketing, inaccuracy and poor outcomes from probate services. The whole system needs to work better if complex and expensive legal processes are to be avoided. Examples we see include:

- Wills of poor quality, which are either invalid or do not reflect the testator's wishes after taking account of their circumstances
- Unfair commercial practices, such as pressure selling tactics or when consumers are deliberately drawn in by a low advertised price but the final price turns out to be much higher ("bait advertising")
- Cross-selling of related services, which may be unnecessary, unsuitable or expensive; e.g. naming the will provider as the executor of the estate
- Insufficient transparency so consumers do not make informed choices or do not realise the consequences of their purchase decisions
- Problems related to storage of wills and their location by beneficiaries
- Consumers failing to make wills because of barriers to access, for example cost, lack of awareness and unnecessary jargon or complex English
- Fraudulent activity linked to wills or related services

Responses to questions posed in the consultation

Q1: Are you aware of any further evidence that we should review?

The LSB has done a thorough job in reviewing the evidence of detriment in the wills and probate market. We would, however, invite the LSB to analyse Citizens Advice's evidence which is collected through an electronic system of bureau identifying problematic case studies. Here a just a few of the many cases we see on the problems in this market:

> A CAB in the South East of England saw an 82 year old widow about problems with a will-writing company. She had already had a will made by the same company three years earlier which cost about £450. The firm cold called the client to suggest that perhaps her will now needed revision and made an appointment. At this appointment the client told the company that there was nothing wrong with the original will she had signed but there was one provision she would like to alter in respect of one inheritor's children. The representative from the company said he could make provision for this and proceeded to comprehensively re-write the will. After four hours of intensive selling, the client was prepared to sign anything to get rid of him. She signed two contracts, one for a lasting power of attorney at a cost of £360 and one for the preparation of a new will costing £350 plus an additional fee of £29.40 - a total of £739.40. The reverse of these contracts carried a notice of the right to cancel but the client's attention was not drawn to this. She believed that her cheque would not be cashed until she had approved and confirmed the new draft of her will, but it was cashed immediately which she found out when she went to her bank to cancel it. The draft of the will that she received contained several very important errors including naming her grandchildren as her nephews and nieces. She complained by telephone and the company sent out a new draft. However she was distraught that she could not exercise her rights to cancel.
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> A CAB in Yorkshire and the Humber saw a couple in their 70s who were cold called by a will-writing company offering 'free advice' about protecting their home from liability for care home fees. When the representative came, he tried to get the couple to give instructions for a lasting power of attorney (LPOA) at a cost of £800. They did not understand the advice given and saw that more charges would follow, but were not clear what the other charges covered. They were left confused by the so-called advice so declined to give instructions without discussing the issue with their family and the CAB. The bureau established that the company were working from an address in the North East of England and did not employ solicitors, though their senior practitioners were studying towards a diploma in Estate Planning (STEPP). Whilst the company belonged to Society of Will Writers, as they were not legally qualified they were not under the Legal Ombudsman's jurisdiction. The bureau noted in its report to Citizens Advice that this case was one of a number they had recently dealt with about this company.
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> A CAB in the South East of England saw a 79-year old widow who had visited a will-writing stand in her local mall the year before. As a result she had started the process of making a will, with the help of a firm to whom she had already paid £660. She wanted to leave her house to her four children now, on understanding that she would live in it until her death. She received a form from the Land Registry but was not really aware of the implications of the forms she had been asked to sign and really required professional help. She felt she should have had more guidance from the will-writers.

A London CAB saw a 67 year widow, who had been named in a deceased friend's will as a beneficiary and a joint executor in a will written by widely-advertised firm. She initially asked the firm to act for her in the executor duties she had held jointly with her deceased friend's nephew, but from which he later withdrew. She subsequently lost confidence in the firm, and was surprised by £12,500 fee in their claimed final account, and by absence of any reckoning for the £2,500 paid to them by her former co-executor from deceased's cash that he had been holding.

A CAB in the East Midlands saw a 71 year old widower who lived alone in a house he owned outright. The house was worth about £100,000 and he also had about £11,000 in cash and gold coins. He had been cold called by a will-writing firm offering to write a will for him for only £65. The client accepted but when a representative subsequently visited to 'finalise matters', the client was informed there was a £1,400 fee payable for 'signing off the form', which could be paid alternatively as £250 plus 60 monthly payments of £27.25 (totalling £1,885). When the client enquired why the fee was so high, he was told it was for 'legal support for signing it off in court'. The representative also said that when the client died there would be a fee of at least £5,000 for probate and solicitors but the £1,400 fee payable now would cover these future costs.

A CAB in the West Midlands saw a couple in their sixties who were persuaded that they needed a will and instructed a will writing firmto prepare a will for them in 2008 They paid £150 up front and since then they had been paying direct debit of £19.50 per month. The agreement was for 150 months and covered both the preparation of the wills and executorship following a death. They continued paying up until two months before seeking advice when they heard that the firm involved was being investigated about a scam. Following this, someone from the company called last week to ask why their direct debit had stopped .After looking at their paper work they were told that their wills were not valid as they had never been signed and witnessed. The couple felt cheated and let down because in over 3 years no one has made sure their will was complete and valid.

A CAB in the South East of England saw an 83 year old man who had been cold called by a will writing company offering help with will trusts which would minimise any capital gains tax or inheritance tax. When the CAB looked company up on the internet, they learnt that the company concerned had only been registered the previous year, so no reports had been filed and they also had no web site. When the client arranged an appointment with them, the company representative told him that his relatives would be due to pay £50,000 tax and that probate would cost £18,000. The client checked the latter with the probate office and was told the standard fee was £20.

Q2: Could general consumer protections and/or other alternatives to mandatory legal services regulation play a more significant role in protecting consumers against the identified detriments? If so, how?

Some problems that bureaux report (see above) could be tackled by existing consumer protection law. Pressure selling often happens in the home and the Cancellation of Contracts made in a Consumer's Home or Place of Work etc Regulations 2008 (Doorstep Selling Regulations) provides consumers with a seven day cooling off period, which should increase to 14 days when the proposed EU Consumer Rights Directive is transposed into UK legislation. In addition the Consumer Protection from Unfair Selling Regulations 2008 (CPRs) provides a means to challenge unfair business

practices. The CPRs, in particular, are well placed to tackle problems in this market, such as pressure selling and bait and switch pricing. For outright frauds, other legislation is also available.

However there are two problems. Firstly these consumer protections can only be used after the event, rather than for prevention. Secondly, they currently fail to provide for adequate consumer redress – the CPRs do not as yet provide a direct link to a private right of redress for consumers harmed by unfair practices. And in this market there is the additional problem that it will often be someone due to inherit, and thus not the contracting party at the time that will writing was purchased, that suffers the detriment. This complicates the road to redress because more specialist legal advice and advocacy may well be required to reach resolution.

Similar problems also arise in respect of the enforcement of voluntary codes, and given that such codes are voluntary providers can walk away from their obligations rather than comply. So we therefore agree with the analysis offered by the LSB that only regulation via the Legal Services Act will be sufficient to tackle consumer detriment in this market.

Q3: Do you agree with the list of core regulatory features we believe are needed to protect consumers of will-writing, probate and estate administration services? Do you think that any of the features are not required on a mandatory basis or that additional features are necessary

We agree with the proposed list of core regulatory features needed to protect consumers should cover all will-writing, probate and estate administration, and pursue an outcomes-driven approach to regulation with incentives for ethical behaviour, supervision of the regulated community at entity and individual level based on the risk presented, and a compliance and enforcement approach that deters and punishes appropriately, targets the risks and detriments that the investigations have identified. In particular we welcome the emphasis on a strategy and early action for consumer information. We agree with the following elements of regulation:

- a mandatory register of authorised/licenced providers with authorisation gateway checks to include a fit and proper person test for ownership and control;
- appropriate financial protection arrangements and indemnities where a providers have access to consumers‘ money
- an outcomes based code of conduct with emphasis on appropriate sales practice
- a requirement that providers have an appropriately trained workforce
- a risk based supervision strategy that targets regulatory action to protect consumers
- an enforcement strategy that incentives compliance, deters non-compliance and punishes transgressions - including levying of financial penalties
- arrangements to ensure each provider has an appropriate in-house complaints process, including signposting to the Legal Ombudsman
- bringing all these activities (will-writing and probate) within the jurisdiction of the Legal Ombudsman.

We would also like to see the regulator have the power to require firms against whom it has taken enforcement action to compensate consumers automatically. The Financial Services Authority has such a power and DECC are currently consulting about giving the energy regulator Ofgem similar powers. We believe that such a power would ensure that unscrupulous firms do not profit from unacceptable practices.

However, in addition to the proposed regulatory changes, we consider that there also needs to be wider reforms to the probate system (though we appreciate most of these are outside the LSB's remit), namely:

- The register of licensees must be a public one and kept up to date by those designated as approved regulators.
- An electronic database for all wills, to establish their existence, and linked to the system for registration of deaths – this could eventually do away with the need for lengthy investigations and attendances at probate registries
- Cross cutting requirements to remind consumers of the need to make or change their will at key life events relevant to testators' decisions in a will, such as marriage, home purchase, birth or adoption of a new child.
- Pre-payment protection for fees paid before a will is provided, to increase consumer confidence and to discourage scams/frauds;
- Adoption of plain English in will documentation and probate rules or, as a minimum, an explanatory annex for the legal language used.

Q4: Do you believe that a fit and proper person test should be required for individuals within an authorised provider that is named as executor or attorney on behalf of an organisation administering an estate?

Yes, because this would ensure an appropriate level of consumer protection. We suggest that this test could be similar to the probity and fitness tests applied in the licensing arrangements for ownership and management of alternative business structures (ABS) under schedule 13 of the Legal Services Act. In other words this test should consist of a declaration of any criminal convictions, pending cases, professional disciplinary action or directorial disqualification as well as a test for financial probity requiring a declaration of any insolvency, individual voluntary arrangement (IVA) or undischarged bankruptcy.

Q5: What combination of financial protection tools do you believe would proportionately protect consumers in these markets and why? Do you think that mechanisms for holding client money away from individual firms could be developed and if so how?

The financial protection tools should not only cover appropriate compensation and indemnification arrangements as set-out in Section 21 of the Legal Service Act, but also good accounting practices for handling clients' monies – for example ensuring that client monies are completely ring-fenced from the rest of the business. Again the model of ABS regulation which requires a client finance director with such responsibility could provide a way forward.

Q6: Do you agree that education and training requirements should be tailored to the work undertaken and risks presented by different providers and if so, how do you think that this could work in practice?

In keeping with the general proposed approach to legal services regulation, we would expect that relevant qualifications should be required. Wills should be prepared or, as a minimum overseen, by someone qualified to understand whether the wishes of the testator will be delivered. Yet qualification alone is not sufficient; it is interesting that LSB's research finds wills written by solicitors

within the shadow shopping sample were just as likely to fail on quality grounds as those written by unregulated providers. So specific training should be tailored to the work undertaken and risks presented by different providers.

Q7: Do you agree with the activities we propose should be reserved legal activities? Do you think that separate reviews of the regulation of legal activities relating to powers of attorney and/or trusts are necessary?

Yes, we agree that the scope of regulated/reserved activity should include drafting wills, ancillary legal activities, and probate discharge and administration. It was always intended that the Legal Services Act's coverage of reserved activities should not only include the conduct of litigation by legal service provides but also the drafting, preparation and discharge of legal documents which create legal obligations (that can be subject to litigation), as well as professional legal advice on the form and content of those legal documents. On this basis, probate was included in the original Bill as a reserved activity, and it only became apparent later that will-writing fell just outside the definition of probate. So regulation should extend to all providers delivering will-writing, probate and estate administration activities and ancillary advice in expectation of fee, gain or reward. This would enable for example regulatory coverage of companies acting as estate executors.

On the same basis, the regulation of legal activities relating to powers of attorney and/ or trusts should also be covered which is also a specialised legal activity commonly offered by firms providing will writing and probate services. However there is still an issue that in the wills and probate market many non-legal activities and services can be offered or sold alongside specialist legal service ie product-bundling – for example funerals, inheritance tax advice and planning, insurance and other financial products. So we suggest that the probate sector should be subject to the same alternative business structure (ABS) regime of regulation that applies elsewhere in the legal sector where legal and non-legal services managed as part of the same business.

Q8: Do you agree with our proposed approach for regulation in relation to "do-it-yourself" tools and tools used by providers to deliver their services? If not, what approach do you think should be taken and why?

This question raises an important issue about stand alone legal technologies and tools, as distinct from professional service. The concepts of "lawyer-less" automated and virtual legal services first written about by Professor Richard Suskind in the *Future of Law* and The *End of Lawyers* are now a real part of the legal services market, and increasingly online services can be accessed or provided directly through social media.

However, the model of regulation under the Legal Services Act is structured around professionals delivering legal activities to their personal clients. Whilst this enables providers to be held to account for the work that they produce, including where they have used software or other tools to deliver a service, it does not of course extend regulation to the legal technologies themselves. So this question needs to be addressed in the context of a wider debate about ensuring the quality of online legal and software products. The LSB's proposal is that regulation should extend to any checking or advice activities provided where this is a feature of a self-completion package, but not to any regulatory where mistakes are derived from software or other tools, except in so far that regulators should prevent legal services from delegating indemnity responsibility to software providers. This may not be sufficient protection into the future.

Manual DiY packs for legal transactions have by contrast been on the market for some time, and the lawyers producing these can incur liability.

Q9: Do you envisage any specific issues relating to regulatory overlap and/or regulatory conflict if will-writing and estate administration were made reserved activities? What suggestions do you have to overcome these issues?

We do not believe that the potential for regulatory overlap or conflict (ie between different approved regulators) is any greater for this market than it is for any other part of the legal services sector (eg conveyancing). The only way to avoid any risk of overlap would be by regulating activities in a way that provides solicitors a monopoly over will-writing, or restrict the delivery of services to existing authorised persons, but this may not be in the public or consumer interest and would have a negative impact on competition and availability of services. Closing the market to non-lawyer providers could have unintended consequences. So any organisation should be capable of being authorised so long as they meet the criteria of an appropriately designated approved regulator.

Q10: Do you agree that the s190 provision should be extended to explicitly cover authorised persons in relation to will writing activities as well as probate activities following any extension to the list of reserved legal activities to the wider administration of the estate? What do you think that the benefits and risks would be?

We agree that the protection of legal professional privilege when seeking legal advice should apply to this sector.