Enhancing consumer protection,

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

A discussion document about the LSB's provisional recommendations on the regulatory approach to will-writing, probate and estate administration activities.

Response from

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Question 1: Are you aware of any further evidence that we should review?

We are not aware of any further evidence that is different to that already submitted. However since we submitted our report to the LSB in July 2011, we have become aware of the following cases which are further and on-gong instances of issues already raised to the LSB.

1) Dudley Trading Standards have turned to the IPW for help in investigating an unnamed Willwriting firm who are promoting a pre-paid estate administration service at a fee typically in the region of £1,500. For this fee consumers can access estate administration services at a 'discounted' rate of 1% of the value of the estate, compared to a typical rate which is quoted at 5%. The reality is that the fee of 1% is not too different from the rate that can be obtained from a number of providers without the need to pay £1,500.
2) York Trading Standards have turned to the IPW for help in investigating a Willwriting firm which recommended 'a trust' to an elderly client at a cost of £1,750 which the client paid in advance. It is unclear what exactly is the purpose of this trust as six months after the event, no trust documentation has been prepared and although a Will has been prepared it does not contain a trust. We understand that there are 3 other similar cases relating to the same firm.
3) A local authority Trading Standards Department is investigating a Willwriting company who has written to 'a number' of consumers advising them of a change in the law in regards to the charging of nursing home care fees which requires additional services at a cost of £800. Some consumers have subsequently attempted to cancel the transaction and have been advised that they have waived their cancellation rights in the very small print. However as a gesture of goodwill, the fee all but £200 is returned. The firm is also falsely claiming to be a member of the IPW.
4) The Crown Prosecution Service has brought charges against a Staffordshire Willwriter alleging 6 counts of fraud and theft from elderly clients to the tune of £100,000. We understand that the Willwriter has previous convictions and although she applied to become a member of the IPW, her application was rejected when she was unable to provide the documentation to enable the IPW to obtain a Criminal Records Bureau Disclosure. Nevertheless she has been able to continue offering Willwriting services, including to elderly and vulnerable consumers.
5) The Daily Mail has investigated the case of a Lincoln Willwriter who has been unhelpful in returning the Wills belonging to a client. The principal of the firm has links to the firm Willmakers of Distinction whose directors were convicted in July 2010 following the disappearance of £400,000 from client estates.
6) The IPW has dealt with three different Willwriting firms who have made false claims to be members of the IPW. In all cases the process of correcting these issues has been difficult and protracted – one required intervention of Trading Standards, one required intervention of a website host and the other is still on-going. The OFT have dealt with two cases where firms have falsely displayed the OFT Approved Codes logo.
7) North East Trading Standards Association (NETSA) issued a warning on 14th June 2012 after receiving 'complaints about scare tactics and high-pressure sales techniques in a bid to persuade consumers to sign up to' what are effectively lifetime trusts. The warning also flagged up that since key elements of these transactions, such as the transfer of property to

trustees is an activity which is a reserved activity which some unregulated providers were carrying out in breach of the Legal Services Act 2007.

Question 2: 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?

Previously we have argued that a 'light touch' regime within the sector, such as the OFT Consumer Codes Approval Scheme (CCAS), which is likely to be taken over by the Trading Standards Institute from April 2013, could be a viable alternative to reservation. However we no longer feel that this is the case because

a) It would not address the technical failings that have been found, particularly in Wills, produced by the currently reserved sector.
b) The failure of the unregulated sector to embrace a voluntary regulatory scheme such as the CCAS gives little hope of such schemes having any significant penetration in the market.
c) Any voluntary scheme provides a loophole through which dubious operators can escape.
d) Evidence is that consumers assume that all Willwriters are regulated and therefore don't bother to look for evidence of voluntary accreditation.

We also share the view expressed in the report that as Wills and Estate Administration services are services which are accessed infrequently, it is difficult for consumers to determine the basis on which to choose an appropriate service provider and to be able to measure the quality of the product and/or service received, making the ability to use general consumer protections largely redundant.

We therefore conclude that reservation of Willwriting and Estate Administration activities is the only viable option that is likely to resolve the issues found by both the LSB and the Consumer Panel.

Question 3: 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?

Whilst accepting some merits of an outcomes-based approach, there is a risk that smaller organisations may find this more difficult to administer. A recent survey of 160 firms in the unregulated Willwriting sector carried out by the IPW found that 62% were 'one man bands' and a further 24% had between two and five fee earners. The same survey found that 45.7% of respondents wrote less than 100 Wills per year – less than two per week. It is possible that this, coupled with other additional regulatory costs, may result in a significant contraction of the sector, which may in turn be detrimental to consumer choice.

We are reasonably content with the core regulatory features identified in the report.

We would also like to see a requirement for Wills drafted by a regulated firm to be registered on a database approved by the regulator(s). Our office takes calls on a daily basis from people looking for the Will of a deceased person. A lost Will is just as bad as a defective Will since it leads the consumer into believing he has made adequate arrangements on his demise, when he hasn't. This is

a problem that the proposals make no attempt to resolve. To back this up, regulators need to have effective requirements for the transfer and on-going management of client files and client records when a firm or practitioner ceases to be a regulated provider. According to the Courts Service, 84% of estates are administered by a Will. We can only speculate how much higher this figure would be if the number of Wills that are lost was reduced.

Question 4: 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?

We agree with this proposal – it has been part of our membership requirement for several years.

Question 5: 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?

There are three areas of concern:

1) That consumers pay in advance for services – whether it be short term advance payments for Wills or longer term advance payments for post death estate administration services. The difficulty here is that having made a payment, the consumer is in a very weak negotiating position if things go wrong. Dealing with short term advance payments has been addressed by the IPW – requiring those who demand advance payments to either
   (i) Deposit money with the IPW to enable consumers who lose out to be refunded or for another provider to be paid to complete the transaction
   (ii) Hold advance payments in a client account separate from the trading account until the transaction is completed
   (iii) Be part of a network of other providers who mutually agree under contract to complete any outstanding work if one of their number becomes unable to do so.
   (iv) To provide a bank guarantee that the bank will provide the necessary funding to refund or complete work that has been paid for but not completed.

   Dealing with the protection of longer term advance payments, typically for the delivery of probate and/or estate administration has been much more problematic, to the point where IPW membership rules currently prevent members from making such charges. Problems that we have encountered are that the size and make-up of an estate can change dramatically between point of payment and point of death. The amount of the pre-payment that needs to be set aside to provide any reasonable assurance of delivery of an adequate delivery of service at the time of need (which could be decades after payment is made) is such that it make the marketing of such schemes with such assurances unattractive.

2) That providers of estate administration services invariably handle estate money and control other client assets such as shareholdings and property. We believe that such providers should be part of some sort of scheme that will ensure that such losses are covered. This may be from a fund (though building up a fund from scratch would be practically impossible) or through insurance, or maybe both.

3) That consumers of any service could lose out because of negligence or error on behalf of the service provider. Any detriment from this can be dealt with by professional indemnity insurance. There is the issue that if a provider ceases to operate and therefore ceases to maintain professional indemnity insurance then consumers lose this avenue of redress. We believe that regulators should provide a contingency fund for such cases, probably underwritten by separate indemnity insurance.

Question 6: 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 could this work in practice?

We agree with the principle, but we are not sure whether it will work in practice unless there is a step change in the availability of training and education, in Willwriting in particular.

We are not aware of any tailored training programmes that are available to enable the workforce to access such bespoke training. In our experience the range of training programmes currently available for Willwriting is poor, often bundled with other legal subjects and often dominated by those other subjects. For example we are aware of a module that is offered in Willwriting but it does not include any subject matter on the appointment of guardians. The reason given for this is that this subject is covered in a module on family law, but the family law module is not mandatory for a student who takes the Willwriting module to complete.

We have spoken to a number of education providers about the development of a range of training programmes to suit Willwriters and to enable them, over time and with experience to build up a portfolio of expanded skills, including the potential for practitioners to migrate into other areas of expertise beyond the subjects of Wills and Estate Administration. To date progress has been disappointing and frustrating, probably because the number of people in an unregulated regime who would access such courses at any one time would be too low to justify the investment required. Maybe proposals that all providers of Willwriting and Estate Administration undergo some sort of training will provide the demand that will make it attractive for training providers to develop the type of training that is required in the sector and that will give consumers a better chance of receiving a product and service that is 'fit for purpose'.

Question 7: Do you agree with the activities that 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?

We accept the conclusion that there is little evidence to indicate issues of detriment in the delivery of powers of attorney, the IPW certainly is not aware of any issues.

However we believe that there should be a review of the provision of trusts. In October 2011 Norfolk firm Universal Group hit the headlines following a BBC investigation[1] into the way they marketed their trust offering. Questions were asked about whether the way they marketed their trusts potentially prejudiced the chances of them being effective.

1 http://www.bbc.co.uk/news/uk-england-15405097

In June 2012, North East Trading Standards Association (NETSA) issued a warning to consumers about the marketing and execution of such trusts[2]

2 http://www.legalfutures.co.uk/latest-news/will-writers-accused-of-mis-selling-and-conducting-reserved-legal-work

The potential consumer detriment in the supply of a trust is not dissimilar to that in the provision of a Will:-

a) there is a high probability that consumers will be elderly and/or vulnerable,
b) there is poor consumer knowledge of the product,
c) it's a product that consumers purchase infrequently, so there is little chance to gather the experience and knowledge by which to measure the claims made for the product,
d) problems only arise when it's too late to resolve them.

Furthermore, the fees charged for such trusts (several thousands of pounds) are such that they could easily become attractive to unscrupulous practitioners looking to make a 'fast buck'.

Although the LSB report rightly points out that the drafting of trusts is a reserved activity, an increasing number of Willwriting firms are providing advice on these products, particularly in relation to care home fee mitigation, and sub-contracting the drafting work to regulated providers, or, as the warning from NETSA indicated, are carrying out the activity themselves in breach of the Legal Services Act 2007.

When the relationship sits between the unregulated adviser and the client, there are few safeguards for consumers, and for these trusts to be effective, the way that the advice is delivered is more important than the actual drafting and provision delivery of the trust document. As with estate administration, where the administrative part of the process is currently regulated, but the advice driven part is unregulated, the regulation of trusts is the 'wrong way round' to provide adequate protection for consumers – and arguably as with the proposals for probate and estate administration – the whole process should be reserved.

We believe that there is a regulatory gap staring us in the face which will allow troublesome Willwriting firms to dump (or unhinge) their Willwriting offering and become "trust advisers" , thus side-stepping the proposed regulations.

The IPW believes that that marketing and execution of trusts is the next scandal to hit the legal sector and now is an excellent opportunity to call a halt to the problems before they get out of hand.

Question 8: 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?

The IPW agrees with this approach.

Question 9: 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 don't envisage any overlap of conflict at this early stage.

There will need to be a high level of intelligence sharing between regulators to ensure that those subject to sanction by one regulator don't find sanctuary with another.

Question 10: 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 don't have any experience of privilege being used for or against the best interests of the consumer. However it seems logical that the same provisions on privilege should apply to all regulated providers. Not to do so would create a variance in how a consumer and his information are dealt with, which would need to be explained to the consumer at point of sale. This seems to be unnecessarily complicated with no added value to the consumer. We agree with this proposal.

Question 11: Do you have any comments on our draft impact assessment, published alongside this document, and in particular the likely impact on affected providers?

As we have already said, we believe that we already provide a regime to our members which is not far away from the regime outlined in the report.

We would like to understand the methodology behind the conclusion that costs to firms to access the Legal Ombudsman scheme are £380 per year. Our current regulatory scheme has yet to result in any complaints being delivered to our existing Independent Complaints Scheme, the Estate Planning Arbitration Scheme, EPAS which is run for the IPW by the Chartered Institute of Arbitrators. This is despite clear requirements on our members to signpost to consumers their right to make a complaint and how to do so. We therefore hope that any regulatory scheme for the sector would have a minimal impact on the workload of Legal Ombudsman and such costs to the sector would reflect that.

If the IPW were to develop a regulatory scheme we do see additional costs in the development and running of a separate Regulatory Board and Disciplinary process and in the development and management of an Outcomes Focussed Code. We also anticipate that further costs will be borne by firms in developing and justifying their regimes in accordance with an Outcomes Focussed regime. We do believe that it is optimistic to expect a regulatory regime to be delivered at similar costs that are currently paid to trade associations for voluntary regulatory regimes. The impact of such additional costs will largely depend upon whether a regulatory function developed for the sector is able to achieve greater penetration in the sector than IPW membership itself currently enjoys and whether that happens depends to a large extent on what regulatory choices are going to be available to those who provide services in the sector.

One final point that we would like to raise is the position of any regulatory regime in Scotland where plans to regulate Willwriters are already on the statute book. Some firms based in England & Wales provide Willwriting services in Scotland – and vice versa and in an ideal world it would be advantageous if those firms were not burdened with two different regulatory regimes. Also our

estimates are that the number of Willwriters in Scotland is insufficient to make any stand-alone regulatory regime in Scotland viable. The IPW is therefore keen for a regime to be developed that meets the requirements of regulation on both sides of the border and thus enables regulatory costs to be shared by firms across both sides of the border and allows those who provide services on both sides of the border to be part of a single regulatory regime that meets regulatory requirements in England & Wales and in Scotland.