LEGAL SERVICES BOARD CONSULTATION ON WILL-WRITING, PROBATE AND ESTATE ADMINISTRATION SERVICES

Response of ITC

Introduction

ITC is the largest specialist probate company in the UK with over 23 years' experience We have over 350 employees and work closely with all the leading financial institutions.

We believe that we are in a uniquely advantageous position to contribute to the debate on the regulation of probate and estate administration as, despite being a market leader ITC is currently not regulated. Although we employ a number of regulated individuals (solicitors and legal executives) the company itself is not required to be regulated as it does not undertake reserved legal activities. When it is instructed in an estate administration it will either have been appointed as a corporate executor or will be granted a power of attorney by the named executor(s) or personal representatives and will obtain a grant of probate either in its own right or by way of an attorney grant. External solicitors are instructed by the company when appropriate for specific purposes. We operate on a transparent fixed fee basis.

ITC does not provide a will-writing service. It did at one time offer that service but discontinued it (in circumstances relevant to this consultation as explained below).

We do not therefore intend to respond, other than incidentally, to that part of the LSB's consultation concerning the regulation of will-writing.

It seems to us that, so far, the primary focus of the debate on extending regulation has been will-writing, with probate (already regulated) and wider estate administration being less fully considered in the research to date. We believe that we can contribute very substantially to the future debate in this second area.

As an unregulated commercial concern it might have been thought that ITC would oppose statutory regulation as it will inevitably come at a cost, which will either reduce profits or cause fees to be raised[1], but in fact we welcome regulation and have separately been considering an application for an alternative business structure licence, independently of the LSB's initiative in widening the scope of regulation.

[1] We have reservations as to the LSB's estimates of the cost of regulation but do not intend to take time in this response to explore that issue. Cost will of course depend on the kind of regulation eventually adopted.

Broadly we support the LSB's approach but we feel strongly that major deficiencies in the present system of estate administration are not addressed in the consultation and we would advocate a more root and branch review, based on our very great experience of what can occur in practice, and which should be prevented by effective regulation.

In this response we will be identifying some particular problems to which we have devised solutions. The solutions are commercially sensitive and will not be disclosed in this document. We would however welcome the opportunity to have discussions with the LSB on this issue in a manner which would protect the company's intellectual property.

The major concerns

The current LSB proposals are aimed at resolving three issues: (1) quality problems; (2) sales practices; and (3) redress options. Although these undoubtedly need addressing, our experience shows that reducing fraud within estate administration should be the major objective of regulation. Although we are encouraged by and approve of the LSB's views on improving the protection of beneficiaries there are significant additional benefits achieved by addressing more aggressively the current wide spread fraud within estate administration.

In our view the major concerns required to be addressed by effective regulation are these:

- Fraud and the prevention of fraud
- Miss-selling of "pre-paid probate" with Wills and consequent overcharging
- Financial protections (client account controls, insurance and compensation)
- Transparency and fairness of charges
- Competence
- Safeguarding and security of Wills.

We are conscious of the fact that the issues we raise may appear to be at the edge of the jurisdiction of the LSB in so far as we advocate a yet wider net of regulation, and a more innovative use of regulation, than is envisaged at present. This may require the use of section 69 of the Act to amend other statutory provisions, for example to achieve changes in the practices of the Probate Registry. We interpret the Legal Services Institute's research on the origins of statutory regulation to be consistent with the concept that (in relation to probate) reservation was based on the need to protect the integrity of the court's process, and the court's intervention was designed to exercise controls to ensure that estates were administered according to law and the wishes of the testator.

In the modern era, such controls are all too easily avoided, with fraudulent intent. We believe that regulation can be designed to meet this all too present threat, and that there is an overwhelming public interest in the LSB taking on this challenge.

Against that background we turn to the specific questions.

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

We say emphatically yes.

We believe that the current approach owes more to the debate over will-writing than estate administration.

HMRC identifies underpayment of tax associated with estate administration to be in the order of £200 million annually. The Society of Trust and Estate Practitioners (STEP) estimates that there is at least £150 million more that is undetected. Our experience leads us to believe that the figure is much higher.

Estate administration is often completed by one person. This allows both professionals and DIY executors (family members) to control the distribution of assets. The elderly are often confused about large sums of money, even as to the number of zeros, and are easily duped. One indication of the level of likely fraud is the fact that we are often dis-instructed once a family member is told how, as a matter of law, we are obliged to distribute the estate. As a matter of reasonable if not inevitable inference that will result in the elderly, vulnerable relatives or remoter beneficiaries, charities and Government departments not receiving the funds to which they are entitled.

Dominant family members can control the process by avoiding probate, by not informing the beneficiaries of their rights or by giving false values to the Probate Registry, HMRC and relatives. Charities are being defrauded as they are only notified when a Will is submitted to probate. Banks now release much higher values without probate (often over £25k each), beneficiaries and charities are often not informed. DIY fraud is increasing as a consequence. Many personal representatives confidently distribute funds to the wrong beneficiaries and ignore the Department of Work and Pensions ("DWP" in respect of overpayments) and charities. Asset holders and the Probate Registry, due to costs, are being forced to loosen controls.

The opportunity exists to tackle this growing problem and we have devised some simple solutions. This subject is however commercially sensitive, but capable of being discussed with the LSB in appropriately controlled circumstances.

One suggestion we make however is that in cases of intestacy an authenticated family tree and a statement as to the correct distribution of the estate should be filed in the Probate Registry as a public record. This, because it is publicly accessible, will deter those inclined to cheat.

We regularly encounter three further areas of miss-selling and fraud.

(1) Pre-paid probate is, in our opinion, the largest dormant but inevitable disaster that will hit this whole sector. For many decades (over 50 years), Wills have been written as a loss leader to lock beneficiaries into using the firm, company or individual as executor. More worrying is the situation where testators have been miss-sold a

package by misleading claims about current estate administration charges (by quoting high bank executor and trustee fees of over 4%) and guaranteeing that the estate will not be charged more than for example 1.5% or 2% which can already easily be found in the current market. For this worthless "guarantee", the testator pays between £1,000 and £2,500. Many have misunderstood and see this as a payment towards the administration or at least believe that the guarantee is enforceable when it is not, because these will-writing companies have not set aside sufficient, if any, reserves to insure against any future increases. The fee is paid directly to the will-writing company which uses the capital for marketing, commission or as profit. This in our view a massive ticking time-bomb in this sector. We estimate that as these practices are employed by some will-writing companies, and have been for many years, there are currently tens of thousands of Wills where the testator is likely to have been miss-sold pre-paid probate and where families will, sooner or later, be clamouring for redress.

(2) As mentioned above it is common practice for Wills to be drafted as a loss leader to lock beneficiaries into using the drafter as the executor. Most of these professionals refuse to renounce as executors. In some rare cases this is justifiable where it is necessary to protect vulnerable beneficiaries. However in 95% of cases where that does not apply beneficiaries find that professionals hide behind out-dated practices and "professional responsibility". Charging clauses in Wills enable the professional to charge the rate they charge at the time of the testator's death whereas the testator, if any information is given, will be told the rates applicable at the time of drafting. Testators have little understanding of the financial burden they are imposing on their beneficiaries and are not told that the professionals will not renounce. Although the professional's fees may appear to be competitive at the time of drafting, there is nothing to prevent significant increases in fees which are not subject to controls such as would apply if beneficiaries tendered the work on the open market at the time of death. Although all major financial institutions will now renounce (unless there is reason to believe a vulnerable beneficiary would be treated unfairly), it is our experience that only 15% of other professionals will renounce and either ignore or intimidate the beneficiaries. This practice of forcing beneficiaries to use a professional (many could choose DIY) or inhibiting an open market option should be prevented. Professionals should be regulated as to the circumstances in which they can be expected to renounce, for example in all cases on the request of all or a specified number or value of beneficiaries unless the estate falls within specified categories. At the start of an administration a standard leaflet should be given to all beneficiaries explaining their rights[2].

[2] It is accepted that an application could be made to the court for removal but in all but the most exceptional of cases this is financially impracticable.

(3) Many DIY packs and internet Will completion forms rely on the testator knowing when to seek further help. With computer programmes the drafting of each clause should no longer be the key issue when creating a Will; there are many good standard clauses. However, interpreting the testator's instructions and reconfirming their true intentions is the key to producing a balanced Will. Most of the research completed over the last 20 years (e.g. 'Which?' reports) has focused on professional Will drafting. From our own research and experience, testators who purchase complex packs frequently decide not to use them or make significant errors. The internet forms have now added to this problem by over-simplifying the process and leading the testator into trusting that the programmes or companies will know when to seek additional information. When researching this market, we became so concerned about the long-term claims in the industry that we decided to stop offering a Will-writing service. DIY packs should include a return policy if the testator decides not to use the pack within four weeks of purchase. Both the DIY packs and internet instruction-takers should have clear responsibilities to both the testators and the beneficiaries.

We emphasise that we have offered the product of our experience simply to highlight the extent of problems that might not otherwise have been brought to the attention of the LSB. We do not suggest that the LSB itself should impose regulation in the degree of detail we have discussed. We have highlighted the problem areas as we see them and some tentative solutions. The question that the LSB has asked is whether further evidence should be reviewed. We believe that there is very considerable scope for further research into the areas we have identified, and that the present consultation offers an invaluable opportunity to look in greater depth at the issues we see arising on a regular basis and which are injurious to the public interest.

As we have already indicated we believe that we can assist further in terms of possible solutions.

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?

We believe that regulation is the only method of adequately protecting all stakeholders, especially vulnerable beneficiaries. Although solicitors are already regulated we need to see much stronger controls on policy, audit and processes to have sufficient impact on the widespread fraud, inside and outside that profession. However there are some relatively simple process changes that could simplify the policing of estate administration and reduce fraud within the professional and DIY market.

An example of a current proposal that does not in our view go far enough is the discussion on compensation arrangements to cover misappropriation of assets when fraud or mistakes have been spotted. Our experience shows that, due to the factors mentioned in our answer to

question 1, most of these cases are likely to go undetected. We therefore need to focus on solutions that will reduce fraud and (material) mistakes in all cases.

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?

We agree that regulation should cover all the items listed; however more emphasis should be focused on dissuading fraudsters, including the DIY sector. At the risk of repetition, because the principal focus of the consultation is on Will-writing the consumer is primarily seen as the buyer of those services. Our focus is on the other 'consumer' group; the beneficiaries and stakeholders such as HMRC because that is where poor service or worse will impact in estate administration. As mentioned above, pre-paying for probate needs to be regulated. Unless other solutions are found companies responsible for this kind of activity are going to impose a huge burden on the insurance premiums of other Will writing companies and/or on members of the public without redress.

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 consider that as well as the business entity the directors (at least) and senior managers should pass a fit and proper person test. The company and the senior staff should be accountable for delivery of the service. Regulation should mainly focus on the senior staff and the governance within all suppliers, with a risk-based approach. Providing the necessary governance is in place, large corporates are more accountable than "dabblers" or one-man bands who are relatively free of control. We agree that any individual appointed as an executor or attorney within the regulated community (ie: where this is done on a commercial basis) should be subject to a fit and proper test.

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?

We broadly agree with the LSB's proposals; we do not believe that a large centralised client account is likely to be practicable within estate administration. In addition to ensuring that client money is kept separate from other accounts, prompt interim payments must be the subject of regulation both as a matter of service (in the sense of avoiding delay) but also as an

anti-fraud mechanism. We have further suggestions which we would prefer to share with the LSB in confidence.

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. ITC would wish to be perceived not only as a market leader (as it currently is) but also, without wishing to make claims that are unduly immodest, we would aspire to be a paradigm in a future regulated environment (we would be interested in working with the LSB in this respect). For example, all our staff complete a six month training and assessment programme in our Academy before managing cases. All of our case managers must take the STEP foundation course within 12 months of completing their training programme.

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 agree with the proposed structure of regulation and believe that this approach should satisfactorily cover issues surrounding powers of attorney and trusts.

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?

We see DIY estate administration differently as not limited to someone drafting their own Will. Personal representatives are often NOT the sole beneficiaries. There is strong evidence that this DIY market (in the sense in which we use that phrase) is affected by significant fraud and without controls this will increase. Vulnerable family members, the elderly, charities and other beneficiaries often do not inherit when DIY personal representatives ignore the Will or intestacy rules. The current recommendations do not touch on this issue. As mentioned above, there are simple but commercially sensitive changes that could reduce fraud.

We agree that suppliers of DIY packs and software should be accountable and subject to regulation though we do not underestimate the difficulties in achieving this proportionately.

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?

Regulatory overlap in other respects already exists and is managed, particularly through memoranda of understanding among regulators. This is therefore not a new problem or one that is incapable of solution to the extent that it arises. We do emphasise that will-writing and estate administration are being considered together, but in the new regulated sector there should be no assumption that a typical supplier will provide both services. As we have explained we are a market leader in estate administration but do not offer a will-writing service, and have no plans to. There will be many will-writers with no aspirations to administer estates. The two areas of practice offer wholly different regulatory issues.

Question 10: Do you agree that the s190 provision should be extended to explicitly cover authorised persons in relation to estate administration activities as well as probate activities following any extension to the list of reserved legal activities to the wider administration of the estate? Do you think that will-writing should be included in the s190 provisions should will-writing be reserved? What do you think that the benefits and risks would be?

We agree that it is logical and wholly appropriate that section 190 should be extended as suggested; proper regulation and the availability of legal professional privilege go together. It is important to remember that the privilege is that of the client not the professional. It would not be right for clients to have protections in one part of the regulated community which are removed in another. This will lead to confusion, consumer detriment, and unfairness. It would also be anti-competitive in our view.

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?

At paragraph 53 it is stated that reservation would tackle three key areas that are causing detriment to consumers (we are primarily concerned with beneficiaries): (1) quality problems; (2) sales practices; and (3) redress options. Although these undoubtedly need addressing, our experience shows that reducing fraud should be a major objective of regulation. As explained above, simple changes in process on which we are able to assist would help, and there would be no additional cost to the beneficiaries or regulators.

At paragraph 113 it is stated that among dissatisfied consumers 71% complained of delay. This may relate to solicitors rather than specialist company providers. In our experience regulation will have little effect in reducing the time to administer an estate in the hands of specialists (it may be otherwise with solicitors if regulation is more targeted).

Comments on the Summary of key problems and analysis

We have commented above on many of these issues, particularly fraud and pre-paid probate. We have the following additional thoughts.

Poor quality Wills: in our experience DIY packs and internet forms now cause more problems than Wills drafted by solicitors or will-writing companies. These DIY or self-instruction suppliers and systems must fall under the regulatory umbrella.

Costly and unnecessary services: we would add the issue over refusal to renounce on the part of unneeded professionals.

Wills can't be found: we would add that in many cases they are destroyed if they do not suit the interests of the person in control.

Unclear referral arrangements: The bereaved are vulnerable clients. The process needs to take into account that they can be confused. Care and sensitivity, as well as complete clarity and openness, must be part of the standard process.

Minor errors

Part 2 of the Impact Assessment, paragraph 94, page 56, misquotes the Consumer Panel's report in referring to 9% of those with assets of less than £100,000 having a Will. The correct figure is £10,000 as correctly quoted at Part 1 of the Impact Assessment, paragraph 116, page 31.

Paragraph 51, page 46 of Part 1 of the Impact Assessment and footnote 70 are wrong as to the contribution of Irwin Mitchell to will-writing. It is said that Irwin Mitchell has 27% of the whole market on the basis of producing 500,000 Wills "annually" which approaches 2,000 per working day and is plainly wrong. The correct figure seems likely to be that given in Part 2 of the Impact Assessment, paragraph 58, page 48; namely "around 25,000". The figure of 500,000 in the Consumer Panel's report is for the total number of Wills drafted by Irwin Mitchell during (apparently) the whole of the firm's life.