Response by Solicitor Sole Practitioners Group to the Legal Services Board consultation document, entitled:

Enhancing Consumer Protection Reducing Regulatory Restrictions: Will Writing, Probate and Estate Administration Activities.

Preamble

The preparation of a Will and the legalities of administering an estate are reliant on a complex legal code based on case law and statute law. Without a professional background knowledge based on a formal legal training, it is as dangerous to draft a Will and be involved in the legalities of administration of estates as it would be for someone who is not a doctor to write medical prescriptions.

This is not a consumer service which the public can evaluate. The quality of the work in relation to a Will does not become apparent until the Will is needed to be proved, by which stage it is too late to change it, with the consequences that the testator's wishes may not be carried out and that expensive and unnecessary disputes will be created.

There is no doubt a historical reason as to why Wills were not a reserved activity for solicitors but, out of all the reserved activities which applied to solicitors, Will writing should have been one of them. There is now an opportunity to rectify that.

The suggestion that competition should somehow improve the quality of Will writing and administration of probate is rather like saying that competition amongst doctors should improve the treatment of a patient.

Competition will only improve the appearance of the service to the client and not the underlying professional service itself, which can only be improved by a rigorous professional background and discipline of the person who provides the service.

Obviously not every Will can be prepared by someone who has had such a rigorous background, but at least every Will that goes out of a professional office can be checked by someone in that position.

The making of a Will and the proving of an estate is something which does not occur frequently in people's lives. It should not be subject to commercial high-pressure sales of either itself or commercial add-ons.

Problems encountered in the background research should be dealt with by Will writing and the legal aspects of administration of estates being placed in the hands of those with a full solicitor's training or those supervised by solicitors and who are subject to the professional regulation of the Solicitors Regulation Authority who can monitor the standards of work carried out and the Legal Ombudsman who can enforce those standards.

It will be an extra and unnecessary expense to create a further form of regulation to cover Will writing and administration of estates when they are already covered by professional standards exercised by the solicitor's profession.

Any justified complaints regarding the preparation of Wills and the administration of estates by solicitors shown up by the background research referred to in the consultation paper should be dealt with by being referred to the solicitor's professional body. It is not good enough to say that another "expert" has decided there will faults in a Will as often, the preparation of the Will depends on instructions and the way they were given, like a diagnosis by a doctor and cannot always be second-guessed. For instance, to say that certain assets were not dealt with in a Will is a misapprehension as an English Will normally deals with all assets as a whole, except those which are referred to specifically.

In the light of those overall comments, the Group's response to the questions is as follows.

1. Q. Are you aware of any further evidence that the LSB should review

A. No

2. Q. 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?

A. No. As stated above Wills are a professional issue and should be dealt with by mandatory legal services regulation in the form of the existing regulation of solicitors.

Dealing specifically with the comment in paragraphs 112, the reason that the solicitor "brand" provides an upfront guarantee of quality of service is firstly because of professional training, which should occur in the period of training of solicitors, in the writing of Wills, which is then backed up by the of the right of redress through the Legal Ombudsman, professional indemnity insurance and compensation arrangements and the ability to sanction practitioners. The net effect is that the solicitors "brand" provides an upfront guarantee of the quality of service.

Dealing specifically with paragraph 113, the issue is that Wills are not something which stand entirely alone within the legal system. They are interpreted by court procedures within that system and are intimately connected with family situations and it is important for people writing Wills to be aware of the consequences of what can go wrong and what potential remedies there are, which may not be appreciated by those who only specialise in Wills themselves.

Any professional solicitor who does not deal with sufficient Wills to feel competent should not offer such a service, but given the broad legal experience of the solicitor is not necessary for solicitors to only specialise in Wills to be competent in drafting them.

3. Q. Do you agree with a list of core regulatory features we believe are needed to protect consumers Will writing, probate and the state administration services? Do you think that any of the features are not required on a mandatory basis all that additional features are necessary?

A. Wills have been provided as a standard service by solicitors for many years and there is no need to have a separate set of regulations to cover them over and above the standard professional duties of a solicitor. To do so will be to encourage the multiplicity of regulation which it was thought that the Legal Services Act was brought in to reduce. By having Wills dealt with through solicitors automatically brings them within the jurisdiction of the Legal Ombudsman.

4. Q. Do you believe that the fit and proper person test should be required for individuals with an unauthorised provider that is named as executor or attorney on behalf an organisation administering an estate.

A. What is being dealt with here is the practice of organisations acting for commercial profit to hold themselves out as executors. This commenced with banks providing an understandable service as a trusted institution which is now less-used because of the significant charges that they ~~have to~~ make, and for less scrupulous organisations to have taken their place. A testator (a person making a Will) should be able to trust anyone they wish to carry out their wishes in administering a Will. What should be prevented is a conflict of interest between the person carrying out those wishes for commercial reward and the interests of the testator or his beneficiaries.

It may be overlooked in the consultation paper that English law provides that a trustee cannot charge for his or her services except as a professional person in carrying out professional services. The only reasonable way to regulate such a professional person or as the consultation paper describes it, "an authorised provider" is that they should be properly professionally regulated and rather than create a separate process of regulation, the solicitors profession is best qualified to provide such regulation.

5.Q. What combination of financial protection tools to you believe would proportionately protect consumers in these markets and why? Do you think that mechanisms for holding client money away from individual firm should be developed and if so, how?

A. Huge funds can pass through the hands of those administering an estate and must be regulated by proper auditing of accounts such as auditing of solicitor’s clients accounts. To do otherwise invites abuse. No client would knowingly place their funds in accounts which were not fully independently regulated and separated from the other funds of the organisation concerned. Accordingly, only the well-established rigour of the solicitor’s client account regulation is appropriate and does not need to be replicated in some other form.

6. Q. 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 (sic) in practice.

A. It should not be dealt with by unqualified people but, as set out above, the qualification should be based on a wide legal qualification rather than limited Will drafting knowledge.

7. Q. Do you agree that with the activities that we propose (sic) should be reserved legal activities? Do you think that separate reviews of the regulation of legal activities relating to powers of attorney and/or trust? (sic)

A. While this appears to be trying to say is: "Do you agree ~~with~~ that the activities that we propose should be reserved activities? Do you think that <u>there should be</u> separate reviews of legal activities relating to powers of attorney and/or Trust<u>s</u>?" In the context of a consultation about the effectiveness of Will writing, the above grammatical errors could have led to a Will being deemed ineffective!

Yes, for the reasons above Will writing and the legal aspects of administration must be regulated for the protection of the public. The issue is whether there is to be a new stand-alone set of regulations set up which will effectively duplicate what is already being done by solicitors. Clearly that is what the Act envisages and that is what the Legal Services Board is intending to, so it will just be an additional cost for the consumer at the end of the day to have a duplicate set of regulations, but as long as the consumer is protected, that is the main issue.

The issue of powers of attorney is of importance as their preparation is also a very important issue, especially in cases of disputed powers, and if not prepared in a professional manner, the distress and expense caused to relatives and even the donor of the power can be substantial. There is clearly an argument for powers of attorney prepared for gain or reward being prepared by an authorised provider.

8. Q. 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 approached you think should be taken and why?

A. The consultation proposal is that anyone providing DIY tools or a backup to a DIY package should be subject to regulation. It is necessary to agree this to avoid abuses of the overall regulation scheme being carried out under the guise that part of the work carried out was DIY work by the client.

9. Q. 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?

A. The problems of regulatory overlap are a feature of the Legal Services Act and it will be possible for organisations to go shopping for the most amenable regulator. The activities should be reserved activities within the Solicitors Act and carried out by solicitors. This is not said in order to enhance the work of solicitors or to increase the expense of the service to the public by monopoly. There is ample competitive pricing within the solicitors' profession as it is and the expensive pricing comes from those who are tasked by their shareholders with making a commercial profit. The essence is that this important work should not be subject to commercial hard sales methods to people who should not need to have detailed legal knowledge or at times when they are emotionally vulnerable.

10. Q. Do you agree that the Section 190 provision (for legal privilege to extend to other types of authorised persons, but only in relation to specified legal activities) should be extended to explicitly cover authorised persons in relation to Will writing activities as well as probate activities following extension to the list of reserved legal activities to the wider administration of the estate? What do you think the benefits and risks would be?

A. Any work carried out by a solicitor in relation to a Will is subject to legal privilege. That will not change, and there is no reason why any other person making a Will, under any other regulatory basis should be in any different situation. The only answer as above is that solicitors should deal with this reserved activity within their competence and understanding of the provisions of legal privilege.

The consultation paper states that the "application of professional legal privilege, if extended to Will writing activities would be to

potentially reduce the evidence that will be available to the courts. For example, where there is ambiguity in the intention of the clauses within a Will or Will is being contested, as the client will be deceased by this point, they cannot waive their right to confidentiality."

The draughtsman of the consultation paper can be assured that if for the purposes of interpretation, which is not always the case, it is necessary to ascertain the intentions of the testator, by waiving legal privilege, the courts will find an appropriate mechanism for doing so, and therefore that is not a consideration for not applying legal privilege to such services

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

A: No