Response to LSB Consultation - Enhancing Consumer Protection, Reducing Regulatory Restrictions: will writing, probate and estate administration services.

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Solicitors for the Elderly (SFE) is a national organisation of lawyers, such as solicitors, barristers and legal executives, who are committed to providing and promoting robust, comprehensive and independent legal advice for older and vulnerable adults, their families and carers. Our membership includes those in private practice as well as those working for local authorities, charities and the Official Solicitors office.

In addition to their professional qualifications, members must have at least 5 years post qualification experience advising older and vulnerable people and complete an examination before joining as a Professional or Full Professional member. The pass mark is 80%. membership is given to the individual, not the firm. The skills they claim to have must be personal to them, not others in their practice. They must also follow our own code of practice. There are currently over 1200 members, based mainly in England and Wales.

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

Our members have reported numerous examples of non regulated will writers and other organisations mis-selling, giving poor advice, overcharging and, in particular, pressurised selling of probate services. We provided numerous examples in our submission to the Investigation but we have not specifically gathered any further evidence for submission now. Anecdotally, our members post many examples of such behaviour on our member's forum on a regular basis. We have attached various comments from our members as an appendix to this response.

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

There is no doubt that mandatory regulation will provide greater protection to consumers. However, SFE represent a specialist and expert body of solicitors, barristers and legal executives who are already subject to regulation. We do not feel that there is any need for this particular group of professionals to have additional regulation to that which already exists. However, non-regulated organisations have no such controls and the consumer is exposed to mis-selling, poor advice, overcharging and inappropriate behaviour from some in this sector. It is difficult to argue against mandatory regulation as a form of control in this context.

We would submit that mandatory regulation must be supplemented by assessed accreditation schemes and continuing professional development in the specific restricted areas of work.

Question Three:
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 any of the features are not required on a mandatory basis or that additional features are necessary?

We agree with the list of core regulatory features, particularly on the basis that current non-regulated bodies are, in some cases, practising with no regulation or qualification at all . We agree that monitoring is required. We also believe that ongoing training and education is a necessity to ensure that providers have a sufficient level of skill and expertise to practice.
We would suggest that providers should have mandatory training in will writing, but that they should also demonstrate sufficient knowledge in respect of mental capacity, undue influence. A will is not just a document that can be prepared in a vacuum.
An additional feature that we would like to see reflected in the core mandatory regulations would be that the practice of "referring" consumers to companies and indicating that they are "partner firms". We gave a

particular example of this in our submission in respect of Barclays and ITC. This is common in probate practice at a time when the consumer is particularly vulnerable and should, in our opinion, be made illegal.
We believe that there should be similar regulation as there is relating to tied Financial Advisers as opposed to Independent Financial Advisors and that consumers should be made aware that there are other choices. We would also welcome a strict code in relation to referral fees.

The proposed regulation for costs is agreed and approved. Solicitors have to set out their costs in advance. They also have to give a clear indication as to likely probate fees when making a will even though death may not occur for many years ahead.
Regulation should be across all bodies providing the services to avoid the same strategy as is used by low-cost airlines where often additional costs are hidden.

Until such time as there is a law enforcing all Wills to be registered then a registration facility is not necessarily a protection for the consumer in all instances. It can be useful in certain circumstances but is not necessarily part of the regulatory process.

We agree that there should be a mandatory list of authorised providers. We would recommend that this list is renewed and reviewed annually in much the same way as solicitors have to renew their practising certificates on an annual basis.

Question Four:
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?

Authorised Gateway checks are commonplace in solicitors' practices in many areas of law. However, we do not agree that this should extend to the individuals working for an authorised provider. The additional administrative burden and cost implications of having to satisfy this requirement would be disproportionate and ultimately the consumer would bear the cost. Authorised providers should have sufficient checks in place to ensure that individuals employed by them do not have an opportunity to misappropriate funds.

Where a Solicitor is appointed as a professional executor or attorney and handles client money the consumer has a high level of protection through current stringent regulation, the Solicitors Accounts Rules and annual auditing. Going forward, we believe that other regulatory bodies should follow the SRA model.

We agree that there should be a list readily available of struck off providers and a prohibition against them returning to practice in any way either permanently or for a fixed period.

Question Five:
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 clients money away from firms could be developed and if so how?

Consumers dealing with Solicitors are already adequately protected financially. Solicitors are subject to stringent regulation within the Solicitors Accounts Rules. Solicitors are also required to prove that they have adequate PII in place before a Practising Certificate is issued each year. Whilst it is acknowledged that on occasion negligence does occur in will writing and in the administration of estates, the PII covers negligence claims and also contains a run off for compensation. It is therefore difficult for SFE to argue beyond the stringent financial protection and regulation under the SRA.

We acknowledge that it is vital that consumers should understand that there is always some risk when funds are held by any organisation but that adequate and ongoing cover is available. The SRA requires that Solicitors have adequate PII, run-off cover and a compensation scheme. Unregulated providers have no obligation to offer this protection and so there is a higher level of risk where a business fails or goes into administration. We believe that all regulatory bodies should provide the same level of protection currently available to consumers via the SRA.
In terms of developing mechanisms for holding clients money away from firms, it is difficult to see how this could be achieved without additional costs being passed on to the consumer. All banks have stringent money laundering requirements which would have to be satisfied. Our concern is that by trying to develop such a mechanism, an additional layer of administration will be built in to every client instruction, increasing

the cost and also increasing the potential for unnecessary delay. In our view, specific Accounts Rules which apply to the providers will be a sufficient protection.

Question Six:
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 that education and training requirements should be tailored to the work undertaken and the risks presented by different providers.

All individual providers of regulated work should be obliged to carry out a specific number of CPD hours per year, relating specifically to the regulated work type. Accredited training schemes should be a mandatory requirement. Many practitioners dabble in this area and in the legal profession the work is often undertaken by practitioners who have not chosen to specialise in this area of work. Similarly, many unregulated practitioners work to an extremely high standard. We would welcome mandatory education and training for all those who wish to carry out this work. Standards need to be raised across the board.

A code of practice adhered to by all regulated bodies is vital to avoid mis-selling, overpricing, negligence and poor advice. There should be penalties for failing to adhere to the code. The code should include examples of good practice and a requirement for adequate and proper training levels.

Question Seven:
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 that the activities proposed should be reserved legal activities and that proper regulation will protect the consumer. We feel that there should be a separate review as to the regulation of trusts and powers of attorney.

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

We agree with the suggested approach.

Question Nine:
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 conflict could arise in a situation where a provider prepares a will free of charge for a consumer, on the basis that the consumer makes a donation to a particular charity, as often occurs during "will weeks". There could also be conflict when a will is prepared on a pro bono basis. Clarity is needed as to whether this is a regulated activity or not. In our view it should be, even though no fee or gain is made by the provider.

We believe that it needs to be made clear that regulation of these services will be a requirement by a strict cut-off date. This should be made public to consumers so they are aware of the proposals.

We ask for clarification as to who will approve the regulators? Who will ensure that all regulators offer a similar and high standard of such as that offered by the SRA?

We would recommend that there is clear national advertising around the fact that the provision of Will writing , probate and estate administration services will become a regulated activity by a defined date. In the interim the risks of using non regulated providers should also be made clear to offer protection to the consumer whilst not limiting their choice.

Question Ten:
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?

Legal privilege should be provided by all those undertaking this work as it is for solicitors. Section 190 should be extended to all bodies or persons acting in this area of work. All authorised providers should have the same requirements as to privilege so that all consumers have the same rights and expectations to protect their personal wishes. Client privilege is vital to protect potential unauthorised disclosure of a Will or Will instructions when someone is losing or has lost capacity.
Solicitors are bound by client privilege so information is not disclosed without a court order. This protects the client who may otherwise be vulnerable and exposed to potential undue influence or duress from a third party. Current non regulation means that those using non regulated bodies may not be afforded the same protection.

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

The draft impact assessment indicates that there will be little if any financial impact on Solicitors, and that in some cases the cost to Solicitors of meeting regulatory requirements could reduce.
SFE is an organisation that exists to promote excellence in the provision of legal services to elderly and vulnerable clients, including will writing and probate/estate administration services. We insist on our members demonstrating a certain degree of skill and expertise. Unfortunately these standards are not matched by a number of people carrying out these services, both in the regulated and un-regulated arenas. There appears to be only one way to protect the consumer and to improve the skills and service delivery of those providing these services. This must be by regulation of all authorised providers. We would suggest that the stringent supervision and monitoring required by the SRA, coupled with accredited training schemes and specific accounts rules would be a good model for future regulation.

Solicitors for the Elderly

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Appendix

Comments from members of Solicitors for the Elderly

1. Firstly a client of mine, a widow with 2 sons who live with her, was told her sons could not be executors as they were the sole beneficiaries. The Will Firm were appointed executors. The only asset is the house. The Will has since been redone

I have recently been trying to locate a Will writer who made Wills for my client and his wife who has advanced dementia. The Will writer had moved and was not registered with any Will Writing organisation. We eventually found him by chance and he handed both Wills to my client's daughter without written authority as he was "moving to France and didn't know what to do with the Wills he was holding."

I dearly hope regulation could prevent some of these issues.

2. I feel strongly that the public perception of the importance of Wills as a commodity should be targeted. A Will is extremely important in what it conveys and should it be drafted incorrectly it can have dreadful consequences, both personally for the family of the testator and the financial implications to would be beneficiaries. The ability and knowledge of any Will drafter is of the utmost importance and this should be reflected in the cost to the client. Will drafting is devalued if done for a minimum charge and to protect the public Will drafting should only be contemplated by qualified people.

3. Any Regulator for Solicitors should only be for the profession and not e.g. Will Writers. The members would feel very aggrieved if their subscriptions increased to fund the competition. Will Writers would be delighted to come under the same regulatory brand as solicitors.
Imagine if a solicitor was disciplined for something that a Will Writer would not, and pay for the privilege.

Solicitor's main focus is the interests of their clients even in today's market driven world. This above all else should be respected, valued and protected. This ethos cannot be imposed from without, it has to come from within and our training helps ensure this ethos is maintained. All the regulations in the world will not instill this. The Law Society should realise this and not dilute it.

It is vital that solicitors continue to control clients' money in estates. How else could we ensure the Dept for Work and Pensions, IHT, funeral directors, utilities, buildings insurance, council tax, Care Homes, gardeners etc are paid? Particularly if we are Executors. The same with situations where we are attorneys in LPAs.

It is wholly inappropriate to have accreditation for different parts of the process. When writing a will it is vital that the person taking the instructions understands the impact of a clients wishes e.g. if they cut out their spouse or children, or need to sever the joint tenancy, or lack capacity etc

4. Having regard to the quality of the Will writing, particularly in respect of trusts by Will writers who are not Solicitors or Legal Executives we strongly suggest that Will writing be restricted to the professionally qualified.
Further there are numerous disadvantages to the general public where Wills are written at the behest of beneficiaries in the Will and the unqualified Will writer does not appreciate either the subtlety of undue influence and the substantial requirements of incapacity.