Enhancing consumer protection, reducing regulatory restrictions; will writing, probate and estate administration activities.

The Society of Will Writers response to the request by the Legal Services Board consultation on the regulatory approach to will writing, probate and estate administration

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LSB Consultation

The Society of Will Writers & Estate Planning Practitioners

Question 1:

There is no additional specific information; the SWW feels that should be reviewed. It is clear from the previous review of evidence by the LSCP that any additional evidence is unlikely to have any material effect on their recommendation to make will writing a reserved activity. Solicitors have accepted that they are as much to blame as unregulated will writers and the LSCP wish with all expedition to move to correct this situation.

Question 2:

Although generally of value the general consumer protections cannot provide proper regulation of the will writing profession as they are merely a clutch of somewhat disjointed and unconnected rules that a firm and/or person active within their sphere of influence is required to obey. The sanctions for not obeying the rules are generally described by the empowering legislation but a more positive connection to the authorities is needed before any mischief complained of by the consumer can be dealt with by these rules. There is every reason for the practitioner to think that in most instances the connection is less than entirely ineffective leaving an abused consumer no better off. Regulation as proposed making will writing a reserved activity provides regulation and consumer protection of the prescribed activity of a will writer and not just activities addressed by general consumer protections, which by definition can be at the margins of a will writers practice. Regulation making will writing a listed activity should provide integrated rules with the opportunity to provide outcomes focussed regulation, which is preferable to arbitrary regulations that consumers may or may not even be aware of and that cannot be guaranteed to provide them with protection.

Question 3:

The LSB propose OFR coupled with individual risk assessments of will writing and estate administration activity as added to the list reserved activities as the driver for effective regulation. OFR is considered to be a practical approach for a regulator to operate as the proper and ethical achievement of the "correct" outcomes can be managed by an AR reasonably easily. The problem created for the practitioner is that it falls on the individual/firm to develop their own awareness of achieving acceptable outcomes. Training of regulated persons about the application of and compliance with OFRs including how to assess when each outcome is achieved to the required standard could be beneficial at individual/firm level.

Hand in hand with OFR is the regulatory requirement for an AR to assess individual/firm risk to consumer. Risk assessment by the AR is a fundamental part of the new proposed regulatory regime. The LSB refers to ARs having a "robust understanding", which may indicate that they will permit each regulator to have different interpretations of what is robust, potentially leading to different standards of regulation applied by different regulators. There may be no easy way to establish each regulator's "understanding" and consequently different application of OFR. This comment also applies to an AR's standard of supervision of that AR's regulation. Presumably the standard can be maintained by the requirement for ARs to submit to review by the LSB – who are to be the keeper of the standards?

As the regulatory structure requires incorrect outcomes to be punishable by the AR enforcement structure, each AR must be immediately capable of providing an enforcement process that upholds natural justice and is free of bias. Engaging the Legal Ombudsman (LeO) as the final arbiter of all will writing and estate administration consumer complaints appears an excellent way of achieving a solid enforcement structure. LeO must be made a formal part of the enforcement structure.

Using OFR to create an effective compliance structure will require each AR to publish practitioner guidance, possibly by means of a "rulebook". The rulebook could be modelled on an existing Code of Practice (CoP) – whether or not that CoP has received prior approval under the OFT-CCAS scheme.

A list of minimum protections derived from the regulatory objectives is logical and its contents should reflect the above observations. Even at minimum protection level the AR is likely to incur significant cost in setting up the structure to the satisfaction of the LSB. The new structure of regulation as applied by each AR may easily increase the cost to each practitioner of being regulating by an AR using this structure.

Question 4:

Any person wanting to be regulated by an AR must be qualified under a "fit and proper" test, which must be legitimated and effective to prevent the mischief complained of.

A Criminal Record Bureau check (CRB) is only a snapshot and an AR must run further checks to reveal new crimes. An annual report by each individual practitioner should reveal a new crime, but the AR is entirely dependent upon the honesty of each regulated person. To be certain an AR would have to combine practitioner declaration together with formal CRB checks The regulations must ensure that the regulated person must either make known all future offences or the CRB must be performed at regular intervals increasing the cost of regulation; or both.

Maintaining records of previous disciplinary actions and disqualifications, bankruptcy, etc. is vital to the credibility and success of the regulatory structure. Can this be achieved with confidence?

The fit and proper test should also be applied to persons named as executor and/or attorney. The obvious potential for consumer protection will depend

ultimately on the effectiveness of the test and whether all target persons are captured. This may depend on whether the AR captures all relevant details of authorised firms and individual persons within them. If data capture is poor the test may fall into disrepute and lose credibility – this has tended to be the case with CRBs especially if they are not continuously applied. Probably the answer is to run fit and proper checks on a regular basis (5 years), which may increase the cost of regulation. If the test is securely applied and recorded the names of those persons failing the test could be made public adding more consumer protection, as long as the names are published prominently. These suggestions are in keeping with OFR activity regulation displacing regulation by title.

Question 5:

In number sole practitioners (SPs) make up a disproportionately large share of the will writing entities and consequently the structures used to regulate them needs careful consideration. Individual SPs need special consideration because generally they can represent potentially higher risk ratings. Larger entities may be able to exercise a greater degree of control over their "sales forces". For example if an SP fails there could be a greater chance of a shortfall in funds to complete work in progress. A SP could be prone to malpractice, cutting corners or inadequate paperwork and/or accounting procedures, even so far as misappropriating client funds – theft. Inadequate experience or failing to keep up with CPD requirements could result in unsatisfactory drafting. To meet cost budgets ARs may be tempted to operate "one size fits all" regulatory structures, despite the best plans of the LSB. The result could be a real risk that some SPs could inevitably slip through the regulatory net to the real detriment of the consumer. ARs will need to operate strong compliance risk-based structures so that the risk that the ARs miss the complained-of mischief is reduced to manageable levels.

Placing the will writing sector under the LeO scheme would be a major advantage as the LeO has been given real teeth to punish misdemeanours

and would be in a position to compensate consumers who suffer at the hands of malpractice by will writing practitioners.

The suggestion that consumers money are held by financial institutions is certainly the safest method of safeguarding funds but as to exactly how such a scheme would or could work needs to be the subject of a separate consultation.

Question 6:

The proposed LSB structure is for an AR to carry out an assessment for each regulated entity to weigh individual practitioner risk. The AR is responsible for ensuring that the assessed level of risk is kept under review. Presumably the individual assessments will lend themselves to being grouped into categories of risk and individual members in each group can be measured against the group risk accordingly; so that education and training requirements can be matched to each risk category. Using such a system entities can be treated differently but proportionately according to their scale and measured risk.

Broadly a person entering the will writing industry might be deemed, unless proven otherwise, to carry a greater risk rating (by assessment) than experienced will writers and consequently progressive education needs to be made available increasing their knowledge incrementally and reducing their risk profile. Risk assessment and subsequent risk rating must reflect the work experience already achieved and training must be matched to the individual's work practice.

Providing suitable training could be the territory of an RB, risk rating the responsibility of the AR. Matching the training to the risk rating could be a joint function with input from both AR and RB. The individual practitioner would be required to take overall responsibility for meeting the regulatory training requirements by reference to the OFR principles of their chosen AR.

With its many years of providing will writers with training, the SWW is well-placed to support AR(s) in their statutory responsibility to ensure regulated entities are meeting and adhering to the LSB regulatory and compliance objectives. The SWW can support ARs in the management of practitioner risk with training platforms designed to underpin risk assessment regulation.

The SWW is currently well-qualified and resourced to provide training supporting different levels of practitioner knowledge and experience and also training to encourage practitioners to develop their careers.

Question 7:

The LSB's recommendation to add will writing and estate administration to the reserved list of activities under LSA 2007 is beginning to look like a "fait accompli". The LSCP mounted a robust argument in favour of this move and research countering their recommendation in 2011 has not surfaced. Latterly the LSB advised that in order to stem financial fraud within the will writing sector it would be appropriate to add estate administration to the reserved list. The current mood amongst the authorities appears to be one of preferring meaningful regulation using statutory powers and not to continue with the previously supported self-regulation. Including the preparation of LPA's as a reserved activity now rather than later if and when issues with the use of LPA's arise, seems to be a move which could produce a number of consumer benefits.

If the production of LPA's is to be transferred from a paper-based system to online (per Office of the Public Guardian (OPG) 2013 Business Plan); it would be prudent where online LPA activity is undertaken by a regulated entity the activity is included within the AR's individual entity risk assessment. Judging by the overall time required to make a decision on will writing and bearing in mind the introduction of LPA's resulted from reported misuse of EPAs, ignoring the potential problems from the online production of LPA's right now, could be considered a false economy of effort. While the will writing

community gears up for the (assumed) regulation of will writing and estate administration it may be no more than a small additional step to include LPA's in the list of reserved activities and one that is likely to prove beneficial to consumers.

Lifetime trusts can only be drafted by qualified individuals under the provisions of the LSA 2007 and the Solicitors Act 1974; while the preparation of testamentary trusts will be covered as a reserved activity by including will writing into the list of reserved activities. Solicitors providing a drafting service only for lifetime trusts are presumably bound by their AR and the relevant OFR rules to make proper enquiries to ensure that the advice governing the use of each lifetime trust they draft is correct (appropriate). In this way the drafted lifetime trust should comply with AR and OFR requirements? If this analysis is accurate it seems that no further action is needed at this time to regulate the provision of trusts?

However under an OFR structure of regulation an entity's involvement with lifetime trusts would need to conform with the outcomes expected from that entity by an AR. It is expected that any involvement in trust work would be assessed in an individual risk assessment and contribute to that entity's risk rating.

Question 8:

It is a fact that technology is being used more to produce wills and the likelihood is that further technological advances could see even more sophistication being used to draft and provide wills. The OPG have announced their intention to harness online technology in the production and registration of LPA's.

The development of the internet for drafting wills is a case in point. The use of OFR suggests that an AR will hold the practitioner "the will writer" responsible for defective drafting and not proprietary drafting software. Defective drafting

cannot be confused with the inaccurate capture of the testator instructions provided for the purpose of drafting their will. The SWW has for some time held the view that technologically advanced methods of will writing, such as over the internet, can be managed if the practitioner's terms and conditions as applied to the drafting process are robust and properly described. It seems possibly harsh to blame a practitioner for mistakes derived from software design, but it must be accepted that the primary responsibility for the accuracy and effectiveness of the will, however it is produced, must remain with the will writer.

In this regard the risk assessment and the OFR derived risk rating attributed to each individual will writer by the AR must be fully understood by an indemnity insurer, including how risk and responsibility within the proposed OFR regulatory framework is planned to be managed by the AR.

OFR appears to be an effective method of regulating the ingenuity of human activity, which will always be looking for new ways to deliver will writing as a reserved activity and that regulation cannot stand still, but must keep up with developments. OFR together with regular risk assessment seems to be a way to cope with future sales/marketing developments.

Question 9:

The LSB recommendations must take account of and provide appropriate regulation of "free" advice (not in expectation of fee, gain or reward). Entities might easily create business models that are designed to circumvent regulatory intention by offering to provide "free advice" for reserved activities while charging for other non-reserved activities, such as LPA's. This could be a separate argument for regulating the supply of LPA's. The example where a practitioner packages together a will without charge, adding a trust(s) and/or LPA for a fee in order to circumvent regulatory intentions might not register on the AR-OFR radar. However the principle that regulation is activity driven should mean that the will is always subject to regulation and it is suggested

that the LSB should underline this point rather than rely on an interpretation from advisers who could be proved incorrect (see para 186).

The LSB comment that they expect organisations who are not currently approved regulators but professional and trade bodies, to apply to become regulators; possibly a signpost to the subsequently declared intention of the IPW to "put its hat into the ring" and apply to become an AR. The LSB does not expand its comment to explain how the separation of AR and RP will be achieved in practice and in particular how it might apply to the separation of IPW as a newly-appointed regulator and the IPW membership. A period of 16 months is mentioned as being the time before a new regulator could be tasked as fit for purpose.

As the regulatory landscape for will writers changes so there is the likelihood of overlap of regulatory functions. One way to manage the change could be to declare an "appointed day", which could be announced; so that functional regulatory changes could all take place on the due date. This may prove difficult to achieve for a previous RB applying to become an AR, unless the LSB arrange for the RB powers of a former RB applying to become an AR are suspended – for example: the IPW.

The benefits of enabling LeO to sit at the top of approved Complaints Process must be weighed against the cost of facilitating LeO's appointment. Having LeO as the sole arbiter of consumer justice across the whole legal services community will bring dividends to consumers, and practitioners, as the quality provided of justice will be consistent and free of bias.

The ABS structure is creating a great deal of interest. Managing an ABS requires an AR to develop specific skills. Not every regulator is likely to have or want to acquire the necessary skills. Enabling multi-discipline practices to offer wide legal services formed beneath a single umbrella is likely to prove popular, provoking the question as to how qualified individuals practising within an ABS structure can obtain professional support? The growth of ABS

entities operating within a regulated OFR framework will generate a market for legal support services in line with AR requirements.

The LSB require that the statutory activity of the regulator must be kept separate from the RB function. Therefore an RB can exist and develop as a separate business entity recruiting members from all quarters of the will writing community. Does the RB business proposition marketed by an individual RB depend upon a practitioner allegiance to an existing or newly-formed regulator? An example of the overlap between the activities of an AR and RB may be the relationship between the Law Society and the SRA. To what extent are the requirements of the LSB seen to be at work in defining this relationship? Does the LSB propose to interfere with the relationship between an AR and an RB – for example will writers practising within an ABS structure obtaining support services supplied by an RB but regulated by a separate AR? An RB must be able to canvass members successfully from the largest possible market of will writers; that is from the ranks of all existing regulators.

The ABS proposition supports an alternative route to regulation that can be used by a will writer that is engaged in multi-discipline activity with other qualified practitioners without the need to wait for will writing to be made a reserved activity. The LSB must exercise care during the transitional period so as to avoid creating artificial competitive bias between ARs and between RBs, as well as between ARs and RBs.

Question 10:

Extending protection to consumers afforded by the rules of legal professional privilege (lpp) when they give instructions to a will writer, as well as to a solicitor, is a welcome additional safeguard. Cases where a challenge is made about the validity of a testator's instructions by disappointed beneficiaries have become more plentiful in recent years, undermining the presumption that a testator has the right to leave his bounty according to his wishes alone (see

Banks v Goodfellow). It is agreed that the application of lpp rules to wills runs the risk of reducing the quality of evidence available either to defend or support a challenge. It would be better practice for a Larke v Nugus letter to be prepared by the will writer and included in every client file together with witness testimony of the execution and attestation, and including with full instruction notes. These measures should go a long way towards the providing the court material evidence to settle a challenge. Therefore lpp together with quality file management is viewed as producing benefits, which should not undermine the judicial process needed to inform the court.

Question 11:

Comments about the contents of the Impact Assessment paper:

1: Improving the standard of minimum protections for all consumers of will writing and probate administration services is a sound and worthwhile end for the proposed regulatory intervention.

2: It is accepted that self-regulation has become increasingly ineffective in containing consumer detriment; as the cost of providing business services has increased generally and acted as a deterrent to proper case management in a marketplace increasingly affected by recession.

3: OFR would seem to be more likely to be effective in a world that is constantly developing than regulation which is based on the strict adherence to a rule-book, which must be constantly reviewed and revised.

8(i) OFR is more likely to be effective than titles based regulation. The LSB intention to promote competition between regulators must be approached with care as effective regulation could be undermined by the competition between ARs seeking to regulate the greatest number of authorised persons or alternatively to undercut the costs involved in delivering the prescribed regulation.

8(ii) The provision of LPA's should also be included in the list of reserved activities.

9: Complaint redress to be provided ultimately by reference to LeO office.

11: Will writers should be able to provide free advice as long as the advice does not form part of a promotional package designed to circumvent the proper regulation of unauthorised activity.

13: Add LPA's to the list of reserved activities.

14: Not permitting regulated providers to pass indemnity responsibility to IT providers will be fraught with problems unless the PII providers universally understand and agree not to accept claims by regulated providers against IT providers. Regulated providers who use will writing and probate administration software programmes to manage/complete their work will need to stay on their guard to avoid uninsured mistakes leading to potentially significant personal claims against them for personal damages. All draft documents will have to be scrutinised by a qualified regulated provider, which has the potential to increase production costs and cost to the consumer.

16: i) What form will the fit and proper test take? ii) How will the CCAS (OFT Consumer Code Approval Scheme) approved code of conduct fit in with the proposed LSB regulatory interventions using an OFR based code of conduct? iii) How does the LSB expect ARs to create an enforcement strategy that incentivises and encourages compliance? iv) Complaints about the provision and advice for LPA's to be included in the activities under LeO's jurisdiction.

18 It is agreed that regulating will writing by reference to the activity will ensure that consumers will find it easier to perceive that the provision of will writing services is always supplied by a practitioner subject to regulation.

19: It is not entirely agreed that the costs of achieving the proposed regulation will fall mainly on those entities that are currently not regulated. The combination of risk assessment, administering OFR including the possibility of increased PII costs coupled with the need to satisfy fit and proper checks including increased attention to education and the payment of contributions to cover AR and PR overheads seems likely to drive up costs and consequently consumer prices.

20: The LSB already accept that there is an additional cost of bringing LeO's office into the regulatory framework (£385pa). Other costs may inevitably arise.

22 to 32 inclusive: Agree with the LSCP conclusions regarding self-regulation and the need for a more formal and enforceable form of regulation to promote a level playing field and adequate consumer protection. Also the OFT CCAS programme may naturally come to a dead end as the OFT take their exit from their responsibility to promote the scheme in April 2013. A replacement is required and the Institute of Trading Standards have not so far confirmed their willingness to replace the OFT's involvement. In this climate of recommending statutory-based regulation adding activities to the reserved list has to be welcomed as a more permanent and effective solution to the consumer issues raised by LSCP.

42 to 49 inclusive: The effectiveness of a counter "do nothing" option rests on whether Parliament is sufficiently concerned about the problems with will writing as reported by LSCP to take action. To date there is no information as to whether Parliament will be sufficiently concerned to take action. If Parliament chooses not to take action and the work of the LSB and of those entities which are likely to be regulated by activity based OFR for will writing and estate administration (and LPA's) could come to nothing and self-regulation may continue. Parliament will not learn of the LSB recommendation for at least 12 months more, after the LCD has made its submission to

Parliament. During this period entrepreneurial activity may generate a significant number of ABS applications increasing the number of entities under formal OFR regulation as a result.

50 to 53 inclusive: Regulation of will writing, etc. by reservation is considered effective, expedient and appropriate to ensure all regulated and non-regulated providers are subjected to proportionate effective regulation.

54: Quality can only be improved by building an appropriately trained workforce if a robust platform capable of delivering quality training is available. It is assumed that the LSB intend that this function is performed by RBs providing training amongst a range of support services to regulated providers. The SWW could adopt the training activity as a major business thread.

56: SWW will review and reframe its Code of Practice as soon as the OFT/ITS issue is resolved after April 2013. In the interim the SWW plans to continue its application for Stage 1 CCAS approval for its Code, assuming it is satisfied that Stage 2 approval can be obtained before the OFT exits. In order to carry out the conversion from a "rulebook" CoP into an OFR CoP greater knowledge and experience of OFR regulation as it is likely to be applied to will writing is essential. It is recommended that the CoP should not be converted to contain OFR principles until more is known about the AR choice(s) for will writers. For this reason the conversion process may be best delayed until after the OFT have made their exit and the LCD have made a positive recommendation for will writing, etc. to be added to the list of reserved activities – possibly not before April 2013.

57 & 58: Including will writing, etc. within the jurisdiction of LeO is a sound decision.

70: It is agreed that bringing estate administration into the scope of OFR will bring positive benefits for those entities that currently provide probate services and should reduce fraud while improving quality. The additional cost

factors involved in applying OFR are likely to drive up prices for estate administration. Evidence (IFF Research see para 63) suggests that consumers do not necessarily hold such services to be price sensitive. This is not necessarily SWW's experience as will writers who carry out estate administration work report that generally competition makes pricing more sensitive and increases pressure on prices. Any increase in costs owing to OFR may serve to reduce the future viability of estate administration work especially if standards of consumer quality are to be maintained.

71 through 96: The conclusions drawn by the consultation paper might not be realised in practice once OFR is in place and established by a number of ARs, RBs on the wide range of entities and individuals practising under these new regulatory rules. The SWW considers that there is a balance to be struck between the benefits and the costs of bringing all entities into a level regulatory environment using OFR principles, by a number of competitive regulators overseen by an active and empowered LSB. More time must pass before a true picture can emerge.

97 to 105: SWW agrees with the LSB that adding will writing and estate administration (and LPA's) to the reserved list and applying OFR to regulated providers along with a structure of risk assessment should improve the quality of will writing and estate administration generally. The cost of these proposals for the regulated entities is an unknown, but is broadly assumed by the LSB to be worth bearing in terms of the benefits that should be brought to consumers as a result of imposing regulation. It is believed that there will no going back, once OFR regulation is introduced the world of will writing and estate administration (and LPA's) will change irrevocably without any option of reverting to self-regulation.

106 to 118: Under the new structure as proposed by the LSB of adding will writing to the list of reserved activities and applying OFR, those currently unregulated firms must either submit to being regulated under the new structure or in order to remain in business face a reorganisation of their

product and services to avoid a breach of the new regulatory principles. The proposed penalties for non-compliance with OFR are high enough to act as a real detriment and therefore should encourage entities to conform to regulation with the result that a level playing field for will writers and estate administration should become a reality within 2 more years – assuming Parliament is prepared to support the LCD and the LSB.

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