

Consultation response June 2012

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

LEGAL
OMBUDSMAN

Introduction

The Legal Ombudsman welcomes the Legal Services Board's (LSB's) recommendation for the regulation of will-writing, probate and estate administration activities by including them in the list of reserved legal activities.

The Legal Ombudsman is a creation of the Legal Services Act 2007. We were established by Parliament to simplify the system of redress by resolving complaints independently and informally in a changing world of legal services. Our role is two-fold: to provide consumer protection and redress when things go wrong; and to feed the lessons we learn from complaints back to the profession, regulators, and policy makers to encourage development and improvement.

In responding to this consultation we have drawn on our previous response to the LSB's call for evidence in September 2011 and from our most recent case data, research and experience handling complaints. This paper focuses on the uneven availability of redress for consumers who have sought legal advice through authorised persons and those that have sought advice from unregulated persons.

In this rapidly changing and innovative sector where consumers are accessing and buying advice in different ways and from different providers, we need to ensure that consumers, particularly vulnerable people, are protected. We will be observing the outcome of this consultation with interest. We also feel we may be in a position to assist in closing some of the gaps which will exist during the transitional period and welcome working with the LSB on this particularly utilising our powers to recommend a voluntary scheme.

What our experiences tells us

In our response to the LSB call for evidence regarding estate administration and probate in September 2011 we stated that 14% of cases investigated by the Ombudsman related to wills and probate activity. This has remained relatively unchanged with 12% of cases relating to wills and probate, the third highest area of law requiring an Ombudsmen decision. In addition work by the Legal Ombudsman has

highlighted that much of our complaints arise from a lack of clarity on costs and this may well also relate to will-writing, probate and estate administration. The Legal Ombudsman has already commenced work to feedback our experiences to the profession through our thematic reports and we welcome the LSB's position on training and competence to practise. We would hope Approved Regulators take into account the experience and feedback from the Legal Ombudsman when considering the criteria for authorising people to practise.

In our Annual Report 2010/11 and our responses to an investigation by the Legal Services Consumer Panel we presented a number of case studies which demonstrated the problems consumers and the Legal Ombudsman are experiencing in this area. It is clear from these examples and the outcomes of those investigations that the general public consider will-writing and the subsequent administration of a deceased's estate to be a legal matter, accompanied by the protection and access to redress that are associated with reserved legal activities.

The Legal Ombudsman has on a number of occasions highlighted the problems with so called regulatory gaps and the obvious knowledge disadvantage consumers suffer when shopping for a legal service. Coupled with the high public perception that will-writing and other activities stemming from it are considered legal activities, consumers are at a great disadvantage in terms of consumer protection. While it is hard to say with absolute certainty how many of the consumers who called the Legal Ombudsman were unaware that they had used an unregulated provider and were therefore outside our jurisdiction, the high levels of complaints arising from authorised persons suggests this is an area that needs regulation and consumer protections.

The Legal Ombudsman's concerns

The Legal Ombudsman supports the move to reserve will-writing, probate and estate administration activities. However, we must ensure regulation does provide better protections for consumers. We welcome the LSB's position on DIY and software services that provide an advice and checking element. As reported in our last Annual Report and corroborated in our most recent Annual Report, consumers are increasingly shopping for legal services in new ways and it is important that loop holes are not created in regulation.

In addition we recognise that by expanding the remit of reserved legal activities and thereby the jurisdiction of the Legal Ombudsman, it is likely we will need to work closely with other Ombudsman and complaints schemes that overlap. The Legal Ombudsman already has in place several Memoranda of Understanding with other parties and agreements to sign post and share information. We will need consider in more detail if our current powers to share information with third parties is sufficient to cover issues arising from will-writing, probate and estate administration.

However, a problem currently being experienced by the Legal Ombudsman and consumers is the differing indemnity insurance requirements and access to compensation fund arrangements by Approved Regulators.

This creates an added layer of consumer confusion, whereby after choosing an authorised person a consumer may not necessarily be afforded the same consumer protections had they instructed an authorised person regulated by an Approved Regulator with more comprehensive indemnity insurance requirements and compensation fund arrangements. While this problem only arises in the rare instances where a firm or persons is no longer practicing, it does create an additional gap in redress and has the potential to create reputational damage for the Legal Ombudsman scheme, when awards and expectations of redress are not recoverable.

While it is important to ensure that unregulated providers are not priced out of the future regulatory regime, careful consideration needs to be given to not only the protection of client monies, but also the potential for redress awarded by the Legal Ombudsman.

Voluntary scheme

Given the timescales for any possible reservation of these activities, we must consider options to provide the public with greater consumer protection as soon as possible. As stated in our Business Plan 2012/13 and Three Year Strategy the Legal Ombudsman is currently considering the merits of requesting the Lord Chancellor to commence section 164 of the Legal Services Act 2007 allowing a voluntary scheme for legal services complaints handling.

One of the obvious areas for a voluntary scheme would be will-writing, probate and estate administration, and there are several reasons for this. First, the evidence provided by the Legal Services Consumer Panel, and

our own data in previous submissions, shows the incidence of poor service was no greater in the unregulated than regulated sector. Developing a voluntary scheme would ensure that consumers have clearer access to redress whichever type of provider they choose, and continue to have a choice between traditional law firms and other providers. This should also be the case when considering which Regulator is competent to oversee those activities by providers.

Secondly, it would help unregulated providers begin to meet the criteria and conduct threshold for providing reserved legal activities. This would prevent a monopoly occurring where only those professions, such as solicitors, are in a position to provide the newly reserved activity. This would be anti-competitive and potentially detrimental to consumers and the public by curtailing the provision by different providers of legal services.

These non-regulated persons, providing good services to consumers, should not be disadvantaged upon reservation, and a voluntary scheme would provide a good transitional arrangement.

Where trade bodies also opt into a voluntary scheme, it would put them in a good position to begin to fulfil the regulatory criteria to become an Approved Regulator. Again, this would prevent a monopoly of services by one profession or Approved Regulator. Further to this we would encourage the LSB to consider using their own powers contained within section 163 of the Act, regarding a voluntary regulatory arrangement, which would also support those persons and trade bodies that may seek authorisation upon reservation.

In addition to the Voluntary Scheme we have also just come to the end of our Scheme Rules consultation, which includes looking at whether the rules can be amended to include certain complaints from third parties.

The Legal Ombudsman currently accepts complaints from beneficiaries of an estate where it is clear that there is a duty of care to them. However when it comes to looking at how we can put a matter right our aim is to look at remedies which benefit the estate as a whole rather than an individual beneficiary. While we do not yet know the outcome of the consultation, if changes are made to the rules it could impact on complaints in this area, potentially around the administration of an intestate estate, or the limits of redress for beneficiaries.

The Legal Ombudsman welcomes continuing to work with the LSB on these matters and further welcomes the chance to respond to this consultation.

Thank you again for the opportunity to respond to this consultation paper. If you would like to discuss in more detail any of the issues raised here, please contact Katie Leslie, Senior Projects Officer, katie.leslie@legalombudsman.org.uk.

**Legal Ombudsman
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