

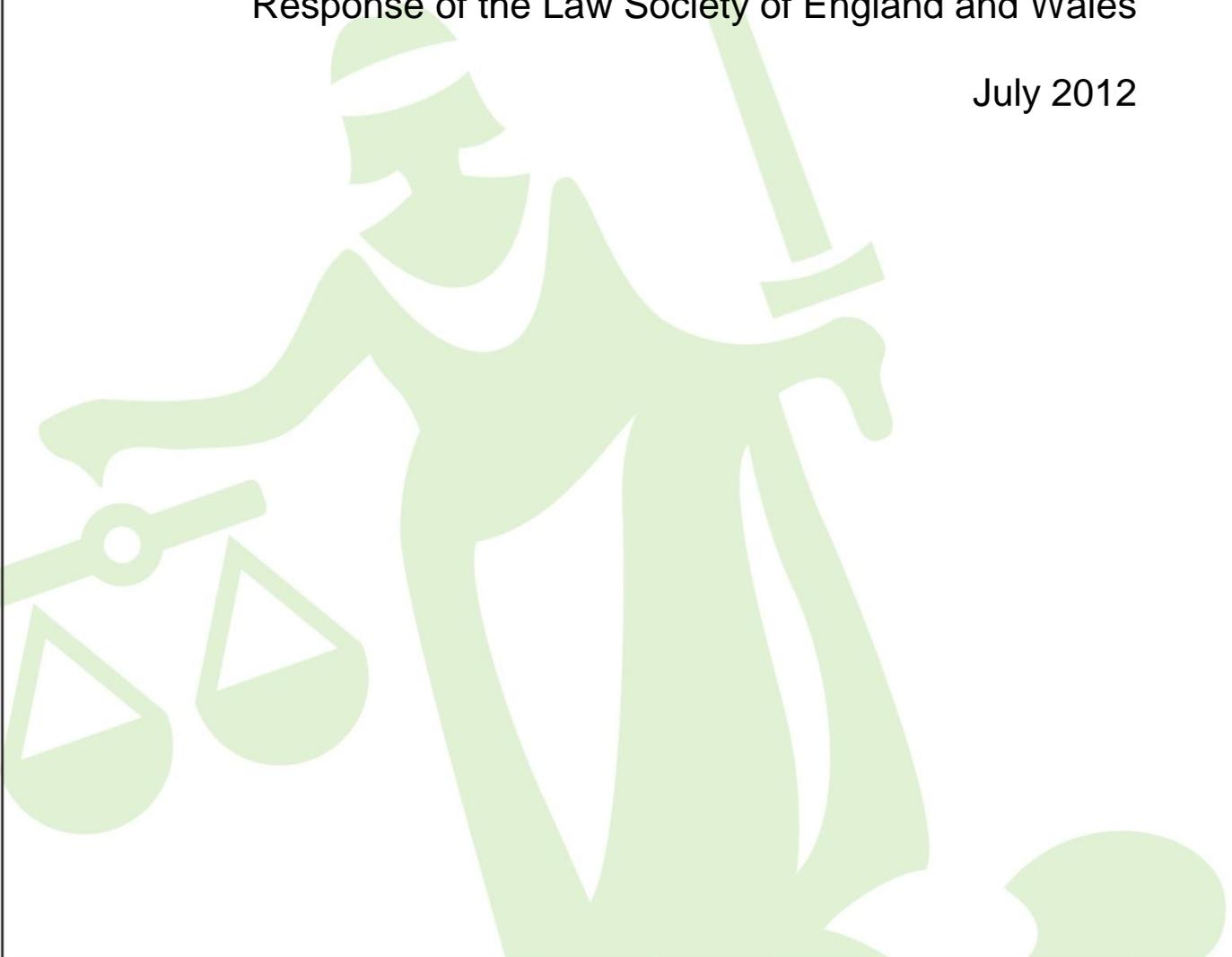


The Law Society

**Legal Services Board consultation
Enhancing consumer protection, reducing
regulatory restrictions: Will writing, probate
and estate administration activities**

Response of the Law Society of England and Wales

July 2012



THE LAW SOCIETY'S RESPONSE

Introduction

The Law Society is the representative body for over 145,000 solicitors in England and Wales. It presents the policy of its council made on behalf of the solicitors' profession as a whole, and lobbies regulators, Government and others. It also works closely with stakeholders to improve access to justice for consumers.

We welcome the opportunity to respond to the Legal Services Board's (LSB) consultation on will writing, probate and estate administration activities.

In preparing this response, we have sought the views of the Law Society's Wills and Equity Committee, Rules and Ethics Committee and the Private Client Section. These groups comprise specialist practitioners who have considerable experience in all areas of wills, probate, estate administration and ancillary matters.

Making a will involves an important process and forms part of a set of arrangements and decisions which safeguard the assets of an individual and ensures that values, aspirations and wishes are expressed so that they can be effectively administered lawfully and properly after death. The drafting of a will and administering of an estate through probate is affected by legal and financial issues some of which may be highly technical involving a variety of taxes, trusts and property rights. Additionally international law impacts in some cases. Badly drafted wills and incompetent administration of an estate can cause profound repercussions for the bereaved and intended beneficiaries.

Moreover, where a will is poorly prepared, this is almost invariably only discovered after the testator has died. The remedies then available are very limited and often unavailable to most people because of the costs and complexity of litigation. It is therefore crucial that those authorised to prepare wills on behalf of others are subject to minimum regulatory requirements in order to ensure that the public are safeguarded against bad practice.

We believe that regulation is the appropriate means of protecting the consumer in this area and we are pleased that the LSB has made provisional recommendations to regulate will writing and estate administration services.

To ensure adequate consumer protections are in place it is essential that there is a consistent standard of regulation for all persons authorised to carry out reserved activities. If varying standards are applied this will:

- lead to confusion for clients and the public about what to expect from different regulated providers and potentially a loss of confidence in the system; and
- encourage a 'race to the bottom' between competing regulators.

Solicitors are currently trained and regulated to provide a good service for consumers. A wide range of legal training, together with the ethical principles of professionalism, owing a duty to the court and acting in a client's best interests, are embedded within both the initial training and continuing professional development. There is a clear risk if such professional values and breadth of knowledge is not required of providers who might enter the regulated market for the first time and be authorised to carry out work in this limited area of activity. It is therefore imperative that the right structures are put in place to avoid risk to the consumer and the emergence of double standards of work.

We agree generally that a risk-based approach to regulation is appropriate.

We are concerned about the significant weight given to the results of the research report 'Understanding the consumer experience of will-writing services' without regard to the limitations of this research. The small sample size of 102 wills used for the shadow shopping exercise means that the findings should be treated as indicative rather than representative. While the research could be useful to gain a general insight into the will writing industry we would caution against using the results as the main basis for setting the regulatory parameters in this area.

The LSB has within the past 12 months approved the Solicitors Regulation Authority's (SRA) new regime, which includes outcomes-focused and risk-based regulation, and covers all aspects of solicitors' work. While we accept that it may be appropriate for the SRA to consider changes and its approach to supervision, we consider the SRA's current regulatory approach is sufficient to regulate will writing and estate administration appropriately. For that reason we believe that the SRA should be passported as an approved regulator for these activities.

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

We are not aware of any further evidence that would assist the LSB's review of will writing, probate and estate administration services.

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?

The Law Society does not consider that a will is a typical consumer transaction as the outcomes will not be visible or 'enjoyed' by the testator. The general consumer protections and the other alternatives to mandatory regulation under the legal services regime are not sufficient to protect consumers in this area. The principal alternative options that exist rely on enforcement by Trading Standards and voluntary self-regulation.

One feature of the enforcement of existing legislation is that action is taken only at a local level. While one local trading standards body may see will writing as a priority, a different authority may take a different view. This is not a satisfactory remedy for the consumer as each case will depend upon its particular facts and circumstances and the outcomes will be different in every case.

We do not believe that voluntary self-regulation is the most appropriate means of protecting consumers in this area. Currently there are no restrictions as to who can undertake this work. Even if a will writer is expelled from a voluntary scheme or a solicitor is struck off the roll or suspended from practising there is nothing to prevent that individual from continuing to act or controlling a business that offers this service. Reliance on voluntary schemes could not resolve this issue and leave the consumer at risk.

In the current market there is a two tier system where not all providers are regulated. There is evidence of significant consumer detriment, which suggests that regulation is necessary. Without enforceable rules and monitoring there may not be adequate incentive to provide a good quality service and to drive up standards.

Within the consultation paper it is argued that 'there appears to be greater uniformity in pricing structures and less choice for consumers about the way in which services are delivered within the regulated sector'. We see within the regulated sector many different pricing structures and businesses organised to cater for the various needs of all types of clients. The diversity within this sector is constantly evolving, and will continue to do so especially with the introduction of alternative business structures. It is wrong to forget that solicitors compete amongst themselves as well as with the unregulated sector.

We believe that voluntary accreditation schemes, such as those operated by the Law Society, also play an important role in highlighting the quality of firms and help the consumer make an informed decision about the services they are paying for. The Law Society is in the process of establishing an accreditation scheme covering will writing, probate and estate administration services as a way for solicitors who meet our assessment process to demonstrate skills, quality assurance and appropriate service standards. This will be an adjunct to, not a replacement for robust minimum regulatory standards.

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 with the list of core regulatory features outlined in the consultation document and believe that all of these features should be mandatory.

We feel that to ensure adequate consumer protections are in place the following core elements should be mandatory for all regulators of will writing and estate administration services:

- qualification and post qualification training requirements;
- indemnity insurance;
- a compensation fund;
- a code of conduct including requirements to meet professional principles, avoid conflicts of interest, follow an advertising code, foster equality and diversity, and ensure transparency about costs;
- a system to ensure clients, their will and client file are protected should a provider cease to exist or to offer its services;
- an adequate storage system for both the original will and client file;
- a complaints management system; and
- a disciplinary mechanism including supervision, monitoring and sanctions.

We agree that clients should be provided with transparent and clear information on the services that will be provided to them so that they can make informed decisions.

We agree that all owners and managers of authorised providers should be subject to a 'fit and proper' test to ensure that companies are only able to carry out reserved activities if they are run by fit and proper persons. Under the current regulations for SRA regulated firms, all owners, managers and compliance officers are subject to the same Suitability Test upon application for authorisation as each solicitor is subject to upon applying for a practising certificate. We believe it is important in the name of public protection that owners and managers of authorised providers should be subject to the same high standards of integrity as are met by each authorised person.

We also agree that it would be appropriate for a list to be maintained of those working within this area who have been 'struck off' and that this list should be shared among approved regulators. However, we doubt that much benefit will be gained from having two different lists available to consumers, one list for authorised providers and one for those providers who have been 'struck off'. The time and expense in ensuring this list is kept up-to-date may not be justified if consumers are relying on the list of approved providers.

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?

It is of fundamental importance that a fit and proper person test should be required for individuals, employed by an authorised provider, who are named as an executor or attorney.

An authorised person who is named as an executor or attorney holds a position of significant authority and trust over a person's assets and financial affairs and in some cases when acting as an attorney may make decisions over a person's health. It is essential that the public should be able to rely on their integrity.

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?

As a minimum, clients should be protected in the event of practitioner negligence, dishonesty, fraud and/or failure to account. There should be an obligation to obtain a compulsory professional indemnity insurance (PII) policy to provide cover for civil liability arising from provision of regulated activities and an obligation to maintain a run-off policy to cover claims that may arise after a firm ceases to practise. Whether this is done through a market mechanism, a master policy, or a mutual fund should be a matter for each approved regulator to determine.

Any compensation fund should aim to minimise the potential for client loss and detriment in the event of a failure of the primary PII cover to meet claims. The fund can be used as a 'last resort' for consumers and only cover otherwise uninsurable risks. There should also be clear and transparent requirements and/or an obligation to inform clients of the existence of any material exclusions that may apply to the scope of PII cover or exercise of discretion of the compensation fund.

We agree that appropriate systems and procedures must be in place to safeguard the client's money. In order to fulfil this objective we believe that rules similar to the SRA Accounts Rules 2011 should be a mandatory requirement for all Approved Regulators to have in place to which all approved persons must adhere.

The SRA Accounts Rules ensure that client money is separated from the firm's money, kept in a secure client account and only used for the client's matter. Firms must establish and maintain proper accounting systems including accounting records and have proper internal controls over those systems. All client accounts and financial records are subject to annual external accountant audits. These are essential requirements to which all approved persons should adhere in order to protect the client's money, especially when providing estate administration services.

We doubt it would be desirable for client money to be held by third party financial institutions. When administering an estate or acting as a professional executor it is important that the client's money is easily accessible so as to avoid significant delays and increased costs. Payments often need to be made or collected from quite a range of companies and many ancillary and interlocking arrangements or activities need to be carried out.

We are aware there are protection schemes in place in other areas which rely on third party financial institutions holding consumer money, such as the Landlords' deposit schemes. However, these schemes are generally based on the concept of a one-off payment, which is protected until the tenants move out of a property. When acting as an executor or attorney, money often needs to be accessed on a regular basis and at very short notice. Third party client money handling would be likely to have negative cost and time implications for the client.

However, if such a change to the current system were permitted then it would require further regulation to assure the probity, transparency and accountability of such outsourced arrangements, which would need to be subject to regulation and accessible to English regulators.

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 consider that, if a consumer seeks advice on something as important as a will, they are entitled to expect that the firm or individual providing the service is trained up to a minimum competence and should be able to cope with all the relevant issues encountered in drafting wills. Given the low level of consumer knowledge at the moment, it is likely that consumers thinking that they need a “simple” will may well find themselves mistaken.

It is essential that a person providing any service has a sufficient understanding of the full range of the law (domestic and international) engaged and of how it applies in particular circumstances and how the whole process works. Even if an authorised person only provides a will writing service that person will also need to understand how an estate is administered and the difficulties that could arise once their client has died. Professional skill is required to be able to identify the options and best choices for the client before the work is undertaken and then to deal with any complexities.

The complexity and difficulty involved in preparing a will or administering an estate does not directly correlate with the size of an estate. A relatively modest estate that involves a difficult family situation can be one of the hardest to manage.

Basing training and qualification requirements on the complexity of work undertaken presupposes that a provider who is only capable of dealing with simple wills or estates would, if faced with work that is outside his or her expertise, have sufficient background knowledge to be able to recognise an issue in the first place.

We think that, in practice, it will prove difficult to tailor training requirements to different business models. We believe that if will writing and estate administration services are seen to be important enough to reserve and place restrictions upon who can undertake this type of work, then it is imperative to ensure that all authorised persons are properly trained to provide their clients with a competent advice, documentation and service.

Not only should all providers have a thorough understanding of the relevant law and practice points relating to wills, probate and estate administration but also related areas of law including property, tax and trusts, family law and issues affecting vulnerable clients, including testamentary capacity. These related issues arise in almost all wills and estates to some degree or other and even the timing of the will may be of significance where the will is triggered by bereavement or other event. Cross-border issues in relation to wills and succession are becoming increasingly common and it is essential that practitioners have an understanding of how to advise such clients, including directing them to an expert in international matters where appropriate.

There are no entirely discrete areas of law – the intellectual framework of the law is, itself, an important concept that any professional provider needs to understand, and most areas of law require at least a basic knowledge of others. It is important for an authorised provider to be able to identify gaps in his or her knowledge and to advise properly.

We also consider that supervision by other competent practitioners is a fundamental tool to ensure that all round competency and expertise is gained and maintained.

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 that any new reserved activities should include:

- the preparation and drafting of a will and all ancillary legal activities; and
- the administration an estate (including the preparation of the papers on which to found or oppose the grant of probate or letters of administration) and all ancillary legal activities.

We also agree that the proposed new reserved activities should capture all activities that the consumer may be offered or provided with when making a will, or when an estate is being administered.

It imperative that in addition to the drafting or signing of the will, all the preparatory work leading up to the execution of the will should be reserved. The reserved work should start at the point where client contact is first made and end at the point where the will is duly executed. This would capture the taking of client instructions and background information, tax planning and any advice linked to the preparation of the will.

We believe that when the definition of reserved activities is being drafted consideration needs to be given to ensure that:

- all activities that could be reasonably assumed to be reserved, because of their association with the will writing or estate administration services provided to clients, fall within the scope of reservation; and
- confusion and the potential for legal arguments over the scope of the reserved activity is avoided, as much as possible.

We believe that the proposed scope for reservation should also include powers of attorney and trusts. Under the current proposal, we understand that if these activities are connected to the provision of will writing or estate administration services then they will fall within the proposed scope of the new reserved activities. However, if there is no connection, then the preparation of a power of attorney and trusts will not do so.

We are concerned that this distinction could cause confusion for consumers as to whether they are afforded the protections that come with regulation if a power of attorney or trust is prepared and/or administered on their behalf. Further, it will enable companies to undertake this activity without any regulatory restrictions.

When a power of attorney or trust is created it places the attorney or trustee in an unique position of trust where that person(s) has control over another's financial and/or health and welfare affairs. By its nature, a power of attorney or trust places the donor in a vulnerable position, even if he/she has sufficient capacity, as it enables another person to act and make important decisions often with minimal scrutiny on behalf of the donor. The attorney / trustee is acting in a fiduciary role which requires the utmost honesty and integrity to protect the donor from abuse.

The preparation of powers of attorney is so important that this service should be reserved and only undertaken by authorised people.

A power of attorney can be misused by some providers in order to enable them to do work which would otherwise be unlawful to conduct. For example, there is evidence to suggest that unregulated providers are using powers of attorney as a way of being able to obtain a grant of probate on behalf of their clients even though this is a reserved activity.

It is also essential that the person preparing the power of attorney has sufficient knowledge and understanding of the document and process to be able to provide comprehensive advice and prepare the document to reflect the donor's wishes, which often involve complex and emotive matters. For example, a health and welfare LPA allows a donor to give general authority for the attorney(s) to give or refuse consent to life-sustaining treatment. Unlike an advance decision, it is not necessary to specify a particular treatment or particular circumstances where treatment is refused. This requires a high degree of trust by the donor towards the attorney(s). Further, a health and welfare LPA made after an advance decision will make the advance decision invalid if the LPA gives the attorney authority to make decisions about the same treatment.

As noted in the consultation document it appears likely that most powers of attorney are arranged independently of will making, so any proposal to reserve only will writing, estate administration services and ancillary matters will not capture the majority of the preparation or administration being undertaken for powers of attorney.

Further, the proposal to reserve ancillary activities to will writing and estate administration gives rise to practical issues connected with trusts. Where are the boundaries in relation to the drafting and administration of trusts likely to fall given that not all trusts are created by a will? Without clarity, enormous uncertainty will arise as to which trust activities are reserved and which are not; for example:

- If the proposed scope of the reservation is merely wills why should there be a distinction between trusts created under a will and those arising on intestacy or by virtue of the settlement of a claim under the Inheritance (Provision for Family & Dependents) Act 1975? In each case it is the death of a person which has caused or is deemed to cause the trust to arise and in each case the trust arising will at least in part affect the administration of the deceased's estate.
- Express trusts are also created by individuals during lifetime and the administration of them is frequently left to professionals who will be managing real property and investments, and sometimes personal property and cash, for a fee. There is at least as much risk attached to the administration of express trusts as there is to the administration of will trusts. We therefore believe the reservation should extend to express trusts as the activities are the same.

Drafting express trusts was a criminal activity under section 22 of the Solicitors Act 1974, if conducted by someone other than a solicitor or barrister when prepared for gain or reward. At present, the reservation of instrument activities means that only the preparation of trust 'deeds' relating to real or personal estate within the law of England & Wales is reserved. This does not cover the administration of trusts created by these documents.

The North East Trading Standards Association (NETSA) recently approached the Law Society in relation to the preparation of Property Protection Trusts, also referred to as Asset Protection Trusts and also known by other names. NETSA has received numerous complaints from members of the public in relation to an influx of unregulated firms promoting these products and using scare tactics and high pressure sales techniques to mis-sell them. We have also received similar reports from solicitors whose clients have sought advice about them or requested similar products from solicitors.

This is an increasingly difficult area where consumers are paying thousands of pounds, which in many cases represents a significant portion of their savings, for a product that promises to protect a person's home against possible future care home fees but where the consumer may not have received adequate advice as to its applicability, its appropriateness for their circumstances and its possible ineffectiveness for the purpose

for which it was sold. There are frequently errors and mistakes which render the use of the product unfit for its purpose and potentially void.

Implied trusts are a fundamental part of the law of England & Wales and can arise by statute or court order. Increasingly, the 'common intention' constructive trust is used to deal with the division of property as a result of the break down of family and cohabitant relationships. It would also be anomalous if the reserved activities only related to express will trusts and not implied trusts (which could be imposed during lifetime or on death as a result of court proceedings or otherwise) and because of their contentious nature need professionals to be involved in the administration of those trusts and their dissolution for a fee.

Trusts should only be set up and managed by those qualified to provide adequate advice and appropriate support in doing so. The problems arising in relation to Property Protection Trusts are a good example of the detrimental impact which consumers may face if unregulated providers are able to provide these sorts of services. The preparation and administration of trust deeds is a very complex area and if this area is not reserved many vulnerable clients, who are not familiar with trusts, could be mis-sold expensive products that may not be needed or which may be inappropriate for the client.

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?

It is obviously right that consumers should be able to choose whether or not to seek professional assistance and either prepare their will or administer an estate themselves or rely on an individual to do this where there is no commercial arrangement.

We agree that reservation should extend to any 'checking' or 'advice' services that may be provided in relation to do-it-yourself tools.

We are pleased that the proposed scope for reservation will capture services provided where software and other tools have been used by the provider. The provision of 'online' legal services seems to be an option that consumers are increasingly using and it is important that consumers are afforded appropriate protection no matter what means are used to deliver the service.

We are, however, concerned to ensure that where a commercial provider offers to provide will writing or estate administration services for free then the provider is still captured within the scope of the reserved activity. In our experience often where one service is provided for free the provider will charge for a connected service. For example, we are aware of instances where providers have offered to prepare the will for free, on the condition that they are named as the executor and able to administer the estate, as illustrated in the below example, which was provided by a practising solicitor. We believe that both activities should be captured under the list of reserved activities.

I had a case where a Will was advertised as 'free' provided the will writer was appointed as the executor, and only when the client asked did the will writer provide information about the costs involved (a flat rate of 10% of the gross estate).

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?

Regulation in legal services needs to be consistent across all providers of the same types of service. An inconsistent approach will cause confusion amongst consumers and undermine their confidence. We currently have concerns about the differences in the way

solicitors and licensed conveyancers are regulated regarding conflicts of interest. Protecting and promoting the public interest should be the overriding objective that the LSB applies to any rule approval processes.

We do not believe there will be any particular issues of regulatory overlap between the approved regulators that are specific to will writing or estate administration, that cannot be addressed by the LSB as appropriate.

Question 10: 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?

We believe that Legal Professional Privilege (LPP) plays an important role in protecting communications between a client and their lawyer. Privilege entitles the client and their adviser to refuse to disclose documents or answer questions in relation to their communications.

In practice, LPP creates a conflict with the general public policy argument that cases should be decided by reference to all available relevant evidence. LPP places restrictions on the availability of relevant evidence in legal proceedings which has significant public policy implications. Therefore, any decision to extend the provision of LPP should not be taken lightly and should only be done after due consideration is given to both the positive and negative impacts that may result from such action. As Lord Justice Lloyd stated in the *Prudential*¹ case at 83:

'It is the essence of the rule that it should be clear and certain in its application, since it is not the subject of any ad hoc balancing exercise but is, to all intents and purposes, absolute.'

It is essential that any extension of section 190 of the Legal Services Act to include will writing is only to cover authorised persons undertaking this work. Public policy requires that LPP must be confined to those who are duly regulated and subject to strict ethical and professional standards.

It also follows that any extension must be accompanied by high regulatory standards being placed on those who would be covered by LPP. It is fundamental that all authorised providers are properly trained and understand their public interest responsibilities and the implications of LPP when it is applied. It is also essential that authorised providers must be under the same sorts of duties concerning ethical behaviour as solicitors.

LPP should only be extended to include authorised providers properly regulated and controlled who adhere to the highest professional standards.

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?

We are very concerned that the draft impact assessment states at paragraph 90:

'Significant additional costs would not fall on those firms that are members of other regulatory schemes such as those administered by IPW or SWW. This is because

¹ R (on the application of Prudential plc and another) v Special Commissioner of income tax and another [2010] EWCA Civ 1094

these firms, as part of their membership duties, are deemed to have fit-for-purpose compliance arrangements’.

We would strongly challenge this assertion, especially taking into account the comments made in the consultation document at paragraph 192 stating that ‘all existing approved regulators have a considerable way to go to demonstrate the different kind of outcomes and risk based regulation that is likely to be needed to effectively meet the regulatory objectives and better regulation principles in these markets’.

It could be implied from the comments made in the impact assessment that IPW and SWW’s current voluntary regime would automatically satisfy the LSB’s requirements to become an approved regulator. The table on page 14 of the draft impact assessment clearly highlights that SWW does not have compensation fund or arrangements for the handling of client money in place. As we have stated in our answer to question 5 these are critical consumer protections, which providers must have in place.

We are also concerned that if the minimum standards set by the LSB do not accord with those already required of regulated providers this will create a two tier system which would not be in the best interests of consumers.

In relation to the general principle of reserving will writing and estate administration activities, we do not feel that regulation will restrict competition within this field. Many will writing organisations have openly supported the move to regulation and we believe that these organisations will continue to stay in the market even if will writing and estate administration become reserved activities.

At present solicitors are already working to meet high regulatory standards, and yet continue to have the largest portion of the market share in this area. This shows that having to meet high standards and compulsory requirements will not prevent organisations or individuals from competing in the market or reduce access to services.

We consider that any increase in cost of services will be fully justified by enhanced consumer protection through regulation. Further, in practice we do not believe that unregulated provision is in fact generally significantly cheaper. Hidden extras such as storage costs for wills may make such services more expensive in the long run.

We do not consider that consumers will be deterred from making a will by relatively small increases in costs. In our 2010 survey² only 3% of respondents cited costs as a reason for not having a will. Only 11% of respondents named low cost as the most important qualities when considering using a will writer. We feel that our survey results demonstrate that most consumers prioritise protection above price. The vast majority (82%) of respondents to our survey agreed that they ‘would pay more to have a will drafted by a regulated provider with a formal complaints procedure and compensation scheme’.

² The Law Society research was conducted by ICM Research, 15-17 October 2010, using a random sample of 1001 adults over 18 in the UK (excluding Northern Ireland). The results of the survey were sent to the Consumer Panel.