

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

A consultation document about the LSB's provisional recommendations on the regulatory approach to will-writing, probate and estate administration activities as part of statutory sections 24 and 26 investigations

Views on our approach are welcomed by Wednesday 16 July 2012

(12 weeks from 23 April)

This consultation will be of interest to:

Regulators

Providers of legal services (including all providers of will-writing, probate and estate administration services) and their representative bodies

Consumers of legal services and their representative bodies

Legal advisory organisations

Third sector organisations

Law Schools/universities

Legal academics

Accountancy bodies

Potential new entrants to the legal services sector

Think tanks

Government departments

Members of Parliament

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Executive Summary

Introduction

1. The Legal Services Board (LSB) launched investigations under Sections 24 and 26 of the Legal Services Act 2007 (the Act) in July 2011, in order to form a view on whether will-writing and estate administration should become reserved activities and whether the reach of the existing reserved probate activities is appropriate. This document sets-out the results of that work and the LSB's proposals for action as a result.
2. The LSB believes that the historic regulatory framework is not serving consumers of will-writing and estate administration services well. The regulatory protections for consumers and obligations for providers are determined by who delivers the service and not by the risks involved. Solicitors and other regulated legal services providers (whom we believe make-up at least two-thirds of the will-writing market¹ and around 90% of the estate administration market²) are regulated in all of the legal work that they perform. However, despite this regulation, our investigations indicate that too many consumers using regulated providers are receiving a poor service.
3. In the unregulated market, there is less uniformity in pricing structures and greater choice for consumers about the way in which services are delivered than within the regulated sector. However, too many consumers are also suffering detriment and lack many of the protections available elsewhere.

Investigation findings

4. Our investigation has shown that many consumers are not adequately protected at the time that the will is being written or at the time that the estate is administered. We are concerned about:
 - the quality of consumers' wills;
 - the safekeeping of their wills;
 - unethical sales practices and fraud (including failure to prevent proven wrong-doers from setting-up business in these markets)
 - the safekeeping of consumers' money and other assets;
 - shortfalls in service levels;
 - a failure to deliver effective redress when things go wrong and to provide access to the Legal Ombudsman as a second-tier of redress; and

¹ Law Society 2010 survey results as submitted to Legal Services Consumer Panel Call for evidence indicate that 67% of wills are written by solicitors. An Office of Fair Trading survey of 2000 adults from February 2010 provided a figure of 88%.

² You Gov, The use of probate and estate administration services, January 2012: http://www.legalservicesboard.org.uk/news_publications/latest_news/pdf/yougov_research.pdf

- market distortion created by only the probate application stage of estate administration being reserved, resulting in added cost, disrupted service and opaqueness over safeguards.
5. Problems have been discovered across both the regulated and unregulated sectors. In particular, problems around quality, service issues, transparency and fraud appear to exist across both sectors. However, the worst sales practices, issues with the safekeeping of wills and the sufficiency of redress options, appear to be largely confined to the unregulated sector.

Proposals

6. Therefore, we consider that action is needed to protect consumers and promote their and the wider public interest. Taking action will also protect the many ethical and robust businesses in both regulated and unregulated sectors, whose reputation and livelihood may be threatened by failures elsewhere in the marketplace which jeopardise consumer confidence.
7. We have two key proposals:
- **Recommending that the list of reserved activities be extended to include will-writing and estate administration activities.** This would ensure that appropriate consumer protections, including access to redress, are in place no matter who delivers the service. Legal services regulation would apply to all providers rather than just those with professional titles. This would make it impossible for unscrupulous or poor quality providers to avoid regulation.
 - **Improving the effectiveness of the existing legal services regulation that applies to the majority of providers delivering these services where it is not working well for consumers.** This would involve regulators placing a greater emphasis on targeted, risk-based monitoring and supervision of regulated businesses and a lesser reliance on wider professional titles.

Effective competition

8. Our proposals are centred on a vision of consumers being best served by “competition between diverse providers within a well regulated market place”³. It is widely accepted that competitive pressure can raise standards as well as reducing prices within a market. A degree of plurality of supply already exists. Independent will-writing and estate administration companies, banks and building societies, accountants, independent financial advisers, charities, trade unions and other membership organisations are all active in the market. We are determined that the value and choice benefits that this

³ Consumer Panel, Response to LSC discussion document “Enhancing consumer protections, reducing regulatory burdens (*we express this view in relation to will-writing, probate & estate administration rather than necessarily subscribing to this as a general philosophy*)

plurality delivers for consumers, must be maintained in the consumer interest. It is our view that greater benefits will be delivered if we also start to see improved competition and innovation within the regulated part of the market.

Effective regulation – mandatory schemes

9. We do not consider that competition alone can provide the solution to all of the identified problems. There are, in our view real barriers to competition working effectively. Most consumers rarely use these services and are not well-placed to exercise choice because of the imbalance in knowledge and power between the consumer and the provider. In our view, consumers should not face the additional burden of having to understand the differences and choose between regulated and unregulated providers.
10. As well as competition, we have considered straightforward reliance upon general consumer law; voluntary regulatory schemes and better consumer empowerment. All of these play a potentially useful role in enhancing consumer protection. However, we do not think that they can address the identified detriments without the support of effective, proportionate and targeted statutory regulation.
11. Alongside any decision to recommend reservation, we would also propose to issue guidance to help approved regulators develop appropriate regulatory arrangements that strike the right balance between all of the regulatory objectives. This will require a different kind of regulation than is currently prominent with the legal services sector. Our proposals are predicated on regulation that flexibly targets risks presented by different providers and the work that they undertake within these markets, rather than general requirements associated with entering a profession. We judge that this will support a market that works more effectively for consumers, the public and providers alike.

Effective regulation – reforming existing regulation

12. In this context, we consider that the starting point for intervention must be the reform of existing legal services regulation. The aim should be to secure consumer benefits through greater competitive pressures within the largest part of the market and also to ensure that regulatory obligations address the identified consumer detriment in practice. This should build on existing work to improve regulatory standards among legal service regulators, including the drive towards outcomes-focused regulation and developing regulator

capability⁴. It is our assessment that at present regulation is too focused on controlling entry through general education and training requirements that are not targeted at the risks in this market. There is very little by way of on-going risk-based monitoring and supervision to ensure that good outcomes are being delivered to consumers. Given this assessment we propose that existing regulators will have to apply to be designated to regulate any new reserved activities and demonstrate that their regulation is fit-for-purpose.

What type of regulation?

13. We propose that our guidance would set a foundation of core minimum protections needed to target the systemic detriments identified in these markets. Beyond this, we consider that the best way to deliver the regulatory objectives and principles of better regulation is by the approved regulators setting a clear set of outcomes that each provider, to which they will be held accountable for delivering for their clients. Providers, within certain guidelines, should be granted flexibility to demonstrate to approved regulators how their business models would achieve the outcomes and how they will guard against risk of this not happening. This would inform decisions about authorisation. The level of monitoring, inspection and supervision that the practitioner can expect would also be based on an analysis of the level of risk that they present. This approach, therefore, would move towards greater authorisation and regulation by activity, teamed with standard risk profile considerations for providers of legal services more widely. Regulation would likely focus on the entity rather than relying predominantly on the qualifications of the individuals undertaking the work and / or supervising others undertaking work. There would likely also be much less reliance on detailed rules.

14. We consider that the regulatory menu for the three activities – will-writing, probate and estate administration - must contain certain features to target the risks and detriments that the investigation has identified. These are:
 - a strategy and early action for consumer education;
 - a mandatory register of authorised providers;
 - authorisation gateway checks including a fit and proper person test for ownership and control;
 - appropriate financial protection arrangements, especially where a provider has access to consumers' money, including indemnity insurance unless work from regulators and financial institutions avoids the need to hold consumers' money;

⁴ LSB, "Developing regulatory standards", 2011:
http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/20111214_regulatory_standard_v11.pdf

- an outcomes based code of conduct, with appropriate emphasis on sales practices;
- a requirement that providers have an appropriately trained workforce
- a risk-based supervision strategy that targets regulatory action to protect consumers;
- an enforcement strategy that encourages and creates incentives for compliance, deters non-compliance and punishes transgressions appropriately, including the levying of financial penalties;
- arrangements to ensure each provider has an appropriate in-house complaints process; and
- bringing all three activities within the jurisdiction of the Legal Ombudsman.

Scope of regulation

15. Our proposal is that regulation should extend to all providers delivering will-writing, probate and estate administration activities and ancillary advice in expectation of fee, gain or reward. This proposal includes holding providers to account for work that they produce, including where they have used software or other tools to deliver a service.
16. We agree that it is not the role of regulation to prevent consumers exercising their legitimate choice as to whether or not to seek professional assistance. We also support the principle of individuals in a personal capacity of being able to provide free advice to help others. We propose that these freedoms should remain without restriction or regulation.

Transitional arrangements

17. With any amendment to the reserved legal activities, there must be a balance between swift implementation and allowing the market time to adapt. We propose that reservation should not take full effect until certain criteria are met:
 - approved regulators and licensing authorities must be designated with regulatory arrangements that allow for the authorisation of the different types of provider currently active within these markets⁵; and
 - providers are authorised to undertake activities in sufficient numbers to ensure access to justice, consumer choice and competition is maintained.
18. We will encourage existing approved regulators to take steps to reform their regulatory approach, to better protect consumers and raise standards on a faster timetable. We understand that the pace and extent to which different regulators and trade bodies have taken action following the publication of the LSB/Solicitor Regulation Authority (SRA) /Office of Fair Trading (OFT)

⁵ Please see annexed CBA

research and the Legal Services Consumer Panel (the Panel) report that highlighted detriment in relation to will-writing published in July has varied. We encourage all bodies overseeing providers of will-writing and estate administration services to progress at speed. This will place interested bodies in a better position to meet the tests for being designated as an approved regulator as set-out in our Schedule 4 and 10 rules⁶ as well as in our proposed guidance, if the activities are reserved.

Providers regulated in other sectors

19. Regulation must work for different types of businesses presenting different risks. This includes the many providers in the markets currently outside of legal services specific regulation. Any prospective approved regulator would have to demonstrate that they have appropriate arrangements to prevent regulatory conflict and unnecessary duplication of regulatory provision if they propose to authorise providers who are also overseen by regulators in a different sector⁷.

Next steps

20. This is our first consultation setting-out our analysis of the evidence base that we have compiled and our initial proposals.
21. In the summer, following the conclusion on this document and the consideration of the responses that we receive, we will publish a further consultation document that may include the full texts of a draft recommendation to the Lord Chancellor, impact assessments and any guidance on high-level regulatory arrangements.
22. We would then produce our final report in winter: recommending that the Lord Chancellor amends the list of reserved activities if we conclude that this needed to protect consumers in these markets and deliver the regulatory objectives.

⁶ Rules for applications for Approved Regulator and Qualifying Regulator designation, Rules for Rule Change Applications and Rules for applications to be designated as a Licensing Authority: http://www.legalservicesboard.org.uk/what_we_do/regulation/index.htm

⁷ As required by Sections 52 and 54 of the Legal Services Act 2007

1. Introduction

24. The LSB was established by the Act to oversee legal services regulation in England and Wales. Working with the approved regulators, who themselves regulate directly the circa 145,000 lawyers in England and Wales, we are responsible for ensuring the highest standards of competence, conduct and service in the legal profession both for the benefit of individual consumers and the public generally. We share eight regulatory objectives⁸ with the approved regulators, which collectively we must deliver. We are also required to regulate in accordance with the better regulation principles of being transparent, accountable, proportionate, consistent and only targeting cases where action is needed.
25. We are undertaking formal investigations into whether there is a need for regulatory reform in relation to will-writing, probate and estate administration activities. This document sets-out our preliminary findings and proposals for consultation.

The current position

26. Legal services regulation works in two main ways. Firstly, there are six reserved legal activities listed at Section 12 and Schedule 2 to the Act. These activities may only be undertaken by individuals and organisations that have been authorised and are regulated by an approved legal services regulator. The exception being where explicit exemptions have been provided⁹. Secondly, some lawyers are regulated in respect of all of their legal work by virtue of the rules of their regulator and their title— such as solicitors and barristers.
27. Will-writing and most estate administration activities¹⁰ are not on the list of reserved activities. This means that anybody can enter the market and deliver these services to the public. Those that do may operate totally outside of legal services regulation. The protections enjoyed by consumers using regulated providers are not mandatory. For example, there are no mandatory:

⁸

LSA 2007, Part 1, Regulatory Objectives:

• protecting and promoting the public interest • supporting the constitutional principle of the rule of law • improving access to justice • protecting and promoting the interests of consumers • promoting competition in the provision of services • encouraging an independent, strong, diverse and effective legal profession • increasing public understanding of the citizen's legal rights and duties • promoting and maintaining adherence to the professional principles.

⁹ Under Schedule 3 to the Act - because for example authority has been granted through other legislation and some or are exempt in certain circumstances when working under the supervision of authorised persons in

¹⁰ The Act reserves one small part of the estate administration process - “probate activities”. These are defined as “preparing any papers on which to found or oppose the grant of probate or letters of administration”.

- fit and proper person tests;
- requirements to be registered as a legal services provider;
- requirements to have demonstrated appropriate knowledge;
- requirements to be signed-up to a code of conduct or to demonstrate specific protections against losing consumers' money; and
- automatic rights of redress to the Legal Ombudsman.

28. Consumer protections vary significantly between different types of providers delivering the same service.

Historical context

29. There has long been debate about whether will-writing and connected activities should be made reserved legal activities. Parliament considered this during the passage of the Act but concluded that there was insufficient evidence of consumer detriment to reach a robust conclusion at that time. The then Government stated that the LSB may return to the issue at a later date using the powers in the Act, at Sections 24 and 26, which allow for the LSB to make a recommendation to the Lord Chancellor that activities be added to or deleted from the list of reserved legal activities.

30. We determined to investigate whether to do so for will-writing in light of the weight of concern expressed to us about practices in this sector, particularly in the unregulated sector. This included a significant number of case studies describing severe consumer detriment, many of which received media attention, potentially impacting on consumer confidence. We were also aware of the introduction of legislation in Scotland to make it illegal for wills to be written for a fee by unregulated providers.

The investigations

31. We started preliminary inquiries in September 2010. We asked the Panel¹¹ to provide us with advice about the different problems and resulting harms experienced by consumers wishing to write a will and the possible solutions. The Panel published its report in July 2011¹², which highlighted systemic issues and recommended statutory regulation. Following receipt of this advice, we moved the investigation onto a statutory footing and extended the investigation to include estate administration¹³, including whether the reach of reserved probate activities, as currently defined, is appropriate¹⁴. The LSB undertook a call for evidence from September to November 2011, which

¹¹ The Panel is a body created by the Act to provide the LSB with independent advice from the consumer perspective.

¹² http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/ConsumerPanel_WillwritingReport_Final.pdf

¹³ Under section 24 of the Act

¹⁴ Under section 26 of the Act

sought views on both the Panel's recommendations for will-writing and also on issues relating to probate activities and estate administration¹⁵.

Summary of evidence

32. All of the information that we have received and the evidence we have gathered have been considered in developing the proposals in this consultation document. This includes, but is not limited to:

Will-writing:

- original research by IFF, (co-sponsored by the SRA and the OFT¹⁶) which comprised:
 - i. shadow shopping exercise;
 - ii. consumer survey; and
 - iii. business survey.
- a call for evidence and connected activity¹⁷, including:
 - i. views of a wide range of stakeholders; and
 - ii. nearly 400 case studies submitted by consumers, lawyers and others.
- data derived from complaints patterns¹⁸
- the Panel's report "Regulating will-writing"¹⁹

Probate and estate administration:

- original research (IFF and YouGov research), including:
 - i. a consumer survey²⁰; and
 - ii. a business survey²¹.

(It was not possible to undertake the kind of shadow shopping exercise for estate administration that has proved so illuminating about quality issues in relation to will-writing, due the prolonged nature of services)
- a call for evidence, stakeholder workshop and interviews²², including:

¹⁵ http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/index.htm

¹⁶ IFF, Understanding the consumer experience of will-writing services:
http://www.legalservicesboard.org.uk/what_we_do/Research/publications/pdf/lbsb_will_writing_report_final.pdf

¹⁷ Consumer Panel, Regulating will-writing, as above

<http://www.legalservicesconsumerpanel.org.uk/ourwork/Willwriting.html>

¹⁸ Including OFT analysis of Consumer Direct data

¹⁹ Legal Services Consumer Panel, Regulating will-writing, as above

²⁰ YouGov, the use of probate and estate administration services by consumers (as above)

²¹ IFF, Probate and estate management services:

http://www.legalservicesboard.org.uk/news_publications/latest_news/pdf/iff_research.pdf

²² http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/submissions_received_to_the_call_for_evidence.htm

- i. views received from a range of stakeholders including members of the public, consumer groups, charities, Ombudsmen, providers and professional / trade bodies.
- data derived from complaints patterns²³
 - Panel's report "Probate and Estate Administration"²⁴.
33. We have set-out at Annex 2 a summary table of the key problems and their impacts. We have published an initial impact assessment alongside this consultation document.
34. We appreciate that if implemented these proposals will have a wide impact. This consultation exercise is designed to solicit input from a broad range of stakeholders. We welcome all views. We would particularly welcome views on the 11 questions asked within the body of the document and listed together at Annex 1.

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

http://www.legalservicesboard.org.uk/Projects/pdf/willwriting_probate_estateadmin_seminar_19october2011_meetingnote_final.pdf

²³ Consumer Panel interim response to LSB call for evidence, November 2011:

http://www.legalservicesconsumerpanel.org.uk/publications/consultation_responses & OFT analysis of Consumer Direct data

²⁴ Consumer Panel, Probate and estate administration, February 2012:
<http://www.legalservicesconsumerpanel.org.uk/ourwork/Willwriting.html>

2. Findings

Inherent features place consumers at risk of detriment

Information and power asymmetry

35. There is an imbalance in knowledge and bargaining power between consumers and providers; consumers rarely use services in these areas. At the time that their will is written, most consumers will lack the knowledge and familiarisation to identify deficiencies. In any event, problems are often not spotted until after the testator has died. And whilst it is the deceased's wishes and the value of their estate that are threatened by disputes caused by poor quality wills, they are obviously no longer available to clarify what they intended, or able to help resolve problems or seek redress.
36. As a consequence, it is intended beneficiaries (or those that believe that they are intended beneficiaries) and any dependents who are left to deal with problems that arise from poor quality wills, rather than the person who purchased the service. Their difficulties may also be compounded by obstacles to effective redress when things go wrong, because they were not the purchaser. It should be noted in this context that the choices made by the testator may not be universally popular; the testator may anticipate this. The driver for seeking professional help preparing a will may be the desire for reassurance that there will be no legal grounds on which to challenge those choices. The driver for naming a professional executor may be the desire for reassurance that potentially unpopular wishes will be implemented with limited opportunity for disappointed individuals to challenge or disrupt proceedings. Poor quality wills may provide opportunity for unhappiness to result in challenge and disruption.
37. Inexperienced consumers lack the expertise to judge the necessity or value for money of services offered. The shadow shopping exercise and case studies indicate a general tendency towards overcomplicating wills. In some cases, this seems to be a deliberate ploy to maximise fees. Shadow shoppers reported examples of providers showing a greater interest in selling rather than tailoring services to their needs, including sales techniques designed to play on their conscience and exaggerations of the potential consequences of not purchasing additional services²⁵.
38. With probate and estate administration, the provider's actions can affect a number of people, such as lay executors and some or all beneficiaries, who are not the provider's client themselves. YouGov survey data indicates that in around one third of cases where there is professional assistance with

²⁵ IFF, Understanding the consumer experience of will-writing services, as above

administering the estate, this was arranged by the testator²⁶. There are very good reasons why a testator may wish to arrange professional assistance themselves and why they may wish to deny autonomy to beneficiaries. In many cases, services will be delivered without significant issue. However, where this is not the case, executors and beneficiaries that have inherited a service provider are not in a good negotiating position. They do not have the knowledge of what was discussed and agreed. The level of service and price has already been determined. The Panel observe in its response to our call for evidence “professional executors may be named by testators in their will; this gives those affected by the estate little control over how they conduct the process or their charges, especially as executors cannot be forced to renounce²⁷”.

Emotional vulnerability - sensitive issues and times of grief

39. The Panel has rightly pointed-out that consumers are particularly vulnerable as writing a will and planning for death is a sensitive and emotional issue that will “make anybody a little vulnerable²⁸”. This is particularly so as people tend to write wills as they get older²⁹. With estate administration, services are being offered and provided at a time of grief. Sales in the home, while welcomed by many, can make people vulnerable as they cannot walk out of the situation³⁰.

Pricing of services

40. A simple will can be purchased cheaply with an average cost of less than £150 from either a solicitor or will-writing company³¹. However, additional services can be more expensive. Estate administration services are considerably more expensive with an average cost of around £1,700³². However, costs vary significantly. In 51% of cases, services cost less than £1,000 but in 18% of cases, the bill exceeds £3,000³³. There are many different levels of service on offer. These include taking-care of the full estate administration, taking-care of the application for probate only or advice as and when it is needed. There are a range of pricing structures including fixed fees, a proportion of the estate, hourly rates or a combination of these. This can be confusing for the unsophisticated consumer. Many consumers complain about a lack of transparency and predictability about costs, especially when services are provided on a billable hour basis. Average costs

²⁶ YouGov, The use of probate and estate administration services, as above

²⁷ Consumer Panel, Regulating will-writing, as above

²⁸ Ibid

²⁹ Alan Humphrey, Lisa Mills & Gareth Morell, National Centre for Social Research and Gillian Douglas and Hilary Woodward, Cardiff University, Inheritance and the family: attitudes to will-making and intestacy, August 2010

³⁰ Consumer Panel, Regulating will-writing, as above

³¹ IFF, Understanding the consumer experience of will-writing, July 2011, as above

³² YouGov, The use of probate and estate administration services, as above

³³ Ibid

can vary greatly depending on the pricing structure - £1,238 where the amount is fixed, £1862 where there is charging by the hour and £2,531 where there is a combination³⁴.

The problems that we found

41. We have found that in practice, consumers are not adequately protected at the time that the will is being written or at the time that the estate is administered and as a result are suffering detriment in practice.

Quality and service issues

42. The shadow shopping research³⁵ provides strong evidence of widespread incidence of wills being drafted that would have failed to deliver what the testator wanted or contained unclear clauses that would lead to difficulties administering the estate. Within the shadow shopping research one in five of the wills drafted by both solicitors and independent will-writers were failed by an expert assessment panel on these grounds. The findings were worse where the consumer chose a self-completion option – such as using an on-line or published will-writing package. More than one in three self-completed wills were failed. Wills prepared through banks and membership groups, such as trade unions, scored most highly with only one in ten wills failing – although the numbers in the sample were very small for these providers.
43. Reasons for deficient wills (as set-out in paragraph 41) included the document not accounting for the estate fully, containing basic technical errors, contradictions or omissions. Wills also failed because of ambiguities that would lead to uncertainty about what was intended and how the estate should be distributed. For example, where the language or format of the document did not make sense or where items, people and requests were described in insufficient detail.
44. Specific examples highlighted in the research include:
 - a lack of provision made for the possibility that the beneficiaries might die before the testator;
 - clauses leaving all the shares in a business directly to a thirteen year old child;
 - money being left to a trust that had not yet been established meaning that part of the will would be invalid and subject to intestacy rules;
 - provision only being made for specific gifts and not the remainder of the estate after these had been made;
 - specifying the gift of “all my property” in one clause and then leaving specific gifts to other people in later clauses;

³⁴ Ibid

³⁵ IFF, Understanding the consumer experience of will-writing, July 2011, as above

- leaving the full estate to an ex-wife outright in one clause and allowing a current partner to continue living in the house in another;
 - assets that the participant had said they own not appearing in the will;
 - the estate being undervalued, because for example, mortgage insurance had not been taken into account; and
 - the identity of intended beneficiaries and intended gifts not being precisely enough defined.
45. There does not appear to be a single cause for poor quality wills. Overall whether the client had simple or complex circumstances had little impact on the likelihood of the will failing. Solicitors were more likely to fail on simple wills and will-writing companies were more likely to fail on complex wills³⁶. Simple errors were common across failed wills. Cutting and pasting of inappropriate precedents, adding unnecessary clauses for straightforward circumstances and using outdated terminology were also common. This may indicate carelessness and sloppy practices. It may also indicate a lack of knowledge and skill.
46. A small number of wills were found not to be legally valid, meaning that intestacy rules would apply as if no will had been written³⁷.
47. Concerns were raised with us about providers acting beyond their capability and we heard suggestions that “dabblers”, those who do very low volumes of work, pose particular risks with their lack of familiarity leading to errors. This was a commonly held view at the stakeholder workshop about will-writing and estate administration held by the LSB in October 2011³⁸. We also heard worries expressed about inexperienced will-writers entering the market without having first learnt their “craft” under supervision within an established provider.
48. Errors in the completion of probate applications by professional service providers are common. It is estimated that a third are returned by the Probate Service because they contain errors or omissions³⁹. However, it is reported most are easily put right with minimal detriment caused.
49. Regarding estate administration, there is no strong evidence to suggest that there is wide incidence of technical errors causing detriment. There is, however, greater evidence that consumers are regularly experiencing poor service. Only 68% of consumers surveyed by YouGov reported being

³⁶ Ibid

³⁷ Ibid

³⁸ LSB workshop, as above

³⁹ RIA, implementation of section 55 of, and schedule 9 to, the CLSA, 2004

http://www.legislation.gov.uk/ukxi/2009/1588/pdfs/ukxiem_20091588_en.pdf and LSB interview with Probate Service 2011

satisfied with the service that they received⁴⁰. YouGov survey data, Legal Ombudsman complaints data and case studies suggest that dissatisfaction with delays and failing to keep interested parties informed of progress are particularly common. The Legal Ombudsman consistently reports that its jurisdictional restrictions on dealing with complaints about unregulated estate administration companies are a cause of real frustration for consumers. We are aware of concerns raised by some MPs to whom constituents have turned when the Legal Ombudsman is unable to help, either because MPs have written to us or because they have spoken publicly on the issue. A number of members of the public have also contacted us directly.

Missing wills

50. Trade body registration data indicates that many independent will-writing companies close within the first few years of opening⁴¹. Case study data and anecdote, including from the Probate Service indicate that a lack of enforced arrangements for orderly closure has led to problems locating the will in a significant minority of cases. The YouGov research indicated a missing will in 3% of cases⁴². A Society of Trust and Estate Practitioners (STEP) survey found 63% of members had experience of cases where will-writing firms had disappeared with the client's will being lost⁴³.
51. Where a will is lost forever, the estate will be distributed in line with intestacy rules or an older will. In many cases, this will not reflect the testator's final wishes resulting in detriment to intended beneficiaries. A missing will is likely to create further cost and delay in the administration of the estate while the will is sought or attempts made to approve a copy will. There may be uncertainty about who should administer the estate and personal actions such as funeral arrangements. If it is discovered that a will is missing when the testator is still alive, costs will be incurred to write a new will.

Fraud, delays in releasing client money and lack of financial protections

52. There was near universal concern raised in response to our call for evidence about unregulated providers having full control of a deceased person's estate, which can involve very large sums of money. Outside of regulation, there is no gateway check to prevent people that have been found to have acted dishonestly in the past from having access to consumers' money. There is no requirement to maintain separate accounts for the estate's money. Nor is there any guaranteed provision of recompense when money is lost or stolen. There are examples of unregulated providers paying monies

⁴⁰ YouGov, as above

⁴¹ IPW – 60% chance of will-writing company closing within four years of opening:
http://www.legalservicesconsumerpanel.org.uk/ourwork/will_writing/Willwritingsubmissions.html

⁴² YouGov, as above

⁴³ STEP "Cowboy will-writing, Incompetence and dishonesty in the UK wills market", January 2011

from the realisation of the estate into the business account and using funds interchangeably.

53. Beneficiaries are often unaware of the full value of the estate and who the deceased intended to leave legacies to: the personal representative controls the information as well as the assets – they are in effect their own client. As we have noted earlier, there can be good reason for this arrangement. However, it also provides conditions that would benefit an unscrupulous provider. Ensuring that client money and assets are protected is seen as a prize of regulation of legal services and across many other service sectors⁴⁴.
54. Our investigations have highlights the evidence of fraud and theft from estates:
- There have been several cases that have resulted in convictions. The Panel's will-writing report included several examples of thefts ranging in value from £30k to £400k⁴⁵.
 - The Crown Prosecution Service (CPS) has informed us that there is steady stream of prosecutions of service providers⁴⁶.
55. Charities, providers and individuals have reported that they have experienced suspected fraud, theft and poor financial practice. For example:
- A STEP survey showed that nearly half of members surveyed had come across suspected cases of theft or fraud from an estate⁴⁷.
 - The People's Dispensary for Sick Animals submitted a response to our call for evidence stating that they have experienced, "a number of cases where professionals acting as or for executors have acted fraudulently and misappropriated estate funds⁴⁸".
56. Many contributors reported a belief that theft of small amounts of money is commonplace. They suggest that this is hard to detect and goes underreported, as it is often passed-off as administrative error if spotted⁴⁹.
57. Problems are not found only within the unregulated sector. The SRA's risk strategy highlights theft and serious overcharging by solicitors acting in a representative capacity such as executor of an estate pose a high risk. Their latest performance report covering the 2011 calendar year records 94 new claims on the compensation fund in relation to probate in the year⁵⁰.

⁴⁴ For example, the FSA has described ensuring that client money and assets are adequately protected as its regulatory "mission":

http://www.fsa.gov.uk/library/communication/speeches/2010/1213_rs.shtml.

⁴⁵ Consumer Panel, Regulating will-writing, as above

⁴⁶ Letter from Andrew Penhale, CPS Central Fraud Squad

⁴⁷ STEP, Cowboy Will-Writing, as above

⁴⁸ http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/submissions_received_to_the_call_for_evidence.htm

⁴⁹ See LSB workshop note and responses to call for evidence e.g. IPW

⁵⁰ <http://www.sra.org.uk/reports/>

58. Anecdotal information has been put forward that providers deliberately delay completing the administration of the estate because of benefits for a business of holding on to client money for as long as possible.

Sales practices, costs and value

59. The purchase of unnecessary services and features was prominent within the will-writing case studies. The Panel's analysis refers to "unnecessary complexity to deal with straightforward circumstances", "tax mitigation measures despite the client having modest assets, and other trusts for which the client had no need. In some case this appears to have been a deliberate ploy to charge the maximum possible fees. However, a more innocent explanation is unconscious gold-plating on the provider's behalf⁵¹".
60. Survey evidence shows that a high number of surveyed consumers felt pressured into buying additional services or felt that sales practices were not transparent. For example, the IFF consumer survey found that one third of participants purchased additional services⁵², and of these, one quarter felt pressure to do so. The proportion that felt pressured differed markedly between customers of will-writing companies (36%) and solicitors (17%). The survey showed 18% of participants that named the provider drafting their will as executor felt pressure to do so and 36% could not recall the cost being explained to them; this is worrying given the high cost of these services compared to the cost of will-writing. It is clear that there is a greater propensity for over-selling among will-writing companies than solicitors⁵³. We cannot know whether this reflects the impact of regulation or different cultural and profit incentives for providers. If it is the latter, the development of ABS will bring new risks within the regulated sector. We do not consider that cross-selling is necessarily wrong, provided that the purchase is made on an informed basis with clarity that unbundled options are available. We consider that the role of regulation is to take the place of purchasing power among infrequent consumers to provide different incentives for fair practice, including punishing transgression.
61. There have been a number of high profile convictions relating to illegal sales practices in these markets, many of which the Panel referenced. The Institute of Professional Willwriters ("IPW"), in its response to our call for evidence reported a further two criminal convictions of will-writers for fraudulent trading and three companies being closed following investigations by the Insolvency Service⁵⁴. In one of the cases the Judge passed a 14-month prison

⁵¹ LSCP, Regulating will-writing, as above

⁵² IFF (figure excludes executor services), Understanding the consumer experience of will-writing, as above

⁵³ See also "sales practices, costs and value", summary of problems and analysis, Annex A

⁵⁴ IPW response to call for evidence, as above

sentence. The case involved the will-writer making false claims that wills he stored needed to be modified at a cost following a change in the law. The Judge also called for regulation, as its absence left the “public vulnerable”. Dismissing an appeal of the sentence Jackson LJ commented:

“He [*the will-writer*] was preying upon customers in the later stages of life, who were obviously concerned about how their assets and their estate would be distributed after death. They were obviously concerned that their dependents and descendents should be provided for in later life...This was a particularly unpleasant form of breach of trust⁵⁵”.

62. Excessive costs and deficient costs information was the largest cause of complaint about estate administration services within a sample of data for the Legal Ombudsman⁵⁶. The YouGov survey⁵⁷ indicates that more than 25% of respondents did not feel that costs were clearly explained. Only 56% of consumers reported that services received were good value for money and only 56% who were subject to additional cost felt that these were fair. Impacts are compounded by the poor bargaining position of the end user when the service was pre-arranged by the testator and a failure to shop around.

63. Solicitors for the Elderly report a “growing problem” among their members of unclear referral arrangements from organisations involved in the immediate post- death processes such as closing accounts and making funeral plans to estate administration companies. The companies then quickly approach confused relatives asking them to sign powers of attorney and probate and estate administration instructions. Their submission reports:

“A common theme emerges...clients feel they were approached when they were emotionally very vulnerable and did not understand what they were doing⁵⁸”.

64. This issue has been raised by other contributors. One individual reported a relative believing that the estate administration was a free benefit of the deceased’s banking service. Beyond the submission of reports of this practice and assertions that it is detrimental to consumers, there was little evidence of systemic poor sales practices at the estate administration stage.

Current probate reservation – fragmentation and consumer confusion

65. Preparing the required papers, along with preparing equivalent papers for opposing the grant of probate, are the only parts of the entire estate

⁵⁵ R v Ventrighia [2011] EWCA Crim 192.

⁵⁶ See Consumer Panel interim response to LSB call for evidence, as above

⁵⁷ YouGov, as above

⁵⁸ http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/submissions_received_to_the_call_for_evidence.htm

administration process that are currently reserved legal activities. Yet, in most cases, this should be a fairly straightforward process⁵⁹. The main justification for regulation therefore appears to be restricting directly the opportunity for unscrupulous providers to misappropriate funds and to assure redress for the consumers of such providers when funds are misappropriated. However, the greater opportunity for fraud comes with the subsequent parts of the estate administration process when the assets are gathered and monies distributed; this is not reserved.

66. There is evidence that the narrow scope of the existing reservation causes fragmentation resulting in added cost, disrupted service and opaqueness over safeguards.
67. In theory, the narrow probate reservation prevents non-authorised providers from delivering a seamless estate administration service. Authorised persons would have to be utilised to undertake this part of the process. Several contributors have reported that this can result in inconvenience, delays and additional costs. This would not seem to be in the consumer interest. Some contributors have also argued that the reservation creates a barrier to competition. It is our view that the ability to provide a seamless service is likely to be one of a number of contributing factors to the predominance of solicitors in the wider estate administration market.
68. As solicitors are regulated in all the work that they do, this does of course provide consequential regulatory protection against the misappropriation of funds in administering an estate for many consumers. This would seem to be in the consumer interest. However, in our view it is difficult to make the case that on balance the regulatory objectives are best served by such a narrow reservation given the detriments associated with the resulting fragmentation of regulation and of services. We consider it equally hard to justify in terms of the better regulation principles. Regulating the probate application alone therefore seems to target regulation at the wrong place.
69. Moreover, contributors have also argued that there is a “double whammy” of bad regulation as the regulation is ineffective. As highlighted below, there are several ways in which non-authorised providers find routes around its boundary. Some involve transferring greater risk to consumers. Therefore, in practice unscrupulous and incompetent providers can still deliver the reserved element that many consumers assume to be regulated, totally outside of regulation.

⁵⁹ Unless contentious, foreign assets etc The Probate Service and HMRC provide detailed guidance and help-lines to assist both lay and professional applicants.

70. The consequential complexity of business structures can make it difficult to decipher what falls within regulation and what does not. The Legal Ombudsman often reports problems in defining his jurisdiction with complaints in these areas as a result. The Panel suggest “the fact that individual elements of probate are reserved adds to the confusion, or, more likely, means that consumers are unaware of the varying protections in the market”⁶⁰. In our view, the probate application, where required, is a component of the wider process of administering an estate and is viewed as such in the eyes of consumers.
71. Reported practices include:
- Outsourcing the probate application to an authorised provider – usually to a solicitor. This may add costs, cause delay and leave the provider with less control over the quality of this part of the service⁶¹. Solicitor costs are often charged as professional disbursements – additional to the quoted cost of administering the estate.
 - Unauthorised providers preparing the papers and requesting that lay executors grant them power of attorney, allowing them to submit an application as a personal representative. In our view this practice is particularly risky because of the full authority to the professional to act on their behalf and is reported to be a growing trend⁶².
 - Unregulated providers employing an in-house solicitor who may prepare the probate papers in that capacity. The extent to which the consumer would be afforded regulatory protection in that scenario is a grey area; the firm may be the executor and therefore also the client.
 - The reserved activity only extends to services delivered for fee, gain or reward. IPW report that some unauthorised providers claim to offer a free probate application service when taken alongside paid-for estate administration services⁶³.
 - There are also provisions within other legislation. For example, an unregulated trust corporation may be granted probate as a personal representative.
72. Our view is that the scope of regulation may be wider than many commentators believe. For example, we have been advised that some practices by non-authorised persons predicated on a narrow definition of

⁶⁰ Consumer Panel, Probate and estate administration, March 2012, as above

⁶¹ See for example BBA and Accountancy Professional Bodies responses to LSB call for evidence: http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/submissions_received_to_the_call_for_evidence.htm

⁶² Interview with Probate Service, 2011

⁶³ IPW, http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/submissions_received_to_the_call_for_evidence.htm

what it means to prepare probate papers or deliver service for fee, gain or reward may constitute an offence under the provisions of the Act. However, it does not appear that any enforcement organisation is taking responsibility for policing potential breaches to the boundaries of the reserved activities - as opposed to pretending to hold a professional title. We are not aware that the existing prosecution provisions have ever been utilised or of evidence that they are likely to ever be utilised, especially given the resourcing priorities that enforcement organisations face.

Detriments

Direct financial detriment

73. Consumers can pay significant amounts for unnecessary, inappropriate, ineffective and overpriced services and products. There are examples of fees for additional services totalling thousands of pounds even when the estate is modest. For example, one case study indicated that 10% of the gross estate was absorbed by fees but with no clear explanation of this being provided up front. Another indicated fees totalling over £1,000 for preparing a will for an estate valued at approximately £14,000. Complainants to the Legal Ombudsman report costs for estate administration unexpectedly “exhausting the estate” and costing amounts that would make a real difference to their financial position⁶⁴. Escalating cost features prominently in the Panel’s analysis of submitted case studies⁶⁵. There is also a degree of wasted costs - where wills that have been paid for are subsequently found not to be fit-for-purpose.
74. The total value of fraudulent trading and theft from the estate cannot be quantified but is likely to be high. We set-out in paragraph 54 that the cost of individual thefts reported in case studies range up to £400k. In 2005, the Royal National Institute of Blind People (RNIB) estimated that in the UK in that year estate fraud amounted to £100-150 million a year⁶⁶. The sales income acquired by the three will-writing companies recently wound-up by The Insolvency Service was reported to be in excess of £1.1 million⁶⁷.

Detriment to beneficiaries:

75. The extent to which a deceased testator whose wishes are not met and/or estate is eroded by additional costs can experience detriment is a moot point. It is clear that detriment will often be experienced by intended beneficiaries who receive less income than was intended or face significant legal costs and

⁶⁴ Consumer Panel, Probate and estate administration, as above

⁶⁵ Consumer Panel, Regulating will-writing, as above

⁶⁶ See, STEP, Probate Fraud, What it is and what should be done, July 2005:

<http://www.step.org/pdf/ProbaterreportFINAL.pdf?link=contentMiddle>

⁶⁷ We are not suggesting that the total is made up only from fraudulent activity

delays trying to put right errors or clarify ambiguities. We are also conscious that the impacts of the failure of clauses within wills or significant delays are not always financial and can be catastrophic for dependents. One example submitted includes an unmarried partner being made homeless as a result of what they report to be a flawed will. In our view, it is not in the public interest to have a system of regulation that does not address detriment to these third parties.

76. Detriments extend to charities as well as individuals. A third of the 140 member charities surveyed by Remember a Charity had experienced a negative impact as result of a poorly drafted will. The impacts included 11% losing the legacy completely, 33% receiving a reduced legacy and 48% experiencing delay in receiving the legacy. A further 52% reported incurring legal costs to sort out the problem⁶⁸. The Institute of Legacy Management report many charities writing-off legacies where legal fees would be needed to correct a problem⁶⁹. It should be noted that several charities are providers of will-writing services as well as consumers and beneficiaries in these markets.
77. There are examples of providers failing to undertake or delaying required actions in administering an estate causing significant financial detriment. For example, one case study reports a provider failing to promptly follow instructions to sell shares held by an estate resulting in losses of £60,000 as the shares devalued over time.

Emotional detriment

78. Our investigations have also confirmed what many would expect; that flawed wills generate significant emotional detriment. Family relationships are put under pressure and can break-down as result of uncertainty of intention created by defects or ambiguity within a will. Poor services, increasing costs and delay with the administration of the estate can result in stress and ill-health, particularly among the elderly⁷⁰. This is not surprising as outcomes can have a life-changing effect, such as whether a person can remain in their home, knowing who has custody of children and whether a person will secure sums of money that will have significant impacts on their independence and standard of living. Emotional detriment comes through strongly in the case studies and the analysis of a sample of Legal Ombudsman complaints data⁷¹; we believe this to be detrimental to the consumer interest. Seeking to prevent

⁶⁸ See Consumer Panel, Regulating will-writing, as above

⁶⁹ http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/submissions_received_to_the_call_for_evidence.htm

⁷⁰ Consumer Panel interim response to LSB call for evidence, as above

⁷¹ Ibid

such distress is likely to be one of the main reasons consumers seek professional help with writing a will or administering an estate.

Consumer confidence

79. The impact on consumer confidence in this sector, on the rule of law and the public interest more widely, especially in light of the continued media attention on examples of unregulated “rogue providers” causing consumer detriment, must be a consideration in the case for regulation. Legal Ombudsman data suggests that a loss of trust in legal services is commonly reported by those who have bad experiences⁷². These activities may often be the first experience that they have had with legal services providers.

80. We are not suggesting that the identified problems are universal but our analysis is that that they are happening in sufficiently high number to justify action, not least to protect the reputation of the majority of providers that deliver a good service to consumers.

⁷² Ibid

3. Tackling consumer detriment

Introduction

81. We consider that action is needed to protect consumers of will-writing, probate activities and estate administration services and to promote their interests. It is also in the public interest to take steps to ensure the wider confidence in legal services is maintained, particularly for those who are coming into contact with providers for the first time, at a time of some distress. As beneficiaries, the public are often not the purchaser of these legal services themselves, but the consequences of the services delivered to others can have a life-changing impact on them. We consider that where possible consumers will best be served by removing the cause of detriment. In our opinion three strands must work effectively together to address other identified detriments:

- general consumer protections;
- effective competition; and
- effective and proportionate regulation.

82. The challenge in these markets, which have such a strong information asymmetry, is to achieve the correct balance between strong regulatory intervention, so that consumers are provided with appropriate protections and developing a more effective market above this. Too much reliance on either as a single measure will so undermine the other as to render potential gains in consumer protection on the one hand and consumer value and choice on the other ineffective.

83. We want to achieve two important outcomes with the proposals for regulation that follow:

- Making it impossible for unscrupulous or poor quality providers to avoid regulation. This means legal services regulation will apply to all providers rather than just those with professional titles.
- Reform of existing legal services regulation where it is not working well for consumers of these services. This involves a greater emphasis on supervision and redress and a lesser reliance on professional titles.

General consumer protections

84. There has been a rapid evolution in consumer protection legislation in recent years. This current regulatory regime for legal services has its origins in earlier times when there was little by way of general protection. Legal services regulation has not changed significantly to reflect this position. We

are now afforded greater opportunity to more closely target regulation on identified risks within different sector specific activities and thereby make greater use of competition to drive quality, access and value for consumers.

85. However, the Panel has provided convincing analysis of the shortcomings in the ability of general law protections to provide adequate redress in these markets, where there is an absence of regulation. This includes the time and cost involved in pursuing quality problems through the courts. There are limited grounds for challenge and limited scope for the courts to right a wrong unless all parties involved agree. A deed of variation may be made if all affected beneficiaries agree. A court rectification order may be granted if there is convincing evidence that the will does not reflect the testator's intentions as a result of a clerical error or failure to understand the testator's instructions (as opposed to failure to properly execute instructions). Wills can be challenged through the Chancery Division of the High Court but only on the grounds of the will not being legally valid because required formalities were not followed (such as signing and witnessing requirements), lack of testator capacity or undue influence having been exerted on the testator. There are also grounds for challenge for dependents left with insufficient provision.
86. There are limited private rights of action for breaches of consumer protection regulations relating to poor sales practices. Furthermore, responsibility for sharing the enforcement of existing legislation is currently shared between the OFT and local authority trading standards (although a new National Trading Standards Board will soon take over this OFT function)⁷³. Action is dependent on local resourcing and prioritisation at a time of shrinking budgets. At certain times the OFT or its successor may be able to co-ordinate an enforcement focus on problems identified in the investigations across local authorities. If such a focus was possible in the near term, it is unlikely that resources would be available across local authorities to sustain focus on an on-going basis.
87. Fraud and theft are criminal offences. Victims of fraud may in theory be able to reclaim the assets they were entitled to following a conviction. However, in many cases the perpetrators will no longer have the assets or money to fulfil any obligations. Victims of fraudsters in the regulated sector do have greater assurance of redress through insurance and compensation arrangements.

⁷³ <http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/e/12-510-empowering-protecting-consumers-government-response.pdf>

88. Consumer law and redress continues to be a developing area and we are conscious of current EU consultations on consumer dispute resolution⁷⁴ and other developments⁷⁵. We are also aware of developing EU thinking on professional reservations⁷⁶. Our interventions must be flexible enough to compliment any resulting outcomes.

Effective competition

89. Our proposals are centred on a vision of consumers being best served by “competition between diverse providers within a well regulated market place”⁷⁷. We support the view put forward in the current Department of Business Innovation and Skills discussion document “Regulation and growth” that:

- “Through their delivery, regulators can create the local and national conditions in which economic activity and enterprise can flourish. [...]
- Competitive, well-functioning markets give consumers choice on the price and quality of the goods they buy and stimulate businesses to innovate and become more efficient to meet changing consumer needs. This process drives long-term productivity gains and supports stronger economic growth.⁷⁸”

90. It is our view that competition and liberalisation within legal services is an important part of tackling consumer detriment in this market. This is a key tenet of the Act. It is widely accepted that competitive pressure can raise standards as well as reducing prices within a market. Providers offering good quality and value services are rewarded through future purchases and recommendations. Those that are not are forced to improve or close. In truly competitive markets we believe that many of the problems that we have identified would be “punished” by consumers and their advocates. For example, the shadow shopping exercise showed that wills written by solicitors were more likely to fail when they were classed as straightforward in nature. It was suggested by some contributors that carelessness and a lack of familiarity if dealing with only low volumes of cases in this area were likely to be causes⁷⁹. We consider that competition as much as regulation is likely to address these problems. Furthermore, we believe that issues around escalating costs and lack of clarity over breakdown of charges could be

⁷⁴ <http://www.bis.gov.uk/Consultations/call-for-evidence-eu-proposals-dispute-resolution?cat=closedawaitingresponse>

⁷⁵ <http://www.bis.gov.uk/policies/consumer-issues>

⁷⁶ http://ec.europa.eu/internal_market/qualifications/docs/news/20120214-summary_en.pdf

⁷⁷ Consumer Panel, response to LSB discussion document “Enhancing consumer protection, reducing regulatory burdens”

⁷⁸ BIS, Better Regulation Delivery Office, Regulation and Growth, April 12:

<http://www.bis.gov.uk/brdo/resources/knowledge/regulation-and-growth>

⁷⁹ See paragraph 47

addressed through competitive pressure towards charging structures that consumers' prefer – such as fixed fees⁸⁰.

91. There is of course already a degree of plurality of supply within these markets with different providers delivering different types and combinations of services in different ways, with different business models, delivery methods and pricing. Independent will-writing and estate administration companies, banks and building societies, accountants, independent financial advisers, charities, trade unions and other membership organisations are all active. Some focus on will-writing alone, some estate administration. Others offer a full range of connected services to consumers. Some providers undertake all work in house; others work in partnership with lawyers.
92. Research shows that consumers value the choice and shop around in the field of will-writing more than in many others, particularly based on price and flexibility of services (such as by telephone and face to face in the home). The IFF consumer survey and the shadow shopping results indicate that around 35% of consumers shop around before selecting a provider to write their will⁸¹. The Consumer Panel's Tracker Survey suggests that this compares to 20% who shop around across legal services more widely⁸². The most common reason will-writing survey participants gave for choosing a non-solicitor will-writing company was the perceived value for money being offered. Convenience of delivery was quoted as influencing choice of provider by over half of the shadow shopping sample⁸³.
93. This is not the case with estate administration. Recent Which? mystery shopping exercises and surveys indicate that costs vary significantly between different types of provider and within different providers of the same type but only 1% of consumers shop around when choosing a provider⁸⁴. The OFT has estimated that failing to shop around for executor services may be costing UK consumers around £40 million a year⁸⁵. The IFF consumer survey indicated that 21% of consumers who chose their will-drafter to be executor "didn't put too much thought into it"⁸⁶. More generally, we are aware that consumer survey data indicates that the perception of high costs is putting

⁸⁰ YouGov survey suggests that 33% of estate administration services were delivered on a fixed fee basis. IFF business survey indicates that this is most prominent among independent will-writers and financial advisers.

⁸¹ IFF, Understanding the consumer experience of will-writing, as above

⁸² <http://www.legalservicesconsumerpanel.org.uk/ourwork/CWI/documents/TrackerSurveyReport.pdf>

⁸³ IFF, Understanding the consumer experience of will-writing, as above

⁸⁴ http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/submissions_received_to_the_call_for_evidence.htm

⁸⁵ <http://www.of.gov.uk/news-and-updates/press/2011/23-11>

⁸⁶ IFF, Understanding the consumer experience of will-writing, as above

consumers off purchasing professional help at all⁸⁷. The YouGov survey shows that of the 46% of respondents that administered the estate themselves, 27% stated high cost as the reason doing so. However, only 31% of these had actually obtained a quote⁸⁸.

94. Maintaining this plurality of supply within the market will be important as it delivers benefit to consumers. Greater benefits still will be delivered if we also start to see improved competition and innovation within the traditional lawyer sector of the market too, as that still commands the lion's share of these markets. We consider that any intervention should be designed with these aims in mind.
95. However, we do not consider that competition alone can provide the solution to all of the identified problems. The diverse supply base that exists now has not prevented detriment from happening and there are in our view real barriers to competition working effectively:
 - As set-out in paragraph 35 consumers are not well placed to exercise choice within these markets because of the imbalance of power and information between consumers and providers.
 - Consumers use services in this area rarely, meaning their experience has little opportunity to influence future purchasing decisions.
 - A will is often not used and errors are not spotted until after the testator has died. The shadow shopping exercise showed that most consumers were satisfied with the service that they received despite a high number of the wills being judged as failing. Those that received poor quality wills did not realise there were problems.
 - There is a lack of accessible quality and price data to help infrequent, unknowledgeable consumers to choose between providers.
96. Where consumers do shop around in this market based on cost and convenience they are unlikely to appreciate the trade-offs that they may be making and which could leave them exposed to harm (and without effective redress). Research has shown that consumers do not understand the differences between regulated and unregulated providers and believe that all services are underpinned with the same level of protections⁸⁹. The case studies that we receive confirm that this is happening in practice.

⁸⁷ YouGov, as above, 27% of respondents who did the process alone said they were put off by the cost of professional services

⁸⁸ YouGov, as above

⁸⁹ See Steve Brooker, Legal Services Consumer Panel Manager, The consumer's role, Legal Services Board, Understanding the economic rationale for legal services regulation -A collection of essays, March 2011 for a summary of research

97. Therefore, it is our view that intervention is needed to facilitate and support the market to overcome these problems and work for consumers. Our analysis at this stage is that greater liberalisation must be underpinned by the consumer protection that can only be provided by regulation. It is generally accepted that one of the fundamental benefits that effective regulation can achieve is to provide a safety net for all against detriment resulting from information asymmetry⁹⁰. This is in tune with our approach to ABS where the market is being liberalised without this safety net being removed.

Effective regulation - voluntary schemes

98. When Parliament decided not to add will-writing to the list of reserved activities at the time that the Act; encouraging effective self-regulation through voluntary licensing schemes run by trade bodies was promoted as an alternative to reservation. Progress has been made but remains insufficient. Despite the promotion of voluntary schemes in the past few years, and one trade body gaining OFT Consumer Code recognition, the scheme still has only partial coverage of the unregulated market. IPW, the organisation that has achieved OFT recognition is the smaller of the two main trade bodies. Furthermore, the government's review of the consumer landscape will result in the Trading Standards Institute being invited to establish a self-funding successor to the OFT's Consumer Codes Approval Scheme. Limited detail about how this will operate has been developed at this point⁹¹. We have considered whether we should take an oversight role but for the reasons below do not think that such schemes, although not unhelpful, will be significantly less effective than regulation, as by definition, they will not attract those practitioners who are most likely to generate the greatest risk.

99. Significantly trade bodies themselves have highlighted weaknesses in their schemes - particularly around enforcement with providers walking away rather than complying. Both the Society of Will Writers and Estate Planning Practitioners ("SWW") and IPW have reported several examples of providers either being expelled from their voluntary schemes for poor practice or leaving while under investigation and yet continuing to practise⁹². Some were subsequently successfully prosecuted by Trading Standards several years later after many consumers had suffered at their hands.

100. Some of the worst offenders identified in the non-regulated sector are not members of any recognised voluntary scheme. Several have previous criminal or regulatory histories that would have been exposed had they have

⁹⁰ See for example Dr Decker and Professor Yarrow, Regulatory Policy Institute, Understanding the economic rationale for legal services regulation, March 2011

⁹¹ <http://www.bis.gov.uk/consumer>

⁹² http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/submissions_received_to_the_call_for_evidence.htm

passed through any compulsory gateway checks.

101. Furthermore, while the main voluntary schemes provide sufficient exit and succession planning requirements to guard against wills going missing, the partial coverage and enforceability mean that issues remain. Consumers of firms who are members of voluntary regulatory schemes still do not have right of redress through the Legal Ombudsman. We discuss in paragraph 165 that the Legal Ombudsman is examining the potential merits of creating a voluntary jurisdiction. However, as the nature of any voluntary scheme participation could not be enforced it is still probable that the most unscrupulous providers would be unlikely to opt-in.
102. We asked a specific question in our call for evidence about whether assessed accreditation schemes and quality marks specific to this field would benefit consumers either as a supplement or alternative to statutory regulation. There was some but not universal support for such schemes to supplement regulation to aid consumers choose provider There was near universal agreement that they would not be an effective alternative to statutory regulation

Effective regulation - mandatory schemes

103. We have concluded that statutory regulation of will-writing, probate and estate administration is needed to protect consumers in these markets. This will ensure that there is no space for unscrupulous providers to practice unchecked and that there can be no escape from appropriate regulatory standards. It will ensure that all providers have appropriate access to redress when things go wrong – including guaranteed access to the Legal Ombudsman.
104. However, we are clear that any new regulation must provide appropriate protections without creating unnecessary barriers to entry or unnecessary restrictions on how providers may organise their businesses to achieve good outcomes for consumers and maximise their competitiveness. This is essential if we are to deliver the regulatory objectives through the principles of better regulation.
105. We are also clear that regulation must work for different types of businesses presenting different risks. This includes the many providers in the markets currently outside of legal services specific regulation. Intervention will have failed if it results in good providers leaving the market, unnecessarily changing the way that they operate or stifles innovation going forward. Intervention will have failed if it prevents good providers that are not traditional legal services providers from entering the market. This will not address the identified problems and may lead to higher prices, less choice

and ultimately fewer consumers making wills and seeking professional help when needed. This would be in the consumer or public interest, would not promote competition and may reduce access to justice.

106. The Act allows new bodies to be designated as approved regulators, providing for regulation to be designed for different types of legal services provider. If will-writing, probate and estate administration are added to the list of reserved activities, it is likely that trade and professional bodies for currently unregulated service providers will apply for designation. In considering whether to recommend designation for these bodies we will guard against any “race to the bottom” between applicants – with cheap yet ineffective regulation acting as bait for poor providers. We must guard against regulators lacking in expertise or resources writing unnecessarily restrictive rules. Such an approach requires less capability and capacity than developing the sophisticated risk profiling and corresponding monitoring and supervision provisions that we believe are more likely to be required.

107. Alongside any decision to recommend reservation, we would also propose to issue guidance to help approved regulators develop appropriate regulatory arrangements that strike the right balance between all the regulatory objectives. This will require a different kind of regulation than is currently prominent with the legal services sector. Our proposals are predicated on regulation that flexibly targets risks presented by different providers and the work that they undertake within these markets, rather than general requirements associated with entering a profession. We judge that this will support a market that works more effectively for consumers, the public and providers alike.

Effective regulation - reforming existing regulation

108. In this context, we consider that the starting point for intervention must be the reform of existing legal services regulation that applies to the majority of providers in these markets. The aim being to secure consumer benefits through greater competitive pressures within the largest part of the market and also to ensure that regulatory obligations are addressing the identified consumer detriment in practice. Our assessment is that this is not currently the case.

109. At present for solicitors and other regulated legal services providers there are higher barriers to entry⁹³, more rules and greater restriction on how they may organise their businesses than within the unregulated sector. 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. Yet, despite this regulation our investigations indicate that too many

⁹³ It can take up to 9 years of education, training and experience for a person to set up a solicitor firm specialising in will-writing, probate and estate administration.

consumers using regulated providers are receiving a poor service. This is particularly so in relation to the quality of wills produced. The headline grabbing feature of the will-writing research was that the wills written by solicitors within the shadow shopping sample were just as likely to fail on quality grounds as those written by unregulated providers. Service issues including over cost transparency and communicating with clients and issues of fraud were also found to be prominent within the regulated sector⁹⁴.

110. It is our view that greater competitive pressure can be achieved by building on the liberalising steps that are a key tenet of the Act and our first three years of operation, namely:

- independent regulation that ensures regulation operates in interests of consumer and without undue professional influence;
- The introduction of ABS that allows external investment, ownership, control and management of regulated legal services; and
- improved complaints handling including the introduction of the Legal Ombudsman.

111. This change is being underpinned by work to improve regulatory standards among legal service regulators including the drive towards outcomes focused regulation and developing regulator capability⁹⁵. We propose that this development should be accelerated to help address the detriments identified by consumers of regulated providers in these markets. It is our assessment that at present regulation is too focused on controlling entry through general education and training requirements that are not targeted at the risks in this market. There are rules specifying what providers can and cannot do and detailed guidance on how they should be met. But there is very little by way of on-going risk based monitoring and supervision to ensure that good outcomes are being delivered to consumers in practice.

112. The net result is that consumers may be turning to a solicitor believing that the solicitor “brand” provides an up-front guarantee of a quality service. However, in reality the greater guarantee provided by regulation may be in relation to after service protections such as access to redress through the Legal Ombudsman, Professional Indemnity Insurance (PII) and compensation arrangements, as well the ability to sanction practitioners.

113. Some of the challenges discovered within this market are indicative of the wider challenges facing approved regulators of legal services including with the current education and training review for legal services⁹⁶. For example,

⁹⁴ See for example paragraphs 40, 49, 57,62

⁹⁵ LSB “Delivering Regulatory Standards”, as above

⁹⁶ The SRA, BSB & ILEX Professional standards are currently undertaking a strategic assessment of the education and training needs of the workforce in 2020:
<http://www.sra.org.uk/sra/news/press/legal-regulators-launch-education-training-review.page>

the general legal practice model means that entry can be gained with little training on the drafting of wills or associated services, limited obligations around on-going training and providers may then only “dabble” in the market. Therefore, although many consumers assume that solicitors are experts, the level of training, experience and frequency of delivering services vary massively between providers.

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?

4. What type of regulation?

Delivering change

114. Reserving legal activities under the Act is the power that Parliament provided for stretching regulation to the entire market. This makes it a criminal offence for anybody not authorised and regulated by an approved legal services regulator for the activities to perform the activities. Our proposal to reserve will-writing, probate and estate administration is designed to achieve the twin objectives of improving existing regulation in line with the better regulation principles and ensuring that appropriate protections are in place no matter who delivers the service.

115. Any organisation wishing to be able to authorise providers to undertake newly reserved activities must be explicitly designated to do so by the Lord Chancellor at the recommendation of the LSB. As our assessment is that existing regulation is not effectively preventing consumer detriment in this market we propose that existing regulators must also apply for designation and demonstrate that their regulation for these specific activities is fit-for-purpose. They will be expected to review and amend their existing rule books and the four key elements of the regulatory menu as set-out in our discussion document “Enhancing consumer protection, reducing regulatory restriction”⁹⁷ rather than apply assuming that what is already in place is the best option. These are:

- entry and licensing arrangements including education and training;
- on-going requirements including training, supervision and risk systems;
- outcomes and rules plus monitoring, supervision and compliance; and
- after service protections and provisions including complaints provisions and financial redress.

116. The reservation of new activities does not automatically mean that we will recommend that any of the existing legal services regulators or trade bodies whose members are working in that area should be designated as an approved regulator. We will consider applications under the Schedule 4 and Schedule 10 processes. We have articulated a set of tests in relation to designating new approved regulators and approving regulatory arrangements under the terms of Schedule 4 and 10⁹⁸. Applicants must meet a robust test of probity, capacity and capability. We must approve any successful applicant’s initial set of regulatory arrangements as part of those processes. Regulatory arrangements must be compatible with the regulatory objectives and better regulation principles. It is our view that the starting point is that arrangements must be demonstrably targeted at the problems and risks that

⁹⁷ LSB, Enhancing consumer protection, reducing regulatory restrictions, as above

⁹⁸ LSB rules:

have been identified in relation to that particular activity and propose the least restrictive way of addressing them.

117. We have proposed that with any recommendation to reserve new activities we will issue Section 162 guidance to help approved regulators develop appropriate regulatory arrangements. It will be the responsibility of prospective approved regulators to shape the detail of the regulatory arrangements and justify them. Both existing regulators needing to reform and any new bodies applying to be legal services regulators for the first time would both need to meet the standards we set-out in our guidance in order to be designated and have their regulatory arrangements approved. We propose that our guidance will not focus only on codes and handbooks, but as much, if not more, on the approach to regulation that shapes authorisation, supervision and enforcement.

Regulatory approach

118. We propose that our guidance would set a foundation of core minimum protections needed to target the systemic detriments identified in these markets. Beyond this, we consider that the best way to deliver the regulatory objectives and principles of better regulation is by the approved regulators setting a clear set of outcomes⁹⁹ that each provider will be held accountable for delivering for their clients. Providers, within certain guidelines, should be granted flexibility to demonstrate to approved regulators how their business models would achieve the outcomes and how they will guard against risk of this not happening. This would inform decisions about authorisation. The level of monitoring, inspection and supervision that the practitioner can expect would also be based on an analysis of the level of risk that they present. This approach therefore would move towards greater authorisation and regulation by activity teamed with standard risk profile considerations for providers of legal services more widely. Regulation would likely focus on the entity rather than relying predominantly on the qualifications of the individuals undertaking the work and supervising others. There would also likely be much less reliance on detailed rules.

119. This approach would require approved regulators to have sufficient information and understanding about the risks within different work undertaken and different business models. They would have to maintain sufficient information and understanding about the existing and proposed work plans and organisational structures of their providers.

120. Some illustrative examples of indicators that may influence risk rating includes:

⁹⁹ Please see paragraphs 147 - 151 for further information

- Volume of work undertaken – We have highlighted concerns raised over “dabblers” in paragraph 47. High volumes of work with small numbers of trained fee earners may also raise indicate risk.
- Complexity of work undertaken – There is little difficulty or particular expertise needed to prepare a simple will or administer an estate with simple financial and personal circumstances (although there is a need to recognise when complexities arise). This is not necessarily the case when more sophisticated wealth management planning is being sought or when particular complications arise such as owning property in a foreign jurisdiction.
- Quality of software – There is sophisticated software available to providers in this market that will reduce the human error element of writing wills, for example, by ensuring that precedents are updated, required detail is not omitted and clauses do not contradict each other.
- Holding client money– Controlling other people’s money for example as an executor or attorney presents particular risks.
- Internal controls – Quality control and internal supervision mechanisms to check output for mistakes and ensure that work is allocated according to the level of expertise required. The IFF probate and estate administration research indicated that businesses that undertake small amounts of work are less likely to have tailored internal quality control systems in place¹⁰⁰.
- Outsourcing – Whether parts of the process are outsourced and if so who to.
- Sales practices – Whether cross-selling is a key feature of a business model, how marketing is undertaken, referral links and whether products are sold in the home.

121. We propose that responsibility for delivery the outcomes set by their approved regulator and accountability for success should sit squarely with the authorised providers which are, after all, closest to their consumers. In practice this means regulators prescribing less, but holding firms to account more for the decisions that they make. This will bring together the gathering of sophisticated risk profiling and monitoring systems with an enforcement strategy that incentivises and encourages compliance, deters non-compliance and punishes transgressions appropriately including the levying of financial penalties (as set-out below).

122. This proposed approach sits squarely with the vision set-out in our work on “Developing Regulatory Standards”¹⁰¹ which sets-out four components of

¹⁰⁰ IFF, Probate and Estate Management Services Survey, as above

¹⁰¹ LSB, Developing Regulatory Standards:

http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/20111214_regulatory_standard_v11.pdf

regulation that will most likely meet the regulatory objectives and better regulation principles. These are:

- an outcomes-driven approach to regulation that gives the correct incentives for ethical behaviour and has effect right across the increasingly plural and diverse market;
- a robust understanding of the risks to consumers associated with legal practice and the ability to profile the regulated community according to the level of risk;
- supervision of the regulated community at entity and individual level according to the risk presented; and
- a compliance and enforcement approach that deters and punishes appropriately.

Minimum protections

123. We consider that the regulatory menu for the three activities – will-writing, probate and estate administration - must contain certain features to target the risks and detriments that the investigations have identified. These are:

- a strategy and early action for consumer information;
- a mandatory register of authorised providers;
- authorisation gateway checks including a fit and proper person test for ownership and control;
- appropriate financial protection arrangements, especially where a provider has access to consumers' money, including indemnity insurance unless work from regulators and financial institutions avoids the need to hold consumers' money;
- an outcomes based code of conduct with appropriate emphasis on sales practices;
- a requirement that providers have an appropriately trained workforce;
- a risk based supervision strategy that targets regulatory action to protect consumers;
- an enforcement strategy that encourages and creates incentives for compliance, deters non-compliance and punishes transgressions appropriately, including the levying of financial penalties; arrangements to ensure each provider has an appropriate in-house complaints process, including signposting to the Legal Ombudsman; and
- bringing all three activities within the jurisdiction of the Legal Ombudsman.

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?

A strategy and early action for consumer information

124. It is our view that approved regulators should have a strategy, on which they take early action, for providing consumers with information to help them to choose and use services in these markets with confidence.

125. This should include ensuring accessible and clear information on pricing and the corresponding service that will be delivered. The results on consumers' views about transparency reported in the consumer surveys were disappointing¹⁰². More broadly, approved regulators may wish to consider encouraging transparency about complaints and other quality indicators – such as experience and specialism in these specific markets. The LSB's March 2012 consultation on quality¹⁰³ and the Panel's report on cost comparison web-sites¹⁰⁴ provide more detail on options for these areas.

126. Further, we suggest that approved regulators should consider requirements for providers to explain potential risks about transactions within these markets to clients and prospective clients. For example:

- naming a professional executor or granting powers of attorney to a provider gives an individual full control of the estate;
- payments involving credit agreements and payment in instalments often results in a significantly overall cost compared to one-off payments;
- paying for estate administration services at the time that the will is written rather than at the time that they will be used, which could be decades later, presents a risk that the provider may no longer be operating;
- a provider should inform clients where their will is going to be stored when this service is taken and what would happen to it if the provider closed; and
- to be effective, wills should be updated when wishes or circumstances change.

127. In the context of missing wills, the Probate Service currently provides a storage facility for a one-off £15 fee. Consumers being made aware of this option, especially if being offered or recommended will-storage facilities involving on-going costs by the provider could provide a beneficial option for the safekeeping of the will.

A mandatory register of authorised providers:

128. The requirement to be authorised by an approved regulator in order to practice is the foundation of mandatory regulation by virtue of the list of

¹⁰³http://www.legalservicesboard.org.uk/what_we_do/consultations/open/pdf/20120311_approaches_to_quality_consultation.pdf

¹⁰⁴http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/ConsumerPanel_ComparisonWebsites_FinalReport.pdf

reserved activities. It is a criminal offence under Section 14 of the Act for persons to perform reserved legal activities unless authorised by an approved regulator. All other regulatory protections are built upon this foundation.

129. We believe that regulation is likely to improve the consumer confidence that helps aid effective competition. In our view, registers of authorised providers should be made available to consumers in an easily accessible format and bodies providing choice tools such as comparison sites.

Authorisation gateway checks including a fit and proper person test for ownership and control

130. We propose that there must be a fit and proper test for all owners and managers of authorised providers to ensure an appropriate level of consumer protection¹⁰⁵. This should include:

- a criminal record check;
- a check of disciplinary action and previous disqualification from any other regulatory scheme (within legal services and beyond);
- a check against removal or disqualification from acting as a company director, trustee or any other responsible position; and
- a check against bankruptcy.

Where individuals are authorised to practice we would expect similar proportionate background and character tests.

131. Those at the top of the organisation will play a key role in setting and ingraining the behaviours and instilling ethics in the workforce that together will shape the culture of the organisation. For this reason, and because of the importance of confidence in the legal system to maintain the rule of law, it is vital that only fit and proper persons may own and manage legal services providers.

132. We believe that a mandatory licensing regime including background and character checks will also act as a deterrent and prevent people known to have acted unscrupulously from being able to practice.

133. We would be interested to hear views on whether 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. Such individuals will legally have access to and control of the estate assets.

¹⁰⁵ This aligns with the wider requirements around ownership and management of authorised entities and licensed bodies within the Act and our Schedule 4 and 10 rules.

We believe that there may be consumer protections benefits to such a requirement.

134. We also recommend that a list of those offering will-writing, probate and estate administration services who have been 'struck off' for bad practice or conduct issues should be maintained and that this should be shared among approved regulators. Consideration should be given to whether the list should be made publicly available and, if so, whether it might be held by the LSB as the Act requires the Board to hold a list of people who are disqualified from acting as a manager or employee of an ABS.

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?

Appropriate financial protection arrangements especially where a provider has access to consumers' money including indemnity insurance or work from regulators and financial institutions to avoid the need to hold consumers' money

135. We propose that regulatory arrangements should ensure that there are appropriate financial protections against the detriments identified in these markets. Protections should:

- minimise the risk of consumers' money being lost by the provider; and
- ensure that recompense is available where a consumer suffers financial detriment caused by the provider as a result of poor quality work or dishonesty (fraud and theft).

136. For an approved regulator's arrangements to be judged appropriate we propose that two further tests should be met. First, they should be proportionate to the problems identified. Second, they should not act as an unnecessary barrier to entry – especially for small businesses.

137. Particular risks and detriments identified in these markets include:

- providers risking the safekeeping of consumers' money by using it business purposes or delaying the release of estate money unnecessarily long to benefit the business;
- providers becoming insolvent and closing while holding estate money or having taken payment in advance for estate administration services that are not then delivered;
- providers stealing money;

- providers causing detriment through poor quality work in particular drafting wills that would not deliver what the testator intended; and
- providers causing detriment through poor service such as overcharging or failing to carry estate administration activities as instructed or in a timely manner.

138. It would ultimately be for ARs to demonstrate that they have appropriate regulatory arrangements around financial protections. In particular, their regulatory arrangements will have to contain “appropriate” compensation and indemnification arrangements as set-out in Section 21 of the Act. There is a menu of tools that may combine to protect proportionately against the risks and detriments. There are also a number of gaps and issues. We have set-out our analysis below. We would welcome views on the issues and potential solutions highlighted.

Client acknowledging level of risk

139. It is not possible to eliminate all risk in the transaction especially when a consumer consents to a provider holding and controlling estate funds. We consider that consumers should be informed that services are not risk free.

Appropriate systems and procedures to safeguard other consumers’ money

140. This would likely include requirements to keep client and provider money separate from business money¹⁰⁶ and prevent consumer money being used for business purposes. We consider that it should also include arrangements to manage the repatriation of consumer money and protect it against business liabilities upon a provider closing. Approved regulators may wish to consider introducing further guidance for example around paying interest on money held and not holding on to money for longer than is necessary.

Professional indemnity insurance (PII)

141. The purpose of PII is to guarantee that funds are available to compensate consumers with successful civil liability claims against a provider. These claims most commonly result from poor quality work. Policies may cover against fraud in some circumstances where the crime is attributable to individuals rather than the business. Most providers within these markets already have some level of PII insurance. It is a requirement of all those that are currently regulated on a mandatory or a voluntary basis. Every provider participating in the YouGov probate and estate administration research reported that they have cover, with the exception of organisations that supervise the process but outsource all of the work¹⁰⁷.

¹⁰⁶ See Schedule 4 and 10 rules – “client money must be protected”....”authorised persons must keep client money separate from their own”

¹⁰⁷ YouGov, The use of probate and estate administration services by consumers (as above)

142. One issue is that negligence and other issues such as overcharging or taking payment for work that is not delivered, relating to will-writing are often not discovered until after the testator has died. This could be decades after the service was provided and when providers may have closed. This presents a gap that may leave clients exposed. Beyond consumers acknowledging that they will face a level of risk, possible solutions – individually or in combination - may include:

- Insurance run –off cover. Regulated providers are usually required to purchase run-off cover for a six year period after closing but this may be insufficient in these circumstances. We have spoken to some insurance providers who inform us that there is unlikely to be an appetite to offer run-off cover for new providers where they are not currently obliged to so by qualifying insurer rules set by regulators. There certainly would not be an appetite for extended run-off cover.
- Individual transaction insurance. We have spoken to insurers about the possibility of offering consumers personal insurance against financial detriment resulting from the purchase of will-writing services. It is possible that a market may exist but that certainty of high volumes of customer would be needed to set a premium that is likely to be attractive.
- Compensation arrangements (as set-out below).

Compensation arrangements

143. Simply put, compensation arrangements cover gaps in PII insurance. For example, claims falling outside of PII run-off cover periods or fraud not covered by PII cover. Compensation arrangements usually involve a group of providers contributing to a shared pot of money from which payments may be made to compensate consumers on a discretionary basis. Compensation arrangements are a compulsory element of many regulatory regimes.

144. Several contributors to our investigations raised concerns that the cost of compensation arrangements would present a barrier for many current providers within the unregulated sector. For example, IPW are developing a bond scheme which is reported to cost 10% of fee income from estate administration services. Some argued that mandatory compensation fund arrangements would be disproportionate for large organisations capitalised to finance any compensation claim themselves¹⁰⁸.

Financial institutions taking responsibility for safe-keeping consumer funds

¹⁰⁸ For example, see PALs response to LSB call for evidence http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/call_for_evidence/PALS_President_of_the_Professional_Association_of_Legal_Services.pdf

145. An alternative approach to protect against the risks of providers holding consumers money could be for regulators and financial institutions to work together to develop arrangements where financial institutions rather than providers are responsible for the safe-keeping of funds. We would be keen to hear suggestions about possible mechanisms for money to be held away from individual firms. In this context, we are interested in suggestions about whether and how systems could be developed that would reduce the risk of misappropriation or maladministration of funds, removes incentives to delay the release of consumers' money and to protect consumer money from business liabilities should a firm close. Importantly we would like to see this achieved without adding costs for consumers.

The Legal Ombudsman

146. Consumers of those providing reserved activities have access to the Legal Ombudsman if they have a complaint about lawyer's service that is not adequately resolved by the provider themselves. The Legal Ombudsman has statutory powers to direct a provider to pay compensation up to the value of £30, 000, although their recent consultation on scheme rules proposes increasing this to £50,000¹⁰⁹.

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?

An outcomes based code of conduct with appropriate emphasis on sales practices

147. A codified understanding of the standards and expectations that are required of an authorised person is at the heart of any regulatory scheme. The first component of regulation set-out in our "Developing Regulatory Standards" paper is:

- an outcomes-driven approach to regulation that gives the correct incentives for ethical behaviour and has effect right across the increasingly plural and diverse market.

148. We propose that the basis of an approved regulator's code should be a clear set of outcomes that each provider will be held accountable for delivering for their clients. Providers, within certain guidelines, should be granted flexibility to demonstrate how they will achieve the outcomes and mitigate risks to failure. It will be important that where an approved regulator is designated for

¹⁰⁹ <http://www.legalombudsman.org.uk/aboutus/consultations.html>

any new reserved activities in these markets codes incorporate outcomes to target the detriments identified. For example around sales practices, openness and transparency. We do not believe that this should be attempted through detailed rules, which we consider may incentivise many providers to adopt a tick box mentality rather than think about how they can best deliver outcomes for consumers.

149. An outcomes based code would underpin other parts of the regulatory menu:

- to be authorised a provider must demonstrate that they are set up to deliver the outcomes;
- the provider – both entities and individuals - will be held to account for complying with the code;
- monitoring and supervision will be assessed against risk to delivering the outcomes; and
- proven non-compliance will form the basis for sanctions and removing providers from practice where necessary.

150. If simply expressed, we believe that codes may also help consumers understand what they should expect of their provider. The Legal Ombudsman has highlighted that such understanding is “critical to support effective redress”¹¹⁰.

151. In considering outcomes, approved regulators are likely to find the Opinion Leader Report “Developing measures of consumer outcomes” from 2011 an important reference document¹¹¹. This report was developed by working with real consumers and providers of legal services, as well as other interested parties. It details outcomes that consumers expect from their providers of legal services provider.

A requirement that providers have an appropriately trained workforce

152. In our view, each provider must have a workforce with the appropriate levels of expertise and skills to deliver the work that they undertake. We consider that providers should have flexibility to innovate and take advantage of the competitive labour market in tailoring a workforce that meets the needs of consumers and the business.

153. Consistency in delivering the right outcomes and protections for consumers is dependent on having the right combinations of people, systems and controls within a provider for the work undertaken. In our view, there is not a single range of qualifications and training that an approved regulator could say is

¹¹⁰http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/submissions_received_to_the_consultation_on_enhancing_consumer_protection.htm

¹¹¹http://www.legalservicesboard.org.uk/news_publications/latest_news/pdf/consumer_outcomes_final_research_report.pdf

required within each organisation. This will depend on the range and complexity of work that the provider proposes to do and the range of controls that they will have in place. For example, we consider it unlikely to be proportionate to require every individual to be legally qualified or be supervised by somebody who is so qualified, to undertake estate administration tasks. Thousands of lay people perform these tasks successfully every year. We have highlighted our concerns that there is currently overreliance on the entry qualifications of individuals within legal services regulation and that this is failing to achieve good outcomes in these markets on an ongoing basis.

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?

A risk based supervision strategy that targets regulatory action to protect consumers

154. Outcomes focused regulation requires approved regulators to tailor their regulatory oversight to diverse business models of their providers and the different risks that they entail. The components of good regulation set-out in our paper include:
- a robust understanding of the risks to consumers associated with legal practice and the ability to profile the regulated community according to the level of risk; and
 - supervision of the regulated community at entity and individual level according to the risk presented.
155. In our view, this will require sophisticated risk profiling and corresponding monitoring and supervision provisions. As set-out in paragraph 119. We propose that approved regulators must have sufficient information and understanding about the risks within different work undertaken and different business models. They must have sufficient information and understanding about existing or proposed work plans and organisational structures of their providers. As well as informing decisions about authorisation, the level of risk that they present should determine the level of monitoring, inspection and supervision that the practitioner can expect. High risk providers can expect a higher level of monitoring and supervision; low risk providers can expect greater freedom.
156. We propose that any applicant approved regulator or licensing authority will need to demonstrate that they have developed an effective risk based supervision strategy which they have the capability and capacity to

successfully deliver in order to be designated for any new reserved legal activities.

An enforcement strategy that incentivises and encourages compliance, deters non-compliance and punishes transgressions appropriately including the levying of financial penalties

157. One of the four key components set-out in “Developing Regulatory Standards” is regulators:

- having an enforcement strategy that incentivises and encourages compliance, deters non-compliance and punishes transgressions appropriately.

158. Even within a regulated sector there will always be providers that will transgress. We believe that deterrence is an important element of any enforcement strategy. As such, we consider that approved regulators’ enforcement strategies need to provide a range of effective sanctions that serve not only as a punishment but are capable of acting as a deterrent to the wider regulated community and so contribute to the attainment of better compliance overall. Further, for regulation to build public confidence, enforcement must be straightforward, fair and swift.

159. Given the problems that the investigations have found we propose that enforcement arrangements must include financial penalties. Reservation under the Act provides the legislative authority needed for a regulator to impose such penalties on the providers they oversee. This is not possible under voluntary schemes.

160. Again, any applicant approved regulator or licensing authority will need to demonstrate that they have developed an effective approach which they have the capacity and capability to successfully deliver in order to be designated for any new reserved legal activity.

Arrangements to ensure each provider has an appropriate in-house complaints process and;

Bringing all three activities within the jurisdiction of the Legal Ombudsman

161. Dissatisfied consumers having consistent assurances around redress mechanisms is a key component within the Act. First, Sections 112(1) and 122(1) requires that all authorised persons provide their clients with access to an in-house - or first-tier - complaints process. We have issued guidance on

this requirement¹¹². Second, one of the Act's major achievements was to introduce a single Legal Ombudsman that may be accessed by all individual and small business clients of authorised persons when the first-tier complaints system is not considered to have provided an acceptable outcome in relation to a service issue.

162. The reservation of will-writing, probate and estate administration activities would spread these protections to all consumers. We believe that this would end the currently unsatisfactory position highlighted by the Legal Ombudsman and the Panel where they apply when consumers use one type of provider but not another. Activities being reserved in all three areas would also solve the issues around jurisdictional ambiguity and consumer confusion created by the complex business structures driven by the existing partial coverage as set-out in paragraph 70. This would mark an important step in meeting the consumer and public interest and building confidence in the rule of law in what is the third most complained area behind residential conveyancing and family law¹¹³.

163. One issue that approved regulators will have to address in relation to in-house complaints processes is third party complaints. The person who commissioned services has often died by the time that issues come to light or in case of estate administration, the service is used. In our view this should not mean that there should be uniform barriers to complaints and redress for all beneficiaries or intended beneficiaries that suffer detriment as a result of poor quality work or poor service at the hands of a provider. Potential benefits of aligning the position adopted by the Legal Ombudsman in relation to second tier complaints are likely to be a consideration for approved regulators.

164. In relation to second tier complaints, Legal Ombudsman scheme rules extend access to beneficiaries but only in certain circumstances. The Legal Ombudsman has started work to review the position relating to third party complaints more widely and whether there are existing gaps and how they may best be addressed. Further detail is set-out in the Legal Ombudsman's recent consultation on scheme rules¹¹⁴.

165. Furthermore, as set-out earlier in paragraph 101, the Legal Ombudsman is currently examining the potential merits of creating a voluntary jurisdiction

¹¹²

http://www.legalservicesboard.org.uk/Projects/pdf/10_05_24_Isb_signposting_requirement_and_guidance_Decision_document.pdf

¹¹³ Legal Ombudsman Annual Report 2010/11:

http://www.legalombudsman.org.uk/downloads/documents/publications/Annual_Report_2010_2011_Final_v1.pdf

¹¹⁴ <http://www.legalombudsman.org.uk/aboutus/consultations.html>

that would provide access to the service for consumers of unregulated will-writing and estate administration providers that opt in to the scheme. This could help deliver more consistent redress in the absence of reservation. However, for these services, we do not think that this can provide a long-term solution to the problems that we have identified. First, access to redress is only one of the required protections against detriments identified in these markets. Our view is that it is a necessary, but not sufficient, condition. Second, although many good providers may welcome this option, the most unscrupulous providers targeting the most vulnerable consumers are unlikely to opt-in. We have shown in paragraphs 98 and 101 that this is a key barrier to the effectiveness of voluntary registration schemes run by trade bodies.

5. Scope of regulation

166. We propose that regulation should be introduced to cover:

- The preparation and drafting of a will and all ancillary legal activities
- The administration of an estate of a deceased person (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

167. The Ministry of Justice will be responsible for drafting the statutory instrument including the definitions of the activities to be reserved if the Lord Chancellor accepts any recommendation to change the list of reserved activities after our consultation. However, we must be clear in making our recommendation what we believe the order should achieve. We propose that regulation should capture all components of the broad activity that the consumer has decided to purchase help with i.e. drafting their will and administering an estate. We believe that regulation should capture ancillary legal activities (within the definition at Section 12(3) (a) and (b)(i) of the Act¹¹⁵), that the consumer may be offered or provided and is likely to believe are part of the same process.

168. Will-writing and estate administration can be broken down into many parts. For example, activities that a provider might undertake in relation to will-writing include, but are not limited to:

- taking instructions and obtaining background information;
- drafting the will (and subsequent amendments);
- providing advice related to the preparation of the will (and subsequent amendments) such as advice about tax, wealth management and about the legal instruments to give effect to their intentions; and
- advising on and overseeing the signing and witnessing of the will.

169. Similarly, activities that a provider might undertake in relation administering an estate might include, but are not limited to:

- collecting details of the assets liabilities in the estate and of the intended beneficiaries;
- preparing the papers on which to found or oppose the grant of probate or letters of administration (where necessary); and
- preparing the relevant HMRC papers (where necessary);
- collecting and realising assets;

¹¹⁵ An activity which is a reserved legal activity within the meaning of this Act as originally enacted, and

(b) any other activity which consists of one or both of the following—(i) the provision of legal advice or assistance in connection with the application of the law or with any form of resolution of legal disputes; (ii) the provision of representation in connection with any matter concerning the application

- advertising for creditors and claimants;
- paying liabilities;
- distributing assets;
- preparing estate accounts; and
- providing advice related to the administration of the estate.

170. The current reserved legal activity of “probate activities” at Schedule 2 to the Act is defined tightly and focused on the specific action of preparing specified legal papers. In theory this provides a “bright line” leaving less scope for confusion and legal argument over what is reserved.

171. However, we are not of the opinion that legislation should try to specify every activity that a provider may undertake in relation to will-writing, probate and estate administration. Unsophisticated consumers do not approach and experience legal services in this compartmentalised way. Furthermore, a detailed list would require updating if processes and activities change.

172. Moreover, we have seen with the existing probate reservation that narrow definitions of centred on specific activity leaves risks arising from related, but broader, activities outside of regulation, unless delivered by an authorised person regulated by title. Further, in our view the “brighter the line” - the greater the opportunity and the temptation for businesses to seek to operate outside of the narrow definition and avoid regulation.

173. We propose therefore that the definition should focus on the broad activity and include ancillary services. Further specification could absolve providers of personal responsibility for making judgements from the consumer perspective. In our view, the onus should be on the provider to judge whether activities fall within the definitions in the first instance. We would expect providers to focus on achieving outcomes across the service they are delivering. We believe that it should be the responsibility of the regulators and ultimately the courts to ensure that this happens in practice. We do not think that inexperienced consumers should be expected or are able to compartmentalise different activities and work out what is protected.

174. It has been suggested to us that the “sale” of the will should be included in the Schedule 2 definition. However, we agree with Professor Stephen Mayson’s view that specifically legislating against sales practices in relation to individual reserved activities is not necessary:

“By bringing will writing into reservation to authorised persons, the professional principles in Section 1(3) of the 2007 Act and an approved regulator’s conduct rules will come into play (cf. paragraphs 1.9 and 2.4.1.3). Rather than regulating separately against inappropriate

bundling or charging, authorised persons who provide will-writing and estate administration services would be obliged to act in the best interests of the client and could therefore be called on to justify to a regulator any bundling of services or charges made”¹¹⁶.

175. In short the newly reserved activities would only be undertaken by authorised persons bound to achieve the outcomes around ethical behaviour, sales and referrals set by their AR.

Powers of attorney and trusts

176. Where legal activities relating to powers of attorney and trusts are ancillary to the writing of the will or administration of an estate we propose that they will be captured by the scope of our proposed reservations. Setting up a trust is already restricted to authorised persons within the reserved instrument activity¹¹⁷. Furthermore, an authorised person would be bound to achieve the outcomes around ethical behaviour, sales and referrals required by their approved regulator as set-out above. Access to the Legal Ombudsman applies in relation any legal activity undertaken by an authorised person – whether reserved or not. This would include authorised will-writers and estate administration companies if these activities are reserved.

177. We have chosen not to propose to extend the list of reserved activities to include legal activities relating to powers of attorney or trusts other than circumstances where this is a legal activity ancillary to preparing and drafting a will or administering an estate. We have not seen evidence of wide consumer detriment to lead us to investigate these areas. The Panel report did highlight some risks in relation to powers of attorney but indicated that incidence of them occurring in practice are low.

178. Arranging powers of attorney is a developing market. The Office of the Public Guardian (OPG) oversees the registration of powers of attorney. Its annual report states its vision as being “to encourage everyone to prepare for a possible lack of mental capacity and to empower and safeguard those who lack mental capacity now”¹¹⁸. The report states that the ultimate measure of success for the Mental Capacity Act would be for every adult to have a lasting power of attorney. OPG reports that applications increased by 50% between 2009/10 and 2010/11 to total nearly 200,000 a year. Our consumer surveys indicate that arranging powers of attorney is one of the most common additional services offered alongside both will-writing and estate administration services, with 28% and 27% of consumers respectively being

¹¹⁶ Legal Services Institute, the regulation of legal services: what is the case for reservation? strategic discussion paper, July 2011

¹¹⁷ See Section 12 of and Schedule 2 to the Act

¹¹⁸ <http://www.justice.gov.uk/downloads/publications/corporate-reports/OPG/opg-annual-report.pdf>

offered these services. However, take up appears to be considerably lower. In relation to wills only 17% took up the offer (take up was not recorded in the estate administration survey). Therefore, although there are links between will-writing and estate administration and powers of attorney, it appears likely that most powers of attorney are arranged independently. We welcome views whether consumer risks are such within this developing area to warrant a separate review of regulation legal activities related to powers of attorney.

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?

DIY and software

179. Many consumers choose to “do-it-themselves” in these markets. We agree that it is not the role of regulation to prevent consumers exercising their legitimate choice as to whether or not to seek professional assistance. We also support the principle of individuals in a personal capacity being able to provide free advice to help others. We propose that these freedoms should remain without restriction or regulation. We do not propose restrictions or regulation of packages developed to inform and guide individuals over and above that provided by general consumer law.
180. Our proposal is that regulation should extend to all providers delivering will-writing, probate and estate administration activities and ancillary advice in expectation of fee, gain or reward. We believe that this should extend to any “checking” or “advice” activities provided by an advisor where this is a feature of a self-completion package. Consumers may legitimately believe that they are receiving a tailored legal advice in these circumstances.
181. This proposal includes holding providers to account for work that they produce, including where they have used software or other tools to deliver a service. We propose that where mistakes are derived from the software or other tool, approved regulators should not allow regulated providers to delegate indemnity responsibility to the provider of the software/other tool. Furthermore, as we have set-out in paragraph 120 we believe that the software used by a provider may prove an important risk indicator for their approved regulator.
182. We have set-out that we do not believe that the role of regulation is to prevent individuals the choice to “do- it- themselves” however, we acknowledge that the shadow shopping research identified particular problems with on-line and paper self-completion options and particularly

welcome views on these proposals. The research methodology is unable to breakdown whether problems were considered to derive from certain self-completion tools or how they are used.

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?

Fee, gain and reward

183. We support the principle of individuals in a personal capacity being able to provide free advice to help others. We propose that these freedoms should remain without restriction or regulation

184. This principle currently exists within the Act. Of the existing reserved legal activities only litigation, rights and audience and the administration of oaths do not have an exemption for:

an individual who carries on the activity otherwise than for, or in expectation of, and fee, gain or reward” (Schedule 3, paragraph 3(10)).

185. The existing probate reservation does carry such an exemption. We propose that the same exemption should carry across to any new reserved activities relating to will-writing probate and estate administration.

186. It is not our intention to offer any automatic exemption to organisations providing legal services or their employees acting in that capacity if no fee is charged. We appreciate potential issues around providers delivering reserved activities without charge but then charging for connected services for example not charging for drafting a will but then charging for setting up a power of attorney at a cost that would be sufficient to provide profit overall. We have been advised that with such an arrangement it could be interpreted that both activities are being provided “in expectation of fee, gain or reward”.

187. We do not propose to create separate exemptions for bodies such non-commercial bodies, trade unions, pro-bono lawyers working within a firm or membership organisations just in relation to new reserved activities. We have issued a separate consultation on the current transitional protection for non-commercial bodies undertaking reserved legal activities alongside this consultation document¹¹⁹.

¹¹⁹ http://www.legalservicesboard.org.uk/what_we_do/consultations/index.htm

6. Transitional arrangements

188. With any introduction of new reserved activities, timings and the need for transitional arrangements need to be carefully considered. There must be a balance between pushing forward implementation to protect consumers against the detriments identified and allowing the market to adapt.
189. We must avoid the unintended consequence of closing the market to non-lawyer providers because of an absence of a suitable regulator to authorise them to undertake newly reserved activities. In our view, this would not be in the public or consumer interest and would negatively impact on competition and access to justice. It is also our view that the regulatory objectives and better regulation principles would not be served by allowing existing ARs to apply their existing rule books and arrangements without demonstrating that they would be proportionate and effective for these markets because it is quick to do so.
190. We propose that reservation should not take full effect until certain criteria are met:
- approved regulators and licensing authorities must be designated with regulatory arrangements that allow for the authorisation of the different types of provider currently active within these markets.
 - Providers are authorised in sufficient numbers to ensure access to justice, consumer choice and competition and is maintained.
191. We believe that this likely to be achieved by one or more of the following combinations:
- Existing approved regulators whose regulated community currently active in these markets are likely to apply to be designated to authorise those providers to continue carrying out the newly reserved activities. For example, the SRA will apply to be designated to authorise solicitors firms to continue undertaking will-writing, probate and estate administration.
 - We believe that some of the existing approved regulators may wish to develop activity based regulatory schemes that allow them to authorise and regulate different types of providers such as will-writing and estate administration companies without lawyer owners, managers or employees.
 - Existing approved regulators whose regulated community are not currently active in these markets may wish to be designated to authorise and

regulate activities in relation different types of providers to undertake newly reserved activities.

- Organisations that are not currently approved regulators under the Act being designated to authorise providers to undertake the newly reserved activities. We understand that existing professional and trade bodies whose members currently deliver the activities outside of legal services specific regulation are likely to be apply to be designated as approved regulators for the activities should they be reserved.

192. This is likely to take some time to achieve. The Schedule 4 and 10 approval processes, to designate a body as an approved regulator and licensing authority respectively, may take up to 16-months¹²⁰. Further, it is likely that all organisations wishing to be designated as approved regulators and licensing authorities will have work to do to be ready to apply. For example:

- In our view, all existing approved regulators would have a considerable way to go to demonstrate the different kind of outcomes and risk based regulation that is likely to needed to effectively meet the regulatory objectives and better regulation principles in these markets. Time is likely to be needed for approved regulators to develop and implement arrangements and the necessary authorities required for a bespoke, activities based authorisation scheme also open to different types of provider if any wish to pursue this option.
- New approved regulators would likely need to develop their internal structures, processes and arrangements to meet the Schedule 4 and Schedule 10 requirements. For example, professional and trade bodies seeking to become approved regulators will need to demonstrate clear separation of representative and regulatory functions.
- Existing and prospective approved regulators would need to develop appropriate provisions in relation to regulatory conflict and overlap (as set-out below).
- Identifying and making consequential requirements to amend existing internal constitutions or legislative provisions to allow different approved regulators proposed regulatory arrangements to take effect.

¹²⁰ A flow chart of the application process can be found on the LSB web-site:
http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/new_designation_process_v3.pdf

- Existing and prospective approved regulators would need to identify risks around separate business activities of authorised providers and develop proportionate, targeted and effective ways of mitigating risks to consumers.

193. Providers will need time to demonstrate compliance with the authorisation requirements of their chosen regulator. There will then need to be sufficient time for the bodies concerned to process the applications.

194. In the intervening period, we will encourage existing ARs to take steps to reform their regulatory approach to better protect consumers and raise standards on a faster timetable. The pace and extent to which different approved regulators and trade bodies have taken action following the publication of the LSB/SRA/OFT research and the Panel's report, which both highlighted detriment in relation to will-writing, has varied. We encourage all bodies overseeing providers of will-writing and estate administration services to progress at speed. This will place interested bodies in a better position to meet the tests for being designated an approved regulator as set-out in our Schedules 4 and 10 rules as well as our proposed guidance if the activities are reserved.

195. We would welcome views on what other arrangements may help to protect consumers in the near term. We would welcome views on whether Legal Ombudsman voluntary jurisdictions may have a role to play or whether development costs would outweigh benefits as an interim measure.

196. We particularly wish to hear the views of prospective approved regulators and licensing authorities and providers performing the activities under consideration. Preparation in advance of any decision of the Lord Chancellor to extend the reserved activities will be important to facilitate a smooth and swift transition. It will be important to anticipate actions needed and related issues.

197. In this context it is worth flagging that Section 25 of the Act provides potential interim measures to ensure a smooth transition. Once the LSB publishes a provisional report saying that we are minded to recommend that the Lord Chancellor extend the list of reserved activities, Section 25 of the Act provides for prospective approved regulators to request that the Lord Chancellor make provision for us to consider provisional applications for designation and thereafter to make provisional designation orders.

7. Providers regulated in other sectors

198. As set-out earlier in this paper, reserving activities would not create a solicitor monopoly or restrict the delivery of services to existing authorised persons. Any organisation may be authorised if they meet the criteria of an appropriately designated approved regulator.
199. Any organisation may apply under Schedule 4 or 10 to the Act to be designated as an approved regulator or licensing authority for reserved activities. This is not restricted to existing legal regulators. Regulators from other sectors able to meet the acceptance criteria may be designated. For example, the Institute of Chartered Accountants of England and Wales (“ICAEW”) is preparing to apply to be an approved regulator and licensing authority in relation to the currently reserved probate activities. Existing ARs may develop regulatory arrangements to authorise different types of providers.
200. Any prospective approved regulator and licensing authority for newly reserved activities will be required to demonstrate to the LSB that they meet the Sections 52 and 54 requirements around preventing regulatory conflict and unnecessary duplication of regulatory provision if they propose to authorise providers who are also overseen by regulators in a different sector. Close working will be required between regulators and professional bodies and regulators in different sectors to develop proposals that will prove effective in practice. There may be important lessons to learn from ABS licensing. A priority will be to ensure that there are effective arrangements between regulators around complaints. The responsibility for finding the right avenue to complain must not lie with dissatisfied consumers themselves.
201. The benefits of avoiding regulatory conflict and unnecessary duplication extend to Ombudsman schemes. The Legal Ombudsman and other Ombudsman schemes or redress arrangements will need to keep their working relationships under review in the light of new reserved activities.
202. In our view, cross-sector arrangements for complaints at both the first and second tiers should adequately address the issues around redress extending to beneficiaries highlighted in paragraphs 163 - 164.

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?

8. Consequential issue - privilege

203. A further consideration is the ability to provide consumers with the benefit of legal professional privilege when seeking legal advice. This protection provides consumer benefits and also competitive benefits for the privileged authorised person. Consumers of services provided by solicitors and barristers enjoy privilege for all of their legal work.
204. Section 190 of the Act provides for privilege to extend to other types of authorised persons but only in relation to specified legal activities. This results in “any communication, document, material or information” being privileged from disclosure as if they had “at all material times been acting as their client’s solicitor”.
205. One of the specified categories is “probate services as an authorised person in relation to probate activities”. Probate services in this context are defined more widely than just the reserved activity of preparing “papers on which to found or oppose a grant of probate or a grant of letters of administration”. It includes the wider “administration of the estate”. Therefore, any amendment of the list of reserved activities that changes the definition and scope of probate activities will require consequential amendments to Section 190.
206. If will-writing activities were added to the list of reserved activities further decisions would need to be made about whether Section 190 provisions should be extended so privilege extends to authorised persons in relation to will-writing activities. One consideration will be potentially reducing the evidence that would be available to the courts for example where there is ambiguity in the intention of clauses within a will or a will is being contested. As the client will be deceased by this point, they cannot waive their right of confidentiality.
207. Any approved regulator applying to be designated to regulate a reserved activity attracting privilege will have to demonstrate that their regulatory arrangements make appropriate provision in relation to authorised persons protecting their client’s rights to confidentiality and taking action if the rights are misused.
208. The LSB has been granted permission to intervene in the Supreme Court case about privilege due to conclude in 2012: *Prudential Plc and Prudential (Gibraltar) Ltd v Special Commissioner for Income Tax and Philip Pandolfo*. We will be mindful of the findings in developing recommendations for consequential provision to accompany a recommendation to the Lord Chancellor to extend the list of reserved legal activities.

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?

9. Conclusion

209. We have analysed each of the main detriments identified within our investigations against each of the regulatory objectives (please see table 1 below). In developing our proposed solutions we have had regard to all of the regulatory objectives. Given the consumer detriment that has been identified, protecting and promoting the interests of consumers is obviously a particular focus. We are also focused on the public interest which we believe is directly impacted by the detriments identified. As beneficiaries members of the public are often not the purchaser of will-writing, probate and estate administration legal services themselves but the consequences of legal services delivered to others can have a life changing impact on them. Moreover, we believe that the public interest and the rule of law will be served by taking steps to ensure deserved public confidence in this market for legal services to consumers who in choosing to purchase services will often be coming into contact with providers for the first time. We believe that the detriments that we have found and which are widely reported in the media do impact on public confidence and this in turn may ultimately result in fewer people writing wills thereby impacting on access to justice. Finally, we have set-out our view that promoting competition is an important element to improving services to the public.

210. We have set-out our view that effective competition alone will not address all of the identified detriments and must be underpinned by statutory regulation that can only be delivered through reservation. In developing our proposed regulatory approach we have been mindful of our duty to have regard to the better regulation principles. We have identified a particular need for regulation to be proportionate and targeted at the identified detriments to avoid creating unintended and counter-productive consequences for consumers. We consider that regulation must not create unnecessary barriers to entry and restrictions on how good providers organise their businesses to achieve good outcomes for consumers and maximise their competitiveness. We believe that regulation must work for different types of businesses presenting different risks. Our proposals are predicated on a regulatory approach that achieves regulation aligned to the better regulation principles for both for those already regulated as legal services providers and those that would be subject to legal services regulation for the first time if will-writing and estate administration activities were reserved.

Table 1: Analysis of identified detriments against the regulatory objectives

	Quality of wills	Safekeeping of wills	Sales practices & fraud	Safekeeping of money / assets	Shortfalls in service	Failure in redress	Market distortion
Public interest	X	X	X	X	X	X	X
Rule of law	X	X	X	X	X	X	X
Access to justice	X	X	X		X	X	X
Interests of consumers	X	X	X	X	X	X	X
Competition	X		X		X		X
Independent etc legal profession			X	X	X	X	X
Citizen's legal rights and duties		X	X	X	X	X	X
Professional principles	X	X	X	X	X	X	

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?

10. Next steps:

211. This is our first consultation setting-out our analysis of the evidence base that we have compiled and our initial proposals. It is open for 12 weeks.

212. In summer, following the conclusion of this consultation exercise and consideration of responses, we will publish a further consultation document that may include the full texts of a draft recommendation to the Lord Chancellor, impact assessments and any guidance on high level regulatory arrangements.

213. We would then produce our final report in winter. This could include a recommendation that the Lord Chancellor amends the list of reserved activities, if we conclude that this is needed to protect consumers in these markets and deliver the regulatory objectives.

214. If we concluded that a recommendation to the Lord Chancellor to amend the list of reserved activities is needed to protect consumers in these markets and deliver the regulatory objectives, we shall set-out our decision in a final report in winter. The Act allows the Lord Chancellor 90 days to decide whether or not to accept the recommendation and publish a notice of that decision.

11. How to respond

215. Views on our proposals are welcome by 5pm on Monday 16 July – this provides 12 weeks for interested parties to respond.

216. In framing this paper we have posed specific questions to help inform our final decision. These questions can be found in the body of this consultation document and also as a consolidated list at Annex B. We would be grateful if you would reply to these questions, as well as commenting more generally on the issues raised (where relevant). Where possible please can you link your comments to specific questions or parts of the paper rather than making general statements.

217. We would prefer to receive responses electronically (in Microsoft Word or pdf format), but hard copy responses by post or fax are also welcome.

Responses should be sent to:

Email: consultations@legalservicesboard.org.uk

Post: Mahtab Grant,
Legal Services Board
7th Floor, Victoria House
Southampton Row
London WC1B 4AD

Fax: 020 7271 0051

218. We propose to publish all responses to this consultation on our website unless a respondent explicitly requests that a specific part of the response, or its entirety, should be kept confidential. We may record and publish the identity of the respondent and the fact that they have submitted a confidential response.

219. We are also happy to engage in other ways and would welcome contact with stakeholders during the consultation period. Please contact Chris Handford by e-mail: chris.handford@legalservicesboard.org.uk or telephone: 020 7271 0074.

Complaints

220. Complaints or queries about this consultation process should be directed to Julie Myers Consultation Co-ordinator, at the following address:

Julie Myers
Legal Services Board
7th Floor
Victoria House
Southampton Row
London WC1B 4AD

Or by e-mail to: julie.myers@legalservicesboard.org.uk

12. Glossary of Terms:

ABS	Alternative Business Structures. From October 2011 non-legal firms will be able to offer legal services to their customers in a way that is integrated with their existing services. Or law firms will be able to develop their portfolios to compete across wider areas compared with their existing experience.
ACCA	Association of Chartered Certified Accountants. Approved regulator in relation to reserved probate activities
AR or approved regulator	A body which is designated as an approved regulator by Parts 1 or 2 of schedule 4, and whose regulatory arrangements are approved for the purposes of the LSA and which may authorise persons to carry on any activity which is a reserved legal activity in respect of which it is a relevant AR
Authorised Person	A person authorised to carry out a reserved legal activity
BME	Black, Minority and Ethnic
BSB	Bar Standards Board – the independent Regulatory Arm of the Bar Council
CLC	Council for Licensed Conveyancers – the regulator of Licensed Conveyancers
Consultation	The process of collecting feedback and opinion on a policy proposal
Consumer Panel	The panel of persons established and maintained by the Board in accordance with Section 8 of the LSA (2007) to provide independent advice to the Legal Services Board about the interests of users of legal services
FSA	Financial Services Authority – the regulator of all providers of Financial Services in the UK
ICAEW	Institute of Chartered Accountants of England and Wales – the representative body for Chartered Accountants in England and Wales
ICAS	Institute of Chartered Accountants of Scotland – the approved regulator in relation to reserved probate activities
ILEX Professional Standards Board	Institute of Legal Executives – the independent regulatory arm of the Institute of Legal Executives
Impact Assessment	An assessment of the likely impact of a policy on cost, benefits, risks and the likely or actual effect on people in respect to diversity
Institute of Legal Executive	Representative body for Legal Executives
LA or Licensing Authority	An AR which is designated as a licensing authority to license firms as ABS
Lay Person	A person that is not an expert in a specified field. In the context of the LSB, the Act specifies that the Chairman and the majority of members of the Board must be lay people.
LSB or the Board	Legal Services Board – the independent body responsible

	for overseeing the regulation of lawyers in England and Wales
LDP	Legal Disciplinary Practice - A form of recognised body providing legal services where the owners and managers are not exclusively Solicitors of England and Wales, registered European lawyers (RELS) or registered Foreign Lawyers (RFLs)
LeO	Legal Ombudsman - The single organisation for all consumer legal complaints
Levy	The LSB is required by the Legal Services Act (2007) to meet all its, and the OLC's costs through a levy on the Approved Regulators.
LSA or the Act	Legal Services Act 2007
MoU	Memorandum of Understanding - A document describing an agreement between parties
OFT	Office of Fair Trading. A <u>non-ministerial government department</u> of the <u>United Kingdom</u> , which enforces both <u>consumer protection</u> and <u>competition law</u> .
OLC	Office for Legal Complaints. NPDB established by the Legal Services Act to establish an independent Legal Ombudsman Service (see LeO)
Principles of Better Regulation	The five principles of better regulation, being proportional, accountable, consistent, transparent and targeted
Regulatory arrangements	The rules and regulations that make up the conditions of authorisation and practice for authorised persons
Regulatory Objectives	There are eight regulatory objectives for the LSB that are set-out in the Legal Services Act (2007): <ul style="list-style-type: none"> • protecting and promoting the public interest • supporting the constitutional principle of the rule of law improving access to justice • protecting and promoting the interests of consumers promoting competition in the provision of services in the legal sector • encouraging an independent, strong, diverse and effective legal profession • increasing public understanding of citizens legal rights and duties • promoting and maintaining adherence to the professional principles of independence and integrity; proper standards of work; observing the best interests of the client and the duty to the court; and maintaining client confidentiality.
Regulatory Rules or rule books	Set-out the regulatory arrangements of Regulators
Reserved Legal Activity	Legal services within the scope of regulation by the Approved Regulators

SDT	Solicitors Disciplinary Tribunal. Adjudicates upon alleged breaches of rules or the Code of professional conduct by Solicitors
SRA	Solicitors Regulation Authority - Independent regulatory body of the Law Society
Statutory Instrument	A form of legislation which allow the provisions of an Act of Parliament to be brought into force or altered without Parliament having to pass a new Act.

Annex 1: List of questions

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

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?

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?

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?

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?

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?

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?

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?

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?

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?

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?

Annex 2: A summary of key problems and analysis

Will-writing

Quality of wills:			
Outcome:	Frequency	Impact:	Additional information:
Invalid wills:	<ul style="list-style-type: none"> 8 out of 101 shadow shops were invalid Probate Service report that few wills fail probate because fully invalid 	<ul style="list-style-type: none"> If invalid intestacy rules will apply or reversion to earlier will – may not deliver what the testator wanted and can disinherit intended beneficiary. Probate Service report that ambiguities (not invalidity) can be corrected with affidavits etc. 	<ul style="list-style-type: none"> Recent Court of Appeal case: if the intention of testator is clear but will is invalid, court has no power to direct that intended distribution stands. Example saw individual totally disinherited when intention was that he would be primary beneficiary.
Poor quality wills: <ul style="list-style-type: none"> Inadequate Requirements not met Technical deficiencies Contradiction Lack detail Presentation 	<ul style="list-style-type: none"> 1 in 4 wills failed shadow shopping exercise <ul style="list-style-type: none"> 1 in 5 solicitors & will writers 3 in 10 self-completion & 4 in 10 on-line (small sample size) High ratio of errors reported by STEP members e.g. 84% experienced erroneous will in preceding 12-mths Remember a Charity survey: 53% of charities 	Variable depending on issue: <ul style="list-style-type: none"> Two main outcomes are: <ol style="list-style-type: none"> that will fails to deliver what the testator wanted that unclear clauses lead to difficulties administering the estate. Significant financial detriment as a result of wasted costs and correction costs if spotted pre- death Intended beneficiaries lose out e.g. with money going to unintended people or too much tax being paid – STEP survey reported one third experienced poor wills resulting in “significant additional tax bills” Case studies show significant costs and delay in receiving entitlements 	<ul style="list-style-type: none"> Provider satisfaction reasonably high in shadow shops given many wills failed assessment – highlights information asymmetry Several respondents reported that problems may never be spotted as intended beneficiaries unsighted as to what was intended Shadow shopping - solicitors were more likely to fail where simple circumstances, will-writers where complex

	<p>experience d poorly drafted will</p> <ul style="list-style-type: none"> • LeO: 110 complaints in 10 mths about failure to follow instructions (Oct 10 – Aug 11) • Over 250 case studies with technical errors or unnecessary features • ILEX member survey - almost 50% gave examples of poor quality wills (total respondents - 24) • Analysis of survey data by Sneddon’s law firm – 50,000 contested wills per annum (although only 555 wills, trusts & probate high court challenges in 2010 & could be for variety of reasons) • IFF survey 14% of consumers could not fully understand their will 	<p>can result</p> <ul style="list-style-type: none"> • Case studies show delays can cause severe hardship for dependents. • LeO complaint data and case studies show emotional detriment a key feature as outcomes can have life-changing results e.g. family home, custody of children, access to significant sums of money. Family disputes / breakdown is a regular feature where uncertainty • Testator usually isn’t alive to sort out problems • Legal costs incurred to interpret/ compile will • There are limited grounds to challenge & must be through courts if no agreement between affected parties. Legal costs can be high. STEP estimates that on average disputes take 12 months to resolve but yield a payoff of under £250 per person. May require pursuing negligence claim against provider. • Impact on charities as well as individuals • Charities reliant on legacies - £1.9billion a year. Many reliant on legacies e.g. 50% RSPCA income • Remember a charity survey – 33% experienced detriment from poorly drafted will (loss of legacy 11%, 	<ul style="list-style-type: none"> • Simple errors, cutting and pasting of inappropriate template precedents, unnecessary complexity; and use of outdated terminology highlighted key features • Stakeholders have raised concerns that “dabblers”, both regulated and unregulated, doing very low volumes of work pose particular risk as lack of familiarity leads to errors. This was a particular theme at the LSB workshop. Concerns were raised about relying on templates and software without sufficient underpinning knowledge. This may cause problems particularly with complex wills. • Concerns have been raised around inexperienced will-writers entering the market without having first learnt their craft under supervision within a firm (regulated or unregulated).
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		reduced legacy 33%, delay 48%, legal costs 53%)	
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Sales practices, costs and value:			
Outcome:	Frequency:	Impact:	Additional information:
<p>Being sold costly and unnecessary services: including paying large sums for services that are not needed, won't work, cannot be afforded or available cheaper elsewhere</p> <p>Undercurrent of sales pressure and lack of transparency about service and cost</p> <p>Being sold inflexibly bundled services or not honouring cooling off periods</p>	<ul style="list-style-type: none"> • IFF will-writing research showed will-writing companies are particularly reliant on income from cross-selling (business interviews 44% make up at least one-third of income vs. solicitors less than 10%). 25% with staff with sales targets & commission structure • Some shadow shoppers reported providers showing a greater interest in selling than presenting options tailored to their needs. One shadow shopper reported being asked to sign a liability waiver if they declined additional services. • IFF consumer survey – 18% naming executor felt some pressure to do so. 36% couldn't recall costs being explained to them. Take up rate unclear. IFF - 12% appoint will-writer executor (19% solicitors & 7% will-writing companies). OFT – 43% name a professional executor. YouGov – 33% of estate administration services pre-arranged by testator. IFF - pre-paid probate packages offered to 25% but only 6% bought (may indicate issues around understanding 	<ul style="list-style-type: none"> • Significant financial detriment to consumers and their beneficiaries inc. £1k fees on estate valued at £14k and Hampshire CAB reporting initial £35 wills becoming £3k package follow pressure selling • Fees for total package amount to a large proportion of the estate. One case study included an example of 10% of gross estate for estate administration but with no explanation up front • Case studies of probate services being sold when probate is not needed • Case studies include 	<ul style="list-style-type: none"> • Home based sales environment, asymmetries of information and emotional nature of products leaves consumers particularly vulnerable. High age profile of consumers • Consumers often do not have private right of action under Consumer Protection Regulations –

	<p>definitions)</p> <ul style="list-style-type: none"> • IFF consumer survey - 1 in 3 purchased additional services other than executor services. Of these, 1 in 4 had felt under pressure to do so (36% buying from will-writing companies and 17% from solicitors) • 20% not satisfied with transparency of process. Some shadow shoppers reported not being told upfront about cost or payment structure • Consumer survey – 20% overall (and 30% using will-writing companies) said wills cost more than expected • 66% STEP members report hidden fees • OFT took action with banks to improve terms and clarity of executor services being sold without understanding of costs or alternative options • Which? survey found that most solicitors offered a clear and transparent service, will-writing companies were less reliable • Case studies & shadow shops show overcomplicated wills for circumstances – 43% of consumers asked about care home fees irrespective of circumstances • Consumer survey – clients of will-writing companies significantly more likely to pay on-going fees that Panel have reported as often providing poor value for money than solicitors (12% -1%). • There is some case study evidence of providers failing to honour cooling off rights or 	<p>examples of unnecessary trusts sold as standard costing hundreds of pounds each</p> <ul style="list-style-type: none"> • OFT report that failure to shop around for executor services costs £40m p.a. • The Panel report that pre-paid probate / on-going costs packages over a long period often result in total costs being far higher than if bought post-death. Examples of firms closing before death with no succession plans and no insurance so money lost. Examples of service purchased not being delivered or being far less than anticipated. • LeO data indicates that wasted time, emotional stress and annoyance is common of pressure sales victims especially given emotional nature of services 	<p>reliance on public authorities.</p> <ul style="list-style-type: none"> • Examples of successful action taken by trading standards. Recent examples of 3 insolvency service successes. But no indication that redress was secured for affected consumers. • Examples of many “rogues” subject to convictions or other legal outcomes having been in trouble before • Trading standards unlikely to have
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	<p>pressuring consumers not to exercise them.</p> <ul style="list-style-type: none"> • Of 275 case studies , 35 about bait advertising/ cross-selling, 44 about on-going fees, 60 about overcharging less frequent pressure selling, pre-paid probate, misleading claims, failure to honour cooling-off rights, inadequate redress • High sale pressure tactics sales of high value additional services feature prominently in media coverage and some successful legal interventions • Some case study evidence inc. of targeting the elderly. Very limited in relation to executor services (although definitions may vary).Shadow shops did not show aggressive pressure selling. • OFT analysis of Consumer Direct data suggests that one-third of complaints could be classified as potential criminal breaches. A large proportion of complaints relate to a small number of companies some of whom may operate nationally. Supported by correspondence including from one local Trading Standards office. • LeO – 102 complaints about excessive costs & 84 about costs info being deficient from October 2010 to August 11. 		<p>resource to target area on on-going basis and there will be geographical inconsistencies.</p> <ul style="list-style-type: none"> • PALs - “pre-paid probate” is often actually a fee paid for services with contract terms providing beneficial rates for other services, should they be requested in the future.
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Missing wills:			
Outcome:	Frequency	Impact:	Additional information:
<p>Wills can't be found:</p> <ul style="list-style-type: none"> • Insecure storage practice: Wills disappear as a result of • Insolvency & lack of succession planning • Gaps in protections of unregulated & not trade body member • Enforcement difficult when membership ends 	<ul style="list-style-type: none"> • Consumer survey - 45% offered storage, services of which 32% purchase. Higher for will-writing companies (61% and 38%) • Probate Service report significant increase in applications for copy wills • 36 case studies, most about lost wills post-insolvency – very few about poor storage practice • 64% STEP members have direct experience of will-writing companies going out of business and disappearing with wills • IPW membership data - within four years of a will-writing company starting there is a 60% chance of it going out of business. They estimate that this affects 4% of all consumers who 	<ul style="list-style-type: none"> • The estate will be distributed in line with intestacy rules or an older will. In many cases this will not reflect the testator's final wishes resulting in financial detriment to intended beneficiaries. • A missing will is likely to cause further costs and delay in the administration of the estate as the will is sought or attempts made to approve a copy will. • There may be uncertainty about who should administer the estate and personal actions such funeral arrangements. • If it is discovered that a will is missing when the testator is still alive costs will be incurred to write a new will. 	<p>SRA code requires -</p> <ul style="list-style-type: none"> • Entities to keep legal documents safe • Closure of a solicitor's practice to happen in a proper and orderly manner. This includes notifying clients and safe disposal of documents. Options include: continuing to hold them (e.g. in a secure storage facility); handing them back to the client; arranging for another firm to take over storage of the files; and storing documents electronically. Firms must inform the SRA of the address where the papers are stored and give contact details which can be passed on to clients wishing to access their papers. • If firms sell their practice as a going concern, they must inform all clients of the change in ownership in advance and take basic steps to safeguard the clients' interests. <p>IPW require:</p> <ul style="list-style-type: none"> • Members to keep wills safe • Members must advise IPW of location of documents along with access procedures. • When a membership ceases they are required to advise the IPW of

	<p>make a will. Very long periods before making will & death</p> <ul style="list-style-type: none"> YouGov probate and estate administration survey reported a missing will in 3% of cases Trade bodies report regularly receive calls from consumers trying to find wills stored with closed will-writing firms. Some dispute the reported frequency of missing wills within unregulated sector and that they sort out most instances when firms close. 		<p>suitable, ongoing arrangements for the storage of documents, or else hand to the IPW.</p> <p>SWW require:</p> <ul style="list-style-type: none"> Members to keep wills safe Members offering lifetime storage services should offer alternative storage arrangements (at no further cost to the client) in the event of them ceasing to practise. <p>Central will-repository:</p> <ul style="list-style-type: none"> Probate service store wills for cost of £15 but not widely publicised or used. Compulsory repository suggested by some stakeholders.
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Fraud and theft:			
Outcome:	Frequency	Impact:	Additional information:
<p>Life-time fraud :</p> <ul style="list-style-type: none"> Accessing a client's savings or credit Exerting undue influence to gain personal benefit within a will Forging or suppressing wills 	<ul style="list-style-type: none"> Examples of criminal convictions and other legal interventions relating to fraudulent trading e.g. Walter Ventrugalia sentenced to 14-months in 2011 for false claims that wills needed modifying at 	<ul style="list-style-type: none"> Potential for high financial impact if controlling estate after death (alone or in collusion with beneficiaries) or access to lifetime accounts Cost of work that is not delivered will vary – case studied include examples running into thousands of pounds 	<ul style="list-style-type: none"> Opportunity for provider to exploit the personal nature of making a will and the knowledge of the testator's financial affairs and family circumstances gained by the will-writer for dishonest purposes.

<p>to gain personal benefit</p> <p>Paying for work that is not delivered (either writing of wills or subsequent estate administration services).</p>	<p>a cost following a change in the law & charging for secure will storage that was not provided.</p> <ul style="list-style-type: none"> • Some limited case study evidence of lifetime fraud submitted inc. examples of handing over credit card details and unexpected sums deducted • Allegations / suspicions only of undue influence, forgery & suppression of wills. Informal Probate Service opinion that this is rare. More likely to be relative/friend/carer. • Examples of payment being taken & work not delivered more common within case studies 	<ul style="list-style-type: none"> • Case studies demonstrate the high emotional distress of being defrauded by persons in a position of trust around sensitive issues 	<ul style="list-style-type: none"> • As highlighted re: poor sales practices, exposed fraudsters often prove to have been in trouble before
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Probate and estate administration

Fraud, delays in releasing client money & lack of financial protections			
Outcome:	Frequency	Impact:	Additional information:
<p>Fraud and theft from the estate</p> <p>Financial detriment resulting from poor accounting practices</p>	<ul style="list-style-type: none"> • Near universal concern with responses to call for evidence. • Panel's will-writing report included several examples of thefts ranging in value from £30k to £400k • The Crown Prosecution Service ("CPS") has informed us that there is steady stream of prosecutions of service providers nationally • Half STEP members in 2005 survey reported having encountered suspected fraud • PDSA report experience of provider fraud and misappropriation of estate funds • Institute of Legacy Management claim charities are regularly not notified of legacies • SRA: 2011 performance report - 94 claims on the compensation fund in 12 mths. SRA risk strategy - theft and serious overcharging by solicitors acting in a representative capacity such as executor of an estate pose a high risk. 	<ul style="list-style-type: none"> • STEP 2005 report references RNIB estimate of fraud amounting to £100-150 million • Potential for high financial impact if controlling estate after death • Emotional distress of being defrauded by persons in a position of trust around sensitive issues • Charities report high costs of pursuing legacies and often not pursuing on grounds of cost vs. benefits • Fraud is a criminal 	<ul style="list-style-type: none"> • Risks are considerable and wide concern across stakeholders • Financial protections a key aspect of regulation across sectors e.g. FSA - ensuring that client money and assets are adequately protected as its regulatory "mission": • Evidence that would allow for accurate quantification of problems occurring does not exist (e.g. crime stats do not break down that allows theft and fraud relating specifically to writing wills and administering estates to be identified) • Several contributors report that low level fraud is often not reported as difficult for beneficiaries to detect & if it is provider likely pass off as admin error

	<ul style="list-style-type: none"> • Case study examples submitted (many suspect rather than certain) • Anecdote about deliberate delay in completing the administration of the estate because of benefits for a business of holding on to client money for as long as possible. • Anecdote and examples of unregulated providers paying estate funds into business accounts (and sometimes using the funds interchangeably) 	<p>matter but where there is a conviction satisfactory redress for the victims is not guaranteed outside of regulation when money is irretrievable</p>	<ul style="list-style-type: none"> • Fraudsters coming from both the regulated and unregulated sectors. Several examples of previously convicted fraudsters entering the unregulated sector and committing further crimes. • LeO data shows examples complaints of selling property below market rate to get a quick sale. • Greatest retrospective justification for reservation of applying for probate is the risk involved with control of estate funds but greater opportunity comes with wider estate administration process.
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Sales practices, costs and value:			
Outcome:	Frequency	Impact:	Additional information:
<ul style="list-style-type: none"> • Unclear referral arrangements to estate administration companies • Costs and sales: inconsistent pricing, lack of transparency over costs and the level of service that has been purchased 	<ul style="list-style-type: none"> • Poor sales practices appear to be much less frequent at the probate and estate administration stages than with will-writing. YouGov survey indicated that 14% of respondents felt pressure to buy additional services. There was a marked difference between those using solicitors (81%) and other types of provider (41%). • Solicitors for the Elderly and others report unclear referral arrangements from organisations involved in the immediate post-death processes to estate administration companies who quickly approach confused relatives asking them to sign powers of attorney and probate and estate administration instructions • LeO data –cost is the largest cause of complaints e.g. failure to give clear estimates, inaccurate estimates, costs being high given the size and complexity of estate, charging for work that lay executors had done • YouGov survey - more than 25% of respondents did not feel that costs were clearly explained, comprehensive and accurate. Only 32% recalled being told about 	<ul style="list-style-type: none"> • High value area and corresponding high financial impact – mean cost of estate administration services is £1,7k but considerable variation. 51% less than £1k but 18% over £3k. Costs vary significantly between different providers & pricing structures. Averages – fixed fees £1.2k, hourly rates £1.86k-combination £2.5k • OFT and Which! survey data report single figure proportions shop around YouGov – 11%. OFT report that this costs £40m of lost saving a year. • LeO data – reported detriments include: fees exhausting estates, costs running into thousands, having to fees out of own pocket, having to obtain loans to pay fees. Overarching impact was 	<ul style="list-style-type: none"> • See will-writing table above for analogous detail • YouGov – 27% who do not use professional help report being put off by perceived cost. • YouGov survey indicates information asymmetry of consumers having no idea of the market rate for services.

	<p>possible extra costs but 27% reported that cost were higher than expected with 26% of these reporting that no reason was given and only 60% reported that the reasons were clear. The mean value of the extra amounts was £1,155.</p> <ul style="list-style-type: none"> YouGov – only 56% of respondents reported services were good value and only 56% were subject to additional costs felt these were fair. Contributors including bodies representing banks and accountants report additional costs for their consumers because of outsourcing of the reserved probate activity to solicitors. Case studies & LeO data includes examples of consumers being unaware that this would present and additional “disbursement” cost. Normal cost reported is the hundreds of pounds. YouGov 43% of customers of non-solicitors report using more than one provider during process. 	<p>detriment having a material impact on their financial situation.</p> <ul style="list-style-type: none"> Unexpected and rising costs are reported to add to emotional detriment at a time of grief. 	
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Quality and service issues:			
Outcome:	Frequency	Impact:	Additional information:
<ul style="list-style-type: none"> • Errors with probate application 	<ul style="list-style-type: none"> • MoJ 2004 survey showed one third of professionally made applications rejected by Probate Service because of errors or omissions. No reason to believe improved position 	<ul style="list-style-type: none"> • Low impact as the Probate Service checks every application & returns those requiring corrections. Most made good without major detriment occurring other than some delay & inconvenience 	<ul style="list-style-type: none"> • Probate Service runs a pre-application checking service for £12 which many solicitors use – Probate Service report that this step is built into some case management systems. • Probate Service are due to shortly consult on changing non-contentious probate rules to simplify the application process
<ul style="list-style-type: none"> • Errors and service issues with process of handling administration of estate 	<ul style="list-style-type: none"> • Service issues appear widespread with lower satisfaction levels than with will-writing services. YouGov survey - Only 68% reported satisfaction with service received (14% dissatisfied & 13% neutral). 15% less likely to recommend provider than with will-writing services. Satisfaction with solicitors higher than other providers (69% vs. 58%) & with face to face advice (77%) than email / mail (62%) & phone (57%) • YouGov – largest cause of complaint. 71% of 	<ul style="list-style-type: none"> • Detriment to multiple people – all beneficiaries. Reported errors inc. assets being distributed incorrectly, assets being incorrectly valued, not fully investigated or value not being maximised. • HMRC report over £200 million annually as a result of compliance work that 	<ul style="list-style-type: none"> • Administrative process that many lay people undertake without problem. YouGov survey – 54% administered the estate themselves without using professional services at any point in the process. Most encountered no problems & 85% said

	<p>dissatisfied participants reported delay as a cause. Only 65% of all participants reported satisfaction with timeliness. (17% dissatisfied, 15%neutral). Delay and failure to progress accounted 27% of wills and probate complaints to LeO. YouGov - administration completed within 6 months in 62% of cases but over a year in 17%.</p> <ul style="list-style-type: none"> • YouGov – failure to keep informed second largest cause of complaint. 51% of dissatisfied participants reported this being a cause. Failure to inform accounted for 10% of wills and probate complaints to LeO. Failure of providers to promptly respond to queries came through strongly in case studies. • LeO has closed over 1500 complaints relating to wills and probate. Consumer Panel analysed a sample of 150 LeO complaints – service issues frequently reported including delay, failure to progress, failure to progress, failure to follow instructions and failure to keep informed. • LeO data (Oct 10 – Aug 11) 13% of complaints about wills and probate were about failure to follow instructions and 10% about a failure to provide adequate advice – two areas associated with competence. 	<p>arises from incorrect valuations, fraud and errors.</p> <ul style="list-style-type: none"> • Financial detriment reported from not dealing with tax efficiently inc. late submission fines, incorrect tax and not claiming tax relief. • One case study reports a solicitor failing to promptly follow instructions to sell shares held by an estate resulting in losses of £60,000 as the shares devalued. Another of failure to insure a property leading to significant unrecouped losses. • Delay can have significant impact on dependents as set out in wills table. LeO data highlights stress delay causing life plans having to be put on hold. • LeO data shows reports of 	<p>that they would do so again. 70% were judged straightforward and without any complicating features.</p> <ul style="list-style-type: none"> • Some contributors have argued that errors are likely to be underreported because beneficiaries are unsighted on details of estate and intended distribution
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	<ul style="list-style-type: none">• Anecdote about technical errors and incompetent handling of estates – evidence so far limited to reference to personal experience by providers and a small number of case studies.	<p>significant impact on emotional and physical well-being and on family relationships.</p> <ul style="list-style-type: none">• LeO data shows reports of loss of confidence in legal profession as a result of poor service.	
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