

Title: Enhancing consumer protection, reducing regulatory restrictions: will-writing, probate and estate administration activities Lead department or agency: Legal Services Board (LSB) Other departments or agencies: Ministry of Justice (MoJ)	Impact Assessment (IA)		
	Date: 05/09/2012		
	Stage: Consultation		
	Source of intervention: Domestic		
	Type of measure: Other		
Contact for enquiries: Luke McInerney luke.mcinerney@legalservicesboard.org.uk			
Summary: Intervention and Options			RPC Opinion: Awaiting Scrutiny

Cost of Preferred (or more likely) Option			
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, Measure qualifies as One-Out?
£m	£m	£m	Yes/No In/Out/zero net cost

What is the problem under consideration? Why is government intervention necessary?

There is currently no restriction on who can enter the market and provide will-writing and estate administration services. Regulatory protections enjoyed by customers of lawyers, including redress, are not available for many consumers in the market. There is evidence to show that systemic detriment is occurring in the market and that basic protections are needed for all consumers, irrespective of which provider they purchase services from. Government intervention is needed to ensure these protections are binding for all firms, that regulation is consistent, and to reduce the risk of rogue and unscrupulous firms entering the market. Only the Lord Chancellor can reserve a legal activity.

What are the policy objectives and the intended effects?

The proposal to reserve will-writing and estate administration aims to ensure that the current risk of detriment to consumers of will-writing and estate administration services by non-solicitor firms is reduced to an acceptable level. The proposal also aims to improve 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, though proportionate regulation that sets a baseline of regulatory protections for all consumers and which has a level playing field for firms to encourage competition and innovation in the provision of these legal services.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

We have considered several options to address the detriments identified including

- Continue to rely on either existing general consumer protections and / or alternatives to reservation
- Reservation and a new proportionate regulatory regime ensuring all individuals and entities offering will-writing and estate administration services are subject to minimum regulatory protections.

We favour reservation, extending regulation, as the existing use of quality codes through voluntary arrangements has already failed to deal with the problems posed by non-complaint firms due to the lack of enforceability of voluntary codes. Extending proportionate regulation will ensure all consumers can be confident in purchasing will-writing and estate administration services, thus supporting market growth. It can have a liberalising effect on the market, requiring existing regulators to implement the better regulation principles, focusing effort on high risk firms and reducing regulatory burdens on low risk firms.

Will the policy be reviewed? It will/will not be reviewed. If applicable, set review date: Month/Year

Does implementation go beyond minimum EU requirements?			No		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	Micro Yes	< 20 Yes	Small Yes	Medium Yes	Large Yes
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)			Traded: n/a	Non-traded: n/a	

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible SELECT SIGNATORY: _____ Date: _____

Summary: Analysis & Evidence

Policy Option 1

Description:

FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate:

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate			

Description and scale of key monetised costs by 'main affected groups'

Many non-solicitor firms in the market are members of voluntary or other sector regulatory arrangements. Their main additional costs would be the annual cost of funding the levy, per firm, of the Ombudsman. The cost of which is £385 (minus cost of existing complaint resolution mechanisms). For those few firms outside of all regulation the costs to firms would include (estimates): £385 Ombudsman levy; £480 for insurance; £35 for PLI and a one-off cost of £1670 for installing compliance systems.

Other key non-monetised costs by 'main affected groups'

We do not expect other non-monetised costs arising from the proposal. The proposal does not intend to restrict competition but instead put in place proportionate mandatory regulation that is consistent with current statutory and voluntary protections such as having gateway suitability checks for owners and managers of authorised providers; ensuring firms have appropriate insurance policies; ensuring firms have adequate in-house complaint processes, etc.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate			

Description and scale of key monetised benefits by 'main affected groups'

The benefits cannot easily be quantified. Please refer to the analysis in the full impact assessment for more detail.

Other key non-monetised benefits by 'main affected groups'

Improving the effectiveness of existing regulation for solicitors and others, while extending regulation to ensure minimum standards of protection for all consumers of will-writing and estate administration services, are expected to benefit consumers in reducing the risk, and hence cost, of detriment. Eliminating inconsistent regulation and having a level playing field for all firms encourages competition and is expected to improve market functioning, such as encouraging a plurality of supply.

Key assumptions/sensitivities/risks

Discount rate (%)

We assume that a proportionately regulated market which has a baseline of basic protections in place can reduce the risk of detriment to consumers. We also assume that regulators view providers, including solicitors firms, with robust quality assurance and compliance processes as low risk and can be subject to lighter touch regulation, freeing up the regulator's resources to concentrate on higher risk firms and reducing compliance burdens on these firms.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs:	Benefits:	Net:	Yes/No	IN/OUT/Zero net cost

Impact assessment summary

This is a summary of the LSB proposal. In brackets we provide the page number for reference to the detail in the full impact assessment which follows below

Issue

The LSB launched investigations into problems in the will-writing and estate administration markets under Sections 24 and 26 of the Legal Services Act 2007 in July 2011 following extensive calls for action from both within the market, consumers of will-writing and estate administration services, the media and Parliamentarians of all parties (see 'Policy Problem' on pp.75-77).

Problems

The investigation found a number of problems (evidence of these problems: **pp.71-81**). Firstly for wills we found problems with:

- The quality of wills produced (pp.81-82).
- Unethical sales practices (including failure to prevent proven wrong-doers from setting up business in the market) (pp.78-79)
- Arrangements for the safekeeping of wills produced (p.79-80)
- Failure to ensure arrangements for effective redress when things go wrong (p.80)
- Market distortion caused by partial coverage of regulation (pp.80-81)

For estate administration (evidence of these problems: **pp.81-83**) we found problems with:

- Unethical sales practices and fraud (including failure to prevent proven wrong-doers from setting up business in the market) (pp.81-82)
- Inconsistent and opaque pricing (p.82-83)
- Shortfalls in service levels (pp.82-83)
- Failure to ensure arrangements for effective redress when things go wrong (p.83)
- Market distortion caused by partial coverage of regulation (p.83).

Although the number of problems was distributed across the regulated and unregulated sector, the nature did vary. Research in particular found that simple wills were more often sloppily drafted leading to problems in the regulated sector, while wider quality problems were more common in complex wills in the unregulated sector. Consumer detriment arising from unscrupulous sales practices, issues with the safekeeping of wills and the sufficiency of redress options (including in relation to fraud), were found to be largely confined to the unregulated sector. Options available to address the problems could be introduced for either or both will-writing or estate administration.

Causes

It is not possible to fully establish causality, we have identified a range of different causal factors (explored at pp.84-85). A key issue is the asymmetry in information and power between providers and consumers. Consumers rarely use these types of services. Many consumers lack the knowledge to be able to identify any failings or to judge the necessity or value for money of services offered. With will-writing, failings are often not spotted until after the testator has died. With estate administration the provider often controls the assets as well as the information about their content and intended distribution. In the unregulated sector there are limited protections against unethical practices such as fraud and pressure selling. For example, there are no compulsory gateway checks to practice or mechanism to stop known wrong doers from offering services to the public. There is no single cause for poor quality services. This could reflect a lack of effort because of the relative low value of many wills compared to other legal services. It may also indicate a lack of familiarity, knowledge or skill. The investigation has considered ways to treat the identified symptoms of consumer detriment.

Options

To address these problems we identified a range of possible solutions which might be implemented alone or in combination (pp.86-94). These were:

1. Reservation and regulation
2. Do nothing
3. Voluntary schemes
4. Consumer education
5. Provider education
6. Compulsory membership of professional bodies
7. Improve existing regulation
8. Partial regulation – reserve only will-writing

Criteria for assessment

These options were judged against their ability to deliver the Regulatory Objectives set out in the Legal Services Act 2007. But in particular we were concerned about their ability to address the problems that we found in our investigations:

- Maintain consumer choice and promote more effective competition
- Deliver good outcomes for consumers
- Address shortcomings in existing regulation

Assessment of options

Option 1: Reservation and a new proportionate regulatory regime for all providers (p.86)

Mandatory regulation will apply to all providers of will writing and estate administration services, with no unregulated providers being able to function in the market. This will ensure a universal set of minimum standards among all providers. This will not create a monopoly for traditionally recognised legal services professionals. All types of provider able to demonstrate that they can competently deliver the activities that they provide may be authorised. In comparison to the existing mix of regulated and unregulated providers, starting with the same standards and protections will allow competition on price and service to operate above the minimum standards set. Those providers who before reservation were subject to the most onerous regulatory burdens will find themselves with more freedom to innovate. These improvements in competition may result in lower prices and improved services for consumers. This, in conjunction with increased consumer confidence due to the standard protections throughout the market, should result in greater numbers of purchases and growth of the market.

Reservation will deliver the following protections against the detriments identified:

1. Up-front competence and suitability gateway checks on all providers (this does not mean specific qualifications)
2. An enforceable code of conduct
3. Risk based monitoring and supervision of providers
4. Appropriate financial protections including insurance
5. Disciplinary and enforcement powers including the ability to suspend and strike off
6. Easily accessible redress mechanisms including access to the Legal Ombudsman
7. Enforceable requirements around the storage wills and succession planning when a provider closes

Mandatory regulation will remove the chance for consumers to choose an unregulated provider. This choice may not always be due to a lack of consumer information; it could be an informed choice based on a lower price. However, research has shown that most consumers do not appreciate the differences between regulated and unregulated providers and wrongly assume that all services are

underpinned by the same level of protection¹. It is our view that the information and power asymmetry in these markets warrants regulatory intervention to protect consumers. We consider potential negative consequences relating to price and access on pages 107-108. We do not consider them significant given the proportionate regulation that we propose.

Option 2: Do nothing (p.87)

Doing nothing would leave the market for will writing and estate administration to continue functioning as it is.

Consumers can currently choose from a wide range of regulated, self-regulated and unregulated providers. There is also a range of prices for services available for consumers to choose from. However, our investigations found evidence of significant consumer detriment in the market. Problems experienced by consumers have and continue to be featured in the national media, potentially leading to a lack of public confidence in legal services. This could be impacting upon access to justice due to lower numbers of consumers seeking assistance with these types of matters and potentially cause unnecessary administrative activity in the public sector by increasing the number of intestacy cases. Further, competition is not operating effectively. There are severe information asymmetries between the average consumer and their service provider, so poor quality providers are not punished through consumer choice.

Regulated providers complain that they are unable to compete on price with unregulated providers due to the regulatory burden they are under. In addition, those providers that are part of self regulatory schemes state that they cannot attract sophisticated consumers due to not having the badge of mandatory regulation, despite shouldering similar direct regulatory costs and potential redress costs as part of their schemes. This includes members of the Institute of Professional Will-writers who are licensed to display the badge of the Office of Fair Trading's Consumer Codes Approval Scheme (CCAS) – the government's approval scheme for trade body self-regulatory schemes. Choosing the do nothing option will allow this detriment to continue. Redress will remain only open to certain consumers depending on the provider they have chosen.

Option 3: Voluntary schemes (p.89)

Two main voluntary schemes already exist within this market; that run by the Society of Will Writers (SWW), and that run by the Institute of Professional Will Writers (IPW). Membership requirements of these schemes include adhering to a code of practice, satisfactory references, criminal records checks, entrance exams (or another means of demonstrating competence) and the holding of professional indemnity insurance. Consumers also benefit from a second tier complaints service provided or facilitated by the self-regulatory body.

A key failing with voluntary schemes is their lack of power to enforce disciplinary decisions. If either body acts to discipline one of its members that member may simply leave the scheme and continue practising without impediment outside the reach of both mandatory and voluntary regulation. There is nothing these voluntary schemes can do to influence standards of those providers that choose not to be a member. Both trade bodies support the reservation of both will-writing and estate administration activities on the basis that voluntary schemes have proved inadequate in protecting consumers. We note that in their consultation response the IPW reported that it has changed a previously held view that voluntary self-regulation could be a practical alternative to mandatory regulation, to a conclusion that reservation was the only viable option. It stated that this change was due to the lack of uptake of such schemes within the unregulated sector, the difficulties in enforcing voluntary regulation and the continuing consumer detriment being caused. The Institute gave an example of an individual that had previously applied for IPW membership but withdrew her application when asked for information to enable criminal record checks to be run. This individual, who had a previous conviction for fraud, was later convicted of defrauding customers of her will-

¹ See Steve Brooker, 'The Consumer's Role', *Understanding the Economic Rationale for Legal Services Regulation: A collection of Essays*, Legal Services Board, 2011, pp.48-49; TLS Survey of 2011, The Law Society research was conducted by ICM Research, 15-17 October 2010, using a random sample of 1001 adults over 18 in the UK (excluding Northern Ireland). The results of the survey were sent to the Consumer Panel, SRA Consumer attitude to the purchase of legal services, February 2011

writing and estate administration company. We consider this support from the main self-regulatory body in the field to be a very significant piece of evidence.

We note that the previous Government decided against including will-writing or estate administration as a reserved legal activity in the 2007. The Government acknowledged at that time that “improvements must be made in the control of quality and standards of will writing and related services in order to protect consumers”.² However, it preferred to give one final try to achieve this through voluntary regulation and consumer education. It was suggested that the LSB could return to this at a later date if real evidence of continued consumer detriment emerged.³ Subsequently the Government promoted membership of the OFT’s Consumer Codes Approval Scheme. This resulted in the IPW obtaining initial approval in 2008 and full approval in 2010. Our evidence shows that pursuing this option has not prevented unacceptable levels of consumer detriment across the market. IPW members account for only a minority of the unregulated sector, and a smaller proportion than the trade bodies that have not yet achieved OFT approval. As set out above, issues of enforceability remain.

Option 4: Consumer education (p.90)

Enhanced consumer education could reduce the information asymmetries that currently exist between consumers and providers. It could also act to provide information to consumers about the difference between regulated and non-regulated providers, and what those differences mean in terms of protection. This would empower consumers to make better informed choices, and would help competition to function more effectively. In most effective markets, it is the role of repeat and regular purchases that effectively ‘educate’ consumers, such repeat purchases are not common in this market.

The costs of educating every consumer to the level where they are able to discern the quality of service they are receiving would be prohibitive – and likely impossible given the infrequency of purchase. Education regarding the implications of regulation may be simpler for consumers to understand, yet there would still be significant difficulties in reaching every consumer that could benefit from the information on offer. The provision of information could be made a requirement by regulatory and trade bodies, but then would only reach those consumers that had already used/ considered using a regulated provider and therefore were likely to have some idea of the benefits regulation could bring them.

Information could also be dispersed through other outlets such as Citizens Advice Bureaux and Law Centres but still would be unlikely to reach total coverage of consumers in this market. Indeed, many consumer-facing outlets have provided information regarding the implications of regulation for a number of years. This includes DirectGov.⁴ Citizens Advice (and previously Consumer Direct), Which! and charities such as Age UK, who all provide consumer guidance relating to will-writing and estate administration. All include guidance on identifying and using providers only providers that offer appropriate safeguards. The Law Society and the charitable sector have run many educational campaigns. These consumer education initiatives, while valuable, have had only limited success. Evidence suggests that a considerable majority of consumers still believe that all providers of will-writing and estate administration activities are already regulated.⁵

It is arguable that a more competitive market, stimulated by higher levels of entry driven by public confidence in more consistent regulation, would drive higher levels of promotional activity by reputable providers, which would have greater impact than more generic educational initiatives.

² See White Paper, *The Future of Legal Services: Putting Consumers First*, 2005, p.79.

³ Parliamentary debate on Legal Services Bill <http://www.publications.parliament.uk/pa/ld200607/ldhansrd/text/70122-0009.htm#07012230000341> (see debate on 22 Jan 2007).

⁴ i.e. via signposting to guidance provided by CAB and Age UK

⁵ LSB Consumer Panel, *Regulating Will-Writing*, July 2011, p.16.

Option 5: Provider education (p.92)

Regular provider education concerning the area in which they operate is likely to help ensure that service provision kept up to date with developments in the law. Moreover, educating providers about consumer needs would facilitate the provision of a more consumer focused service, which in turn would work towards achieving better outcomes for consumers. Education could also address the consequences for consumers of basic protections such as insurance not being in place.

This option would only be effective if providers could be relied upon to comply with the information they receive. There would be no way of ensuring that unregulated providers adjusted their behaviour in any way. Supervision may only be possible of existing members of a regulatory scheme, who would be more likely to hold such basic knowledge already. Finally, our research did not find that high levels of training and skills were needed for simple wills and estate administration.

Option 6: Compulsory membership of professional bodies (pp.92-93)

Under this option all providers would be compelled to be members of a professional body. Any requirements thought necessary could be applied to membership of those bodies, such as competence and suitability requirements, ethical codes of conduct, insurance and other financial protections. In this way the regulator could ensure the minimum standards that it deems necessary. Making membership compulsory would make providers who avoid disciplinary proceedings by terminating their membership unable to continue practising in the market, thus alleviating one of the main problems with voluntary self-regulation. This option would require new primary legislation to achieve. It would in effect bring about statutory regulation by a different means. This would produce different statutory schemes for lawyer and non-lawyer providers of the same services acting in opposition to The Act which was intended to reduce the regulatory maze faced by consumers.

Furthermore, being a member of a professional body is not the same as being authorised to practice by an approved regulator. The LSB would not have independent oversight of these bodies, nor any control of the costs they would impose on their members, as it does for approved regulators. One of the first tasks the Legal services Act 2007 required of the LSB was to ensure separation between the representative and regulatory functions of the legal professional bodies, due to the inherent conflict between those two roles. It is important that not only are disciplinary issues dealt with effectively, but also that consumers have confidence in the handling of these types of issues. As previous research for the LSB by the Regulatory Policy Institute⁶ has noted, "...professional restrictions or practices...can result in restrictions of new entry and the stifling of innovation, including in relation to different ways of doing business". Independent regulation provides a check on such tendencies ensuring that regulation is targeted explicitly on risk.

We also note that soft regulation tends not to grow markets to their maximum potential size. Not only does this affect economic growth, it also artificially reduces demand, in this case for wills which would lead to increased intestacy.

Option 7: Improve existing regulation (p.93)

Our research revealed that existing regulation was failing to prevent sloppy drafting of wills which undermined the ability of many wills produced to deliver on the consumers' desired outcomes. At present there is limited consideration by regulators of the skills, systems and processes firms employ to draft wills or administer estates. As well as liberalising the market through introducing Alternative Business Structures, independent regulation and a legal ombudsman, the LSB has been active in helping regulators develop outcomes focused regulation. Better targeting of risk, through an understanding of the entities in particular could help target supervision and reduce the problems experienced. Under this option regulators will be required to demonstrate to the LSB that their authorisation and supervision regimes target risks in relation to will-writing and estate administration activities.

⁶ Decker, C; Yarrow, G; *Understanding the economic rationale for legal services regulation*, RPI, October 2010.

This is crucial if we are to improve competition in this sector, but improving existing regulation will do nothing to address the problems experienced with those outside of current regulation. Here problems caused by the lack of enforceability of rules set up by trade bodies will continue. Equally, there is little we can do to ensure that rules proposed by those outside statutory regulation are proportionate or targeted at identified risks.

We are not of the view that consumer and general law effectively protect against the identified detriments in the absence of regulation. Unsophisticated consumers are unlikely to have the knowledge to identify poor practice, and the confidence and means to pursue court action. In any event, there are limited grounds for a court to put right defects in wills cause. There are limited private rights of action for breaches of consumer protection regulations relating to poor sales practices. Enforcement action is reliant on local resourcing and prioritisation by local authority trading standards offices. We have not been able to obtain any assurance that it will be possible to prioritise the problems identified in our investigations. Where there are criminal convictions for fraud or theft, in many cases, perpetrators will no longer have the assets or money to fulfil any obligations to recompense their victims.

Option 8: Partial reservation – will-writing (pp.93-94)

The LSB considered a partial regulatory solution whereby only will-writing activities would be regulated along with the current reservation for probate. This option therefore excludes reservation to be extended to estate administration.

Most of the evidence regarding consumer detriment focuses on will-writing, such as problems around quality, sales and storage. This option would ensure that consumers of all will-writing firms would have the same minimum protections in place. However, the process associated with estate administration would not be reserved, except the current probate application process which is already a reserved activity. Instead, a code of practice and voluntary requirements such as having separate client monies and having undergone a criminal check could instead be used.

This option will only partially reduce the risk of detriment in the market. This is because consumers face potential detriment such as financial fraud during the estate administration process when providers have access and control of to estate monies. Inconsistent regulation across a closely linked service of will-writing and estate administration may also increase the risk of confusion among consumers as to what is a regulated service and what is not. Importantly, having a set of non-mandatory requirements for providers of estate administration services such as a code of practice or other voluntary regulatory schemes, would still not be binding on providers and non-compliant firms would still be able to exit such arrangements at any stage.

Summary

Option	Accept	Reject	Tried & Failed
1. Do nothing		X	X
2. Voluntary self-regulatory schemes		X	X
3. Consumer education	X		
4. Provider education		X	X
5. Compulsory membership of professional bodies		X	
6. Improve existing regulation	X		
7. Reservation and regulation	X		

Recommendation

We act immediately to improve existing regulation. Alongside this will-writing and estate administration become reserved legal activities. Through this we will introduce new targeting

minimum standards of regulation across the market to address the problems identified and enhance consumer education through this regulation. Thus we believe we can reduce regulatory burdens, increase competition in the market and ensure basic protections for all consumers.

This impact assessment explores our evidence base and the options described above in greater detail. Also refer to the attached equalities impact assessment for further analysis concerning equality issues.

Question 6: Do you agree that having mandatory regulation for all firms in the market will improve consumer confidence?

Question 7: What business impacts (both positive and negative) do you envisage will occur with the proposed reservation of will-writing and estate administration? How will any such impacts affect your business?

Evidence Base

Background

The Legal Services Board (LSB) launched investigations under Sections 24 and 26 of the Legal Services Act 2007 (the Act) in July 2011, to examine whether there is an unacceptable consumer detriment in the market for will-writing and estate administration. The LSB's approach to the investigation was to identify detriments arising in practice and to consider options for addressing the identified detriments in order to form a view on whether will-writing and estate administration should become reserved activities. There is currently no restriction on who can enter the market and provide will-writing and estate administration services. The level of protection for consumers and regulatory obligations for providers is determined by the type of provider delivering the service and not the risks involved. Solicitors, who account for the majority of these markets, and some other legal service providers, are regulated in respect of all the legal work they perform. Some providers are regulated through requirements of professional membership in other sectors – such as accountants, banks and building societies. Some providers are members of voluntary self-regulation schemes without any statutory underpinning.

This lack of consistent regulation leaves consumers without minimum protections which are currently only available to consumers of regulated firms. Existing regulation covers the majority, though not all, of the market, but quality problems occur across both regulated and unregulated providers.

Evidence shows that many consumers are not being adequately protected at the time that a will is being written or at the time that the estate is administered. Evidence we have provided shows that consumers suffer from detriments in the market, such as poor quality of wills and unethical practices including fraud during administration of estates

Reserving the activities will provide a baseline of consumer protection irrespective of which type of provider services are purchased from. It reduces the risk of detriment which a portion of consumers in the market currently suffer. It will help remove distortions in the market and promote competition between providers on an even regulatory footing. Our proposals aim to both protect consumers from

detriment and ensure that the regulation of will-writing and estate administration is fit for purpose, effective and consistent.

We consider that action is needed to improve competition, protect consumers better and promote the wider public interest. Taking action will also protect the many ethical and robust businesses in both the regulated and unregulated sectors, whose business opportunities, reputation and livelihood may be threatened by failures elsewhere in the marketplace which jeopardise business and consumer confidence. We recommend that the list of reserved activities be extended to include will-writing and estate administration activities. Our analysis does not show significant negative business impacts in reserving will-writing and estate administration; having a consistent regulatory framework for all providers can ensure a common regulatory standard and protect consumers from detriment while also improving the operation the market.

Benefits of proportionate regulation

Having in place a set of minimum regulatory standards across all providers will ensure that consumers are protected in their purchases of wills and estate administration services and that they will have recourse to an Ombudsman service, previously only possible for consumers of solicitors, other authorised legal services providers and some providers regulated in other sectors. We anticipate that the business impacts of extending minimum protections across will-writing and estate administration to prevent regulatory avoidance will be mainly positive and will mean that rogue or non-compliant firms cannot walk away from regulation. Ensuring all providers are subject to a common set of minimum standards will also enable competition on a level-playing field above that level.

The proposals intend to widen consumer choice in service providers further by enabling all the different categories of existing provider to be authorised to undertake newly reserved activities as well as facilitating new entry to a more vibrant, confident market. In this way a common set of minimum protections will be established above which providers can compete with each other, thus raising standards even further. We propose that transitional arrangements should be instituted. These will allow the market time to adapt. We recommend that reservation should not take full effect until at least one regulator has reached the standard set and been approved to authorise the different types of provider currently active within these markets.

Extending reservation is expected to have a liberalising effect on the largest part of the market – existing legal services regulated providers. We intend for the regulation applicable to reserved will-writing and estate administration activities to differ from historical models of legal services regulation. The regulatory measures proposed will be outcomes and risk focussed rather than consisting of prescriptive rules. We expect a sufficient degree of flexibility within the regulatory framework to allow providers to demonstrate how their arrangements will deliver the outcomes set by their regulator. A sharper focus on risks will provide for the required flexibility as well as facilitating the achievement of better outcomes for consumers. Furthermore, it will allow for a reduced regulatory burden on providers deemed to be low risk, thereby delivering more targeted and proportionate regulation across the market. We will expect regulators seeking to add newly reserved will-writing estate administration activities to the activities that they regulate to demonstrate that they have reviewed their existing rulebooks with a mind to removing any existing ineffective, inappropriate, disproportionate or unnecessarily restrictive obligations for providers of the relevant activity(ies).

Shortcomings of alternative approaches

Alternatives to regulation such as self-regulation, quality marks and guidance are currently proving inadequate in this market despite experience over several years. They have not addressed the chief concern of unscrupulous firms and rogue persons setting up shop and avoiding regulatory sanction, as such voluntary schemes lack enforceability. Consumer education by itself is not feasible given that wills and estate administration services are infrequent purchases and often occur in circumstances of great personal stress. At present there is no restriction as to who may deliver

these services to the public and the regulatory protections enjoyed by customers of regulated providers, including access to an independent Ombudsman and valuable to many consumers of will-writing and estate administration, are not enjoyed by consumers of unregulated firms.

Extending proportionate regulation to cover all firms ensures protections for consumers regardless of what services are purchased or which firms are used, and allows regulators to test that only fit and proper persons can own or manage providers. This allows a more effective functioning market that facilitates fairer competition. This will be accompanied by removing reliance on barriers to entry and any misaligned regulations, as regulators adopt a more risk-based approach to regulating providers. We anticipate that in the future regulators will be able to tailor their supervisory activities to target those areas of higher risk, ensuring better outcomes for consumers.

Policy background and evidence collection

The LSB started preliminary inquiries into will-writing in July 2010 with a stakeholder workshop. In September 2010, we asked the Consumer Panel 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 2011, which highlighted systemic issues and recommended statutory regulation of will-writing (estate administration was not investigated). Following this, the LSB moved the investigation onto a statutory footing and extended the investigation to include estate administration, including whether the reach of reserved probate activities, as currently defined, is appropriate. A summary of the information and evidence collected by the LSB is set out below. We have set out at Annex 1 a summary of table of the key problems identified, their impacts and supporting information.

Will-writing

Original research conducted included, (co-sponsored by the SRA and the OFT) which comprised⁷:

- shadow shopping exercise –(a form of mystery shopping that shadowed the experience of 102 real consumers using a mixture of will-writing companies, solicitors and other providers. The sample included individuals with both simple and complex needs. An expert panel of different provider types assessed the wills that they had written);
- consumer survey (a survey of 500 recent will purchasers);
- business survey (a survey of nearly 100 will-writing businesses);

Full consultation, calls for evidence and connected activity (including stakeholder interviews and workshops) – ingathering the views of a wide range of interested parties and over 400 case studies provided by consumers, beneficiaries, providers and others; Data derived from complaints patterns⁸; The Consumer Panel's report, *Regulating will-writing*⁹.

Estate administration

Original research conducted research which comprised:

- a consumer survey (a survey of over 2,000 individuals that had who had used probate and estate management services using different types of providers or gone through the process themselves within the previous three years plus 25 depth interviews)¹⁰; and
- a business survey¹¹ (100 depth interviews with a range of business types to gain an understanding of the way in which they conduct estate administration work including solicitors, will-writing firms, accountants, banks/ building societies, charities, financial advisers and trust corporations)

⁷ IFF, *Understanding the consumer experience of will-writing services*, July 2011: http://www.legalservicesboard.org.uk/what_we_do/Research/Publications/pdf/lbsb_will_writing_report_final.pdf

⁸ Including OFT analysis of Consumer Direct data.

⁹ See

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

¹⁰ YouGov, *The use of probate and estate administration services*, January 2012:

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

¹¹ IFF, *Probate and estate management services*, January 2012.

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

Full consultation call for evidence and connected activity (including stakeholder interviews and workshops); Data derived from complaints patterns; The Consumer Panel's report, *Probate and estate administration*¹²

LSB call for evidence and consultation

The LSB undertook a call for evidence from September to November 2011, which sought views on both the Consumer Panel's recommendations for will-writing and also on issues relating to probate activities and estate administration. On 23 April 2012 the LSB issued a consultation titled *Enhancing consumer protection, reducing regulatory restrictions: will-writing, probate and estate administration activities* which consulted on a proposed policy recommendation to reserve will-writing and estate administration activities. The consultation also sought views on a draft impact assessment. Views received were from a range of stakeholders including members of the public, consumer groups, Ombudsmen, providers and professional/trade bodies.

There was general agreement among most respondents to our 23 April consultation that the LSB's review of evidence had been comprehensive. To the majority of respondents consulted the current system of general consumer protections, plus voluntary regulatory schemes, allowed an unacceptable level of consumer detriment to exist in the market. There was also general agreement among respondents to the consultation paper in the LSB's assessment of consumer harm and that existing consumer protections and voluntary regulation schemes were for the most part inadequate to address consumer harm. This included the bodies that currently operate voluntary regulatory schemes in this sector.

IPW, one of the two main trade bodies providing a voluntary regulatory scheme for will-writing and estate administration companies, explained that it had changed its previously held position that voluntary self-regulation could be a practical alternative to reservation, to a conclusion that reservation was the only viable option. It stated that this change was due to the lack of uptake of such schemes within the unregulated sector, the difficulties in enforcing voluntary regulation, and the evidence of continuing consumer detriment being caused.¹³

Policy Problem

LSB's investigations into the regulation of will-writing, probate and estate administration have found that consumers were not adequately protected both at the time the will was written and at the time the estate is administered.¹⁴ Firstly for wills we found problems with:

- The quality of wills produced;
- Unethical sales practices;
- Arrangements for the safekeeping of wills produced;
- Shortfalls in service level;
- Failure to ensure arrangements for effective redress when things go wrong;
- Market distortion caused by partial coverage of regulation.

For estate administration we found problems with:

- Unethical sales practices and fraud (including failure to prevent proven wrong-doers from setting up business in the market);
- The safekeeping of consumers' money and other assets;

¹² The LSB Consumer Panel, *Probate and estate administration*, February 2012:

http://www.legalservicesconsumerpanel.org.uk/publications/consultation_responses/documents/2012-03-19_LSB_PEAFinal.pdf

¹³ Responses are published on the LSB web-site along with a summary of feedback and LSB response document:

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

¹⁴ Submissions received to the LSB's *Call for Evidence: investigation into will-writing, estate administration and probate activities*:

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

- Shortfalls in service levels;
- Failure to ensure arrangements for effective redress when things go wrong;
- Market distortion caused by partial coverage of regulation in that only the probate application stage of estate administration is subject to mandatory legal services regulation resulting in added cost, disrupted service and opaqueness over safeguards.

Detriments that affect consumers of unregulated providers also include having to seek redress through the courts, associated high administrative burdens associated with this, as well problems associated with a lack of private right of redress through consumer protection regulations. Further detriments are caused by the current existence of an unlevel playing field whereby unregulated providers have a competitive advantage by avoiding many of the costs of basic quality assurance and consumer protections, making competition on price and service harder for those firms bound by voluntary regulatory schemes.

At present there is no restriction on who can enter the market and deliver services outside of regulation.¹⁵ There are solicitors and other types of regulated legal services providers. 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. 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. Our best estimate is that there are around 5,484 firms offering will-writing services, of which 4,634 are solicitor firms and 850 are independent will-writing companies including d members of trade bodies (IPW, SWW). Around 85 other firms also offer will-writing services but are not regulated in the legal services sector or other sectors; are not members of a professional body operating membership rules; or members of voluntary regulatory schemes run by trade associations. These firms account for only about 1.5 per cent of all firms in the market.

While there is a diversity of suppliers in the market¹⁶, solicitor firms that are regulated by the Solicitors Regulation Authority (the SRA) are believed to account for at least two-thirds of the will-writing market.¹⁷ Our research indicates that around 86 per cent of consumers purchasing estate administration services use solicitor firms, and around 14 per cent use non-solicitor firms which comprise mainly independent trust corporations, banks / building societies, accountancy firms and financial advisers.¹⁸ Of the latter group we know that about half – or 7 per cent – are not regulated by either a regulator, voluntary code or are members of a professional body. Anecdotal evidence points to a handful of independent trust firms being in this category, though exact numbers are difficult to quantify.

Problems have been discovered across both the regulated and unregulated markets but issues such as safeguarding of wills, unethical sales practices, absence of protections to safe-keep consumers' money, and failure to deliver effective redress are mainly restricted to the unregulated sector.

We propose two key ways to tackle these detriments:

- 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. We would like to promote competition in the market but to retain essential protections in order to have both a fair and competitive market for consumers;

¹⁵ With the exception of the reserved activity of preparing the papers on which to found or oppose a Grant of Probate.

¹⁶ For a snap-shot of the diversity of the supply-side of the market see the impact and market picture document published by the LSB in April 2012 impact assessment published by the LSB in April 2012:
http://www.legalservicesboard.org.uk/what_we_do/consultations/open/pdf/willwritingcon_impact_assessment_final.pdf

¹⁷ Law Society 2010 survey results as submitted to Legal Services Consumer Panel *Call for Evidence* indicate that 67% of wills are written by solicitors. Moreover, An Office of Fair Trading survey of 2000 adults from February 2010 provided a figure of 88%.

¹⁸ *YouGov, The Use of Probate and Estate Administration Services*, January. 2012, p.11.

- 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. All existing types of businesses active in these markets must sign up to regulation to continue to practice if they adhere to required standards.

These options were judged against their ability to deliver the Regulatory Objectives set out in the Legal Services Act 2007. But in particular we were concerned about their ability to:

- Promote competition
- Deliver good outcomes for consumers
- Address shortcomings in existing regulation

The LSB has considered the Government's approach to regulatory simplification and removing unnecessary regulatory barriers that can stifle innovation and competition. The LSB views the liberalisation of the legal services market to external ownership through the introduction of Alternative Business Structures (ABS) and helping Approved Regulators (ARs) to improve the way they regulate by focusing on outcomes, as essential to ensuring competition and innovation within a framework of consistent regulatory protections.

We propose 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 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.

Evidence of problems

Will-writing

Evidence of problems in will-writing include: poor quality wills; inappropriate sales practices; missing wills; consumer redress; and differing levels of regulation. Potential solutions are either continued reliance on general consumer protections and voluntary regulatory arrangements including codes and guidance, or mandatory regulation which requires a new form of proportionate regulation (though not based on the solicitor-model of regulation). This section describes the evidence which, in aggregate, demonstrates that the risk of detriments will remain unless regulation is placed on a statutory basis and therefore is consistent and binding for all firms.

Poor quality wills

The shadow shopping research undertaken by IFF Research¹⁹ provides strong evidence of widespread incidence of poor quality wills being drafted which would have failed to deliver what the testator wanted, or which would have contained unclear clauses that would lead to difficulties administering the estate. Despite its methodological strength, there are some constraints on this evidence as the sample size was 102 wills, so the findings should be considered indicative rather than representative. However, these findings are also supported by much anecdotal and case study evidence submitted to the LSB during the course of consultations. 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 (non-solicitor) – such as using an on-line or published will-writing package.

¹⁹ See IFF, *Understanding the consumer experience of will-writing*, July 2011. This can be accessed on the LSB website: http://www.legalservicesboard.org.uk/what_we_do/Research/Publications/pdf/lwb_will_writing_report_final.pdf

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. The impact of such failures include wills being found to be invalid, potentially jeopardising the testator’s wishes and failing to deliver what was originally intended, along with beneficiaries potentially missing out on bequeaths.

Reasons for deficient wills included the document not accounting for the estate fully, containing technical errors, contradictions or omissions. Wills also failed because of ambiguities that would lead to uncertainty about what was intended and the distribution of the estate.

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;
- 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.

Inappropriate sales practices

The evidence compiled by the LSB indicates significant incidence of detriment arising from inappropriate sales practices. This generally was more of a concern for the unregulated will-writing and estate administration firms. The purchase of unnecessary services and features was prominent within the hundreds of case studies submitted during the investigation. The Consumer Panel’s analysis refers to a recurring theme of “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 cases 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 behalf”.²⁰

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 services,²¹ 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

²⁰ LSB Consumer Panel, *Regulating Will-Writing*, July 2011, p.26.

²¹ See IFF *Understanding the consumer experience of will-writing*, July 2011. (figure excludes executor services),

cost being explained to them; this is worrying given the high cost of these services compared to the cost of will-writing. 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 services.²² It is clear that there is a greater propensity for over-selling among the unregulated part of the markets²³. While cross-selling is not necessarily wrong and indeed potentially desirable in some cases, it is essential that the purchase is made on an informed basis with clarity and that unbundled options are available. Regulation can support purchasing decisions among infrequent consumers (and who are at risk of purchasing under stressful conditions) providing different incentives for fair practice, including punishing transgression.

There have been a number of high profile convictions relating to illegal sales practices in these markets, many of which the Consumer Panel referenced in their report. 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 Service.²⁴ In one of the cases the Judge passed a 14-month prison 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 trust”.²⁵

A secondary issue found was the problem of asymmetrical information in the purchasing decision, which was compounded by the fact that the purchase was made often at times of stress (i.e. testator was ill) and happened on an infrequent basis.

Arrangements for the safekeeping of wills

The investigations found widespread incidence of a failure to be able to locate wills after a testator dies. Missing wills cause significant detriment to consumers as well as imposing additional costs on consumers, regulators and firms in seeking a new will. Trade body registration data indicates that many independent will-writing companies close within the first few years of opening.²⁶ It follows then that most of the detriment caused regarding missing wills is among non-solicitor firms, especially those not subject to voluntary regulation or codes. 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 cases.²⁷ 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 lost.²⁸ Missing wills usually occur among non-solicitor firms (especially those subject to no regulation) because solicitor firms have requirements in place specifically in the event of insolvency and succession planning.

While the main *voluntary* schemes provide sufficient exit and succession planning requirements to guard against wills going missing, partial coverage and enforceability problems mean that issues remain. However, as the nature of any voluntary scheme participation could not be enforced it is still

²² *Ibid.*

²³ See also “sales practices, costs and value”, summary of problems and analysis, Annex 1 of this report.

²⁴ IPW response to the LSB’s call for evidence.

²⁵ *R v Ventrighalia* [2011] EWCA Crim 192.

²⁶ IPW cited in LSB Consumer Panel’s Will writing - *Call for Evidence Case Studies and Submissions* – 60% chance of will-writing company closing within four years of opening: http://www.legalservicesconsumerpanel.org.uk/ourwork/will_writing/Willwritingsubmissions.html

²⁷ See *YouGov, The Use of Probate and Estate Administration Services*, January, 2012.

²⁸ STEP, *Cowboy will-writing, Incompetence and dishonesty in the UK wills market*, January 2011. Also see here: <http://www.step.org/pdf/Will%20Writing%20Report.pdf>

probable that the most unscrupulous providers would be unlikely to opt-in. Those firms who remain outside the scope of any voluntary regulation have little in place to protect consumers in the event of missing wills or if they went insolvent and had no succession plan in place. These consumers, should they wish, could only seek private redress which is likely to be both slow and expensive.

The impact of a missing will can be significant, with beneficiaries usually impacted upon the most. If the will cannot be found the result will be intestacy or reverting to an earlier will that can be located. This will mean enhanced administrative costs as well as the testator's wishes not being met, It 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.

Failure to ensure arrangements for effective redress when things go wrong

Consumers of providers within the unregulated sector have limited practical options for redress when they receive a poor service. This is despite research showing that consumers do not understand the differences between regulated and unregulated providers and believe that all services are underpinned with the same level of protections²⁹. Most consumers of regulated providers, within the legal services sector and other sectors, are ensured of a range of enforceable protections to provide access to appropriate redress when they suffer unfair detriment which is the fault of the provider that they have purchased services from. This includes regulatory requirements for providers to have appropriate indemnity insurance and compensation arrangements, appropriate in-house complaints procedures and access to an independent Ombudsman with statutory powers to award compensation. Statutory regulators and Ombudsman have powers to investigate allegations on behalf of the complainant.

We have set out in the next section below in unregulated parts of the market consumers have limited practical options for obtaining redress. Within the voluntary schemes, protections exist but there are difficulties with enforcing these because there is no statutory basis for doing so.

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 protections³⁰.

Market distortion caused by partial coverage of regulation

The proposal to introduce regulation in the form of reserving will-writing estate administration differs from the form of regulation that has historically functioned for solicitors. This is because the market would remain open and competitive for new entrants and for the vast majority of providers their regulatory obligations and compliance requirements would experience little, if any, real change. Rather than creating differing levels of regulation, we propose to regulate all will-writing firms on the same basis would ensure consistency in the regulatory approach for all firms, providing consumers with the same protections regardless of which type of provider they purchase their wills from (e.g. solicitors, will-writers).

Extending proportionate regulation that is consistent for all providers is expected to have a liberalising effect on the market because the supervision of firms by regulators can concentrate on the most risky firms while reducing the supervisory burdens on those firms assessed as lower risk. There is also overall merit in ensuring that the regulatory arrangements in place across the whole market are consistent and do not create undue distortions; the current asymmetry of regulation across will-writing and estate administration means that there is an unlevel playing field between providers operating under different arrangements which gives those firms who are currently wholly outside the scope of regulation a competitive advantage as they are not required to have any assurance and compliance systems/controls in place.²⁰

²⁹ For a summary of research see Steve Brooker, 'The Consumer's Role', *Understanding the Economic Rationale for Legal Services Regulation: A collection of Essays*, Legal Services Board, 2011.

³⁰ *Ibid.*

It is possible that the inconsistent nature of the protections give solicitor firms an advantage as consumers confer a 'quality mark' on their services due to the known protections in place compared to will-writing firms. It is not known what the impact of consumer confusion is, or the aggregate impact of having inconsistent regulatory features in place across the market between different providers. However, it is possible that consumer confusion may lower confidence in purchasing services, dissuading some purchases. As only the consumers of solicitors and other regulated providers have protections including recourse to the Ombudsman, it may also result in reduced consumer confidence in non-solicitor firms and a preference for solicitor firms because of a perceived sense of higher quality and regulatory safeguards. Such a situation confers an unfair advantage to solicitor firms and potentially undermines benefits of having a plurality of supply in the market for these services.

Estate administration

Evidence of problems in estate administration relate to several causes which include fraud, lack of financial protections, inconsistent and opaque pricing, and service issues. On the estate administration side, we have less quantified evidence to draw from, though clearly the risk of detriment is high for beneficiaries as it is chiefly during this stage of the process that client monies are involved. Much of our evidence draws from individual case studies, views and experiences relayed by interested parties including respondents to the consultation, analysis of complaints data and survey information. In relation to estate administration, the risk of consumer detriment can be considerable, with beneficiaries and charities impacted upon due to fraud or quality issues (delay, etc) and which can affect testators' bequeaths. These have implications for policy development; potential solutions essentially come down to either voluntary regulatory arrangements or approaches which include codes and guidance, or to mandatory regulation which requires a form of reservation (though not necessarily based on a solicitor-model of regulation).

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

Fraud at the stage of estate administration is a significant risk causing considerable consumer detriment when it occurs. Providers acting as executors are responsible for collecting in the estate's assets and then have full control of those assets – i.e. they have full access to client money. 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. Ensuring that client money and assets are protected is seen as a prize of regulation of legal services and across many other service sectors³¹.

Our investigations have highlighted evidence that fraud and theft from estates happening in practice See Annex 1 for further details, some examples includes:

- 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 £400k.³²
- The Crown Prosecution Service (CPS) has informed us that there is steady stream of prosecutions of service providers³³.
- Charities, providers and individuals have reported that they have experienced suspected fraud, theft and poor financial practice e.g. A STEP survey showed that nearly half of members surveyed had come across suspected cases of theft or fraud from an estate.³⁴

Respondents to the LSB consultation have identified key areas in relation to fraud:

- Fraud is difficult to detect and few prosecutions have occurred, where it does occur it is usually high impact detriment;

³¹ 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

³² See LSB Consumer Panel, *Regulating Will-Writing*, July 2011, p.8.

³³ Letter from Andrew Penhale, CPS Central Fraud Squad.

³⁴ STEP, *Cowboy will-writing, Incompetence and dishonesty in the UK wills market*, January 2011. Also see here: <http://www.step.org/pdf/Will%20Writing%20Report.pdf>

- Respondents pointed to the risk of fraud but that this risk tends to materialise in relation to retention and management of client funds;
- Quantifying the level of fraud is difficult and little data is available.

STEP estimates that for 2005 fraud cost around £100-150m. Feedback from charities and other stakeholders evidence points to charities as 'soft targets' by those who want to exclude them from bequests. Under the current system, there is a risk that 'struck off solicitors' and rogue providers can have access to client monies as there are no gateway checks, or mandatory regulatory arrangements, to screen and indentify high risk providers. Such providers are unlikely to be members of voluntary regulatory codes and other non-binding quality arrangements. Financial protections such as separate client accounts are essential in any regulatory arrangements for consumers and can help to minimise the risk of fraud. However, a regulatory solution is needed to ensure that gateway checks are in place to screen for rogue providers and to increase consumer confidence in the estate administration process.

Inconsistent and opaque pricing

Excessive costs and deficient costs information was the largest cause of complaint about estate administration services within a sample of data for the Legal Ombudsman.⁵⁶ The *YouGov* survey³⁵ 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.

There was some concern around pricing and that consumers fail to shop around – or are approached by a company connected with the deceased's banking or accounting services. Many consumers complain about a lack of transparency and predictability about costs, especially when services are provided on a billable hour basis. Estate administration services are considerably more expensive than will-writing services with an average cost of around £1,700.³⁶ However, costs vary significantly. In 51% of cases, services cost less than £1,000 but in 18% of cases, the bill exceeds £3,000.³⁷ There are many different types 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. Average costs 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 combination.³⁸

There was little evidence in the case studies of poor sales techniques in relation to executorships. However, 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 doing."³⁹

³⁵ See *YouGov, The Use of Probate and Estate Administration Services*, January 2012.

³⁶ *Ibid.*

³⁷ *Ibid*

³⁸ *Ibid*

³⁹ See the LSB's call for evidence:

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

Shortfalls in service levels

There is evidence that consumers are regularly experiencing poor service. Only 68% of consumers surveyed by *YouGov* reported being satisfied with the service that they received.⁴⁰ *YouGov* survey data, Legal Ombudsman complaints data and case studies received by the LSB as part of our consultation 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.

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 administering the estate, this was arranged by the testator.⁴¹ 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 observed in its response to our call for evidence that "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 renounce."⁴²

Regarding estate administration, there is no strong evidence to suggest that there is wide incidence of technical errors causing detriment.

Failure to ensure arrangements for effective redress when things go wrong

The position here mirrors that for will-writing activities as set out on page 80.

Market distortion caused by partial coverage of regulation

The position here mirrors that for will-writing activities as set out on page 80.

Causes

Although it is not possible to fully establish causality, we have identified a range of different causal factors.

Barriers to effective operating of the market

Consumers are not well placed to exercise choice in these markets. A key issue is the asymmetry in information and power between providers and consumers. Consumers rarely use these types of services meaning their experience has little opportunity to influence future purchasing decisions. Many consumers lack the knowledge to be able to identify any service failings or to judge the necessity or value for money of services offered. For example, the shadow shopping indicated that consumers who received a poor quality will did not realise there were problems. And while it is the deceased's wishes and the value of their estate that are threatened by disputes caused by poor

⁴⁰ See *YouGov*, *The Use of Probate and Estate Administration Services*, January 2012.

⁴¹ *Ibid.*

⁴² See LSB Consumer Panel, *Regulating Will-Writing*, July 2011.

quality wills, they are obviously no longer available to clarify what they intended, or able to help resolve problems or seek redress.

There is a lack of accessible quality and price data to help infrequent, unknowledgeable consumers to choose between providers. *YouGov* survey data indicates that in around one third of cases where there is professional assistance with administering the estate, this was arranged by the testator. 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. However, 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 renounce⁴³.

Where consumers do shop around, and our research found more do for will-writing services than in many other legal services markets, 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). We set out on page 80 that research indicates that consumers do not understand the differences between regulated and unregulated providers and believe that all services are underpinned with the same level of protections. The case studies that we received confirm that this is happening in practice.

Fraud and inappropriate sales practices

The main cause of fraud and poor sales practice is likely to be unethical behaviour. These markets provide particular incentive and opportunity for unscrupulous behaviour. This includes the opportunities provided by the asymmetry of information and power between providers and consumers. This includes the vulnerability of consumers because of the sensitivities and emotions involved and people tend to write wills as they get older or at a time of illness. With estate administration the provider often controls the assets as well as the information about their content and intended distribution.

It is our view that in some instances overselling of unnecessary or poor value products may also be caused by gold-plating services or a lack of knowledge by some providers about what services are necessary in particular circumstances.

Missing wills

The causes of missing wills include the high rate of firms closing with no succession firms and no robust plan for an orderly exit and insecure storage practices.

Quality of wills

There is no single cause for poor quality services. 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 wills. 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 a lack of effort – perhaps because it is low value work with mistakes rarely spotted. It may also indicate a lack of knowledge and skill.

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 2011. We also heard worries

⁴³ LSB Consumer Panel, *Regulating Will-Writing*, July 2011, p.34.

expressed about inexperienced will-writers entering the market without having first learnt their —craft under supervision within an established provider.

Failure to ensure redress when things go wrong

We have set out on page 80 the barriers consumers face to seek and obtain redress in the unregulated sectors.

Opaque pricing and services

Information asymmetry, limited market experience of consumers and a lack of shopping around limit competition in the market and thus limit the incentives on firms to provide transparent pricing and service offering.

Current Progress

The LSB has already taken substantial steps to improve legal services regulation and liberalise the legal services market in line with the Act. Delivering regulation that is independent of inappropriate professional or provider influence is being achieved through the separation of regulation from professional bodies. The introduction of alternative business structures enables greater contestability and innovation across the whole market. And the improvement of complaints handling with legal services, including the introduction of the Legal Ombudsman, are beginning to improve customer experience and confidence as well as providing the sort of feedback that supports a more responsive and competitive market.

A relentless focus on improving the quality of regulation in legal services is at the heart of the LSB work programme. To realise the full potential of the Act, in areas such as will-writing and estate administration where there is evidence of consumer detriment arising from a combination of inconsistent achievement of proper standards of work and lack of contestability in the market. The LSB's focus should be on achieving better regulation to support innovation and competition and achieves consistent consumer protection, thereby improving consumer confidence to choose and use legal services.

Policy Objectives

The main policy objective is to ensure that the current risk of detriment to consumers of will-writing and estate administration services is reduced to an acceptable level. Other policy objectives that this proposal aims to achieve are:

- To improve regulatory consistency across the market which will ensure a level playing field for all firms and therefore a better functioning market for consumers;
- To keep the market open to all types of will-writing and estate administration providers. As provided for by Parliament within the Act, this means breaking the link between professional title and authorisation of reserved activities.
- To remove unnecessary barriers and supervisory burdens for providers who are assessed as low risk because, for example, of the types work, consumer type and quality assurance and compliance systems they have in place.

Policy Options

The LSB's proposal identifies two key ways to tackle the consumer detriments that have been identified in our research and consultation for both will-writing and estate administration:

- 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. This will mean retaining essential protections while reducing regulatory restrictions on how businesses may organise themselves, innovate and maximise their competitiveness.
- 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. All existing types of businesses active in these markets would face up to a basic level of regulation to ensure that they adhere to required standards.

It is not the role of regulation to prevent consumers exercising their legitimate choice as to whether or not to seek professional assistance. 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. We do not propose restrictions or regulation of packages developed to inform and guide individuals over and above that provided by general consumer law.

The LSB proposed approach is set out in more detail below, along with alternative options that have also been considered.

Option 1

LSB's proposed intervention – Reservation and a new proportionate regulatory regime for all providers

The LSB's preferred option to tackle the identified detriments in the market is to improve the application of existing regulatory protections and reserve will-writing and estate administration activities so that only providers authorised and regulated by a legal services regulator may undertake them.

The LSB takes the view that the legal activities that should be reserved are:

- Will-writing and legal activities provided ancillary to the writing of a will.
- The administration of an estate of a deceased person and legal activities provided ancillary to the administration of an estate.

We continue to support individuals being able to act for themselves and also to provide free advice to help others. Our proposal is that regulation should extend to providers delivering will-writing and estate administration activities in expectation of fee, gain or reward. Where consumers utilise a self-completion aid, such as a do it yourself will-writing pack, both the activity of the consumer and the publication of the pack or software itself will fall outside the scope of the proposed new reservations. However, if a checking service is provided in addition to the self completion, we intend that this will fall within the scope of the new reservations.

We do not intend for providers of related services, such as inheritance tax advice, that are not provided in conjunction with either the writing of a will; collecting, realising or distributing estate assets; to be caught within the scope of new reservations. Further, we do not intend to extend regulation to people choosing to write their own will, or beneficiaries to an estate administering it themselves. Providers of help or assistance will only be regulated when performing the activities listed in the preceding paragraph in expectation of fee, gain or reward.

Any organisation wishing to regulate the activities will have to apply to the LSB under the *Legal Services Act 2007* (LSA) Schedule 4 process. This includes existing legal services regulators should they wish authorise providers to undertake newly reserved activities. Alongside this document, we are consulting on draft guidance on the type of regulation that we will expect.

As set out on page 73, this does not mean creating a solicitor monopoly but keeping the market open to all types of will-writing and estate administration providers. All types of provide able to demonstrate that they can competently deliver the activities that they provide may be authorised. Regulation will differ from historical models of legal services regulation. This means more risk-based monitoring and supervision to make regulation more effective at delivering good outcomes to consumers. Existing regulators will be required to demonstrate to the LSB that its regulation is fit-for-purpose for addressing the risks in these specific activities.

The key features of regulation that will protect the identified detriments include:

- Up-front competence and suitability gateway checks on all providers (this does not mean specific qualifications)
- An enforceable code of conduct addressing sales practices
- Risk based monitoring and supervision of providers
- Insurance and other financial protections
- An enforcement strategy that incentivises and encourages compliance, deters non-compliance and punishes transgressions appropriately including financial penalties and the ability to strike off
- Easily accessible redress mechanisms including access to the Legal Ombudsman
- Enforceable requirements around the storage of wills and succession planning when a provider closes.

The LSB takes the view that bringing unregulated providers into the scope of regulation will ensure that consumer expectations of all legal services, including the preparation of wills and the administration of an estate, are regulated and that this perception reflects reality. As not all providers of estate administration services are currently regulated, there remains some disparity between consumers' perception of what is, and what in reality is not, covered by regulation.

Alternative options considered

The LSB has explored numerous alternative options to regulation. While certain elements are attractive, the key drawback is that they are essentially voluntary and therefore do not adequately cover all consumers or guarantee sanction against non-compliant firms. Reservation would not impose significant costs on the majority of firms which are already members of voluntary regulatory schemes, but would ensure regulatory consistency across the whole market. Hence the apparent financial merit of alternative options is significantly lessened.

Option 2

Do nothing option

The LSB considered the 'do nothing' scenario. This would leave the market functioning as it is. The identified consumer detriment would remain in will-writing and estate administration activities, and no immediate remedy would be in place to mitigate future risks.

This could be impacting upon access to justice due to lower numbers of consumers seeking assistance with these types of matters and potentially cause unnecessary administrative activity in the public sector by increasing the number of intestacy cases. Further, competition is not operating effectively. There are severe information asymmetries between the average consumer and their service provider, so poor quality providers are not punished through consumer choice.

The market for will-writing and estate administration services would continue to only be partially regulated either through legal services regulators that require those that they authorise to be regulated in a similar way for all legal activities that they undertake, whether Parliament has determined the need for them to be reserved legal activities or not, regulators or professional bodies from different sectors overseeing providers where the majority of their work is in that sector e.g. banks and accountants⁴⁴, or through voluntary regulation via bodies such as IPW and SWW, who have voluntary regulation in place around estate administration and probate services. Some providers would, however, remain outside the scope of regulation altogether. The landscape is complicated for consumers to navigate and differentiate between different levels of consumer protection. Most believe, wrongly, that all providers are subject to the same protections. The complicated and uneven regulatory landscape is also a challenge for new businesses entering the market.

Regulated providers complain that they are unable to compete on price with unregulated providers due to the regulatory burden they are under. In addition, those providers that are part of self regulatory schemes state that they cannot attract sophisticated consumers due to not having the badge of mandatory regulation, despite shouldering similar direct regulatory costs and potential redress costs as part of their schemes. This includes members of the IPW who are licensed to display the badge of the Office of Fair Trading's Consumer Codes Approval Scheme (CCAS) – the government's approval scheme for trade body self-regulatory schemes. Choosing the do nothing option will allow this detriment to continue. Redress will remain only open to certain consumers depending on the provider they have chosen.

While research has shown that around a quarter of wills in that sample do not pass a quality check, it should be noted that around three quarters of wills are fit for purpose. The risk is that doing nothing creates incentives in the market for the small number of unregulated providers (around 1.5 per cent of total firms) to provide services which have little in way of protections in place for consumers. These risks are likely to remain if no intervention takes place. The role of wider market liberalisation through ABS increasing competition will not, in itself, adequately reduce risks for consumers. It is possible that an increasingly competitive market with lower barriers to entry because of the lifting of external ownership requirements for law firms, could exacerbate the risk of detriment occurring as a competitive advantage could favour some providers in stepping outside the scope of regulation. Just as Parliament has judged that a regulatory framework is needed to prevent 'a race to the bottom' in ABS, so a proportionate response is needed to ensure the optimal balance of incentives.

The LSB considers that a 'do nothing' scenario would not remedy any of the identified detriments, nor reduce the risk posed by future consumer detriment. The LSB takes the view that to do nothing would see detriment occurring among consumers of unregulated firms continue, and risk impacting negatively on consumer confidence in legal services. There would be no option for redress for consumers of unregulated providers through the LeO. Under this option consumers of unregulated providers could only seek redress through the courts, which is likely to be expensive and have the negative effect of increasing the caseload of the courts. Using the courts for redress may also potentially increase delays for consumers seeking redress, and therefore risk compounding the level of detriment experienced by them.

⁴⁴ Provider will be regulated but regulation may not explicitly cover will-writing and estate administration activities.

Under this option there would be no additional compliance costs on unregulated providers as regulation would not be expanded to include them, but there may be additional and on-going costs. Costs will be imposed on consumers of unregulated providers who will have to resort to the Courts to privately seek redress for detriments. This is likely to be costly to individual consumers in terms of financial costs and delay. This also has costs for HM Courts Service due to increased caseload. Also, there may be ongoing costs in the form of remedial action for detriment caused by unregulated providers in the market.

As in the non-regulatory option, there would also be costs in doing nothing and maintaining what would be a 'non-level' playing field among providers because not all providers would be within the scope of regulation. This can have the effect of maintaining a non-level playing field whereby some providers are unregulated and do not need compliance systems in place, while others do. This can impose a cost to some consumers and deter fair competition across the market which may distort prices for legal services.

Option 3

Voluntary schemes

The LSB considered non-mandatory regulatory options in the area of will-writing and estate administration. These schemes include voluntary arrangements and self-regulation, examples of which include the schemes run by the existing will-writing trade bodies.

Two main voluntary schemes already exist within this market; that run by the Society of Will Writers, and that run by the IPW. Membership requirements of these schemes include adhering to a code of practice, satisfactory references, criminal records checks, entrance exams (or another means of demonstrating competence) and the holding of professional indemnity insurance. Consumers also benefit from a second tier complaints service provided or facilitated by the self-regulatory body.

Voluntary schemes have the benefit of getting different providers to agree to a common set of requirements to guide their business conduct. This is often done in collaboration with the firms affected and has the advantage of being flexible and able to be updated (e.g. such as a code of practice) without the approval of an independent oversight body.. Also, voluntary schemes can act as a 'quality mark' for consumers and can emulate a lot of the supervisory requirements and regulatory arrangements contained in statutory regulatory regimes. A voluntary scheme which covers both will-writing and estate administration could incorporate elements to reduce the risk of detriment to consumers such as having gateway authorisation checks in place, a voluntary scheme for redress and appropriate financial protection arrangements to ensure client monies are kept separately. The core elements of a voluntary scheme are largely captured in the present requirements and codes of practice of the trade associations such as the IPW and SWW, though their membership does not cover the whole market. Such arrangements, however, even if only voluntary, are not cost free because they still require firms to have in place a certain level of compliance and quality assurance processes. Indeed, strong self-regulation will potentially be more expensive than statutory regulation as the costs would be spread over the full provider base.

We note that the previous Government decided against including will-writing or estate administration as a reserved legal activity in the 2007. The Government acknowledged at that time that "improvements must be made in the control of quality and standards of will writing and related services in order to protect consumers".⁴⁵ However, it was preferred to make one final attempt to achieve this through voluntary regulation and consumer education. It was suggested that the LSB could return to this at a later date if real evidence of continued consumer detriment emerged.⁴⁶ Subsequently the Government promoted membership of the OFT's Consumer Codes Scheme. This resulted in the IPW obtaining initial approval in 2008 and full approval in 2010. Our evidence shows

⁴⁵ White Paper, 'The Future of Legal Services: Putting Consumers First', October 2005, p.79.

⁴⁶ Parliamentary debate on Legal Services Bill <http://www.publications.parliament.uk/pa/ld200607/ldhansrd/text/70122-0009.htm#07012230000341> (22 January debate)

that pursuing this option has not prevented unacceptable levels of consumer detriment across the market. Despite the promotion of voluntary schemes in the past few years and one trade body gaining Office of Fair Trading. IPW members account for only a minority of the unregulated sector, and a smaller proportion than those of the trade bodies that have not yet sought OFT approval.

A key failing with voluntary schemes is their lack of power to enforce disciplinary decisions. If either body acts to discipline one of its members that member may simply leave the scheme and continue practising without impediment outside the reach of both mandatory and voluntary regulation. There is nothing these voluntary schemes can do to influence standards of those providers that choose not to be a member. This situation risks creating misaligned incentives in the market in terms of regulatory compliance and risks reducing the efficiency of enforcement action.

Both trade bodies support the reservation of both will-writing and estate administration activities on the basis that voluntary schemes have proved inadequate in protecting consumers. We note that in their consultation response the IPW reported that it has changed a previously held view that voluntary self-regulation could be a practical alternative to mandatory regulation, to a conclusion that reservation was the only viable option. It stated that this change was due to the lack of uptake of such schemes within the unregulated sector, the difficulties in enforcing voluntary regulation and the continuing consumer detriment being caused. The Institute gave an example of an individual that had previously applied for IPW membership but withdrew her application when asked for information to enable criminal record checks to be run. This individual, who had a previous conviction for fraud, was later convicted of defrauding customers of her will-writing and estate administration company. We consider this support from the main self-regulatory body in the field to be a very significant piece of evidence.

Partial coverage means that some consumers have no redress options other than the private right of action for breaches of consumer protection regulation which is costly and time-consuming. Partial coverage also results in some firms operating outside the scope of any regulation which can lead to different obligations (and therefore cost) falling to firms whether they are, or are not, regulated. This may result in an unfair competitive advantage on those firms who do not sign up to any regulatory arrangements.

It is generally not deemed sufficient to assume that consumers would drive demand for greater levels of regulation, as consumers are confused as to whether will-writers and estate administration were already under the same mandatory regulatory obligations as solicitor firms. In assessing self regulation, the Consumer Panel decided it was not sufficient and that only mandatory regulation would have the effect of introducing sufficient protections and redress mechanisms for consumers.⁴⁷ The Consumer Panel recommended that regulation must be mandatory regulation of all will-writing and estate administration.

Under this option there may be additional and on-going costs in dealing with remedial ways to reduce detriments where consumers use businesses from outside of voluntary jurisdictions. Without having in place a redress scheme that covers all consumers, the costs of seeking redress by consumers who experience detriment may be high as many would have to use the Courts to seek redress from unregulated providers. This is likely to be costly to individual consumers in terms of financial costs and delay. This would also be costly to HM Courts Service in terms of increased caseload. Non-regulatory approaches have the effect of maintaining a 'non-level' playing-field whereby some providers are unregulated and do not need compliance systems in place, while others do. This can impose a cost to some consumers and deter fair competition across the market which can distort prices for legal services.

Option 4

Consumer education

⁴⁷ LSB Consumer Panel, *Regulating Will-writing*, July 2011, pp.66-68.

The LSB considered the non-regulatory option of improving transparency and consumer guidance as a viable option for addressing the policy problem. Consumer education plays a useful role in helping some consumers avoid some detriments identified but on its own cannot provide a sufficient long-term solution to the problems identified. Better guidance and enhanced consumer education could have the effect of reducing the risk of fraud and helping consumers make an informed purchasing decision. Fraud occurring during the estate administration process has been identified as a risk by the LSB. Greater awareness by consumers as to what protections are in place, and also alerting consumers as to the risks such as the fact that beneficiaries are not entitled to inspect the will, may have a positive effect of encouraging consumers to purchase will-writing and estate administration services from providers who have appropriate protections in place, including redress and compensation arrangements.

Consumer education could be targeted towards vulnerable consumers who, evidence shows⁴⁸, are targeted by poor sales practices such as pressure selling. Low income consumers may have a tendency to purchase services from unregulated firms as a cheaper alternative to other firms and so education may have a role to play in increasing awareness among consumers as to the risk of doing so (i.e. no redress to Ombudsman; no voluntary code of practice to turn to). Lessons drawn from consumer education strategies in financial services that improvements in the level of financial capability require a long-term change in attitudes, habits and behaviour towards money that the timing of educational intervention has to be closely tied to the time of a decision, and that measuring the impact of both individual campaigns and long-term interventions is fraught with difficulty. Considerable resource is also needed to affect changes, which takes a long term commitment on behalf of the regulator. Such strategies take a long term view and involve changing behaviours in the workplace, among parents and even school children.⁴⁹

Consumer misunderstanding around what is and what is not regulated, as well as the process of writing a will and the estate administration process – all of which often represent one-off purchases made under stress – could be partially offset by better access to information. 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 protections⁵⁰. According to research by *YouGov*, 84 per cent of consumers believed they were purchasing services from a regulated provider and a majority of consumers regarded regulation as important in providing essential safeguards.⁵¹ It has been considered that consumer information could be delivered through providers themselves (though this would require a regulatory action through mandating the provision of basic consumer information) or through professional bodies.

Currently, members of professional and trade bodies such as IPW and SWW have a code of practice which includes requirements to disclose fees for executor services and that consumers must be notified by letters of engagement for purchasing additional services. Greater transparency around cost may help facilitate a better functioning market and empower consumers in their purchasing choices. For providers of probate and estate administration services, research suggests that some firms thought that educating consumers would be the most appropriate method of protecting them so that they were aware of the process involved in probate and estate administration services.⁵²

The LSB takes the view that consumer education, and the provision of greater market information, such as cost of services and types of protections in place would not, in itself, solve the key issue of improving quality of wills or providing better protections in place for consumers. General consumer advice is already available on the internet (DirectGov, Citizens Advice Bureau and Professional Bodies' websites) and some price information is available on comparison websites.

Identified problems in the market which cause consumer detriment such as the poor quality of wills and the occurrence of fraud during the estate administration process would not, under this option, be robustly tackled. Detriments relating to service issues and overcharging may, however, be

⁴⁸ LSB Consumer Panel, *Regulating Will-writing*, July 2011, pp.34-44.

⁴⁹ See Financial Services Authority, *Evidence of impact: an overview of financial education evaluations*, July 2008.

⁵⁰ See Steve Brooker, 'The Consumer's Role', *Understanding the Economic Rationale for Legal Services Regulation: A collection of Essays*, Legal Services Board, 2011.

⁵¹ *YouGov, The Use of Probate and Estate Administration Services*, January 2012, p.21.

⁵² IFF Research, *Probate and Estate Management Services Survey*, 2012, p.45.

lessened but consumer education is unlikely to make any substantive impact on these without firms being mandated to supply consumers with information at the point of purchase, which in itself constitutes a form of regulation. There are also cost implications associated with consumer education and it is unclear on whom the costs would fall: government, regulators/trade bodies or directly to firms and consumers.

Under this option there would be both additional and on-going costs. While there may be some benefits in changing consumer behaviour, this would be limited if voluntary, and probably would not extend much further than what is already offered. The issue of poor quality wills and mistakes found in wills after the death of the client would not be altered, nor would the issue of no access to the Ombudsman for non-solicitor firms. This is likely to be costly for consumers in terms of seeking private redress and has cost implications for HM Courts Service due to increased caseload. This is especially true for cases that go to court where the losing party pays the costs of both sides. In the case of poor sales practices, this may be in breach of Consumer Protection Regulations, but consumers do not have a private right of action, as individuals cannot take companies to court, only public authorities can do this. This places a heavy reliance on public enforcement and the constituent costs associated with this.

Also, there may be ongoing costs in the form of remedial action for detriment caused by unregulated providers in the market. By relying solely on consumer education and information it is likely that only some consumers will benefit, especially those who can easily access information to inform their purchasing decisions. Vulnerable consumers, however, are less likely to be influenced by consumer education and information campaigns (particularly if it is not mandatory and not at the point of purchase) will still be the chief cause of concern for this group of consumers.

Option 5

Provider education

Regular provider education concerning the area in which they operate would help ensure that service provision kept up to date with developments in the law. Moreover, educating providers about consumer needs would facilitate the provision of a more consumer focused service, which in turn would work towards achieving better outcomes for consumers. Education could also address the consequences for consumers of basic protections such as insurance not being in place.

This option would only be effective if providers could be relied upon to comply with the information they receive. There would be no way of ensuring that unregulated providers adjusted their behaviour in any way. Supervision may only be possible of existing members of a regulatory scheme, who would be more likely to hold such basic knowledge already. Finally, our research did not find that high levels of training and skills were needed for simple wills and Estate Administration.

Option 6

Compulsory membership of professional bodies

Under this option primary legislation could be used compel all providers to be members of a professional body. Any requirements thought necessary could be applied to membership of those bodies, such as education, ethical codes of conduct, insurance and other financial protections. In this way the regulator could ensure the minimum standards that it deems necessary. Making membership compulsory would make providers who avoid disciplinary proceedings by terminating their membership unable to continue practising in the market, thus alleviating one of the main problems with voluntary self-regulation.

However, being a member of a professional body is not the same as being authorised to practice by an approved regulator. One of the first tasks the Legal Services Act 2007 required of the LSB the LSB was to ensure separation between the representative and regulatory functions of the legal professional bodies, due to the inherent conflict between those two roles. It is important that not only are disciplinary issues dealt with effectively, but also that consumers have confidence in the

handling of these types of issues. As previous research for the LSB by the Regulatory Policy Institute⁵³ has noted, "...professional restrictions or practices... can result in restrictions of new entry and the stifling of innovation, including in relation to different ways of doing business.". Independent regulation provides a check on such tendencies ensuring that regulation is targeted explicitly on risk. We also note that soft regulation tends not to grow markets to their maximum potential size. Not only does this affect economic growth, it also artificially reduces demand, in this case for wills which would lead to increased intestacy.

The timeframe for such an intervention, the absence of control on the performance and standards of professional bodies, and the likelihood that there would be no cost saving for providers also militates against this option.

Option 7

Improve existing regulation

Our research revealed that existing regulation was failing to prevent sloppy drafting of wills which undermined the ability of many wills produced to deliver on the consumers' desired outcomes. As well as liberalising the market through introducing Alternative Business Structures, independent regulation and a legal ombudsman, the LSB has been active in helping regulators develop outcomes focused regulation. Better targeting of risk, through an understanding of the entities in particular could help target supervision and reduce the problems experienced.

This is crucial if we are to improve competition in this sector, but improving existing regulation will do nothing to address the problems experienced with those outside of current regulation. Here problems caused by the lack of enforceability of rules set up by trade bodies will continue which means that detriments being caused to consumers would be expected to persist. Equally, there is little we can do to ensure that rules proposed by those outside statutory regulation are proportionate or targeted at identified risks.

We are not of the view that consumer and general law effectively protect against the identified detriments in the absence of regulation. There are limited grounds for a court to put right defects in wills caused by a poor quality drafting service. This relies on unsophisticated consumers having the knowledge to identify poor practice, and the confidence and means to pursue court action. There are limited private rights of action for breaches of consumer protection regulations relating to poor sales practices. Hence the comparatively low level of convictions for failures in this area cannot be taken as a sign that there is little detriment. Enforcement action is reliant on local resourcing and prioritisation by local authority trading standards offices. We have not been able to obtain any assurance from the OFT that it will be possible to focus on the problems identified at all or on an on-going basis. Where there are criminal convictions for fraud or theft, in many cases, perpetrators will no longer have the assets or money to fulfil any obligations to recompense their victims.

Option 8

Partial regulation – will-writing

The LSB considered a partial regulatory solution whereby only will-writing activities would be regulated along with the current reservation for probate. This option therefore excludes reservation to be extended to estate administration.

Most of the evidence regarding consumer detriment that has been identified by the Consumer Panel, IFF research and in the LSB consultation focuses on will-writing, such as problems around quality, service and storage, as well as redress options for consumers of non-solicitor firms. This option would ensure that consumers of all will-writing firms would have the same minimum protections in place such as access to redress through the Ombudsman as well as having a

⁵³ Decker, C; Yarrow, G; *Understanding the economic rationale for legal services regulation*, RPI, October 2010.

mandatory register of authorised providers including a fit and proper person test for ownership and control. However, the process associated with estate administration would not be reserved, except the current probate application process which is already a reserved activity. Instead, a code of practice and voluntary requirements such as having separate client monies and having undergone a criminal check could instead be put in place by voluntary or professional bodies.

The LSB takes the view that this option, while providing protections to all consumers of will-writing, will only partially reduce the risk of detriment in the market. This is because consumers face potentially more serious detriment such as financial fraud during the estate administration process when providers have access to client monies. Consumers of will-writers would not be able to have access to the Ombudsman for problems emanating from estate administration services and the absence of mandatory regulatory requirements such as gateway checks would risk fraudsters and other non-compliant firms providing estate administration services. Inconsistent regulation across what is, essentially, a closely linked service of will-writing and estate administration, may also increase the risk of confusion among consumers as to what is a regulated service and what is not.

Having a set of non-mandatory requirements for providers of estate administration services such as a code of practice or other voluntary regulatory schemes, would still not be binding on providers and non-compliant firms would still be able to exit such arrangements at any stage. This means that regulators could not guarantee enforcement and it would be up to consumers to seek private redress for any problems encountered, or to rely on enforcement of existing legislation which, to date, has found it difficult to prosecute matters relating to estate fraud.

Economic rationale for intervention

The conventional economic approach to government intervention to resolve a problem is based on efficiency or equity arguments. The Government may consider intervening if there are strong enough failures in the way markets operate (e.g. monopolies overcharging consumers) or if there are strong enough failures in existing government interventions (e.g. waste generated by misdirected rules). In both cases the proposed new intervention itself should avoid creating a further set of disproportionate costs and distortions. The Government may also intervene for equity (fairness) and redistributive reasons (e.g. to reallocate goods and services to the more needy groups in society).

In the case of will-writing and estate administration, the proposed intervention would be justified on both efficiency and equity grounds. Government intervention is required to ensure that the risk of detriment in the market to consumers is lowered and to ensure that the market operates more efficiently by removing current distortions which impact on consumer choice such as an unlevel playing field due to inconsistent regulatory arrangements across the market and between different provider types. Intervention would also ensure that regulation is better targeted at the risks in order to effectively deal with the problems that our research has identified. Having in place basic protections across the market such as redress to the Ombudsman for all consumers would support those where regulation fails.

The proposal aims to protect consumers from detriment and ensure that regulation for will-writing and estate administration is fit for purpose. Evidence shows that consumers suffer from detriments in the market, such as poor quality of wills and a variety of unethical practices including fraud during administration of estates and pushy sales techniques. Putting in place proportionate regulation for providers delivering the legal activities of will-writing and having legal authority to collect and distribute estates, we are not intending to regulate tax advice, or being an executor or trustee. Also, we do not intend to extend regulation to cover do-it-yourself (DIY) wills. This preserves incentives for innovation e.g. in the development of software packages.

It is our view that intervention is needed to facilitate and support the market to overcome the barriers to consumer choice through information and power asymmetry between consumer and provider. 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 asymmetry and their poor position to address problems.

To the extent that regulation boosts consumer confidence and increases market growth, there are likely to be broad welfare gains arising from avoided litigation, easier administration and greater certainty for testator and beneficiary alike.

Removing unnecessary barriers

The proposal to extend reservation to will-writing and estate administration will not result in creating solicitor monopoly. Rather, by ensuring that providers are regulated on an even-footing and that all consumers have access to redress, supports the effective functioning of the legal services market and encourages a competitive and open market for both providers and consumers.

Costs and Benefits

This impact assessment attempts to identify both monetised and non-monetised impacts on individuals, groups and businesses in the UK, with the aim of understanding what the overall impact to society might be from implementing these options. The costs and benefits of each option are compared to the do nothing option. Impact assessments place a strong emphasis on valuing the costs and benefits in monetary terms (including estimating the value of goods and services that are not traded). However there are important aspects that cannot sensibly be monetised. These might include how the proposal impacts differently on particular groups of society or changes in equity and fairness, either positive or negative.

A largely qualitative assessment is provided here as many of the aggregate impacts could not be quantified. Where possible, however, we have attempted to quantify the monetary impacts, especially the costs. To provide a full quantitative assessment would require obtaining specific details such as what are the savings made to regulators and firms in using a risk-based approach to regulation and how those savings are passed onto firms deemed as less risky. Also, how to precisely quantify the cost of putting in place systems of quality assurance and compliance process in those currently few firms who exist wholly outside the scope of regulation. In the latter example we use a proxy measure to give an indication of possible cost, but readily note that this is an indicative estimate only. The impact assessment adopts a largely qualitative approach to issues such as the possible increased benefit of having consistent regulation across the market for all providers.

Much of the information that we have used to identify detriments is based from the Consumer Panel investigation into will-writing, the IFF research survey and the responses to the LBS consultation. We have also held meetings with the main representative bodies and various regulators and from this array of information have formed our conclusions. However, given the difficulty in obtaining data on will-writing and estate administration there may be issues with data from samples being representative of the whole industry, and also with self-reported data reflecting bias. This impact assessment therefore also provides some anecdotal evidence received from consultations and other sources, which are included here for indicative purposes.

Option 1 (preferred LSB option)

Rationale for reservation as a means to extend regulation

The issue of regulating will-writing was last considered during the passage of the Legal Services Act 2007 (the 'Act'). Parliament decided there was insufficient evidence of consumer detriment to justify adding will-writing to the list of reserved activities. The Act, however, did include flexibility to bring new activities into regulation without the need for primary legislation, by giving the LSB power to recommend such a step to the Lord Chancellor (under section 24).

Reservation is the most expedient way to make mandatory regulation and works within the parameters of the Act. An alternative approach in delivering regulation is to use primary legislation to create a new, bespoke regulatory regime. The merits of such an approach was looked at by the Consumer Panel who rejected it on the basis that, 'multiple regulatory regimes could be costly and might create an unlevel playing field between providers operating under different arrangements'. A bespoke regulatory regime would have fewer benefits while having significant costs. These costs include the practical issue of establishing such a regime through primary legislation involving lengthy timescales and a commitment of Parliamentary resources. By contrast, the Act includes flexibility to bring new activities into regulation without the need for primary legislation, and for this reason we consider reservation the best, and least cost, way of delivering regulation.

Reservation is the most effective and direct way to tackle the identified detriments. Reservation would affect all providers – but particularly those not currently subject to regulation – thereby bringing all providers within the scope of regulation and providing assurance to all consumers. We set out below how reservation would tackle three key areas that have been identified as causing detriment to consumers: (1) quality problems, (2) sales practices, and (2) redress options.

Improving Quality

The poor quality of wills has been demonstrated through the shadow shopping exercise commissioned by the LSB and undertaken by IFF Research. The LSB's preferred policy option of introducing reservation and bringing into scope formerly unregulated providers, is intended to improve quality having in place a requirement that providers have an appropriately trained workforce will also help ensure that quality is improved across providers. Also, having in place an easy to navigate redress mechanism can ensure to resolve problems for consumers when they have complaints about quality issues.

Improving Sales Practices

Problems associated with poor sales practices centre on using unfair practices such as pressure selling and bait tactics to cross-sell additional services and features to unsophisticated consumers. Examples of services include probate and estate administration services and more complex wills containing unnecessary features. Research shows that vulnerable consumers such as the elderly or those grieving a family death have been the target of these tactics. For example, in the IFF consumer survey, 25 per cent of those who bought extra services felt some degree of pressure to buy them (17 per cent using solicitors and 36 per cent using will-writing companies).

As shown in **Annex 1** the worst sales practices are restricted to the unregulated sector (at least in comparison to solicitors, the regulated group about which we have the most data). We cannot know whether this reflects the impact of regulation or different cultural and profit incentives for providers. We do not consider that cross-selling is necessarily wrong, provided that the purchase is made on an informed basis. 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 gateway checks that will filter out operators that have previous form seeking to target vulnerable consumers through selling tactics, an enforceable code of conduct with focus on sales and punishment for transgression.

Fraud, theft and risk to consumer money

In relation to fraud, we do not have data to support any comparison between regulated and unregulated providers, but there are examples across both sectors. However, there are clear protections in place through regulation. This includes gateway checks on entry to prevent the examples that we have seen of people with a history of dishonesty, either criminal convictions or having professional membership revoked, being found to continue dishonest practices in the unregulated sector.

Also, reservation will ensure that appropriate financial protection arrangements are in place where a provider (usually during the estate administration process) has access to consumer money.

Improving Effective Redress

The lack of appropriate in-house complaints process among unregulated firms, and the fact that the jurisdiction of the Legal Ombudsman currently covers only solicitor-regulated firms, means that some consumers have to rely on private means to seek redress when things go wrong. Private means of redress can be expensive and in some cases seeking redress through the courts can result in delays, causing additional detriment to consumers and costs to HM Courts due to potentially higher caseloads. It is also possible that the difficulty (both actual and perceived) faced by some people in seeking redress through private means may dissuade people from attempting to seek redress in the first place.

Introducing reservation will have the effect of ensuring that the jurisdiction of the Legal Ombudsman will cover all purchases of wills or estate administration from any provider. All consumers, therefore, will be covered by this minimum protection so that they may use a single mechanism to resolve disputes, bringing into line current expectations by consumers that legal services are already regulated.

Impacts

All existing providers delivering the will-writing and /or estate administration activities that would be reserved will be impacted to some extent by the LSB's proposals. All existing providers will have to be approved by an approved legal services regulator or licensing authority in order to be able to continue delivering these services. The majority of providers are solicitors and other providers who are already fall under the oversight of such regulators and are subject to their existing rules- (whom we believe make-up at least two-thirds of the will-writing market⁵⁴ and around 90% of the estate administration market⁵⁵) These providers may face minor one off information costs to allow regulators to develop their risk profile for these activities. For lower risk firms, this is likely to be more than off-set by reduced on-going monitoring and supervision burdens. This is especially for firms exclusively providing services in these areas as we will require regulators to demonstrate that they have reviewed their rule-books to strip away disproportionate and untargeted obligations associated with risks presented by wider activities that they are theoretically authorised by their regulator to undertake but do not⁵⁶

Existing provider types that we have identified will have to move within legal services regulation for the first time, unless they are already ABS, include:

- Independent will-writing companies, estate administration companies and trust corporations (self-regulated through a trade association)
- Totally unregulated will-writing companies, estate administration companies and trust corporations
- Banks and building societies (regulated by the FSA)
- Membership groups such as Trade Union
- Charities
- Independent Financial Advisors (regulated by the FSA but not specifically for these activities)
- Accountants (mainly self-regulated through their professional bodies, overseen by the Financial Reporting Council)

Depending on the nature and type of reservation, the likely impacts will, in the first instance, be totally unregulated providers being subject to external regulation and its requirements for the first time. By setting minimum standards of quality, service, and on-going compliance, unregulated providers will be subject to a minimum quality standard in the market. There are likely to be costs

⁵⁴ 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%.

⁵⁵ *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

⁵⁶ Please see the draft section 162 guidance published alongside this guidance.

imposed on formerly unregulated providers in complying with regulation, but equally there may be a reduction in cost for those providers already regulated (soli) as the adoption of a greater risk focus in regulation can mean that those regulated firms who are deemed low risk can be subject to more proportionate levels of supervision.

Providers regulated in other sectors such as accountants, banks and building societies will face some additional cost to be authorised as legal services providers as well as authorised providers in their home sector. This will include a one-off application cost reflective of the actual cost of processing the application. Dual-regulation could in theory create significant additional costs as a result of being subject to multiple sets of regulatory obligations, information costs and Ombudsman services. The proportionality of this is one of the biggest fears put to us by these providers on consultation. However, we expect these costs to be minimal. The Legal Services Act (at sections 52 and 54) provides statutory requirements for approved legal services regulators to demonstrate how they will avoid regulatory overlap and conflict if they propose to authorise providers who are also overseen by regulators in a different sector. This is a position that already exists with Alternative Business Structures. In order to approve any body them to regulate these activities, we require them to must have identified any conflicts and unnecessary duplication with other regulators' arrangements and taken the necessary steps to address the issues. Therefore, additional obligations should only exist where it cannot be demonstrated that regulation of a provider in their home sector adequately addresses risks identified in relation to these activities and are targeted at proportionately filling the gaps. The LSB must approve any practising fees charged and we will require that these are proportionate given the level of regulatory activity undertaken by the legal services regulator as opposed to have been delegated to a regulator in another sector.

Many banks and building societies already outsource much of their will-writing and estate administration services to authorised legal services providers – further reducing potential impacts of regulatory overlap and duplication. All of the major banks routinely offer will-writing services and most also offer additional estate administration services. Many use firms of solicitors for their will services with HSBC and Barclays using Irwin Mitchell, while RBS uses Hugh James. Equally, banks use solicitor firms to complete the estate administration and application for Grant of Probate process for clients. Some banks use software themselves (such as Epc Tech) for drafting wills and provide an option to consumers to have their drafted will checked by a solicitor. On-line self-completion services are not within the scope of our proposed reservation unless where a checking is provided.

Similarly, in practice, many of the wills supplied by charities and trade unions to members are contracted via solicitor firms, making quantification of market share actually undertaken by the sector themselves independently of regulated individuals difficult to determine. For example, Thompsons prepares 13,000 wills a year for a trades union client.⁵⁷

Reserving will-writing and estate administration will also create a level regulatory playing-field which will eliminate regulatory non-compliance by rogue firms and provide a straightforward safeguard on quality and service for consumers. Extending reservation also brings into scope redress through the an independent Ombudsman for all consumers irrespective of which type of provider the purchase their services from. Having a level playing field, and consistent regulation, will help facilitate new entry into the market rather than unnecessarily distort firms' decision making.

Impacts of Will-writing

For will-writing, the costs of this option would mainly fall to those firms that are currently outside the scope of all regulation (including voluntary arrangements and codes). This will impact on around 85 firms or 1.5 per cent of the market. These costs include extending the jurisdiction of the Legal Ombudsman, having in place regulatory compliance systems and appropriate insurance arrangements and financial protections. Most of these unregulated firms offer will-writing and estate administration activities only. Reservation will also put in safeguards in terms of authorisation gateways checks, and fit and proper person tests, which are particularly relevant for those unregulated firms who do estate administration work.

⁵⁷ See LSB Consumer Panel, *Regulating Will-writing*, July 2011, p.15.

The main additional cost that will fall on providers who are members of voluntary schemes (850 firms or 18.3 per cent of the whole market) is the cost of extending the Legal Ombudsman to ensure that all consumers have a single redress option.

Impacts of Reservation on Estate Administration

Extending reservation to will-writing and estate administration will impact differently.

Solicitors are clearly dominant in the market and comprise 86 per cent of estate and administration services purchased. The number of non-solicitors such as will-writers, accountants, banks and trust corporations who administer estates comprise a comparatively small part of the overall market. Therefore, the extension of reservation would not increase regulatory costs for a majority firms as solicitors are already regulated as legal services providers and is likely to lower costs for low risk providers.

The extension of reservation would impact on those non-solicitor firms who are not members of professional or trade bodies and therefore do not have in place entry or operational requirements designed to screen suitability of firms offering estate administration and holding client money. In terms of estate administration only half of non-solicitors reported that their probate and/or estate administration activities were regulated by an external body.

Our research found that firms who are not solicitors offering estate administration services were likely to be accountants/financial advisers or banks/building societies and trust corporations. Only a small minority of firms who carried out probate/estate administration practices were wholly outside the scope of any regulation, including voluntary codes and membership of professional bodies. It is this group that most of the impact(s) of reservation is expected to fall on. According to *YouGov* research, the estate administration market is made up of 86 per cent of solicitors and 14 per cent of non-solicitors. If around half of the non solicitors are wholly outside the scope of regulation, then about 7 per cent of firms (mainly independent estate administration companies and trust corporations) would be the primary firms affected by the extension of reservation to cover all estate administration activities.

Reserving estate administration means that regulatory protections would apply for all providers undertaking estate administration. In particular, authorisation gateway checks which include a fit and proper person test, and a mandatory register of authorised providers, would ensure that owners and managers of firms and authorised persons are checked for criminal history and past convictions. Given that fraud and mishandling of client monies tend to occur during the estate administration process, basic requirements to practise would help reduce the risk of rogue firms and individuals operating in the market and in handling client monies at the vulnerable estate administration stage. The requirement to have appropriate financial protection arrangements especially where a provider has access to consumers' money would help reduce detriment and have in place safeguards for clients' money. Our draft guidance for regulators specifies that we do not expect regulation to require specialist qualifications to administer most estates – something that thousands of lay individuals successfully undertake each year.

In a survey of firms that offer probate and estate administration services, IFF Research noted that on the whole service providers believed that despite some possible increases in costs, regulation would have a positive impact on the market, increasing consumer protection, reducing fraud and ensuring quality of services are being delivered.

Consumers also appear to choose a firm to do their probate and estate administration on the basis of its location and having a past relationship with the client or members of their family. Cost does not appear to be the key driver in people's choice of service provider when it comes to probate and estate administration (although it does impact on choices of whether or not to use professional services at all).

Marginal cost of reservation

For will-writing, the additional costs of reservation would chiefly fall on the 85 or so firms who are wholly outside the scope of regulation currently. For estate administration, the additional – or

marginal cost of reservation – will fall on the 7 per cent of unregulated firms that offer estate administration services, many of which are trust corporations may also write wills, as well as handle the administration client's estates.

These firms make up around 1.5 per cent of all will-writing firms in the market, the rest of which are members of professional and trade bodies (such as IPW, SWW, ICAEW/ICAS/ ACCA). The type of costs that are likely to fall to them include:

- Cost of establishing an inclusive compensation and PII scheme for the previously unregulated part of the market (1.5 per cent of firms); 19.8 per cent of firms (18.3 per cent members of IPW or SWW and 1.5 per cent outside of voluntary regulation);
- Cost for firms in establishing complaints handling processes and the cost of extending the coverage of LeO for these firms (about 19.8 per cent of firms in the market, including 18.3 per cent who are members of professional bodies and 1.5 per cent outside of voluntary regulation);
- Cost of establishing regulatory compliance systems for the previously unregulated part of the market (1.5 per cent of firms);
- Cost of monitoring, by regulators, compliance of the previously unregulated part of the market (1.5 per cent of firms).

These costs are necessary to ensure that this small number of firms are compliant with regulation and have in place the same protections that are offered by firms which are members of professional and trade bodies.

Where the costs will fall

The costs of the above will only fall to those firms that are currently outside of regulation. This is defined as:

- Firms that offer will-writing services and estate administration outside of the scope of any professional or trade membership body. The number of such firms is around 85 and account for about 10 per cent of will-writing firms, or around 1.5 per cent of the market. These firms are not members of a professional trade body and so consumers do not have the same level of quality guarantee or redress mechanisms as they have with self-regulated firms. It is for these reasons that some costs will fall on these firms as they will need to upgrade protections for consumers and have in place compliance systems.

The cost of reservation will therefore affect a fraction of firms in the market which are not regulated by any organisation or code.

If the current regulatory protections in place for self-regulated firms who are members and firms regulated in other sectors are adequate, extending reservation will not place additional costs on these firms. These firms will be subject to regulatory arrangements that ensure complaint handling procedures and they also have in place systems and controls that provide basic levels of quality and training standards among members. Arrangements for will storage and mandatory insurance for IPW and SWW members means that these firms are likely to have sufficient protections in place for consumers.

The only cost that will fall to those firms that are already members of bodies such as IPW and SWW is the levy cost for the running of LeO. This cost is £385 for solicitor or CLC firms. LeO costs also depend on the volume of cases opened, the costs of which are apportioned across regulators. Extending reservation also means extending the scope of redress for consumers to pursue complaints, and therefore this cost will need to be met by all firms.

Costs for unregulated firms

Cost of compensation and PII scheme for unregulated firms

The cost of insurance varies between firms and products purchased. Comparing the cost of contributions for the compensation fund and PII for SRA is not useful as the risk premiums for these firms reflect a broad range of legal services rather than a singular activity such as will-writing. Currently, IPW and SWW firms, which specialise chiefly in providing will-writing, pay an average of £480 and from £290 per annum respectively for insurance. It is thought that if a market was developed for insuring only will-writing activity (excluding estate administration) the premiums may be low for firms as the activity itself is not considered particularly high risk. Hence the premiums for will-writing firms and also those solicitor firms doing will-writing exclusively, would be expected to come down; the same is likely to also happen for those offering will-writing through other professional bodies such as accountants. Having in place effective on-going monitoring and supervisory arrangements between firm and regulator is seen as key to having lower premiums for will-writing firms.

For unregulated providers, putting in place insurance to ensure that consumers are properly protected could mean costs of around £480 per annum for firms. This figure is the current average cost of PII for IPW firms, the majority of which offer will-writing but not estate administration service. Firms that undertake estate administration services are likely to face higher insurance costs than those that do not. This reflects the increased risk of insuring against client's estates and fraud. It is not possible at this stage to quantify future costs of insurance.

Cost of extending the coverage of LeO for unregulated and self-regulated firms

The cost of extending the current redress mechanism for consumers to unregulated and self-regulated firms is difficult to accurately quantify. However, using the current costs of using LeO for CLC firms we can arrive at an approximate cost for extending LeO coverage to will-writing firms. This cost is £385 per annum and is based on the current LeO levy for existing ARs. This figure may be subject to change when LSB's review the levy rules in 2013/14.

Any additional costs of extending the LeO scheme will fall to the sector of the market not currently subject to legal services regulation, which accounts for around 19.8 per cent of firms (18.3 per cent members of IPW or SWW and 1.5 per cent outside of voluntary regulation) and 14 per cent of the estate administration market.

This cost represents the main additional cost that would fall to those firms that are currently members of professional bodies.

We have used the CLC figures as a proxy for the LeO costs and probable future cases. This would mean that around 1.6 per cent of claims going to the LeO would be from these firms, and based off the costs of cases for the CLC, totals £328,000, or £385 per firm (assuming 850 will-writing firms in a static market) per annum. This cost would be borne by both firms who are regulated by professional bodies but have not previously have had LeO arrangements in place before (about 850 firms or 18.3 per cent of market), and those 85 firms (1.5 per cent of market) who are outside the scope of regulation.

Cost of regulatory compliance by unregulated firms.

We have no way of accurately calculating the cost of regulatory compliance by unregulated firms. We can, however, describe what such compliance may entail:

- Governance and risk management;
- Compliance in data requests by regulators (including financial information);
- Costs incurred by developing a system-based complaints register at the firm level.

While the above costs are not known with certainty for unregulated firms, we have assumed that they would probably be similar to those additional regulatory costs that have been estimated for ABS firms in the context of Outcomes Focused regulation (OFR) and establishing new compliance

systems. The SRA estimates that such costs would be, on average across all different sizes of firms, £1670 per annum.⁵⁸ This figure includes any practising fee that an entity pays. We have taken this figure as an assumed upper cost estimate that covers set-up cost for establishing compliance processes and for on-going monitoring costs. For firms offering a simpler range of business services, the on-going costs would probably be lower reflecting their lower insurance costs.

The figure of £1670 is only borne by the 1.5 per cent of firms currently outside the scope of any regulation. This is because extending reservation would require these firms to have in place adequate compliance and on-going monitoring arrangements. Specifically, these firms would need to have in place minimum requirements such as:

- A mandatory register;
- Authorisation gateway checks – a fit and proper person test;
- A code of conduct with outcomes with an emphasis on sales practices;

Compliance and enforcement approach that incentivises and encourages compliance, deters non-compliance and punishes transgressions appropriately, including the levying of financial penalties.

Significant additional costs would not fall on those firms that are members of other regulatory schemes such as those administered by IPW or SWW or those run by banks and accountancy bodies. This is because these firms, as part of their membership duties, are deemed to have fit-for-purpose compliance arrangements. IPW's regulatory arrangements are monitored and assured under an approved code with the OFT (SWW is currently seeking a Code of Practice with OFT under the CCAS scheme for Stage One approval).

Therefore, costs for regulatory compliance chiefly fall on the 1.5 per cent of firms outside the scope of any regulatory arrangements.

Cost of monitoring, by regulators, compliance of previously unregulated firms

It is not possible to quantify the additional costs that monitoring and compliance may have to regulators. Any additional costs will only be incurred by those bodies which begin to regulate the previously unregulated 1.5 per cent of firms outside the scope of present regulatory arrangements. For these regulators, there may be a one off cost of registering and authorising these firms, which is likely to be recouped through membership/practicing certificate fees. The cost for regulating these firms that constitute about 1.5 per cent of the market is not thought to be high. On-going costs to regulate these affected firms is equally thought not be high as the marginal cost of supervision would be extended to around 85 firms (1.5 per cent of the market). Most of the costs incurred would be absorbed within a regulator's on-going current regulation and would draw from the same databases and risk based interventions as those set up for other firms. This is not expected to result in material additional costs.

The costs to regulators will depend on whether the regulator is already accustomed to regulating and has in place the requisite supervisory arrangements. For example, a large regulator already operating in the market place and regulating hundreds of entities is unlikely to incur high costs for bringing into scope and regulating the activities of 85 will-writing firms. However, a new entrant regulator with no prior experience in regulation may face additional set up costs and other costs associated with approval of their regulatory code by the LSB.

There should not be any costs for firms subject to self-regulation or regulation in other sectors as these firms pay membership fees which already cover the scope and extent of the necessary regulatory activities such as supervision and monitoring.

⁵⁸ SRA, *Outcome-focused Regulation: Indicative Costs Benefit Analysis*, November 2010, pp.46-48.

Summary of Costs of reservation

- Cost of compensation and PII scheme for unregulated firms:
 - Estimated cost is £480 per firm per annum (will impact 1.5 per cent of firms).
- Cost of extending the coverage of LeO for unregulated and self-regulated firms:
 - Estimated cost is £385 per firm per annum (will impact 850 firms or 19.8 per cent of firms in the market, including members of professional bodies).
- Cost of any regulatory compliance by unregulated firms (will impact 1.5 per cent of firms):
 - Estimated cost is £1670 per firm per annum (will impact 1.5 per cent of firms).
- Cost of monitoring, by regulators, compliance of previously unregulated firms:
 - Costs not quantifiable but likely to be low. (will impact 1.5 per cent of firms).

Benefits of reservation

It is not possible to fully quantify the benefits of reservation. In economic assessments cost tends to be concentrated while benefits are diffuse and harder to quantify. We can, however, describe some general benefits to consumers, businesses and market functioning, and also to regulators.

According to the responses to the LSB's 'Call for Evidence', most stakeholders were supportive of regulation in raising quality standards. The Law Society views regulation as an important element in tackling detriment faced by consumers. This view is supported by the main will-writing organisations, IPW and SWW, who see regulation as a means to raise the quality of wills written and the confidence of customers in the market improved.⁵⁹

Benefits to consumers

The marginal benefit of reservation is to ensure adequate quality standards are adhered to and enforced across the market. It is expected that the reservation of will-writing and estate administration will make compliance mandatory and bring *all* firms into the scope of regulation. Of particular concern is to bring into the scope of regulation those firms that have not been subject to any regulation. As already mentioned, these firms constitute around 85 firms or 1.5 per cent of the total market.

The Consumer Panel in their report identified wide ranging types of consumer detriment relating to the writing of wills. The respondents to the LSB's *Call for Evidence: investigation into will-writing, estate administration and probate activities*⁶⁰ reported substantial consumer detriment occurring due to poorly drafted wills and the risk presented by fraud, lack of insurance and redress mechanisms for consumers. The LSB's preferred regulatory approach is expected to deter potential non compliant firms from operating in the market while introducing regulation to ensure adequate standards and consumer protections. Deterring non compliant behaviour among firms has a direct benefit to consumers in terms of time and cost, as well as to the aggregate quality of services across the market.

Extending reservation across all will-writing and estate administration firms will ensure that all have the same basic level of protections in place. This is particularly important for the 1.5 per cent of providers who currently operate outside the regulatory schemes, the consumers of which currently have no redress options in place to protect against poor quality services and detriment, beyond private redress through the Courts.

Extending regulation to these firms will go a long way to mitigate poor quality wills and the types of detriments found in the Consumer Panel's shadow shopping exercise. Examples include:

⁵⁹ Submissions received to the LSB's *Call for Evidence: investigation into will-writing, estate administration and probate activities*: http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/submissions_received_to_the_call_for_evidence.htm

⁶⁰ See http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/submissions_received_to_the_call_for_evidence.htm

- Having a mandatory register in place and authorisation gateway checks for firms will ensure that regulators will have details about which firms operate in the market and will be able to undertake fit and proper checks to ensure that individuals previously involved in fraud and other serious crimes are barred from practicing in the market;
- Ensuring all firms are regulated also exposes firms to the possibility of undergoing regulatory interventions and therefore should act to encourage compliance and dissuade non-compliant firms entering and operating in the market;
- Having a code of practice that is recognised and enforced across all firms helps ensure that vulnerable consumers are not exposed to unnecessary risks, such as aggressive sales practices.

The benefits of greater supervision and registration of firms undertaking the reserved activities means that consumer problems, and any continuing detriments, can be more easily identified and monitored by regulators. The LSB will also have better access to regulatory information via regulators supervising these firms and can monitor developments in the market against the regulatory objectives in the Legal Services Act (2007). Such market information can be used to inform regulatory intervention to reduce risks of detriment occurring across all types of providers in the market.

Consumers will benefit by having access to LeO guaranteed no matter if they purchase services from a solicitor firm or a will-writing firm. This is expected to boost consumer confidence in will-writing as well as meet consumers' expectation that these services are regulated and that protections are in place for all consumers of these services.

Reducing consumer detriment by improving quality and standards of will-writing also has beneficial effects on consumer confidence and may positively influence the repeat purchasing decisions of consumers. Increasing consumer's confidence to access and purchase legal services supports the effective functioning of the legal services market and improves access to the market for consumers. Reducing the amount of people dying intestate is also a significant benefit that will be realised both by beneficiaries and in terms of reduced administration costs for probate bodies such as HMCTS and the Probate Service.

Benefits to businesses and market functioning

Extending the scope of regulation across all providers of will-writing and estate administration services should ensure consistency and a level playing field for firms. This is because all regulated firms will be required to have in place appropriate insurance arrangements and other arrangements for handling client money. This means that the same barriers to entry will apply to solicitor and non solicitor firms supplying will and estate administration services.

Having a 'hard floor' of regulation that is consistent across, and applicable to, all firms in the market encourages competition above that level. There is a public benefit here as all services provided above that level are delivered in a way that does not risk creating detriments to consumers and serve as a basic standard which safeguard protections that are agreed to be essential to have in place. This is so that consumers can expect a minimum standard of service and quality no matter which provider they chose to use. Having the basic threshold for standards and protections creates benefits also for businesses by ensuring a consistent level of regulation across the market rather than having different barriers to entry (and different protections in place) for essentially the same activity. This should assist in eliminating any price distortions for services resulting from different regulatory burdens faced by businesses.

By ensuring consistent regulation across all firms the supervision of firms can concentrate on firms' risk profile due to the nature and type of activities which they undertake. This can allow regulators to focus resources on the most risky firms while reducing the supervisory burdens on those firms or areas of the market which are assessed as lower risk. While it is not possible to quantify what the market-wide benefit of better targeted supervision would be, it is expected to achieve:

- Lower compliance and supervisory costs in the form of information provision and on-site inspections for low risk firms (including lower costs for solicitor firms – the majority of firms);

- More responsive regulation that pro-actively mitigates emerging risks by identifying those risks and targeting resources;
- Lower costs for the regulator.

The approach taken in assessing the impacts of reservation of will-writing and estate administration is that for most of the market which comprises solicitor firms, we would expect to see regulators taking a more focused activity based form of supervision of solicitor firms that offer will-writing services. This focus would generally mean lower regulatory compliance costs for the majority of firms in the market. This is because the costs of ongoing regulatory burdens will be lower for a single activity business for those firms that primarily undertake will-writing and estate administration.

In particular, we would expect that the ongoing lower regulatory costs for solicitor firms doing a single business activity such as offering a will-writing service would be due to:

- Lower insurance costs;
- Easier risk analysis (e.g. fewer risks and associated issues);
- Easier business assessment;
- Easier quality assessment.

We would expect that lower supervisory costs would accrue to solicitor firms for the above reasons. Lower costs may feed through to end price for consumers, making will-writing and estate administration services for the majority of providers in the market more affordable, benefiting consumers of these services.

Benefits to regulators and market governance

Regulation also means that approved regulators will have a greater understanding of how the market is functioning and can responsively deal with issues that arise through their ongoing supervision and data collection. These regulators will be in a position to positively influence consumer education through providing information about the market and improving transparency. Consumer education can inform the purchasing choices of consumers and make them better empowered and more confident in access services and shopping around.

While it is not possible to quantify benefits, increased quality across the market is expected to lead to lesser errors and invalid wills which has wider benefits that may be realised. Benefits resulting from this include reduced costs for HMRC in collecting inheritance tax through more efficient processing of applications. Reduced delays for arranging estates benefit beneficiaries as monies are paid more promptly. Consumer surveys show that the principal area of dissatisfaction for probate and estate administration services is delay, with 71 per cent of consumers surveyed admitting that delay featured as the foremost problem, followed by 57 per cent agreeing that mistakes during the process was reason for dissatisfaction⁶¹ We would anticipate that a benefit would arise as a consequence of having a more competitive market with more robust regulation such as lower rates of intestacy (and litigation) which would be expected to have a positive impact on public expenditure and the court system. While litigation over estates is relatively low, any reduction in intestacy and the costs associated with this for beneficiaries would have a positive benefit.

Summary of benefits of reservation

The benefits of reservation include:

- Extending proportionate regulation to prevent regulatory avoidance and regulatory gaming is expected to make the regulatory landscape easier for consumers to navigate and guarantees minimum regulatory protections for all consumers irrespective of the type of firm they use;

⁶¹ YouGov, *The Use of Probate and Estate Administration Services*, January 2012, p.36.

- Mandatory coverage of regulation means that rogue or non-compliant firms cannot walk away from regulation and that a 'hard floor' of regulatory protections are in place and enables competition above that level;
- Elimination of competitive advantage for firms to remain outside the scope of regulation;
- Authorisation gateway checks will screen for rogue persons, reducing the risk of fraud and other detriment occurring (especially) during estate administration;
- Supervision of firms can concentrate on the most risky firms while reducing the supervisory burdens on those firms assessed as lower risk. Better aligned supervision will mean less regulation and compliance for the majority of firms that have compliance systems in place (e.g. solicitor firms which form the majority of firms);

Our proposals represent largely liberalising reform. Extending reservation to will-writing and estate administration will be accompanied by better focusing regulation that already exists and thus reducing the regulatory burdens that can act as a barrier to innovation in the market for will-writing and estate administration.

Assumptions

The chief assumption is that a proportionately regulated market which has a hard floor of basic protections in place can reduce the risk of detriment to consumers. We also assume that regulators view solicitor will-writing firms and other firms with robust quality assurance and compliance processes as low risk and can be subject to lighter touch regulation, freeing up the regulator's resources to concentrate on higher risk firms and reducing compliance burdens on these firms.

Other assumptions include:

- It has been assumed that the regulation of providers regulated in other sectors such as banks, building societies and accountants adequately protects against identified problems as they have told us (we have yet to receive any data about numbers and type of active providers or other regulatory data)
- It has been assumed that voluntary regulatory codes and obligations of the professional bodies such as SWW and IPW are adequate and fit for purpose to be passported across to a reserved regulatory regime.
- It has been assumed that a market which is subject to consistent regulation will encourage consumer confidence in purchasing services from all suppliers of services (solicitor and non-solicitor) and will also have a positive benefit on business confidence to invest and innovate. We assume that this will facilitate a growing market, as measured by rising volumes of wills purchased and new firms entering.
- It has been assumed that introducing mandatory regulation such as gateway authorisation checks will act to reduce the likelihood of rogue and non-compliant firms in entering the market.
- It has been assumed that introducing mandatory regulation making redress to an independent Ombudsman available for all consumers irrespective of the service they purchase will help improve the quality of services by encouraging firms to have in place effective complaints handling processes.
- It has been assumed that having in place regulation such as gateway authorisation requirements, appropriate financial arrangements for handling client monies and outcomes based code of conduct, with appropriate emphasis on sales practices will reduce the risk of poor quality wills and inappropriate sales practices.
- It has been assumed that existing legal services regulation will be improved in line with the guidance that explicitly making these activities reserved legal activities gives the LSB the mandate to hold regulators accountable to deliver in these area

Risks

- There is a risk that reserving will-writing and estate administration will be seen by some potential new entrants as creating additional barriers to entry and may discourage new investment in the market.
- There is a risk that existing providers are unwilling to accept the burden of minimum consumer protection obligations or that there are additional costs resulting in unsustainable
- Financial strain, resulting in them exiting the market – this is most likely occur with small providers who are totally outside of regulation
- The cheapest options delivered by currently unregulated providers are no longer available as costs of minimum consumer protection obligations are reflected through higher process
- There are higher prices and is reduced choice meaning consumers buy less and reducing access to justice.

Mitigation

- Providers that do not meet consumer protection obligations leaving the market is an intended consequence of the intervention to protect consumers against the detriments identified given the significant asymmetry of information and power in these markets
- We will require regulatory obligations and oversight set at the lowest level to protect against the risks presented by providers and the work that they undertake – this includes liberalisation for existing regulated providers that are low risk

It should also be noted that IPW has stated that it believes that its members will be able to compete with existing legal services regulated providers should these activities be reserved. Some will-writing and estate administration providers have already come under legal services regulation for the first time as ABS because of the competitive benefits that they perceive.

Business Impacts

The LSB's preferred option to tackle the identified detriments in the market is to improve the application of existing regulatory protections and extend reservation to encompass will-writing and estate administration activities provided by those outside of existing regulation. The chief identifiable business impacts include:

- No increased costs on solicitor firms and existing legal services regulated providers.
- Reduced restrictions on single area firms (whether solicitor firms or other) and lower supervision for regulators and lower compliance cost savings for firms assessed as low risk.
- Minimal costs on the majority of firms who are members of voluntary regulatory bodies that are currently operating in the market. The cost incurred by these firms relate to extending the LeO scheme only (£385 per firm).
- Some costs on the 1.5% of unregulated providers in the market who need to have adequate compliance systems in place and pay for extending the LeO scheme. Extending reservation would require these firms to have in place adequate compliance and on-going monitoring arrangements. These firms would need to have in place minimum requirements such as: a mandatory register; authorisation gateway checks – a fit and proper person test; A code of conduct with outcomes with an emphasis on sales practices. However, for firms that are regulated by other regulatory bodies such as accountants which also undertake will-writing services will not be duplicate regulation.

The proposal is expected to have a range of positive business impacts. These include:

- Extending proportionate regulation to prevent regulatory avoidance is expected to make the regulatory landscape easier for consumers to navigate and guarantees minimum regulatory protections for all consumers;

- The marginal cost of extending regulation is likely to be either wholly, or in very large part, offset by reduced costs for lower risk businesses that are currently regulated, leading to lower supervisory costs for both regulators and firms;
- Mandatory coverage of regulation means that rogue or non-compliant firms cannot walk away from regulation and that a 'hard floor' of regulatory protections is in place and enables competition above that level;
- Elimination of competitive advantage for firms to remain outside the scope of regulation;
- Authorisation gateway checks will screen for rogue persons, reducing the risk of fraud and other detriment occurring (especially) during estate administration, improving market functioning and business confidence.
- Supervision of firms can concentrate on the most risky firms while reducing the supervisory burdens on those firms assessed as lower risk. Better aligned supervision will mean less regulation and compliance for the majority of firms that have compliance systems in place (e.g. solicitor firms which form the majority of firms);

The proposed changes in regulation for will-writing the estate administration should be viewed in the context of overall liberalisation of the legal services market to external ownership through the introduction of Alternative Business Structures (ABS), and helping regulators to improve the way they regulate by focusing on outcomes and risk-based regulation. These developments are aimed at ensuring that the legal services market is more competitive and attractive to new investment, and that the regulatory arrangements in the market are fit for purpose and strike a balance between protecting consumers and having low barriers to entry.

Business and stakeholder views of the proposed regulation

The vast majority of respondents to the LSB's consultation (16 July 2012) viewed the current system of general consumer protections plus voluntary regulation schemes as allowing an unacceptable level of consumer detriment to exist in the market. There was general concurrence amongst respondents to the consultation paper that objectionable levels of consumer harm are currently to be found within the markets and existing consumer protections and voluntary regulation schemes were for the most part inadequate to address consumer harm.

There was general agreement amongst most respondents that the LSB's review of evidence had been comprehensive (although some bodies representing accountants argued that limited information were presented about accountants undertaking this work and the effectiveness of their existing regulation). Requests for information indicate that professional bodies do not maintain data about their membership in relation to probate and estate administration either in terms of who does the work or risk profiling and other regulatory activity relating to them in relation to these activities. LSB research incorporates all provider types but indicates low level accountant activity in these areas. The majority of respondents viewed the current system of general consumer protections plus voluntary regulation schemes allowed an unacceptable level of consumer detriment to exist in the market. Most agreed that objectionable levels of consumer harm are currently to be found within the market, and existing consumer protections and voluntary regulation schemes were for the most part inadequate to address consumer harm. This included the bodies that currently operate voluntary regulatory schemes in this sector. The Institute of Professional Will-writers (IPW) explained that it had changed its previously held position that voluntary self-regulation could be a practical alternative to reservation, to a conclusion that reservation was the only viable option. It stated that this change was due to the lack of uptake of such schemes within the unregulated sector, the difficulties in enforcing voluntary regulation, and the continuing consumer detriment being caused. Similarly, a Trading Standards Officer that responded to consultation supported a regulatory solution on the basis that reservation would assist them in enforcing existing protections.

Some respondents differentiated between will-writing and estate administration in terms of the case for regulation. Whilst there was a consensus that regulation was required to tackle the consumer detriment in relation to will-writing that our research found evidence of, there was slightly less unanimity in relation to estate administration. Most respondents believed that greater consumer protection is needed particularly given that providers usually have control of an estate's entire assets. However, some regulators of non-legal professionals argued that there was not sufficient evidence of detriment in that area to warrant regulation, whilst others felt that it could not be classified as a legal activity and therefore should not be made into a reserved legal activity.

Statutory Impact Test

An equalities impact assessment has been prepared and is attached.

Annex 1: A summary of key problems and analysis (April 2012)

Will-writing

Quality of wills:			
Outcome:	Frequency	Impact:	Additional information:
Invalid wills:	<ul style="list-style-type: none"> 8 out of 102 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 experienced poorly drafted will LeO: Approx 110 	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 can result Case studies show delays can cause 	<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 Simple errors, cutting and

	<p>complaints in 10 mths about failure to follow instructions (Oct 10 – Aug 11)</p> <ul style="list-style-type: none"> • 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>severe hardship for dependents.</p> <ul style="list-style-type: none"> • 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%, reduced legacy 33%, delay 48%, legal costs 53%) 	<p>pasting of inappropriate template precedents, unnecessary complexity; and use of outdated terminology highlighted key features</p> <ul style="list-style-type: none"> • 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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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 definitions) • 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 	<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 examples of unnecessary trusts sold as standard costing hundreds of pounds each • OFT report that failure to shop around for executor services costs £40m p.a. 	<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 – reliance on public authorities. • Examples of successful action taken by trading standards. Recent

	<ul style="list-style-type: none"> • 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 pressuring consumers not to exercise them. • 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 	<ul style="list-style-type: none"> • 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>examples of 3 insolvency service successes. But no indication that redress was secured for affected consumers.</p> <ul style="list-style-type: none"> • Examples of many “rogues” subject to convictions or other legal outcomes having been in trouble before • Trading standards unlikely to have resource to target area on on-going basis and there will be geographical inconsistencies. • PALs - “pre-paid probate” is often actually a fee paid for services with contract terms providing beneficial rates
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	<p>elderly. Very limited in relation to executor services (although definitions may vary). Shadow shops did not show aggressive pressure selling.</p> <ul style="list-style-type: none"> 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>for other services, should they be requested in the future.</p>
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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 	<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 	<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 	<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

<p>of unregulated & not trade body member</p> <ul style="list-style-type: none"> Enforcement difficult when membership ends 	<ul style="list-style-type: none"> 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 make a will. Very long periods before making will & death 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>who should administer the estate and personal actions such funeral arrangements.</p> <ul style="list-style-type: none"> 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>clients wishing to access their papers.</p> <ul style="list-style-type: none"> 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 suitable, ongoing arrangements for the storage of documents, or else hand to the IPW. <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 to gain personal benefit <p>Paying for work that is not delivered (either writing of wills or subsequent estate administration services).</p>	<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 a cost following a change in the law & charging for secure will storage that was not provided. • 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"> • 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 • 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"> • 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. • As highlighted re: poor sales practices, exposed fraudsters often prove to have been in trouble before

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 matter but where there is a conviction 	<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>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 possible extra costs but 27% 	<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 	<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>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 an 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>loans to pay fees. Overarching impact was 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%) 	<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 	<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

	<ul style="list-style-type: none"> • YouGov – largest cause of complaint. 71% of 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%. • 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 follow instructions and failure to keep informed. • LeO data 13% of complaints about wills and probate were about failure to follow instructions and 11% about a failure to provide adequate advice – two areas 	<p>that 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. 	<p>problems & 85% said 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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	<p>associated with competence.</p> <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.	<ul style="list-style-type: none">• LeO data shows reports of significant impact on emotional and physical well-being and on family relationships.• LeO data shows reports of loss of confidence in legal profession as a result of poor service.	
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**Enhancing consumer protection, reducing
regulatory restrictions: will-writing, probate
& estate administration**

Equality Impact Assessment

September 2012

Summary

1. This equality impact assessment (EIA) relates to the proposal to extend reservation to will-writing and estate administration services. The LSB's proposal aims to both protect consumers from detriment and ensure that the regulation of will-writing and estate administration is fit for purpose, effective and consistent.
2. Consumers suffer from detriments in the market, such as poor quality of wills and unethical practices including fraud during administration of estates. The lack of consistent regulation leaves consumers without minimum protections, which are currently only available to consumers of regulated firms. Extending reservation to will-writing and estate administration services aims to reduce the risk of detriment to consumers and create an environment that enables innovation, competition and choice.
3. We have considered the policy reforms in accordance with the statutory obligations under the Equality Act 2010. The following is a summary of our overall assessment. More detail of the impacts is given in the analysis in the individual policy areas below.

Legal duties

4. Under the Equality Act 2010 (s.149) (“the Act”), when exercising its functions the Ministry of Justice is under a legal duty to have ‘due regard’ to the need to:
 - Eliminate unlawful discrimination, harassment and victimisation and other prohibited conduct under the Act;
 - Advance equality of opportunity between different groups (those who share a protected characteristic and those who do not); and
 - Foster good relations between different groups.
5. The relevant protected characteristics for those purposes are: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion and belief, sex, and sexual orientation.
6. Consistent with that duty, and with the statutory objectives of s.149 of the Act in mind, this EIA considers how the policies in question are likely to impact on people sharing protected characteristics.

Direct discrimination:

7. We do not consider that these proposals will result in treating some people less favourably than others because of a protected characteristic. We therefore do not consider there to be a risk of direct discrimination within the meaning of the Equality Act as a result of the proposal.

Indirect discrimination:

8. On the basis of the available evidence we do not think that anyone sharing a protected characteristic will be put at a particular disadvantage from the changes and that therefore it is unlikely that there will be any indirect discrimination within the meaning of the Equality Act as a result of the proposal.

Discrimination arising from disability and the duty to make reasonable adjustments:

9. We do not consider there to be a risk of discrimination arising from disability within the meaning of the Equality Act. We expect that reasonable adjustments will continue to be made for people with disabilities by providers in the market.

Harassment and victimisation:

10. We do not consider there to be a risk of harassment or victimisation within the meaning of the Equality Act as a result of the proposal.

Advancing equality of opportunity:

11. As consumers are currently only partially covered in terms of consumer protections in the market, extending reservation to include all will-writing and estate administration services will ensure that all consumers, irrespective from which provider they purchase their services from, will be covered by a minimal standard of protection. Access to redress and having a consistent regulatory framework in place means that consumers have equal access to minimum protections and an opportunity to enjoy the benefits that arise from a market regulated with appropriate protections. The proposals should, therefore, result in steps being taken to meet the needs of everyone.

Fostering good relations

12. Fostering good relations is regarded as tackling prejudice and promoting understanding between people from different groups. The proposed extension of reservation to include will writing and estate administration is intended to give all consumers equal access to minimum standards of regulatory protection. To this end the proposal is expected to improve access to justice which helps to empower consumers. In view of this, and because the proposal is not expected to have significant adverse equality impacts, we anticipate that it will help to foster good relations, especially for consumers who are better protected when purchasing wills and estate administration services.

Conclusion

13. We have considered the potential impacts of the proposal to extend will-writing and estate administration against the obligations under the Equality Act 2010 and those that are set out in the 'Analysis of potential impacts' sections (see below). Our assessment is that the overall impacts are likely to be positive for consumers and providers, given that the main aim is to ensure consistent and mandatory regulation across all providers and to have in place protections

accessible for all consumers. We would also expect to see a positive benefit for providers and other market participants due to better targeting of regulation on the basis of risk. This will free-up the resources (and reduce burdens) of those firms deemed low risk, and enable low risk firms to deliver competitive services to consumers.

14. We acknowledge there are a number of gaps in the research and statistical evidence because of the nature of data-collection in the relation to legal services. Research on the unregulated side of the market is difficult to obtain as currently there are no regulators or groups that collect data for this side of the market. However, we hope to collect new information in this second consultation particularly around equality impacts which should go some way in filling in gaps in our knowledge. Also, the LSB continues to undertake research into the legal services market and we have a specific work stream that focuses on diversity issues across legal services including, but not limited to, monitoring and encouraging greater diversity in regulated legal professions. Overall, we do not expect any groups to be disproportionately negatively affected or for there to be a significant adverse, impact on the statutory equality characteristics. We do not consider that the current gaps in data are so significant as to cast material doubt on this conclusion.

15. Introduction

16. The LSB launched investigations into problems in the will-writing and estate administration markets under Sections 24 and 26 of the Legal Services Act 2007 in July 2011, following extensive calls for action from within the market and from consumers of will-writing and estate administration services.

17. The investigation found a number of problems. In summary, for wills we found problems with:

- The quality of wills produced
- Arrangements for the safekeeping of wills produced
- Unethical sales practices
- Shortfalls in service levels
- Failure to ensure arrangements for effective redress when things go wrong
- Market distortion caused by partial coverage of regulation

18. In summary, for estate administration we found problems with:

- Unethical sales practices and fraud (including failure to prevent proven wrong-doers from setting up business in the market)
- The safekeeping of consumers' money and other assets
- Shortfalls in service levels
- Failure to ensure arrangements for effective redress when things go wrong
- Market distortion caused by partial coverage of regulation

19. These problems were not evenly distributed across the regulated and unregulated sector. Research in particular found that simple wills were more often sloppily drafted leading to problems in the regulated sector, while wider quality problems were more common in complex wills in the unregulated sector. Also in the unregulated sector there was concern regarding unethical and inappropriate sales practices and detriment caused by missing wills when unregulated firms enter insolvency. Options available to address these

problems could be introduced for either or both will writing or estate administration.

20. There is currently no restriction on who can enter the market and provide will-writing and estate administration services. Regulatory protections enjoyed by customers of lawyers, accountants and banks, including redress, are not available for many consumers of will-writing and estate administration services in the market. There is evidence to show that detriment is occurring in the market and that basic protections are needed for all consumers, irrespective of which provider they purchase services from. Government intervention is needed to ensure these protections are binding for all firms, that regulation is consistent, and to reduce the risk of rogue and non-compliant firms entering the market. Only the Lord Chancellor can reserve a legal activity allowing the introduction of such regulatory protections.
21. The LSB's proposal to reserve will-writing and estate administration aims to ensure that the current risk of detriment to consumers of will-writing and estate administration services by currently unregulated firms is reduced to an acceptable level. The proposal also aims to improve 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. Proportionate regulation that sets minimum regulatory protections for all consumers, and which has a level playing field for firms to encourage competition and innovation, encourages better outcomes for all consumers.
22. The EIA analyses the potential impact of the proposed regulatory change on the advancement of equality of opportunity, the fostering of good relations and the elimination of discrimination, harassment, victimisation and other conduct that is prohibited under the *Equality Act 2010*.
23. The analysis has been informed by the responses received to the LSB consultation document *Enhancing consumer protection, reducing regulatory restrictions: will-writing, probate and estate administration activities*¹ and builds on the initial EIA which accompanied that document. Many of the policy areas discussed here will be further informed by current consultation of will-writing and estate administration starting in September 2012. We will update and undertake further equalities work building on responses received to this consultation.
24. This EIA should be read alongside the associated Impact Assessment (IA), *Enhancing consumer protection, reducing regulatory restrictions: will-writing, probate and estate administration activities*.² In this introductory section of the

¹ LSB, *Enhancing consumer protection, reducing regulatory restrictions: will-writing, probate and estate administration activities*, 23 April 2012:

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

² *Ibid.*

full EIA we set out the relevant legal duties as well as the approach we have taken to assessing potential impacts including the sources of evidence and methodology used.

25. We then set out the main regulatory proposal as detailed in the full impact assessment and also in our past consultations. Each of these sections integrates the consultation proposals; the feedback on the equalities impacts of the proposals that we have received through consultation; and our analysis of the likely impact of the proposed change for implementation. We set out our consideration of the impacts identified, how they can be justified and proposals for mitigation.

Equality Duties

26. Under the Equality Act 2010 section 149, when exercising its functions, Ministers and the Department are under a legal duty to have 'due regard' to the need to:
- Eliminate unlawful discrimination, harassment and victimisation and other prohibited conduct under the Equality Act 2010;
 - Advance equality of opportunity between different groups (those who share a protected characteristic and those who do not); and
 - Foster good relations between different groups.
27. Paying 'due regard' needs to be considered against the nine "protected characteristics" under the Equality Act – namely race, sex, disability, sexual orientation, religion and belief, age, marriage and civil partnership, gender reassignment, pregnancy and maternity.
28. The Ministry of Justice (MoJ) has a legal duty to investigate how policy reforms are likely to impact on the protected characteristics and where a potential disadvantageous effect is identified how that is either mitigated or justified by reference to the objectives of the policy. MoJ also has a legal duty to advance equality of opportunity in the design and delivery of its policies and practices. MoJ records its fulfilment of its duties by completing an equality impact assessment (EIA).
29. Identical duties apply to the LSB and further information may be obtained from our website:
http://www.legalservicesboard.org.uk/about_us/our_staff/equality_and_diversity/index.htm

Consultation and Engagement

30. The LSB consulted on the proposal to introduce reservation for will-writing and estate administration legal activities. The consultation *Enhancing consumer protection, reducing regulatory restrictions: will-writing, probate and estate administration activities* was consulted on for 12 weeks from 23 April 2012 (closed on 16 July).³ Alongside the consultation we issued a draft impact assessment and equality impact assessment and sought comment to specific questions in the consultation regarding impacts. The LSB received a range of responses from interested parties including members of the public, approved regulators, professional bodies, charities and a range of firms. In total we received 43 responses to our consultation.
31. Alongside this publication we are consulting for second time for a six week period starting from 24 September 2012. This consultation will ask respondents specific questions regarding equalities duties and impacts on groups and consumers.
32. Our consultation papers sought comments specifically on the potential impacts of the proposed reservation and asked for any information that could be provided to improve our evidence base. In addition to the full impact assessment we also supplied a market picture document in the 23 April consultation which was intended to show the research that we have undertaken on understanding the market for will-writing and estate administration, as well as to highlight areas of the market for which there remains evidence gaps.
33. We held meetings with the main professional bodies for will-writing and estate administration firms, as well as meetings with individual firms, in order to better understand their organisations' particular concerns and the possible impacts of the proposal. These meetings complemented our ongoing engagement with the SRA and other approved regulators which also informed our understanding of the potential impact of our proposed regulation would have on those organisations and the regulated community.

³ LSB, *Enhancing consumer protection, reducing regulatory restrictions: will-writing, probate and estate administration activities*, 23 April 2012:
http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/index.htm

Methodology and evidence sources

34. This EIA draws upon a number of evidence sources. We have used the best quality evidence available and where possible in the impact assessment we have attempted quantification. Much of our evidence for will-writing and estate administration is derived from the following sources:

- Consumer Panel report in July 2011 which highlighted systemic issues and recommended statutory regulation of will-writing (estate administration was not investigated).
- LSB commissioned IFF Research to undertake shadow shopping with consumer's purchasing wills together with a consumer survey and provider research on will-writing and estate administration.
- The LSB undertook a call for evidence from September to November 2011, which sought views on both the Consumer Panel's recommendations for will-writing and also on issues relating to probate activities and estate administration.
- IPW survey of will-writing firms in May 2012.
- YouGov research on probate and estate administration services in January 2012
- On 23 April 2012 the LSB issued a consultation titled *Enhancing consumer protection, reducing regulatory restrictions: will-writing, probate and estate administration activities*. This included a full impact assessment and market picture document.

35. The evidence base that we have used in our impact assessments is primarily derived from the above sources, including commissioned research. We have also drawn from information contained in responses to our consultation; from our discussions with professional membership bodies; our own research of the market as well as from other sources where appropriate.

36. We have also considered the evidence regarding the impacts of reserving will-writing and estate administration services. We do not have detailed data concerning the unregulated part of the market. Also, we are faced with incomplete data concerning the self-regulated part of the market. This is because the trade bodies, which cover the self-regulated part of the market, do not collect detailed information on their membership, including data that could inform a robust equalities analysis.

37. We have considered how consumers with different protected characteristics might be affected by reserving will-writing and estate administration. We also considered the impact(s) on the providers of these services. We do not have sufficient data on different types of consumers and providers with the

protected characteristics to make specific comments on whether, if at all, any groups with these characteristics would be disproportionately impacted upon. In assessing potential impacts, we have undertaken the following analysis.

- Examined the risk of vulnerability of certain consumers in suffering detriment in the current market and whether the risk would be reduced, or otherwise, by the proposal to reserve will-writing and estate administration.
- Examined whether changing the regulatory arrangements in the market will benefit, or otherwise, specific groups of consumers. This has been done with reference to having consistent regulation across all firms, increased competition and the operation of fitness to own and other gateway authorisation checks.
- Examined the impact on providers of mandatory regulation, risk-based regulatory supervision (and associated cost) and greater competition.

Data Sources

38. As already touched on, the LSB has gone through a process of evidence collection and consultation since first starting preliminary inquiries into will-writing and estate administration in September 2010. We asked the Consumer Panel 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 2011, which highlighted systemic issues and recommended statutory regulation of will-writing (estate administration was not investigated in detail at this stage).

39. Following this, the LSB moved the investigation onto a statutory footing and extended the investigation to include estate administration, including whether the reach of reserved probate activities, as currently defined, is appropriate. Evidence calls conducted by the LSB (including research by IFF Research) co-sponsored by the SRA and the OFT comprised:

- shadow shopping exercise;
- consumer survey;
- business survey;

40. Other research included:

- a call for evidence and connected activity;
- data derived from complaints patterns;
- the Consumer Panel's report, Regulating Will-writing.

41. Research focused exclusively on probate and estate administration:
- original research (IFF and YouGov research);
 - a consumer survey;
 - a business survey;
 - LSB internal research and liaison with relevant bodies.
 - LSB Call for Evidence
42. The limitations of these data sources is explained in greater detail in the next section.
43. The LSB undertook a call for evidence from September to November 2011, which sought views on both the Consumer Panel's recommendations for will-writing and also on issues relating to probate activities and estate administration. On 23 April 2012 the LSB issued a consultation titled *Enhancing consumer protection, reducing regulatory restrictions: will-writing, probate and estate administration* activities which consulted on a proposed policy recommendation to reserve will-writing and estate administration activities. The consultation also sought specific views on a draft impact assessment. Views received were from a range of stakeholders including members of the public, consumer groups, Ombudsmen, providers, professional/trade bodies and the accountancy bodies.
44. There was general agreement among most respondents to our 23 April consultation that the LSB's review of evidence had been comprehensive, the exception being some accountancy bodies who felt that not enough was known about their members and their concerns about dual regulation. However, the majority of respondents viewed that the current system of general consumer protections, plus voluntary regulatory schemes allowed an unacceptable level of consumer detriment to exist in the market. There was also general agreement among respondents to the consultation paper in the LSB's assessment of consumer harm and that existing consumer protection and voluntary regulation schemes were for the most part inadequate to address consumer harm. This included the bodies that currently operate voluntary regulatory schemes in this sector. Respondents did not come back with any specific concerns regarding equality impacts, nor did they suggest any new areas for investigation or evidence-collection.
45. The Institute of Professional Will-writers (IPW) ran an online survey of their membership between 8 May-6 July, 2012 to collect views on the LSB's proposal on will-writing and estate administration. The survey was promoted through IPW's membership as well as known will-writers who are not IPW members. In total 162 respondents completed the survey. The majority (65.5%) of respondents were members of IPW, while 32.1% were members of the Society of Will-writers (SWW). The survey was also completed by respondents who indicated that they were not members of either of the two

primary self-regulatory bodies (they totalled 2.4%). The survey contains some information that is of relevance when considering equality impacts on different sections of the market, including the unregulated sector.

46. Further evidence was collected when we met with professional bodies such as the IPW and the SWW. However, as these organisations have primarily been involved in professional representation and maintaining self-regulatory codes, they have not actively engaged in – or necessarily had the capacity – to collect either detailed membership or market-wide information that would be useful from an equalities analysis point of view. One of the abiding difficulties has been to collect information on the unregulated side of the will-writing market. As there are no regulators in this part of the market or a singular representative body, data collection is absent.
47. To this end, there exists considerable information gaps, not just in the self-regulated part of the market, but also (and more especially) for the unregulated part of the market. The next section will delve into the challenges posed by these evidence gaps in greater detail.

Evidence gaps

48. There are evidence gaps relating to the will-writing and estate administration market. Evidence gaps fall on both the demand-side (i.e. consumers) and also on the supply-side (i.e. providers). Many of these gaps relate to the unregulated side of the market where there is an absence of data collection.
49. While diversity and other relevant information exists for the supply of solicitors in practising firms, less is known about the characteristics of the personnel employed in will writing firms. This is because will-writing firms are not currently regulated by the SRA but rather are either covered by self-regulatory schemes run by IPW and SWW or other professional bodies' codes such as accountants, or they are operating outside the scope of any regulation. Accountancy bodies were unable to provide data on which providers undertake the activity. Even in terms of the information about solicitor firms who provide will-writing and estate administration services, relevant data is difficult to obtain because solicitors who write wills typically are also involved in providing many other legal services for which they are regulated. Differentiating between solicitors who offer different services is difficult and while the LSB's proposal to reserve will-writing and estate administration will impact on non-solicitors, the main evidence gaps appear in this side of the market.

50. The main professional organisations such as IPW and SWW who have a membership base of around 850 firms, do not collect specific information regarding the demographic and diversity characteristics of their members. This constitutes the chief gap in information in which to analyse the impact of the proposal on particular groups. There are evidence gaps around providers of services such as accountants, however such providers account for only a small number of providers in the market. We have looked at proxy information sources where possible, such as the IPW on-line survey (May 2012) and also information raised in discussions with these bodies and also from respondents to our consultations.
51. Where appropriate we have also considered information about consumer vulnerability from the *BSI Standards Publication (18477:2010)* on identifying and responding to consumer vulnerability and impacts that may affect this group. We have been able to draw from the recent IPW online survey in order to have a more complete understanding of the types of providers that are offering services in the self-regulated and unregulated sector of the market.
52. From the point of view of consumers, there is some evidence linked to socio-economic status and the propensity to make a will. This tends to rise, commensurate with the size and value of a testator's estate. For example, research points to financial worth as a key determinant of demand as 80 per cent of people with assets valued above £500,000 have a will, while only 9 per cent of those with assets valued at £10,000 or less have a will.⁴ It has also been observed that low income groups tend not to purchase wills, and they tend to be under represented in purchasing other types of legal services. The responses to making a will – or otherwise – may depend on other factors such as wealth or presence of children, people with no children may consider not making a will a convenient and sensible response to organise their financial affairs. The demand side for wills and estate administration is likely to be driven by a several issues and not only about income and assets, with personal circumstance and life choices also feature as important determinants.
53. As Black and Minority Ethnic People (BME) have a proportionally greater risk than their share of the population of being in lower income groups, it can be assumed that this group are underrepresented in purchasing wills, a situation perhaps compounded with issues regarding access to services and other risk factors that make them more vulnerable to being ill-informed in their purchases. English as a second language may, for some people, also be

⁴ Consumer Panel, *Regulating Will-Writing*, July 2011, p.12.

deemed a risk factor in increasing consumers' vulnerability when accessing will-writing and estate administration services.

54. Also, some further proxy information may be found by the type of sales practices by certain will-writing firms and the targeting of specific groups for commercial purposes. This point may raise the possibility that vulnerable groups are at risk of targeted and high-pressured sales, especially if these sales occur in the home environment or at unsociable hours. Concern about targeting of vulnerable groups has been noted by the BSI Standards publication (BS 18477:2010) and anecdotal evidence submitted to the LSB during the July consultation confirms this. However it needs to be recognised that certain sales practices such as in-home selling are an important way to reach isolated and immobile groups and can serve to increase access to justice among some groups of people, vulnerable or otherwise. This is especially the case for those who do not have access to the internet. In outlining risks faced by consumers, the BSI reports notes a secondary risk which is that 'consumers are frequently required to fit in with the way that organisations or markets operate' and that if 'there is a lack of effective competition and choice in a market, consumers are likely to be placed at a disadvantage'. The BSI Standards does warn, however, that a variety of risk triggers are present in the population at large in terms of vulnerability and that any attempt to assume vulnerability for certain groups is misleading.

Limitations of data sources used

55. Research conducted by the LSB is limited in respect to its coverage of the market and also to the scope and sample size of the market. For example, research undertaken as part of the shadow shopping exercise showed strong evidence of widespread incidence of poor quality of wills being drafted which would have failed to deliver what the testator wanted, or which would have contained unclear clauses that would lead to difficulties administering the estate. However, although robust in qualitative terms, there are some constraints on this evidence as the sample size was only 101 completed wills. However, the findings are supported by much anecdotal and case study evidence submitted to the LSB during the course of consultations.
56. Limitation of available data also occur across all of our surveys and call for evidence regarding the unregulated sector. As we have identified in the impact assessment accompanying this document, the unregulated sector accounts for a very small share of the overall will-writing market – around 85 or so firms.

However as there are no regulators or organised groups or bodies that collect data in the unregulated side of the market, we have to rely on proxy sources which are limited in their scope and detail in understanding this side of the market. Anecdotal evidence on unregulated firms which we have received as part of our calls for evidence, and also views on the unregulated side of the market by the professional trade bodies, are constrained in their coverage. The same is true of the calls for evidence and the responses that the LSB received as these are overwhelmingly from either SRA regulated firms or firms under voluntary regulation (i.e. members of IPW and SWW).

57. LSB evidence on complaints patterns is not completely even as this does not extensively include those from the unregulated side of the market. In order to improve our evidence collection we have drawn some of our data from consumer and business surveys. These surveys reflect information only from willing firms in the regulated or voluntary regulated side of the market. For example, the qualitative telephone research conducted by IFF Research interviewed 97 firms, split between 47 will-writing firms and 50 solicitor firms, of which 5 were from the unregulated side of the market. Some of the data can be match up with the IPW on-line survey taken in May 2012 in understanding a wider section of those providers in the voluntary regulated side of the market. However, the small sample size of the survey (162 respondents of which 2.4 per cent from the unregulated sector) means that this source is somewhat limited in its scope. IFF research and also the calls for evidence do not especially focus consumers in the unregulated part of the market. IFF did undertake an online survey of 500 individuals who had purchased a will in the last 12 months, however as they were recruited online it is possible that vulnerable consumers and those with disabilities are underrepresented in the sample because of a lack of internet access.

58. Evidence gaps remain around vulnerable consumers and their purchasing patterns. While we may be able to use proxy data, we do not have specific data that enables us to survey their preferences more fully.

Aims and outcomes for the policy

59. The proposal to reserve will-writing and estate administration aims to ensure that the current risk of detriment to consumers of will-writing and estate administration services by non-solicitor firms is reduced to an acceptable level. The proposal also aims to improve 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. Evidence we have provided shows that consumers suffer from detriments in the market, such as poor quality of wills and unethical practices, including fraud during administration of estates. This lack of consistent regulation leaves consumers without minimum protections which are currently only available to consumers of regulated firms such as solicitor firms for example. Existing regulation covers the majority, though not all, of the market, but quality problems occur across both regulated and unregulated providers.

60. Because of these reasons we consider that action is needed to protect consumers better, improve competition, and promote the wider public interest. Taking action will also protect the many ethical and robust businesses in both the regulated and unregulated sectors, whose business opportunities, reputation and livelihood may be threatened by failures elsewhere in the marketplace which jeopardise business and consumer confidence.
61. Our proposal is for the list of reserved activities be extended to include will-writing and estate administration activities. We will also be working closely with those currently regulated in the market to improve the effectiveness of the existing legal services regulation which applies to the majority of providers delivering these services. Our analysis does not show significant negative business impacts in reserving will-writing and estate administration; having a consistent regulatory framework for all providers can ensure a common regulatory standard and protect consumers from detriment.
62. In terms of the outcomes, reservation will ensure that all consumers of the legal services of wills and estate administration will have access to redress through the Legal Ombudsman and that all consumer purchases have basic protections in place which apply equally across all providers. Reservation will also ensure that regulation is both consistent across all providers and also mandatory; that non-compliant firms cannot simply walk away from regulation when it suits. We would also expect several important outcomes such as improved existing regulation (proportionate and effective) and a plurality of providers in the market which will have positive outcomes in terms of choice for consumers and market competitiveness.

Analysis

Identification of positive impacts

63. The reason to extend reservation to cover will-writing and estate administration activity is to benefit all consumers rather than just those who purchase services from a regulated provider. Presently, if things go wrong when consumers purchase services from a will-writer they do not have a right of redress through the Legal Ombudsman unlike if they had purchased the service from a solicitor. The LSB has found systemic consumer detriment across different types of providers and for this reason seek to put in place appropriate protections for consumers. Introducing minimum regulatory protections that are mandatory across all providers should have the effect of benefiting those consumers who tend to purchase services from unregulated or partially regulated providers.

64. In summary, the chief positive impacts for consumers can be summarised as:

- Extending proportionate regulation to prevent regulatory avoidance and regulatory gaming is expected to make the regulatory landscape easier for consumers to navigate and guarantees minimum regulatory protections for all consumers irrespective of the type of firm they use;
- Mandatory coverage of regulation means that rogue or non-compliant firms cannot walk away from regulation and that a 'hard floor' of regulatory protections are in place for all consumers;
- Elimination of competitive advantage for firms to remain outside the scope of regulation and therefore not have in place minimum protections for consumers;
- Authorisation gateway checks will screen for rogue persons, reducing the risk of fraud and other detriment occurring (especially) during estate administration and which negatively impact consumers;
- Supervision of firms can concentrate on the most risky firms while reducing the supervisory burdens on those firms assessed as lower risk. Better aligned supervision will mean less regulation and compliance for those firms who are managing their risks effectively. This frees-up resources in those firms to offer more competitive services to consumers.

65. These positive impacts would benefit all consumers in all areas of the market. However, it is our view that introducing minimum protections will disproportionately benefit these consumers of currently unregulated services, as opposed to consumers who purchase their services from solicitors who will

benefit the least as protections are already in place. From our research we know that consumers of unregulated firms tend to have lower income and therefore at higher risk of being vulnerable purchasers; introducing regulation to ensure that protections are in place will overwhelmingly benefit these consumers. Likewise, those consumers who purchase their services from members of professional bodies such as IPW or SWW will, under the current proposal, benefit from having access to the Ombudsman which they do not have currently, and assurance that their regulatory rules are mandatory so rogue and non-compliant firms cannot simply walk away from regulation and their responsibility to consumers.

66. We also expect that there will be consumer benefit gained through improving existing regulation and having greater confidence to purchase services in a sector with mandatory and consistent protections in place and with the opportunity for good providers to be recognised. Also, there is likely to be some benefit to those consumers of solicitors who are likely to see a greater variety of services provided if regulation is pitched at a more appropriate level. None of our proposals would affect the large number of people who undertake estate administration without a professional. Known as DIY estate administration, these people make up just under half of the *YouGov* sample survey. Nor would it have an impact on those who write wills using 'DIY kits' or online tools. However, as we expect the market to become more competitive as a result of our proposal, there may be greater choice for those consumers whose decision to self-serve is driven by price considerations.

Removing confusion & creating consistency

67. Introducing reservation is expected to remove consumer confusion around what is and what is not regulated. It is also expected to reduce confusion concerning the process of writing a will and the estate administration process – all of which often represent one-off purchases made under stress. Research shows that consumers do not understand the differences between regulated and unregulated providers and believe that all services are underpinned with the same level of protections.⁵ According to research by *YouGov* it was found that 84 per cent of consumers purchased their services from a regulated provider, though only a minority of respondents were actually certain that their firm was being regulated.⁶ Also a majority of consumers regarded regulation as important in providing essential safeguards.⁷
68. Interestingly, a large majority of will-writing respondents to the IPW May 2012 online survey also agreed with having financial protections in place for

⁵ 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.

⁶ *YouGov, The Use of Probate and Estate Administration Services*, Jan. 2012, p.19.

⁷ *Ibid.*

consumers; 96.9% agreed with having Professional Indemnity Insurance and 82.2% agreed with having protection of client money and client assets. Having consistent regulation for all consumers irrespective of what will-writing or estate administration services that they purchase, means that providers can compete in terms of quality, service and price rather than on the perceived benefits of having a 'badge' by being affiliated with voluntary industry codes, etc.

69. Our proposals intend to develop more consistent regulation for both consumers and also firms, all of whom we propose to bring within the ambit of regulation (for further details refer to the full impact assessment). The proposals have received wide support from industry, organisations and charities who see mandatory protections essential in helping vulnerable consumers. This approach is not expected to have a disproportionate negative effect on a particular group or segment in the market.
70. The extension of reservation to include all will-writing and estate administration services is expected to raise product and service quality by having mandatory authorisation gateway checks in place (including a fit and proper person test for ownership and control) and also requiring providers to have appropriate financial protection arrangements if handling client money. These requirements are intended to have a positive impact on all groups of consumers, including those who tend to purchase will-writing or estate administration services from previously unregulated providers as these changes ensure greater protections are in place. Also, by extending recourse to the Legal Ombudsman for all consumers, irrespective of which service they purchase or which provider they use, this will have a positive impact on consumers who do not use solicitor firms for these services. It treats these consumers equally in terms of basic protections, and benefits consumers as quality and service issues can be remedied in an inexpensive way, which helps ensure access to justice in a way open to all consumers irrespective of income.
71. As the proposal does not envisage large cost burdens on providers we do not foresee particular groups being disproportionately impacted upon. In particular, we don't expect to see significant numbers of firms exiting the market which might negatively affect the employment of particular groups or limit access for certain consumers such as those with protected characteristics. Ensuring that regulation is consistent and mandatory across all providers may only see a slight rise in risk of firms exiting the market due to an increase in costs, but this would mainly impact on the 85 or so firms that currently are under no regulatory obligations. As reservation may increase the opportunity for a wide variety of individuals to be authorised, it is possible that this may promote equality of opportunity in the market by firstly increasing the supply of firms offering services and by encouraging new firms into the market. We would expect increased entry in the market to also improve competition.

Also, by having in place transitional provisions, the LSB will identify any emerging risks in terms of impacts on equality.

72. We would expect ARs, when they apply to us to be designated to regulate will-writing and estate administration, to have in place systems to collect equality data from those that use the services. Also, as the LSB develops a regular information reporting channel with ARs through our self-assessments and regulatory standards work-stream, we would expect that more market information would support work programmes that focus on equality issues. Further information on monitoring and data collection may be found at the back of the document.

Identification of adverse impacts

73. 1.5% of the market is currently unregulated and outside of existing regulation (whether legal, accountancy, banking, or will-writing professional bodies). These firms, in particular, will face additional cost burdens as a result of the introduction of regulation. This could mean that some firms may decide to exit the market, particularly firms whose commercial viability is already marginal. Our discussions with professional bodies confirm this view, and also the fact that these small providers tend to be sole practitioner firms and often engaged in low turnover, many of whom are part-time and semi-retired. It is for this reason that we think any negative impacts are likely to be small.
74. Any such exit is unlikely to have a significant impact on the level of competition or service provision in the market; firms are likely to be smaller than average and not have a great affect on the overall volume of wills written. According to the IPW on-line survey taken in May 2012, 62.3% of respondents were sole practitioners (most of these belonging to self-regulatory schemes), and only 13.8% wrote more than 500 wills annually. In the same survey 73.3% of respondents indicated that they would consider 'joining a network of other will-writers' in order to make the cost of any new regulation more affordable.⁸
75. The risk of an adverse impact of smaller firms exiting the market because of additional regulatory cost, is thought to be greatest among unregulated providers unable to absorb the costs of additional regulation. Much of these firm's additional costs will be to ensure that they have appropriate regulatory systems in place to protect against consumer detriment. Those firms that cannot implement appropriate systems or comply with regulatory supervision would not be allowed to continue providing services which risk detriment occurring. We do not consider such an impact likely, in a substantive way, to disproportionately affect groups or people that fall within the protected characteristics of an equalities impact assessment.

⁸ IPW Online Survey: A Snapshot of the unregulated Will-writing Market, May 2012.

76. Our proposals require all firms to meet requirements of regulators to have in place basic monitoring and compliance systems. This may in turn reduce the competitive advantage of these previously unregulated firms – however such a change is not thought likely to force many of the 85 or so unregulated firms who are also outside of voluntary schemes of the market. This change is justified on the grounds of wider consumer interest and having fair and consistent regulatory architecture for all providers in the market. These 85 firm account for 1.5% of the total number of firms in the market supplying these services, so we would not expected to see a substantive lessening of competition and therefore consumer detriment, if even a portion of these firms exited the market.

Mitigation and Justification

77. We anticipate that the impacts such as additional costs for compliance and consumer protections will primarily fall on unregulated firms (whether regulated by legal, accountancy or banking regulators) which do not, anyway, have minimal regulatory protections in place. It is possible that some unregulated firms may exit the market due to additional regulations, thus impacting on their clients. However, such impacts are expected to be minimal given the proportionate nature of our proposals. Indeed, it is thought likely that having in place mandatory protections will instil greater confidence among consumers in purchasing services and thereby stimulate growth in the sector, as well as providing an enabling environment to encourage new firms in the wills and estate administration market. New providers who compete on quality and price are likely to make the market more competitive which would be expected to exert downward pressure on prices, to the general benefit of all consumers. Encouraging regulators to supervise firms on the basis of risk also helps to free-up resources and lower regulatory costs on those firms that are deemed as low-risk. All this is beneficial for consumers as it means that low-risk firms who have in place robust compliance and quality assurance systems would face lower supervisory costs. We would expect this also to mitigate any negative impact experienced on firms in and consumers of the unregulated side of the market due to the proposed changes.
78. The proposals do not prevent the LSB or other ARs from developing opportunities to promote equality of opportunity. To this end, any residual groups impacted upon could receive specific intervention if it was determined that the impacts were severe enough and long-term in nature. The proposals to extend will-writing and estate administration, however, are not intended to target any particular group but to benefit consumers as a whole through ensuring proportionate protections are in place for *all* purchases and that *all* consumers have a right of redress. The proposals also seek to bring other types of providers within legal services regulation which opens up the sector making it more diverse and thereby providing wider choice for consumers.

Monitoring

LSB monitoring impacts

79. The proposal to extend reservation for will writing and estate administration is intended to reach recommendation stage (for the Lord Chancellor) in the first quarter 2013. By the time transitional provisions end, proposed implementation would occur in 2015. The LSB has various levers to directly and indirectly monitor and review implementation. We intend to review the impacts of the proposal in terms of two primary questions:

- Whether it achieves its aim of reducing the risk of identified consumer detriments
- Assessing if any groups or persons are unduly impacted upon.

80. Monitoring of the impacts on specific groups will be captured by the ARs as part of their licensing requirements. This data will then be captured and assessed at a market level through the LSB's research and monitoring framework and will contribute to us forming a view on the level of impacts, etc.

81. The LSB intends to monitor impacts of the proposal and the equality outcomes against our regulatory objectives as set down in the Legal Services Act 2007. These outcomes should be judged against their ability to deliver the Regulatory Objectives. But in particular we were concerned about their ability to:

- Promote competition
- Deliver good outcomes for consumers
- Address shortcomings in existing regulation

AR's responsibility in monitoring impacts

82. The LSB will also encourage ARs when reviewing impacts to be mindful of the regulatory objectives as a framework for capturing equality impacts and which may help shape the nature of their regulatory supervision. The LSB is assisting ARs to implement this through the LSB's regulatory standards work stream which encourages ARs to take a stronger evidence-based understanding of the market which they regulate. Through the regulatory standards work, along with the implementation of outcomes focused regulation, the LSB expects regulators to collect high quality, up to date, reliable evidence from a range of sources about how all groups of consumers need and use the legal services that regulators regulate, as well as collect

evidence about whether outcomes are being achieved. This type of monitoring will capture both general impacts of the proposal as well as equality impacts.

83. Currently, all ARs are collecting data on workforce diversity which may be used to inform future equalities impacts. The LSB has issued guidance to the ARs introducing new duties in relation to the collection and transparency of information on diversity and social mobility. The ARs are now implementing the actions needed to comply with these new duties. This will result in the publication of data towards the end of this year and throughout the beginning of 2013. As an oversight regulator the LSB will be able to use this information to encourage ARs to investigate impacts in the market and this information will also be useful in monitoring the equality impacts arising from extending regulation to all providers in the will-writing and estate administration market.