

Enhancing consumer protection, reducing regulatory restrictions

A discussion document about how the LSB will assess the boundaries of legal services regulation and connected regulatory decisions

Response from

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Institute of
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BACKGROUND

The Institute of Professional Willwriters was formed in 1991 by a group of Willwriters who wanted to form a representative and regulatory structure following the failure of franchise operation Quill Wills in 1993 when the business was wound up in the High Court on petition of the Department of Trade and Industry.

The aims of the organisation were:

- 1) to put in place a system of technical training and mandatory examination to ensure that the advice and documentation that consumers received was valid and relevant
- 2) to put in place a professional indemnity insurance scheme that would be mandatory for all members – to ensure that if anything did go wrong, consumers (or more likely, their beneficiaries,) would receive adequate financial redress

In 1994 the IPW started to provide training courses – both initial training to new and prospective members to help them achieve the standard required to pass the entrance exam and ongoing training to existing members to enable them to expand their knowledge and keep up to date with changes in legislation and new working practices. Much of this training was, and still is, delivered by solicitors with specialist knowledge in the sector and by commercial legal training providers who provide training to the wider legal profession.

In 1997 the IPW introduced a programme of Continued Professional Development (CPD) to ensure that members were not only competent when they joined the organisation but remained so throughout their membership. CPD became mandatory in 2001 and since then the IPW have expelled members who have failed to meet their CPD requirement. However the unregulated nature of the sector means that those who have failed to meet training targets are still able to provide Willwriting services.

In 2003 the IPW introduced an examination and membership for employees and self employed agents who work for members of the IPW and this requirement became mandatory in April 2006. The IPW had recognised that it was essential that the quality of the frontline advice given to consumers and the instructions that developed from that advice, was critical to the quality of the finished document and therefore everyone who gave advice should be tested on their competence to do so. Members of the IPW has had their competence tested, specifically in the fields that they advise in, meet ongoing competence tests and have professional indemnity insurance.

In 2010 the IPW achieved approval of its Code of Practice from the Office of Fair Trading under its Consumer Codes Approval Scheme (CCAS). Compliance with the IPW Code of Practice is mandatory for all members and their firms and sets high standards of technical competence and customer service.

In 2010 the IPW formed the Institute of Scottish Professional Willwriters (ISPW) and later that year the Scottish Government started to investigate whether Willwriting in Scotland should be regulated. When it subsequently made the decision to regulate Willwriting, the ISPW indicated that it would apply to become a regulator of Willwriting services in Scotland and that the IPW Code of Practice would be central to that application.

As long term campaigners for statutory regulation of Willwriting, the IPW takes a particular interest in this project, especially as decisions on the regulation of Willwriting have been touted as the test case for the principles that will evolve from this discussion.

Question 1

What are your views on the three themes that we have put at the core of our vision for the legal services market? If different, what themes do you believe should be at the core of our vision?

1.1 The IPW agrees with the three themes.

Question 2

What is your opinion of our view that the purpose of regulation is to ensure appropriate protections and redress are in place and above this there are real competitive and cultural pressures for legal services to deliver the highest possible standards with a range of options for consumers at different prices? If different, what do you consider that the role of regulation should be?

2.1 The IPW agrees with the principle. However it is important that consumers are able to appreciate the myriad of different protections and redress mechanisms that may be available from different providers of the same service. The impact of this should not be ignored in the excitement to provide 'new ways to do business'.

2.2 The IPW suggests that there should be a requirement on providers to provide information to consumers about the different ways in which a service could be delivered, the advantages and disadvantages of each and where the particular service provider fits into this. For example, the motor insurance industry provides this information to consumers very well in a menu list with the appropriate method of service delivery ticked.

Question 3

In light of the changing market do you think that specific action may be needed to ensure that more legal services activity can unequivocally be included within the remit of the Legal Ombudsman and, if so, how can this best be achieved?

3.1 The IPW understands that the Legal Ombudsman is investigating how unreserved activities could be brought within their remit. There is a potential issue in that the best way to signpost a complaints procedure is through 'point of sale' information provided by service providers. The provision of this information by problem service providers who are outside of any regulatory regime will be impossible to monitor. The Legal Ombudsman could find themselves keeping a watch on the honest while the dishonest still make hay away from the spotlight.

- 3.2 Careful thought also need to be given to how the funding of complaints originating from unregulated providers is met. It would be unfair for regulated providers to meet this cost but there inevitably will be difficulties in collecting fees from those outside of a regulatory requirement to make payment.
- 3.3 Ultimately the only effective way to ensure access to an effective complaints procedure, whatever it may be, is through regulatory oversight of all service providers.

Question 4

What are your views of our diagnosis of the weakness of the existing system and the problems within it?

- 4.1 The experience of the IPW is that consumers don't understand the subtleties of the different types of regulation (including voluntary regulation of unregulated services) and the different types of protection and remedy that each provider might offer – or might not offer. This is perhaps the biggest challenge that the LSB faces if it wants to expand the diversity of product and service delivery channels. The cost of consumer education and the impact of consumer detriment arising from the encouragement of such diversity should not be ignored in any cost-benefit analysis.
- 4.2 Paragraph 93 of the consultation suggests options to create a level playing field where all legal work is either regulated or deregulated. But goes on to say 'Clearly neither is likely to deliver the regulatory objectives...'. The IPW is not sure why. Both would give the consumer what he thinks he already has.
- 4.3 Aside from the lack of the current regime to provide global and real mandatory consumer protection from unscrupulous unregulated legal practitioners, lack of consumer understanding of the existing regime is clearly the biggest weakness of the existing system. There is a real danger that in attempting to provide greater choice that this confusion is exploited and the intentions of the Legal Services Act defeated.

Question 5

What do you see as the benefits and downsides of regulating through protected title such as solicitor and barrister?

- 5.1 There are no benefits of regulating through protected title. Title means nothing. That the Consumer Panel research into Willwriting found that a Will drawn up by a solicitor was just as likely to have 'failed' as a Will drafted by a Willwriter came as no surprise to the IPW, given that

little or no training in Wills is required by someone to become a solicitor and no ongoing training in Wills is required to maintain the title. A consumer is just as likely to find themselves before a solicitor with little or no experience of writing a Will as they are likely to find themselves before a Willwriter with little or no experience of writing a Will. At last the myth that all solicitors are competent to provide all legal services has been exploded.

5.2 Activity based regulation where an individual is required to be competent in the activity(ies) in which he operates has to be an essential part of an effective regulatory regime.

Question 6

What are your views on whether there should be a consistent approach to the allocation of title to authorised persons? What are your views on whether the title should be linked directly to the activities that a person is authorised to undertake or linked to the principal approved regulator that authorises them?

6.1 The regulation of solicitors has proved that the reference to the approved regulator who authorises them gives no assurance of competence, though does give assurance of the potential for redress.

6.2 The first step in any satisfying experience for consumer is that the provider that they choose is competent and able to deliver the services that they offer. If that goal could be achieved there would probably be no need for any protection or redress - save protection and redress arising from occasional human failings. The IPW therefore believes consumers should have a simple, clear and transparent way of identifying which providers are competent to deliver which legal service. The title of a legal services provider therefore needs to have at least some indication of the activities that they are able and competent to provide. A provider of more than one service could have more than one title.

6.3 Of wider importance to the IPW is that there should be some sort of SINGLE badge or logo of endorsement of legal services provider which would enable consumers to identify those providers with whom they can rely on for a greater level of trust. Simple variations should enable consumers to be able to identify the activities under which the provider is regulated.

Question 7

What are your views on our proposal that areas should be examined “case- by- case”, using will-writing as a live case study, rather than through a general recasting of the boundaries of regulation? If you disagree, what form should a more general approach take?

- 7.1 The IPW accepts that each area will have its own particular issues. But we once more re-iterate that a cacophony of regulatory regimes has the real risk of increasing, rather than reducing, consumer harm.
- 7.2 The IPW is however pleased to see that the decision on whether to regulate Willwriting, and if so, how, is taking place against a general review of the regulation and de-regulation of the provision of wider legal services. As has been pointed out by others, the reservation of a number of legal services is at best illogical and at times works against the best interests of the consumer. We welcome intelligent debate going forward.
- 7.3 Offset against this is that consideration needs to be given to mitigating the uncertainty that is inevitably created in a sector while such investigations are carried out and the potential for commercial damage caused to businesses who find it difficult to make long term strategic business decisions against a background of regulatory uncertainty. We discuss how the protracted decision-making process on regulating Willwriting has affected the Willwriting sector in our response to question 13.

Question 8

What are your views on our proposed stages for assessing if regulation is needed, and if it is, what regulatory interventions are required?

- 8.1 It is the opinion of the IPW that there is a potential for too great a reliance on the need for evidence. This has certainly been our experience over the many years that the case of regulating Willwriting has been argued. The very nature of an unregulated and therefore fractured and dysfunctional community is that it can be difficult to compile evidence.
- 8.2 The IPW experienced this when regulating Willwriting was first considered in 2006 – there was a clamour for evidence and data and statistics about problems. However the nature of the service and the nature of the sector meant that documentable evidence was hard to come by – so the decision not to regulate was made on the basis of a lack of evidence of problems. Five years on and the topic is back up for discussion, with the same level of hunger for evidence. The difference is that this time the money has been found for the Consumer Panel to find the evidence of problems. And evidence of problems is what they have found – no surprise to the IPW.
- 8.3 Furthermore, it must be appreciated that those who have been wronged may not realise that they have been wronged until many years after the event – if ever. The absence of complaints data should therefore not be seen as evidence that a problem does not exist.

8.4 There is then a decision to be made about when is enough evidence enough evidence to warrant action. This needs to be easily quantifiable to ensure that decisions made over time are justifiable and consistent.

8.5 The IPW thinks that greater consideration of potential solutions to a potential problem should be given to the process of deciding if to regulate and if so, how to regulate. If an easy and cheap solution to a problem exists, then why shouldn't the solution be implemented, even if there is no measureable evidence of the problem?

Question 9

What are your views on the implications of our approach for professional privilege?

9.1 We have no views on this topic.

Question 10

Do you believe that any of the current reserved legal activities are in need of urgent review? If so, which activities do you think should reviewed and why?

10.1 The administration of an Oath is a service which does not appear to require too much in-depth specialist knowledge or carry any huge risk to a consumer. In many cases the use of an Oath is in connection with the delivery of another legal service (e.g. probate, conveyancing) and the risks to consumers from the Oath could be dealt with through appropriate regulation of that service. It's therefore not immediately clear to us what useful purpose this reservation serves.

Question 11

What are your views on our analysis of the regulatory menu and how it can be used?

11.1 The IPW supports the regulatory menu outlined in the consultation. Getting the right level of regulatory involvement right first time is likely to be an unachievable goal so it should not be the target. More important is that, certainly in the case of regulation of a new activity, that graduated regulation is implemented so that new approved regulators and those who they regulate can 'find their feet', and it can be established whether the regime is effective or not, and if not, to plug any identifiable gaps and loopholes.

Question 12

Do you have any comments on our thoughts on other areas that might be reviewed in the period 2012-15, including proposed additions or deletions, and suggestions on relative priority?

12.1 The IPW has no comments on this programme – except that we support in-depth consideration of the purpose of regulation and de-regulation of the provision of all legal services.

Question 13

Do you have any comments on the approach that we have adopted for reviewing the regulation of will- writing, probate and estate administration?

13.1 While the IPW has not found the actual process and procedure during the review of Willwriting, we do wonder why a second investigation into Willwriting was deemed necessary following the investigation by the Consumer Panel.

13.2 It is now over 12 months since investigations first started and it could be two years after they first started before a final decision is made. Some larger businesses have commented that they have been unable to make long term strategic plans – and the same can certainly said for the IPW. This uncertainty has happened at a time of difficult trading conditions and when some competitors in the market have had a clear direction of their destiny – including those forming Alternative Business Structures. While we don't think any firms have gone out of business because of this uncertainty, and many IPW members are reporting growth, we are aware that some Willwriting firms (both IPW members and non-members) have lost contracts with contract providers citing the regulatory uncertainty as an issue. Clearly the uncertainty over the future of the OFT CCAS added to this difficulty for IPW members so we wouldn't want to overstate this issue, but the uncertainty hanging over the sector has not been helpful to its prosperity.

13.3 We appreciate that the scope of the second investigation has been widened to include estate administration and probate and hope that this is the only reason why further effort and duplication has been expended on this exercise, and that going forward, two investigations (and the time taken to carry out two investigations) is the exception rather than the rule.