

Policy Discussion Document – May 2012.

As a result of the recent announcement from the Legal Services Board (LSB) that they propose to recommend Willwriting in England & Wales should be statutorily regulated, the Institute would like to canvas opinions from across the whole Willwriting community that currently provides Willwriting services.

Although this may not at first sight seem relevant to members and Willwriters in Scotland, some of the policy options discussed at the end of the document will have an impact on those who provide Willwriting services there.

As part of the process, time will be set aside at the following IPW regional meetings which, as usual, are open to both IPW members and non IPW members – please note that there may be a nominal charge to cover room hire and lunch:

South West/South Wales

Friday 22nd June 2012 10.00am to 3.30pm – for more information please contact avon@ipw.org.uk

Holiday Inn (Bristol Filton) BS16 1QX. The venue is located just off junction 1 of the M32

West Midlands

Thursday 28th June 2012 10.00am to 2.00pm – for more information please contact westmids@ipw.org.uk

The Limes Country Lodge Hotel, Earlswood, Solihull, B94 5JZ which is just off Junction 3 of the M42

North London

Thursday 14th June 2012 10.00am to 2.00pm – for more information please contact eastlondon@ipw.org.uk

Watford Town and Country Club, Rosslyn Road, Watford WD18 0JX

East Midlands/East England

Tuesday 3rd July 2012 12.30pm to 4.00pm – for more information please contact anglia@ipw.org.uk

Woodman, Thorpe Wood, Peterborough PE3 6SQ

South East

Friday 15th June 2012 10.00am to 12.00pm – for more information please contact kent@ipw.org.uk for more information.

Best Western Reigate Manor Hotel, Reigate Hill Reigate, Surrey RH2 9PF

Copies of this document are available on the Institute website at www.ipw.org.uk

At the end of this document there are a series of questions to which we welcome responses, along with other general or specific comments from the whole Willwriting community by 5pm on Wednesday 4th July 2012.

The answers to the questions can be provided in the following ways:-

Online at: <https://www.surveymonkey.com/s/regulation-survey>

By email to: chairman@ipw.org.uk

By post to:

Institute of Professional Willwriters

Trinity Point

New Road

Halesowen

B63 3HY

1.0 The LSB proposals

The full report can be found [here](#) but below is our brief analysis of the report.

1.1 The problems that the Legal Services Board found:

The LSB looked at each of the three activities, Willwriting, Probate and Estate Administration in isolation but also considered how they each interact with each other through linked and bundled services – for example the appointment of a firm as an executor to deal with estate administration at the time that the Will is drafted.

The LSB confirmed the issues found in an investigation by the Legal Services Consumer Panel which reported in the summer of 2011. The main issues were

- 1) Poor quality of Wills – exasperated by the fact that consumers, as infrequent buyers were poorly placed to measure quality
- 2) Firms using the sensitive nature of services to their advantage – this was particularly true of estate administration services purchased at a time of grief
- 3) Confusion over pricing, especially of ‘additional services’ which could see the cost of a transaction increase disproportionately.
- 4) Missing wills – the unregulated nature of the sector means that firms ‘come and go’, sometimes disappeared with Wills drafted by them which are still in their care. Decades later problems arise when someone dies and the firm originally holding the Will cannot be found.
- 5) Fraud and delays releasing money, particularly during estate administration services. Firms have been using client money to support their general trading bank account and therefore benefiting from delaying distribution of funds.
- 6) Sales practices – using low consumer knowledge to their advantage, resulting in unnecessary and/or over-priced packages being sold. Also a lack of clarity over referral arrangements.
- 7) Confusion over the current breakdown between the reserved activity of applying for probate and unreserved activity of estate administration means that in some cases providers are escaping through a loophole by providing regulated activities under the guise of unregulated activities while other providers were forced to deliver part of their service through regulated providers. This gives consumers the worst of all worlds.

These issues led to financial detriments – ranging from paying more than was necessary for services to losses to beneficiaries through fraud during the administration of an estate. Emotional detriment was also highlighted – ranging from strained and broken family relationships over uncertainty due to

poorly drafted Wills to stress caused by unexpected delays and expenses during the administration of the estate of a loved one.

Finally the LSB noted that the mounting media interest in rogue Willwriting and probate providers risk causing a lack of consumer confidence in the whole process which could deter people from making a Will.

1.2 The possible solutions

The LSB considered the following four options

- 1) Do nothing
- 2) Enhance consumer education to that better informed consumers are able to spot the better services and service providers
- 3) Voluntary regulation
- 4) Statutory intervention

The 'Do nothing' option was rejected because it allows firms to deliver services outside of any regulatory regime. This not only means that there is no control over the quality of the service, but it is also more difficult for consumers to obtain satisfactory redress as their only option is to pursue matters through the courts. This was identified as a difficult, expensive and lengthy process and an unnecessary use of court time. It also obviously fails to address any of the issues that both the LSB and the Consumer Panel highlighted in their investigations.

Enhancing consumer education was rejected because of the complex nature of the services and the fact that they are services which consumers rarely purchase. There was therefore unlikely to ever be a high level of consumer knowledge of the products and services available, their benefit and their cost and therefore their value. Furthermore consumers, having experienced poor service were unlikely to be able to influence the market by taking their future purchasing elsewhere – since they rarely need to buy the services.

Voluntary regulation – it was noted that the IPW is the only organisation in the sector to have a voluntary regime approved by the Office of Fair Trading under its Consumer Codes Approval Scheme and that the future of the scheme is uncertain. Subsequent announcements have however confirmed the likely survival of the scheme with it being operated by the Trading Standards Institute. The biggest issue is that the worst offenders in the non-regulated sector did not belong to any voluntary scheme and some of them continued to operate despite expulsion or refusal of entry from such voluntary schemes.

1.3 Statutory regulation

So statutory regulation was concluded to be the only viable response to the issues identified in the Willwriting sector. However the report went much further by recommending that existing regulatory regimes that apply should also be reformed since it was clear that many of the issues highlighted were not unique to the unregulated sector. Clearly the present regime is also not fit for purpose.

The proposal is that any firm wishing to offer Willwriting/Probate and/or Estate Administration services should be regulated by an approved regulator who has been approved by the LSB to regulate these activities. This means that the Solicitors Regulation Authority (SRA), the Council of Licenced Conveyancers (CLC) and ILEX Professional Standards (IPS) will need to apply to be approved regulators if they are still to be able to regulate their respective communities in the provision of such services.

The report identified other potential regulators including:

- 1) Existing legal service regulators who are not currently involved in the regulation of Wills, Probate and Estate Administration activities
- 2) Non legal service regulators whose regulated community may wish to become involved in Wills and related activities. In particular the accountancy body Institute of Accountants in England and Wales (ICAEW) which currently has an application before the LSB to regulate its members in the provision of probate activities was identified
- 3) Organisations that are not currently legal service regulators, such as trade and /or voluntary regulatory bodies already operating in the sector, such as the IPW.

1.4 Essential elements of a regulatory regime

The LSB identified the following as minimum protections

- A strategy and early action for consumer information – such as clear pricing, publishing quality indicators and providing impartial information about alternative options to store Wills, appoint non-professional executors and payment of probate at time of Will making;
- A mandatory register of authorised persons;
- Authorisation gateway checks including CRB Disclosure, checks against bankruptcy, checks against disqualified directors, checks on previous disciplinary action;
- Appropriate financial protection arrangements, covering loss caused as a result of poor quality work (Professional Indemnity Insurance) but also dishonesty where providers have access to client money;

- A requirement that providers have an appropriately trained workforce – with different requirements for different members of the workforce depending on the type of work that they are doing.
- Risk based supervision strategy based on a robust understanding of the risks to consumers arising from the work carried out in the sector including work that could be planned to be carried out
- Enforcement strategy that encourages compliance and deters and punishes non-compliance and is straightforward fair and swift and includes financial penalties
- A complaints process that enables complaints to be ultimately passed to the Legal Ombudsman, following the failure of in house procedures provided by firms
- An outcome focussed Code of Practice with appropriate emphasis on sales practices

The biggest challenge for the IPW is to deliver an outcome focussed Code of Practice as its current Code was intentionally drafted as rules-based to enable it to be effectively and economically enforced in a sector where there was always the option to do nothing.

A further challenge, which applies to the whole sector is that there isn't a wide range of different qualifications and training opportunities to create the menu of different levels of training for different workers within the sector and the sector probably isn't large enough to justify the levels of investment that would be required to deliver such opportunities.

1.5 The scope of regulation

The LSB considered how to frame the scope of the regulatory requirements. It has been smart enough to realise that careful drafting is required here not to create loopholes which allow the cowboys to continue to operate outside of regulation.

It has suggested

The preparation of a Will and all ancillary activities, including (but not limited to) taking instructions and obtaining background information, drafting the will and any amendments to it, providing advice (such as tax advice, wealth management) and advising on and/or overseeing the signing and witnessing of the Will.

And

The administration of an estate of a deceased person (including the preparation of the papers on which to found or oppose the grant of probate or letters of administration) and all ancillary activities,

including (but not limited to) collecting details of the assets and liabilities in the estate and of the intended beneficiaries, preparing relevant HMRC papers, collecting and realising assets, advertising of creditors and claimants, paying liabilities, distributing assets, preparing state accounts and providing advice relating to the administration of the estate.

This does raise the question regarding what are 'ancillary activities' and here the LSB suggests that this decision lies with the provider and the regulator. The LSB has considered whether to draw into regulation Powers of Attorney and lifetime trusts, but has chosen not to unless they are delivered as part of a will or estate administration transaction because they have not seen wide evidence of consumer detriment in these areas. While that may be true of Powers of Attorney, media interest at the end of last year, which arose from a series of mis-selling scandals relating to advice surrounding the sale of lifetime trusts seems to indicate otherwise. And those issues are remarkably similar to the issues that the LSB highlighted for Wills – low consumer knowledge, poor quality advice, highly priced services. There is the potential for some dubious Willwriting firms to dump their Willwriting offering in order to market trusts outside of the regulatory regime.

1.6 Where do DIY wills fit into this?

The LSB supports the option for people to make their own Will, however bad a job they make of it. However they have suggested that DIY services which hold out to provide some added value element, such as a checking or advice service will come under the proposed regulations.

1.7 Timescales

The current consultation ends on 16th July 2012 and the LSB is expected to confirm its proposals in September, including guidance on high level regulatory arrangements. There will then be a further 12 week consultation.

A final report will be produced in the winter, including any recommendation to the Lord Chancellor to amend the list of reserved activities. The Lord Chancellor then has 90 days to decide whether to accept the recommendation or not – and to publish a notice of that decision.

The LSB has rightly not under estimated the scale of the task that their proposals place on both potential regulators and also providers and to that end there will be a transitional period to allow potential regulators to submit applications to the LSB and to put processes and procedures into place and for sufficient providers to be approved by regulators under their schemes.

2.0 The Scottish Element

The Scottish Government announced in 2010 that they were to introduce a system of regulation for Willwriters in Scotland. Once enacted legislation will allow organisations like the Institute, under its Scottish brand to apply to be a regulator of Willwriting and also Estate Administration (Confirmation) in Scotland.

We do not see anything contradictory in any of the requirements for regulation in England and Wales and for regulation in Scotland. What is becoming increasingly clear is that the number of Willwriters in Scotland is very low and a stand- alone regulatory regime in Scotland may turn out to be prohibitively expensive. Certainly a scheme in Scotland that was able to ‘ride on the coat tails’ of a scheme in England & Wales (or vice versa) is likely to be much more affordable for all concerned.

3.0 The OFT and the Consumer Codes Approval Scheme

We have spent the last 12 months expecting the worst in the review of the Consumer Codes Approval Scheme (CCAS) operated by the OFT. It is now clear that there is a new organisation prepared to take on the scheme, on a self-funding basis – the Trading Standards institute (TSI).

However the scheme is not out of the woods yet. A number of issues need to be bottomed out to the satisfaction of the existing Code Sponsors if the scheme is to survive.

However it is perfectly feasible that the Institute could remain in the scheme and run it alongside regulatory regimes in England, Wales, and Scotland, as a ‘chartermark’ to set aside Institute members from other regulated providers of the activity.

4.0 Costs

The costs of running the regulatory regime are largely unknown. The Institute runs a scheme that is not dis-similar to the proposed scheme, but there are a number of factors that are likely to increase costs if the IPW were to become a regulator of Willwriters in England & Wales:

- 1) The regime in England and Wales requires an Outcome Focussed Code of Practice. This Code will consist of broad principles. It will be up to providers to consider those principles and how they could meet them and then put those proposals to the regulator. It will then be up to the regulator to consider those proposals on a case by case basis and decide if those proposals meet the principles. Clearly this is a much more labour intensive process than having a Code based on rules where the provider has to meet the rules and the regulator has a simple task of checking whether the rules have been met, or not. There will therefore be

additional on-going costs for both providers and regulators in monitoring an Outcomes Focussed Code.

- 2) The Institute would need to create a separate body to deal with regulatory matters. The Institute itself could remain as it is – a democratic representative body owned by its members, delivering services such as PI, technical support, regional meetings etc. Though some staff and resources would be transferred to the regulatory body (or shared), there is little doubt that a regulatory body will have more work to do and require more resources to do it.
- 3) The reporting requirements to the LSB appear to be greater than the current reporting requirement to the OFT and the LSB seems to be a more intrusive (or interested) oversight regulator than the OFT.
- 4) The above regulatory costs could be reduced if there are greater numbers of providers to be regulated – thus the cost of funding the regulator is spread across a larger pool, without necessarily increasing costs of running the regulatory regime proportionately. We have in the past floated the concept that the IPW and the SWW could divide the representative and regulatory functions with one organisation taking one function and the other taking the other. This has the potential to be the most cost effective way of dealing with the challenges ahead since it removes any duplication in the regulatory and representative functions within the sector and maximises the pool of Willwriters who would contribute to the two regimes. We recognise that both organisations carry baggage and we have floated the idea that this might best be achieved by a merger under a new name with new management.
- 5) An alternative is for both the IPW and the SWW to continue as separate members' organisations, but to agree to support a common regulatory organisation, which might or might not be set up by one of them. However this would leave the sector with two representative bodies, one more than any other regulated legal activity, despite the sector being one of the smallest of the regulated legal activities. If the sector has to carry the cost of two representative bodies, it might find itself at a competitive dis-advantage.
- 6) Providers will need to contribute towards the cost of the Legal Ombudsman. A figure of £385 per provider in England and Wales is mentioned by the LSB in their report, however this is based on the average fee paid by solicitors or conveyancers. The fee is actually made up of an annual levy on all providers along with a case fee which is charged when the number of cases that are upheld against a provider breach a certain allowance. It is not clear how this funding arrangement would play out in the Willwriting sector but we would hope that the level of complaints against Willwriters would be less than solicitors experience. As an

example we are aware that one small regulator of Legal Services in England & Wales whose annual levy is £50 per individual and those who enjoy a low level of complaints pay no more because they don't pay case fees. The Legal Ombudsman has indicated that their budget for 2012/13 will remain static compared to 2011/12, though this prediction probably excludes any additional work from newly regulated providers of Willwriting and Estate Administration services, since the regime is unlikely to come into effect until the 2013/14 budget year.

The IPW is aware of one legal regulator who regulates 600 individuals and does so at a cost of £450 per regulated individual per year, of which £200 is paid to the representative function and £50 paid to the Legal Ombudsman. The regulator works in a sector where they do not handle client money, so compliance requirements are lighter than they would be, certainly for estate administrators, though not necessarily for Willwriters.

5.0 Options going forward

If the IPW is not able to put together a successful or economically viable application to become a regulator, then the following options are available to Willwriters:

- 1) The SRA, CLC and IPS have all expressed an intention to introduce a regulatory scheme for Willwriters and Estate Administration in England and Wales. We expect the Institute of Chartered Accountants in England and Wales (ICAEW) to do the same. Willwriters could apply to be regulated by any of these organisations, subject to their applications to the LSB to be a regulator of Willwriting and Estate Administration being successful. None of these organisations have a presence in Scotland and it is not clear to what extent any of these schemes would extend into Scotland. This option could leave Willwriters in Scotland 'high and dry'.
- 2) Willwriters could apply to become an Alternative Business Structure (ABS) under the Solicitors Regulation Authority or the Council of Licenced Conveyancer, (assuming either or both are successful with their applications to the LSB to regulate Willwriting and Estate Administration. This would potentially allow them to offer legal services beyond Willwriting and Estate Administration. This option would also be available to Willwriters in Scotland, where a structure of ABS's is expected later this year.
- 3) The IPW as a members organisation cannot apply to be a regulator, but it could create a separate organisation to deal with regulatory matters for Willwriting and Estate Administration. The IPW as a members organisation could continue as a representative

organisation unless agreement was agreed with another organisation for them to deal with representative functions

- 4) There is the potential for some sort of hybrid scheme where the IPW joins up with one of the existing regulators to deliver a regulator scheme in one of two ways:
 - a) The Institute could 'white label' an existing regulatory scheme under its name. We have already been approached by one such regulator who does not currently regulate Willwriting, and has no plans to do so directly. They have indicated that they would only be interested in providing such a scheme if the sector was united behind one representative body and one regulatory body. They do not want to be drawn into the squabbles and rivalries between organisations that exist now and may continue to exist.
 - b) The Institute could act as a gateway to one of the existing regulators, providing an easier and more direct path to a regime provided by another provider. This solution is unlikely to provide a solution for members in Scotland.
- 5) The SWW has yet to declare any firm indication of whether it would apply to be a regulator, though press comment has reported hesitancy in the idea, citing difficulties in separating out their representative functions from regulatory functions.
- 6) The Society of Trust and Estate Practitioners (STEP) has indicated that they would only apply to be a regulator as a last resort, if no other suitable regulators come forward.

Questions (these can be completed on line [here](#))

- 1) Are you a member of the IPW (or its Scottish equivalent)?
 - a) Yes
 - b) No

- 2) Are you a member of SWW (or its Scottish equivalent)?
 - a) Yes
 - b) No

- 3) How many Wills per year do you/your firm write (include re-writes and count mirror Wills as one)?
 - a) Less than 100
 - b) 101-500
 - c) 501-1000
 - d) More than 1,000

- 4) How many advisers/instruction takers work in your firm?
 - a) One (only me)
 - b) Between two and five
 - c) Between six and ten
 - d) Between eleven and twenty
 - e) More than twenty – please state how many_____

- 5) Do you/your firm offer estate administration services?
 - a) No
 - b) Yes – we refer the work to a third party
 - c) Yes – we deliver the service ourselves

- 6) Are you a member of any of the following?
 - a) Society of Trust and Estate Planning (STEP)
 - b) Professional Association of Legal Services (PALS)
 - c) Council of Licensed Conveyancers (CLC)
 - d) The Law Society
 - e) Chartered Institute of Legal Executives (CILEX)
 - f) Institute of Chartered Accountants in England and Wales (ICAEW)
 - g) Other – please specify_____

- 7) Would you prefer to be regulated by? (place numbers by order of preference, 5 being the most preferred and 1 being the least preferred)
 - a) A regulator of Willwriters
 - b) A regulator of solicitors
 - c) A regulator of conveyancers
 - d) A regulator of legal executives
 - e) A regulator of accountants

- 8) At what annual REGULATORY cost (including any Ombudsman costs but excluding representative costs and insurance costs) would you consider ceasing to provide Willwriting and/or Estate Administration services?
- a) £250pa
 - b) £500pa
 - c) £750pa
 - d) £1,000pa
- 9) In order to maintain your presence in the Willwriting sector would you consider?: (please tick either or both)
- a) Joining a larger firm
 - b) Joining a network of other Willwriters to spread the cost and obligations of compliance and regulation
- 10) Do you think that the IPW and the SWW should pursue a joint strategy to deal with the challenges of regulation?
- a) Yes
 - b) No
- 11) If Yes, what do you think that the aim of the strategy should be? (please tick one):
- a) To create a single regulatory solution for Willwriters or
 - b) To create multiple regulatory solution for Willwriters
- And (please tick one):
- c) To create a single representative solution for Willwriters or
 - d) To create multiple representative solutions for Willwriters
- 12) Do you think that there is a more appropriate way of dealing with the issues in the sector which the LSB identified?
- a) No
 - b) Yes – please explain _____
- 13) Do you agree that the core regulatory features (paragraph 1.4) are appropriate to deal with the issues in the sector which the LSB identified?
- a) Yes
 - b) No – please explain _____
- 14) What financial protection tools for consumers do you think are appropriate for those offering Willwriting services?
- 15) What financial protection tools for consumers do you think are appropriate for those offering Estate Administration services?

16) What sort of on-going education and training requirements should be required for those operating in the sector?

17) Do you have any other comments or concerns about the LSB proposals?