



# Probate and estate administration

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# 1 Summary

## The case for regulation

- 1.1. The Panel published a detailed report on regulating will-writing in July 2011. This submission focuses on probate and estate administration services. It draws on an evidence base including responses to our original call for evidence on will-writing, submissions to the LSB's call for evidence, analysis of complaints to the Legal Ombudsman and consumer research by YouGov involving depth interviews and a quantitative survey of recent users.
- 1.2. There are some key differences between the will-writing and probate and estate administration markets. A key feature of the latter is the large proportion of people who complete the processes involved without any professional help. Another difference is that the unregulated sector has a smaller market share than solicitors in the probate and estate administration market than for will-writing. The costs involved in seeking professional help to obtain probate and administer an estate can be far higher than for preparing a will.
- 1.3. We recommend that probate and estate administration services should be made reserved activities along with will-writing services. The main reasons are the risk of fraud and the severity of detriment that can result from overcharging and poor service. The detriment can involve large sums of money, but there also some very human consequences – stress, ill health and fractured personal relationships – which are difficult to repair. Probate and estate administration services are also unusual in that the provider's actions can harm

multiple individuals who, since they are not the lawyer's clients, have little power to control events. Often the persons affected will be elderly, but even the most confident individuals will be at their most vulnerable when grieving for a loved one. In this situation, people are more likely to make poor purchase decisions and find it more difficult to deal effectively with bad service. In this context, we consider that caveat emptor should hold less weight

- 1.4. The main consumer benefit of regulation would be opening up avenues of redress, both through the Legal Ombudsman for poor service, and through financial protection arrangements in cases of fraud.

## Evidence of consumer detriment

- 1.5. The Panel has identified six groups of problems:
  - Fraudulent activity linked to the administration of the estate – there is a high risk of this due to inherent characteristics of the market. The extent of fraud is unknown but individual cases have involved substantial sums, whilst there may also be lower-level fraud which is hard to detect. Regulation does not prevent fraud, but it offers the victims the best hope of being reimbursed.
  - Service issues – delay and poor communication are the main service failures. This can lead to a series of practical and personal impacts on lay executors, beneficiaries and others. The Legal Ombudsman offers a valuable avenue to redress in these

circumstances. Generally speaking satisfaction with elements of service is poorer in probate than in will-writing based on the survey data.

- Costs – this is a potentially high-cost legal activity and complaints about excessive charges, escalating charges and lack of clarity over charges are commonplace. Legal fees can exhaust the estate and lead to serious financial consequences. Beneficiaries are in a poor bargaining position where professional executors are appointed in the will, especially as there is no requirement to renounce. Again, the opportunity to complain to the Legal Ombudsman offers a vital source of redress and a brake on poor practice.
- Sales practices – there was less evidence of poor sales practice than in our will-writing report, although consumers could be more vulnerable to being taken in by bad deals when they are grieving.
- Quality issues – there is anecdotal evidence that one-third of probate applications are rejected mostly due to sloppiness rather than lack of technical knowledge. Dealing with the estate is a largely administrative process which is regularly done successfully by lay persons. Quality issues are a weak justification to regulate, but access to redress is important; and
- Consumer confusion – consumers assume that legal work is regulated, whilst the fact that one narrow element of probate is reserved adds to the confusion. The narrow reservation may have other harmful effects such as lack of quality control and creating opportunities to escape regulation. Consumers legitimately expect there to be consistency of regulation and access to redress across will-writing, probate and estate administration.

- 1.6. The strong linkages between will-writing and probate and estate administration, whilst not absolute, make it sensible to regulate all three activities. For example, professional executors may be named by testators in their will or through purchasing pre-paid probate activities, fraudsters seek to be named executors in the will and some will-writing businesses also provide probate and estate administration services.

### Ingredients of a regulatory regime

- 1.7. As with will-writing, there is no justification to create a monopoly for solicitors or other existing authorised persons; any business wishing to offer probate and estate administration services should be able to do so as long as they can satisfy the regulatory requirements.
- 1.8. The ingredients of a regulatory regime should reflect the risks to consumers. For example, it is not necessary to set entry requirements based around technical competence due to the administrative nature of the work, which is commonly done successfully by lay persons. However, based on the risk of fraud, it is sensible to authorise firms and carry out appropriate checks, such as for criminal records and bankruptcy. In addition, it may be appropriate to require businesses to nominate a Head of Legal Practice and Head of Finance and Administration – key office holders responsible for compliance.
- 1.9. The main ingredients of a future regulatory regime should be remedial measures. This includes financial protection where client money is handled comprising insurance and compensation funds or equivalent. Remedial measures should also include businesses being subject to the mandatory jurisdiction of the Legal Ombudsman to allow consumers to obtain redress for poor service and excessive or unclear charges.
- 1.10. Finally, there is scope to explore other solutions as an adjunct to regulation, such

as fraud prevention measures, consumer education, renouncing executorships, active supervision by approved regulations of rules on transparency of charges and further steps to simplify the probate application process and thus make getting professional help less necessary.

### Recommendations

The Panel's advice to the LSB is as follows:

- Probate and estate administration services should be made reserved activities along with will-writing services.
- There should be no monopoly for existing authorised persons; any business wishing to provide these services should be able to seek authorisation.
- The ingredients of a future regime should include:
  - Suitability checks on individuals, such as for criminal records and bankruptcy;
  - Requiring entities to nominate a Head of Legal Practice and Head of Finance and Administration;
  - Access to redress through the Legal Ombudsman; and
  - Financial protection through compensation funds or equivalent measures.
- In addition to reserving the activity, further progress can be made by exploring fraud prevention measures, consumer education, policy on renouncing executorships and simplification of the probate application process.

# 2 Introduction

## About this submission

- 2.1. This paper is the Panel's submission to the Legal Services Board (LSB) following its call for evidence on will-writing, probate and estate administration services. It follows on from our interim submission in November 2011 based on an analysis of complaints to the Legal Ombudsman. As previously announced, we delayed submitting a full response in order to take account of the consumer research findings which we helped the LSB to commission.
- 2.2. Our response focuses on probate and estate administration services only. The Panel has provided detailed advice on the need to regulate will-writing services, which prompted the LSB to commence its statutory investigation. We have nothing to add to that report, although we have been pleased to note broad support for its recommendations among representatives of industry, consumers and regulators.
- 2.3. We have based our views in this paper on the following evidence:
  - Responses to the Panel's original call for evidence on will-writing which related to probate and estate administration services;
  - Analysis of complaints to the Legal Ombudsman – previously published;
  - Consumer research by YouGov involving depth interviews and a quantitative survey of recent users commissioned by the LSB with the Panel's assistance; and
  - Information drawn from submissions to the LSB's call for evidence.
- 2.4. Probate and estate administration services often involve large sums of money and are used at times of high emotion and stress. They are also services that most people have to use rarely and involve unfamiliar processes. We acknowledge the evidence base assembled by stakeholders so far appears weaker than that produced for our will-writing report. However, this must reflect in part that hard evidence is difficult to gather in this market, a situation not helped by an absence of basic data on the operation of the market. Nevertheless, this should not detract from the fact that probate and estate administration is a potentially high-risk area for consumers due to the factors described above, plus the executors may be unknown to the beneficiaries. The LSB's analysis should take account of the level of risk and the prospect of unrevealed detriment due to the limited evidence base.
- 2.5. This submission has three chapters:
  - Our understanding of the market, in order to provide context for the analysis and recommendations;
  - Consumer detriment; and
  - The case for regulation and ingredients of a future regulatory regime.

# 3 Our understanding of the market

## Introduction

- 3.1. When a person dies, their estate (all property, money and possessions) needs to be assessed and administered, either in line with their will or under the intestacy rules where there is no valid will. The process has four main steps:
  - Identifying all assets and liabilities from the estate;
  - Paying any inheritance tax;
  - Applying for a 'grant of probate/letters of administration'; and
  - Collecting assets, distributing against liabilities and then to beneficiaries.
- 3.2. There are limited exceptions where probate is not required, mostly where the estate is very small or when all bank accounts/property etc are jointly owned by a surviving spouse or civil partner.
- 3.3. The steps described above are undertaken by executors (if named in a will) or by an administrator (if there is no will). Lay or professional persons can perform these roles; professional involvement is not required during the process. Of course, a lay person may seek professional help at any stage in the process or not at all.
- 3.4. The Legal Services Act reserves to authorised persons "probate activities", which are defined as "*preparing any papers on which to found or oppose a grant of probate/letters of administration*" where such services are offered for fee, gain or reward. Where the estate is non-contentious, this involves two processes:
  - Preparing an oath to be sworn by the personal representatives; and
  - Submitting an estate account to HMRC.
- 3.5. Opposing a grant of probate is essentially the mirror image of applying for probate. For example, a person might ask the Probate Registry not to prove a will due to suspicions about its validity. Legal work on contentious probate cases is covered by other reservations where this involves the conduct of litigation, although the provision of general legal advice up to this point is not a reserved activity. One unsatisfactory feature of this market is a lack of clarity about what the reserved activities precisely cover, which reflects the absence of definitions in preceding legislation.
- 3.6. The task of administering an estate involves multiple steps yet the reserved element is very narrow. Each step may present different risks, and, therefore, require different approaches to regulation. However, it is important to remember that consumers will not make these fine distinctions, not least since providers sell packages offering a joined-up service. We discuss the policy implications of this later.

## Consumer behaviour

- 3.7. Probate Service data indicates a significant and growing number of people are obtaining probate without professional help – 36% of probate applications were done without any legal representation in 2010. Consumers may make use of a £12 form checking service provided by the Probate Service. Analysis by Title Research indicates a fall in solicitor applications could be attributable to a number of factors including more private DIY estate administration, a tougher economic environment leading to belt tightening by consumers, a greater number of estates falling below the threshold requiring a grant or financial institutions being more relaxed about the need for a grant.<sup>1</sup>
- 3.8. The YouGov survey indicates a high DIY element: only 54% of respondents used professional probate services at some stage in the process. In one third of these cases the deceased had made arrangements for professional help before they died which means that in two thirds of cases where help is required the decision is made by the person dealing with the estate. Overall this means that 36% of probate cases utilise paid services commissioned by the person dealing with the estate, 18% have pre-arranged paid services commissioned by the deceased and 46% of cases do not use paid for services. Perhaps surprisingly, people are less likely to use professional services for when the deceased died intestate. 14% of people die intestate, i.e. without a will.
- 3.9. Professional services are more likely to be used when estates are of higher value or have complexities. The YouGov survey attempted to ascertain incidence of complex estates based on identified features being present. None of the features were present in 70% of cases suggesting that three-quarters of estates are straightforward. Of the remainder,

inheritance tax was present in 11%, family trusts/life interests were mentioned in 9% and beneficiaries under 18 (unless small gifts) were mentioned in 6%.

- 3.10. In three quarters of cases where the service used was pre-arranged, the provider takes care of everything compared to just over half for those cases where services are purchased by the person dealing with the estate. About one third of people purchasing services do so to arrange the grant of probate with about 9% of purchases relating to 'as and when needed' help and assistance with the probate forms. Therefore, in the remainder of these cases the administration of the estate was carried out by the lay individual.
- 3.11. A trawl of websites suggests it is rare for firms to offer only the reserved element of probate services, although the 'Probate Wizard' is planning to launch an online service to assist in the completion of probate forms in 2012 and some solicitors offer a service which is confined to helping people to navigate this process. It is more common for firms to combine the reserved and unreserved elements, often alongside other services such as will-writing, to offer a full estate planning service. Others specialise solely in the post-death services of probate and estate administration.

## Service delivery

- 3.12. Probate and estate administration services are offered by a wide range of regulated and unregulated providers. There is no reliable industry data, so we have to rely on the consumer research to provide a guide to market share. This indicates that solicitors deal with 86% of estates where professional help is purchased. Therefore, the unregulated market is small, especially when compared to the will-writing market (solicitors prepare only two-thirds of wills).
- 3.13. However, market share varies depending on the types of services used. For, 'as and

when needed' services, solicitors accounted for 53% of services used, accountants 13%, whilst trusts and banks accounted for 10%.

- Solicitors – 86%
- Financial advisers – 3%
- Trust Corporations – 3%
- Banks – 2%
- Accountants – 2%
- Will-writing companies – 2%
- Retailer such as a supermarket chain – 1%
- Other – 1%

3.14. The YouGov survey suggests that the main method of delivery is face-to-face, accounting for 44% of service users. However, alternative delivery methods are the norm for other types of provider. Services are provided by telephone among 16% of solicitors compared to 47% for other providers, whereas they are provided by email among 2% of solicitors compared to 15% for other provider types.

## Costs

- 3.15. The costs of applying for probate are fixed by the Probate Service at £105 for direct applications by individuals and £45 for applications made through authorised persons (the difference is due to personal applications requiring an interview and preparation of the oath by the Registry).
- 3.16. The charges made by a commercial provider to their clients for both probate and estate administration services will vary according to a number of factors including the value of the estate and the complexity of the case. Therefore, it is difficult to provide average prices, but the YouGov research indicates that the mean cost is £1,697. There is considerable variation in prices, however: in 51% of estates the

costs are less than £1,000, but in 18% of estates the charges exceed £3,000.

3.17. The YouGov survey also provides data on charging structures, as follows:

- Fixed price – 33%
- Hourly rate – 30%
- Percentage of estate – 10%
- Combination of above – 13%
- Other way – 4%
- Don't know – 10%

3.18. Where a percentage of the estate was charged, the mean was 1.95%. Again, there is considerable variation: in 29% of estates this was less than 1%, but in 15% of estates this was more than 3%.

## Regulation

- 3.19. The Law Society, the Bar Council, the Master of the Faculties, the Council for Licensed Conveyancers, the Institute of Chartered Accountants of Scotland and the Association of Chartered Certified Accountants are approved regulators in relation to probate activities (although these bodies have yet to authorise anyone to carry out these activities). All authorised persons also fall within the jurisdiction of the Legal Ombudsman.
- 3.20. Financial services firms are regulated by the Financial Services Authority and consumers may complain to the Financial Ombudsman Service. Accountancy firms are self-regulated via their professional bodies – ACCA and ICAEW. Charities may be named in wills as executors and are regulated by the Charity Commission.
- 3.21. Two organisations can be said to provide a quasi-regulatory role in relation to the grant of probate. The Probate Service will only approve applications once it is satisfied the paperwork is in order. We understand that HMRC does a sense check in relation to the payment of inheritance tax. However,

there is no quasi-regulatory input to the estate administration part of the process.

3.22. There are no trade associations for firms specialising only in probate and estate administration, but many will be members of the various will-writing bodies, such as the Institute of Professional Willwriters, the Society of Will Writers and STEP. Some of the largest independent companies are

members of the Professional Association of Legal Services (PALS).

3.23. Of course, like any business, firms in this area are subject to general consumer law. We covered this in detail in our report on will-writing services. The most relevant are the Consumer Protection Regulations and laws relating to contracts, cooling off rights, the supply of services and advertising.

### Key points

- Probate and estate administration involves distinct steps, only a narrow part of which is a reserved activity, although consumers may view it as a single process.
- 70% of estates have no complex features.
- A growing proportion of people (now 36%) obtain probate without legal representation. Around half of people deal with estates without paying for professional help.
- Solicitors account for 86% of the paid-for professional services market.
- The mean cost of probate and estate administration services is £1,697, but there is considerable variation in prices: in 51% of estates the costs are less than £1,000, but in 18% of estates the charges exceed £3,000.
- There is also wide variation in charging structures: there are fixed fees in one-third of cases, hourly rates in 30%, a percentage fee in 10% and a combination in 13%.
- There are six approved regulators, whilst banks are separately regulated and accountants are self-regulated through their professional bodies.
- There are no trade associations specialising only in probate and estate administration but many will be members of will-writing bodies.
- The Probate Service and HMRC can be said to perform a quasi-regulatory role for the probate process, but there is no equivalent for the estate administration side of things. Providers are also subject to a series of general consumer law obligations.

# 4 Consumer detriment

## Introduction

4.1. This chapter sets out the risks to consumers and available evidence on consumer detriment related to probate and estate administration services. We have identified six groups of problems:

- Fraudulent activity linked to administering an estate;
- Service issues;
- Costs;
- Sales practices;
- Quality issues related to the process of the handling of estates after death; and
- Consumer confusion.

## Fraudulent activity

4.2. The Panel covered issues related to fraud in its report on regulating will-writing. This identified a series of inherent features of the market that left consumers at higher risk of being defrauded, including the close knowledge gained of the testator's affairs, the potentially large value of estates, the prospect of non-discovery by victims or the potential long time lag before discovery, the highly personal nature of writing a will, the targeting of vulnerable people and the difficulty in proving some types of fraud.

4.3. The report further identified various types of fraud that could be committed during the testator's lifetime and after their death. There is currently a lack of statistics on the extent of fraud, although there seems to be a consensus that the most common type involves stealing from the estate, with incidence in both the regulated and

unregulated sectors. Some high-profile cases have demonstrated that the sums involved can be very substantial.

4.4. In addition to cases involving large sums, responses to the LSB's call for evidence highlighted the issue of low-level fraud. The IPW described this could occur when estates are under-reported by a few hundred pounds due to non-disclosure or undervaluing of assets or over-valuation of debts, or a combination of these. They argued this type of fraud is not easily recognised and so unlikely to be reported, or if recognised could be brushed off as an administrative or accounting error.<sup>2</sup> Should instances of low-level fraud be significantly more common than high-level fraud, it is possible that the total sums are similar.

4.5. As highlighted by the Law Society, there is currently no regulation or monitoring in place to ensure that administrators do not misappropriate the estate's assets despite the administrator being responsible for important tasks which can be easily open to abuse, such as collecting the assets due to the estate, selling assets in the estate, releasing monies to pay debts and preparing estate accounts. Administrators have considerable autonomy to handle the assets of an estate as they please, whilst the beneficiaries may not know the exact assets held by the estate or know the contents of the will and therefore would not be in position to question their actions.<sup>3</sup>

4.6. We were also concerned to hear about a particular practice whereby fraudsters acquire contact details for the recently bereaved and persuade them to sign over a power of attorney; this gives them control over the administration of the estate and

thus provides access to funds which they then misappropriate for personal gain. The extent of this activity is unknown, but it highlights the risks – the fraudsters prey on people when they are very vulnerable and when they may make decisions which they would not do in normal circumstances.<sup>4</sup>

- 4.7. The Panel is under no illusions that regulation will prevent fraud, as the volume of claims to the SRA Compensation Fund testifies. However, as identified in many of the submissions to the LSB's call for evidence, what regulation does offer victims of fraud is the possibility of redress through insurance and compensation funds. Moreover, as the Law Society has highlighted, although victims of fraud may be able to reclaim the assets they were entitled to following a conviction of theft, this is not guaranteed as the perpetrators may have already disposed of the assets and spent the money.<sup>5</sup> In addition, the decision to investigate and prosecute such crimes is subject to local priorities.
- 4.8. There may be non-regulatory measures which could help to prevent fraud. For example, the fact that beneficiaries are not entitled to inspect the will makes it harder to know whether they have received all the assets to which they are entitled. It is also surprising there are no external checks on the final accounts beyond signed copies being sent to the beneficiaries. Consumer education also has a role to alert people to the risks. There is not space in this submission to properly consider fraud prevention measures. However, these are unlikely to stop determined fraudsters and do not remove the need to ensure financial protection for victims of such crimes.

## Service issues

- 4.9. The YouGov consumer survey provides useful statistical information on the service provided by solicitors. The sample was not large enough to allow detailed analysis of service by other types of provider. Our analysis of complaints made to the Legal Ombudsman about poor service by authorised persons provides more qualitative information about the causes of dissatisfaction and the impact on executors and beneficiaries. There is no guarantee that the common service failures of solicitors are the same as those among unregulated providers, but we suspect there are close similarities as the processes involved are the same.
- 4.10. The YouGov survey suggests that 68% of consumers were satisfied overall with the service provided, 14% were dissatisfied, whilst 13% said they were neither satisfied nor dissatisfied. 74% of respondents said they would recommend their provider to others. This compares unfavourably with 89% of people who responded positively when asked about their will provider in the IFF Research for our will-writing report. Indeed, generally speaking satisfaction with elements of service is poorer in the YouGov probate survey compared to the IFF Research on will-writing services.
- 4.11. Service satisfaction was stronger for solicitors (69%) than other provider types (58%). In addition, face-to-face delivery scored much higher levels of satisfaction (77%) than other methods with telephone services getting the lowest score (58%). The two are linked as solicitors are most likely to provide a face-to-face service.
- 4.12. Table 1 provides statistics on the reasons why people were dissatisfied based on the YouGov data. Below this we then focus on issues relating to timeliness and communication.

**Table 1 – Reasons for dissatisfaction with providers**

Type of complaint	%
<b>Delays</b>	71%
<b>Mistakes</b>	57%
<b>I was not kept up to date on progress</b>	51%
<b>Poor value for money</b>	47%
<b>Quality of service</b>	45%
<b>The person dealing with it didn't seem to know what they were doing</b>	44%
<b>Lost paperwork</b>	30%
<b>I wasn't treated very well by staff</b>	26%
<b>Legal advice proved to be wrong</b>	18%
<b>The person dealing with it was more junior than I had been led to believe</b>	16%
<b>Other</b>	13%

## Delay

4.13. The YouGov survey indicates that most estates are dealt with relatively quickly – 62% are finished in less than six months. However, it is quite a protracted process in a significant minority of cases – 17% were reported to have taken more than a year. Moreover, estates were likely to take longer to resolve when a professional was engaged compared to DIY routes, although this may be partly due to professionals being engaged more often for higher value estates (which tend to be more complex). Only 65% of consumers were satisfied with the timeliness with which their case was handled, with 17% dissatisfied and 15% being neither satisfied nor dissatisfied.

4.14. These satisfaction ratings are alarming, although we recognise that delays can arise due to factors outside of the lawyer's

control. For example, the Institute of Legacy Management highlighted a general backlog at HMRC is leading to estates being delayed which has an impact on cash flow for charities.<sup>6</sup> In the YouGov depth interviews, people described their frustration about how long it took for banks, building societies and utility companies to respond after they had sent them the required documents.

4.15. Complaints about delay or failure to progress a case accounted for 27% of the Legal Ombudsman's probate caseload in its first year of operation. The underlying reasons for these complaints were:

- Estates which were apparently straightforward taking a long time to complete;
- Inaccurate estimates about the likely time the matter would take;
- Timelines that were repeatedly pushed back;

- Lack of or slow response to letters and phone calls etc;
- Inadequate explanation about the reasons for delay;
- Delay resulting from mistakes requiring remedial work, such as errors in tax returns or accounting errors;
- Delay in distributing money; and
- Delay resulting from issues at the firm – e.g. solicitor overworked or illness.

### Communication

- 4.16. The YouGov survey shows good levels of satisfaction with information given about the process at the start. 76% of consumers were satisfied with the extent to which things were explained so that they were easily understood. Moreover, 86% were satisfied that the explanation they were given about the process when commissioning the provider was clear, 85% that it was accurate and 83% that it was comprehensive.
- 4.17. Satisfaction with communication whilst the process was ongoing was less positive. 64% of consumers were satisfied, with 14% dissatisfied and 16% neither satisfied nor dissatisfied with this service element.
- 4.18. Communication failures (classified as 'failure to keep informed') accounted for 10% of the Legal Ombudsman's caseload in its first year of operation. The underlying reasons for these complaints were:
- Lack of communication between the lawyer and executors and beneficiaries despite requests for contact;
  - Failure to respond to letters and phone calls etc; and
  - Failure to update the parties.

### Impact of service failings

- 4.19. The Legal Ombudsman asks every complainant about the impact on them caused by the problems they allege. Aside from suffering financial loss (see section on costs), people report various emotional, personal and practical consequences:
- Additional stress caused by their lawyer during what is already a difficult time. This is particularly acute when the probate process drags on, with people describing this as preventing them from drawing a line under the matter and thus achieving closure on the death. People described getting angry at the delay and lack of communication by their lawyer. Elderly complainants described things as being particularly stressful to deal with at their age;
  - Sometimes the experience affected people particularly badly and their health suffered as a result, for example by triggering depression. Some cases involved people in vulnerable circumstances, for example people with learning difficulties, and problems related to the estate made things even more difficult;
  - The stress contributed to a breakdown in family relationships;
  - Unnecessary delay and inconvenience – people felt that dealing with the probate took an inordinate amount of time involving a great many phone calls and continual chasing;
  - A loss of confidence in lawyers. There is a sense that people expected better from a professional placed in a position of trust. Some people felt particularly hurt that, in their view, the lawyer had exploited them at a time when they were at their most vulnerable; and
  - Other impacts – executors said they felt embarrassment and had suffered a

loss of respect from beneficiaries due to delays and other problems caused by lawyers, e.g. when beneficiaries made reasonable requests for information which they were unable to provide. Other people described having to put life plans on hold, such as a planned move overseas, in order to see the work completed.

- 4.20. The volume of complaints about solicitors suggests that regulation does not prevent service problems, although codes of practice should clarify the ground rules and provide some deterrent. The main benefit of regulation for consumers is opening up an avenue of redress through the Legal Ombudsman, although the remedies may not be able to repair some of the more personal effects of poor service.

## Costs

- 4.21. Probate and estate administration can be a high cost legal service. As highlighted in Chapter 3, the mean cost of probate and estate administration services is £1,697, but there is considerable variation in prices: in 51% of estates the costs are less than £1,000, but in 18% of estates the charges exceed £3,000. Although in most situations the costs are met by the estate, any unnecessary costs can still be said to incur financial detriment for beneficiaries. We were surprised to see that executors and beneficiaries reported paying costs themselves on 11% of occasions.

- 4.22. Below we comment on three areas:

- Pre-paid probate services;
- Services provided by professional executors named in wills; and
- General issues.

## Pre-paid probate services

- 4.23. The Panel discussed pre-paid probate services in our report on will-writing. These deals can represent poor value for money – typically the cost is paid by regular instalments over a fixed period, often including a credit agreement; the total ends up being well in excess of what would normally be paid for the same service after the testator has died. A percentage of the estate is sometimes charged to the beneficiaries on top of fees already paid by the testator. In addition, there is evidence of consumers being confused about what they are buying. In particular, they believe they are paying for the administration of the estate, when in fact the fee is just for obtaining the Grant of Probate or even for advisory services where no actual work on the estate is done by the firm.

## Professional executors named in wills

- 4.24. In the normal run of events, professional fees are charged out of the estate. For non-contentious work, rules require that solicitors' charges are fair and reasonable. They may consist of two elements: an hourly rate and a value element, of which it is usual to divide the estate into the deceased's residence and the remainder of the assets. The value element is a matter for agreement between the solicitor and the client; it is not mandatory. The Law Society has produced a table to assist solicitors in calculating the value element and example fees, although it stresses these should not be regarded as scale charges and should be exercised with discretion. Solicitors must also provide clients with the best information possible about the likely overall cost of a matter both at the outset and, when appropriate, as the case progresses.
- 4.25. The beneficiaries are in a poor bargaining position when the professional executor has already been appointed. Consumers

cannot shop around for these services as they do in other markets and must negotiate the level of fees with the solicitor. This is not easy for beneficiaries as they tend to lack experience of seeking legal advice, they are grieving for their loss and it can be difficult to find information about what other solicitors charge as many do not openly publish fees for this work. It is particularly galling that solicitors often charge clients an hourly rate in addition to taking a percentage of the estate. The idea behind charging a value element is that more complex estates are likely to involve more work. This may represent poor value for money anyway given the potentially large size of estates and because not all large estates are complex to administer. However, by levying an additional hourly fee, solicitors are removing all their risk.

- 4.26. There may be good reasons why testators choose to name professional executors in their will. However, we would normally recommend that consumers name lay executors in their will and leave them to negotiate fees when the time comes. There is a role for consumer education to reinforce this message, but also a need to enforce existing rules on transparency. The IFF research for the Panel's recent investigation into will-writing services found that only two-thirds of consumers who appointed their will-writer to be their executor recalled being informed how the charges would work.<sup>7</sup>
- 4.27. We would encourage policymakers to look at rules around renouncing executorship. The IPW code includes a commitment to renounce appointments if requested to do so in writing by all of the co executors or by all of the residuary beneficiaries capable of doing so. The British Bankers Association has told the Panel that banks will also renounce if requested or if the service is not suitable for the estate and renunciation is not detrimental to the interests of any of the beneficiaries.<sup>8</sup> The SRA code does not

specifically address this, but a Law Society practice note advises solicitors they should look at the reasons why they were appointed as executor, whether circumstances have changed since the appointment and what is now in the best interests of the estate, including whether the administration of the estate could easily be handled by a lay executor. The Panel would be interested to know whether these rules are followed in practice as the lucrative nature of this work means there are weak incentives for firms to renounce. There also appear to be differences in emphasis across professional groupings.

### General issues

- 4.28. One issue is the perception of high costs dissuading consumers from purchasing professional help when they might have wanted to. In the YouGov survey, 27% of respondents who did the process alone said they were put off by the cost of professional services. However, only 31% of these people had got a quote.
- 4.29. An area of concern is information given to consumers about costs when they first commission the provider. 12% recalled being told nothing about the likely charges whilst 54% said they were given an estimate and 26% given a formal quote. Furthermore, only 74% agreed that the explanation of costs was clear, 72% that it was comprehensive and 71% that it was accurate.
- 4.30. Only 32% of people recalled being told about possible additional costs when they first instructed their provider. However, in 27% of cases respondents said that the final costs were more than they were quoted and 26% of these said that no reason was given for this. When reasons were given, just 60% said these were clear. The extra amounts can be high – a mean of £1,155.

- 4.31. Another set of issues is whether the costs are fair. Of course, this is subjective and costs can rise for legitimate reasons. Overall, 56% of consumers felt the service represented good value for money, 15% felt it was poor value for money and 29% responded they were neither good nor poor value for money. Where additional costs were involved, just 56% of respondents said they felt these were fair. These are highly disappointing results.
- 4.32. Interestingly, the costs vary depending on the charging structure. The average cost of fixed fee services was £1,238 compared to £1,863 for hourly rates and £2,531 for combinations of charging structures. Moreover, whilst 19% of fixed fee payers were dissatisfied with value for money, this was 38% for hourly rate payers. This may provide some insight into the effect of competition, although it is likely that fixed fees are more common in simpler estates.
- 4.33. Complaints about costs – excessive costs and deficient cost information – accounted for 22% of the Legal Ombudsman’s caseload in its first year. The underlying reasons for these complaints were:
- Failure to give a clear estimate of the likely costs;
  - Costs being excessively high, for example relative to the size of the estate or because the estate was apparently straightforward to administer;
  - Final bills being far in excess of initial estimates, often with little communication from the lawyer to explain such increases, in the context of cases that can take many months or even years to complete;
  - A lack of information being given as to breakdown of costs;
  - Being charged for an initial consultation which the complainant understood was being offered free of charge;
- Charging fees for work which the lay executors had done; and
  - Selling property at well below the market value in order to achieve a quick sale resulting in reduced inheritance for the beneficiaries.
- 4.34. The Legal Ombudsman’s data also provides information on the financial impacts of such cases. Some people felt the fees were exhausting the estate leaving little left for the intended beneficiaries. They described how these funds, often running into many thousands of pounds, could have made a substantial difference to their financial situation. Examples included having to cancel a planned holiday or losing the deposit on a home. The financial impact on complainants was keenly felt when the final bill was well in excess of original estimates and/or the increase came as a surprise. Some complainants described having to pay legal fees out of their own pockets rather than from the estate. On occasions people lacked sufficient funds to pay the legal fees and had to obtain loans on which they paid interest. In some situations, the financial implications were extended and difficult to unravel, for example losing out in a divorce settlement, or water damage to a property because instructions relating to purchase of insurance were not carried out.
- 4.35. Issues around high charges, escalating costs and lack of breakdown of charges go beyond probate and estate administration. Competitive pressures rather than further regulation, is likely to offer the best hope of tackling these problems. For example, the trend towards fixed fees should provide greater certainty over costs; despite the challenges this presents to providers due to the varied duration of the process across cases, and which is not always easily predictable, the YouGov survey suggests that 33% of services are already provided in fixed fee deals. There remains

a key challenge to encourage consumers to shop around for the best deals. In the YouGov survey, just 11% of respondents who used professional services said they had shopped around.

### Sales practices

- 4.36. The Panel's report on will-writing identified that sales of additional services are a key source of revenue for firms. We found that some firms operated a highly sales-driven culture with agents incentivised by commission payments creating the risk that consumers are sold services they do not need. We concluded that low-level pressure selling and poor transparency appeared quite common in the unregulated market and there was a rogue minority which targeted older people and used aggressive sales techniques.
- 4.37. The YouGov research suggests that such problems are far fewer in the probate and estate administration market. 14% of respondents said they felt under pressure to purchase additional services (just 4% felt under a great deal of pressure). People using providers other than solicitors were significantly more likely to report that they had been pressured. The more common of these services were property sales related to the estate, tax and other financial advice, power of attorney, funeral plans and will-writing.
- 4.38. We were concerned to read evidence from Solicitors for the Elderly of when a family member notifies a bank of the customer's death and are then tricked into using a probate service, without informed consent or knowledge, even when professional executors have been appointed. The client feels they were approached when they were emotionally very vulnerable and did not fully understand what they were doing.<sup>9</sup>

### Quality issues

- 4.39. The poor quality of wills was a key finding of our report on will-writing services based on a mystery shopping survey. A similar exercise has not been carried out for probate and estate administration services so it is not possible to draw conclusions on the competence of work. As with wills, it is difficult for consumers to spot technical errors so these will be under-reported. Nevertheless, the YouGov survey reveals 74% of respondents were satisfied with the quality of advice, 8% were dissatisfied and 15% were neither satisfied nor dissatisfied.
- 4.40. The Panel was surprised to read in a Regulatory Impact Assessment prepared in 2004 for the Courts and Legal Services Act 1990, that nearly one-third of the applications received by the Probate Service from solicitors were stopped due to errors.<sup>10</sup> While this data is old, anecdotal evidence submitted to the LSB's call for evidence suggests as many as one-third of probate applications are still returned for extra work.<sup>11</sup> There are no official statistics on this, but we gather that the majority of mistakes are down to sloppiness rather than reflecting a lack of legal knowledge. Indeed, the fact that so many lay people successfully complete the probate application process suggests that technical knowledge is not usually needed. The YouGov survey indicates that 73% of people who did the process themselves did so because they felt it was straightforward. Commenting on their experience of managing the estate, only 11% said they found the process to have been difficult.
- 4.41. ACCA suggests that lawyers view applying for a grant of probate as low value work and a mechanical process, especially when another professional has performed the associated tax compliance and other work.<sup>12</sup> Whilst this is frustrating and may delay the process, consumers should not experience financial or other detriment as

the Probate Service will ensure paperwork is in order before things can proceed.

4.42. Similarly, the tasks involved in dealing with the estate are essentially administrative and are regularly done by lay persons. Irwin Mitchell suggested that specific errors include lack of proper accounting, incorrect distributions, late submission of tax returns and penalties/interest or failure to claim appropriate tax reliefs.<sup>13</sup> There will be some estates where the issues involved are complex, such as where there are foreign assets or business affairs, but the vast majority of estates are straightforward. Consumers may prefer professional help for peace of mind or time factors, but legal knowledge is not usually necessary.

4.43. We see that professional advice is likely to be necessary in order to oppose a grant of probate and other contentious matters. Given the high stakes, it is more likely that consumers will ask searching questions about the provider's ability to handle the case than for non-contentious work. However, there is an absence of data on which to make any further comment.

4.44. The Legal Ombudsman's complaints data also provides clues about the sorts of quality issues that can arise. 13% of its probate caseload in its first year was about failure to follow instructions and a further 11% related to failure to advise (not providing advice which would reasonably have been expected). The underlying reasons for these complaints were:

- Failure to inform beneficiaries and executors about their inclusion in a will;
- Not alerting consumers to their rights, e.g. to challenge a will;
- Not making consumers aware of the possible consequences of taking a certain course of action, e.g. having to sell a property in order to meet the claims of other beneficiaries in a settlement offer;

- Incurring unnecessary tax liabilities;
- Not alerting consumers to a change of fee earner;
- Releasing papers to parties against instructions;
- Failure to send copies of letters and documents as promised;
- Financial detriment due to the way in which money from the estate was handled; and
- Not following instructions specified in the will.

4.45. The above evidence suggests that quality issues are a weak argument for regulation of probate and estate administration, in sharp contrast to will-writing services. Technical knowledge is not normally necessary and errors are usually due to carelessness. However, regulation remains critical since it is important for consumers to access redress when mistakes occur.

### Consumer confusion

4.46. Regulating the entire probate and estate administration process should help to reduce consumer confusion. The Panel's research has identified an expectation that all legal services are regulated.<sup>14</sup> This is not a strong justification by itself to regulate, but it should be a contributing factor. The LSB would also risk causing confusion if it regulated will-writing, but not probate and estate administration services due to linkages between these described in the next chapter. For example, the business preparing the will may also do the probate and estate administration work, by selling a pre-paid probate package or by being named as an executor. Consumers legitimately expect there to be consistency of regulation and access to redress across all three of these activities.

4.47. The fact that individual elements of probate are reserved adds to the confusion, or,

more likely, means that consumers are unaware of the varying protections in the market. This situation is unhelpful in other ways: the requirement for unregulated providers to engage an authorised person for this part of the process may add costs and delay, whilst the unregulated provider has limited control over quality of this work. Seen from the other end, this situation creates an opportunity for providers to avoid regulation by setting up businesses to carry out the unregulated work and then sub-contract the reserved element to

another, possibly linked, business. The Legal Ombudsman has said this may mean they are unable to provide redress to consumers because the poor service occurred outside of its jurisdiction.<sup>15</sup>

4.48. The SRA model illustrates the benefits of regulating the entire process – solicitors must be insured and follow the same rules for each bit of the process, are subject to the Legal Ombudsman’s jurisdiction for the totality of their work and are prevented from setting up separate businesses in order to escape regulation.

## Key points

- There is a high risk of fraudulent activity due to inherent characteristics of the market. The extent of fraud is unknown but individual cases have involved substantial sums, whilst there may also be lower-level fraud which is hard to detect. Regulation does not prevent fraud, but it offers the victims the best hope of being reimbursed.
- Delay and poor communication are the main service failures. This can lead to a series of practical and personal impacts on lay executors, beneficiaries and others. The Legal Ombudsman provides a valuable avenue to redress in these circumstances.
- This is a potentially high-cost legal activity and complaints about excessive charges, escalating charges and lack of clarity over charges are commonplace. Legal fees can exhaust the estate and lead to serious financial consequences. Beneficiaries are in a poor bargaining position where professional executors are appointed in the will, especially as there is no requirement to renounce. Again, the ability to complain to the Legal Ombudsman is an important source of redress and a brake on poor practice.
- There was less evidence of poor sales practice than in our will-writing report, although consumers are more likely to be taken in by bad deals when they are grieving.
- There is anecdotal evidence that one-third of probate applications are rejected mostly due to sloppiness rather than lack of technical knowledge. Dealing with the estate is a largely administrative process which is regularly done successfully by lay persons. Quality issues are a weak justification to regulate, but access to redress is important.
- Consumers assume that legal work is regulated, whilst the fact that one narrow element of probate is reserved adds to the confusion. This may have other harmful effects such as lack of quality control and creating opportunities to escape regulation.

# 5 Case for regulation

## Introduction

- 5.1. The Panel considers there is a strong case for regulating the entire probate and estate administration process based on the risks to consumers and the available evidence. This chapter provides information on:
- Our overall attitude towards regulation;
  - The justification for regulation; and
  - The ingredients of regulation.

## Our attitude towards regulation

- 5.2. We described our attitude towards regulation in response to the LSB's discussion paper on the boundaries of regulation, as follows:

*“The Panel’s vision is a market where everyone can access high quality and affordable legal services that meet their needs. The best way of achieving this is by empowering consumers to drive competition between diverse providers. Regulation is sometimes needed to support consumers in playing this role due to inherent features of the market, for example the critical impact of legal services on the lives of users and others and the wide imbalance of power between consumers and lawyers. These factors will often create a bias towards regulation at some level, but rarely by restricting types of provider. In short, the LSB’s role should be promoting competition between diverse providers within a regulated market place.”*

- 5.3. Therefore, our instinct is that competition can lead to the best outcomes for consumers, but regulation provides an important safety net for them and enables

them to drive competition between firms. Risk factors are also important when we consider the need for regulating particular activities. In this context, decisions on the need for regulation should take account of the severity as well as the scale of detriment, and impacts on vulnerable consumers.

- 5.4. As we stated clearly in our will-writing report, regulating probate and estate administration should not mean creating a monopoly for solicitors or other authorised persons. Instead, any business should be permitted to offer these services as long as they meet the requirements for regulation set by the approved regulators within a framework approved by the LSB.

## Justification for regulation

- 5.5. The main reasons why probate and estate administration should be regulated are the risk of fraud and the severity of detriment that can result from overcharging and poor service. The detriment can involve large sums of money, but there also some very human consequences – stress, ill health and fractured personal relationships – which are difficult to repair. This activity is also unusual in that the provider's actions can harm multiple individuals who, since they are not the lawyer's clients, have little power to control events. Often the persons affected will be elderly, but even the most confident individuals will be at their most vulnerable when grieving for a loved one. In this situation, people are more likely to make poor purchase decisions and find it more difficult to deal effectively with bad service. In this context, we consider that caveat emptor should hold less weight.

- 5.6. The reasons for regulating probate and estate administration differ from those for regulating will-writing. In particular, quality issues are a weak justification despite evidence of large numbers of errors during the probate application process. This is because the detriment to consumers as a result of these mistakes is low and due to the largely administrative nature of the process. There are also likely to be better solutions, such as to encourage more probate applications from members of the public, further simplifying the application process and exposing professionals whose sloppy work causes unnecessary delays and extra costs.
- 5.7. In fact, there is little reason to regulate the currently reserved element of the process; it is the unreserved parts that pose the highest risks to consumers. Nevertheless, we consider it important for the entire probate and estate administration process to be regulated. This is to avoid consumer confusion, meet public expectations about regulation of legal work and promote consistent access to redress. Such a course would likely make little practical difference to businesses in the market as it seems rare for firms to specialise only in the area which is currently reserved.
- 5.8. We would go further to say that the strong linkages between will-writing and probate and estate administration also mean it is sensible to regulate all three activities. Many estates are administered without a will being present, so the linkages are not absolute. However, there are a series of connections between the two:
- 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;
  - Testators may purchase pre-paid probate packages; again, beneficiaries must deal with the consequences;
  - Anecdotal evidence that individuals seek to be named as an executor in order to commit probate fraud; and
  - Many of the businesses which prepare wills also provide probate and estate administration services. They deliver joined-up packages to consumers, and both authorised persons and members of trade associations in the unregulated sector will already be subject to the same rules for each of these activities.
- 5.9. These linkages are important to analysing the case for regulation: a strictly risk-based approach may attach different levels of regulation (or no regulation) to individual processes, but such a finely-tuned solution could be artificial in practice and replace one set of anomalous arrangements with another. This could increase burdens on providers and exacerbate consumer confusion.

### Alternatives to regulation

- 5.10. It is important to consider alternatives to regulation, as these may achieve just as good results without the downsides that regulation sometimes entails.
- 5.11. The Panel considered alternatives in some detail in our report on will-writing. We think that the issues are the same across the three markets. In brief, self-regulation has made some progress, but the trade bodies themselves consider it is not a viable solution. Furthermore, the risks to consumers mean that all providers should be subject to appropriate controls, not just those who voluntarily adopt standards – it is unrealistic to expect consumers to work out the different protections that apply. Probate and estate administration firms are subject to general legal obligations so another option is better enforcement of existing legislation. However, there is a

serious doubt as to whether local services, each determining their own priorities, will decide to deploy their limited resources on this issue rather than on the many other possible consumer problems. Even where trading standards do act, compensation is not guaranteed, particularly where the offender has no realisable assets.

- 5.12. That said there is scope to explore other solutions as an adjunct to regulation. There is not the space to explore these in detail here, but some have been highlighted in the paper, for example fraud prevention measures, consumer education, renouncing executorships, active supervision by approved regulators of rules on transparency of charges and further steps to simplify the probate application process and thus make getting professional help less necessary. There have been recent welcome efforts to make the process more accessible. The rise of DIY applications suggests these have had some success, although we note that the desire for reassurance and unfamiliarity with the process were the main reasons why people pay for professional help.

### Ingredients of regulation

- 5.13. The Legal Services Act was designed flexibly to enable approved regulators to tailor their systems to the needs of different legal activities. The ingredients of a future regulatory regime for probate and estate administration services should reflect the key risks to consumers of these activities. The Panel's role at this stage is not to make recommendations, but to outline the desirable key features of regulation.
- 5.14. These measures should apply to all businesses. However, where non legal businesses can demonstrate they are already subject to equivalent regulation in their own sectors, it should not be necessary for them also to be regulated by a regulator in the legal services market.

- 5.15. We do not consider it is necessary to set entry requirements based around technical competence due to the administrative nature of the work, which is commonly done successfully by lay persons. However, based on the risk of fraud, it is sensible to authorise firms and carry out appropriate checks, such as for criminal records and bankruptcy. In addition, it may be appropriate to require businesses to nominate a Head of Legal Practice and Head of Finance and Administration – key office holders responsible for compliance.
- 5.16. The main ingredients of a future regulatory regime should be remedial measures. This includes financial protection where client money is handled comprising insurance and compensation funds or equivalent. Remedial measures should also include businesses being subject to the mandatory jurisdiction of the Legal Ombudsman to allow consumers to obtain redress for poor service and excessive or unclear charges.

## Key points

- Competition leads to the best market outcomes, but regulation provides an important safety net for consumers and enables them to drive competition between firms. Risk factors are also important when considering the need for regulation; this should take account of the severity as well as the scale of potential detriment.
- The main reasons why probate and estate administration should be regulated are the risk of fraud and the severity of harm that can result from overcharging and poor service. The detriment can involve large sums of money, but there are also some very human consequences. This activity can harm multiple beneficiaries who have little power to control events and who are at their most vulnerable when grieving for a loved one and so are more likely to make poor purchase decisions.
- On paper, the arguments for regulating the currently reserved probate work are weak, whereas the case for regulating estate administration is far stronger. However, for reasons of consumer confusion and strong overlap in the business delivery of wills, probate and estate administration, all three elements should be regulated.
- Anyone should be able to offer probate and estate administration services as long as they are authorised; there should be no monopoly for authorised persons.
- There is no need to set entry requirements related to technical competence due to the largely administrative nature of the probate process. Instead, the ingredients of a future regulatory regime should focus on measures to prevent fraud and reimburse its victims and access to redress through the Legal Ombudsman for complaints about excessive, escalating and unclear charges, and other elements of poor service.
- There is scope to explore other solutions as an adjunct to regulation. There include fraud prevention measures, consumer education, renouncing executorships, active supervision by approved regulations of rules on transparency of charges and further steps to simplify the probate application process and thus make getting professional help less necessary.

# Notes

<sup>1</sup> <http://www.titleresearch.com/News/Grant-of-probate-statistics>

<sup>2</sup> Submission by IPW to the LSB's call for evidence

<sup>3</sup> Submission by the Law Society to the LSB's call for evidence

<sup>4</sup> Submission by Solicitors for the Elderly to the LSB's call for evidence

<sup>5</sup> Submission by the Law Society to the LSB's call for evidence

<sup>6</sup> Submission by the Institute of Legacy Management to the LSB's call for evidence

<sup>7</sup> IFF Research, *Understanding the consumer experience of will-writing services*, July 2011.

<sup>8</sup> Submission by the BBA to the Consumer Panel's call for evidence on will-writing

<sup>9</sup> Submission by Solicitors for the Elderly to the LSB's call for evidence

<sup>10</sup> Ministry of Justice, *Explanatory Memorandum to the Probate Services (Approved Bodies) Order 2009, Annex A - Full Regulatory Impact Assessment for Implementing Sections 54 and 55 of the Courts and Legal Services Act 1990*.

<sup>11</sup> Submission by IPW to the LSB's call for evidence

<sup>12</sup> Submission by ACCA to the LSB's call for evidence

<sup>13</sup> Submission by Irwin Mitchell to the LSB's call for evidence

<sup>14</sup> Legal Services Consumer Panel, *Quality in Legal Services*, November 2010.

<sup>15</sup> Legal Ombudsman, Annual Report 2011.

**The Legal Services Consumer Panel was established under the Legal Services Act 2007 to provide independent advice to the Legal Services Board about the interests of consumers of legal services in England and Wales. We investigate issues that affect consumers and use this information to influence decisions about the regulation of legal services.**

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