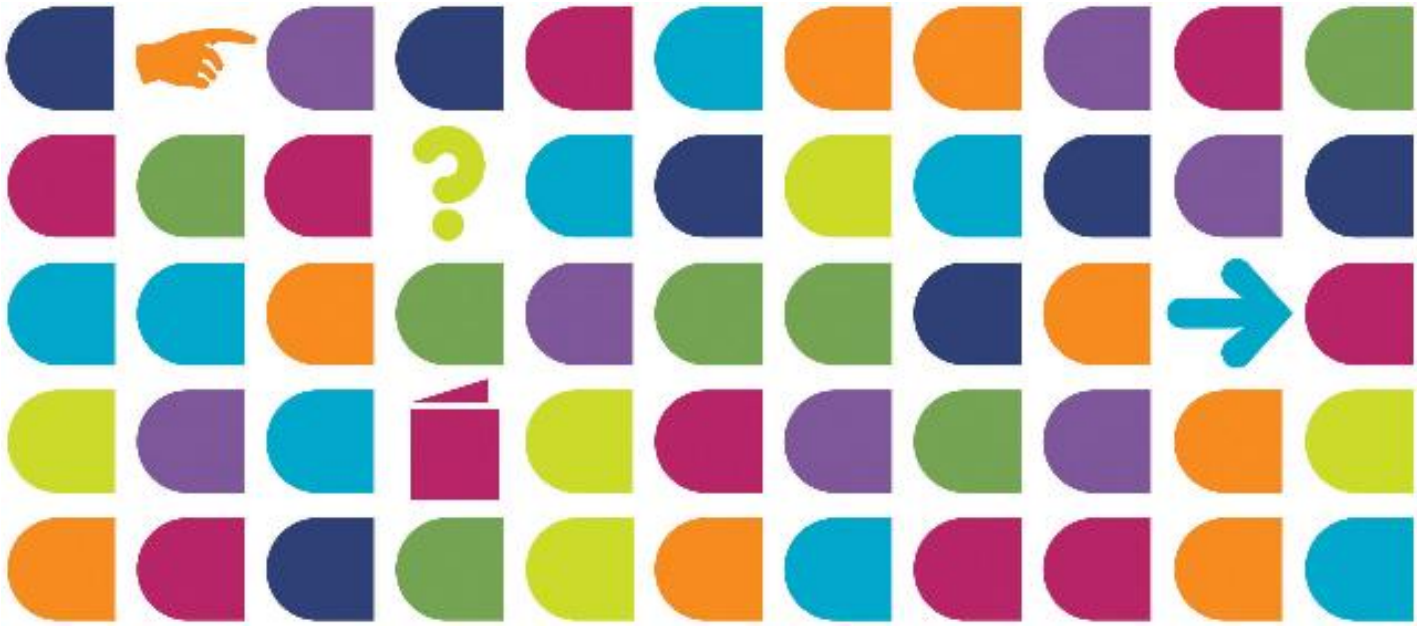
LEGAL SERVICES CONSUMER PANEL



Regulating will-writing

July 2011

CONTENTS

Foreword		1
1	Executive Summary	2
2	Introduction	8
3	Market Picture	12
4	Quality	19
5	Sales practices	34
6	Storage	45
7	Mental capacity	49
8	Fraud	54
9	Consumer detriment	58
10	Remedies	66
11	Recommendations	80
Annex 1 – LSB commissioning letter		81
Annex 2 – Contributors		84
Annex 3 – General law		85
Notes		87

Foreword

This report – the second major piece of advice sought from the Legal Services Consumer Panel by the LSB – covers an area which increasingly affects us all: the preparation of wills. Whilst historically, though each of us will need the services of a funeral director in due course, for many the need for a will was slight. Fewer owned houses, and many couples only either had each other, or their joint children, to inherit their assets.

Today life is more complicated, with major changes in family structures. Co-habiting parents; step-, fostered- or adopted children; a higher incidence of owner occupation and even the growth of second homes; and concerns about expensive care in later life – all make it of greater importance for people's wishes for disposal of their assets (or custody of their children) after their death to be properly documented and carried out.

So whilst this issue grows in importance, there are three unique features of this market which lead any consumer advocate to be concerned. One is that most people only make this purchase once, so are "unsophisticated" users of this particular service. Secondly, wills can involve very sensitive and emotional issues, which make any client a little vulnerable. And thirdly – perhaps most importantly – any problems with the will are likely to be spotted only after the client's death.

Furthermore, the potential detriment – financial and emotional – from an incorrect or inappropriate will can be very serious.

There were therefore good reasons to look at this. Sadly, the results of the research took us by surprise. The poor quality of too many wills left us with little doubt that standards across the whole industry need to be raised in the quality of will-writing, but also covering sales practices.

Having considered all the options, the Panel is clear that it is only by regulating will-writing that detriment will be prevented and standards improved. This does not mean giving solicitors a monopoly. As now, anyone should be able to offer will-writing services. The difference is that providers should have to satisfy regulators as to their competence and commitment to client care before they are allowed to do so.

The Report's recommendation to the LSB is therefore for regulation to demand improved training, reaccreditation, providers to be subject to conduct rules, robust storage requirements and access to redress for clients and beneficiaries.

We look forward to the continuing debate on this issue, and hope that this thoughtful and comprehensive report assists in the development of a policy response to the problems it has identified.

Dianne Hayter

Dr Dianne Hayter
Chair, Legal Services Consumer Panel

1 Executive Summary

About this investigation

1.1. Like many legal activities, there are no restrictions on providing will-writing services to consumers. This means that anyone can set up a business to provide wills. But will-writing is unusual because alternatives to solicitors – banks, independent financial advisors, charities, trade unions, will-writing companies and providers of paper and online self-completion wills – have made significant inroads into the market. Together, they are estimated to account for one-third of wills prepared last year.

1.2. There has been longstanding debate about whether will-writing should be regulated. Parliament last considered the issue during the passage of the Legal Services Act, but accepted the view of Ministers that there was insufficient evidence of consumer detriment to justify this move. Following the decision to regulate will-writing companies in Scotland, and mounting concern south of the border, last year the Legal Services Board asked us for advice on the current and potential problems that consumers face, the impact on testators and beneficiaries and whether new solutions are needed, including the advantages and disadvantages of various ways of regulating will-writing.

1.3. Assembling a robust evidence base in this market is challenging. Consumers lack the knowledge to spot problems with the quality of wills, so these might not be discovered until many years after the will was prepared. It is also difficult to shine a spotlight on sales practices which take place in the privacy of the home. The limited nature of the evidence base is something that policymakers need to accept when assessing the case for intervention; it is impossible to be entirely certain about the scale of detriment, but this cannot excuse inaction.

1.4. Nevertheless, the Panel collected evidence from a range of sources:

- A shadow shopping exercise (a form of mystery shopping) with 101 wills;
- A survey of 500 recent will purchasers;
- Nearly 400 case studies from members of the public, lawyers and others;
- Submissions to a call for evidence from a range of organisations;
- Interviews with providers; and
- Complaints data from the Legal Ombudsman

The case for intervention

Risks to consumers

1.5. Inherent features of will-writing services place consumers at risk of detriment. Consumers lack the knowledge to identify technical problems or assess whether the additional services offered are necessary or represent good value for money. The reliance on extracting good information about the consumer's circumstances and preferences, combined with the range of possible ways to deal with these in the will, means there is potentially wide scope to give bad advice. Selling services in the

home is uniquely suited to inducing consumers to buy, as people cannot walk away from the transaction and the home environment has special emotional significance. Providers can exploit the personal nature of making a will, at worst using the close knowledge gained of the consumer's affairs to commit fraud.

1.6. Will-writing services present unusual risks due to who is affected. Some consumers are in vulnerable circumstances: people who lack mental capacity have specific needs in relation to wills; and older people are a target market for providers. The people most affected by a will are those named in the document, including the beneficiaries and any dependants. They are poorly placed to prevent problems with wills and the remedies available to them are limited in practice.

1.7. The severity of possible harm also makes will-writing services particularly risky. This can involve many hundreds of pounds for consumers buying more complex wills or additional services. Beneficiaries can face huge financial implications because of defects in the will, for example the assets going to unintended people, a higher tax bill or sale of the family home. Charities are also highly reliant on legacy income. Problems with a will can also have very personal consequences, triggering or inflaming family disagreements or causing uncertainty for children.

Evidence of detriment

1.8. The main focus of the investigation was will-writing companies as this is where greatest concern lies. Our evidence suggests they provide a valuable alternative to solicitors as they tend to be cheaper and the key element of their business model – providing wills and related services in the home – appeals to consumers due to the flexibility of service. The best will-writing companies at least match the service provided by solicitors, for example the instruction-taking interview is longer and members of one of the main trade associations face stricter competence checks. The vast majority of consumers – 90% – would recommend their will-writing company to others.

1.9. The high overall levels of satisfaction extend to solicitors and other providers. However, there is also much evidence of consumer detriment. Of most concern is the poor technical quality of wills, as this potentially causes the most serious harm.

1.10. Our main areas of concern are:

- Quality – one in four wills in the shadow shops were failed with more than one in three of all assessments scoring either poor or very poor. The same proportion of wills prepared by solicitors and will-writing companies were failed. Wills were almost just as likely to fail when the client had simple or complex circumstances. Key problems where the will was not legally valid or did not meet the client's stated requirements, were: inadequate treatment of the client's needs; the client's requests not being met; potentially illegal actions; inconsistent or contradictory language; insufficient detail; and poor presentation. Key problems relating to poor advice include: cutting and pasting of precedents; unnecessary complexity; and use of outdated terminology.
- Sales practices – there is an undercurrent of sales pressure that plays on people's fears and a lack of transparency about what consumers are committing to and the costs. The case studies demonstrate that consumers can end up paying enormous sums for services they do not need or which they could find far cheaper elsewhere. There are specific concerns – relating to quality, value and pressure selling – about trusts which claim to protect a surviving

spouse from selling their home in order to pay for the costs of care home fees.

- Storage – a recurring theme in the case studies is beneficiaries being unable to trace wills due to will-writing companies becoming insolvent and disappearing without trace. There are no safeguards where such companies are not part of a self-regulatory scheme; and
- Rogue minority – a rogue element in the unregulated sector which is engaged in sharp practices including very aggressive selling, gross overcharging and fraud. Solicitors and will-writing companies interviewed were both of the view that a rogue minority operates in the sector.

1.11. The evidence suggests a need to raise standards across the market as the quality of wills prepared by solicitors is also disappointing. We have identified opportunities to strengthen the Legal Practice Course (where the compulsory will-writing elements are fairly minimal) and to introduce reaccreditation. The joint regulators' education and training review provides a good forum for discussion about ensuring ongoing competence.

Remedies

1.12. The Panel's aim is to propose a package of remedies that will deliver robust consumer protection whilst preserving the benefits of a competitive market and ensuring high levels of will ownership. In this, we are aware of the legitimate desire of the better regulation agenda to properly consider alternatives before deciding to introduce regulation. We are also conscious of the need to avoid unintended consequences. In this market, the main risk is that regulation reduces the number of people who make a will, due to higher prices or by deterring providers whose services are more appealing to consumers than solicitors.

Alternatives to regulation

1.13. The three main alternatives are consumer information, self-regulation and enforcement of existing legislation.

1.14. General education campaigns would not help consumers to identify defective wills – the main issue to correct. However, there is a need to make consumers better aware of the suitability of online services as these received the highest proportion of fail marks in the shadow shopping, but wills sold over the internet are difficult to regulate. Giving information to consumers has more potential for dealing with poor sales practices. As consumers buy will-writing services rarely, disclosure of key terms at the time of purchase is likely to be more effective than general education campaigns. Adequate disclosure rules are already in place in the regulated part of the market and in one industry code.

1.15. There are many trade associations in the unregulated sector, but two main ones. The Institute of Professional Willwriters (IPW) has about 200 members and its code of practice is recognised under the Office of Fair Trading approved codes scheme. The Society of Willwriters (SWW) has about 2,000 individual members and so is the larger scheme in the sector. It is unknown what proportion of will-writing companies belongs to neither.

1.16. Our analysis is that the IPW scheme offers key added protections in the areas of pre-entrance checks on technical competence and business probity, and stronger disclosure rules around cross-selling of services including sales of executor services. Self-regulation has made some progress, but our view is that all will-writers should have to demonstrate they are technically competent before being able to offer will-writing services. The IPW's own view is that self-regulation is not a viable solution in the sector.

1.17. Consideration of enforcing existing legislation should be approached from multiple angles. Firstly, the person who has suffered detriment, i.e. testators or beneficiaries. Secondly, whether it is possible for such persons to take action privately, or whether they must rely on public authorities, such as local authority trading standards services, to take enforcement action on their behalf.

1.18. Where solicitor clients identify quality problems, these may be addressed by the provider and, in some circumstances, the Legal Ombudsman. However, where, more commonly, defects come to light after the death, remedies available to beneficiaries exist but the high costs put these out of reach for most people. This is especially true for cases that go to court where the losing party pays the costs of both sides. Contested probate cases are likely to be removed from the scope of legal aid.

1.19. Many of the poor sales practices outlined in the report may constitute breaches of existing consumer legislation. The most relevant law is the Consumer Protection Regulations, but consumers do not have a private right of action, i.e. as individuals they cannot take companies to court, only public authorities can do this. This places a heavy reliance on public enforcement. Evidence suggests that a relatively small number of companies are responsible for the worst problems, indicating the market is ripe for targeted enforcement action. Some trading standards services have achieved notable prosecutions dealing with large-scale abuses. 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 for individual consumers is not guaranteed, particularly where the offender has no realisable assets.

1.20. Fraud is, of course, a criminal activity. However, whereas for regulated providers beneficiaries can make a claim on a compensation fund, this is not available for will-writing companies.

Regulatory options

1.21. There is therefore a compelling case to intervene to protect consumers of will-writing services. This is based on: the risks to consumers due to innate features of the market; the potential severity of harm, including to clients in vulnerable circumstances; and the strong evidence of consumer detriment, especially in relation to the poor quality of wills. The nature of the detriment suggests that preventative, rather than remedial measures, are needed. This is because quality problems are normally only discovered after the client has died, the financial and personal harm to beneficiaries can be severe, and beneficiaries have limited remedies available to them.

1.22. Two regulatory approaches were considered: to establish a new bespoke regulatory regime for will-writing companies; or to work within the parameters of the Legal Services Act by making will-writing a reserved activity. Although the first option would produce a solution tailored to the unique challenges of the market, the costs are likely to be prohibitive and it would fail to deal with the problem of an unlevel playing field.

1.23. The Panel proposes that will-writing services should be made a reserved legal activity. Any business – not just a solicitors firm – satisfying an approved regulator's entry standards could provide will-writing services. The starting point for a regulatory scheme could be the IPW code. Around this core should be added greater monitoring of the quality of wills

and some regulatory arrangements that apply to solicitors, such as falling within the Legal Ombudsman's jurisdiction. As a co-regulatory approach, this idea has the benefit of expert provider input that self-regulation offers. Economies of scale also mean it is likely to be more cost-effective.

1.24. Another key advantage is that the Legal Services Act was designed flexibly to enable approved regulators to tailor their systems to the needs of different legal activities. This means that will-writing companies would not need to meet all the regulatory requirements placed on solicitors. Thus reservation could potentially match the flexibility of a bespoke regulatory regime.

1.25. The boundaries and ingredients of a regulatory scheme would need to be carefully developed following consultation. However, the Panel has identified some core ingredients of such a scheme:

- Scope – the commission, sale and preparation of will-writing and related services for fee, gain or reward;
- Education – a requirement to pass an entrance exam or other means of demonstrating competence.
- A requirement to appoint a Head of Legal Practice and Head of Finance and Administration;
- Conduct rules – the IPW code of practice provides a good starting point;
- Ongoing compliance – annual CPD requirements and periodic reaccreditation;
- Monitoring compliance – to include mystery shopping as part of the toolkit;
- Redress – indemnity insurance, contributions to a compensation fund and subject to the jurisdiction of the Legal Ombudsman; and
- Discipline – a range of sanctions

Recommendations

The Panel's advice to the Legal Services Board is as follows:

- Will-writing services should be made a reserved activity;
- The scope of regulation should include the commission, sale and preparation of will-writing and related services for fee, gain or reward.
- The core elements of the regulatory scheme should include:
  - Education – a requirement to pass an entrance exam or other means of demonstrating competence.
  - A requirement to appoint a Head of Legal Practice and Head of Finance and Administration;
  - Conduct rules, using the IPW code of practice as a starting point;
  - Ongoing compliance: annual CPD requirements and periodic reaccreditation;
  - Monitoring compliance – to include mystery shopping as part of the toolkit;
  - Redress – indemnity insurance, contributions to a compensation fund and bringing will-writing within the jurisdiction of the Legal Ombudsman; and
  - Discipline – a range of sanctions
- The OFT should coordinate enforcement action targeted at the rogue element of the will-writing industry, working in partnership with local trading standards services;
- The SRA should consider whether the mandatory aspects of the will-writing part of the Legal Practice Course should be strengthened; and
- The Joint Regulators' Education and Training Review should consider the lessons of will-writing, particularly on the issues of specialisation and ensuring the ongoing competence of lawyers.

2 Introduction

Why this report matters

2.1. Writing a will is the only way to ensure that the money and possessions people accumulate in their lifetime are distributed according to their wishes on their death. Research[1] shows strong public support for the entitlement to inherit, although less than half of adults have made a will.

2.2. It is essential that the will works as intended since defects may not be discovered until it is too late to correct them. Lacking knowledge of the law, consumers have little choice but to place their trust in providers to get things right. Further, as decisions about inheritance are a very personal matter, it is important that consumers are treated fairly and their vulnerability is not exploited.

2.3. Consumers may spend significant sums on wills and related services. However, a poorly drafted will impacts most on the intended beneficiaries, at a time when they are grieving. At worst, a will may be deemed invalid and have the same effect as there being no will at all. The rules of intestacy then apply, possibly frustrating the deceased's wishes. This can have serious financial implications, trigger or inflame personal conflicts and cause uncertainty for the most vulnerable, including children.

Mounting concern

2.4. There are no restrictions on who may provide will-writing services. This is true of many activities, such as giving advice on an employment claim or a divorce, which do not have to be provided by regulated lawyers. Will-writing is unusual because it is one of the few areas where the dominance of solicitors has been eroded. Estimates suggest that solicitors prepare only two-thirds of wills.[2] The alternatives include banks and other financial services providers, charities, trade unions and will-writing companies.

2.5. The desirability of regulating will-writing was last considered during the passage of the Legal Services Act 2007. Parliament decided there was insufficient evidence of consumer detriment to justify adding will-writing to the list of reserved activities. The Act, however, did include flexibility to bring new activities into regulation without the need for primary legislation, by giving the Legal Services Board (LSB) power to recommend such a step to the Lord Chancellor. At the time, there was a feeling this issue had not been resolved and an expectation that the LSB would return to it in due course.

2.6. Since then, there has been mounting concern about some will-writing companies, in relation to the quality of wills and poor sales practices. The successful prosecution of Willmakers of Distinction for fraudulent trading and the theft of over £400,000 of clients' money, and alleged abuses by other companies exposed by a BBC Panorama programme, brought the issue into the public eye. Within the regulatory community, representatives of solicitors and will-writing companies have pressed for regulation. In his Legal Regulation Review, Lord Hunt of the Wirral recommended that the Solicitors Regulation Authority (SRA) and the Law

Society should 'discuss with the LSB the possibility of extending the edges of the regulatory "net" to cover will-writing and all probate work'.[3] In 2010, will-writing was made a reserved activity in Scotland producing an inconsistent regulatory environment for British businesses.

This investigation

2.7. In September 2010, the LSB asked the Consumer Panel to provide advice about the provision of will-writing services. Evidence was requested on the problems, both current and potential, experienced by consumers wishing to write a will. The LSB wanted to know the size of each problem, its cause and the impact on the testator, executors and beneficiaries. The Panel was invited to consider whether existing consumer protections were capable of addressing consumer harm or whether new solutions were needed, including the advantages and disadvantages of various ways of regulating will-writing. The LSB's commissioning letter is reproduced in Annex 1.

2.8. This investigation's primary focus is on will-writing companies. However, the terms of reference made clear that all providers were encompassed, including solicitors. This is helpful, firstly, because it allows us to identify where improvements might be made to the current regulatory framework, and secondly, it enables us to infer where regulation might address any problems we identify in the unregulated part of the market.

2.9. The investigation is limited to will-writing and related services purchased by the 'testator' (the client whose will it is). The delivery of probate and estate administration services is outside of scope except where the selling of such services forms part of a will-writing package. We have received some evidence about estate administration and have passed this to the LSB to help them decide whether to include this in any further investigation.

2.10. The wider context for the investigation is the LSB's project to rationalise the scope of regulation. Research by Professor Stephen Mayson[4] has highlighted that the list of reserved activities is an accident of history rather than the result of a clear policy rationale. Therefore, the legal services landscape is not based on a sound analysis of which activities need to be regulated to protect consumers. In light of this, the LSB is developing criteria for decisions about the scope of regulation – including the circumstances in which it might recommend that the list of reserved activities be amended. The LSB will use its examination of the case for regulating will-writing to test its proposed approach.

The Consumer Panel's approach

Assessing the consumer interest

2.11. There is a broad consensus, including professional and consumer bodies, in favour of regulating will-writing. Supporters point to the potentially serious consequences of a badly drafted will, which is difficult for clients to spot, and the lack of compensatory arrangements. They argue that skill is required to prepare a competent will and hence a minimum level of training is needed. Proponents of regulation also highlight the evidence of unfair commercial practices, often targeted at older people, and the limited success of self-regulation in controlling such abuses. In addition, representatives of solicitors complain of an unlevel playing field. Equally, some will-writing trade associations argue that regulation would improve their legitimacy and so enhance their ability to compete.

2.12. The opposing view is that unnecessary restrictions on who may provide will-writing services would not be in the

consumer interest. Regulation could limit choice, dampen innovation and increase prices. Costlier services might erect access to justice barriers that dissuade people from writing a will. Opponents also argue that there is only anecdotal evidence of consumer detriment, which trading standards services could tackle. They claim that self-regulation has gained traction with Office of Fair Trading (OFT) approval of the Institute of Professional Willwriter's (IPW) code of practice.

2.13. These arguments were used during the passage of the Legal Services Act. What was missing was a robust evidence base to support change. This point was stressed by the LSB in setting the terms of reference for our investigation. They warned: "*The LSB will not jump into recommending regulation that would restrict the type of providers that may deliver will-writing services. We will only do so if there is compelling evidence of systemic failure and that existing tools cannot provide adequate protection for consumers in light of these failures.*"[5]

2.14. The Consumer Panel recognises that regulation offers vital consumer protection, but that unnecessary regulation can have harmful effects for consumers. Therefore, we have invested in establishing an evidence base to help us determine whether the nature and scale of detriment justifies intervention and which solutions are likely to deliver the best consumer outcomes.

Establishing the evidence base

2.15. The sources for the investigation were:

- Consumer research – IFF Research carried out a shadow shopping exercise and a survey with 500 consumers who had made a will in the last two years (the 'consumer survey').
- Call for evidence – 18 organisations responded to a call for evidence issued in September 2010.
- Case studies – as part of the call for evidence, members of the public, lawyers and others contributed case studies of problems to help us build a picture of the consumer experience. Nearly 400 cases were received.
- Legal Ombudsman – provided details of complaints about will-writing services during October 2010 to April 2011.
- Business interviews – IFF Research conducted in-depth interviews with 100 solicitors and will-writers.

2.16. In order to examine quality issues, the LSB, its funding partners – the OFT and the SRA – and the Panel commissioned IFF Research to conduct a shadow shopping exercise using 101 consumers. These were recruited to make wills using a mixture of will-writing companies, solicitors and other providers. The sample included individuals with both simple and complex needs. An expert panel of different provider types assessed the wills. The sample size means that the findings should be treated as indicative rather than representative.

2.17. The anonymised case studies cited represent the Panel's reasonable efforts fairly to summarise the responses received. The opinions expressed in the case studies are those of the respondents and not those of the Panel. The Panel has made no attempt to check the accuracy of the assertions made by respondents as to law or fact. They should be seen as indicative of the issues and not as representing standard industry practice.

2.18. An independently prepared research report from IFF on both elements of the consumer research and the business interviews is available on the Panel's website. The submissions to the call for

evidence and anonymous summaries of case studies may also be found there.

Structure of the report

2.19. Chapter 3 sets out the current market picture describing: consumer behaviour; the structure of the market and existing regulatory requirements.

2.20. Chapters 4 to 8 report on the different problems experienced:

- Chapter 4 – the quality of wills
- Chapter 5 – sales practices
- Chapter 6 – storage
- Chapter 7 – mental capacity
- Chapter 8 – fraud

2.21. Chapter 9 pulls the evidence together to provide an overall assessment of the various risks facing consumers and the scale of detriment.

2.22. Chapter 10 examines possible solutions, including alternatives to regulation and regulatory options.

2.23. Chapter 11 makes recommendations.

Thank you

2.24. The Consumer Panel is grateful to the many individuals and organisations who gave of their time generously.

2.25. We are particularly grateful to the expert panel for assessing the quality of wills.

2.26. A special note of thanks is due to the individual consumers who participated in the shadow shopping exercise, and, in particular, those members of the public who submitted case studies during our call for evidence. We appreciate the courage it took to relive often painful circumstances in order to help others avoid being affected by similar problems in future.

3 Market Picture

Introduction

3.1. This chapter describes the market, including:

- Consumer behaviour – ownership of wills across the population and usage of providers;
- Market structure – the business models of different providers; and
- Regulatory requirements – the rules that apply to the different providers.

Consumer behaviour

Levels of will ownership

3.2. Survey estimates of the number of people with a will vary between 36%-48%. There are no significant differences in will ownership in England compared to Wales. The Panel's annual tracker survey[6] suggests that 7.8% of consumers purchased a will in the last two years. This suggests that approximately 1.8 million wills are prepared annually.

3.3. The most recent comprehensive survey of will ownership was conducted by Cardiff University.[7] Its findings are consistent with numerous studies which suggest that age, marital status and financial worth are key variables related to making a will:

- Age – the proportion of people with a will increases steadily with age; 6% of those aged 16 to 24 compared with 82% of those aged 75 or over.
- Marital status – widowed and married people are more likely to make wills whilst cohabiting and single people are least likely to do so. Among younger people, those with children are more likely to make a will.
- Financial worth – will ownership is greater among those with higher value estates; 9% of those with assets valued up to £10,000 have a will compared to 80% of those with assets valued at more than £500,000.

3.4. The Law Commission has for the first time produced statistics on the number of people who die intestate (without a will), based on data from HMRC and the Probate Service. In the year November 2007-October 2008, the Probate Service dealt with 254,370 estates of which 42,060 were intestate – 16.5%. It cannot be conclusively stated that 83.5% of the population make a will by the time they die because these figures do not include those estates where probate is not required (such as small estates or estates which pass by joint ownership). These newly available statistics provide a sharp contrast to the number of people who currently have a will.

3.5. The data demonstrates a strong correlation between size of estate and a will: the median value of an intestate estate is £56,000 compared with £160,000 when there is a will, with almost one third of intestate estates valued at less than £25,000. Age is another key characteristic: those dying intestate (median age 73) are on average younger than those with a will (median age 83).

Usage of different providers

3.6. Consumers may choose to write their own will or seek the services of a range of commercial or not-for-profit providers. Table 1 provides data from surveys by the Law Society[8] and the National Consumer Council[9] indicating consumer preferences and how these have changed over time.

3.7. As expected, most consumers use solicitors. However, alternatives account for a significant and growing minority. Usage of will packs or online services has also risen significantly. This is likely to reflect new online services offered by major retailers working outside of legal services regulation.

3.8. The survey suggests that 35% of people shop around before selecting a provider. Of these, 51% do an online search and 17% use a price comparison website. These figures are higher than for other legal needs; the Panel's Tracker Survey[10] suggests that one in five consumers shop around across legal services.

3.9. The Panel's qualitative consumer research on quality in legal services indicates that preferences depend on the consumer's situation. Using unregulated providers was seen as acceptable in simple circumstances, but any complexity would require a solicitor, to provide the reassurance that the advice was watertight.

3.10. The IFF consumer survey suggests choice is influenced by perceived advantages associated with different providers. For example, previous use, local offices and recommendation are the factors most strongly influencing selection of solicitors. Flexibility of service delivery and a cheap price are the key drivers for using will-writing companies. Those attracted to self-completion options are attracted by a cheap price and ease of use.

3.11. Similarly, perceived disadvantages explain why different providers are rejected. For solicitors the strongest reason is price. Price is also the strongest rejection factor for will-writers, but just over one-third (36%) cited concerns about their reliability. A further fifth were unsure as to how qualified they were to write wills. 15% had doubts about whether wills would be legally binding. Therefore, credibility issues appear to be holding back will-writing companies from making further inroads into the market.

Table 1 – Consumer usage of will providers

Provider type	Law Society (2010)	NCC (2007)
Solicitor	67%	74%
Will-writing company	10%	8%
Will pack or online service	13%	8%
Financial services provider	7%	5%
Other	4%	5%

Market structure

3.12. Details on each of the main types of will provider are presented below. Wills are also sold in a number of ways, for example on the provider's premises, in the home or online. A summary table is provided on page 18.

3.13. Alternative Business Structures (ABS)[11] may change the market from October 2011. For example, will-writing services may become more attractive to providers if they can also offer in-house probate services (obtaining a Grant of Probate is a reserved activity). More than half of those participating in the business interviews – both solicitors and will-writing companies – believed that ABS is the biggest challenge the industry faces.

Will-writing companies

3.14. The absence of regulation and thus any register means it is not possible to give a definitive number of will-writing companies. The IPW is aware of 750 firms, of which most are sole practitioners. The Society of Will-writers (SWW) has 2,000 members (it counts on an individual rather than firm basis).

3.15. Many providers work part-time either in addition to another business activity or as a sole source of business. Most companies have been operating for 5-20 years, but far more will-writing companies than solicitors have been operating under 5 years (16 out of 47, compared to 3 out of 50).

3.16. Consumers using will-writing companies are more likely to pay £50 or under for their will (16%) than solicitors' clients (7%), while consumers using solicitors are more likely to pay more than £50 but less than £150 (45%) than the clients of will-writing companies (37%). This perhaps indicates that will-writing companies are more likely than solicitors to operate at the 'bottom end' of the market in terms of price, while solicitors are more likely to position themselves as 'mid-market'. At the 'top end' there is little to choose between the two types of provider.

3.17. The differentiating feature of will-writing companies is visiting the client's home (some solicitors also offer home visits). Some employ instruction-takers to note the client's wishes while someone else prepares the will. The business interviews suggest that there is a higher focus amongst will-writing companies on selling additional services to consumers. Approximately one-fifth offer commission to incentivise staff compared to only one out of the 50 solicitor firms interviewed.

Solicitors

3.18. SRA practice data for May 2011 indicates that 5,285 solicitor firms - 48% of all firms - provide will-writing services. Firms of all sizes are involved in the market, although smaller firms are proportionately more likely to be. For example, 1,793 sole practitioners and 2,455 firms with 2-4 partners are in the market, but so are 98 firms with 26-80 partners and 30 firms with more than 81 partners.[12]

3.19. In the business interviews, most solicitors' length of involvement with will-writing was in excess of 20 years (34 out of 50) in stark contrast to will-writing companies (3 out of 47). Solicitors tend to prepare fewer wills per year than will-writing companies, as most practices offer a range of legal work. For example, 44% of solicitors prepare fewer than 199 wills each year compared to 34% of will-writing companies. Solicitors are also more likely to prepare simple wills than will-writing companies (58% v 43%) and less likely to prepare complex wills (22% v 34%).

3.20. Wills are traditionally prepared following a face-to-face interview in the solicitor's office although some solicitors offer home

visits and some large firms provide online services. Solicitors also win contracts from financial services providers and trade unions to prepare large volumes of wills, for example Thompsons prepares 13,000 wills a year for trade union clients and Irwin Mitchell has prepared over 500,000 wills for its own clients and those of its corporate partners. This 'behind-the-scenes' work means that solicitors prepare more wills than the market share figures indicate and some firms together account for a large proportion of this market share.

Financial services providers

3.21. The British Bankers Association informed us that many of their members offer will-writing services through an in-house unit or through a firm of solicitors.

3.22. Major retail brands, such as Halifax Legal Services, the Cooperative Legal Services, the AA and Saga have been at the forefront of providing online will-writing services (see DIY will providers below).

3.23. Building societies and independent financial advisors also provide will-writing services. It is not possible to give further details as their trade associations did not respond to the call for evidence. However, we observe some building societies offer wills through both solicitor firms and will-writing companies.

Self-completion wills

3.24. Wills are one example of a growing range of fixed-fee document services that can be purchased either in a shop or online.

3.25. Paper-based self-completion kits are sold in stationers or to download online. LawPack is the leading provider of DIY will kits which are priced at £9.99. The company says its kits are regularly checked and updated by barristers and solicitors to ensure they are legally valid and easy to complete. Template forms are provided, along with guidance to aid their completion.

3.26. Search engines generate a wide range of online will-writing services. The websites use interactive software to automatically generate wills based on a series of templates using information provided by the user. The services include guidance materials for users to draw on. Some services include a 'try before you buy' facility which enable customers to review the document before committing to a purchase. Typically the will is checked by a professional before being sent to the customer for it to be signed and witnessed, although some services give the choice of excluding a professional review. A brief trawl found prices for single wills in the range of £30-90.

Other providers

Charities

3.27. A trawl of websites of ten large national charities revealed few prepare wills for consumers, but instead provide online and telephone advice about the process. Some charities have relationships with particular firms, for example Irwin Mitchell provides wills for Age UK and the MS Society promotes totallyfreewills.com.

3.28. Each November, the Will Aid initiative enables people to have a basic will professionally drawn up by a solicitor who will not charge their usual fee. Instead they will ask for a donation to one of nine charities. In 2010, Will Aid raised more than £1.5 million in donations.

Trade unions

3.29. A trawl of 50 union websites listed on the TUC website showed that 20 advertise free or discounted will services to members as part of a general package of legal services. Typically solicitors drawn

from the union's panel of firms prepare the will based on a self-completion questionnaire. The Panel understands that the solicitors employ paralegals to draft the wills, while non-standard wills, that is for members who need inheritance tax advice or have complex needs, are drafted by solicitors at a discounted rate.

Regulatory requirements

3.30. Will providers are subject to different sectoral regulatory requirements. In addition, all providers are subject to general consumer law.

3.31. Consumers exhibit low awareness of regulatory requirements. A Law Society survey found that 61% of respondents believed that 'will drafting is always subject to regulation'.[13] The Consumer Panel's report, Quality in legal services, similarly found that consumers assume all legal services are regulated.[14] The shadow shops found consumers are very unlikely to check whether providers have some form of accreditation. Even those who do check tend to concede that the various accreditation or quality marks mean little to them, and there is a degree of suspicion about 'invented' accreditations.

Will-writing companies

3.32. Some will-writing companies belong to one or more of the sector's trade associations. The two main bodies are IPW and SWW.

3.33. The IPW has achieved approval for its code of practice from the OFT under its Consumer Codes Approval Scheme (CCAS). The IPW describes seven benefits for consumers:

- An examination for everyone giving advice to consumers and signing off documents;
- All advisors are checked with the Criminal Records Bureau;
- Professional Indemnity Insurance (of at least £2 million) and Public Liability Insurance (of at least £2 million);
- Clear contractual terms that must be given to every customer before they become obligated to the service including cancellation rights and requirements for consumers to be advised of their rights to cancel;
- Any payments taken in advance of work being completed must be protected to ensure that in the event of service failure, the consumer receives either a refund or the work is completed elsewhere;
- A clear complaints procedure including the option for a consumer to turn to an independent arbitration service run for the IPW by the Chartered Institute of Arbitrators; and
- Compliance checking of member firms by the IPW, through analysis of customer feedback forms, compliance visits to members and further analysis of IPW compliance monitoring by the OFT.

Solicitors and other authorised persons

3.34. All legal work conducted by solicitors, regardless of whether it is a reserved activity, is regulated by the SRA. The SRA also prohibits solicitors from setting up separate unregulated businesses to conduct certain unreserved legal activities. These policy decisions, which are not legislative requirements, mean that will-writing is brought within the SRA's regulatory ambit. Features of the regulatory regime include:

- A code of practice setting out the level of service and conduct that consumers can expect to receive;

- Professional indemnity insurance and access to a compensation fund to protect against negligence and fraud;
- Minimum requirements with respect to training and CPD;
- Monitoring of the performance of firms using a risk-based approach

3.35. Other authorised persons undertake will-writing, such as legal executives and notaries. The Council for Licensed Conveyancers regulates the provision of probate services. Its policy is to regulate any unreserved legal services directly related to the reserved activities within its jurisdiction; this includes will-writing.

Financial services providers

3.36. Financial services firms are regulated by the Financial Services Authority (FSA). At the heart of the FSA's regulatory regime is Treating Customers Fairly, which sets out the outcomes consumers can expect from financial firms. Consumers also have access to the Financial Ombudsman Service which may award redress up to £100,000.

Table 1 – Summary of market structure

Provider	Market share	Approx. Wills p/a*	Principal delivery channels	Price for single will	Regulation	Redress
Solicitors	67%	1,228,207	Local offices Online	£100-200	SRA	Legal Ombudsman (£30,000) Insurance and Compensation Fund
Will-writing companies	10%	183,314	In the home	£50-100	Voluntary self-regulation	Conciliation and arbitration as part of self-regulation Insurance as part of self-regulation
Self-completion will providers	13%	238,309	Stationers Online	£10 £30-90	None	None
Financial services providers	7%	128,320	In branch Online	£75-100	FSA	Financial Ombudsman Service (£100,000)
Other **(last four columns relate to trade unions)**	4%	73,326	Self-completion questionnaire sent to solicitors	£free or discount on solicitor rates	No sectoral regulation, but wills prepared by solicitors	Legal Ombudsman where prepared by solicitors

* Figures based on estimated 47,003,700 adult population in England and Wales (National Statistics, 13 May 2010)

4 Quality

Introduction

4.1. This chapter considers the quality of wills and associated issues. The desired outcomes are that wills are legally valid, clear and reflect the client's wishes. Further, where professional advice is given, the will is tailored to the client's circumstances and deals with the estate effectively in accordance with the client's informed instructions.

4.2. The discussion below covers:

- The elements of a good quality will;
- Evidence of quality problems;
- Trusts which seek to protect against care home fees;
- Education and training; and
- Online wills

What makes a good will?

4.3. At its most fundamental, a good will must satisfy some basic tests in order to be a valid legal document and so be capable of obtaining probate. For example, it must be signed by the testator and two witnesses in the presence of each other (who must not be beneficiaries). Some defects can cause problems when obtaining probate but may not be fatal, for example when the will has been amended or is undated.

4.4. A good will must also get some basic technical things right. Some standard clauses should be included where relevant, for example a residuary estate or guardians for children. The will should follow exactly the client's instructions. The drafting should ensure that the clauses deliver their intended effect. The document should also be clear, in two senses: the meaning is unambiguous to minimise the possibility of disputes after the death; and the will should be clearly written so that the client can understand it.

4.5. Where consumers get a professional to write their will, in addition to the elements above, a good will should also be tailored to their personal circumstances. There are a series of elements to this:

- The will should be as simple and straightforward as possible in order to produce the desired outcomes, without any unnecessary complexity;
- The provider should build a full knowledge of the client's relevant financial and personal affairs and apply technical knowledge in a range of areas in order to identify solutions that would deliver their wishes effectively;
- Issues and potential scenarios that clients might not have considered should be highlighted;
- Providers should help clients to think through their options and make a decision that they are comfortable with. This reflects that consumers may know the broad outcome they want, such as to divide various assets fairly between the children, but not know how they can best achieve this; and
- Good client care skills build trust in the advisor to handle sensitive issues and assist in extracting information about consumers' needs and preferences.

4.6. Consumers are free to reject advice given by providers. This may mean the best

possible will is not produced. Ultimately, however, the provider has to respect the client's decision as making a will involves very personal choices.

4.7. Consumers should be free to decide not to obtain any advice when getting a will. Here there is a wider market objective: consumers should make an informed choice about the degree of professional input they wish to purchase based on an understanding of the added value that different levels of information and advice can provide. For example, a self-completion will should be legally valid and deliver the consumer's stated wishes, but may not deal with the estate in the most efficient way possible. However, as long as the first two basic tests are fulfilled it is a matter for consumers to make an informed decision about whether they can afford or wish to pay for bespoke advice. Providers should be upfront about the limitations of their service to support consumers in making such choices.

4.8. When consumers do get advice, they can legitimately expect a bespoke will which deals with their estate efficiently. For example, where the value of an estate is likely to exceed the inheritance tax threshold, they should be alerted to this. Where consumers get advice to reduce exposure to inheritance tax, the advice should have this effect. Where a provider is not competent to give suitable tax advice they should decline to act and refer the consumer elsewhere. This distinction – when advice is purchased – is critical to assessing the quality of wills.

4.9. The number of people who would benefit from advice due to their circumstances is rising as a result of rising home ownership and more complex family relationships. In a Society of Trust and Estate Practitioners (STEP) survey, a large majority of firms reported seeing an increase in complex families resulting in a growing number of people requiring specialist advice.[15]

Evidence of quality problems

4.10. Below we report on evidence with respect to the elements of quality described above split into two parts: whether the will is valid and follows the client's instructions; and the quality of advice. The main evidence is the shadow shopping exercise. Other sources include official data, the IFF consumer surveys, surveys of practitioners and the case studies.

4.11. The findings of the shadow shops are provided in Table 2. The assessors awarded a 'pass' when they considered the will was *both* legally valid (it would obtain probate, with an affidavit if needed) and its overall quality was of passable, good or excellent standard. A 'fail' was given when the will was assessed as *either* being not legally valid *or* of poor or very poor overall quality. The assessors did not know what type of provider made the will. Due to the sample size, the findings should be treated as indicative.

4.12. In total, one in four wills were failed. Furthermore, just over one-third of all assessments had a rating of poor or very poor. However, there were a few wills – just eight of the entire sample – assessed as not legally valid. One quarter of all wills were failed on the grounds of poor overall quality. Overall, about the same proportion of simple and complex wills was failed. Although the sample size makes comparisons difficult, solicitors were more likely to be failed on simple wills and will-writing companies were more likely to be failed on complex wills. This is a disappointing set of results.

4.13. There are some differences in the overall results by type of provider. The findings for solicitors and will-writing companies were identical – each getting around one in five fails. Three in ten self-completion wills were failed, with online routes being responsible for most of these assessments. More positively, only one

will prepared by banks and affiliate groups was failed. Again, it should be emphasised that this is a qualitative sample and so the results should be treated as indicative.

Valid will and client's instructions followed

4.14. Where the expert panel assessed the wills to have failed on the grounds of not being legally valid or not meeting the client's requirements as expressed in the testator questionnaire, IFF classed these failings into six wider categories:

- Inadequacy – where the content of the will does not account for an estate fully, fails to make adequate provision or neglects to take certain outcomes into consideration;
- Requirements – where the client's requests have not been met (as specified in the testator questionnaire) through omission or conflicting specification;
- Legality – where the actions specified in the will are potentially illegal;
- Inconsistency – where the language, logic and/or content of the will is contradictory;
- Detail – where items, people and requests are described in insufficient detail; and
- Presentation – where the language and format of the document is lacking.

Table 2 – Summary of shadow shops expert panel assessments

Overall	**Assessment**						
	Execution		Quality		Overall		Total
Channel	Pass	Fail	Pass	Fail	Pass	Fail	
Solicitor	**40**	**1**	**32**	**9**	**32**	**9**	**41**
Complex	*20*	*1*	*17*	*4*	*17*	*4*	*21*
Simple	*20*	*0*	*15*	*5*	*15*	*5*	*20*
Specialist will-writer	**22**	**2**	**19**	**5**	**19**	**5**	**24**
Complex	*14*	*1*	*11*	*4*	*11*	*4*	*15*
Simple	*8*	*1*	*8*	*1*	*8*	*1*	*9*
Bank or affiliate group	**9**	**1**	**9**	**1**	**9**	**1**	**11**
Complex	*4*	*1*	*4*	*1*	*4*	*1*	*5*
Simple	*5*	*0*	*5*	*0*	*5*	*0*	*5*
Paper self-completion	**6**	**2**	**5**	**3**	**5**	**3**	**8**
Complex	*3*	*1*	*3*	*1*	*3*	*1*	*4*
Simple	*3*	*1*	*2*	*2*	*2*	*2*	*4*
Online self-completion	**16**	**2**	**10**	**8**	**10**	**8**	**18**
Complex	*6*	*1*	*3*	*4*	*3*	*4*	*7*
Simple	*10*	*1*	*7*	*4*	*7*	*4*	*11*
Total	**93**	**8**	**77**	**24**	**75**	**26**	**101**

Rating	**Count**
Excellent	10
Good	81
Passable	107
Poor	82
Very Poor	21

Source: IFF Report

Other data

4.15. The Probate Service is a public office which checks the validity and execution of wills when assessing applications for grants of representation. It reports that very few wills presented for probate are actually invalid, but does see a small but significant number of poor quality wills, where they need to carry out further work to ensure the will is valid. Of course, a will may be legally valid and pass probate yet not reflect the client's wishes, so this point addresses only one dimension of quality.

4.16. One of the main issues seen by the Probate Service relates to poorly drafted appointment clauses (identifying who will be the executor) and attestation clauses (statements by witnesses about how the will was made). As poor drafting is not discovered until after the death, which may be many years later, it can be difficult to locate the draftsman to obtain further evidence to demonstrate the will is valid. The Probate Service does not have any breakdown by type of provider and points out the above shortcomings can be found on wills drawn up by solicitors, will-writing companies or home-made wills.[16]

4.17. The volume of contested wills provides a possible indicator since wills may be disputed on validity grounds. However, wills may be contested for a range of other reasons and it is not possible to provide a breakdown. Further, external factors, such as the economic climate, can influence the likelihood of claims. Table 3 shows that High Court cases have fluctuated during 2005-09 making it difficult to identify a discernible trend. The real number of cases is likely to be much higher as these figures do not include out-of-court settlements. The law firm Seddons estimates there were 50,000 disputes in 2007 based on a survey in which one in ten respondents had challenged a will. On average, disputes take 12 months to resolve, but most cases yield a payoff of under £250 per person.[17]

Table 3 – High Court cases related to trusts, wills and probate

Nature of proceedings	2005	2006	2007	2008	2009
Contested probate actions	115	73	185	106	152
Disputes relating to Trust property	27	10	3	13	44
Variation of Trusts	8	2	-	19	34
Inheritance (provision for dependants)	15	10	43	80	110
Guardianship of minors' estate	-	-	8	5	1
Charities	-	1	-	3	10
Other applications	318	214	237	365	216

Source: Judicial and Court Statistics 2009

4.18. In a STEP survey, 60% of members had come across will-writers whose wills were invalid due to basic mistakes. Problems outlined included: problems with witnesses, basic typing errors, trust errors, the use of standard clauses and lack of legal knowledge. 84% of members who responded had come across one will containing drafting errors in the last year, with more than 72% coming across multiple wills containing errors.[18]

4.19. In the regulated part of the sector, the Legal Ombudsman accepted 55 cases for investigation in its first six months about failure to follow instructions. This is likely to be the tip of the iceberg as most problems, if spotted, should be resolved internally when the client complains to the provider.

Case studies

4.20. The case studies include some examples of wills being invalid because they were not properly signed or witnessed. There were also cases of sloppy drafting that could cause problems at probate, for example names being misspelt, clauses not being numbered and the relationship of relatives being incorrectly described.

4.21. There were also examples of avoidable basic drafting mistakes. These include omission of standard clauses, such as no mention of a residuary estate, failure to appoint guardians for children, or not stating what should happen if the testator is predeceased by the beneficiaries. Another aspect is failure to follow the client's instructions by not distributing the estate to relatives in the proportions that the client had instructed.

4.22. Other problems in the case studies include wills that defeat the client's intentions due to ambiguous drafting or technical mistakes. In one case the structure of the will was in the wrong

Case studies – Technical errors

I saw a will that was set over twelve pages long, which was inordinately complex for a relatively straightforward will. The executors of the will, Mr and Mrs C, are described as daughter and son-in-law of the deceased, when they are in fact daughter and son-in-law of the deceased's partner. Mrs C is not the deceased's child, although Mr S is his son. The real issue is that having granted a life interest in the half share in the property, the residuary trusts give that half share outright to the deceased's partner - clearly not intended. The mirror image will is drafted in the same way. The will permits the property trustees (the deceased's step family) to appoint the property fund in its entirety to the deceased's partner outright. This power could of course be used to disinherit the deceased's son, Mr S, completely. The will was witnessed by Mr C, who is the husband of Mrs C, they are both executors and property trustees under the terms of the will. The will-writers are no longer trading.
(Individual lawyer)

I saw married clients whose will purported to leave life insurance policies in trust. It was only discovered after the husband's death that the trust in the will was invalid as it failed to provide for any beneficiaries. This may end up costing the widow or her estate many thousands of pounds in inheritance tax. Upon pursuing this with the will-writing company, they denied responsibility by saying the will was prepared by their franchisee, for which they had no current address.
(Individual lawyer)

order, giving an unexpected result. Another case involved a failure to recognise that the legal definition of children includes adopted children but not foster children, although thankfully the error was spotted in time. Similarly, wills failed to work as intended because they contained contradictory clauses or trusts were created which did not work, for example to prevent sale of the home to pay for care home fees (see paragraphs 4.32-4.34 below).

4.23. A specific problem relates to checking that the will is properly executed. Execution does not have to take place in the presence of the provider. In the business interviews, a small but significant minority of solicitors and will-writing companies stated that they ensure the act of signing and witnessing takes place under their supervision. It is impossible to eliminate this problem in situations where there is no professional supervision, but it can be mitigated by providing clear information to consumers about the steps they need to take. The business interviews indicate that virtually all solicitors and will-writing companies issue guidelines to clients.

Poor advice

4.24. This is the hardest aspect on which to gather evidence as it is difficult to accurately reconstruct the interaction between provider and client. A limitation of the research approach for the shadow shopping is that the wills could only be assessed based on the client's instructions rather than the questions asked by the provider.

4.25. A key part of providing good advice is the instruction-taking process, as a will can only take account of the information provided by the client. In the business interviews, both will-writing companies and solicitors saw this as the main challenge: asking the right information of clients to build a comprehensive picture of their circumstances; and obtaining unambiguous and complete information from the client. In hindsight many of the shadow shoppers were not happy with the level and quality of communication they had with their provider, specifically with regards to questions about personal circumstances that could affect the will.

4.26. However, the IFF consumer survey found strong scores in this area. This included clear, accurate and comprehensive explanation before the process started and high recall of key information about assets and personal circumstances that providers should cover in an interview. Clients of will-writing companies were more likely to have spent over an hour discussing their personal circumstances (47% compared with 16% for solicitors), while solicitors' clients were more likely to spend half an hour or less (54% versus 29% for will-writing companies). Respondents who spent longer providing information about their personal circumstances tended to be more satisfied with the overall quality of their will.

4.27. A theme in the shadow shopping, STEP survey and case studies was wills being assembled by providers by cutting and pasting precedents from software packages, where a lack of legal knowledge meant the document when put together did not work as intended. Whilst this might work for a simple will, it may fail to deal with more complex circumstances.

4.28. During the course of the investigation, allegations about a technical problem with wills drafted using a widely used software product was brought to our attention. This meant that wills designed to protect against care home fees would not work, potentially forcing the surviving spouse to sell their home in order to pay these fees. Our understanding is that the problems were caused by a combination of misuse of the software and the software's design.

Case studies – Cut and paste jobs

I have come across numerous examples of very badly drafted wills. It is clear from these that the firms or individuals concerned simply select clauses from a computer package without any understanding of the law or the effects of the document they have drafted. A man in his forties died in an accident shortly after his will was made. I am acting for his widow in respect of an Inheritance Act claim. There is confusion and muddle about the rights of the life tenant and the drafting makes it clear that the author really had no idea of the background law. (Individual notary)

I came across a very poorly drafted will that included ambiguous provisions that failed to take account of the particular circumstances of the testator and her estate. The will appeared to have been compiled by cutting and pasting clauses without any understanding of the terms of those clauses and their interaction with each other. Due to the ambiguity I wanted to call for production of the will file, however the will-writing company had gone out of business and the will-writer himself could not be located. Ultimately an agreement was reached between the beneficiaries as to the division of the assets in the estate but a great deal of time was wasted and unnecessary administration costs arose as a result of the inadequacies of the original will. (Individual lawyer)

Although the software has been updated, there may be a large number of wills that will not work. We have been informed that some providers have notified their clients and rectified the wills, but others have not. The Panel is concerned that potentially thousands of consumers will be affected but completely unaware of the problem. The matter has been brought to the attention of the OFT.

4.29. A recurring theme in the case studies evidence was unnecessary complexity to deal with straightforward circumstances. Examples were wills of many pages length that could have been far shorter and done the same job, tax mitigation measures despite the client having modest assets, and other trusts for which the client had no need. In some cases this appears to have been a deliberate ploy to charge the maximum possible fees. However, a more innocent explanation is unconscious gold-plating on the provider's behalf. In other words, preparing a will to deal with all foreseeable scenarios even if these are highly unlikely, or devising an elaborate trust to resolve a problem when a far simpler device would deliver an identical result.

4.30. A related issue is where clients are not able to understand their will. The IFF consumer survey found that 14% of respondents did not fully understand the content of their will. This figure was only 5% for those purchasing an online will. More positively, in nearly all occasions when the provider took the consumers through their will respondents said they did so in a way that enabled them to understand it sufficiently.

4.31. A contributory factor is the style of language used, which is often archaic and obtuse. The terminology used in wills dates back many centuries. Reducing confusion over terms was one of the most common areas for improvement suggested by the shadow shoppers. A

significant minority of solicitors and will-writing companies interviewed hold negative opinions over the clarity of wills written in the market, with virtually all of these blaming legal jargon and outmoded terminology. The Plain English Campaign has indicated support for regulating will-writing and the need for plain English in all legal documents, wherever possible.

Protecting against care home fees

4.32. Providers may offer to prepare trusts to protect against care home fees – known as Life Interest Trusts or Protective Property Trusts. The market value of a home is included within the means testing calculations used by local authorities to assess someone's ability to fund the costs of care. Local authorities cannot take possession of a property occupied by the spouse of the person requiring long term care, but may place a charge on the property for possession on the death of the partner – potentially forcing the home to be sold. It is illegal deliberately to transfer ownership of a property to avoid paying care home fees, but a partner may state in their will that when they die, half of their share in the property is put in trust for someone else. The property's value then becomes 'effectively nil' under local authority guidance. These trusts are also used for other reasons, for example to prevent an inheritance passing to a new spouse and subsequently their family should the surviving partner remarry.

4.33. The high numbers of people requiring care (estimates suggest one in four women and one in six men in the future) and the high costs of care (average annual costs are estimated at £21-30,000) mean these trusts will be worth considering for some people. However, they are not suitable for those who are single or widowed, or who have assets valued below the means test threshold (£17,250). Despite this, the case studies

Case studies – Care home fees

We have had numerous instances of a company selling wills to couples incorporating an interest in possession trust on the first death designed to cover an undivided half share in the family home to reduce the impact of nursing home fees if the survivor needed care. The documentation was ultimately defective in that it did set up a life interest trust but then directed the capital to residue which was expressed as passing to the spouse absolutely. (The Law Society)

I have dealt with two instances of will-writers purporting to create life interest trusts in order to safeguard assets for mainly care home fee purposes. In neither case did the will writer ensure that the necessary Deed of Severance was executed. In one of these cases, we had to do a Deed of Variation, retrospectively severing the tenancy and it was particularly important in this case as the surviving spouse was likely to need care in the near future. There was a good possibility that had we not rectified this error, the whole of the property would have needed to be sold to pay for care fees, thereby defeating the clients' original objectives. (The Law Society)

Husband and wife clients were sold wills for a large sum and were then told that the joint tenancy would be severed at HM Land Registry in order to avoid paying nursing home fees. The only problem is that it was unregistered land and in the husband's sole name. (Solicitors for the Elderly)

include examples of the trusts being marketed to, and prepared for, individuals in these circumstances.

4.34. Another problem in the case studies is a failure to ensure that the necessary Deed of Severance is executed. These trusts only work by changing ownership of the home from joint ownership to Tenants in Common. Without this, there is no property to fall into the trust created by the will of the first spouse to die. The purpose of the trust is then defeated. In one example, the solicitor severed the tenancy of the property, but drafted wills leaving their respective estates to each other – and so failed to mitigate care home fees.

Education and training

4.35. Table 4 summarises where will-writing features within the qualification routes of solicitors and legal executives. The stages are based on a route map developed by the LSB and Skills for Justice. By way of comparison, the entrance requirements for members of IPW are given. Members of the SWW do not have to provide any evidence of technical competence, nor, of course, do will-writing companies that do not belong to a trade association.

4.36. Will-writing is a compulsory part of the curriculum for solicitors, although this training is minimal. In its guidance notes on the Legal Practice Course (LPC), the SRA notes that the outcomes for this area are at higher level of generality than for the three core practice areas; in other words students should have an overview of wills, grants of representation and administration and should be familiar with the relevant documents. It is up to providers of the LPC to decide how and when to assess the outcomes. More comprehensive training is provided in a voluntary elective group. In light of the evidence in this report, we call on the SRA to consider whether these requirements should be strengthened.

4.37. Continuing professional development (CPD) requirements for solicitors are not linked to practice areas, with solicitors largely free to choose how to fulfil their annual 16 hours quota. By contrast, half of legal executives' CPD must be linked to practice areas, whilst members of the IPW must conduct 20 hours a year CPD in wills, powers of attorney, estate administration and related work. Of course, solicitors working across multiple fields of law cannot expect to match CPD levels at the IPW.

4.38. The evidence of poor quality wills opens up wider issues about the education and training of lawyers about which the Panel has previously commented.[19] These include weaknesses in the solicitors' CPD regime (for being unlinked to knowledge or skills needs) and the need for fresh debate on more far reaching ways of ensuring competence, including licensing by activity and periodic reaccreditation. We have said there is a case for additional qualification requirements in practice areas where it is necessary to demonstrate knowledge, skill or experience as a pre-requisite to provide competent advice. In effect, this might involve an endorsement on the practising certificate that would require renewal.[20] However, we warned that unnecessary specialisation could act as a barrier to entry and inhibit competition.

4.39. In sum, many wills are simple to prepare, but there is also scope for advisors to get things wrong. Education and training cannot prevent sloppy basic errors, such as failing to follow the client's instructions. This is a failure of attention to detail. However, more than one in four wills failed by the expert panel were prepared for clients with more complex personal circumstances. This suggests that a minimum level of knowledge and skill is required to prepare wills above a certain level of complexity. There is also a need

for providers to keep their knowledge up-to-date, particularly in technical areas, such as taxation and means-testing, where the rules regularly change. This points to a need to introduce reaccreditation for will-writing. At the same time, the full training that solicitors must undergo – across a wide breadth of law – is surely not necessary to advise on and prepare a good will.

4.40. Based on the evidence, we consider that there should be minimum education and training requirements for all will-writers who give advice to clients. It might be appropriate to introduce different tiers of requirements where there is greater complexity, for example higher standards for those providing estate planning advice. In addition to the specific obligations for will-writers, we hope that the wider issues this report raises – such as specialisation and reaccreditation – will be considered as part of the joint regulators' education and training review.

Table 4 – Place of will-writing within qualification routes for lawyers

Stage	Solicitors	Legal executives	IPW code of practice
Higher education	Equity and Trusts is one of seven compulsory subjects in the Qualifying Law Degree	Level 3 Certificate of Law and Practice – Wills and Succession is a mandatory unit	n/a
Vocational education	Wills and Administration of Estates is a compulsory subject at Stage 1 of the Legal Practice Course. Wills, probate and tax planning is an elective group	Level 6 Professional Higher Diploma in Law and Practice – Wills and Succession can be studied as a Single Subject Certificate or as a mandatory single unit for those wishing to work in a Probate Practice	n/a
Professional training	Training contract and Professional Skills Course (includes client care as a compulsory element)	Qualifying work experience	Written examination with pass mark of 70% and a role play Qualified practitioner route – 4 written assignments and 4 examples of previous work Certain exemptions from above routes for those with specific qualifications and experience
Ongoing training	16 hours CPD per year, of which 25% must be in accredited courses. CPD is not linked to practice areas, but must contribute to general professional skill and knowledge	Half of CPD (i.e. 8 hours for Fellows, 6 hours for Graduate Members and 4 hours for Associate Members) must be relevant to the area of law in which the member practices	20 hours CPD for Full, Affiliate and Fellow members, all of which must be in the fields of wills, powers of attorney, estate administration and related work, using a mixture of structured and unstructured training CPD from other professional bodies relevant to will-writing counts towards IPW total

Self-completion wills

4.41. There are two types of self-completion will on the market. Paper-based do-it-yourself wills can be purchased from stationers and involve the consumer completing a standard form supported by guidance. They are one step further on from an unassisted hand-written will. Online wills are also based on standard templates, but the content is created by answers given by consumers following prompts for information generated by the software. Online wills usually involve at least the option of professional review. An important distinction is that online wills are *prepared for the consumer* and so the provider has a greater duty of care than where the *consumer prepares the will* assisted by some guidance.[21]

4.42. The trend data on market share suggests these options are increasingly popular with consumers who are attracted by the perceived ease of use and lower prices. In the IFF consumer survey, satisfaction with the quality of online wills was 8.5 out of 10 – drawing favourable comparisons with solicitors (8.8) and will-writing companies (8.4). The quality of paper-based wills was rated slightly lower (7.8). Similarly, 90% of consumers would recommend their online will to other people, which compares well with other routes (92% solicitors and 91% for will-writing companies). However, only 76% would recommend paper-based wills – a significant difference.

4.43. The sample size in the shadow shopping was smaller than that for solicitors and will-writing companies, so it is difficult to draw statistically valid conclusions. 3 out of the 8 paper-based wills were failed. Furthermore, 8 out of 18 online wills were failed, mostly due to poor overall quality. The assessors' comments related to the omission of a residuary estate, complicated wording, vagueness or ambiguity, and errors not spotted by the reviewer. The shoppers' suggestions for improvement were for more guidance and someone on hand to answer their queries.

4.44. The Panel staff met with two software providers during the project and were impressed by the level of sophistication in the technology. Online wills can generate legally valid wills which reflect the wishes of clients even when their needs are quite complex. Of course, whilst online wills can incorporate prompts and guidance, they do not replicate the advice environment. It is therefore possible that clients do not consider all the scenarios that they ideally should. Major providers of online wills filter out clients with complex needs, such as those owning a business, by warning that the service is unsuitable. However, beyond this a degree of *caveat emptor* is justified: consumers must accept responsibility for deciding when they do not need advice. Indeed, in the IFF consumer survey, there appeared to be a sense that consumers recognised 'you get what you pay for'.

4.45. Systemisation and automation of will-writing brings risks of its own. On quality issues, the scope for human error – by clients or professionals using the software – is reduced thus safeguarding quality. However, if the software itself is faulty the problem can lie undetected for a while and produce defects in a great many wills (see also paragraph 4.28). Regarding sales practices, as the will is purchased remotely, this removes the salesperson from the process. However, the design of self-completion wills can exploit consumers. Behavioural economics suggests that people's choices are influenced by the way that information is presented. An example is appointment of executors, where we were told about providers who made appointment of their firm as the default option, or set out the form in such a way to encourage consumers to tick this box, without

including any guidance about the consequences of this decision.

4.46. Major brands, in both the regulated and unregulated sector, offer online wills. These packages appear to have high technical specifications and offer unique selling points, for example consumers can review the completed will before parting with any money. However, an internet search reveals a great many online will providers. On closer inspection, some of the packages seem far less sophisticated in design and do not contain the usual consumer protection safeguards, such as warning people whose circumstances are more complex that the service is not suitable for their needs. As the shadow shop exercise demonstrated, weak design of the underpinning template can mean that poor quality wills can be generated.

4.47. The Panel was unable to examine such websites in detail and it is unknown how many consumers use them. We recognise that it is difficult to regulate will-writing services delivered online for practical reasons, for example some companies operate outside of our legal jurisdiction and establishing liability for defective wills may not be straightforward given the consumer's input in the process. Regulation of such services should be kept under review. In the meantime, the Panel would welcome initiatives to educate consumers about the suitability of such online services helping people to know what things they should look out for.

Key points

- A good will is legally valid, clear and reflects the client's wishes. Where professional advice is sought, consumers should expect the will to be tailored to their circumstances and deal with their estate effectively.
- The market should operate so that consumers make informed choices about the degree of professional input they wish to purchase based on an understanding of the added value that different levels of information and advice offer them.
- One in four wills in the shadow shopping exercise were failed. Few wills tested were assessed as not legally valid, with most failing on the grounds of poor overall quality. Just over one-third of assessments across gave scores of poor or very poor. Solicitors were just as likely to get an adverse assessment as will-writing companies – each getting around one in five fails.
- Key problems in the shadow shopping where the will was not legally valid or did not meet the client's stated requirements, were: inadequate treatment of the client's needs; the client's requests not being met; potentially illegal actions; inconsistent or contradictory language; insufficient detail; and poor presentation.
- Key problems in the case studies relating to poor advice include: cutting and pasting of precedents; unnecessary complexity; and use of outdated terminology.
- There is evidence of badly designed trusts for protecting against care home fees.
- Some online will services are sophisticated and capable of dealing with quite complex personal circumstances. They are not suitable for all consumers and cannot replicate professional advice, so it is important to help people decide whether this is a sensible option. Other online will services appear less robust and there is a risk that they can unfairly manipulate decisions, for example around appointment of executors.
- The Probate Office reports that very few wills it sees are actually invalid, but there are a small but significant number of poor quality wills that need further work.
- The compulsory wills-related training requirements for solicitors are fairly minimal. The case of will-writing opens up deeper issues about education and training, which the joint regulators' review is to consider.

5 Sales practices

Introduction

5.1. This chapter considers evidence of poor sales practices. The desired outcomes are that: people are aware of the benefits of making a will; consumers make informed choices about the services they buy; providers treat clients fairly; and clients get value for money.

5.2. The evidence is grouped into themes representing the main problem areas:

- Cross-selling of probate and estate administration services
- Bait tactics leading to more complex wills or cross-selling of other services, including the payment of ongoing fees
- Pressure selling; and
- Failure to honour cancellation rights

Cross-selling of probate and estate administration services

Executor services

5.3. The executors of a will are responsible for administering the testator's estate upon their death. A lay person or a professional can be appointed for this role in the will. If someone's affairs are straightforward, appointing a professional executor is not necessary. Executors, as long as they are not guilty of misconduct, cannot be forced to renounce or retire.

5.4. Naming a trusted professional as executor may be a sensible choice for clients who do not have a suitable lay person in mind. Given the potentially high costs, which are deducted from the estate, it is important that consumers are not pressured into nominating a professional executor. If they make this choice, they should do so knowing the financial consequences. Honesty and transparency on the part of providers is important as consumers are likely to assume administering an estate is more complicated than it actually is.

Survey evidence

5.5. The IFF consumer survey suggests that 12% of consumers make the will provider an executor - 19% of solicitors and 7% of will-writing companies. In the business interviews, solicitors reported that 25% or fewer of their wills name them as executor. Only a small number of shadow shoppers purchased executor services, with around one in ten reporting that their provider recommended themselves as executor of the will. These numbers are lower than expected as the OFT found that 43% of consumers name professional executors. The OFT estimates that failing to shop around for executor services could be costing UK consumers around £40 million a year.[22]

5.6. There is a discrepancy between the consumer survey and business interviews. The consumer survey found that 57% of will-writing companies suggest they are made an executor, but in the business interviews many said they never offer to be the executor and that they do not wish this. This is surprising since being named as executor can be lucrative as fees are usually at least partly based on the value of the estate – see Table 5 from a Which? survey.

5.7. The IFF consumer survey provides an insight into how people choose executors. The most common reasons were the executor's perceived reliability or because they were next-of-kin. Just over a third of respondents (35%) who appointed their will-writer to be their executor had this idea suggested to them by the provider – three quarters of these used a solicitor. The most common reasons that providers gave to consumers were that it was standard procedure or that it would be easier for the beneficiaries.

5.8. In the consumer survey, two-thirds of respondents who chose their provider as executor did so because they felt that the provider understood legal matters, 39% because they felt the will-writer was a responsible individual, while 21% said they 'didn't put too much thought into it – they seemed the obvious choice'. 18% of consumers felt under some degree of pressure to name the provider as an executor, while just 64% of consumers recall the provider explaining how they would charge for this. Although there was little evidence in the shadow shops of high-pressure sales techniques, there was evidence of playing on the consumer's conscience.

5.9. The Which? survey found that while most solicitors offered a clear and transparent service, will-writing companies were less reliable. Two of the banks offering will-writing – HSBC and Natwest – made naming them as an executor or back-up executor a condition of using the service. However, the banks said they would renounce if asked – a point repeated by the British Bankers Association in its evidence to the Consumer Panel.

5.10. Following discussions with the OFT, Barclays Bank, HSBC, Lloyds Banking Group and RBS Group have all voluntarily agreed to review and, where necessary, improve the way they sell will-writing and executor services. The OFT approached the four banks during 2010 as part of a wider effort to improve the will-writing market for customers and their beneficiaries, following concerns that some consumers were appointing professional executors without fully understanding either the likely costs or the alternative options.[23]

Table 5 – Estate administration costs compared

Firm type	Estate administration fees	Estimated minimum cost of administering a £270,000 estate (£)
Banks' average	3% of estate	10,830[a]
Will-writers' average	1% to 2% of estate or £100 per hour. Fixed quotes available in some cases	4,759[b]
Solicitors' average	£144 to £210 per hour or 0.5% to 3% of estate. Fixed quotes available in some cases	5,199[c]
Probate broker[d]	Fixed quotes	1,522

a Average of the three banks figures; **b** Based on 1.5% of estate; **c** Based on an estimated 25 hours of work at £177 an hour; **d** Quotes provided by Final Duties

Source: Which? Money, July 2010: Get your will your way

Case studies evidence

5.11. Poor sales practices in relation to executorships did not feature highly in the case studies. However, as most case studies came via solicitors, many of whom seek to be named as an executor, there may be some underreporting.

5.12. Apart from pressure selling, problems reported included:

- Providers appointing themselves as an executor without the client's consent;
- Giving false information about the ability of relatives to act as executors;
- High fees – in one example, the will was free but the estate administration costs were a flat rate of 10% of the gross estate; these costs were only disclosed when the client asked;
- Fees charged to renounce – in one case, a £500 charge for renouncing when the family objected to the fees for executor services; and
- Unreasonable refusal to renounce role as executor.

5.13. In relation to removing executors, one submission stated it is hard to persuade a Probate Registrar to pass over will-writers as at that stage the probate is in its infancy so there is little basis for such a decision. Moreover, the procedure for removing executors can only be safely put into action after much damage and delay has been caused and the cost is rarely under £10,000. The solicitor noted this cost often deters applicants and there are cases where executors have denied co-executors access to funds to take independent advice with a view to removing them.

Pre-paid probate and estate administration services

5.14. Pre-paid probate services enable consumers to pay some or all of the costs of dealing with their estate themselves, rather than the traditional option of such services being organised by the family after the death and paid out of the estate. The IFF consumer survey suggests that providers offer pre-paid probate and estate administration services to 16% of consumers (25% will-writing companies), although only 6% of these purchase them. Therefore, overall a small number of consumers are affected; however the case studies suggest that the level of financial detriment can be high.

5.15. Such services might be attractive to consumers who wish to have control over their affairs or who prefer to pay now rather than have this sum deducted from the estate and hence the beneficiaries get a lower inheritance. However, the case studies indicate the following problems:

- The deals can be 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 client has died. In addition, a percentage of the estate is sometimes charged to beneficiaries on top of fees already paid by the client;
- Consumers are 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 is done;
- The product is unsuitable for the client's needs – for example, their estate is too small to require obtaining a Grant of Probate; and

Case studies – Pre-paid probate and estate administration services

My client made a will a couple of years ago through a will writer (who she believed to be a solicitor) and bought a "Probate Support Package" at a cost of £1,500. She was informed they would assist her daughter to deal with any estate, free of charge. The daughter attempted to claim on this policy and was told that the money she had paid was for access to their "advisory" service and that to prepare the paperwork etc they would charge 1% of the value of the estate.
(Solicitors for the Elderly)

Hampshire CAB clients were pressure sold will-writing services in their home, following an approach in a shopping centre. Initially, they were told wills would cost £35 each. The cost became £3,000 which the sales person advised them to pay then so that it would not be deducted from the estate. The agreement included the firm having a right to 1% of the estate, storage and an annual check of the wills, monthly payments and counselling for family members... (Citizens Advice)

I had a client who was charged a "Probate fee" of £587.50 at the time of signing the will (in addition to the costs of the will, Enduring Power of Attorney and storage costs charged in advance). The client was never told what this was for but being elderly she did not question it. By the time she saw him, the company had gone into liquidation, with the person behind it having disappeared with the money, and the will and EPA could not be located. There was no prospect of recovering the "Probate fee", or the storage costs paid in advance. (Individual lawyer)

- Should the provider become insolvent, as is common (see Storage section), this money is wasted. Indeed, the service is paid for twice if the executors use professional help to obtain probate. In addition, there is no compulsory protection of client money – a concern given the high sums and the potential long time gap between payment of fees and delivery of the service.

Bait tactics

5.16. Bait tactics involve providers deliberately inducing consumers to invite them into their homes by advertising wills at low price, but where the final price turns out to be much higher or the appointment is used to sell lucrative additional services.

5.17. There may be legitimate reasons why a will costs more than the price originally quoted. It might be discovered that the client's circumstances are more complex than previously thought or the client might make an informed choice to deal with their estate in ways that require more work, for example by setting up a trust. Equally, the client might decide to purchase additional services about which they were unaware having had the potential benefits explained. Such awareness-raising by providers, for example about powers of attorney, can enhance access to justice.

5.18. However, as people are inexperienced and lack knowledge of the law, they find it difficult to assess whether the final price is good value for money or whether the extra features in their will, or additional services, are suitable for their needs. Moreover, as the sale takes place in the home, consumers can feel pressured to sign up before having the opportunity to reflect or explore alternatives.

Escalating cost of wills

5.19. The IFF consumer survey suggests wills typically cost in the region of £50-150

Case studies – escalating will costs

My clients were initially told a will would be £49.99 plus VAT. At the end of the home visit they were advised that the charge would be more like £1000. Their instructions were for a simple will 'all to each other and then to kids'. When the clients pointed out the drafts were unacceptable, they were sent another bill for £300 before changes were made. They never received a completed will. (Law Society)

A firm of will-writers called at the door of an elderly couple's house (at Christmas) and proposed a tax-efficient will for each of them, revoking much simpler wills prepared some years before by us. The clients were of modest means. The new wills cost the couple in the region of ten times what we would have charged and made provision for an entirely misconceived nil rate band trust aimed at saving Inheritance Tax which would not have been chargeable anyway... (Law Society)

A client called into my offices to ask how much it would cost for an "Estate Protection Trust" telling me her mother had been quoted £2,500. I did not understand what she was talking about and the client agreed to return with the relevant paperwork she had been given by a "Solicitor". The documents were drawn up by a will-writing company, whom the client had wrongly thought were solicitors; she was shocked to learn this was the case. The literature advised the client's mother to set up the trust in order to safeguard her property against care home fees. The lady was a widow and the sole owner of her property meaning this type of trust was not suitable for her. I would prepare this for a client in their will at a cost of £175 plus VAT. (Individual lawyer)

excluding additional services. There is a mean score of 8.3 out of 10 for satisfaction with value for money, which varies little across types of provider. However, 20% of consumers reported that their will cost more than expected; this was 30% where will-writing companies were used. Despite this, most said they paid only slightly more. In the business interviews, both types of provider felt that value for money was offered, although a small but significant minority consider that a great deal of overcharging goes on in the market generally – among both types of provider. This view is consistent with the evidence in this report.

5.20. The case studies show how the price of wills can escalate. One problem is providers inserting unnecessary features when the consumer is seeking a simple will and their circumstances are relatively straightforward. The consumer lacks the expertise to assess whether the various clauses and arrangements the provider recommends are necessary. Examples include: arrangements to minimise exposure to inheritance tax when the client had modest assets and a severance of tenancy when the client's wills left everything to each other, and then to the children.

5.21. A confidential submission suggested that both solicitors and will-writing companies increase the price from that quoted for inserting clauses into wills that should be included within the definition of a 'simple' will and so the extra cost is not justified. Examples include naming guardians for children or making specific gifts.

5.22. More simply, the cost of a will might be excessively high compared to the market average. The case studies include charges for trusts to protect against care home fees running into thousands when solicitors' charges are typically in the low hundreds. There are examples of such trusts being unsuitable for the client's

circumstances, for example because they live alone or have modest assets. Solicitors also reported that will-writing companies are making false claims about the scale of fees that solicitors charge in order to make their own costs sound reasonable and to deter consumers from shopping around.

Cross-selling of additional services

5.23. Providers may offer other services beside the will and executorships. These include arranging powers of attorney, funeral plans, lifetime updates and document storage. In the business interviews, around half of will-writing companies (44%) said that sales of additional services make up at least one-third of their income. Solicitors state that such sales account for less than 10% of their income, but half state this income has increased compared with one quarter of will-writing companies. Providers say openly that wills are a loss leader as a route to selling other related or unrelated services. Cross-selling of additional services therefore constitutes a significant part of the market.

5.24. The IFF consumer survey found about one-third of consumers bought additional services. Just over half of the shadow shoppers did so. The most common services were storage and powers of attorney. Will-writing companies are more likely to offer extra services and to succeed in persuading consumers to buy, see Table 6. Not all additional services were covered in the survey, for example other evidence suggests that a funeral plan is sold alongside one in five wills.

5.25. Loss leaders are common in the economy and there is nothing inherently wrong with this as a business strategy. Indeed, consumers might consider these services as worthwhile purchases and this revenue stream keeps the price of basic wills low. However, as consumers often pay for these extras in instalments, they can work out as poor value for money. Furthermore, the evidence suggests concerns about the incentives for providers that mean consumers purchase unsuitable services.

5.26. There is evidence that some firms have a highly sales-driven culture fuelled by commission, billing targets and other incentives. For example, one trade website article commented: "*I have to confess, until I met Paul, I too considered will-writing an old-fashioned business, boring and probably poorly paid. Until Paul told me about several wonderfully profitable add-on services that can turn a first-time client into a profitable income source for many years to come*".[24]

5.27. The consumer survey suggests that 59% of services were paid in one-off charges and 28% in ongoing charges. Clients of will-writing companies were significantly more likely to pay ongoing charges than solicitors (12% versus 1%). When consumers pay through ongoing fees the eventual sums can be considerable. This is particularly true of storage, where examples include fees of £6 per month over an indefinite period or £150 per year. By contrast, the government's Probate Service offers lifetime storage of a will for a £15 one-off fee.

5.28. Commonly, will writing companies employ instruction-takers whose role is to obtain information about the client's wishes and to sell extra services; the will itself is drafted by someone else. The risk is that consumers are not given advice which is in their best interests, but that which yields the highest return for the salesperson. The rewards are potentially lucrative. For example, Dignity – one of the leading providers of funeral plans – offers a commission of £275 on its cheapest product (priced at £2,175).

Table 6 – Cross-selling of additional services

	Offered (%)			Purchased (%)		
Service/Provider	**All**	**Solicitor**	**Will-writing company**	**All**	**Solicitor**	**Will-writing company**
Storage online/hard copy	45	49	61	32	34	38
Power of attorney	28	25	46	17	12	25
Legal assistance in future	22	22	31	6	5	9
Probate/estate administration	16	15	25	6	5	6
Preferential rates from other professionals or organisations	6	4	9	4	4	4
Free updates	2	2	-	1	1	-
Storage in a safe	2	-	2	-	-	-
Other	5	2	2	2	-	1
None	27	26	9	49	49	43

Source: data drawn from IFF consumer survey

Pressure selling

5.29. In the IFF consumer survey, 25% of those who bought extra services felt some degree of pressure to buy them (17% using solicitors and 36% using will-writing companies). The shadow shoppers felt that providers were concentrating more on selling additional services than explaining to them how the process would work. This exercise also found that a proportion of consumers were unaware of how such services would be paid and not all were told upfront about the cost of additional services.

5.30. Related to this, 76% of the entire sample gave a score of at least 8 out of 10 for their satisfaction with 'transparency – the extent to which you felt you knew what was happening and why'. 61% scored in at least 8 out of 10 for 'the guidance and supporting literature used to explain the process' and 60% for 'the clarity with which your options were explained'. These scores are among the lowest ranked of the elements of service tested.

5.31. Will-writing companies typically take the client's instructions in their home (some solicitors also offer home visits). The potential benefits to consumers include: convenience, especially for those with mobility problems; more opportunity to discuss complex issues, which may be time-consuming; and overcoming an

Case studies – Ongoing fees

Mrs F was recommended to an estate planning company for making her will by the financial adviser who was managing her pension. She was told the will would cost £50 and understood this would include storage and lifetime updates. She signed up, only to find that after an initial lump sum, she had to pay over £50 per month for two years, totally nearly £1,500. However, she was led to believe this was worth every penny as solicitors would charge very much more. Later, when she wanted to change her will, she accepted advice from the estate planning company that her husband should be added to the policy, thinking this would cost just a small amount. However, they ended up paying a further £2,375 – this fee includes storage, updates, executor fees, half price other will related services and 10% off funeral arrangements. They felt frightened into taking this as they were told executors often have to pay the deceased's bills out of their own money, if they came to light after probate had been decided. On reading the details, it transpired that the company would also take 1% of the value of the estate.
(Member of public)

Wills made by a will writer were given to the clients with a covering letter which states incorrectly: "when you die if your will cannot be found within 6 weeks, by law it does not exist." The clients paid for a "Willsafe" package for storage of the wills and free updates. The company no longer exists.
(Solicitors for the Elderly)

inertia which prevents many people from getting round to writing their will at all.

5.32. However, buying services in the home presents additional risks in comparison to other sales environments. In a market study on doorstep selling, the OFT concluded that it represents a different experience from buying, for example, in a shop. Consumers can enter or leave shops as they wish, the transaction is more impersonal and, if they are unhappy with the way a product is being sold, they can walk away. An academic study commissioned for the OFT identified a range of psychological influencing techniques that can be highly effective in inducing the consumer to buy. The home was found to have special psychological and emotional significance, especially for older people.

5.33. Pressure selling tactics can be subtle, with providers preying on the possible personal consequences of failing to make trusts or purchase extra services, to convince people to be 'better safe than sorry'. In the case studies, an area where such sales techniques are used is trusts to protect against care home fees. In the consumer survey, 43% of respondents were asked about this. Further, there was little variation by age yet such trusts are not an urgent need for younger consumers .

5.34. Although this might be a suitable product for some, being forced to sell your home in order to pay for long term care is a frightening prospect and so consumers are susceptible to pressure selling. Solicitors reported clients receiving cold calls from will-writing companies warning them of these risks and how they could help. Once at the appointment, the possible pitfalls of this product are not raised nor is there any informed discussion as to whether or not it is appropriate in the client's circumstances. In their experience, the clients are often

elderly and do not understand what they are being sold, but given the emotive nature of the topic, when coupled with the pressure of the salesperson, they find it difficult to say no.

5.35. The evidence suggests a spectrum from exerting subtle pressure on consumers to purchase services, through unfair pressure sales techniques targeted at specific parts of the population, to the use of aggressive and intimidating tactics which are illegal. The survey suggests that fairly low-level pressure selling is prevalent. This should be seen in the context of low transparency – when key terms are not visible, it is harder for consumers to resist pressure selling.

5.36. High pressure and aggressive sales techniques appear relatively infrequent, although the case studies suggest that some operators target older people, who may be more susceptible to such techniques. The cases included people who signed agreements out of desperation to get the provider to leave.

Failure to honour cancellation rights

5.37. The law provides a seven day cooling off period for contracts entered into at the consumer's home worth over £35. This allows consumers to seek advice on whether what they agreed to was reasonable and, if necessary, withdraw from the contract. The case studies include examples of providers failing to honour the regulations:

- Information about cooling off rights is not provided in the paperwork – this means the contract is unenforceable;
- The provider refuses to provide a refund when the consumer seeks to enforce their cooling off rights;
- A contract is signed and work paid for up front, but the provider does no work

Case studies – Pressure selling

A will was advertised for £23 but ended up costing several hundred pounds and the will writer refused to leave the client's house without payment, demanding the clients pay £800 after the first meeting by credit card before the will writer would leave and then the drafts sent were not as per their instructions. (STEP)

Mr I's sister and brother-in-law responded to an advertisement in a local newspaper offering wills for £29.99. A representative visited their home, but talked non-stop and did not pause to explain or ask questions; he left with £600 less than 30 minutes later. The will contained glaring mistakes and was poorly presented. The will-writing company refused to cancel the will and claimed that the testator had signed a waiver of their cooling off rights. The testators had no recollection of signing a waiver document and claimed their signatures had been photocopied – the will-writing company refused to provide the original. (Member of public)

A CAB client in Lancashire was cold called and sold a contract to protect the value of his home from care home fee costs for £2,100 plus annual charges of £90 for administration. It was sold as inheritance protection whereby his half of the property would be inherited by his children but his spouse could live there. They told him that his home could otherwise by lost due to care home fees, re-marriage of a spouse and the birth of further children, or bankruptcy. The bureau was concerned that the client would not be able to afford this, the difficulty in knowing whether the will would deliver the promised protection and the way in which the business had played on his fears. (Citizens Advice)

for two weeks waiting for the cooling off window to close;

- Providers give false information about the consumer's cancellation rights;
- Providers pressure consumers not to exercise their cancellation rights.

Case study – Cancellation rights

A Newcastle Willwriter visited elderly clients, aged 78 and 76, who are carers for their disabled daughter, having offered a will for £79. The bill came to £1600 after the clients were advised to transfer their house into a trust to avoid care fees. The Willwriter was to be the trustee although his fees for doing so were never discussed. After having second thoughts the clients attempted to cancel the transaction but this was ignored. The Willwriter has turned up uninvited on two occasions to attempt to get the trust paperwork signed by the clients and continues to be unwilling to accept cancellation. (IPW)

Key points

- Survey evidence for this investigation suggests that 12% consumers appoint the will provider as an executor. This is lower than expected given other surveys and the potentially lucrative rewards. A significant minority of consumers do not recall the provider explaining their fees for executor services.
- Pre-paid probate services are purchased by a small minority of consumers. There is evidence that these represent poor value for money and consumers think they have purchased a more comprehensive service than is the case.
- A large majority of consumers are satisfied with value for money, although one in five report that the will ended up costing more than they expected. The case studies show that poor value can result from unnecessarily complex wills, fees that are well in excess of the normal market rate and instalment payments.
- Sales of additional services are a significant part of the market, representing an important source of income for will-writing companies. Many solicitors and will-writing companies view wills as a loss leader leading to other work.
- Some will-writing companies operate a highly sales-driven culture with agents incentivised by commission payments – this creates the risk that consumers are sold services they do not need.
- The home-based sales environment, asymmetries of information and emotional resonance of the product leaves consumers susceptible to pressure selling. Low-level pressure selling and poor transparency appear to be quite common in the unregulated part of the market.
- There is some evidence that a minority of rogue operators target older people and use aggressive sales techniques.
- There is some evidence of providers failing to honour cooling off rights, although the extent of the problem is unknown.

6 Storage

Introduction

6.1. This chapter examines consumer detriment in relation to the storage of wills. Clients may opt to retain the original will or to use storage services. The government's Probate Service provides "safe custody" storage of wills for a one-off fee of £15. The private sector offers similar services by charging fees for registration, search and retrieval.

6.2. Where such services are used, the desired consumer outcomes are for wills to be stored safely and to be swiftly retrieved by the executors on the testator's death.

6.3. The discussion below covers:

- Risks to consumers;
- Evidence of problems;
- Proposals for a National Wills Registry; and
- Regulatory protections.

Risks to consumers

6.4. A lost will, especially where no copy exists, is as useless as no will being made at all. The intestacy rules then apply, with the financial and personal problems that could follow. The Probate Registry may prove a copy will, but a successful outcome is not certain and additional cost will be incurred.

6.5. Where it is discovered during the client's lifetime that the will has been lost, there is extra expense and inconvenience in making a new will. Moreover, where fees are paid in advance for the storage of a will this money is wasted. This is especially a risk when the provider cannot be traced or has become insolvent as there is no means of seeking redress.

6.6. Losing a will can also cause difficulties about steps that should be taken shortly after the death. A will may be used to record wishes about the funeral. The testator may have named the will provider as an executor, raising uncertainty about who should perform this role. Searching for a missing will, and making a decision it is lost forever, causes delay in the administration of the estate. Another risk is that the estate is distributed based on an older will which did not reflect the testator's final wishes.

Evidence of problems

6.7. The case studies provide anecdotal evidence of the types of storage problems experienced by consumers. They fall into two categories: insolvencies and insecure storage practices.

6.8. Most cases involve insolvencies where executors are unable to trace what happened to the will. The IPW's membership records show that within four years of a will-writing company starting, there is a 60% chance of it failing. Based on figures about the market share enjoyed by will-writing companies, it estimates that 4% of consumers who make a will do so with a firm which then ceases trading within just a few years.[25] To this should be added the factor that there may be very many years between the preparation of the will and the testator's death. The provider survey illustrates that some unregulated will-writers are sole

practitioners, often working on a part time basis, so the likelihood of the business ending, due to retirement, insolvency or other reason is greater than for solicitors.

6.9. In its evidence, the Probate Service said that if there is a successor firm, it is not always easy to establish its name and whether wills made by one firm have been forwarded to the safe custody of another.[26] Some case studies from the public bear this out.

6.10. The IFF consumer survey suggests that 14.4% of consumers purchase storage services. They can benefit consumers by offering peace of mind that this important document will be kept safely until it is needed in the future, whereas it might be mislaid or damaged if retained at home. For providers, although storing a will properly requires time and investment, this may be recouped by charging storage fees. Moreover, the possession of a will increases the prospect of the provider being selected to carry out lucrative estate administration later. This may help to explain why solicitors typically store wills free of charge. Issues related to storage fees were considered in Chapter 5.

6.11. The case studies suggest problems with misleading claims about where the wills are being stored and wills being stored unsafely – examples include wills being found in wardrobes, attics, sheds or dumped in a field. Quantifying the size of lost wills is difficult, but there are clues. The Probate Service has recorded an increase in applications to prove copy wills.[27] A STEP survey found 63% of members had direct experience of cases where will-writing companies had gone out of business and disappeared with their clients' wills.[28] The IPW report they regularly take calls from beneficiaries, including about wills prepared by Quill Wills which ceased trading in 1991 – twenty years ago. In this case, wills were stored either locally or with franchisees.

Case studies – storage practices

I was instructed to amend a will drawn up by a will writer and when I asked to see the original will was advised that it had been placed in store for which the client had paid a significant fee. On a subsequent visit to the client's home I was shown two wills one of which was the original will. This means that the client paid for a service that was not delivered and the will writer is no longer in business and so the fee cannot be recovered. (The Law Society)

JHD offered to store client wills at the national wills depository at Somerset House. In reality they were stored in a barn in Wincanton – in Somerset! When the business closed, the wills were rescued by another will-writing firm, but further anguish was caused for consumers when they demanded payment from JHD clients for their wills to be returned to them or payment from them for ongoing storage of the wills to be arranged. (IPW)

On the failure of the business, wills were scattered in numerous locations and over time franchisees have moved, died or closed their businesses.

National Wills Registry

6.12. In its evidence, Citizens Advice recommended an electronic database for all wills. They propose the register should operate in a similar way to that of the Land Registry when someone buys a home. The register could then be linked to the registration of deaths, so that the registrar and the person registering the death would immediately be aware of the will. The original will would be kept by the

person who made it or a third party, such as a solicitor, bank or relative.

6.13. The advantages of such a scheme are obvious: relatives would not need to know who prepared the will and it offers peace of mind for testators. Technological advances make the idea more feasible than in the past. However, a registration scheme (where the location of the will is logged on a database, but the will itself is retained by a third party) would not deal with situations where providers lose the document or disappear without trace – the main consumer protection gap in the unregulated sector. A compulsory electronic wills depository service (where an electronic copy of the will is held) would address such problems, but the costs would be higher and there are practical issues to overcome.

6.14. A centralised register of wills is not a new idea and exists in some other jurisdictions. The European Convention on the Establishment of a Scheme of Registration of Wills was drawn up in 1972 – the Basel Convention – providing for the creation of national registration schemes. The Administration of Justice Act 1982 enacts its provisions in the UK, but they have not been put into force. A 2005 EU green paper on Succession and Wills asked whether provision should be made for a scheme of registering wills in all member states.[29] In responding, the UK Government called for "careful evaluation" and stressed any scheme should be voluntary.[30]

6.15. Draft EU Regulations published in 2009 on broader succession issues mention the registration of wills as a subsequent Community initiative.[31] It is likely this would be a non-binding instrument limited to the registration, rather than the deposition, of wills in schemes organised separately by Member States, with a focus on interconnecting national registers. The UK Government has decided not to opt into the Regulations, although continues to participate in discussions. Therefore, developments suggest that the likelihood of a Government-backed UK national wills register in the short-term is slim.

Regulatory protections

6.16. It is for government to determine whether a form of wills register is needed to help relatives trace wills where their location or the provider is unknown. The Panel can assist by identifying whether existing or new regulatory protections could resolve the risk of wills being lost due to poor storage or providers going out of business and not disposing of wills properly.

6.17. The SRA's code of conduct offers some consumer protection. There are general rules about safekeeping of documents, although none specifically relating to wills. The detail of the firm's arrangements is a matter for entities to decide in all the circumstances. However, as a minimum requirement, they must be able to identify to whom documents and assets belong, and in connection with which matter.

6.18. Closure of a solicitor's practice must happen in a proper and orderly manner. This includes notifying clients and safe disposal of documents. Options include: continuing to hold them (e.g. in a secure storage facility); handing them back to the client; arranging for another firm to take over storage of the files; and storing documents electronically. Firms must inform the SRA of the address where the papers are stored and give contact details which can be passed on to clients wishing to access their papers. If firms sell their practice as a going concern, they must inform all clients of the change in ownership in advance and take basic steps to safeguard the clients' interests.

6.19. Self-regulatory schemes also make provision for the safe storage of wills:

- All IPW members are required to advise the IPW of the location of any documents held in storage, along with access procedures. When a membership ceases they are required to advise the IPW of suitable, ongoing arrangements for the storage of documents, or else hand them over to the IPW. The location of documents must either be in a fire resistant and water resistant facility with suitable security on the premises of the Member or in a location with suitable security away from the Member's premises.
- The SWW specifies that wills or other documents should be stored in fire-proof and flood-proof secure premises and be adequately insured. Moreover, members offering lifetime storage services should offer alternative storage arrangements (at no further cost to the client) in the event of them ceasing to practise. It has also told us it audits firms annually as to their storage arrangements and access facilities.

6.20. These regulatory arrangements appear to be satisfactory. There are two concerns in relation to self-regulatory schemes. First, the schemes only have partial coverage of the market, excluding many wills. Second, although schemes can require members to put in place orderly closure mechanisms, it is hard to enforce these once firms cease membership.

Key points

- A lost will can be as useless as there being no will at all, having the same effect as intestacy or at least causing uncertainty about the testator's wishes and delay in the administration of the estate.
- There is a high rate of insolvency among will-writing companies – a will might not be discovered as missing until the provider has long disappeared.
- There is some evidence that lost wills are a growing problem.
- There is anecdotal evidence of unsafe storage practices among some will-writing companies.
- There is support for a National Wills Registry and technological advances make this more feasible than in the past. However, efforts at EU level to establish such a mechanism have made slow progress.
- There is adequate provision for insolvencies and safe storage where regulatory and self-regulatory arrangements apply.

7 Mental capacity

Introduction

7.1. This chapter examines consumer detriment in relation to the following:

- Assessment of mental capacity;
- Powers of attorney; and
- Advance Directives.

7.2. It is predicted that as many as one in three adults will be affected by mental capacity or mental health problems at some point in their lives. There are special rules in relation to preparing the wills of people who lack mental capacity and legal frameworks which make it possible for all adults to plan in advance for a time when they may no longer have the mental capacity to make decisions regarding their own welfare or finances.

7.3. The main desired outcome is that providers make reliable assessments of capacity in order that wills reflect the genuine wishes of clients. Another desired outcome is that people are aware of the potential benefits of powers of attorney, and, where appropriate, providers support them in making suitable plans for the future.

Assessment of mental capacity

Legal framework

7.4. A will is only valid if the client has 'testamentary capacity'. The Mental Capacity Act 2005 provides that "*a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or disturbance in the functioning of, the mind or brain*." A person is unable to make a decision if he is unable: to understand the information relevant to the decision; to retain that information; to use or weigh that information as part of the process of making the decision; or to communicate his decision (whether by talking, using sign language or any other means).

7.5. This test is consistent with case law on will-writing, which dates from 1870. There is a presumption that a person has capacity to make a will unless it is proved otherwise. Indeed, recent case law has confirmed there is "*no general duty upon solicitors in general to obtain medical evidence on every occasion upon which they are instructed by an elderly client just in case they lack capacity*".[32] However, the 'Golden Rule' establishes that in situations when it is suspected that the client lacks capacity a will ought to be witnessed or approved by a medical practitioner.

Consumer detriment

7.6. A failure by the will provider to take appropriate precautions to assess these legal tests can have serious consequences for clients and their beneficiaries. The will may not reflect the client's genuine wishes, whilst there is also opportunity to exploit a lack of capacity. For example, there are cases where carers and will providers have made financial gain by abusing their position of trust. Should there be a challenge to a will, this could involve delay, stress and significant costs. The Court of Protection arbitrates on such

cases; the legal costs are normally met by the losing party rather than from the estate. Successfully contesting a will on the ground of undue influence is rare.[33]

7.7. The case studies include examples where there was a failure to carry out proper checks. Identifying when someone lacks capacity is not straightforward, for example those with dementia may have lucid intervals. Undue influence may also be difficult to detect, for example when a client wishes to cut out some children from their will in order to leave everything to the son who carries out all the caring responsibilities. The common theme in both situations is that the circumstances can be subjective and left to the provider's interpretation. An issue for further consideration is the extent to which the training of regulated providers equips them with these skills.

Case study – failure to carry out proper checks

Mr O was aggrieved that the manner in which the instructions of his mother were taken, when she was 95 years old, by a consultant at a national will-writing company. According to her GP, Mr O's mother was suffering from senile dementia at the time the Will was signed and was incapable of understanding her affairs. Mr O alleges that his alcoholic brother manipulated the situation so that the entire estate was left to him, completely disinheriting Mr O and his two children. Mr O considers the will-writing company did not carry out proper checks about claims his brother made in the consultation interview with his mother and did not consider his complaint. (Member of public)

Powers of attorney

7.8. Someone, as long as they possess the legal capacity so to do, can appoint an attorney or attorneys to act for them in relation to their financial or property affairs. This is known as an ordinary power of attorney and ceases to have effect if the person appointing the attorney loses capacity. The Enduring Powers of Attorney Act allowed people to appoint attorneys whose appointment would continue even after the person loses capacity. The Mental Capacity Act replaced EPAs with Lasting Powers of Attorney (LPAs). The main difference between an EPA and an LPA is that an attorney can now make health and welfare as well as financial decisions. An LPA must comply with certain formalities and be registered with the Office of the Public Guardian (OPG) in order to become valid and take effect. The instrument must also contain a certificate from a prescribed person that in his or her opinion the Donor (the client) understands the purpose of the document and no fraud or undue pressure is being exerted.

7.9. The OPG's annual report[34] states that an ultimate measure of success for the Mental Capacity Act would be for every adult to have an LPA. From implementation, October 2007 to March 2010, 212,253 people registered powers of attorney. The OPG is committed to raising awareness of its services and its annual report discusses the role of professional advisors in disseminating information or assisting with applications. As highlighted in Chapter 5, the IFF survey suggests that 28% consumers buying wills are offered the opportunity to arrange powers of attorney of whom 17% take up this offer. Will-writing companies are significantly more likely to sell these services.

Consumer detriment

7.10. The technical quality of LPAs is a key issue. Some errors can be rectified later, but if there is a mistake in an LPA that cannot be rectified it is invalid and must be re-made in whole. This can mean extra cost, but more seriously delay in decisions on behalf of the Donor. Following customer feedback, the OPG introduced new forms in October 2009. A key objective was to make LPAs more accessible – so that individuals can realistically consider filling in the forms themselves without the need to engage legal advisors.[35]

7.11. The OPG told us they were not aware of specific quality issues related to will-writers, with no evidence to suggest they were any better or worse than solicitors. Moreover, error rates have reduced significantly since the introduction of the new forms, although there are still some including fatal flaws and which require a new instrument to be drawn up from scratch and resubmitted for registration. In addition, few matters make it through to the Court of Protection; for every one thousand applications the OPG has received to register an LPA, the court has received only one application in respect of problems arising.

Technical issues

7.12. The most common problems with LPAs in the case studies relate to technical mistakes and poor advice. For example:

- EPAs signed after 1 October 2007 and therefore invalid. In one example, a firm asked a client to sign an EPA in January 2009 (when they could no longer be created) and backdate it to September 2007;
- Forms that are incomplete or not properly executed; and
- The advisor did not properly explain the Donor's options.

Case studies - technical mistakes

Mr Y made a will with a solicitor which he thought had given his two children enduring power of attorney. However, when the children later contacted the solicitor to obtain the paperwork it became apparent the solicitor had set up the power of attorney for one child only. When the solicitor amended this, the new paperwork misspelt the names of Mr Y and his children and incorrectly quoted some of the home addresses. The solicitor also sent some covering letters to Mr Y without the relevant enclosures and they had to be resent. Following the Legal Ombudsman's investigation, the firm offered to issue a compensatory payment to resolve the complaint. In addition, they did not charge for any work completed. (Legal Ombudsman)

A firm prepared an EPA, which appointed two attorneys but the Power did not state whether they could act generally or subject to specific authority or whether they could act in relation of all property and affairs or just limited property and affairs. In other words, no thought had been addressed to the various options at all. In addition, only one of the attorneys had executed the Power. (The Law Society)

Assessing capacity

7.13. Another change with LPAs is the need for a certificate provider. That is someone independent of the Donor who certifies that the Donor has the necessary capacity to make the instrument, understands what its provisions mean, and that no undue

influence has been exerted. Professional advisors may act as certificate providers. This raises similar risks of consumer detriment as discussed in the previous section in relation to assessing capacity.

Delay in registration

7.14. LPAs cannot be used before they have been registered with the OPG. From the evidence, a problem is that will providers may complete the form but fail to tell the Donor about the registration requirements or other formalities.

Lost forms

7.15. Problems with lost wills were discussed in the previous chapter. Where will providers also retain power of attorney forms and these cannot be traced, the Donor would need to prepare a new LPA at more cost. This is probably a greater issue with EPAs as these only have to be registered with the OPG at the point the Donor begins materially to lose capacity. LPAs can still be used before the Donor loses capacity, but they cannot be used before they are registered with the OPG.

Overcharging

7.16. In its Annual Report 2010, the Public Guardian Board recognises a widespread view that "*the option of taking out an LPA is restricted to the comfortably off. Whatever the reality behind these perceptions, the Board has no doubt that they act as a significant disincentive...*"[36]

7.17. A fee of £120 is charged for registration of each LPA application, to which must be added the advisor's fees. LPAs are one of those additional services where some will providers appear to charge prices well in excess of the normal market rate to compensate for the low price of the will document. For example, in one case study submitted by the IPW, the firm offers to draft the LPA for free but charge a £495 administration fee to register the forms.

Advance Directives

7.18. If someone is concerned about having a lack of capacity in the future, they can make a statement explaining medical treatments they would not want at that future time. The statement, verbal or written, is called an 'advance decision to refuse treatment'. An advance decision only applies where someone wants to refuse medical treatments. If a doctor did treat that person, legal action might be taken against them. This is better known as a 'living will' although the term has no legal meaning. They are sold as 'Advance Directives' by some will-writers.

7.19. People may wish to make an advance decision if they have strong feelings about a particular situation that could arise in the future, for example loss of a limb or a terminal illness. Doing this can offer peace of mind knowing that your wishes should not be ignored if you are unable to take part in the decision-making process at the relevant time.

7.20. There is no prescribed format for making an advance decision. If in written form, it must be signed and witnessed and is only valid if the person is:

- 18 or over and had capacity when they made it;
- Has set out exactly which treatments they do not want in future (if they do not want life-saving treatment, this decision must be signed and witnessed);
- Has explained the circumstances under which they would want to refuse this treatment;
- Has made the advance decision without any harassment by, or under the influence of, anyone else; and

- Has not said or done something that would contradict the advance decision since it was made.

7.21. The Panel did not seek evidence on this issue, but it is an example of an additional service sold by unregulated businesses as part of a will-writing package that involves hugely sensitive issues and where those party to the process put their trust in the provider to get things right. Although we cannot quantify problems with Advance Directives, the case study opposite highlights the potentially horrific consequences.

Case study – Advance Directives

I saw a client whose late husband had completed his Will with a Will Writer and the Will Writer had left the husband's half of the house to the children, subject to a right of occupation to the widow... The Will Writer also completed an Advance Directive for the widow where she had stated that she did not wish to be kept alive should she end up suffering from Alzheimer's Disease or Senile Dementia. This was not in accordance with the widow's wishes as clearly she wished to have life sustaining treatment in such circumstances. She was horrified when this document was explained to her and immediately destroyed it.
(Lawyer, anonymous)

Key points

- A will is only valid if the client has testamentary capacity. There is a presumption that a person has capacity to make a will unless it is proved otherwise, but case law suggests providers should involve medical practitioners where they suspect their client lacks capacity
- A key challenge for providers is assessing capacity, which is not always straightforward – the consequences of misjudging this are serious.
- Government is encouraging citizens to arrange powers of attorney and sees that professional advisors can encourage take-up.
- The Office of the Public Guardian is not aware of specific quality issues related to will-writing companies, with no evidence to suggest they are any better or worse than solicitors. Errors rates on forms have reduced significantly.
- The case studies provide anecdotal evidence of technical problems, assessing capacity, registration delays, lost forms and overcharging
- Advance Directives – where clients set out under what circumstances they would not want medical treatments in future – are an example of a high-risk additional service provided by some will writing companies.

8 Fraud

Introduction

8.1. This chapter considers the risks and incidence of fraud related to will-writing. The desired outcomes are that the level of fraudulent activity is minimised, fraud is detected and penalised, and victims of fraud are fully compensated.

Risks

8.2. Inherent characteristics of will-writing give opportunities to commit fraud:

- Providers gain a close knowledge of the client's affairs yet are trusted;
- The potentially large value of estates means the gains can be high;
- Beneficiary victims may never discover that they were defrauded if they are unaware of being due an inheritance, or of the exact amount;
- There may be a significant time lag between the fraud being committed and its discovery, by which time it might be too late to catch the perpetrators;
- Wills are sold within the privacy of someone's home. Moreover, given the personal nature of dividing an estate, clients may prefer not to share information about the will, or to report their suspicions of the process;
- Older people and the frail are a target market for fraudulent will-writers; and
- Types of fraud, such as collusion with beneficiaries, can be difficult to prove.

Types of fraud

8.3. Fraud may be committed by businesses involved in will-writing or individuals known to the client, including family or people in a position of trust such as carers. It may take place when the client is alive or after their death.

8.4. The victims of fraud are normally the intended beneficiaries, which include charities as well as individuals. Clients may be victims when the fraud relates to the sale of wills and additional services.

Fraud during the client's lifetime

8.5. The case studies include consumers paying in advance for wills that are not delivered or handing over credit card details and finding unexpected sums deducted. Pressure selling may be involved in these scenarios, as discussed in Chapter 5.

8.6. Fraud also happens in connection with the drafting of the will. The fraudster seeks to be named as a beneficiary, or to gain control of the assets by being appointed an executor, when this is not the client's intention. Testators may be subject to undue influence or coercion; as discussed in the previous chapter, issues around mental capacity complicate matters. Other examples include wills that are forged, go missing or are destroyed.

8.7. Fraud also occurs with powers of attorney. As the Donor hands over control of their financial affairs to someone else, there is scope for that person to misuse these powers for their own gain.

Fraud after the testator's death

8.8. The terms of reference for the investigation are limited to the purchase of will-writing and related services. However, the sale of wills is closely linked to probate fraud – in particular, where providers seek to be appointed as executor in order to control the estate's assets. The law allows providers to collect in assets and pay the proceeds into their own bank account. Providers can restrict the information given to the beneficiaries – there is not even any legal obligation to disclose the will's contents. In any event, beneficiaries may not know what to look out for, especially when estates are complex.

8.9. In its evidence, the IPW cited nine cases where will-writers have been convicted of fraud, including these examples:

- In 2009, Essex will-writer Leslie Lester was exposed for drafting ineffective wills, appointing his firm as executor of wills, 'losing' £300,000 of client money and destroying wills held on behalf of clients. He became a will-writer in 2006, having been made bankrupt following the failure of an investment company which lost £2.5 million of client money;
- In 2010, Northampton will-writer Martin Lloyd was jailed for 2½ years for stealing around £40,000 from a dead man's estate. He spent the money on a QE2 cruise and on gambling. The beneficiaries of the estate (including Cancer Research UK and the Injured Jockeys Fund) have not received a penny of the lost money; and
- In 2010, David Nash, Nicholas Butcher and Raymond Prince were convicted for their part in the disappearance of £400,000 of client money held by their business, Willmakers of Distinction. Pending his trial, David Nash formed

Case studies – Lifetime fraud

Mr N claimed his mother-in-law's will did not reflect her intended wishes based on conversations with her; in particular, it left out her close companion. Mr N was also surprised the will named her brother as executor, as he was expecting to carry out this task. Mr N was unhappy with the layout of the will, which had been prepared by a will-writing company. The Attestation section was alone on a single page yet there was sufficient room for this on the preceding page, while he suspected that the same person had signed for both witnesses. Mr N decided not to pursue the matter further as he was worried about the impact this might have on his wife's health. (Member of public)

Mr L's aunt named him and his two sisters, along with a solicitor of the firm she employed to draw up her will, to be executors. A few months before his aunt died of terminal cancer, a new will was drawn up naming his younger sister as the main beneficiary and naming her and another solicitor of the firm as executors. Mr L was unaware of a new will being drawn up; members of his family are contesting the will. (Member of public)

A representative of a firm of will-writers visited a lady and her husband at home. All her credit card details were taken at the initial meeting but there was no discussion relating to fees. She received a very lengthy draft will which was unnecessarily complicated and not appropriate to deal with her personal and financial circumstances. The very day after the visit a sum of almost £1,000 was taken off her credit card without her prior knowledge or approval. (Law Society)

another will-writing company, Legal Services Associates, and was working at the firm up until his trial. Problems with Willmakers of Distinction first surfaced in 2003 when the firm was refused a Consumer Credit Licence by the OFT. Nicholas Butcher had been convicted in 1998 for false accounting, theft and conspiracy to defraud following the theft of £50,000 from client bank accounts. At that time he was sentenced to 30 months imprisonment, declared bankrupt and struck off the solicitors' roll.

8.10. The common element in these examples is stealing from the estate. Other types of probate fraud include accounting schemes, cheques going missing, properties being sold at low values, cash paid into the wrong account and personal possessions ending up in the wrong hands.[37]

8.11. Another theme in the above examples is that the individuals involved had been in trouble previously, yet there was nothing to stop them setting up a business where unsuspecting clients trusted them to handle such large sums. In its evidence the IPW suggested that former IFAs and struck-off solicitors take advantage of the lack of regulation by setting up as will-writers.[38]

Incidence of fraud

8.12. The incidence of fraudulent activity in this area is unknown as it is not recorded in crime statistics (apart from the issue that the fraud might be undiscovered).

8.13. The SRA's risk-based regulation strategy notes that theft and serious overcharging by solicitors acting in a representative capacity such as executor of an estate (but also under powers of attorney) continue to pose a high risk. It notes the numbers of reports to the SRA of possible irregularity in probate cases increased from 6 in 2004 to 31 in 2005, 52 in 2006 and 65 in 2007.[39] The SRA's latest performance report records 73 new claims on the Compensation Fund in relation to probate in 2010-11.[40]

8.14. The scale of fraudulent activity in the unregulated sector is less clear. STEP commissioned a report on probate fraud in 2005 incorporating a survey of its members, nearly half of whom had come across suspected cases or fraud or theft from an estate.[41] The RNIB estimated that in the UK in 2005, estate fraud amounted to £100-150 million.[42]

8.15. Clearly, fraud takes place in both regulated and unregulated environments. The key difference for victims is access to the Compensation Fund when solicitors are involved, whereas there is no equivalent protection when will-writing companies are responsible. Self-regulation can mitigate the risks to an extent. For example, the IPW requires all members to undergo a Criminal Record Bureau Disclosure and checks all applicants to see whether they have been struck off the Solicitors Roll, or are barred from holding a company directorship or have been made bankrupt. It is also in the process of agreeing bonding arrangements so if client money is misappropriated, it would be reinstated from the bond. However, those will-writers intent on perpetrating fraud are unlikely to submit voluntarily to these requirements.

Key points

- Inherent characteristics of will writing give opportunities to commit fraud, including close knowledge of the client's affairs, the large potential gains and the possibility that the crime will never be discovered or until too late.
- Fraud can occur during the client's lifetime or after their death.
- Fraudulent activities committed during the client's lifetime including forging of wills, coercing clients to name them as beneficiaries or appoint them as executors, and deducting unauthorised sums from bank accounts.
- Fraudulent activities committed after the client's death normally involve stealing from the estate. The incidence of probate fraud is unknown, but is a problem in both the regulated and unregulated sectors.
- The sums involved can be very large and some individuals convicted for probate fraud have previously been in trouble with the authorities.
- In the regulated part of the industry, individuals who have been defrauded can access a compensation fund.

9 Consumer detriment

Introduction

9.1. This chapter brings together the evidence in previous chapters to assess the risks to consumers and evidence of detriment against our desired outcomes for the market. It discusses:

- Desired outcomes in the market
- Particular characteristics of will-writing services that place consumers at risk;
- Types of consumer that are affected by problems with wills and the nature of the detriment suffered; and
- The scale of consumer detriment.

9.2. Our aim is to pinpoint the key problems that the LSB should address. The next chapter examines possible solutions to these problems.

Desired outcomes

9.3. At the start of each chapter of this report, the desired outcomes were provided as a basis for discussion. These are collated below under five headings to provide a list against which to assess consumer detriment in the market.

9.4. The outcomes are as follows:

Access to justice

- Consumers are aware of the benefits of making a will;
- Consumers are aware of the potential benefits of powers of attorney. Where appropriate, providers support them in making suitable plans for the future;
- Consumers can choose between a range of providers and services;

Quality

- Wills are legally valid, clear and reflect the testator's wishes;
- Where professional advice is given, the will is tailored to the client's circumstances and deals with the estate effectively in accordance with the client's informed instructions;

Service

- Consumers make informed choices about the services they buy;
- Providers treat clients fairly;
- Consumers get value for money;

Storage

- Providers store wills safely;
- Executors can swiftly retrieve wills;

Honest trading

- Fraudulent activity is minimised;
- Fraud is detected and penalised; and
- Victims of fraud are fully compensated.

Characteristics of will-writing services

9.5. There are innate characteristics of will-writing services that place consumers at risk of detriment:

- Wide asymmetries of information;
- Giving advice when there are different options to secure good outcomes;
- The personal nature of the product;
- The home as a sales environment; and
- Dealing with vulnerable clients.

9.6. These features were described in previous chapters and are briefly summarised below.

Wide asymmetries of information

9.7. As with many professional services, there are wide gaps in knowledge between the provider and consumer – asymmetries of information – that make it difficult for consumers to judge the quality of wills. As making a will is a rare event, consumers cannot easily learn from experience. Although it is possible to spot some simple errors, such as misspelt names or missing beneficiaries, most technical problems will not be spotted by clients. Will-writing is unusual as defects may not be discovered until the testator's death, which may be many years hence. Such asymmetries of information also make it difficult for consumers to assess the necessity or value for money of the services offered, including additional services ancillary to the will.

Giving advice

9.8. Like all advice, the quality of a will depends on the information extracted by the provider about the client's circumstances and wishes, and then the provider's skill in using this knowledge to produce a good outcome. A will may work in a legal sense, but deficiencies in the instruction-taking process may produce an inferior product. Even with the right knowledge about the client's needs, the way the will is drafted can lead to better or worse outcomes, for example in relation to tax-efficiency.

Personal nature of the product

9.9. The personal nature and sensitivities of writing a will presents a series of risks. Clients may prefer not to share information about the will, or to report their suspicions of the process to relatives or friends, heightening the risk that problems will not be discovered until too late. The emotional context of writing a will gives scope for providers to exploit the client's desire for peace of mind, for example by selling unnecessary services. As the provider gains close knowledge of the client's affairs, this creates opportunity for fraudulent behaviour.

The home as sales environment

9.10. Where will-writing is purchased in the home, consumers benefit from added convenience and more opportunity to discuss complex issues. However, selling in the home presents additional risks: consumers cannot walk away from the sales environment in the same way they can leave shops, and the home has special emotional significance, especially for older people. This can be unfairly exploited, for example by use of scare tactics about the welfare of beneficiaries.

Dealing with vulnerable clients

9.11. Will-writing can involve vulnerable clients. People who lack mental capacity have specific needs in relation to writing wills. Older people are a target market for providers. While it would be mistaken to label all older people as vulnerable, it is accepted that older people more often can

become confused by complex services and intimidated by pressure sales tactics.

Types of detriment

9.12. Will-writing is unusual in that the primary benefit of the product is not enjoyed by its purchaser and often not for a lengthy period until after it is bought.

9.13. Three types of person might be said to be affected by will-writing and they experience detriment in different ways:

- The client – the person who engages a professional to prepare the will
- Named persons – persons named in the will, including the beneficiaries and any dependants; and
- Charities – a type of beneficiary in the form of legacy income

Clients

9.14. The main type of detriment experienced by clients is monetary. More money may need to be spent to correct a defective will or to purchase an entirely new will if the defects cannot be rectified. Extra expense is also incurred to replace a lost will. Clients also suffer financial detriment when the price they have paid is too high. This can happen if providers charge well in excess of the market rate, produce wills which are overly complex or set high fees for additional services. Clients may pay many hundreds of pounds more than necessary, so the detriment is sometimes significant.

9.15. Clients may experience wasted time, stress or annoyance as a consequence of pressure selling. This can be especially distressing given the potentially highly personal and emotive nature of deciding who should benefit from the will.

9.16. It is a moot point whether clients can be said to suffer detriment after their death because their stated wishes are frustrated as a result of a defective will. However, as a will can be used to set out a preferred type of funeral, a lost will (or one which takes too long to locate) can have direct consequences for them.

Named persons

9.17. Beneficiaries suffer financial detriment if the will is defective, for example if it does not distribute the estate in the proportions that the client had instructed, it is not tax-effective, or drafting problems create ambiguity or render the will invalid. The most likely financial consequence is that beneficiaries receive less income than intended. The value of the assets is also reduced if the will provider is appointed as executor as their fees will be charged from the estate; this is unsatisfactory if the client was misled or was unable to make an informed choice due to the provider's actions.

9.18. There can be severe financial implications for beneficiaries if the intestacy rules apply either because the will is defective or it has been lost. For example, partners in a marriage or civil partnership get only the first £250,000 of the estate plus a life interest in half the remainder; this can lead to the family home being sold in order to ensure the other beneficiaries receive their entitlement. A defective will could also force the surviving spouse to sell their property in order to pay for care home fees if a trust designed to prevent this has been negligently drafted.

9.19. Dealing with the legal problems following a defective will can be time-consuming and stressful for beneficiaries. More seriously, they may put relationships under strain and trigger or inflame family conflict. The case studies show this to be particularly true in situations involving multiple families.

9.20. As a will should appoint guardians for children and other dependents, the

consequences of poor advice, bad drafting or a lost will can cause added anxiety for the most vulnerable. Although the courts provide an important safety net the cost and stress involved is unwelcome.

Charities

9.21. Around 30,000 estates contain charitable bequests each year, about a tenth of all estates notified for probate. It is estimated that £1.9 billion is left to charities in legacy gifts annually, representing 12% of the income of the largest fundraising charities.[43] This masks individual variations, for example the RSPCA states that half of its annual income comes from legacies.[44]

9.22. Remember A Charity carried out a survey of over 140 member charities to inform its response to our call for evidence.[45] 32% of respondents had experienced negative impacts, whilst 53% had simply experienced a poorly drafted will that had given problems. The negative impacts included a decreased legacy for the charity (33%) or loss of the legacy completely (11%), delay in receiving the legacy (48%) and the need to engage solicitors to sort out the problem (52%).

Scale of consumer detriment

9.23. The nature of will-writing means it is very difficult to give a reliable indication of the scale of consumer detriment. Defective wills might not become apparent for many years. Agencies that examine wills, such as the Probate Service, only check specific things and are unable to give breakdowns between provider types. Where the will-writing sale happens in the privacy of the home it is hard to establish what went on behind closed doors. The personal nature of deciding inheritance may make people reluctant to report problems to the authorities.

9.24. These factors suggest that problems with will-writing are likely to be under-reported and impossible to definitively establish. However, the Panel has assembled evidence from a range of sources which enables us to identify both the benefits for consumers of current provision and the issues that need to be resolved. Whilst policymakers must make decisions based on such limited evidence, it gives a good indication of consumer experience.

9.25. In Table 7, we provide a summary of the evidence against the five desired outcomes: access to justice; quality; storage; service; and honest trading.

9.26. Most people get around to making their will eventually, although some parts of the population, such as those from Black and Minority Ethnic backgrounds and cohabitants, are underrepresented. It is clear that consumers find will-writing companies appealing, which they perceive as cheaper and more flexible than solicitors. Any future intervention should seek to preserve a diverse supplier base.

9.27. Most consumers are happy with the quality of their will and the service they receive. The retrospective consumer survey showed comparable levels of satisfaction between solicitors and will-writing companies. These high overall levels of satisfaction are encouraging. However, the evidence suggests some major problems which cause, or have the potential to cause, serious harm to consumers and beneficiaries.

9.28. Of most concern is the poor quality of wills, to which consumers are blind. It is extremely worrying that our expert panel failed around one in four wills and one-third of their assessments gave scores of poor or very poor. Solicitors and will-writing companies were as bad as each other – about one in five wills were failed for both types of provider. This suggests

that standards need to be raised across the sector, including by strengthening the education and training requirements for solicitors.

9.29. Although a large majority of consumers are happy with the service and value for money, we have concerns about poor sales practices. Additional services are a significant income source for many will-writing companies. There is an undercurrent of sales pressure that plays on people's fears and a lack of transparency about what consumers are committing to and the costs. The case studies demonstrate that consumers can end up paying enormous sums for services they do not need and which they could find far cheaper elsewhere.

9.30. We have particular concerns about trusts which claim to protect a surviving spouse from selling their home in order to pay for care home fees. Some will-writing companies deliberately target older consumers and unfairly pressure them into making such arrangements, whilst charging well in excess of what solicitors would. There is also evidence of errors meaning the trusts do not work.

9.31. Lost wills are a concern, although these problems are confined to the unregulated sector. A strong theme in the case studies is of beneficiaries being unable to trace wills due to will-writing companies becoming insolvent and disappearing without trace. There is some evidence of unsafe storage practices. Self-regulation offers some safeguards, but these do not apply to companies which are not members of an industry code. There seems little prospect of a National Wills Register or similar in the short-term.

9.32. There appears to be a rogue element which is engaged in the worst practices, including very aggressive selling, gross overcharging and fraud. Solicitors and will-writing companies interviewed were both of the view that a rogue minority operates in the sector.

Table 7 – Summary of evidence

Outcome	Case studies	Consumer survey	Shadow shops	Expert panel	Other
Access to justice	n/a	35% consumers shop around – higher than for other legal work Choice influenced by perceived advantages of different providers 28% offered powers of attorney, of which 17% purchase. Higher for will-writing companies (46% and 25%)	n/a	n/a	Surveys suggest 36-48% of people have a will with some groups underrepresented 16.5% estates are intestate Alternatives to solicitors provide one-third of wills
Quality	245 cases, most about technical errors; wills with unnecessary features also commonly reported 27 cases involving care home fees	79% satisfaction with quality of will – variation across providers (solicitors 84%, will-writing companies 77%, paper-based 67%, online 79%) High satisfaction on criteria related to instruction-taking across providers Will-writing company interviews take longer than with solicitors 14% consumers did not understand will	n/a	1 in 4 of all wills failed. Few wills failed due to problems with execution, but more than 1 in 3 assessments scored wills as poor or very poor 1 in 5 failure rate for both solicitors and will-writing companies 3 in 10 self-completion wills failed including over 4 in 10 online	Very few wills fail probate 50,000 contested wills per annum; High Court case volumes fluctuate Legal Ombudsman received 55 cases about failure to follow instructions High ratio of errors reported by STEP Error rates on power of attorney forms falling - OPG

Sales practices	275 cases in total 60 cases about overcharging 44 cases about ongoing fees 35 cases about bait advertising/ cross-selling Less common categories: pressure selling, pre-paid probate, misleading claims, failure to honour cooling-off rights, inadequate redress	89% would recommend provider to others – similar between solicitors and will-writing companies, but lower for self-completion wills 76% satisfaction with transparency and 60% for clarity when explaining options – self-completion routes account for lower scores 12% appointed provider as executor (19% solicitors and 7% will-writing companies) 1 in 3 purchased additional services other than executor services. Of these, 1 in 4 had felt under pressure to do so (36% buying from will-writing companies and 17% from solicitors) 8.3 out of ten satisfied with value for money – little variation across providers 1 in 5 say will cost more than expected	Will-writing companies seen as less professional Lack of clarity around appointment of executor and concerns that providers were concentrating more on selling additional services than explaining how the process would work – especially by will-writing companies Some consumers unaware of how additional services would be paid for – lower transparency than other areas	n/a	OFT – 43% appoint provider as executing. Failure to shop around for executor services costing £40m 66% STEP members report hidden fees 38% STEP members report inappropriate relationships with recommended company

Storage	36 cases, most about lost wills post-insolvency A small number of cases about poor storage practices	45% offered storage, services of which 32% purchase. Higher for will-writing companies (61% and 38%)			High likelihood of insolvency for will-writing companies Increase in applications to Probate Service to prove copy wills 64% STEP members have direct experience of will-writing companies going out of business and disappearing with wills IPW regularly receive calls
Honest trading	29 cases about possible fraud	n/a	n/a	n/a	Rise in possible probate fraud recorded by SRA 73 new claims on Compensation Fund in 2011-12 Nearly half of STEP members encountered fraud Value of probate fraud estimated at £100-150 million in 2005 by RNIB

10 Remedies

Introduction

10.1. This chapter discusses solutions to the problems identified in the report. The Panel's aim is to propose a package of remedies that delivers robust consumer protection whilst preserving the benefits of a competitive market and ensuring high levels of will ownership.

10.2. It is government policy that regulation is a last resort measure, whilst the LSB has also signalled that reservation of a legal activity is the most extreme of the options that it will consider. Therefore, alternatives to regulation are considered before examining models for regulation.

10.3. Alongside the preparation of this report, the LSB is developing criteria to help it make decisions about the scope of regulation. Our proposals draw on this emerging thinking.

10.4. The nature of the solutions proposed will depend on the type and severity of each problem and who it affects. Different problems will require different approaches and the intervention point will also vary. The LSB has indicated that where clients are vulnerable and the impact of poor outcomes irreversible, preventative action would be favoured. Equally, where clients are well informed and the impact of poor outcomes reversible, such as through financial compensation, regulation may favour remedial measures.[46]

Alternatives to regulation

10.5. Government requires policy makers to consider alternatives to regulation before it will intervene. Alternatives include options that are less prescriptive than classic regulation techniques and which can implement policy proposals.[47] This section considers three such tools:

- Consumer information;
- Self-regulation; and
- Enforcement of existing legislation.

Consumer information

10.6. A range of consumer information solutions are used across the economy including educational campaigns, rating schemes, kitemarks and disclosure rules (requiring businesses to provide certain information to consumers).

10.7. General consumer advice on choosing a will provider is already available through Consumer Direct, the websites of regulators and trade associations and on price comparison websites. In the IFF survey, 51% of consumers used an online search and 25% used a price comparison website to help them choose a will provider. This suggests a basis to provide useful information that could help consumers to find a competent provider and sales practices to look out for.

10.8. However, general consumer education campaigns would not correct the major problem – poor quality wills – as consumers lack the expertise to assess quality apart from basic checks that the

details they provide are accurately recorded.

10.9. Disclosure of key information is particularly important around appointment of executors, contract terms (such as instalment payments, sale of additional services and waiver of cancellation rights) and receipt of commission. Disclosure is already a feature both of the SRA's Handbook and industry codes of practice. For example, the IPW's code includes: requirements to disclose fees for executor services; letters of engagement must state clients are under no obligation to purchase additional services; which services are not covered by the code; and disclosure of commission payments. The agreement reached between the OFT and the major banks to review their practices also focuses on enhanced disclosure.

10.10. By and large the right rules are in place, although the SWW's code is weaker in this area (see later discussion). However, the extent to which providers are following these rules is unclear. Disclosure of information around executorships and payment terms runs against the natural grain of business interests since it warns consumers against purchasing services that yield providers most of their profits. As noted earlier, the IFF consumer survey found lower satisfaction with transparency compared with other service features.

10.11. Another solution is to help consumers to make an informed choice about whether to use a regulated or unregulated provider so they can make trade-offs between the potential benefits and risks (for example, cheaper price versus lack of remedy). However, this is unlikely to succeed as it runs counter to consumers' strongly held beliefs that all legal services are regulated.[48] Moreover, as the LSB has acknowledged, it is strange to ask consumers to make such a decision – either regulating will-writing is necessary to protect consumers or it is not.

10.12. There is certainly scope to improve the clarity of wills by dispensing with the rather archaic terminology. The simple language found in some wills assessed by the expert panel shows that this can be done.

Self-regulation

10.13. The OFT defines self-regulation as initiatives by groups of businesses within an industry to modify their behaviour in order to improve quality standards. Such initiatives may aim either to achieve compliance with consumer law or to go beyond what the law requires. There is a very wide range of possible self-regulatory mechanisms and structures.[49]

10.14. Self-regulation can offer benefits to consumers and industry. These include: making use of industry expertise especially where goods and services are complex; getting industry buy-in to raise standards; greater flexibility to adapt to fast-changing markets; speed of implementation and lower costs (which are fed through to consumers through cheaper prices). However, self-regulation has a chequered history. Common problems include low coverage of the industry, weak monitoring of rules, little use of sanctions and poor transparency.

10.15. The literature suggests that the prospects of success for self-regulation depend on the characteristics of the sector.[50] This sector exhibits some features where self-regulation is suitable, such as its technical nature, the changing legal services landscape and the desire to establish the credibility of will-writing companies in order to better compete with solicitors. This is balanced against features where self-regulation appears less suitable, in particular difficulties in monitoring the technical quality of wills and a lack of enthusiasm among industry to change standard practices that do not afford sufficient consumer protection.

Importantly, self-regulation does not have full industry buy-in: the IPW considers it is unlikely to tackle the problems which it considers to be widespread.[51]

10.16. There is also a multiplicity of trade bodies. The IPW and SWW are the two main organisations. However, the IPW listed seven other trade bodies, although it claims some are merely fronts for companies and have no other members. One trade body, the Fellowship of Professional Willwriters and Probate Practitioners, became insolvent in 2010. It is unknown what proportion of the industry does not belong to any trade association.

10.17. Self-regulation must be credible if consumers can trust its members. The IPW is one of just ten trade bodies whose code of practice is recognised under the OFT's approved codes scheme. However, it has approximately 200 members (some of whom are solicitors and IFAs) and so covers a relatively small part of the industry. The SWW, which has around 2,000 members, is working towards OFT approval and has made recent modifications to its code. Table 8 compares the two codes based on our view of desirable consumer protection features. Our analysis is that the IPW scheme offers key added protections in the areas of pre-entrance checks on technical competence and business probity, and stronger disclosure rules around cross-selling of services including sales of executor services.

10.18. The Department for Business, Innovation and Skills (BIS) is proposing to merge the OFT and the Competition Commission to create a single Competition and Markets Authority with a clear primary focus on securing competition in markets. It is separately consulting on the future of the OFT's consumer codes scheme as part of the consumer landscape review, with one possibility being the British Standards Institution taking on a modified version of the scheme.

10.19. In summary, self-regulation has made progress through the IPW code gaining recognition from the OFT. However, whilst this is a credible code, only a small number of will-writing companies are members. Crucially, the IPW does not consider that self-regulation offers a viable solution. Given the evidence from the shadow shops on the poor quality of wills, all will-writers should have to demonstrate they are technically competent before offering will-writing services to consumers.

Table 8 – Comparison of self-regulation schemes

Consumer protection feature	Institute of Professional Willwriters	Society of Will-writers
Check on probity of potential members	Criminal Records Disclosure check Bankruptcy check Disqualified directors check Struck off solicitors check	Application procedure includes declarations and references
Education and training	Entrance exam CPD (20 hours for full members)	Entrance either through the College of Will Writing (the personal development division of SWW) or by self-certification and/or examination CPD scheme (16 hours for all members)
Insurance	Professional Indemnity - £2million Public Liability - £2million	Professional Indemnity - £2million Public Liability (SWW own policy - £5million) Public Indemnity Fund
Prepayment protection	Must belong to suitable scheme	Appropriate mechanism required Separate client account
Pre-contractual information	Letter of engagement required Clear pricing Expected delivery times Cancellation rights Complaints arrangements Reference to code of practice	List of information to be provided Clear pricing Expected delivery times Cancellation rights Complaints arrangements Reference to code of practice
Taking instructions	Assessment of mental capacity Reference to vulnerable clients (see	Assessment of mental capacity Reference to vulnerable clients (see

	below) Must be face-to-face unless client determines otherwise Determination of client's financial position and wishes Explanation of roles and documents	below)
Executorship rules	Naming provider as executor must not be a mandatory contract term Fees for executor services to be disclosed in writing	Must demonstrate knowledge, education and experience in order to offer executor services to clients
Cross-selling of extra services	Must act in best interests of client Letter of engagement states client is under no obligation to purchase Commission payments to be disclosed if requested Advise client when extra services are not covered by the code	Information on availability of linked services to be provided as part of pre-contractual information
Duties to vulnerable clients	Special care measures	Special care measures
Storage	Fire and water resistant premises Notify IPW of access arrangements Insurance requirements	Fire and flood proof premises Insurance requirements Notify SWW of any changes Annual audit as to their storage arrangements and access facilities
Complaints	Internal complaints procedure required with timeliness targets IPW conciliation service Independent arbitration	Internal complaints procedure required with timeliness targets SWW complaints procedure Independent arbitration

Sanctions	Removal of endorsement from Certificate of Professional Development until further training is completed Informal warning and costs Formal warning and costs Expulsion and costs	Suspension Expulsion
Monitoring	Complaints record to be kept and made available to IPW on request Members required to advise clients of online satisfaction survey run by IPW, the results of which are made public	Complaints record to be kept and made available to SWW on request Members required to advise clients of online satisfaction survey run by SWW All members to receive a personal visit at least every three years from 1 August

Sources: codes of practice, websites of IPW and SWW and statements from both bodies taken in good faith.

Enforcement of existing legislation

10.20. There would be no need to introduce new rules if all that is required is better enforcement of existing legislation. Annex 3 provides a brief summary of laws that are most likely apply in this sector. However, it is necessary to consider whether it is feasible to rely on existing enforcement agencies in the wider economy or whether sectoral regulation is needed in order to provide a dedicated resource for such activities. This section mostly focuses on will-writing companies because solicitors and financial services providers are already subject to sectoral regulation.

10.21. The legislative route and enforcement agents will differ depending on the nature of the problem. For example, remedies for defective wills are likely to be pursued through the courts with the help of solicitors, whilst local authority trading standards services are likely to become involved when there are illegal sales practices, and the police when there are allegations of fraud.

Quality problems

10.22. Clients may complain about solicitors and other regulated persons to the Legal Ombudsman which can award redress up to £30,000. Unlike the Legal Complaints Service (LCS), the Legal Ombudsman handles some complaints about poor quality. The Legal Ombudsman has also departed from the LCS in accepting complaints from beneficiaries about the work of solicitors acting as executor.

10.23. The Supply of Goods and Services Act 1982 enables consumers to bring claims when a provider does not exercise reasonable care and skill. However, defective wills may only come to light once the testator has died. Contractual rights will not be passed on with the deceased's estate, so those disputing the will must rely on more complex law, such as negligence. In order to prove negligence, the claimant would need to establish that the provider had failed to exercise the same care that a "reasonable" or "ordinary" provider would have taken in similar circumstances.

10.24. If a defective will is declared invalid, the intestacy rules determine who inherits what. A will or distribution on intestacy can be challenged on the grounds that it does not make reasonable provision for all the interested parties. A deed of variation can be drawn up where the parties agree on a fair distribution, but otherwise a court claim under the Inheritance (Provision for Family and Dependants) Act 1975 is necessary. This is known as a 'family provision claim'. A 'contested probate claim' occurs where the validity of the will is in doubt.

10.25. While these routes exist, they are impractical for many beneficiaries due to the high costs. Where the cause of the litigation has been the testator's fault (for example, in losing his will) or where the circumstances of the case lead reasonably to an investigation (for example, doubt over execution), the costs may come out of the estate. However, such guidelines do not override the 'loser pays' rule – the losing side pays the legal costs of both sides. In his review of civil litigation costs, Lord Justice Jackson found some litigants mistakenly believe that all parties' costs will come out of the estate of the deceased, whatever the outcome of the claim. Indeed, the costs can rise to the extent that there is no money left in the estate. He concluded: "*If the entire estate is exhausted in the resolution of those issues, there is no difficulty about the question who is the winner or loser. Everyone is a loser (except for the lawyers).*"[52]

10.26. The Government is removing all probate claims from the scope of legal aid. In its view such claims concern financial issues of low objective importance when compared with other cases involving fundamental issues such as homelessness or domestic violence. It does not consider that the class of individuals bringing these claims is generally likely to be particularly vulnerable, or that they will be unable to present the case themselves.[53]

10.27. All this suggests that remedies for beneficiaries are limited in practice.

Illegal sales practices

10.28. Responsibility for enforcing consumer law is shared jointly between the OFT and 172 local authority trading standards services in England and Wales. The Enterprise Act gave the OFT responsibility to coordinate enforcement activity across legislation enforced by both it and trading standards services. Individual consumers may also launch claims against providers where a private right of action exists.

10.29. Table 9 summarises consumer laws against the problems identified in this report. This suggests most of the worst sales practices are illegal and so companies could be pursued for their actions. However, it highlights a reliance on public enforcement because consumers lack a private right of action for breaches of the Consumer Protection Regulations. This may change as the Law Commission is consulting[54] on allowing individual claims for certain types of case. Even so, the proposals are for “limited and cautious reform”. It is not suggested that consumers should have a right of redress for all breaches. For example, prohibitions on misleading omissions – a feature of the will-writing market – are considered too uncertain for such rights to be conferred.

10.30. OFT analysis of Consumer Direct data suggests that a large proportion of complaints relate to a small number of companies some of whom may operate nationally. Moreover, one-third of complaints could be classified as potential criminal breaches. This should be treated with some caution as there was a spike in activity following a BBC Panorama programme exposing poor sales practices. Even so, the figures indicate that a targeted enforcement effort could have a high impact, both removing the worst rogues from the market and deterring other ill-intentioned companies. It would also help to educate other providers about what conduct is unacceptable under law.

10.31. A key consideration is the extent to which trading standards services would treat will-writing as a priority given their very wide responsibilities and the decreasing resources at their disposal in the current economic climate. Local authorities are quite rightly free to determine their own priorities. At the same time many will-writing companies operate at a very local level, so there is no guarantee that action would be targeted in locations of greatest need. The Trading Standards Institute told us that services had not received many complaints regarding this industry and they would not necessarily distinguish it as a 'problem area'.[55]

10.32. Approaches to priority setting in local government and coordination of enforcement efforts are likely to change. The Local Better Regulation Office (LBRO) is consulting on priority regulatory outcomes to replace narrower national enforcement priorities, drafted through a collaborative approach between local and national partners, to provide clarity about the outcomes that matter to Government. At the same time, as part of the consumer landscape review, BIS is proposing measures to strengthen consumer

enforcement by improving the national leadership and coordination capability of trading standards and by clarifying its responsibility to tackle cross-boundary threats. It is also seeking to ensure that there is more effective partnership working and prioritisation of activity between trading standards and the proposed Competition and Markets Authority.[56]

10.33. Another issue is the capability of trading standards services to deal with the complexities of the will-writing market. There have successful prosecutions, notably of Willmakers of Distinction by Lincolnshire Trading Standards. However, establishing the evidence to secure prosecutions is time-consuming and local authorities must take account of their potential financial liabilities should they lose at trial. There are also external developments. In order to reduce the disincentive for individual authorities to take on more complex or risky cases, as part of the consumer landscape review BIS is considering the establishment of an indemnity fund or other mechanism for underwriting risk.

10.34. Even if will-writing were a priority, trading standards services could not tackle every problem but would need to prioritise, most likely on the most serious cases. Therefore, public and private enforcement should work in partnership. There is a need to give consumers the means of seeking redress privately leaving public authorities to deal with the worst offences. Even where trading standards do act, compensation for individual consumers is not guaranteed, particularly where the offender has no realisable assets. The Legal Ombudsman and the Financial Ombudsman Service offer consumers this possibility in the regulated sector, but consumers only have limited recourse to the courts when dealing with unregulated will-writing companies (under laws giving them a private right of action).

10.35. Many of the poor sales practices highlighted in this report constitute breaches of consumer law. The Panel wishes to see a targeted enforcement effort focused on the apparently small number of rogues committing the worst abuses. In addition, regulators and trade associations should educate providers about their legal responsibilities. This should happen whether or not will-writing is made a reserved activity. At the same time, we have passed information to the Law Commission to assist their work on proposals to give consumers a private right of redress under the Consumer Protection Regulations.

10.36. Had the evidence related to poor sales practices alone, the Panel might have reached a different conclusion on the need to regulate will-writing. However, the technical quality of wills is the most serious concern – neither private nor public enforcement is equipped to deal with this. Moreover, the nature of consumer detriment means preventative, rather than remedial, measures are required. This relates to the discovery of quality problems after the death, the potential severity of financial and personal detriment, the particular risks to people in vulnerable situations and the limited remedies for beneficiaries.

Table 9 – Legislation applicable to will-writing problems

Problem	Legislation	Enforcing agent	Comment
Defective wills	Negligence Inheritance Act 1975 Supply of Goods and Services Act	Individual	Legal costs can be very high where case reaches court SGSA – available to testators only, not beneficiaries
Lack of transparency over key contract terms	Unfair Terms in Consumer Contract Regulations	OFT/Trading Standards	Remedy limited to declaring contract unenforceable
Consumer persuaded to purchase unsuitable products	None unless breaches of legislation – caveat emptor		
Bait tactics	Consumer Protection from Unfair Trading Regulations	OFT/Trading Standards	No private right of action
Overcharging	None – caveat emptor		
Pressure selling tactics	Consumer Protection from Unfair Trading Regulations	OFT/Trading Standards	No private right of action, but likely to change
Misleading information or omissions	Consumer Protection from Unfair Trading Regulations	OFT/Trading Standards	No private right of action
Cancellation rights not honoured	Cancellation of Contracts made in a Consumer's Home or Place of Work etc Regulations Consumer Protection (Distance Selling) Regulations	Individual OFT/Trading Standards	Can pursue redress in small claims court, but enforcing any award may be difficult
Fraud	Fraud Act	Police	Asset recovery may lead to compensation order
Lost will	Sale of Goods and Services Act	Individual	Can claim for breach of contract if company is trading

Regulatory options

10.37. If it is decided to regulate will-writing services, there are two broad options:

- Establish a new bespoke regulatory regime for will-writing providers; or
- Work within the parameters of the Legal Services Act by making will-writing a reserved legal activity.

10.38. The main advantage of the first option is that the regulatory framework can be tailored to the unique challenges of the sector. However, it also presents a series of disadvantages. Multiple regulatory regimes could be costly and might create an unlevel playing field between providers operating under different arrangements. Given the relatively small number of will-writing companies, of which a large proportion are micro-enterprises, poor economies of scale might make the costs of regulation prohibitive. In practical terms setting up a new regulatory regime from scratch would take longer to devise and would require primary legislation.

10.39. Therefore, if regulation was introduced, the Panel's preference would be to work within the parameters of the Legal Services Act. Reservation, being an example of co-regulation – a partnership between industry and the state – brings with it some advantages of self-regulation, in particular the expert input of, and buy-in from, providers. Before making such a recommendation, however, the Panel would need to be satisfied that this model affords sufficient flexibility to produce a regulatory system that is suitable for the particular needs of this group of consumers.

What reservation could mean

10.40. The Legal Services Act includes a list of 'reserved activities'. Only persons that are authorised by an approved regulator designated by the LSB to regulate that activity may provide such services to consumers. Should will-writing be reserved, existing approved regulators which wish to regulate this activity would have to be approved to do so by the LSB. In addition, new organisations could apply to become an approved regulator. Such bodies must be able to demonstrate that they fulfil certain criteria in order to satisfy the LSB. These include achieving a clear separation between regulation and representation. One vital rule is that regulatory boards include a majority of lay members. Such provisions clearly have implications for trade associations which currently conduct both regulation and representation functions.

10.41. The SRA has decided to regulate all the legal activities that solicitors undertake, regardless of whether they are reserved. Therefore, solicitors are subject to regulation when providing will-writing services by virtue of holding their professional title. In addition, the SRA prohibits solicitors from establishing a separate unregulated business to conduct unreserved activities to prevent them from avoiding regulation. Should will-writing services be made a reserved activity, and will-writing companies be regulated by the SRA, all their legal activities would fall within the scope of regulation, unless the SRA decided to establish a different model. One practical consequence would be that estate administration services provided by will-writing companies would also be regulated, as they are now for solicitors.

10.42. The Legal Services Act allows reservation to apply to individuals or to entities. The existing approved regulators have chosen to take reservation of an 'authorised person' to mean reservation to individual lawyers, but this is not a requirement. This means that there is '*considerable scope for applying regulatory arrangements in*

different ways and for amending existing requirements'.[57] For instance, the SRA is free to define (subject to LSB approval) different regulatory arrangements for will-writing companies than which it applies to solicitors as a whole. So, it could set out expectations with respect to qualifications, such as passing an entrance examination in will-writing, but not require will-writers to meet the full education and training standards expected of solicitors. Alternatively, it might only require will-writing companies to register with it and be subject to the Legal Ombudsman.

10.43. Another feature of the Legal Services Act is regulatory competition. Providers may choose their approved regulator so long as the body is designated to authorise the full range of reserved activities that they wish to offer to consumers. Therefore, where existing approved regulators arrangements do not fit the preferred business models of providers, these are unlikely to be an attractive option for will-writing companies. Indeed, providers currently regulated by an existing approved regulator may decide to move to any new approved regulator designated by the LSB. The LSB, as oversight regulator, has an important responsibility to ensure that all approved regulators offer a robust minimum level of consumer protection in order to maintain standards and prevent a race to the bottom.

10.44. Some conclusions emerge. First, making will-writing a reserved activity would not give a monopoly to solicitors, but could enable anyone wishing to provide such services to do so as long as they satisfy the approved regulator's entry criteria. Second, there is sufficient flexibility within the Legal Services Act for regulators to tailor regulatory systems to the needs of individual legal activities. This would allow existing approved regulators to insist that will-writing companies follow some, but not all, of their regulatory requirements. Third, the principle of regulatory competition gives an incentive for approved regulators to develop such flexibility. Finally, the oversight role of the LSB safeguards against regulatory competition driving down consumer protection.

Ingredients of regulation

10.45. As reservation enables approved regulators to create a bespoke set of regulatory arrangements for will-writing, we have identified the key ingredients that should form the basis of such a scheme. Our view is that a proportionate approach would involve a mandatory code of practice enforced by one or more approved regulators. As with any new regulatory arrangement, the LSB would need to agree the scheme. We consider that the IPW code, which is recognised by the OFT as providing suitable consumer protection at or above that provided by general law, offers a good starting point. In effect, this solution offers a limited form of reservation, but one which targets the roots of consumer detriment.

10.46. The Scottish legislation – where the core ingredients of a regulatory scheme are specified – has been examined in developing our thinking.

10.47. The Panel has purposely not been prescriptive beyond this by suggesting precise requirements, which should be the subject of careful discussion should will-writing become a reserved activity. Nevertheless, they would include:

- Education – given the evidence about the poor quality of wills, providers should have to pass formal exams or equivalent qualifications;
- Office holders – given the risk of fraud, providers should be required to appoint a Head of Legal Practice and Head of Finance and Administration (defined

roles under the alternative business structures regime);

- Conduct rules – given the evidence of poor sales practices and the incentives for providers to withhold information from consumers, providers should be required to follow a set of rules built around the elements in Table 8;
- Ensuring ongoing competence – given our concerns about quality and regular changes to laws and taxation, there should be annual CPD requirements and periodic reaccreditation;
- Monitoring compliance – given consumers lack of expertise, a mystery shopping programme should form part of approved regulators' toolkits. This is an area where existing mechanisms need strengthening;
- Redress – providers should be insured, make contributions to a compensation fund (if estate administration falls within scope) and fall within the jurisdiction of the Legal Ombudsman; and
- Discipline – where providers are guilty of misconduct, they should be subject to a wide range of sanctions including expulsion.

Scope of regulation

10.48. The regulatory boundaries should be clearly defined in order to ensure that the framework does not contain gaps, but at the same time is risk-based and avoids unintended consequences. Again, the Scottish model has been considered in developing our suggested approach. We have not attempted a legal definition, but sought to capture some minimum core ingredients.

10.49. The scope of regulation should include the commission, sale and preparation of will-writing and related services for a fee, gain or reward. It is for the LSB to determine whether probate and estate administration services should fall within scope as, consistent with the terms of reference for this investigation, we have not collected the evidence to make a recommendation. The limited evidence suggests that probate fraud and poor service are among the key areas of consumer detriment. We have passed any evidence received to the LSB.

10.50. Clearly, citizens should have freedom to continue to prepare their own wills, as they have always done. We are aware that some providers offer to prepare wills free of charge, but benefit financially in other ways, for example by being appointed as an executor or by selling additional services. The risks of poor quality wills and unfair sales practices means that such services should fall within scope. Hence the inclusion of 'gain or reward' in our definition.

10.51. The position of not-for-profit bodies should be considered further. In practice, wills commissioned via these bodies are prepared by solicitors and will-writing companies, so they would come within regulation anyway. As the LSB is considering the regulation of so-called 'special bodies' during 2011-12, we do not make specific recommendations now.

10.52. We consider that services related to will-writing should fall within scope where these are offered in connection with the will, for example the sale of additional services and appointment of providers as executors. The evidence suggests there are significant risks to consumers arising from these activities. Moreover, as wills and related services are sold together it would be difficult for consumers to work out which services were regulated or not.

10.53. Self-completion wills – both paper-based and online services – should not fall within the scope of regulation. The Panel is concerned that online wills received the highest proportion of fail marks in the

shadow shopping. As discussed earlier, regulating online services brings practical challenges and establishing liability for defective wills may prove difficult. Further, we recognise that self-completion wills are an affordable option for consumers and the costs of regulating them may have a disproportionate impact on prices. Nevertheless, the provision of such services should be kept under review.

Unintended consequences

10.54. Regulation which is not properly thought through can have unintended consequences which may defeat its aims, or even leave consumers worse off than they were before. More generally, all regulation incurs costs and it is important to consider whether the likely benefits of regulation will outweigh these.

10.55. The major concern to address is whether restricting the supply of will-writing services might lead fewer consumers to make wills. This could occur if suppliers were forced to leave the market reducing choice or increasing the cost of wills. A full cost benefit analysis is beyond the terms of reference of this report; the LSB would carry out such an exercise should it decide to take action.

10.56. The Panel considers these risks are unlikely to be significant and can be mitigated through our preferred regulatory approach. Making will-writing a reserved activity would not give a monopoly to solicitors. Reservation enables approved regulators to develop a bespoke set of arrangements for will-writing which are risk-based and proportionate. If implemented sensibly, will-writing companies should not find the requirements too onerous or unaffordable. The limited reservation option proposed, with the exception of greater monitoring of quality, should involve no more costs to the industry than existing self-regulation.

10.57. As regulatory burdens on will-writing companies should be little higher than now, the price of wills should not increase significantly. Indeed, our proposals could reduce the burden of regulation on solicitors who specialise in this field, should the SRA accept that they do not need the full set of qualifications just to practise this activity alone. The evidence also suggests that consumers are not especially price-sensitive when choosing will providers. Instead other factors, such as reputation and convenience, are more influential in guiding choices. Also, the potential cost is not a major factor in surveys which ask consumers to explain why they have not made a will. Further, in a Law Society survey 82% respondents agreed that they 'would pay more to have a will drafted by a regulated provider with a formal complaints procedure and compensation scheme'.[58]

10.58. Another reassuring factor is providers offer wills as a loss leader in order to secure more lucrative work. Hence the costs of regulation are not fully passed on to consumers. This appears to be a consequence of a diverse and competitive market. We see no reason this would not continue to be the case should will-writing become regulated.

11 Recommendations

The case for regulating will-writing

11.1. There is a compelling case to intervene to protect consumers of will-writing services. This is based on: the risks to consumers due to innate features of the market; the potential severity of harm, including to clients in vulnerable circumstances; and the strong evidence of consumer detriment, especially in relation to the poor quality of wills. The nature of the detriment suggests that preventative, rather than remedial measures, are needed. This is because quality problems are normally only discovered when the client has died, the financial and personal harm that beneficiaries suffer can be severe, and beneficiaries have limited remedies available to them.

11.2. Alternatives to regulation, in particular consumer information and enforcement of existing legislation, would not deal with quality problems – the main area of consumer detriment. Self-regulation has made some progress, but our view is that all will-writers should have to demonstrate they are technically competent before being able to offer will-writing services.

Recommendations

11.3. The Panel's recommendations are:

- Will-writing services should be made a reserved activity;
- The scope of regulation should include the commission, sale and preparation of will-writing and related services for fee, gain or reward;
- The core elements of the regulatory scheme should include:
  - Education – a requirement to pass an entrance exam or other means of demonstrating competence.
  - A requirement to appoint a Head of Legal Practice and Head of Finance and Administration;
  - Conduct rules, using the IPW code of practice as a starting point;
  - Ongoing compliance: annual CPD requirements and periodic reaccreditation;
  - Monitoring compliance – to include mystery shopping as part of the toolkit;
  - Redress – indemnity insurance, contributions to a compensation fund and bringing will-writing within the jurisdiction of the Legal Ombudsman; and
  - Discipline – a range of sanctions
- The OFT should coordinate enforcement action targeted at the rogue element of the will-writing industry, working in partnership with local trading standards services;
- The SRA should consider whether the mandatory aspects of the will-writing part of the Legal Practice Course should be strengthened; and
- The Joint Regulators' Education and Training Review should consider the lessons of will-writing, particularly on the issues of specialisation and ensuring the ongoing competence of lawyers.

Annex 1 – LSB commissioning letter

9 September 2010

Dear Dianne

Will writing

My Team recently asked the Consumer Panel if they would respond positively to a request from the Board to provide us with advice about the consumer interest in relation to the provision of will writing services. The Panel indicated that they would welcome the opportunity to do so. Since then, the Consumer Panel Manager, with the assistance of Panel members and members of my Team, has already begun planning this exercise. Steve also spoke on behalf of the Panel at the LSB's workshop of 26 July that brought together a range of organisations with different interests and experiences of the will writing industry. I am therefore now writing on behalf of the Board to formally request the Consumer Panel's advice and suggest some parameters for the investigation.

The LSB would like the Panel to provide a broad and cohesive evidential base of all of the different problems, both current and potential, experienced by consumers wishing to write a will. We would like to understand how widespread each problem is, or could be, why it happens and what the impacts are on the testator and their executors and beneficiaries. We would also like to understand whether existing consumer protections are capable of addressing any consumer harm or whether new solutions are needed, including what the advantages and disadvantages of various ways of regulating will writing may be for consumers.

The note annexed to this letter provides some broad context. Additionally, our joint scoping work has identified many actual or potential problems that the Consumer Panel will want to look at. These may include:

- Wills are of poor quality because they are either invalid or do not reflect the testator's wishes after taking account of their circumstances
- Unfair commercial practices, such as pressure selling tactics or when consumers are deliberately drawn in by a low advertised price but the final price turns out to be much higher, i.e. "bait advertising"
- Cross-selling of related services, which may be unnecessary, unsuitable or expensive; one area of focus is naming the will provider as executor of the estate

- A lack of transparency on price and other issues so that consumers do not make informed choices or do not realise the consequences of their purchase decisions
- Problems related to storage of wills, charges for such storage, and their location by beneficiaries
- Consumers fail to make a will because of barriers to access, for example cost, lack of awareness and unnecessary jargon or complex English
- Fraudulent activity linked to wills or related services

It is obviously for the Panel to decide how it undertakes its work and determine the different evidence sources that you will explore. However, I know that you think, as does the Board, that original consumer research is needed to obtain a clear picture of what is currently happening in practice and therefore what the most appropriate protections might be. This would include a mystery or shadow shopping exercise looking at issues such as:

- How consumers shop around for wills
- What the consumer experience is like buying a will
- How the quality of wills produced varies between distribution channels
- How common cross-selling of other services is when buying a will
- How firms selling wills approach the service and their marketing and selling techniques

The results of this research will provide an important springboard for the Panel's investigation and you will be eager for this research to be commissioned as soon as possible. We estimate that the cost of the research is likely to be in the region of £150,000. The LSB is committing £40,000 towards the cost but we need to secure further financial support from partners who share our enthusiasm to make this happen - we do not have the budget to fund the research alone. We have approached several organisations and will keep you informed of progress.

The Panel will want to consider its timetable for reporting to the Board, I recommend that you talk to Chris Handford as you do so.

Yours sincerely

Chris Kenny
Chief Executive

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Annex 1: Context to the request for Consumer Panel advice on will-writing

Will writing is not currently a reserved legal activity and the writing of wills is not restricted to authorised lawyers - although many lawyers such as solicitors and barristers are bound by rules that mean that they are regulated even when carrying out legal activity that is not reserved. New legal services legislation in Scotland will shortly change this position north of the border by making will writing a reserved legal activity that only authorised lawyers will be able to undertake. There are increasing calls from some parties to introduce similar restrictions in England and Wales.

This is not a new issue and Parliament debated whether or not to add writing wills to the list of activities reserved to lawyers when introducing the Legal Services Act in 2007. They determined not to do so in the absence of any serious evidence of systemic failure. However, Parliament also suggested that this is an area that the LSB might want to look at again once established. In light of the developments in Scotland, concerns reported by a number of professional and trade bodies and anecdotal evidence of current consumer detriment the LSB has begun looking at the need for regulation in this area.

The LSB will not jump into recommending regulation that would restrict the type of providers that may deliver will writing services. We will only do so if there is compelling evidence of systemic failure and that existing tools cannot provide adequate protection for consumers in light of these failures. To recommend reservation, or other forms of regulation, we must also be sure that this is the most appropriate solution to the problems that are identified and that the benefits of reservation outweigh the disbenefits. This includes the potential for creating price or delivery barriers to individuals writing a will at all. It is in this context that we seek the Panel’s advice.

Annex 2 – Contributors

We are grateful to the following for making submissions to our call for evidence. In addition, a large number of law firms and members of the public provided case studies. The names of these contributors have not been disclosed in order to protect the anonymity of the parties.

Allied Professional Will-writers Ltd

British Bankers Association

Citizens Advice

Co-operative Legal Services

Essex & Suffolk Wills Ltd

Institute of Paralegals

Institute of Professional Willwriters

Irwin Mitchell

The Law Society

National Consumer Federation

Notaries Society of England and Wales

Office of Fair Trading

Remember A Charity

Society of Trust and Estate Practitioners

Society of Will-writers and Estate Planning Practitioners

Solicitors for the Elderly

Thompsons

TUC

Annex 3 – General law

Consumer law

The Consumer Protection from Unfair Trading Regulations (or CPRs) provides wide-ranging consumer protection against unfair or dishonest trading. There are provisions against misleading actions or omissions, or aggressive sales practices, which lead consumers to make decisions they would not otherwise have made. The 31 expressly prohibited practices include some related to will-writing: bait tactics; ignoring consumers' requests to leave or not to return when visiting their homes; and persistent and unwanted cold calling.

The CPRs specify three groups of consumers: 'average', 'average targeted' and 'average vulnerable'. Where a commercial practice is being assessed against the vulnerable consumer concept, it is the behaviour of the average member of the relevant group of vulnerable consumers that must be (or be likely to be) materially distorted in order for the relevant test to be met. These provisions are there to ensure that traders do not unfairly exploit vulnerable people, where their practices might not change non-vulnerable consumers' decisions. This is of relevance in will-writing as older people and individuals lacking mental capacity are served by the market.

The Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs) protect consumers against unfair standard terms in contracts they make with traders. The UTCCRs can protect consumers from terms that reduce their statutory or common law rights and from terms that seek to impose unfair burdens on the consumer over and above the obligations of ordinary rules of law. Terms that fall foul of the legislation will be unenforceable (i.e. the consumer will not be bound by it).

The Cancellation of Contracts made in a Consumer's Home or Place of Work etc Regulations 2008 are aimed at traders who enter into a contract with a consumer at their home or workplace. The regulations also cover contracts made at another individual's home or on an excursion organised by the trader away from their business premises. The regulations cover contracts that are made during both solicited and unsolicited visits by traders. The regulations apply to all contracts with a total payment of more than £35 and they set the cooling off period to a minimum of seven calendar days. The regulations also require cancellation rights to be clearly and prominently displayed in any written contract or provided in writing if there is no written contract. Services sold online or via the post or telephone, are also subject to a minimum seven days cooling-off period under the Consumer Protection (Distance Selling) Regulations 2000.

The Electronic Commerce Regulations 2002 apply to businesses which sell or advertise goods and services on the internet. They provide buyers with the right to certain general information in a form which is easily, directly and permanently available. This is especially relevant to wills purchased online.

All advertising, wherever it appears, must be legal, decent, honest and truthful in line with the mandatory UK Code of

Broadcast Advertising (BCAP Code) and the UK Code of Non-broadcast, Sales Promotion and Direct Marketing (CAP Code). The codes of practice are enforced mainly by the Advertising Standards Authority (ASA), and the laws on advertising are co-enforced by trading standards and the OFT. The ASA's remit includes advertisements on the Internet and, since 1 March 2011, advertisers own marketing communications on their own websites and in other non-paid-for space under their control. Adverts on television and radio are regulated by Ofcom.

The Supply of Goods and Services Act 1982 implies into contracts that services must be carried out with reasonable skill and care. Suppliers' liability depends on proving that they have failed to exercise the reasonable care and skill expected of an ordinarily competent member of their profession or trade. Services must be supplied within a reasonable time. Services should also cost no more than a reasonable charge, if no charge is agreed. The law treats failure to meet these obligations as breach of contract and consumers would be entitled to seek redress, if necessary through the civil courts. They may reject goods, claim damages, request a repair or replacement and request a refund. In any dispute, it is usually for the buyer to prove that the goods do not conform to contract, although the burden of proof is reversed for claims brought within six months. The time limit for claims is six years from when the services were performed, although this depends on the nature of the service.

Criminal law

The Fraud Act 2006 created a new general offence of fraud, which can be committed in three ways: fraud by false representation; fraud by failing to disclose information; and fraud by abuse of position. Two basic requirements must be met before any of the three limbs of the new offence can be charged: the behaviour of the defendant must be dishonest and it must also be his intention to make a gain, or cause a loss to another. Gain or loss extends to either money or other property and can either be temporary or permanent. Gain also includes keeping what one already has as well as getting something that one does not have.

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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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