HOUSE OF COMMONS LIBRARY

BRIEFING PAPER

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Regulation of will writers

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Summary

This briefing paper deals with the position in England and Wales, except for Section 7 which deals with the position in Scotland.

The issue

Some types of legal activities, known as "reserved legal activities", may be carried out only by regulated "authorised" legal professionals, such as solicitors and barristers. However, other legal advice, including will writing, may be delivered by people ("unauthorised providers") who are not regulated in the same way.

There is no sector-specific regulation that covers will writing and no-one is legally prevented from offering will writing. A similar service may be offered by regulated legal professionals, such as solicitors; will writers subject to a self-regulatory scheme; and will writers who are not subject to either compulsory or voluntary regulation.

A problem with a will may not come to light until the testator (person making the will) dies, which may be many years after the will was written. If there is a problem, the redress (if any) available may be dependent on who wrote the will, and complainants may not have anticipated this.

Regulation of will writing

In its 2016 report on the legal services market, the Competition and Markets Authority (CMA) found three different levels of regulation in will writing:

- at a minimum level, all providers are subject to general consumer law;
- regulated legal professionals are covered by their wider professional regulation and are subject to additional requirements intended to protect consumers, including access to the Legal Ombudsman, mandatory Professional Indemnity Insurance, training requirements, and codes of conduct;
- the CMA found that around half of unauthorised providers have signed up to be regulated by voluntary bodies, such as the Society of Will Writers and the Institution of Professional Willwriters, which have similar requirements to those of regulated legal professionals – the CMA also considered the effectiveness of self-regulation.

Arguments for and against regulation

Arguments have been advanced both for and against regulating will writing, based, for example, on the need for consumer protection on the one hand, and the cost, burden and effectiveness of regulation on the other. The Labour Government decided against making will writing a reserved legal activity because it considered at that time that there was insufficient evidence that statutory regulation was necessary – it favoured voluntary regulation instead.

Legal Services Board recommendation that will writing should be a reserved legal activity – rejected by the Government

The list of reserved legal activities may be extended on the recommendation of the Legal Services Board (LSB). In February 2013, following a statutory investigation, the LSB recommended to the Lord Chancellor that will writing activities should be reserved, on the basis that the risk of detriment to consumers was significant enough to warrant regulation.

In May 2013, the then Lord Chancellor announced his decision not to accept the LSB's recommendation. He acknowledged that the LSB had identified consumer detriment in the will writing market. However, he considered that further efforts should be made to

address the problems through alternatives to regulation, in order to ensure that the costs and burdens of increased regulation were not imposed unnecessarily. The LSB and several interested parties expressed disappointment with the Government's decision.

Competition and Markets Authority legal services study

On 13 January 2016, the CMA began a market study into legal services in England and Wales to examine whether they were working well for consumers and small businesses. As part of this exercise, the CMA carried out a detailed examination of will writing and probate services to individual consumers.

The CMA published its Final Report on 15 December 2016. With regard to will writing services, the CMA found a range of consumer protection issues but had not been able to identify the scale of any consumer detriment. It also found evidence that it was a "small rogue element" rather than the broader unauthorised sector which caused problems.

The CMA concluded that there was there was potentially a role for some regulation of will writing, such as training and entry requirements, but that more evidence was needed.

The CMA recommended (among other things) that the Ministry of Justice should:

- work with the Legal Ombudsman, the self-regulatory bodies, Citizens Advice, HM Courts and Tribunals Service and the Probate Service in order to consider whether there is scope to adapt existing data sources to collect additional information relating to the unauthorised part of the sector;
- look at whether to extend protection from existing redress schemes to customers using 'unauthorised' providers; and
- review the current regulatory framework to make it more flexible and targeted at protecting consumers in areas where it is most needed.

In its letter of response dated 19 December 2017, among other things, the Ministry of Justice:

- accepted the recommendation to work with others to consider the scope to adapt existing data sources to collect additional information;
- agreed to review any case made for extending redress to consumers using unauthorised providers; and
- agreed to "continue to reflect" on the potential need for a formal review of the regulatory framework – but without a commitment to carry out such a review.

Scotland

The Legal Services (Scotland) Act 2010 contains provisions which would allow for the regulation of will writers. However, these provisions have not been brought into force.

In October 2018, the report of a Review of the Regulation of Legal Services, which was set up by the Scottish Government, recommended the creation of a single, independent regulator for all providers of legal services in Scotland.

The Review recommended that will writing should continue to be unregulated (although it noted that, in practice, many will writers are part of a voluntary regulatory regime). It should not become an activity that only solicitors could carry out. It would be up to the new, independent legal regulator to make proposals to change this system in the future.

The Scottish Government is currently considering the Review's recommendations.

1. Background

1.1 Will writing

Who can write a will?

It is not necessary to take professional advice to write a will. Some people choose to make a "do-it yourself" will, sometimes using one of the widely available forms. Unless the estate and the wishes of the testator are straightforward, and all the necessary formalities are complied with, a DIY will can sometimes have unintended and unwanted consequences, including being found to be invalid.

People may instead choose to have their will written by:

- a regulated legal professional, such as a solicitor; or
- a will writer subject to a self-regulatory scheme; or
- a will writer who is not subject to either compulsory or voluntary regulation.

Will writing: what is the issue?

A problem with a will may not come to light until the testator (person making the will) dies, which may be many years after the will was written.

For example, if a will is found to be invalid, the intestacy rules will apply, instead of the testator's stated intention (if different).

If there is a problem, the redress (if any) available may be dependent on who wrote the will, and complainants may not have anticipated this.

1.2 Statutory regulation of legal activities

The Legal Services Act 2007 sets out a range of activities, referred to as "reserved legal activities",[1] which come under the regulatory control of the Legal Services Board (LSB).[2] These activities include, for example, the exercise of a right of audience in the courts and the conduct of litigation. The list of activities may be extended.[3]

Only regulated legal professionals, such as solicitors and barristers, are entitled to carry out reserved legal activities.

Other legal advice, such as will writing, which falls outside of the definition of reserved legal activities, can be delivered by people who are not subject to regulation, and who may not have any legal qualification.

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1 The six reserved legal activities are: the exercise of a right of audience; the conduct of litigation; reserved instrument activities; probate activities; notarial activities; and the administration of oaths – Legal Service Board, Reserved Legal Activities [accessed 27 November 2018]

2 Section 12. See section 3.1 of this note below for more information about the LSB

3 Legal Services Act 2007 section 24

1.3 Regulation of will writing

There is no sector-specific regulation that covers will writing and no-one is legally prevented from offering will writing.[4] A similar service may be offered by both regulated and unregulated providers.

In its 2016 report on the legal services market, the CMA found three different levels of regulation in will writing:

- at a minimum level, all providers are subject to general consumer law;
- authorised providers [regulated legal professionals][5] are covered by their wider professional regulation and are subject to additional requirements intended to protect consumers, including access to the Legal Ombudsman (LeO), mandatory Professional Indemnity Insurance (PII), training requirements, and codes of conduct;
- self-regulated providers "have attempted to replicate the benefits of regulation on a voluntary basis".[6]

Legal professional regulation and guidance

As a consequence of their professional rules, many regulated legal professionals, such as solicitors and barristers, are regulated by their professional bodies even when they are carrying out activities which are not reserved legal activities.

The Law Society operates a Wills and Inheritance Quality Scheme which is a quality standard for wills and estate administration in England and Wales for practices regulated by the Solicitors Regulation Authority.[7]

The Solicitors Regulation Authority has issued Ethics guidance Drafting and preparation of wills.[8]

Voluntary regulation

The CMA noted that "around half of unauthorised providers have signed up to be regulated by voluntary bodies, such as the Society of Will Writers (SWW) and the Institution of Professional Willwriters (IPW)".[9]

- The Institute of Professional Willwriters (IPW) has a Code of Practice which is approved by the Chartered Trading Standards Institute.[10]

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4 CMA, Legal services market study Final report, 15 December 2016, Appendix A, paragraph 3, p A3.

5 The CMA refers to regulated legal professionals who are entitled to carry out reserved legal activities as "authorised providers" and to other providers as "unauthorised' providers". Some unauthorised providers choose to join a self-regulatory professional body and voluntarily comply with their rules

6 CMA, Legal services market study Final report, 15 December 2016, Appendix A, paragraph 109, pA29 and paragraph 9, pA4. Further information about this report is provided in section 6 of this briefing paper

7 Law Society, Wills and Inheritance Quality Scheme accreditation [accessed 27 November 2018]

8 Issued on 6 May 2014 (updated 11 July 2014), see also Solicitors Regulation Authority news release, SRA issues guidance on will writing, 22 May 2014 [accessed 27 November 2018]

9 CMA, Legal services market study Final report, 15 December 2016, Appendix A, paragraph 8, pA4

10 Institute of Professional Willwriters, Code of Practice, October 2018 [accessed 27 November 2018]

- The Society of Will Writers also has a Code of Practice.[11]
- The Society of Trust and Estate Practitioners (STEP) Code for Will Preparation in England and Wales took effect from 1 April 2014.[12]

The CMA also noted that the requirements of self-regulatory bodies are similar to those, for example, of the Solicitors Regulation Authority (SRA):

> Self-regulated providers are covered by similar requirements to those in authorised professions. For example, they are subject to training requirements, codes of conduct, PII requirements and external complaints mechanisms. Both the SWW and the IPW have entrance exams, codes of conduct and requirements for professional development (CPD) and require members to have PII. Customers of these providers can refer complaints to these bodies. [13]

1.4 Redress

If a problem with a will does emerge, the ability to seek redress may be important. The CMA set out the redress options for different types of service provider:

> All authorised and self-regulated providers are required to have PII that can provide compensation if things go wrong. However, not all other unauthorised firms have such insurance and even those that might have it may be hard to trace when problems arise because there is no central tracking of firms.
>
> Customers of authorised and self-regulated firms also have the option of escalating complaints to other bodies.[14] Taking into account the size of the self-regulated part of this area of law, the number of escalated complaints appears roughly proportionate to the number referred to LeO. However, as explained in paragraph 115, the complaint process may be less effective because providers that are self-regulated can choose to leave a self-regulatory body if they wish to avoid its redress mechanisms.
>
> Other forms of redress options may exist, such as through the courts, but at such high cost as to put them out of reach for most people, particularly where parties are required to go to court.
>
> Even where there is a redress mechanism in place, it may not be able to find the original provider; this is particularly a concern in the unauthorised sector where, as noted, there is no central tracking of firms.[15]

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11 Society of Will Writers, Code of Practice [accessed 27 November 2018]
12 The Society of Trust and Estate Practitioners (STEP), STEP Announces New Code for Will Writers, 13 January 2014 [accessed 27 November 2018]
13 CMA, Legal services market study Final report, 15 December 2016, Appendix A, paragraph 114, pA30
14 Footnote to test: "Consumers of authorised providers can escalate complaints to LeO, while consumers of self-regulated providers can escalate complaints to the self-regulatory body or the chosen ADR scheme, where available"
15 CMA, Legal services market study Final report, 15 December 2016, Appendix A, paragraphs 127-130, ppA37-8 (footnotes omitted, except where stated)

1.5 Why was will writing not included in the Legal Services Act 2007?

In the process of consultation and policy development which preceded the enactment of the Legal Services Act 2007, and in debates on the Bill which became the Act, various calls were made for will writing to be regulated.

The Future of Legal Services: Putting Consumers First

On 17 October 2005, the Labour Government published a White Paper entitled, The Future of Legal Services: Putting Consumers First, which set out proposals for the future of legal services in England and Wales. This concluded that, at that time, there did not appear to be a compelling argument for statutory regulation of will writing. Instead, it recommended voluntary regulation, such as codes of conduct and consumer education schemes.[16]

Report of the Joint Committee on the draft Legal Services Bill

The Joint Committee which scrutinised the draft Legal Services Bill recommended that will writing for fee, gain or reward should be included within the new regulatory framework.[17]

In its response to the Joint Committee, the then Government stated that it would be for the new Legal Services Board to consider whether there was a need for regulation of will writing in the future.[18]

Parliamentary debate on the Legal Services Bill

In debates on the Bill which became the Legal Services Act 2007, calls were made for will writing to be included in the list of regulated legal activities. For example, at Committee stage in the House of Lords, the late Lord Kingsland, who was then Shadow Lord Chancellor and Spokesperson for Constitutional and Legal Affairs, called for will writing for fee, gain or reward to be added to the list of reserved legal activities:

> Our view is that the absence of regulation of will writing combined with the fact that a defect in a will is normally identified only when it is too late to do anything about it provide a particularly strong need for regulation in this sector".[19]

Baroness Ashton of Upholland, who was then a junior Minister in the Department for Constitutional Affairs,[20] resisted, arguing that evidence had not shown that regulation was necessary.[21]

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16 Cm 6679, p79
17 Joint Committee on the Draft Legal Services Bill, Draft Legal Services Bill, 25 July 2006, HC 1154, HL 232 2005–06, paras 212-216
18 Government Response to the Report by the Joint Committee on the Draft Legal Services Bill, Cm 6909, 25 September 2006, p17
19 HL Deb 22 January 2007 c943
20 As it was then, now Ministry of Justice
21 HL Deb 22 January 2007 c946

2. Should will writing be regulated by statute?

Arguments have been advanced both for and against regulating will writing, based, for example, on the need for consumer protection on the one hand, and the cost, burden and effectiveness of regulation on the other.

2.1 Westminster Hall debate

In a Westminster Hall debate on the will writing industry in February 2008, Lorely Burt (Liberal Democrat) set out concerns about the lack of regulation, but also acknowledged that there were many ethical operators:

> Independent financial advisers are regulated and required to be qualified, and solicitors need to be qualified and closely controlled, but someone could be a convicted fraudster, set up as a will writer tomorrow with no qualifications, experience or professional indemnity insurance and proceed to dispense advice on tax, inheritance laws and so on. Most consumers are unable to judge the quality or value of the service that they are getting, so it is no exaggeration to say that will writing has become a happy hunting ground for the incompetent, the dishonest and the fly-by-night operator.
>
> Of course, there are many ethical operators, and there are two professional bodies for will writers. I have mentioned the Institute of Professional Willwriters, and the other main body is the Society of Will Writers. The problem is not with them, or with the vast majority of their members, but with those who operate without proper training, professionalism and insurance. [22]

In reply, Bridget Prentice, who was then a junior Justice Minister, set out arguments against regulation at that time and said that the then Government would regulate only if there was evidence that regulation was not only necessary, but also the most effective way of increasing consumer protection.[23] Instead, Bridget Prentice said that she wanted to work with consumer organisations and others, including the will writing associations, to ensure that consumers had sufficient information to make informed choices about the quality of service that they should expect to receive.

2.2 Legal Ombudsman report

In October 2014, the Legal Ombudsman (LeO) published a report setting out its concerns about wills and probate related legal services.. The report included seven case studies that illustrated what could go wrong. The LeO concluded that:

- The regulated wills and probate market is suffering from a number of quality issues as evidenced by high levels of

22 HC Deb 19 February 2008 c62WH
23 HC Deb 19 February 2008 cc64-5WH

complaints about costs, delays, and the remit of service providers;

- Service providers could better manage client and beneficiary expectations by: avoiding misleading promotions and marketing; being clear about potential costs and timeframes for completing work; and explaining the limits of their roles and responsibilities – thereby reducing the number of avoidable disputes; and,
- A disjointed approach to regulation and consumer redress could be leaving consumers confused about which service providers to use and where to go for help when things go wrong.

The LeO further concluded that:

> All consumers of wills and probate service providers should have access to redress. Regulators, representative bodies, and government should work together to find a solution to the problems caused by an unregulated sector.[24]

[24] Legal Ombudsman, Complaints in focus: Wills and probate, October 2014

3. Legal Services Board review

3.1 The Legal Services Board and Legal Services Consumer Panel

The Legal Services Board (LSB), which became fully operational on 1 January 2010, oversees the regulation, by Approved Regulators, of people authorised to undertake reserved legal activities. In broad terms, this means that it oversees the regulation of lawyers by their own professional bodies. The Secretary of State may, by order, extend the activities within the scope of the definition of "reserved legal activities", but only on the recommendation of the LSB.

The Legal Services Consumer Panel was created by the Legal Services Act 2007 and started work on 1 November 2009. The Panel is an independent arm of the LSB and is made up of eight lay members whose appointments are approved by the Lord Chancellor. Its role is to provide evidenced-based advice to the LSB, in order to help it make decisions that are shaped around the needs of users. The Panel has legal powers to publish its advice and the LSB has a legal duty to explain its reasons when it disagrees with the advice published by the Panel.[25]

3.2 LSB review: should the scope of reserved legal activities be altered?

In its Business Plan 2010/11, the LSB undertook to examine whether the scope of reserved legal activities should be altered. The LSB acknowledged that, in doing this, it expected to have to balance better consumer protection with the additional costs of regulation.[26]

In a response to the BBC's Panorama investigation into the mis-selling of wills, broadcast on 9 August 2010, the LSB indicated that, because of concerns expressed about will writing, it would be looking at the case for regulation in that area on an expedited timetable.[27]

In September 2010, the LSB asked its Consumer Panel to conduct an investigation into consumers' experiences of will writing.[28]

3.3 Legal Services Consumer Panel: will writing should be reserved legal activity

Following an investigation, on 14 July 2011, the Legal Services Consumer Panel published its final report and proposed that will writing services should be made a reserved legal activity.[29] It considered that the scope of regulation should include the commission, sale and

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25 Legal Services Consumer Panel, About us [accessed 27 November 2018]
26 Legal Services Board, Final Business Plan 2010/11, paragraph 91, p29
27 "The Legal Services Board's full response", BBC Panorama, 8 August 2010 [accessed 27 November 2018]
28 Letter from the Legal Services Board requesting that the Legal Services Consumer Panel investigate will writing, 9 September 2010 [accessed 27 November 2018]
29 Legal Services Consumer Panel, Regulating will-writing, July 2011, paragraph 1.23, p5

preparation of will writing and related services for fee, gain or reward. The Panel found 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.[30]

The Consumer Panel made clear that this did not mean restricting will writing to solicitors only:

> 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.[31]

3.4 LSB statutory investigation

On 14 July 2011, having considered the advice of the Consumer Panel and an associated research report,[32] the LSB announced the start of a statutory investigation into how best to protect consumers in the will writing, probate and estate administration markets.[33] This was followed, on 5 September 2011, by a call for evidence.[34]

LSB's consultations

During 2012 the LSB undertook two consultations on will writing, estate administration and probate activities:

- Enhancing consumer protection, reducing regulatory restrictions: will-writing, probate and estate administration activities, April 2012.

  The LSB noted that problems had been discovered across both the regulated and unregulated sectors:

  > In particular, problems around quality, service issues, transparency and fraud appear to exist across both sectors. However, the worst sales practices, issues with the

30 Legal Services Consumer Panel, Regulating will-writing, July 2011, p5
31 Legal Services Consumer Panel, Regulating will-writing, July 2011, p1
32 IFF Research, Research Report Understanding the consumer experience of will-writing services Prepared for Legal Services Board, Legal Services Consumer Panel, Office of Fair Trading and Solicitors Regulation Authority, 14 July 2011
33 Legal Services Board press release, "LSB announces first statutory investigation into will-writing", 14 July 2011 [accessed 27 November 2018]
34 Legal Services Board, Call for evidence: investigation into will-writing, estate administration and probate activities [accessed 27 November 2018]

safekeeping of wills and the sufficiency of redress options, appear to be largely confined to the unregulated sector.[35]

The consultation paper set out two key proposals:

- **Recommending that the list of reserved activities be extended to include will-writing and estate administration activities**. This would ensure that appropriate consumer protections, including access to redress, are in place no matter who delivers the service. Legal services regulation would apply to all providers rather than just those with professional titles. This would make it impossible for unscrupulous or poor quality providers to avoid regulation.
- **Improving the effectiveness of the existing legal services regulation that applies to the majority of providers delivering these services where it is not working well for consumers.** This would involve regulators placing a greater emphasis on targeted, risk-based monitoring and supervision of regulated businesses and a lesser reliance on wider professional titles.[36]

- Enhancing consumer protection, reducing regulatory restrictions: will-writing, probate and estate administration activities, September 2012

  The LSB said that they had developed and refined their proposals in light of responses to the earlier consultation and of discussions with stakeholders, but that they remained committed to their core proposals.[37]

LSB Final Reports: will writing activities should be regulated

On 13 February 2013, the LSB published their final reports, Sections 24 and 26 investigations: will-writing, estate administration and probate activities. The LSB recommended to the Lord Chancellor that will writing activities should be reserved on the basis that the risk of detriment to consumers was significant enough to warrant regulation.

The LSB said that their proposals were based upon three main principles:

- ensuring that proportionate protections, including access to redress, are in place for all consumers irrespective of who provides their service;
- making competition more effective between all different types of will-writing providers so that the market works well for both consumers and businesses;

35 Legal Services Board, Enhancing consumer protection, reducing regulatory restrictions: will-writing, probate and estate administration activities, p6
36 Ibid
37 Legal Services Board, Enhancing consumer protection, reducing regulatory restrictions: will-writing, probate and estate administration activities Cover paper and consultation document, p1

- improving the existing legal services regulation that applies to the majority of providers in these markets.[38]

The LSB had considered alternatives to reservation but still considered regulation to be necessary:

> 24. We have considered the following alternatives to reservation: voluntary self-regulation, enforcement of existing consumer protections, enhanced consumer education and improving existing legal services regulation. Many elements of these arrangements are already in place and, even if further promoted, we consider that they are unable to address the problems found, either individually or in combination. We consider reservation is now necessary to protect consumers and improve competition in the market.[39]

Existing approved legal services regulators would not be approved automatically in relation to will writing activities on the basis of their current regulatory arrangements. Each would have to demonstrate how their arrangements were proportionate and fit for purpose in relation to these specific activities.[40]

The LSB anticipated that the following benefits would be delivered:

- protection for consumers against identified detriments, improved consumer confidence leading to more people writing wills
- reduction in problems requiring resolution by a court, Probate Service or Her Majesty's Revenue and Customs
- support for sector growth by enhancing the operating environment for reputable providers
- better targeting of legal services regulation.[41]

The LSB pointed to the support for their proposals:

> 29. We are supported in this proposal by bodies representing both consumers and charities; existing legal services professional and regulatory bodies; and the main trade bodies representing the unregulated sector.[42]

The recommendation related only to will writing; in a change to the position in their provisional report, the LSB had decided not to recommend that estate administration activities should be reserved. The LSB said that the evidence gathered in the consultations had not shown a similar level of risk occurring in estate administration or probate activities.[43]

Probate activities are already reserved and the LSB did not recommend any change to this position.

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38 LSB, Sections 24 and 26 investigations: will-writing, estate administration and probate activities Final Reports, 13 February 2013, p11
39 Ibid p12
40 Ibid
41 Ibid pp12-13
42 Ibid p13
43 Ibid p33

The LSB's final reports provide further details about, and the reasons for, the LSB's decisions. The LSB website has links to documents associated with their work on will writing and estate administration.[44]

[44] LSB, Will-writing and estate administration [accessed 27 November 2018]

4. Lord Chancellor's response: LSB's recommendation rejected

4.1 The decision not to make will writing a reserved legal activity

On 14 May 2013, Chris Grayling, who was then Lord Chancellor and Secretary of State for Justice, announced his decision not to accept the LSB's recommendation to make will writing a reserved legal activity.

The Decision Notice acknowledged that evidence provided in the LSB's report identified consumer detriment in the will writing market. However, the Lord Chancellor considered that the report did not adequately demonstrate that reservation was the best solution, or that alternative measures had been sufficiently exhausted in seeking to address the detriment. The Decision Notice stated that, in order to ensure that the costs and burdens of increased regulation were not imposed unnecessarily, further efforts should be made to address the problems through alternatives to regulation:

> For example, there could be more targeted guidance for the legal profession and strengthening of existing regulation of authorised persons in this area, combined with voluntary regulation schemes and codes of practice for non-authorised providers. There could also be greater efforts made to educate consumers on the different types of provider and their respective protections and options for redress, as well as greater use of existing consumer protections.[45]

4.2 Reaction to Lord Chancellor's decision

The then Chairman of the Legal Services Board, David Edmonds, expressed disappointment with the Government's decision but said that "it is their decision alone to make and we will study the details and respond in due course". He indicated what would happen next:

> In the meantime the LSB will work with Ministry of Justice officials, consumer groups, providers and other stakeholders to ensure that the issues are tackled and that consumers' confidence in the market for will writing services is increased.
>
> The onus is now on both regulated and unregulated providers of will-writing services to improve standards and thereby earn consumer and public confidence.[46]

Several other parties also expressed disappointment at the Lord Chancellor's decision, including the Law Society, the Legal Services Consumer Panel, the Institute of Professional Willwriters, the Society of Will Writers, and the Chartered Institute of Legal Executives (CILEx).

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45 Gov.UK, Ministry of Justice, Decision Notice: Extension of the reserved legal activities, 14 May 2013 [accessed 27 November 2018]

46 Legal Services Board, The Government declines to accept the regulation of will-writing activities, 14 May 2013 [accessed 27 November 2018]

4.3 What happened next?

The LSB said that, in response to the Lord Chancellor's decision, they asked relevant regulators to demonstrate that they were taking the necessary steps to tackle the identified issues. The LSB convened a roundtable of the providers of will writing services on 22 January 2014 to help facilitate discussions about how the industry might improve service standards and quality.[47]

In July 2014, in a written answer to a Parliamentary question, the then junior Justice Minister, Shailesh Vara, provided further information about what was being done following the Lord Chancellor's decision:

> In the Lord Chancellor's Decision Notice of 14 May 2013, as well as confirming that he had decided not to make will writing a reserved legal activity, he indicated that further efforts should be made to see if alternatives to regulation could be made more effective in improving standards in relation to will writing.
>
> Since then, the Legal Services Board (LSB) has taken a number of steps, with the intention of encouraging and supporting measures to improve standards, in both the regulated and unregulated legal service sectors.
>
> In relation to the regulated sector, the LSB has written to the approved regulators, to encourage them to take steps to address concerns about the quality of will writing by authorised persons. In May 2014, the Solicitors Regulation Authority issued guidance for solicitors on will writing.
>
> In relation to the unregulated sector, the LSB convened a roundtable with industry stakeholders, including leading will writing trade bodies, in January 2014, to explore ways to improve the coverage and effectiveness of voluntary schemes and codes. At this roundtable, the LSB and stakeholders also discussed how to improve consumer information, to better educate consumers about the differences between regulated and unregulated will providers, and related protections and redress routes.[48]

More recently, in December 2016, Sir Oliver Heald, who was then Justice Minister, said that the Government's position remained the same but that it would consider any recommendations made by the Competition and Markets Authority:

> In 2013 the Legal Services Board (LSB) recommended that will writing be made a reserved legal activity, so that only authorised persons under the Legal Services Act 2007 could provide this service. The then Lord Chancellor, however, considered that the evidence provided in the LSB report did not adequately demonstrate that reservation was the best solution to the identified problems in the will writing market, or that other measures had been sufficiently exhausted in seeking to address these problems. This remains the Government position.
>
> We will consider any recommendations from the Competition and Markets Authority (CMA) when they publish their Legal Services Market Study.[49]

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47 Legal Services Board, Will-writing and estate administration [accessed 27 November 2018]
48 HC Deb 7 July 2014 c88W
49 PQ 55155 [on Wills], 6 December 2016

5. Review of the regulation of legal services: no extension proposed

On 5 June 2013, the Coalition Government launched a call for evidence, which ran until 2 September 2013, as part of a review of the regulation of legal services.[50] The Government said that the purpose of the call for evidence was "to seek evidence and comments from stakeholders across the legal services sector and legal services practitioners in respect of simplifying the legal services regulatory framework and ideas for reducing unnecessary regulatory burdens on the legal services sector".[51]

On 1 May 2014, the Ministry of Justice published a summary of responses.[52] Whilst noting that a number of responses highlighted the inconsistency between reserved activities and other legal services which are not regulated, the Coalition Government confirmed that it did not propose to extend the scope of regulation to new areas at that time.[53]

50 HC Deb 5 June 2013 c105-6WS
51 Ministry of Justice, Call For Evidence on the Legal Services Regulatory Framework Summary of responses to the Government's call for evidence on concerns with, and ideas for reducing, regulatory burdens and simplifying the legal services regulatory framework, 1 May 2014, p3
52 Ibid
53 Ibid p5

6. Competition and Markets Authority legal services study

6.1 The market study

On 13 January 2016, the Competition and Markets Authority (CMA) began a market study into legal services in England and Wales to examine whether they were working well for consumers and small businesses:

> The Competition and Markets Authority (CMA) will examine long-standing concerns about the affordability of legal services and standards of service. Concerns have also been raised about the complexity of the current regulatory framework.
>
> In light of these concerns, the CMA's market study plans to examine 3 key issues:
>
> - whether customers can drive effective competition by making informed purchasing decisions
> - whether customers are adequately protected from potential harm or can obtain satisfactory redress if legal services go wrong
> - how regulation and the regulatory framework impact on competition for the supply of legal services.[54]

As part of this exercise, the CMA carried out a detailed examination of will writing and probate services to individual consumers.

6.2 CMA reports

The CMA published its Interim Report on 8 July 2016 and its Final Report on 15 December 2016. The wills and probate services case study forms Appendix A to the Final Report.

Overall, the CMA found that competition in legal services for individual consumers and small businesses was not working well, and made recommendations in order to address the issues that it had identified.

6.3 CMA consideration of will writing services

With regard to will writing services, the CMA found a range of consumer protection issues but had not been able to identify the scale of any consumer detriment. It also found evidence that it was a "small rogue element" rather than the broader unauthorised sector which caused problems:

> Although the limited evidence on quality we have suggests similar problems among both authorised and unauthorised providers, other consumer protection concerns, for instance, in relation to sales practices, are more prevalent in the unauthorised sector. Problems in will writing are especially difficult to address through redress mechanisms due to consumers' difficulty in assessing

[54] Gov.UK from Competitions and Market Authority, Legal services study launched by CMA, 13 January 2016 [accessed 28 November 2018]

> quality and the potentially long delay before the will is needed. However, due to the general lack of evidence, we have not been able to identify the scale of any consumer detriment. Furthermore, there is evidence that it is a small rogue element, rather than the broader unauthorised sector, that is the source of such problems.[55]

In the context of looking at general consumer protection, the CMA set out some particular issues related to will writing:

> 111. All will providers are covered by general consumer laws designed to protect consumers. These include protections against aggressive and misleading sales practices, false advertising, unfair contract terms, faulty service and breach of contract.[56] However, as highlighted by Citizens Advice in its response to the LSCP's 2010 consultation, there are particular problems that are specific to will writing: for example, contractual rights are not passed on with the deceased's estate, and so executors and beneficiaries must rely on showing the providers' negligence.[57] Overall, the LSCP reported that many of the poor sales practices that it outlined might breach existing consumer law,[58] but also concluded that further regulation was desirable.

The CMA considered the role of regulation in will writing including the different positions of authorised and unauthorised providers:

> Authorised providers
>
> 112. There are additional regulatory requirements on authorised providers, such as solicitors. …these include both those designed to make problems less likely, such as having certain qualifications, undertaking a certain amount of training and being subject codes of conduct, and those to help if things do go wrong, such as having PII and a compensation fund, and the ability to take complaints to the LeO [Legal Ombudsman] and the relevant regulator. Failure to adhere to these requirements can result in providers being fined or even struck off from profession.
>
> 113. Some solicitors feel that they are at a disadvantage compared with unauthorised providers due to the burdens of regulation. However, it appears that these regulations are those that relate to being a solicitor rather than regulations specific to will writing; the majority of respondents to the CMA's online questionnaire of solicitors did not think they incurred any regulatory costs specific to will writing.[59]
>
> Self-regulation

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55 Footnote to text: "The LSCP [Legal Services Consumer Panel] found that the 'evidence suggests that a relatively small number of companies are responsible for the worst problems'. See LSCP (2011), Regulating will writing": CMA, Legal services market study Final report, 15 December 2016, Appendix A, paragraph 139, pA40

56 Footnote to text: "Appendix E (Overview of the consumer law framework) provides further details on the consumer law framework"

57 Footnote to text: "Citizen Advice (2010), Investigation into will writing call for evidence: Response to the Legal Services Consumer Panel from Citizens Advice"

58 Footnote to text: "Indeed, there have been successful prosecutions of will writers who have sold wills under false pretences. Examples are reported by Wigan Today (2015) Fake will writer jailed; the Law Gazette (2011), Will writing fraudster jailed; and Lincolnshire Live (2010), Will makers jailed for three-and-a-half years for stealing £400k from estates of clients"

59 Footnote to text: "CMA's online questionnaire of solicitors providing wills and probate services"

> 114. Self-regulated providers are covered by similar requirements to those in authorised professions. For example, they are subject to training requirements, codes of conduct, PII requirements and external complaints mechanisms. Both the SWW and the IPW have entrance exams, codes of conduct and requirements for professional development (CPD) and require members to have PII. Customers of these providers can refer complaints to these bodies…[60]

The CMA then considered whether self-regulation by unauthorised providers was effective:

> 115. There is little evidence about how effective these regimes are. As self-regulation is voluntary, providers can choose not to join a body that will impose such requirements. Research by Economic Insight suggests that only around half of unauthorised providers have signed up to be regulated by voluntary bodies.[61] In theory, providers can choose to abandon self-regulation if they wish to avoid the restrictions it places on them. Self-regulatory bodies themselves have noted the difficulties they face in enforcing their rules as members can be expelled, but then continue trading.[62] However, the SWW told us that in practice these instances are extremely rare as the majority of members will act on the recommendations from the SWW. The Law Society has said that it is 'not worth the risk in hoping that a will writer will abide by any voluntary requirements they sign up to.'[63]

The CMA concluded that there was there was potentially a role for some regulation of will writing, such as training and entry requirements, but that more evidence was needed:

> We have found that the nature of will writing, particularly consumers' difficulty in assessing quality and the potentially long delay before the will is used, means there is potentially a role for ex-ante regulation, eg training and entry requirements. The benefit of any such regulation would have to be weighed against the burdens it placed on businesses and the impact on choices for consumers. However, there is not clear evidence on how widespread consumer protection problems are and therefore the extent to which further regulation would be beneficial. More robust evidence about the unauthorised sector would allow this question to be assessed more comprehensively.

6.4 CMA recommendations

The CMA recommended (among other things) that the Ministry of Justice should:

- work with the Legal Ombudsman, the self-regulatory bodies, Citizens Advice, HM Courts and Tribunals Service and the Probate Service in order to consider whether there is scope to adapt existing data sources to collect additional information relating to the unauthorised part of the sector;

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60 CMA, Legal services market study Final report, 15 December 2016, Appendix A, pA30

61 Footnote to text: "Economic Insight (2016), Unregulated legal service providers: Understanding supply-side characteristics, commissioned by the LSB"

62 Footnote to text: "SWW (2011), Investigation into will writing, estate administration and probate activities, SWW's response to LSB Call for evidence"

63 Footnote to text: "The Law Society, Regulation of will writing: Protecting the consumers"

- look at whether to extend protection from existing redress schemes to customers using 'unauthorised' providers; and
- review the current regulatory framework to make it more flexible and targeted at protecting consumers in areas where it is most needed.

6.5 Government response

The Ministry of Justice's response to the CMA took the form of a letter dated 19 December 2017 from Lord Keen of Elie. Among other things, the Ministry of Justice:

- accepted the recommendation to work with others to consider the scope to adapt existing data sources to collect additional information:

> We will work with the listed bodies to consider whether further information is already available, or could be collected as part of on-going operational changes, to shed light on the size and performance of the unauthorised sector. In doing so we will ensure that the benefits of collecting additional information are weighed against any costs

- agreed to review any case made for extending redress to consumers using unauthorised providers:

> We recognise that there is a disparity in the redress available to consumers depending on their choice of provider, with those using authorised providers having access to the Legal Ombudsman Scheme, while those using unauthorised providers may have access to other redress mechanisms depending on their choice of provider. We also recognise that consumers may not understand the implications of their choices on the consumer protection available to them should there be a problem with the service they receive. At the same time, we note that under the EU Alternative Dispute Resolution (ADR) Directive, all providers of services must signpost available ADR schemes recognised under the Directive, indicate to consumers whether or not they are a member of a particular scheme, and if they are, whether the scheme they are a member of is one that is recognised. We agree that there is a general lack of data on the scale and range of unauthorised providers, the extent to which those providers are members of ADR schemes, and the variance in the protections offered by those schemes, preventing any meaningful consideration of the scale of any consumer detriment that may arise from this disparity, and therefore whether there is a case for reform. We will work with the Department for Business, Energy and Industrial Strategy, as the department with wider policy responsibility, to review the existing provision and consider whether further steps are necessary and proportionate

- agreed to "continue to reflect" on the potential need for a formal review of the regulatory framework – but without a commitment to carry out such a review:

> We recognise that the current framework is not consistent, with a disparity in the regulatory burdens on authorised and unauthorised providers potentially offering some of the

> same services, as well as in the related protections for consumers. While this may impact on competition between regulated and unregulated providers, it does also provide greater consumer choice.

The Ministry of Justice noted specifically "the widely held view that the current reserved legal activities should be reviewed, to ensure that regulation is appropriately targeted to ensure the right balance between consumer protection, wider public interest and competition is achieved".

6.6 Remedies Programme Implementation Group

The Remedies Programme Implementation Group (RPIG) has been put together to oversee the implementation of the recommendations made by the CMA to the regulators in the final report.

The RPIG terms of reference and minutes are available on the Gov.UK website.

7. The position in Scotland[64]

The Legal Services (Scotland) Act 2010 currently contains provisions which would allow for the regulation of will writers. However, these have not yet been brought into force, and the Scottish Government has no plans to do so.

The Scottish Government has, however, set up an independent Review of the Regulation of Legal Services. The Review published its report – Fit for the Future – in October 2018. It recommended the creation of a single, independent regulator for all providers of legal services in Scotland.

The Review recommended that will writing should continue to be unregulated (although it noted that, in practice, many will writers are part of a voluntary regulatory regime). It should not become an activity that only solicitors could carry out. It would be up to the new, independent legal regulator to make proposals to change this system in the future.

The Scottish Government is currently considering the Review's recommendations.

64 Information provided by the Scottish Parliament Information Centre (SPICe) on 29 November 2018

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