



# Submission to The Legal Services Board Consultation on Will-writing and Related Services

Professional Association of Legal Services (PALs)

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## 1. What is PALs?

The Professional Association of Legal Services (PALs) is a trade association which protects consumers buying services from the independent legal services industry. Specifically, it guarantees continuity of service for consumers buying estate planning services from any of its members – services such as Will writing, Will storage and executor support.

The Association estimates that its members are responsible for around 70% of all Wills written by the independent legal sector in England and Wales, and each delivers high volumes of Wills every year, numbered in the thousands. This specialism means they have developed quality processes and in-depth expertise which we believe is a model for how high numbers of Wills can be written efficiently and cost-effectively to consumers.

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### 3. Summary of our key points

- The independent Will-writing sector has been and is a force for public good: there are more Wills in place now than would otherwise be the case thanks to the efforts of the industry, and we believe Wills overall are being delivered at a lower price thanks to this more competitive market.
- The case for wider regulation has clearly not been made, given that the LSB Consumer Panel's own research found no difference in the quality of Wills written by the regulated providers to those produced by independent (unregulated) providers.
- We believe the major problems with Will quality arise from providers who deliver low volumes of Wills, be these solicitor firms or independent providers.
- The case for wider regulation is also weakened because:
  - "regulated" clearly does not equate with quality: indeed this term is already misleading the consumer. A firm of solicitors (unlike independent Will-writers) does not have to demonstrate any expertise in Will-writing and estate management services: the public believes that paying a solicitor will result in a quality process and outcome, yet the LSB Consumer Panel's own research suggests this is not the case for 1 in 4 consumers.
  - The Consumer Panel research suggests two-thirds of Wills are written by solicitor firms (67%), and 10% by independent Will-writing companies. In terms of absolute numbers, this means the largest problems are being caused by the already-regulated providers. Imposing a patently inadequate regulatory model, that is not fit for purpose, on the independent sector will do nothing in itself to improve the quality of Wills;
  - Adding new regulatory burdens to independent providers will result at best in higher costs for consumers, and at worst will drive a large number of providers out of the market. There will be less competition, higher costs, less promotion of Wills overall, and as a result fewer members of the public will make Wills;
  - Will-writing cannot be separated from probate and estate administration services, but there is no objective evidence on this market: regulating one without full knowledge of the others could result in anomalies similar to the current anomaly where Will-writing and estate administration is not reserved, but extracting the grant of probate is;
- The principle of "caveat emptor" must carry some weight in this market, as any other: the consumer needs easily adopted "markers" to help make their own informed decisions.
- The importance of the presence of indemnity insurance must be publicised across the industry, as an important "marker" to help consumers make informed choices.
- The Legal Ombudsman should be given the power to take voluntary jurisdiction in relation to will-writing and estate administration, allowing him to investigate complaints, and undertake conciliation across the industry.
- The LSB ideally, but if not the Legal Ombudsman or the OFT, should create something like the Estate Agents Public Register, to allow consumers to see names of individuals and companies which have acted unfairly or improperly.

- Trading Standards Offices and the Office of Fair Trading should be encouraged to use their existing powers to investigate complaints against companies and practitioners, since all providers are covered by consumer protection regulations.
- There is a particular onus on solicitors and their regulators to improve the quality of service and product which they deliver, given that “solicitor” is understood by consumers to mean “trained and expert”, yet the LSB’ Consumer Panel’s research shows this not to be the case. The consumer deals with a solicitor in a different way to dealing with an independent Will-writer as a result.
- There should be no new restrictions on the ability of specialist Will-writers to promote their services, given the need to encourage more people to have Wills.
- There is no need for non-law firms to have a compensation fund, which is a model designed for solicitors’ partnerships, not corporate entities.
- If any new regulations are introduced, these must cover **all** providers, including those delivering two-thirds of all Wills and thus the greatest number of defective Wills i.e. solicitor firms.

## 4. Our approach

### Why the independent sector is important

The growth of the independent sector in the field of estate planning services over the past few decades has been a positive development; the need to have a Will and plan for the proper administration of one's estate after death is being promoted more widely, by more organisations, than would otherwise be the case.

The type of service being delivered from the independent, non solicitor-practice, sector is proving popular with many tens of thousands of people every year. Indeed, the National Consumer Council, in its report on Wills in 2007, found that almost four out of ten people would prefer not to use a traditional solicitor for preparing their Will, and this trend away from the traditional route was particularly strong amongst younger consumers.

Despite far more estates now reaching a size and complexity that make a Will a vital requirement, most high street solicitors still do not appear to regard Will-writing as a core part of their practice. In comparison, the independent sector contains several substantial businesses which solely focus on providing estate management solutions, including the drafting of a Will. These organisations, represented by PALS, make up a significant proportion of all Wills written by the independent sector: we estimate around 70%.

The growth of the independent sector has introduced real competition into the marketplace,

resulting in more choice, easier access, and lower overall average costs to consumers. The promotional activities of the independent sector means the subject of Wills also has a higher profile, and is brought to the attention of more people, more often, prompting action which has often been long put-off.

At the same time, the industry has voluntarily and on its own initiative moved to address key areas of concern where consumer detriment is a possibility. One example of this is the creation of PALS as a means to ensure continuity of provision. Such continuity has been enforced on solicitors by the code of conduct of the Solicitors Regulation Authority (SRA). PALS members are similarly covered by the obligation to take on certain responsibilities from companies which are in membership but cease trading. One such case was successfully handled in 2007, when 40,000 individual customers of National Legal Services were smoothly transferred to another PALS member. The fact that this structure has been put in place voluntarily demonstrates the professionalism and responsible approach of the industry.

In short, more people have Wills now than would be the case without the efforts of the professional, independent Will-writing sector, and we believe this is something which should be both applauded and encouraged.

## The LSB investigation

The LSB statutory investigation into the Will-writing industry has already produced some interesting and important information. Most startling has been the revelation about the poor quality of apparently huge numbers of Wills, especially those written both by the - supposedly – well-regulated sector. It is our view that the only area where a case has been unarguably made for action is in the need to significantly improve the quality of Wills written.

In our members' experience, there are indeed significant problems with poorly or very-poorly drafted Wills. We find that most of these problems arise from smaller organisations, often non-specialist Will-writers, for whom drafting a Will is a relatively small part of their business. Problems can range from Wills being incorrectly verified (not signed, or signed in the wrong places, or witnessed by beneficiaries, for example), to straightforward inaccuracies in translating instructions, even inaccuracies in spelling the name of the testator, or a patent lack of knowledge of up-to-date law.

We base this comment on the experience of our members of seeing many hundreds of Wills a year written by others, either when they are asked to update Wills, or to help executors manage estate administration.

It is these non-specialist Will-writers, drafting perhaps a few dozen Wills a year or fewer, who are the most likely to either not know the law, to have forgotten it, to not be aware of current legislation, or who lack the processes and procedures to help eliminate mistakes and oversights.

Given the apparent scale of this problem – tens of thousands of new Wills each year failing to achieve the intentions of the testator (and by the LSB's own figures, two-thirds of these written by already-regulated solicitor firms) – it should surely be the focus of any action by the LSB or others to revise the market. The level of consumer detriment, in terms of money alone, is huge. Millions of pounds is being spent ineffectively, to say nothing of the consequent loss to consumers and their potential beneficiaries in unnecessary tax paid, additional fees to sort out problems or intestacy (because a Will is invalid), even legal costs as a result of disputed Wills.

A further corollary of the Consumer Panel's finding is that the idea that regulation will produce better quality Wills (which, after all, is surely what consumers want above all), has been shown to be completely false. Indeed, it can be argued that "regulation" gives a false signal to consumers. The public not unreasonably will believe that a regulated provider is going to provide a better service than an unregulated one. They will enter into a commercial relationship with that regulated provider feeling reassured. This reassurance, the research suggests, has been shown to be false. Therefore simply regulating the entire industry in the same way as some are regulated at present will produce what must be judged as a false sense of security for consumers.

What is more, if a burdensome system of regulation is placed upon the independent sector, it is possible the number of providers, and therefore competition, will diminish. Restrictions on the independent providers will result in higher costs, and possibly less promotion, both of which will result in fewer wills being written, without any guarantee that quality will improve.

The LSB have wisely recognised the link between Will-writing services and probate and estate administration. In our members' experience, and knowledge of the wider market, these services are inextricably linked. These links can be seen in terms of charging (for example, offering low-cost Will-writing, linked to appointing the agent as an executor, to handle estate administration), and in terms of practicalities – someone having a Will written will also be interested in related services such as the setting up of trusts, advice on inheritance tax financial planning and so on.

However, as the LSB acknowledges, its Consumer Panel only gathered evidence on Will-writing. It lacks detailed evidence on the probate and estate administration market. Without this evidence, we are concerned that any move to introduce statutory regulation only covering Will-writing may have unforeseen consequences and produce anomalies which may cause their own consumer detriment, as well as pose problems for the industry, both regulated and independent.

Finally, from the discussions we have already been involved with inside the industry and with the LSB, we can see significant hurdles to introducing proscriptive regulation to cover such a diverse industry. Wills are currently delivered to the consumer in a wide variety of ways:

- direct from High Street solicitors and direct from independent Will-writers, both of which can vary in size from large organisations employing hundreds to sole traders, and writing in some cases thousands of Wills a month, to one or two a month;
- via third parties such as banks and trade unions, although these are mostly delivered by large solicitor firms.

As we have stated above, we believe the majority of problems with Will quality are caused by non-specialists who write small numbers of Wills and have little regular experience of estate administration. But creating statutory regulations just to deal with these organisations, without adversely affecting large organisations (through added bureaucracy and cost), will in our view be almost impossible.

Given all of these concerns, we therefore strongly believe that the case for further statutory regulation of the industry is not proven. Instead, we believe there is a case for the LSB with others in the field –

the Legal Ombudsman, the larger Will-writing organisations (both regulated and independent), the trade associations and consumer groups – to work together to develop a stronger framework of best practice within a regulated free market: the same sort of market as currently exists.

We set out in the next section our ideas on the enhancements to the current regulations and codes of practice which we believe are appropriate and which we believe will result in enhanced consumer protection while still encouraging a competitive marketplace for Will-writing, probate and estate administration services.

We believe one other over-arching point must be made, while we recognise it may not be popular: and this is the principle of “caveat emptor”. In the end, consumers must take some responsibility for their decisions, and bring to the decision to appoint a Will-writer the same sort of analysis they would bring to any other purchase. Whilst we recognise that there are perhaps fewer “markers” in this marketplace to allow consumers to make educated judgments, we believe this problem can be addressed by the sorts of action we list in the next section. If these are enacted, and the vast majority of organisations which behave responsibly in the marketplace publicise these changes and include them in their material for consumers, we believe it will swiftly become obvious to the public which organisations to trust with drafting their Will, and which not.

## 5. Enhancing existing regulations

### Legal Ombudsman

We believe a major element of concern could be removed from the marketplace by giving all consumers a specific and expert outlet for complaint, conciliation and redress.

As we argue later, there is at least in principle such an existing route for disgruntled consumers via local Trading Standards offices and the Office of Fair Trading. However, a more straightforward and obvious solution would be have the independent Will-writing sector voluntarily come under the auspices of the Legal Ombudsman.

Since its creation, the office of the Legal Ombudsman has, we believe, made a positive impact and shown a well-balanced approach to its task. Two of the trade bodies in the independent sector are already in discussions with the Legal Ombudsman over submitting their members to the Legal Ombudsman's jurisdiction. PALS has also indicated that it would be happy for its members to do the same.

### Consumer Protection regulations

It is wrong to suggest that the market has "regulated" practitioners and "unregulated" ones. For a start, our members, and indeed other independent providers of any size, have working for them their own qualified solicitors, supported by teams of legally-trained personnel. These solicitors are, at least notionally, still regulated (they have to pay, for example, subscriptions to the Law Society to maintain their practicing certificate).

What is more, our members' activities are already covered by a raft of regulations, including several examples of consumer protection regulation. Principle of these is the Consumer Protection against Unfair Trading Regulations 2008. In our view, this gives an outlet for action and redress covering many of the examples of consumer detriment quoted by others in their submissions to the Legal Service Board Consumer Panel.

The CPRs list 31 practices which are unlawful, and local trading standards and the office of Fair Trading have powers to take action against organisations in breach of these regulations. We are also aware that it has been pointed out that the Government can, if it believes it necessary, give

powers to these enforcing agencies to arrange for consumers to be compensated by organisations in breach of the regulations.

We would urge both Trading Standards and the OFT to take action on those cases which the investigation has brought to light.

### Insurance

We recognise the importance to consumers of commissioning their Wills from a professional who is adequately insured should problems subsequently arise as a result of the service they provide.

All PALS members, as corporate entities, have in place professional indemnity insurance. It is our understanding that smaller operators have in place insurance arranged via the two trade associations which cater for them – the Society of Will Writers and the Institute of Professional Will-writers. Solicitors – who operate as partnerships – have to have such insurance in place personally before they are permitted to practice.

The question therefore is whether it would be practicable to set up regulation that in some way would force anyone writing Wills to prove they have in place such insurance - or something similar. We regard this as a difficult if not impossible challenge. For example, we assume large organisations such as high street Banks providing a Will-writing service do not have personal insurance in place, but instead self-insure. The policing of such insurance – including checking it is still extant, on a regular basis – strikes us as un-manageable at a sensible cost.

We believe the right approach is to spread the message to the public of what good practice should be when writing a Will, through widespread public information across the industry. A signal to the consumer of a professional practice would be evidence of such insurance being in place. In the end, the principle of caveat emptor should prevail, as it does, for example, when appointing a builder, another professional whose actions could cause significant cost, but potentially not for many years after his work.

## 6. Introducing new procedures to improve the market

### **Will-writers Public Register – or similar**

One concept which was raised at the LSB seminar in October on possible regulation of Will-writing was to create a public registrar of individuals or firms which have been found to have acted unacceptably. Such a list exists for Estate Agents, created by the Estate Agents Act, 1979, administered by the OFT.

PALS would support the creation of such a list for all Will-writers (including solicitors). The list could be administered by the LSB, or alternatively by the Legal Ombudsman's Office, or the OFT.

Given that the creation of such a list might require primary legislation, an alternative might be for the Ombudsman to develop such a "list" based on complaints made and judgments made.

### **Training for solicitors**

Any consumer looking to employ an independent Will-writer is likely to think carefully about the person's credentials; his experience, any testimonials, the content and quality of any written material. The consumer will approach dealing with him in the same way that consumers deal with others whose technical knowledge is significantly in advance of their own: for example builders or other tradesmen. The comparison is a valid one, since in both cases the consumer would be working on a certain degree of trust, and any problems with a tradesman's work may not emerge for several years; and these problems may not even affect the original customer of the tradesman (which is why house purchasers are for example advised to ask for insulation and damp-proof course guarantees from the previous owners).

In comparison, a consumer approaching a law firm assumes, because he is dealing with regulated solicitors, that they will have the necessary knowledge and skill to draft a valid and properly effective Will. However, as the LSB Consumer Panel's mystery shopper exercise showed, this faith in solicitors is misplaced. Dealing with a law firm assigns no greater security to the main purpose of the transaction – obtaining a good, effective Will. Given the natural trust of consumers, we believe it is particularly incumbent on the regulated sector to significantly improve its practices in order to improve the standards of Wills which it delivers to consumers.

Given that, as the LSB itself suggests, two-thirds of Wills are written by solicitor firms, and accepting that poor quality Wills are the source of the largest consumer detriment in the marketplace, improving the quality of Wills written by solicitors would logically be the one change from the current situation which would have the largest consumer benefit.

## 7. What is not needed

### Compensation fund for non-legal partnerships

One topic which some have raised is the existence, for consumers from the regulated sector, of the Solicitors Compensation Fund, and the absence of such a fund for customers of the independent sector.

We believe this is a false comparison, for the following reason: the compensation funds exists, in the words of the Law Society, to rectify any situation when *“a client suffers loss and hardship due to a solicitor’s dishonesty or failure to pay the client money that they have received”*. (“Regulation of Will-writing” leaflet, Law Society 2010).

Such a fund makes sense to cover an industry which is made up of partnerships of individuals. However, such a fund is not appropriate for corporate entities which are adequately capitalized. To illustrate this point, it is worth imagining demanding that Tesco, should it start selling Wills under the new ABS rules, be required to set aside funds for compensation. We regard such a concept as unreasonable.

What is more, if an independent Will-writing company is not a Trust, then it is not able to hold money on behalf of its clients. The risk of dishonesty with client’s funds is not there, and the need to have a compensation fund does not exist.

### Restrictions on promotion

We set out earlier in this document our view of how the independent sector has helped stimulate greater interest in Wills, and that through its efforts, more Wills have been written than would otherwise be the case. The legal profession has its own reasons for restricting pro-active promotional activities by law firms, but we see no reason why these restrictions should be extended to the independent sector, especially where, acting within existing regulations and codes of practice, the independent industry is stimulating action - writing a Will - which it is widely agreed to be in the public good.

## 8. Probate and estate administration

The LSB has asked for evidence and views on problems within probate and estate administration. We have a limited amount to report on here, except to say that in our members' experience, the major problems for consumers are disproportionate charges being made for these services, and delays in finalising affairs. We would support further investigation into this, especially in relation to regulations within the Consumer Protection against Unfair Trading Regulations 2008. These regulations, as mentioned earlier, are powerful. To quote from the Office of Fair Trading, they consist of:

*“A general duty not to trade unfairly by acting contrary to the requirements of professional diligence so as to distort the average consumer's decisions in relation to the product or service. This can be broadly understood as failing to act in accordance with acceptable trading practice a reasonable person would accept.*

*Prohibitions of misleading and aggressive practices. Examples include withholding material information from consumers so as to impair their ability to make an informed choice, or coercing a consumer into making a decision.”*

*(A quick guide to competition and consumer protection laws that affect your business” OFT)*

Another area where there have been some negative comments is around the concept of what is sometimes called “pre-paid probate”. We accept that the practice of suggesting to consumers that they can pay their probate and estate administration charges in advance of them being delivered is risky, unless the consumer's funds are ring-fenced and protected in some way. This could, for a large corporate entity, simply mean that there is capital in place to fund the corporate liability which such contracts would represent.

In reality, most so-called “pre-paid probate” is actually a fee paid for a set of services, and which include under the terms of the contract an entitlement to beneficial rates for certain services, should they be requested in the future. We regard such offers as perfectly legitimate commercial offers in a free market, and that consumers should be allowed to make their own minds up about whether they wish to take up such an offer.

## 9. Conclusion

As stated in the opening section, we remain unconvinced that the case has been made for making Will-writing a reserved activity. We have listed above some practical suggestions for clarifying and reinforcing some areas of law and potential consumer protection which we hope will have wide support.

We hope that the current investigation results in wider acceptance of the need to make a Will, and stronger confidence in the quality of Wills and the process by which they are produced. As the representative body for the major companies in the independent Will writing and estate administration sector, PALS is ready to do what it can to help achieve this important outcome.

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