MARKET STUDY INTO THE SUPPLY OF LEGAL SERVICES IN ENGLAND AND WALES

SUBMISSION OF THE CHANCERY BAR ASSOCIATION TO THE STATEMENT OF SCOPE OF THE COMPETITION AND MARKETS AUTHORITY

Introduction

1. The Chancery Bar Association ("ChBA") is one of the longest established Bar Associations and represents the interests of about 1,200 barristers. Its members handle the full breadth of Chancery work at all levels of seniority, both in London and throughout England and Wales and in cases overseas. It is recognized as a Specialist Bar Association. Full membership of the Association is restricted to those barristers whose practice consists primarily of Chancery work, but there are also academic and overseas members whose teaching, research or practice consists primarily of Chancery work.

2. The CMA's statement of scope includes two case studies. One of those – will writing and probate services to individual consumers – is relevant to members of the ChBA. We therefore respond to the questions in the Statement of Scope in relation to this case study only. Although our members offer 'commercial law services' (particularly litigation) we do not propose to respond to potential third case study at this stage.

3. Our members are those barristers most likely to be involved in drafting wills, and advising on probate and the proper administration of estates as part of their day-to-day practice. At the moment members of the self–employed bar are not permitted to

handle client money (save in certain rare circumstances) and so are not engaged in administration of estates themselves.

4. In that context, perhaps a majority of our members' work arises in contentious matters, where a dispute has arisen as to the correct interpretation of a will in the circumstances, or as to the validity of a will, or as to the correct manner of administering the estate of a deceased person. Our members are frequently involved in cases involving negligence on the part of the will-drafter or breach of duty by a personal representative. As such, our members have a clear insight into the things that go wrong in will-drafting and probate.

5. The CMA will be aware that most work done by barristers in self-employed practice is done on instructions by a solicitor, or occasionally other approved professionals such as accountants. They do not have a contractual relationship directly with the lay client; there is therefore a professional intermediary. Some barristers are authorised, following additional training, to do work for lay clients on a direct access basis; they will only do so where they feel the client is capable of managing the case themselves, and the circumstances do not call for the involvement of a solicitor.

Theme 1: The ability of consumers to drive effective competition through making informed purchasing decisions

Wills are extremely important documents. In most cases, most or all of person's wealth is governed by their will on their death, and competent advice given when a will is made will expressly consider those assets which will not pass under the will (jointly owned property, for example).

The range of will-writing services available to consumers is extremely diverse:

- Consumers can write their own wills without help for free.
- They can buy a will-writing kit from a stationers' for £10 or less.
- They could use an online service or app.
- They can use a will-writer; who may well be untrained and are likely to be uninsured, although many voluntarily subscribe to a variety of trade associations. Some offer pricing structures whereby additional provisions in the will are charged separately. A will likely to cost between £100 and £400.
- They could use a high-street solicitor, whose practice will encompass all sorts of legal services, but including regular will-writing. In practice, much of the work may be done by a legal executive (under the supervision of the solicitor). High-street solicitors are obliged to compete with will-writers on price, despite the fact that they will carry insurance, and will often charge £200 or under.
- At the top end of the spectrum may go to a specialist solicitor, or even a barrister. A will is likely to cost at least £500, and complex wills will cost thousands of pounds.

Our experience is that many consumers do not understand the advantages and disadvantages of each of these options, the relative prices, or the risks associated with some of the cheaper options.

Some sectors of the market divide the job of will-drafting between different people. For example, some will-writing companies employ, in effect, salesmen, to take instructions and record them on a proforma. This is then sent to a central pool of will-writers who produce a will. We consider that this division of labour carries risks of communication errors. Moreover, over-reliance on proformas, which can never cater for all possible scenarios, is likely to result in wills that do not carry out the consumer's intentions fully.

We consider it unfortunate that trained and insured solicitors are obliged to compete on price with untrained, uninsured will-writers. This often leads to the work being done hastily, by untrained members of staff, and as a 'loss-leader' in the hope of securing the work for probate and administration of the estate in due course.

We do not believe intermediaries have a particularly large role in the market place.

Theme 2: Whether information failures expose consumers to harm that is not being adequately address through existing regulation or redress mechanisms.

Wills that are prepared hastily, with unthinking use of precedents, or without any or any sufficient face-to-face contact with the consumer/testator, are particularly susceptible to errors, difficulties of interpretation, and challenge on grounds of the testator's mental incapacity, want of knowledge and approval or undue influence by beneficiary. The cost of resolving these matters is invariably high, and in extreme cases can exceed the value of the estate in question.

As noted above, a large sector of the market is untrained – making these risks greater – unregulated – meaning that the consumer has no simple redress mechanism – and uninsured – meaning that the consumer (or his beneficiaries) may be unable to recover any loss suffered.

Where, however, consumers use the regulated sector, they are given full information about the existing and effective redress mechanisms as a matter of course.

Theme 3: Impact of regulations and the regulatory framework on competition

As noted above, new entrants to the will-writing sector presently require no regulation. We consider that this distorts competition between the regulated and unregulated sectors, given the lack of consumer awareness of the relative benefits and risks. Accordingly, we propose will-writing should become a reserved legal activity. This may increase the price of will-writing services slightly, but given the importance of the document and the cost of mistakes, we do not consider that this is a sufficient reason not to level the market place. We attach a copy of the Association's response to the Legal Services Board's consultation on the regulation of will-writing.

More generally, for the regulated legal sector, we are conscious that the costs of regulation have increased significantly over the last decade. Ultimately, this is passed on to consumers and contributes to the high cost of legal services in this country, and so it is in the public interest to keep the regulation as efficient as possible. We therefore invite the CMA to make recommendations designed to streamline the regulation of the legal services market, reducing the layers of regulation to one.

There has been very little take-up of ABSs among our members, suggesting that the referral model of the self-employed bar continues to operate well for barristers and solicitors in our areas of practice.

ENHANCING CONSUMER PROTECTION, REDUCING REGULATORY RESTRICTIONS: WILL-WRITING, PROBATE AND ESTATE ADMINISTRATION ACTIVITIES

RESPONSE OF THE CHANCERY BAR ASSOCIATION TO THE PROVISIONAL REPORT OF THE LEGAL SERVICES BOARD

Introduction

1. The Chancery Bar Association ("ChBA") is one of the longest established Bar Associations and represents the interests of about 1,200 barristers. Its members handle the full breadth of Chancery work at all levels of seniority, both in London and throughout England and Wales and in cases overseas. It is recognized as a Specialist Bar Association. Full membership of the Association is restricted to those barristers whose practice consists primarily of Chancery work, but there are also academic and overseas members whose teaching, research or practice consists primarily of Chancery work.

2. The provisional report has a significant impact on members of the ChBA who are involved in drafting wills. Apart from members of the Revenue Bar Association (and many of our members overlap) and perhaps members of the employed bar, it is our members (rather than other barristers) who draft wills as part of their day to day practice and will be affected. At the moment members of the self–employed bar are not permitted to handle client money

(save in certain rare circumstances) and so are not engaged in administration of estates. This response, therefore, focuses on will drafting.

3. We propose to deal with those questions raised in the consultation to which we can make a worthwhile response. However, first, we wish to set out the way in which our members are involved in will writing and the effect the proposed regulation will have on them.

Will-writing

4. The time allowed for responding to this provisional report has not enabled us to carry out a proper survey of our members and so the following information is of necessity general but nevertheless based on a firm factual basis. We estimate that about one third of our members will be involved in drafting wills at some time in their practices and for some it is a very significant part of their work. Informal soundings suggest that the junior members of the ChBA undertake more will drafting work than senior members.

5. We fully support the proposal of the LSB to have will writing and estate administration activities made reserved activities. Our members have seen the products produced by untrained and at present unregulated will writers and the results are often shocking. Similarly it seems clear that estate administration should be a reserved activity.

6. Our members are involved in will-writing in the following situations:-

(1) Solicitors may instruct them to draft a Will for a client. That might be a whole Will or involve drafting single clauses. A barrister might be asked to approve and amend a draft which a solicitor has already prepared or, again, one or more clauses. Sometimes solicitors will instruct counsel to draft will precedents for them to use.

(2) Professionals other than solicitors who have direct professional access to the Bar, such as accountants or banks may also instruct our members to carry out work similar to (1).

(3) Those of our members who are authorized by the BSB to undertake direct access work may draft wills for members of the public.

(4) Our members who undertake Court of Protection work will frequently be involved in applications for the Court to authorize a deputy of someone who lacks testamentary capacity to make a statutory will. They may draft the statutory will, or approve a draft prepared by the solicitor who has instructed them. In urgent situations they will often have to draft the Will on the spot.

7. It will therefore be seen, that it is only in the scenario painted in sub-paragraph (3) above that a barrister will have direct contact with the consumer and will be marketing his or her services to the public. As far as we have been able to ascertain there are very few members of the Bar who accept instructions to draft wills directly from the public.

8. Barristers who are engaged in any of the above activities are highly trained. In pupillage in a set of Chambers which undertakes this sort of work, a pupil barrister will see numerous wills and receive training on how to draft complex documents. What is more, the ChBA runs an extensive programme of continuing professional education for its members. It has a conference every year, where at least one and possibly more sessions relate to this area, and a full programme of seminars. This year, for example, three of the seminars have relevance to will writing. There is also a programme every year for new practitioners.

Proposed Regulation

9. For our members, the proposed change in terms of regulating those who undertake will writing activities will produce a burdensome regime which we submit is wholly unnecessary. As we understand matters, our regulator, the BSB, would have to apply to become an approved regulator. This would be for the benefit of probably about only 400 barristers. Members of the bar who have been undertaking will writing could then have to apply individually to be authorized to carry out such work. This seems to be wholly disproportionate to the risk involved. We doubt there are any of our members who only undertake will writing.

10. We fully understand that consumers need to be protected. However, the risk as far as barristers undertaking such work is concerned is extremely small. It is only likely to arise in the case of direct access will drafting, where there is

likely to be contact with the client with only the barrister present and no professional intermediary.

11. We are not aware of any case where a barrister has been successfully sued in negligence for the drafting of a Will. Indeed, we are not aware of any reported case involving alleged negligent will drafting by a barrister, successful or otherwise.

12. We therefore would argue that in defining what is a reserved activity, will drafting should exclude any situation where a barrister is being instructed to prepare or advise on the contents of a will by a regulated entity. This would relieve individual members of the Bar from having to seek authorization for one, often infrequent, part of their practice. It would also relieve the BSB from having to go through the process of being approved as a regulator for a small number of those it regulates and then to set up a procedure for authorizing individual barristers. This would be without in any way compromising the risk to the consumer.

13. The laudable aims of the LSB in reducing regulation where possible would not be met if our members have to seek authorization for will drafting. Indeed, the regulation would be disproportionate. However, we accept the position is somewhat different where our members offer will writing services on a direct access basis. In that case we can see that they ought to be regulated but they could of course be regulated by a body other than the BSB for that particular reserved activity.

14. We have tested our proposal against the suggested appropriate consumer outcomes set out in the Guidance for prospective regulators in the report. Taking those in turn:-

Consumers receiving appropriate information and advice: in all the situations in which the Bar is involved in will writing apart from direct access, that information and advice will come from a solicitor or other professional who is already regulated.

Consumers can make informed choices: where our members are involved (except in direct access cases) they will not have access to the consumer unless the professional instructing them chooses to arrange that. They would not be able to affect this outcome.

Consumers receive good quality advice and services: we have set out above the extensive training our members undertake and the absence of any negligence cases against them in this area.

Authorised providers act in the best interests of their client: Our members are currently bound to do this as part of their code of conduct and existing regulation that covers all their activities.

Authorised providers act with integrity and promote and maintain adherence to the professional principles: again our members are already bound to do this as part of their existing regulation.

Consumers' confidence in the owners is as high as for other authorized providers/law firms and is equally justified: the way in which the Bar is involved in will drafting means this does not have any relevance, except perhaps in direct access cases.

Consumers are deservedly confident that their advisors are regulated appropriately and effectively: our members are subject to the highest possible standards as a result of the current regulatory regime to which they are subject.

Consumers are aware of their opportunity to complain: this is already in place for all work undertaken by the Bar.

Consumer money and assets are protected: this is not relevant as the Bar cannot handle client money in any of the circumstances being discussed in the report.

Consumers have an appropriate level of assurance that recompense is available: our members of course must have professional indemnity insurance.

Range of authorized providers: apart from our members undertaking will writing by way of direct access we would even if regulated have no control over this. As a predominantly referral profession, we are dependent on other professionals to instruct us.

15. There would therefore be no effect on the outcomes which the LSB wishes to achieve if will writing as a reserved activity were confined to those who deal directly with the consumer.

Answers to the Questions

Question 1: We are broadly in agreement with the scope of the proposed reserved will-writing and estate administration activities but for the reasons set out above we consider that they should not include any situation where a barrister is being instructed to prepare or advise on the contents of a will by a regulated entity or person. As set out above the impact of individual barristers having to obtain authorization for carrying our referral work is utterly disproportionate to the risks involved.

Question 2: We would support options 3 and 4 because in our view consumer protection from unregulated will writers is far more important an objective than the effect adopting such options will have on the market. The impact of a badly drafted will on a family can be horrendous in terms of cost and anxiety.

Question 3: As far as the definition of will writing as a reserved legal activity is concerned, we have set out our views of how this should be defined above. The only other comment we have is in respect of section 122 of the Senior Courts Act 1981. That does not mention legal professional privilege because the section underpins the Court's inquisitorial function in respect of the admission of wills to probate. While issues of legal professional privilege might conceivably arise, in general where there is doubt as to which will is

going to be admitted to probate the privilege does not vest in any particular party.

Questions 4 and 5: These do not apply to us.

Question 6: yes, but only if that regulation improves the standards of non legally qualified will writers and ensures that they are properly trained.

Question 7: As far as our members are concerned, if individual barristers have to obtain authorization, we expect that some of our members will stop doing will writing work for which they have years of training and expertise. In that sense there will be an extremely negative impact on the business of the ChBA

Question 8: We have no evidence to assist in answering this question.

Question 9: Unless authorized entities are subject to appropriate regulatory controls including proper training then vulnerable individuals may well suffer. It is a crucial part of the will draftsman's job to spot undue influence when it is being practised on a vulnerable testator and even more significantly to be able to assess capacity to make a will and seek appropriate medical opinion if in any doubt. Our members are heavily engaged in cases where the validity of a will is disputed, and the role of the will draftsman is almost always crucial.. Those who prepare wills at the moment can be ignorant of the correct approach to dealing with a vulnerable testator, such as seeing them alone and assessing their capacity against the relevant legal test. The result is often a disputed will leading to litigation which is often financially and emotionally

ruinous for the beneficiaries of the will. Therefore it must be a requirement in terms of training that will writers not only know how to write a will but also how to deal with these vitally important matters.