



Legal Services Board Consultation on Regulation of special bodies/non-commercial bodies

The Advice Services Alliance's response

July 2012

1. Introduction

- 1.1. The Advice Services Alliance (ASA) welcomes the opportunity to respond to this consultation paper.
- 1.2. ASA is the umbrella organisation for independent advice networks in the UK. Full membership of ASA is open to national networks of independent advice services in the U.K. Currently, our full network members are
 - Advice UK
 - Age UK
 - Citizens Advice
 - Law Centres Federation
 - Scope
 - Shelter
 - Shelter Cymru
 - Youth Access
- 1.3. Our members represent over 1,700 organisations in England and Wales which provide a range of advice and other services to members of the public. Most of these organisations offer services within a local area, but some of them are regional or national. They are largely funded through public sector grants and contracts, and charitable fundraising.
- 1.4. With some limited exceptions, services are offered to users free of charge and are focused on areas of law which mainly affect poorer people, particularly welfare benefits, debt, housing, employment, immigration, education and community care. We estimate that some 120 of these organisations currently employ solicitors who provide reserved legal activities.
- 1.5. At present, the following ASA network members represent organisations which employ solicitors to undertake reserved legal activities on behalf of the public: Advice UK, Citizens Advice, Law Centres Federation, Shelter and Shelter Cymru. We anticipate that some of these organisations will be submitting their own responses.
- 1.6. A copy of a draft ASA response was sent to these members and their comments taken into account. However, this response does not necessarily represent the views of our members in their entirety.
- 1.7. We have followed the format of the consultation paper and, where appropriate, have responded to the questions in groups.

2. Consumer protection issues

1. *To what extent do you think the current non-LSA regulatory frameworks provide full adequate protection for consumers?*
2. *Do you agree with the LSB's assessment of the gaps in the current frameworks?*
3. *What are the key risks to consumers seeking advice from non-commercial advice providers?*

2.1. We agree that special bodies are not risk free simply because of the not for profit nature of their services. We also agree with the principle that clients of special bodies should not have significantly less protection because of the type of organisation delivering the advice.

Frontier Economics' analysis

- 2.2. We agree, in part, with Frontier Economics¹ analysis of the risks posed by non-commercial providers. It is certainly true that insecure and inadequate funding can result in consumer detriment. Unfortunately, this may become even more evident soon as substantial areas of social welfare law are taken out of the scope of legal aid.
- 2.3. However, whilst we accept that there may be individual examples of poor financial management and poor quality advice in the advice sector, we are unaware of any evidence that these risks are higher in the Not for Profit (NfP) sector than in private practice.
- 2.4. The Frontier Economics report (p18) raises concerns about the quality of advice in the NfP sector, referring to "several published studies". However, we note that these studies are not cited.
- 2.5. We do not accept that poor quality advice is a particular risk within the NfP sector. In coming to their conclusions about the quality of advice in the NfP sector, Frontier Economics appear to rely heavily on a workforce survey² which suggests that staff in NfP organisations tend to have less training than those in private practice. However, this survey does not compare like with like. Most of those working in the NfP sector are generalist advisors and would not claim to offer advice equivalent to that offered by private practice solicitors.
- 2.6. Further, as mentioned by Frontier Economics (p202) there is evidence³ that "specialist [LSC] contract files handled by NfP agencies scored significantly better than solicitors' contract files . . . [and] that NfP

¹ Understanding the supply of legal services by "special bodies", Frontier Economics, September 2011

² [Smith, M. and Tam, T. \(2007\)](#)

Findings from the Legal Advice Sector Workforce Survey, London: Legal Services Commission, LSRC Research Paper No. 18

³ Quality and Access, Richard Moorhead et al, 2004

agencies scored more highly than solicitors on every single criterion of the individual peer review criteria”.

Our analysis of the current problems for consumers

- 2.7. We do not accept that, for the most part, the regulatory gaps identified in paragraph 15 of the consultation paper are the most significant. Whilst it is true that the Law Centres Federation does not currently require Law Centres to have professional indemnity insurance, all Law Centres have such insurance as it is required by both the SRA and the LSC. Advice UK also requires its members to have professional indemnity insurance. Further, most CAB do not provide the level of advice that requires the employment of solicitors.
- 2.8. Having said this, we do not dispute that there are problems with the current regulatory system as it applies to the clients of NfP solicitor agencies. In our view, these include:
- that the regulatory system is particularly opaque as it relates to NfP organisations. At present, the redress available to clients of an NfP organisation depends in part on whether a client happens to be advised by a solicitor. This is not satisfactory.
 - the current system means that there can be a lack of clarity within an organisation about who has regulatory responsibility for client care and professional standards.
 - that there is no universal system for ensuring that clients’ interests are protected if an organisation goes into administration. However, it should be noted that networks such as Citizens Advice and Law Centres Federation will intervene to assist as much as possible in these circumstances. We understand that Citizens Advice will be giving more information in their response about the measures they take.
- 2.9. Finally, the current regulatory system is inhibiting some NfP solicitor organisations from developing new services which could protect or enhance access to legal services for some clients. This will be dealt with in more detail in section 4 of this response.

3. Ending the transitional period

4. *What are your views on the proposed timetable for ending the transitional protection?*

5. *Should we delay the decisions of whether to end the transitional protection for special bodies/non-commercial bodies until we have reached a view on the regulation of general legal advice?*

6. *Do you have any comments on the Impact Assessment? In particular do you have any evidence about the likely positive or negative impacts of the changes set out in this document and/or information about*

the diversity of the workforce of consumers that use special bodies/non-commercial organisations?

Different views within the sector

- 3.1. There are differing views within the NfP sector about when the transitional protection should end.
- 3.2. Broadly, there are two types of NfP solicitor agency within ASA membership, although the distinction between them isn't necessarily clear-cut:
 - Organisations, such as Law Centres and some independent housing advice agencies, whose main role is the provision of specialist legal advice and litigation and who have a high proportion of legally qualified staff. These organisations provide services similar to those provided by private practice solicitors, although they will also often provide complementary services such as outreach and community legal education work. Such organisations often already adopt the behaviour of those subject to entity regulation and may have only a few adjustments to make before applying to become an ABS.
 - Organisations, which mainly deliver services other than specialist legal advice such as generalist advice, practical support, information, campaigning. For these organisations, specialist legal advice and litigation is only a part (and sometimes a very small part) of what they do. This includes some CABx and Advice UK members and national charities such as RNIB. The introduction of entity regulation may lead to significant disruption for these organisations.

Reasons for ending transitional period quickly

- 3.3. As identified in the consultation document, there are some solicitor NfP organisations which, in the face of significant public sector spending cuts, want the flexibility to develop new paid-for services for clients. They are doing this for two reasons:
 - They want to ensure that services such as good quality immigration advice continue to be available to their user groups
 - They want to improve their own financial sustainability so that they can continue to provide both paid-for and free services to members of the public.

The current regulatory framework prevents them from doing this.

- 3.4. Further, some organisations are aware of the need to prepare for the forthcoming regulatory changes and have spent time considering how it will affect them and the changes that they will have to make. Delaying implementation increases uncertainty and makes it difficult to plan for the future.

Reasons for delay in ending transitional period

- 3.5. For those organisations where specialist legal advice and litigation is a relatively small proportion of their work, the introduction of entity regulation risks creating a disproportionate regulatory burden.
- 3.6. In part, the problem emanates from the extremely wide definition of legal advice contained within the Legal Services Act (LSA): “the provision of legal advice or assistance in connection with the application of the law or any form of resolution of legal disputes”⁴.
- 3.7. By employing one solicitor to conduct reserved legal activities, an organisation risks having all of its advice regulated. This could encompass a wide range of activities not normally undertaken by private practice solicitors and not normally understood by consumers to be legal advice. For example, the LSA definition of legal advice might encompass:
 - volunteers assisting people to complete simple forms where there is some application of the law e.g. basic welfare benefit forms, council tax benefit forms.
 - tenancy support workers advising vulnerable people about the implication of clauses in a tenancy agreement
 - community workers providing information to a local parents’ group about how to ensure that their disabled children get the services to which they are entitled.
- 3.8. We are aware that the fear of disproportionate regulation is leading some organisations to question whether they should continue to employ a solicitor. This could have a detrimental impact on access to justice for some very vulnerable people.
- 3.9. In addition to the extra resources required to manage regulation, there is a growing concern about the financial costs involved in both applying for ABS status and continuing fees. Organisations have looked at the amounts the SRA is charging commercial ABS and have expressed concerns as to whether these are affordable.
- 3.10. Furthermore, the introduction of regulation is not the only change that advice agencies will be facing in the next few years. Some organisations have pointed out that the concurrence of the introduction of the new regulatory regime with the implementation of substantial cuts to legal aid could cause a level of upheaval with which they lack the resources to

⁴ s12 (3) (b) (i) Legal Services Act 2007

cope. The transition period should therefore be carefully managed to avoid detriment to agencies in this position.

- 3.11. It seems likely that the LSB's review into the regulation of general legal advice will be a long-term project and that the timing of any changes in the scope of regulation is very uncertain. We therefore don't believe that the LSB should wait until it has concluded this review before the transitional period is lifted.
- 3.12. Whilst there are arguments for an early end to the transitional period, it is important that there is sufficient time to develop a properly proportionate and affordable regulatory framework for special bodies. Therefore, on balance, and subject to our comments below about the removal of unnecessary regulatory restrictions, we agree that April 2014 is a realistic target date for the end of the transitional period.

4. Removal of unnecessary regulatory restrictions

7. What are your views on allowing special bodies/non-commercial organisations to charge for advice? What do you think are the key risks that regulators should take into account if these bodies can charge?

8. What are your views on our proposed approach to allowing a full range of business structures?

Charging for advice

- 4.1. We agree that the current restrictions imposed by the SRA on special bodies charging for advice should be removed immediately. Our understanding is that these restrictions were introduced by the Law Society in the 1970s in order to limit the work that could be done by Law Centres and thereby protect private practice firms from competition. These restrictions were not introduced in response to any perceived risk to consumers.
- 4.2. We consider that the risks of allowing special bodies to charge for advice are no greater than those for private practice solicitors. Not for profit organisations are already required by funders and other regulators to use transparent financial management systems that are designed to minimise the risk of fraud and dishonest behaviour. In addition, many NfP solicitor agencies which hold client money already operate client accounts without difficulty.

Business Structures

- 4.3. We sympathise with the intention behind the SRA's "separate business rule" and share their concerns about the potential detriment to consumers. In particular, we are concerned that consumers (many of whom are infrequent users of legal services) might not be aware of the different levels of regulatory protection they have in each of the separate businesses and, even when they do, they may not fully understand the impact on them.

- 4.4. However, we agree with the Legal Services Board that a blanket ban on such arrangements is unduly restrictive and may limit some people's access to legal services. We anticipate that, in future, some NfP solicitor organisations may want to establish separate businesses, not with the intention of avoiding regulation but in order to protect funding sources or to clearly distinguish between services which are offered free and those which are paid-for.
- 4.5. We therefore agree that a case by case approach, as long as it is rigorous in protecting consumer interests, would be preferable.

5. Group licensing

9. Do you agree with our analysis of group licensing?

- 5.1. ASA agrees with the LSB's analysis of group licensing. In particular, we are concerned that a group licensing system would undermine consumer confidence in the regulatory system as a lead body would be expected to exercise conflicting roles as a representative body and quasi-regulator.
- 5.2. We acknowledge that Citizens Advice does not agree with our view on this issue and that they will be making a case for group licensing in their response.

6. Content of licensing rules

10. What are your views on those issues that may require changes to licensing rules?

11. Are there any other areas where the LSB should give guidance to licensing authorities?

- 6.1. We agree with the list (paragraph 49 of the consultation) of areas where licensing rules may need to be adapted and agree with the approach taken in relation to these.

Additional guidance

- 6.2. In relation to the conflicts of interest mentioned, we suggest that licensing authorities should be alert to the potential for new funding models to have a detrimental effect on the independence and integrity of legal advice. For example, there is a risk that "payment by results" models of funding might create incentives for providers that conflict with regulatory principles. Although the use of such funding models is more likely within the NfP sector, the private sector may also be affected.
- 6.3. As suggested in paragraph 31 of the consultation paper, we agree that licensing authorities should be encouraged to take into consideration protections provided by existing frameworks at least in the period immediately after the transition. These could be network requirements or compliance with quality standards such as the SQM. It would be helpful for the LSB to develop guidance on this.

- 6.4. We are concerned that some organisations that will be affected by special bodies regulation are not sufficiently aware of what it will mean for them or may be confused about what actions they will need to take when the time comes. We have seen the Legal Services Consumer Panel's response to this consultation and agree that licensing authorities "should have a role to work with regulatory and other organisations in the affected sectors to raise awareness, while taking a sensible approach to ensuring compliance in the early days". This is another area on which LSB guidance would be helpful.
- 6.5. We would also like to see some consideration given to the position of special bodies currently required to register their non-solicitor caseworkers with the OISC. Once special bodies are regulated as entities, we think the OISC requirements should be reviewed.
- 6.6. Finally, we suggest that licensing authorities may need to develop additional guidance for special bodies on:
- the role and responsibilities of those who sit on governing bodies
 - the delivery of second tier consultancy services and
 - the provision of pro-bono legal advice by solicitors in either solicitor or non-solicitor agency.