Consultation Response

Shelter's Response to the Legal Services Board Consultation: Wider Access, Better Value, Strong Protection

14th August 2009

www.shelter.org.uk

Shelter

Introduction

Shelter is a national campaigning charity that provides practical advice, support and innovative services to over 170,000 homeless or badly housed people every year. Our services include:

- A national network of over 30 advice centres offering specialist legal advice in housing, welfare benefits, debt and community care law, funded by legal aid contracts
- Shelter's free advice helpline, which runs from 8am-8pm, providing generalist housing advice
- The Community Legal Advice helpline, providing specialist telephone advice and casework in housing, debt and welfare benefits
- Shelter's website which provides advice online
- The Government-funded National Homelessness Advice Service, which provides second tier specialist housing advice, training, consultancy, referral and information to other voluntary agencies, such as Citizens Advice Bureaux and members of Advice UK, which are approached by people seeking housing advice
- A number of specialist support and intervention projects including housing support services, the Shelter Inclusion Project,
- A children's service aimed at preventing child and youth homelessness and mitigating the impacts on children and young people experiencing housing problems. These include pilot support projects, peer education services and specialist training and consultancy aimed at children's service practitioners.
- We also campaign for new laws and policies - as well as more investment - to improve the lives of homeless and badly housed people, now and in the future

About 10 of our advice centres have solicitors on site providing specialist expertise and litigation services in housing and homelessness law. Our central legal services team also provide litigation services, policy and campaigning, our Children's Legal Service and second tier support to housing lawyers via the Legal Services Commission's Specialist Support Service.

We employ approximately 30 solicitors and over 200 advisers providing legal services to the public.

Response to the Consultation

We note at para 8.13 that the LSB intends to address special bodies further in future consultations. As a special body that is a national charity providing legal advice services on a large scale, including reserved legal activities, we would welcome the opportunity to discuss with the LSB further its approach to regulation of special bodies.

We do not propose to answer all the questions in this consultation, as many are not relevant to our work. We focus on the issues surrounding the regulation of special bodies, of which we are one.

Question 26 – What are the risks to the consumer associated with the delivery of legal services by special bodies and which more general risks are less relevant to these bodies?

We believe that the main risks to clients who are likely to seek services from the NfP sector are:

- The inherent vulnerability of much of the client base; they are individuals, often socially excluded and in relative poverty. By virtue of the nature of the legal problems dealt with by the sector, they may be poorly housed or homeless, at risk of domestic or other violence, suffer from mental or physical health problems, or be refugees from persecution, or any combination of the above. Again by virtue of their legal problems, the other side will often be the state or quasi-state bodies, with a consequent severe imbalance of resources and inequality of arms. Their legal problems tend to be of overwhelming importance. This vulnerability requires greater protection than that applied to a sophisticated client such as a large corporate body.
- With the exception of ourselves and other bodies such as Citizens Advice, and organisations such as Law Centres which concentrate on litigation services, much of the sector consists of small organisations which may not have the knowledge, resources or professional management which facilitate full regulatory compliance, and larger organisations for whom the provision of reserved legal activity is a small part of their service and where therefore there may be tensions between legal services regulation and other regulation or organisational policy.
- The potential for tension where funders of services may be opponents in cases taken by agencies, such as where a local authority funds an advice agency which provides housing services. Even where a funder does not seek to place restrictions on how cases are taken forward, there may be (conscious or unconscious) reluctance to challenge on the part of the agency.

However, there are also areas where special bodies present low risk:

- There is less likelihood of internal pressure or incompatibility of services. Commercial companies with a legal services business may seek to use client details for cross-marketing of services such as financial or insurance products; in special bodies, areas of work outside legal services provision are more likely to be other support services or policy, campaigning and fundraising. There is therefore less risk of mis-use of client information for other purposes.
- They are less likely to be engaged in financial transactions on behalf of clients and to be subject to money laundering regulations
- Special bodies are generally already regulated to some degree. For example, many (including ourselves) are charities and therefore regulated by the Charities Commission.

There are also risks associated with regulation itself:

- Most special bodies are charities, often reliant on legal aid funding, and therefore run on tight margins. Additional regulation – both any fees for licensing and business costs associated with ongoing compliance – would impose additional burdens and unless carefully managed could impact on the viability of some organisations
- Alternatively, organisations could decide that regulation is not practical for them and decide to stop providing regulated activities and concentrate on other areas of service provision – with consequent implications for access to justice

Question 27 – Is it in the consumer interest to require special bodies to seek a licence, and if so, what broad approach should licensing authorities take to their regulation?

We will take this question in its two parts.

Is it in the consumer interest to require special bodies to seek a licence?

We believe that it is in the consumer interest to require special bodies to seek a licence.

Currently, bodies such as ourselves are in an ambiguous and uncertain regulatory position. We undertake both reserved and non-reserved legal activities, and employ both solicitors and non-solicitor advisers to provide litigation and advice services, and advice services respectively. Our solicitors are personally regulated by the SRA in the conduct of both reserved and non-reserved activities. Our advisers are not regulated in the conduct

of non-reserved activities. Shelter is not regulated in the conduct of reserved or non-reserved activities. The burden of regulation falls directly on individual solicitors, not on the organisation that employs them. The same is true of the whole not for profit (NfP) sector. We are not regulated, but some of our employees are.

It is anomalous that private practice is regulated as an entity, both in the provision of reserved and non-reserved legal activity, whilst the NfP sector is not subject to entity regulation but regulation of some individual employees. We do not believe that it is necessarily clear to clients of legal and advice services whether and to what extent services they receive are regulated, nor that their expectations of the protection they should receive differ according to the type of agency they access.

We do not consider it appropriate that the burden of regulation should fall on individuals rather than entities. This is particularly the case where, unlike in private practice, solicitors may not to be in positions of management or ownership and therefore may not have power to ensure regulatory compliance or design compliant systems. There may be tensions between their regulatory and employment obligations.

We believe that we are unique as a national NfP organisation that provides extensive litigation services. This means that we have the resources and knowledge to ensure compliance in our systems. However, smaller organisations, perhaps without professional management and with volunteer trustees or management committees, may not have the resource or expertise to ensure compliance. Similarly, larger organisations where litigation services are but a small part of overall service provision may not take sufficient account of legal regulation in designing systems. In such cases it is unfair for the burden of non-compliance to fall on solicitors individually where they do not have the power or authority to change things. There is a risk to the client in potential regulatory failure.

In reality, the risk is unlikely to be large – the vast majority of organisations that employ solicitors to provide litigation services to the public will have carefully considered the professional requirements and ensured that they have compliant systems. Nevertheless, the risk remains more than theoretical.

In addition, we consider that it is important that there is clarity in the regulation of legal services, in place of the present uncertainty that surrounds some of the position of solicitors in the not for profit sector.

As far as the client is concerned, they are being advised by the solicitor on behalf of the agency, not the solicitor as an individual. We think it important that the client has a full understanding of how the services they receive are regulated, and they are unlikely to

appreciate the current technical distinctions between entity and individual regulation according to ownership model of the body they have approached.

We also consider it important to stress that the responsibility for regulatory compliance – and therefore protection of the interests of clients – falls (or should fall) on both the agency and the individual solicitor. The solicitor must always comply with professional rules; but the agency, as a responsible employer and service provider, also has a duty to ensure that its employees are able to comply and its clients are protected.

We therefore believe that entity based regulation should be extended to the not for profit sector, and thus that special bodies should be required to be licensed.

What broad approach should licensing authorities take to their regulation?

The broad approach that should be taken should reflect the needs of the client and the circumstances of the sector. It should be based around mitigation of the principal risks, which we set out in our response to question 26 (see above).

For the reasons set out above, we accept that special bodies should be required to be licensed to provide reserved legal activities. However, account should be taken of these risk factors.

We believe that the LSB should use its discretion to vary the rules that apply generally so as to regulate special bodies in a way appropriate to the sector. In particular, we propose that:

- Special bodies wishing to provide reserved legal activities should be required to employ at least one authorised person and be licensed.
- Given the particular ownership and governance structure of many special bodies, and that they are already regulated by the Charities Commission, we do not believe that it is necessary that an authorised person be on the board of trustees or similar
- For the same reasons, we do not believe an extension of a “fitness to own” / “fitness to govern” test is necessary beyond that required by the Charities Commission and / or Companies House, except that no member of the governing body should have been struck off or barred from practice by a legal regulatory body
- Where a special body does more than provide legal services, we do not believe it should be necessary for it to form a separate or subsidiary body to provide the legal services. There is not the same degree of risk of mis-use of client information (e.g. for cross-selling) that there would be in the corporate sector, and therefore

the protection of client information and confidentiality can be maintained by means of an information barrier within the organisation.

- Bodies should be required to nominate a Head of Legal Practice to ensure regulatory compliance. This person does not need to be on the governing body but should be of sufficient seniority within the organisation to be able to set and enforce the policy, procedures and structures needed to ensure compliance. Where client money is held, there should also be a Head of Finance and Administration, and the same would apply to them. These may or may not be the same person. We do not believe it is necessary for any particular qualification to be prescribed to the HoLP and HoFA; that would be a matter for the licensed body to determine and to justify to the regulator. Fundamentally, we believe, compliance should be a matter for the body as whole rather than any one individual within it, and therefore the duty should rest with all managers and employees, not just the HoLP and HoFA.
- Licensed special bodies should be treated as ABSs able to provide reserved legal activities to the public, and able to charge for services where appropriate. We believe there is a real access to justice issue at the moment where clients are not eligible for legal aid but can not afford the charge-out rates of private practice; were special bodies permitted to charge (they are currently prevented from doing so by rule 13 of the Solicitors Code of Conduct) they would be able to set substantially lower rates than private practice and fulfil substantial unmet need

There is a particular issue around the regulation of non-reserved legal activities. Where an organisation provides non-reserved legal activities but not reserved legal activities, there is no obligation on them to be licensed or regulated. There is no proposal, so far as we are aware, to extend regulation to such bodies.

Where (currently) private practice or (in future) an LDP / MDP / ABS provides reserved legal activities, its non-reserved legal activities are also regulated. The separate businesses rule prevents the division of reserved and non-reserved legal activities into different businesses to avoid regulation of the non-reserved activities.

The current position in the not for profit sector is a reflection of the ambiguous state of regulation referred to at the beginning of this response. An organisation as a whole is not regulated. Solicitor employees are personally regulated whether they provide reserved or non-reserved legal activities. Non-solicitor employees are not regulated in the provision of non-reserved activities; where they provide reserved activities under the supervision of a solicitor, it is the solicitor who is regulated.

Therefore, in private practice, all activities are regulated, and this will continue under the new licensing regime. In NfPs that do not employ solicitors, no activities are regulated, and this will continue under the new licensing regime.

In NfPs that do employ solicitors, all reserved and some non-reserved activities are regulated. This position is confused and opaque; we do not believe clients would be aware of this, or would understand why it is as it is.

However, whichever solution is adopted is not ideal. To extend regulation to all legal activities of licensed special bodies would place an additional regulatory burden on them, which would involve additional cost burdens in an already fragile sector. It is not clear that clients have been exposed to particular risk justifying an extension of regulation to an area currently unregulated.

On the other hand, to reduce regulation so that only reserved activities are regulated creates another, if different, artificial dichotomy between private practice and the NfP sector, in that non-reserved activities of solicitors would be regulated in private practice but not in the NfP sector. That does not remove the anomaly, it merely moves it, and would not result in any additional clarity for providers or clients.

From the point of view of the client, clarity would suggest that the scope of regulation end at the extent of a licensed body, rather than the work of an authorised individual, i.e. part-way through a licensed body. We consider that a client would expect that if a body is regulated in the provision of legal services, it is regulated in the provision of all its legal services, and a distinction between reserved and non-reserved activities would be illogical and confusing. Therefore, clients would see a distinction between regulated and non-regulated bodies, rather than regulated and non-regulated activities or individuals within the same body.

On balance we therefore consider that a licensed body should be regulated in the conduct of all its legal services activities. Given a programme of public information by the Legal Services Board, clients could be educated about what to expect from licensed bodies and the fact of being licensed – and therefore offering greater client protection – could be taken into account by funding bodies in weighing up bids for funding. Thus licensing and regulation could be a benefit for both the client and the organisation.