Introduction

The Prisoners Advice Service (PAS), launched as an independent charity in 1991, is the only charitable organisation in the UK with a specific remit to provide free legal advice and information to adult prisoners in England and Wales. It provides advice and assistance in particular on the application of the Prison Rules and conditions of imprisonment.

PAS does not accept Home Office or Prison Service money as this may affect our independence. We receive most funding from charitable trusts and foundations.

PAS is a "special body" within the meaning of the Legal Services Act. We employ solicitors (currently 3) to provide reserved legal activities to prisoners in England and Wales, through legal aid contracts in prison and public law. We also employ non solicitor advisers (currently 2) to provide litigation and advice services. We run an advice line on Monday, Wednesday and Friday and have the assistance of up top 12 volunteers per week to assist in responding (under supervision) to letters form prisoners in England and Wales on issues of prison law. We do not provide other non legal services, such as commercial activities.

PAS does not conduct litigation on behalf of client's to make money. We have a LSC contract in both prison and public law and the legal aid element to our work provides costs protection to our clients. We do not undertake conditional fee arrangements and so are not affected by the proposals

around ‘success fees’ contained in the Legal Aid Sentencing and Punishment of Offenders Act 2012 (section 44)

Out trustee Board (‘Management Committee) currently consists of 8 people (2 of whom are lawyers). They provide their time voluntarily, meeting quarterly as well as attending an AGM yearly. They are not paid and derive no commercial benefit from their role at PAS.

Consultation Questions

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

We are pleased that the LSB recognise the broad range of regulation that the Not for Profit sector already face, including the Charities Commission, the Legal Services Commission and Companies House, as well as (in some cases) membership bodies such as the Law Society. The Legal Services Commission whilst not strictly a regulator but a ‘purchaser’ of services is concerned with the quality of legal advice provided to the public to the extent that value for public money is obtained. This entails assessing the suitability of tenders for legal service contracts, audits and the obtaining of a quality mark (either SQM or LEXCEL).

Insofar as NfPs carry out reserved legal activities, they must employ solicitors or other lawyers to do so and those solicitors are regulated as individuals by their appropriate legal regulator (the SRA). However, the entities that employ them are not. 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.

It does seem 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 rather the regulation of some individual employees. PAS does not believe that it is necessarily clear to clients of legal and advice services whether and to what extent the services that they receive are regulated, nor that their expectations of the protection they should receive differ according to the type of agency they access.

PAS would also question the appropriateness of retaining the current system of regulation where the burden falls 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. Tensions may also arise between their regulatory and employment obligations though this risk is likely to be militated given that 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.

PAS hopes that the LSB proposals will bring greater clarity in the regulation of legal services in the not for profit sector. As far as the client is concerned, it is essential that any proposals should bring about greater client understanding of how the services they receive are regulated.

PAS accepts that the responsibility for regulatory compliance – and therefore protection of the interests of clients –should fall on both the agency and the individual solicitor. The solicitor must of course 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.

PAS therefore has no objection to entity based regulation in principle being extended to the not for profit sector, and that special bodies should be required to be licensed. With that in mind however we are very concerned to ensure that any new regulation should be proportionate to the risks the organisation – and the sector as a whole – presents, both in terms of cost and the requirements imposed. In particular we have not seen any evidence submitted to suggest that quality of advice is an inherent risk in the sector. There will of course be some agencies and individuals whose quality of legal advice is below the standard expected, but there has been no evidence provided to suggest that this is a particular concern in the NfP sector as compared to say private practice

The LSB has identified some gaps in the existing regulatory structure, though some of them are less of a concern than may appear. For example, the LSB has raised the issue of the LCF not requiring indemnity insurance – but this is already a requirement by the SRA and certainly as far as LSC contracts are concerned, NfPs like PAS are required to have indemnity insurance in order to tender and be awarded LSC contracts for legal advice work in the same way as private firms are. In PAS case, as a charity we are required to have professional indemnity insurance coverage of £1million.

However, there are issues with the current system. The LSC is primarily concerned with budgetary control and its accountability to government rather than a regulator concerned with the consumer focus per se. Also the potential failings in the current system can be seen in the collapse of Refugee and Migrant Justice and the Immigration Advisory Service, two organisations that between them did over half of legally aided asylum work in England and Wales. When they collapsed there was no equivalent of an SRA intervention to protect the interests of their clients and many clients were unable to access their files for some months. There was real and significant consumer detriment to a particularly vulnerable group.

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

Should we delay the decision 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?

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 or consumers that use special bodies / non-commercial organisations?

It seems to us that the end of the transitional period under s23 LSA is inevitable at some point. The real question is the timing. In deciding this we would ask simply that the LSB have regard to the diversity of the not for profit bodies that will need to be licensed and the potentially serious constitutional and structural changes such organisations will need to make.

We would also not favour the making of all legal advice a reserved activity and would like to await a decision on whether general legal advice will be deemed a reserved legal activity before commenting further. However this is clearly a consideration as to when the transitional period should end (currently mooted as April 2014) given that if general advice were to be included this would increase significantly the number of organisations that would have to be licenced. However, whatever the outcome of that putative consultation, both it and (if it was decided to extend reservation) the subsequent legislative and regulatory amendments would be a very lengthy process, presumably several years.

PAS' constitution does not allow it to charge for advice and so we do not take a view as to whether there is a need for some of the restrictions on the operation of solicitors in NfPs that currently exist in SRA rules (charging for advice being a prime example) nor do we take a view on the LSB proposal that the prohibition on charging should be removed immediately.

While PAS accepts entity regulation is inevitable and in some ways welcome for the NfP sector, PAS is keen to stress that regulation must be proportionate to the nature of NfPs and the risks they represent. The current licensing regime of the SRA does not seem to us to be appropriate for regulation of special bodies. It would appear any potential regulator including the SRA has significant work to do before a licensing regime fit for the NfP sector and proportionate to its risks emerges. This would seem to accord to views of the LSB itself given that no licensing regime has yet been approved.

Any regulatory regime of NfPs must not be overly complicated given the NfP sector contains, like PAS, a number of small organisations, who would be overwhelmed by a complex and lengthy regulatory framework.

With the above in mind it seems that the April 2014 date is unrealistic. If it is, the LSB should say so clearly now, and commit to fixing a future date that will give the sector at least two, preferably three, years notice. Once that date is definitively fixed; there should not be further slippage of a few months at a time.

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?

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

PAS because of its constitution and the type of advice and law practised does not hold a client account but we are required to account for our work to the LSC – who scrutinise it extremely closely – to the Courts and to opponents when inter partes costs are awarded. Clients of solicitors in NfPs have the full range of protections available to clients of solicitors in private practice; all that is different is that it is only the solicitor as an individual

who is held to account but that presents no difference in practice since the solicitor is insured in the same way.

Do you agree with our analysis of group licensing?

We agree with the LSB's analysis of the Act, and would add further that it is clearly envisaged that there be a relationship between the managers of a body and the HOLP / HOFA on the one hand and their regulator on the other. That relationship would be of a rather different character if there was another organisation in between.

There is of course nothing to stop a membership organisation applying to become a full licensing authority and it could then licence its members. However, in doing so it would be required to carry out additional steps such as clearly separating its membership / representation functions from its regulatory functions as for example the Law Society and Bar Council have done with the SRA and BSB.

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

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

We agree with the LSB's proposals at para 49, with one reservation.

The LSB refers to Schedule 13, which discusses the role of "managers". In the NfP sector, "managers" are members of the governing body – management committee, or in our case Board of Trustees.

NfP trustees are by and large unpaid volunteers. They have already complied with a "fit and proper persons" test from the Charities Commission to be allowed to act as trustees. To require it again seems to be unnecessary duplication.

Similarly, the obligations on "managers" seem to be directed at those with a financial stake in the organisation or with a significant say in its day-to-day

running. Neither of those applies to many trustee boards – day to day running of the organisation, working practices and decision on casework are made by employees not trustees. There is a risk that the additional obligations could deter people from volunteering to act as trustees.

The involvement of unpaid volunteers in the nominal ownership and strategic oversight of the organisation is standard for the not for profit sector. In our experience, for such a structure to work well there has to be a clear division of responsibility between the members of the body similar to our Management Committee and the employed staff. The Management Committee should set strategic objectives for the organisation and, through the consideration of regular reports, ensure that these are being pursued. Applying this to PAS's legal work, while our Management Committee defines the areas of law and issues that should be a priority for the whole organisation, it is the employed staff that decide which cases to take on to give effect to those priorities. We then report on the progress of those cases to the Management Committee. The Management Committee should also exercise particular oversight of the organisation's finances. In PAS' case the Management Committee approves our accounts each financial year and reviews our performance against the accounts and budgets.

We would be concerned if the regulatory arrangements put in place for NfPs such as PAS once the transitional period under section 23 LSA ends should put this type of governance structure under threat. We can see this happening in several ways:

(i) The requirement that the "managers" (within the meaning of section 207 LSA) of a not for profit body be subject to approval may act as a significant disincentive to those considering putting themselves forward as members of a management committee. The SRA's existing rules for ABSs make anyone who is the manager of an ABS within the meaning of section 207 LSA (other than a practising solicitor) subject to the SRA Suitability Test. The test itself applies the standards that would be required of someone seeking admission as a solicitor, with a number of additional

requirements relating to disqualification from involvement in charities or companies and to insolvency. While on one view this might seem entirely reasonable – why should someone involved in the management of an organisation providing legal services be subject to less stringent standards than the lawyers directly acting for clients – the information that will inevitably be required to allow the test to be applied will be viewed by many as intrusive. Many people may take strong objection to having to fill in a lengthy form in order to take up a voluntary post, even if there are no grounds on which they might fail the suitability test. In our view the information required of prospective managers of an NfP and the grounds for refusing approval should be the minimum necessary. Moreover, arrangements should be put in place that would allow new managers to take up their position on a temporary basis pending formal approval. So int he case of an organisation like PAS, we are actively seeking, because fo the nature of our servcie, to have ex-prisoners on its Management Committee Board. Any 'fit and proper' test should take this into account in terms of definition and the availability of the waiver in certain regulatory requirements such as schedule 13. This would allow organizations like PAS to have on their Boards members from less 'traditional' routes.

(ii) The obligations placed on "managers" may also have a detrimental effect on prospective managers' willingness to become involved in NfP. The LSA itself imposes a number of obligations on the managers of an ABS including the obligation under section 90 not to do anything which causes or contributes to a breach by the organisation or the lawyers employed by it of the regulatory obligations placed on them. In addition to the requirements in the Act the existing rules for commercial ABSs promulgated by the SRA create many further obligations and the SRA Handbook is notoriously long and convoluted. Again, while each requirement placed on the manager of an ABS may itself be reasonable, the cumulative effect of the requirements and, perhaps more significantly, the fear that a manager may fall foul of them is likely to prove a significant disincentive to taking on the unpaid, voluntary role of a manager within a NfP. This is especially the case with

lawyers in the Board where failures may have consequences for their professional standing and even ability to practice. Accordingly the obligations placed on those involved in the strategic oversight of an NfP should in our view be kept to a minimum and proportionate to the organisation.

(iii) The division of responsibility between "managers" and employed staff may become blurred. We consider that it is important that our Management Committee exercise strategic oversight of the work of PAS but does not become involved in day-to-day management of the organisation. Any suggestion that Managers may be personally liable for failings of the employed staff of the organisation runs the risk of interference in the organisation's work. This possibility is reinforced, in our view, by the use of the word "manager" in the LSA to describe those who may in reality have very little to do with the day-to-day management of the organisation. The concept of a "manager" suggests a hands-on approach, not, for example, the arm's length oversight role that our Management Committee performs. Perversely, placing considerable responsibilities on the managers of an NfP, particularly those who are not themselves lawyers and will not therefore be trained and experienced in professional ethics, may have the effect of diluting the protection afforded to the organisation's clients.

Given these risks and given that Board members of NfP's are typically unpaid volunteers, PAS considers that the regulatory arrangements for ABSs should clearly distinguish between those who are involved as managers in a commercial ABS for profit and those involved as public-spirited, volunteer Board members in NfP bodies. As light a burden as the LSA permits should be placed on the Board members of a NfP such as PAS, while the primary responsibility for ensuring compliance with regulatory requirements should be placed on the body's employed members of staff.

In terms of licencing rules there is an understandable importance placed on employed staff for ensuring compliance with regulatory requirements. It

follows that the HoLP and HoFA roles will be important internal functions. And whilst we see no reason why these roles should be in any way diminished in NfP's, it makes no sense for an organsiation like PAS, which does not hold client money, to have to have a HoFA.

A further significant issue is the definition of legal activity and the extent to which such activities would enter the regulated sector. This is an issue for NfPs in a way it is not for private practice by virtue of the work we do. For example, at PAS, our work comes under:

- Reserved legal activities
- Generalist information by telephone and letter with no casework or follow-up element

The work that our helpline does will often consist of information provision, signposting and referral to other agencies and some one-off legal advice with no ongoing casework. That may well be "legal activity" within the meaning of s12 of the Act, but to what extent is it contemplated that that is regulated?

Guidance needs to be given as to where the boundary of legal activity is, and to what extent regulators can insist on particular delivery models or methods of supervision on that work which does fall within regulatory oversight. An outcomes focused regime for special bodies should take into account the particular nature of those bodies and the work they do.

Finally is the issue around the cost of any regulation. Judging by the information released to date on the licensing process by the SRA the costs both of the licensing application and the annual licensing fee appear high. In the case of special bodies, the fee should be set on the basis of the agency's ability to pay as well as the regulator's cost of regulation. If the costs or impact of regulation is disproportionate, it risks making the work uneconomic. Driving agencies out, or leading them to the conclusion that

they can not afford to be regulated and therefore can not afford to employ solicitors does not protect consumers, it leaves them worse off than they are now.

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