Consultation Response

Shelter's Response to the Legal Services Board Consultation: Regulation of Special Bodies / Non-Commercial Bodies

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www.shelter.org.uk

Shelter

Introduction

Shelter is a national campaigning charity that provides practical advice, support and innovative services to homeless or badly housed people. 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 funded by legal aid
- 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
- 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 20 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 telephone support to housing advisers, lawyers and others.

We employ approximately 40 solicitors and over 200 advisers providing legal services to the public.

Response to the Consultation

Introduction

Shelter is a "special body" within the meaning of the Legal Services Act. We employ about 40 solicitors to provide reserved legal activities (litigation and advocacy) to the public, almost exclusively through legal aid contracts. We also provide a wide range of other services, including specialist legal advice (non-reserved) and casework provided by non-lawyers, as well as generalist legal advice and intensive personal support. Our advice is provided mainly on housing law, but also welfare benefits, debt and community care.

When the transitional period ends, we will be required to become an Alternative Business Structure.

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 Citizens Advice and the Law Centres Federation. However, the latter two are only available to those who qualify for membership, and are representative as well as regulatory bodies. Of the others, only the Legal Services Commission is concerned with the quality of legal advice provided to the public and then only to the extent that value for public money is obtained.

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. However, the entities that employ them are not. In responses to previous consultations to the LSB and SRA, we have addressed this issue. In 2009, in response to the consultation *Wider Access, Better Value, Strong Protection* we said:

> 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

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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.

That remains our view, but we stressed then and stress again now that 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.

We have seen in draft the response of the Advice Services Alliance and endorse their comments (their paras 2.2 to 2.6) on the Frontier Economics research. In particular we do not consider that the evidence supports their assertion that quality of advice is an inherent risk in the sector. Of course, there are some agencies and individuals whose quality is not as it should be, but that is no more true of the NfP sector than it is of private practice.

The existing regulatory structure for solicitors in the NfP sector is unsatisfactory and confusing. In particular, it is confusing for the consumer who is likely to be unaware of the distinction between regulated and unregulated advice or understand that the degree of protection they have depends on the identity of the person giving the advice rather than the content of it or who they work for.

The LSB has identified some gaps in the existing regulatory structure, though we do consider that many of them are less of a concern than appears. For example, it is said that the LCF do not require indemnity insurance – in fact, this may not be a lacuna in their oversight of Law Centres but a deliberate omission in the knowledge that this is already required by the SRA and so would be a duplication.

However, we do consider that there are two significant issues with the current system, one of principle and one of practicality. The issue of principle is that each of the bodies mentioned in para 15 of the consultation paper has another role which is potentially incompatible with a role as a regulator of quality and practice; Citizens Advice and the LCF are also (perhaps primarily) representative bodies for their members rather than regulatory protectors of the consumer interest, while the LSC is primarily concerned with budgetary control and its accountability to government.

The practical issue was illustrated most starkly in the recent collapses 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. Yet 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 is inevitable at some point. For the reasons we have given above, we do not oppose its ending per se. The question is the timing.

It has been clear to us for some time that entity regulation for the NfP sector is coming, and that given the range and complexity of what we do that it would have a significant impact on us. We have, in reliance on the previous end dates of October then December 2013 invested resources in planning for an application which would take many months to be decided by the SRA and would involve us in significant organisational change.

Taking a purely preliminary view and without considering in detail any future consultation, we would not favour the making of all legal advice a reserved activity. 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. We are not able to predict how lengthy but presumably it would be a question of several years.

We do not see the 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). It seems to us that they are a historic relic from the battles of the 1970s over whether solicitors should be allowed to practice from Law Centres and the like and the vestiges of protectionism of private practice. We favour the LSB's view that the prohibition on charging should be removed immediately; if there were to be a delay in ending the transitional period, that becomes even more imperative, since it prevents us from fully developing and implementing innovative ways of working that would help us in the future strained funding environment.

The logic of our answer to the first question is that the transitional period should be ended on the proposed date of April 2014 and not postponed further. Certainly if it were to be substantially postponed we would have needlessly invested considerable resource in advance planning.

However, what is absolutely key is that there has to be certainty. Over the last year or so, the end date has slipped three times, each time by a matter of months. Either it should not slip further and the date of April 2014 should be the final date; or the LSB must clearly state that it will not end until a clear fixed date in the future, which presumably can not be before 2017 or 2020 if it does not end until all legal activities are reserved (if they become so). What is imperative is that there be certainty allowing us properly to plan for entry into the regulated sector, a process that will inevitably take two years at least (given the SRA's timescales for considering an application and the volume of information required). So if the transitional period is to slip further, a realistic fixed date should be set with at least two years notice.

While we take the same view we always have, that entity regulation is inevitable and in some ways welcome for the NfP sector, that regulation must be proportionate to the nature of NfPs and the risks they represent. The current licensing regime of the SRA, and what we have been told of its contemplated approach to us, does not seem to us to be appropriate for regulation of special bodies and we believe both the LSB and the SRA, or any other potential regulator, has significant work to do before a licensing regime fit for the NfP sector and proportionate to its risks emerges. That being the case, it seems likely to us 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. That date should not be fixed until it can be 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?

The risks of NfPs charging for advice are no different to those of private practice. We already hold a client account and are regulated by the SRA in doing so; we account for our work to the LSC – who scrutinise it extremely closely – to the Courts and to opponents when inter partes costs are awarded. Charging for advice is no different as a process; all that changes is the identity of the payer. 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.

The existing restriction prevents innovative ways of working being developed across the sector to compensate for restrictions in legal aid and other funding. It also arguably prevents agencies working for other organisations and offering a second tier consultancy or outsourced model, since those organisations constitute a section of the public.

We can see no argument for its continued retention and agree that it should be removed immediately.

As regards the separate business rule, it is not entirely clear in what circumstances a permitted separate business would operate. But we certainly agree with the principle of case-by-case regulation rather than blanket bans on operating models.

Do you agree with our analysis of group licensing?

We agree that group licensing should not be permitted. 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.

A further issue that the LSB should consider is competition. There should be a level playing field in the NfP market as in any other. But the reality is that the only organisation likely to be able carry out group licensing is Citizens Advice. If they were able to use part of their very large government subsidy to manage all CABx relationships with their regulator (and potentially provide outsourced back office and regulatory compliance functions?), that would give those CABx a significant competitive advantage as against other NfPs. As contracts in legal aid and other areas move towards a price competitive tendering model, there is an argument that that is an unfair advantage and may even

amount to state aid. We are far from experts on competition law, but this is an issue that the LSB should consider before it allows group licensing.

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.

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 Shelter, our work comes under four main headings:

- Reserved legal activities
- Specialist legal advice consisting of non-reserved legal activities
- Generalist advice by telephone with no casework or follow-up element
- Intensive personal support

Currently only the first of these is done by or under the supervision of solicitors.

A support worker will work with a client or a family to help sustain them in their housing. This might include helping with children's schooling, arranging medical needs, helping with skills and training, helping with the management of anti-social behaviour, supporting victims of domestic violence, and so on. But it might also incidentally include work around legal advice and entitlements. Is explaining the legal requirement to attend school a legal activity? Is helping someone apply for welfare benefits? Is explaining to them what a tenancy is and what it means for them, or what the terms of their particular tenancy are? These are all matters of law and arguably caught by s12 of the Act. But to bring them within the regulated sector, with all that that means, would involve significant organisational change. More importantly, it would significantly change the relationship between the support worker and their client. It is not a lawyer / client relationship and should not become one.

The work that our telephone helpline does consists of information provision, signposting and referral to other agencies (including specialist advisers in Shelter) and some one-off legal advice with no ongoing casework. That is more clearly "legal activity" within the meaning of s12, but to what extent is it contemplated that that is regulated? In our initial discussions with the SRA, it has been indicated to us that they would expect all legal advice work to be under the oversight of solicitors. That would significantly increase our costs in carrying out work, as would requiring the full might of the SRA Handbook to be imposed on that work.

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. The traditional approach a regulator has taken to its "mainstream" bodies may be one with which it is familiar and comfortable, but it should not draw from that the conclusion that that is the only way in which compliance can be demonstrated.

A further issue is the cost of regulation. Judging by the information released to date on the licensing process by the SRA (which is disappointingly little), 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.