Public Law Project Response to the Legal Services Board consultation on the regulation of special bodies/non commercial bodies that provide reserved legal activities

Introduction

The Public Law Project (PLP) is an independent legal charity, set up in 1990 with the key aim of improving access to justice for the disadvantaged. We discharge our charitable objectives through four distinct strands of work; casework, policy, research, and training.

We employ a small team of solicitors (headed by two Principal Solicitors), a Research Director (a non-practising solicitor) and an Events/Training Manager, supported by a small administrative/finance team. The running of PLP is overseen by a voluntary management committee which includes practicing lawyers, voluntary sector advocates/campaigners and academics, responsible for ensuring that PLP properly discharges its role as a charity and as a company under the Company Acts. Our current patron is Sir Henry Brooke.

PLP is a not for profit agency ("NfP") and a "special body" within the meaning of the Legal Services Act. PLP's employed solicitors provide reserved legal activities to the public, predominantly by way of our legal aid contract (we hold an LSC contract in public law) but may also act *pro bono*, or on a Conditional Fee basis. In addition we provide a wide range of other services, including legal advice (non-reserved), generalist advice, conducting and publishing empirical legal research, and running CPD accredited training and conferencing.

The focus of our casework team is on strategic litigation; we aim to take forward cases to test or develop the law to improve access to justice to the benefit of disadvantaged groups. We are a specialist practice, and do not have a significant caseload, but the cases we do bring tend to be complex and/or to conclude in the appeal courts. The majority of our cases are issued in the High Court as judicial review claims.

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

Summary

We are grateful to have been provided with a copy of Liberty's response to this consultation and generally endorse the comments made therein.

We recognise that the forthcoming changes offer a positive opportunity to develop a regulatory regime that recognises the particular needs of the not for profit sector and we welcome the LSB's stated commitment to the development of a regime that is targeted and proportionate, and which does not impose unnecessary cost or complexity.

In this respect we would refer the LSB to the concerns expressed in the roundtable meeting with NGOs on 12 July 2012. We gratefully acknowledge the generally positive response to those concerns, and look forward to a continued dialogue. We also express gratitude for the LSB's willingness to extend time for the submission of responses to the consultation to permit PLP to supplement its expressed views in writing.

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?***

PLP is not subject to entity regulation as a provider of legal services, but is otherwise subject to a wide range of regulation/quasi-regulation and quality control under existing frameworks. PLP's employed lawyers are subject to stringent personal regulation by their professional body (Law Society, now Solicitors' Regulation authority).

Whilst we do not oppose entity regulation per se, we do not consider the examples cited by the LSB as indicative of gaps in current frameworks (at paragraph 15) to be particularly good ones. For example, there is simply no need for the LCF to impose an insurance requirement. Such a requirement exists further to SRA requirements for the provision of services to members of the public. Equally a standing Citizens Advice *requirement* to have a solicitor would obviously be disproportionate for the many bureaux that do not engage in regulated legal activities and only provide general advice through lay volunteers.

The LSB notes the lack of LSC procedures for managing supplier insolvency. This concern presumably arises in the particular context of the recent collapse of Refugee and Migrant Justice and the Immigration Advisory Service. When those organisations went into administration there was no equivalent of an SRA intervention to protect the interests of their clients (an inherently vulnerable client base) many of whom were unable to access their files for some months.

However the vast majority of work undertaken by RMJ and IAS, although legally aided, was work within the tribunal system and thus not reserved legal activity. It is understood that litigation files in those organisations were transferred to other practices further to RMJ/IAS solicitors' individual obligations, and that the significant problem of access largely arose in the context of other files. It is not clear to us the extent to the kind of entity regulation of providers of reserved legal activities now proposed would necessarily address the risk of recurrence. Whilst we express no view within this response on the possibility of extending regulation to include the provision of general legal advice, it would clearly be in consumers' interests if such a situation as occurred with RMJ/IAS could be avoided in future.

We are not aware of evidence supporting the assertion that quality of advice is an inherent risk in the non-commercial sector. Whilst there may well be agencies and individuals whose quality is not as it should be, that is no truer of the NfP sector than it is of private practice. Indeed one might argue that the ideology in place of a profit motive characteristic in lawyers who chose to work in the NfP sector is a factor likely to mitigate in favour of increased quality.

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?

We consider that the transitional period should not end before April 2014.

We do not object to the ending of the transitional period per se, but our concern is that the transitional period should not end before an appropriate regulator has been an identified, an appropriate set of rules has been developed (in close conjunction with the sector) and a clear and achievable timetable for implementation has been developed.

As no suitable regulator for the NfP sector has yet been identified, even the April 2014 date appears likely to be unrealistic, and it is therefore unclear to us on what basis this date continues to be the preferred option of the LSB.

We have seen Shelter's response to this consultation (albeit in draft), and endorse the call for certainty expressed therein. In this regard we are pleased to note the LSB's impact assessment recognises the potential for delays to cause uncertainty for non-commercial providers, and to impact on strategic decision-making. We would encourage the LSB not to unintentionally aggravate such impact by further unrealistic timetabling. We would be grateful for realistic and definite timetabling going forward from this point on.

PLP has yet to form any organisational view on the possibility of a proposal to extend regulation to currently unregulated activity, but would endorse Shelter's concern that the potential impact of any such proposal on current NfP providers of general legal advice needs to be very carefully considered. As above, we do not consider that the LSB has made good its case that current users of regulated activity provided by NfPs have less protection, in any practical and meaningful sense, than mainstream legal services consumers such as to *require* a more rapid removal of transitional protection.

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?

PLP agrees with the LSB that there is no valid policy rationale for the SRA's blanket restriction on charging in the NfP sector. On the contrary, and whilst PLP has no immediate plans to charge for services, we consider the restriction prevents innovative ways of working being developed across the sector which may help to compensate for existing and anticipated restrictions in the legal aid budget. Such a rule may also limit the flexibility of second-tier organisations (such as PLP) to offer services to the organisations they seek to support.

In addition, the restriction (when considered alongside the indemnity rule) has the potential to complicate an NfP's ability to enforce the recovery of fees from an unsuccessful Defendant pursuant to an otherwise appropriate CFA. This causes unnecessary complexity/uncertainty, and is a potential barrier to access to justice.

The risks of NfPs charging for advice are no different to those of private practice (and again, the lack of a profit motive might be credibly argued to be a factor that in fact reduces risk). PLP has a client account and are regulated by the SRA in doing so; we account for our work to the LSC, 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.

Even under the transitional arrangements there is no meaningful difference in the regulatory protection of a client of a solicitor employed by an NfPs to a client of a solicitor in private practice. Individual as opposed to entity regulation makes no difference to a client in practical terms, not least because both solicitors will be similarly insured.

Therefore we can see no argument for the continued retention of the rule and favour the LSB's view that the prohibition on charging should be removed immediately. We support the LSB's efforts to liaise with the SRA to this effect.

As to the proposal for separate business structures, we see no reason in principle to object to case-by-case regulation rather than blanket bans on operating models.

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 broadly agree with the LSB's proposals at paragraph 49, save for the concerns as to the consequence of Schedule 13 which were discussed in some detail at the meeting on 12 July 2012.

In particular, PLP is concerned by the implications of Schedule 13, which considers the role of "managers" within the meaning of s.207 LSA. In the NfP sector, "managers" are members of the governing body (in PLP's case our voluntary management committee (MC)).

The intention of the imposition of obligations on "managers" is to target directed at those with a financial stake in the organisation or with a significant say in its day-to-day running. They were not formulated with unpaid boards in mind. Within PLP, the day to day running of the casework department, development of working practices/procedures and decisions on individual cases are made by PLP's employed lawyers, not by trustees.

Any scheme of regulation must distinguish between those managing a commercial ABS with a view to their own profit, and those volunteering in an unpaid capacity to further the charitable or otherwise public-spirited aims of an organisation.

PLP considers that the primary responsibility for discharge of regulatory requirements should rest with qualified employees further to clearly defined job descriptions.

There is a risk that the imposition of additional obligations could deter potential trustees. The risk of deterrence applies both to lay people (who as non-lawyers looking to bring their particular skills and experience to a trustee board may be understandably unwilling to assume the liabilities of a "manager" of an ABS) and qualified lawyers and accountants, whose professional tendencies towards risk aversion are likely to mean that they shy from a voluntary role which could in theory (however remote) have consequences for their own practice.

Perversely, the consequence of such regulation can be anticipated to be an increased risk to consumers, in that it can reasonably be anticipated that fewer risk-conscious individuals will take up trustee roles, and/or that individuals without training in law or professional ethics will consider themselves bound to seek to influence day to day decisions made by lawyers (who, as now, will continue to be regulated).

The goodwill of voluntary Management Boards should not be taken for granted. We are a reputable and respected legal charity, yet even now it is not easy for us to recruit and retain trustees. We are concerned that recruitment difficulties in the sector will only increase in the absence of a proportionate approach, and clear indications as to the expectations on

voluntary boards. This would certainly be the case if the prior approval requirement were not waived.

We also echo concerns expressed at the meeting on 12 July that the fit and proper test should not be permitted to operate so as to preclude organisations from recruiting trustees representative of their client base or of disenfranchised groups generally (such as ex-prisoners or drug users) who might not traditionally be regarded as 'fit and proper'.

It goes without saying that the cost of entity regulation must be kept under strict review and must not be permitted to impact disproportionately on the NfP sector.

Finally, the meeting on 12 July also touched upon the possibility that (despite provisions designed to prevent conflict of regulation) such conflict might exist, in which case entity regulation would prevail over individual regulation. The LSB should appreciate that such preference does not answer the needs of individual solicitors working in special bodies. They must a) be subject to such a regime as to enable them to act with full confidence in the discharge of their professional obligations and b) able to change employer freely. Insofar as they relate to individuals, substantive differences in entity regulation of NfPs compared to private practice must not be permitted to operate in such a way as to have the consequence of restricting the ability of members of the profession to move between the NfP sector and private practice.

Public Law Project

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