



Alternative business structures: approaches to licensing

The response of the Advice Services Alliance to
the Legal Services Board's consultation paper

February 2010



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 U.K. Full membership of ASA is open to national networks of independent advice services in the U.K. Currently, our full members are:
 - adviceuk
 - Age Concern and Help the Aged
 - Citizens Advice
 - DIAL UK, a division of SCOPE
 - Law Centres Federation
 - Shelter
 - Shelter Cymru
 - Youth Access
- 1.3 Our members represent some 1,750 organisations in England and Wales which provide a range of advice and other services to members of the public. About 200 of these organisations currently employ a solicitor.
- 1.4 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. With some limited exceptions, services are offered to users free of charge and are focused on areas of law which mainly affect poorer people e.g. welfare benefits, debt, housing, employment, immigration, education and community care.
- 1.5 For more detailed background information about the advice sector we refer you to our response to the discussion paper "Wider Access, Better Value, Strong Protection".
- 1.6 A draft of this response was sent to appropriate member networks (adviceuk, Citizens Advice, Law Centres Federation and Shelter), and we have discussed its content with some of them. However, please note that this response does not necessarily represent any individual member's view.
- 1.7 The focus of this response will be on the impact of your proposals on Special Bodies, in particular on those Not for Profit (NfP) organisations which carry out reserved legal activities. This response deals with each consultation question in turn.
- 1.8 Before responding in detail to the consultation, we would point out that the terms used do not translate well to the NfP sector. For example, NfP organisations do not have "owners" or "non-executive directors". We suggest that, in order to avoid ambiguity and uncertainty, any guidance to Licensing Authorities (LA) on the regulation of Special Bodies should use appropriate terminology.

2 Response to questions

Question 1: What is your view of basing the regulation of ABS on outcomes?

- 2.1 We accept that a set of outcomes or principles provides a valuable framework for regulation and agree that all LAs should have the same core outcomes.
- 2.2 However, broad outcomes can not always provide sufficient protection for consumers. In our view, clear and detailed rules will be required for dealing with certain issues such as the holding of client monies, conflicts of interest, confidentiality and disclosure. We question the wisdom of allowing organisations flexibility in relation to these matters.
- 2.3 Indeed, in our experience, clear detailed rules can save time for providers. In practice, the absence of clear rules can be time-consuming as more resources can be expended on working out the "right" course of action particularly when balancing conflicting principles or outcomes.
- 2.4 It seems to us preferable that each LA is required to have detailed rules concerning core matters relevant to consumer protection.
- 2.5 The proposed outcomes, on the whole, appear to be sensible.
- 2.6 We agree that consumer protection and redress for those using Special Bodies should be equivalent to those using mainstream ABS. However, as is recognised, it may not be appropriate for the requirements to be identical.

Question 2: Do you think our approach set out to the tests for external ownership is appropriate?

- 2.7 As we have already stated, the use of the term "owner" is unhelpful in relation to Special Bodies.
- 2.8 We agree that the same test for external ownership should apply across all LAs and consider that directors/trustees of NfP organisations which provide regulated legal services should meet the same qualifications as to criminal convictions and disciplinary action as ABS owners.
- 2.9 However, we note that Schedule 11 Legal Services Act, Section 9 (2) requires that at least one of the licensed body's managers must be a person who is an authorised person in relation to the licensed activity. While we agree that this is desirable for NfP organisations which are regulated, we are concerned that it may not be possible for all NfP organisations to achieve this. For example, there are areas of the country where it is difficult to recruit solicitors to give up their time on a voluntary basis to contribute to the management of NfP organisations. We therefore suggest that, on a case by case basis, LAs should be able to exempt Special Bodies from this requirement.

Question 3: Do you have views on how indemnity and compensation may work for ABS?

- 2.10 We agree that indemnity and compensation are important topics and that users of Special Bodies should have adequate coverage.

2.11 However, we do not believe that a minimum requirement for £2m insurance for any one claim is at all sensible for most NfP organisations. Most NfP providers advise poor people whose cases have relatively low monetary value (although often significant personal impact). We therefore strongly support the exploration of alternatives as set out in your paragraph 150. From an NfP point of view, the following are sensible ways forward:

- a requirement for organisations to demonstrate that they have sufficient cover
- minimum cover based on activities carried out (although in certain areas of law, such as housing, it is possible that NfPs conduct cases of lesser value than other providers)
- cover based on average value of transactions.

We would not support minimum levels of cover to be based on the number of fee earners (or turnover of the ABS for licensed activities) as it is very unlikely that, in the case of NfPs, these are related to the risk.

2.12 As far as run-off insurance is concerned, we are aware that some NfP organisations have purchased such insurance when they have closed following loss of funding. Our understanding is that it still isn't always possible to purchase run-off insurance in advance - that premiums must be paid annually. Therefore, organisations have to stay in existence for 6 years after they have ceased to provide services. This can be burdensome for those who take responsibility for properly closing down an organisation and can involve additional expense e.g. managing and accounting for any remaining finances, lodging reports with Charity Commission. The option of purchasing run-off insurance with a one-off payment in advance would be more convenient for some organisations and offer better consumer protection.

2.13 We support proper protection for consumers when lawyers act dishonestly and agree that there should be a compensation fund. However, it would not be appropriate for Special Bodies to join with ABSs to form an ABS-only compensation fund. The contribution of NfP organisations to any compensation fund should reflect the risk that they present. The amount of money involved in any NfP fraud is likely to be significantly less than in commercial ABSs.

Question 4: Do you agree with our position on reserved and non-reserved legal activities?

2.14 We agree that commercial ABSs should be treated in a consistent way to non-ABS solicitors firms and that all legal activities undertaken by them should be regulated.

2.15 However, we have some concerns about the impact of this on some of our members, particularly those which offer a range of services (legal and non-legal) to disadvantaged people.

2.16 We agree that where a charity has a distinct legal/advice team or department (which conducts reserved legal activities), all of their activities should be regulated. However, some charities provide other services which are not legal services, but where incidental advice provision might take place.

2.17 For example, a charity might provide a distinct service which provides nutritional advice to people suffering from a particular illness. Staff employed by this service might occasionally provide advice about welfare benefits entitlement in order to ensure that their users have sufficient money to buy the food that they need. We are

concerned that it would impose a disproportionate regulatory burden on the charity to treat such a service as regulated and the responsibility of the HoLP.

- 2.18 We therefore believe that this issue needs to be further explored as it impacts on Special Bodies. One option would be for LAs to be given the discretion, on a case by case basis, to relax this requirement for some NfP organisations. We would expect that LAs would want to be satisfied that those staff providing advice which is incidental to their main work are aware of the limitations of their role.
- 2.19 We agree that consumer education is very important and that, at all times, consumers need to be informed about whether the service they are receiving is regulated or not - and what this means for them.

Question 5: Are the enforcement powers for LAs suitable?

- 2.20 As far as Special Bodies are concerned, we would not consider it fair for any proposed maximum penalty to be related to organisational turnover. As we have already said, many NfPs provide legal and non-legal services. We suggest therefore that any penalty should relate only to turnover from legal activities.

Question 6: What do you think of our approach to access to justice?

- 2.21 It is difficult to predict the outcome of the Legal Services Act reforms on access to justice. We accept that the reforms may lead to new methods of delivery and that these will be welcomed by some consumers of legal services. However, there is also a risk that new methods of delivery will make it more difficult for some people to access services. In particular, we are concerned that access to justice may become more difficult for those people who need face-to-face advice.
- 2.22 We agree that it is important for the impact of changes to be carefully monitored and analysed. Care should be taken to ensure that monitoring takes account of the needs of the most disadvantaged. We support the suggestion that LAs should publish annual reports on this issue.

Question 7: What is your view of our preference for a single appeals body?

- 2.23 Our current view is that it would be preferable to have one appellate body to hear all appeals against licensing authorities, as this would promote greater consistency.

Question 8: Do you agree with our approach to Special Bodies?

- 2.24 Whilst some of our members consider that a further 12 months after the start of mainstream ABS is sufficient time, some disagree.
- 2.25 As we have already indicated, further work will be needed to ensure that the regulatory framework is appropriate for NfP organisations. It will be important to ensure that guidance in appropriate language is produced for governing bodies of Special Bodies so that they understand what is required of them.
- 2.26 Licensing Authorities will not need to adapt their regulation for all special bodies – we anticipate that many will not require special treatment. However, as we have already identified, some requirements will need to be adapted for some Special Bodies on a case by case basis. These include:
- any requirement that *all* non-reserved legal activities should be regulated

- the requirement that at least one manager must be an authorised person
 - the qualifications necessary for HoLPs (see below)
- 2.27 Whilst some organisations will need special treatment, we consider that it is important that there is consistency about how this is done – there will need to be clear and transparent criteria for any adaptations.
- 2.28 We note the proposal that unregulated NfP organisations might opt for a voluntary agreement with the Office of Legal Complaints (OLC). This suggestion has not been supported by all of our members and needs further discussion.

Question 9: Do you think that our approach to HoLP and HoFA is suitable?

- 2.29 We agree that the role of HoLP is a particularly important one. In the context of NfP organisations, the HoLP will, amongst other things, provide consumer protection against undue influence by funders.
- 2.30 We agree that focusing on governance and compliance systems across the organisation is sensible. We also agree that HoLPs should report to the most senior level of management.
- 2.31 However, as we have already said, NfP trustee boards will need appropriate guidance material to enable them to exercise this role.
- 2.32 We agree that HoLP and HoFA should have to undergo a fit and proper test. Our one concern in this area is that there have been times when NfP solicitor organisations have struggled to recruit a 3-year qualified solicitor and have needed to apply for a waiver of this requirement from the SRA – often to enable them to employ someone with substantial pre-qualification experience but only 2 years' post qualification experience. We suggest that a similar provision may be needed for Special Bodies in the new licensing scheme.
- 2.33 We are sympathetic to the need for targeted professional training for HoLPs. However, it will be important that this training is relevant to the circumstances in which the HoLP will work. In our view, there will need to be specific training for those HoLPs who work for Special Bodies.
- 2.34 We strongly agree that the HoLP and HoFA could be the same individual and anticipate that this is very likely to be the case in many NfP organisations.

Question 10: Do you think that our approach to complaints handling is suitable?

- 2.35 Most, if not all, NfP organisations already have appropriate complaint handling systems – these are often required by funders and quality standards.
- 2.36 We agree that ABS (including Special Bodies) complaints should be handled in the same way as non-ABS complaints.

Question 11: What are your views on our proposed course of action to conduct research and, depending on the results, either compel transparency of data or encourage it?

- 2.37 It is difficult to anticipate the likely impact on diversity of these reforms. In our view the impact is likely to be complex.

- 2.38 We have no principled objection to the LSB asking for information about the diversity of the workforce in Special Bodies. However, it is important that such research does not impose too much of a burden on scarce resources in the NfP sector.

Question 14: Should ABS licences be issued for indefinite periods?

- 2.39 We agree that the proposed requirements to notify a LA of any changes in fitness to own or licence breaches makes an annual check unnecessary.
- 2.40 We welcome the suggestion that there will be different annual licence fees for different types of ABS. Most NfP organisations are charities and are low risk. Annual licence fees should recognise this and be set at an affordable level.

Written by Ann Lewis

© **ASA February 2010**

6th Floor, 63 St Mary Axe, London EC3A 8AA

☎ 020 7398 1470 www.asauk.org.uk info@asauk.org.uk

The Advice Services Alliance is a company limited by guarantee, registered in England & Wales No.3533317, registered office as above. Charity no. 1112627