

policy response

Review of the Regulatory Framework for Legal Services in England and Wales

The Advice Services Alliance's response to Sir David
Clementi's consultation paper

Table of Contents

1	Introduction	2
2	Some background issues	2
3	Chapter A – the objectives and principles of a regulatory framework for legal services	3
4	Chapter B – Regulatory Models	4
5	Chapter C – Complaints and Discipline	5
6	Chapter D – governance, accountability and related issues.....	6
7	Chapter E – Regulatory Gaps.....	8
8	Chapter F – Alternative Business Structures	9

1 Introduction

- 1.1 The Advice Services Alliance (ASA) welcomes the opportunity to respond to the Consultation Paper published as part of the Review of the Regulatory Framework for Legal Services in England and Wales (the Review).
- 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 England
 - Citizens Advice
 - Citizens Advice Scotland
 - DIAL UK (the disability information and advice service)
 - Law Centres Federation
 - Scottish Association of Law Centres
 - Shelter
 - Shelter Cymru
 - Youth Access
- 1.3 Our members represent over 2,000 organisations which provide a range of advice, legal and other services to members of the public. 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 (now commonly referred to as 'social welfare law').
- 1.4 This response has been drafted following discussion and consultation with our full members. However, it may not reflect our members' views in their entirety and we are aware that some members will submit their own response. On some issues, our members have differing views. Where this is the case, we have attempted to set out these out in our response.
- 1.5 We have not responded to all of the questions posed in the Consultation Paper. Our members, for example, have little experience or knowledge of the international considerations affecting the regulation of legal services.

2 Some background issues

- 2.1 The independent advice sector represented by ASA's members is extremely diverse and the relationship between the sector and the current regulatory framework is very complex.
- 2.2 Advice agencies are often close to their intended beneficiaries and aim to respond to unmet need. This has led them to offer services which are outside traditional professional or service boundaries. Organisations within the advice sector provide legal and advice services alongside other services such as counselling, health advice, campaigning, information, and financial advice.

- 2.3 A small, but growing, number of organisations employ solicitors. The Review highlights the role of Law Centres and similar not-for-profit solicitor agencies where solicitors and other legal professionals work together to provide a legal service to the public.
- 2.4 This pattern of provision means that some organisations within the sector are already regulated by the Law Society, Office of the Immigration Services Commissioner (OISC), and the Financial Services Authority. Further, most are registered charities and therefore subject to regulation by the Charity Commission.
- 2.5 A substantial number of organisations within the sector are subject to oversight by the Legal Services Commission (LSC) through its Quality Mark scheme, and most are subject to some additional oversight by other public sector funders. Some organisations within the youth sector which offer advice may be subject to inspection by Ofsted.
- 2.6 Finally, the advice networks, which are ASA's members, require their members to meet minimum membership requirements, details of which have already been supplied to the Review Team.
- 2.7 It is not surprising therefore that our members are concerned about the growing, and sometimes disproportionate, burden of regulation on small voluntary sector agencies. We would therefore urge the Independent Reviewer to take this into account when considering what proposals to make. In particular, from the point of view of the advice sector, the relationship between the LSC, OISC and any new legal services Regulator needs to be considered.

3 Chapter A – the objectives and principles of a regulatory framework for legal services

A1 There are a number of important possible objectives for a regulatory system covering the provision of legal services. What objectives do you believe should form the cornerstone of a regulatory system for legal services?

- 3.1 We agree that clear objectives are important in any regulatory regime. We welcome the objectives proposed in the Consultation Document and in particular welcome the suggestion that the Regulator should have a role in promoting public understanding of the citizen's legal rights. Although many ASA members are already active in the field of public legal education, this is an area of work that is underdeveloped in this country.
- 3.2 However, in our view, the objective of maintaining the rule of law does not, as currently drafted, give sufficient weight to the important role that a legal services Regulator should have in protecting the independence of lawyers and the judicial system from interference by the state. We suggest an additional objective of promoting the independence of lawyers from interference by the state.

A2 What aspects of professional ethics, or legal precept, do you feel are essential to a properly functioning legal services industry and in what way should they be reflected in the regulatory system?

- 3.3 We agree that the principles set out by the Review are fundamental. We suggest that the concept of independence should explicitly include a requirement that lawyers

should not advise in situations where their interests (or those of their employers, partners or staff) conflict or potentially conflict with the interests of a client.

A3 Do you consider that risks to the regulatory objectives should be a central consideration in determining how regulatory powers and resources should be used?

- 3.4 We agree that risks to the regulatory objectives should be a central consideration in determining how regulatory powers and resources should be used. However, as is acknowledged in the Consultation Paper, there are potential conflicts between the regulatory objectives. It is ASA's view that, where there is conflict, the proper safeguarding of consumer interests should take priority over the promotion of competition.

4 Chapter B – Regulatory Models

B1 What do you see as the broad advantages and disadvantages of Model A in comparison with Model B? In particular, what do you see as the strengths and weaknesses of (i) combination and (ii) separation of regulatory from representative functions?

- 4.1 In our view, Model A has the advantage of providing a simple service-based structure where it would be relatively straightforward to add to the scope of regulation. We accept that separating regulation from representation enhances the perception of the objectivity of the Regulator and that this is particularly important in relation to complaints handling.
- 4.2 On the other hand, the model incorporates few checks and balances and arguably leaves the Regulator exposed to undue pressure from government. Further, we are concerned that a Model A-type regulator would become too remote from practice.
- 4.3 It is arguable that Model B, by retaining a regulatory role for the professional bodies, would better protect the independence of lawyers from government interference. Further, in ASA's view, combining the representative and at least some regulatory roles strengthens a professional ethos and this in turn reinforces integrity within a profession. We would argue that our members work to promote an equivalent ethos within the not-for-profit advice sector.
- 4.4 However, a Model B-type structure makes it more difficult to bring unregulated providers within the scope of regulation and would make the regulation of further developments in alternative business structures more complex.

B2 What model best meets the criteria of the terms of reference?

- 4.5 On balance, ASA considers that a hybrid of Models A and B would provide the best way of regulating legal services. This would, in our view, retain the advantages of a service based framework whilst retaining a strong role for the professional bodies and provide encouragement for the development of new ones.
- 4.6 We suggest that an over-arching Regulator should set minimum standards in relation to the entry setting, rule making, monitoring and enforcement, and disciplinary functions. However, these functions should be delegated by the Regulator to professional bodies where they were considered to be competent. These professional bodies should be free to decide on additional requirements for their members.

- 4.7 However, we consider that there should be a separate body to consider complaints once a provider's in-house complaints handling process has been exhausted. We deal with this in more detail in our next section.

B3 If it were felt appropriate to separate regulatory and representative functions within professional bodies as is envisaged under Model B+, how might it best be achieved?

- 4.8 We do not have proposals about how regulatory and representative functions within a professional body might be separated.

B4 What powers would you wish to see delegated from the Government to the Regulator?

- 4.9 We consider that, in order to ensure independence from Government, all powers relating to the regulation of legal services should be delegated to the Regulator.

B5 What powers to instruct the Regulator would you wish to see Government retain?

- 4.10 We do not consider that the Government should retain any power to instruct the Regulator other than the power to set objectives in consultation with the Regulator.

5 Chapter C – Complaints and Discipline

C1 Should service complaints (which are consumer centred) be operationally split from professional conduct and disciplinary issues (which are centred on the practitioners and their professional bodies)?

- 5.1 In ASA's view, there are advantages to separating the handling of complaints from disciplinary issues. We consider that the responsibility for professional conduct and disciplinary issues should remain with the professional body concerned, provided they are judged competent, subject to an appeal to an independent tribunal in the case of serious disciplinary matters.

- 5.2 However, a separate complaints handling body would inevitably provide a significant degree of oversight over the exercise of the disciplinary function and we consider that this would be beneficial. Clearly, there would need to be good communication between the complaints-handling organisation, the professional bodies and the Regulator.

C2 In connection with complaints, what are the advantages and disadvantages of a) having a uniform complaints organisation, independent of the bodies, similar to the FOS or b) each body remaining responsible for its own complaints? Is the New South Wales example a useful model?

- 5.3 ASA agrees that there should be a separate complaints organisation which is independent of the professional bodies along the lines of the Financial Ombudsman Service. This is important to counter the perceived lack of independence of the current system where lawyers deal with complaints about their fellow professionals. We also consider that there are significant advantages for the consumers of a single gateway for complaints where they are unhappy with complaints handling by their legal services provider.

C4 How do you think that disciplinary arrangements should relate to the underlying practitioner bodies? Is there a case for one single uniform disciplinary body for all lawyers?

- 5.4 We believe that competent professional bodies should retain the right to remove or punish their members. However, the professional bodies should be expected to report to the complaints body the outcome of any disciplinary processes resulting from a referral by them.
- 5.5 The Regulator may need to exercise disciplinary functions if the scope of regulation is extended beyond members of competent professionals.

C5 What should be the mechanism for funding the handling of complaints?

- 5.6 The arguments for the “polluters” paying are attractive, where there is fault. We would be opposed to a no-fault polluter pays system because this may have undesirable consequences. Firstly, it may be unfair on organisations which work in “high risk” areas of work where unfounded complaints are more likely. Secondly, we are concerned that this would deter providers of legal services from taking on “difficult” clients. Thirdly, there is a danger that a separate complaints organisation funded by those who are complained against will be seen as biased against the complainant. Finally, we are concerned that the burden of such a system could be disproportionate on small voluntary organisations.
- 5.7 On balance therefore, we consider that a separate complaints body should be jointly funded from fees collected by the Regulator and a fault-based “polluter pays” system.

C6 What should be the mechanism for funding the handling of disciplinary processes?

- 5.8 In view of our proposal that the professions should continue to exercise disciplinary functions, we consider that the mechanism for this should be down to the professions themselves.

6 Chapter D – governance, accountability and related issues

D1 Should the Regulator be a board or an individual?

- 6.1 ASA considers that the Regulator should be a Board.

D2 What sort of Board should the Regulator have and how should it be constituted? What would be an appropriate split between practitioner involvement and lay content in the Board? As regards the practitioner content, would you favour the inclusion of individuals on their merits, or formal representatives from different parts of the industry?

- 6.2 ASA considers that the nature and membership of the Board will depend on its role. In a Model B-type structure where the Board’s role is to have oversight of the professional bodies, we consider that the Board should be relatively small with a majority lay membership.
- 6.3 However, the nearer the structure is to Model A the more important it will be for the Board to have the confidence of the professions and members will need to have expertise and experience drawn from legal practice, and any other professions which are to be regulated.
- 6.4 We consider that individuals should be appointed to the Board on merit and that practitioner members, between them, should have a broad experience including that

of working in the not-for-profit advice sector. However, we do not consider that members of the Board should formally represent any part of the sector.

D3 Who should appoint the leadership of the Regulator? With whom should that person consult? How should the appointments of the other directors of the Board be made?

- 6.5 ASA is concerned that the appointment of the Regulator should be as independent as possible from the Government. We propose that this might be achieved by involving members of the Judiciary or setting up an independent recruitment panel on Nolan principles.

D4 What period should the appointments be for? In what circumstances and by whom could directors be removed

- 6.6 We do not have strong views on this issue. We suggest that appointments should be for a 4 year period, with the possibility of one renewal. We consider that members should resign on a rota basis in order to give some continuity.

D5 Having regard to the need for independence both from Government and providers of legal services, what qualities and background would you wish the leadership of the Regulator to possess? Is there anything you believe it would be important for the leadership of the Regulator not to be?

- 6.7 ASA considers that the Chair of the Regulator should not be a practising lawyer.

D6 What mechanisms would you propose to ensure the accountability of the Regulator: (1) to Parliament; (2) to Ministers; (3) to public interest groups? Is there anyone else to whom a Regulator for legal services should be accountable and how?

- 6.8 The Regulator should be accountable to Parliament and to the public through publication of a report.

D7 What consultation arrangements would you wish to see the Regulator follow before exercising its powers?

- 6.9 We consider that the Regulator should have a statutory duty to consult with the professions, the advice sector and representatives of consumer bodies. This might be achieved through a network of reference groups.

D8 To where should the right of appeal against decisions made by the Regulator lie? On what matters should appeal be permitted?

- 6.10 Decisions made by the Regulator will be subject to judicial review. We consider that there should be an appeal process if the Regulator exercises disciplinary powers.

D9 This section refers to the funding issues arising from different models. What would be your suggested mechanism for dealing with these issues?

- 6.11 In view of our proposal, we suggest that the Regulator should be funded through a precept from the professional bodies. Additionally, any individuals or organisations which are regulated independently from the professional bodies should be required to pay a fee. However, we suggest that charitable or not-for-profit organisations should benefit from a significant reduction in fees payable.

D10 What relationship should there be between the Law Officers, the Regulator and professional bodies with advocacy rights?

- 6.12 We do not consider that the government legal officers should have any relationship with the Regulator or professional bodies.

7 Chapter E – Regulatory Gaps

E1 Should the Government have power to determine which legal services should be included in, or removed from, the regulatory framework? What consultation with the Regulator, with the providers of legal services, and with public interest groups, should there be in reaching these decisions?

- 7.1 We accept that ultimately, it will be the Government which decides which legal services should be included in, or removed from, the regulatory framework. However, the Regulator should have the power to recommend some changes. Any legislation will need to define legal services and therefore the potential scope of a Regulator.

- 7.2 Again, we consider that any decision to change the scope of regulation should involve full consultation with the providers, the advice sector and with consumer and public interest groups.

E2 What are the main factors one should consider in determining whether a service requires regulation?

- 7.3 This issue is an important one for ASA and its members. We consider that the list given in paragraph 7 of the Consultation Paper is a useful starting point. As stated earlier, many of our members are concerned about the disproportionate cost of regulation on small community advice agencies providing a range of services to their users. We suggest therefore that an additional factor should be whether a service is already adequately regulated by another Regulator.

- 7.4 Decisions on the scope of the legal services Regulator will potentially have a significant impact on our sector. We suggest that both the nature and level of a service offered by an organisation should be taken into account. For example, it may be sensible to exempt from regulation those agencies which provide only legal information and education.

- 7.5 Further, some of our members have suggested that it may be appropriate to exempt from regulation those legal services where money is not paid by or on behalf of a client. In the not-for-profit sector, this would bring within the scope of regulation those organisations with a Legal Services Commission contract, but exclude those which receive only grant income from statutory and charitable sources.

- 7.6 Our members have expressed differing views about whether the regulatory regime should be fundamentally different for not-for-profit organisations.

- 7.7 Those in favour of a different approach for not-for-profit organisations point out that they are not subject to the same commercial pressures as most legal services providers. The opportunities for personal gain are rare in the not-for-profit sector, and few people motivated by personal gain would choose to work in the sector. Some have suggested that this justifies exemption from regulation for not-for-profit agencies and that the self-regulatory role of advice networks should continue. Others have suggested that the absence of commercial pressures should lead to a lighter-touch regulation, consistent with a risk-based approach. This could involve an approach similar to that adopted by the OISC.

- 7.8 However, others have pointed out that the absence of traditional commercial pressures does not mean the absence of external pressures, whether financial or

political. For example, there are concerns about the pressures which can be exerted by public sector funders. Many advice organisations are funded by local authorities to advise members of the public about problems which are often caused by inefficiency or wrong decision-making by that authority. This potential conflict could result in agencies not acting in the best interest of their clients. Oversight by a Regulator may help to protect such agencies from external pressure.

- 7.9 Finally, some of our members have pointed to concerns that they have about currently unregulated providers such as claims managers and will writers. Further, we are concerned that there is currently no regulatory framework for services which are seen as alternatives to court e.g. mediation.

E3 What characteristics of the regulatory framework would facilitate the inclusion of new services within the regulatory net, or the exclusion of a service presently included?

- 7.10 As we have already stated, we suggest that the Regulator should be able to set minimum standards in relation to all regulatory functions. These standards would apply to all, but professional bodies judged to be competent would be free to impose additional standards if they wished. In the absence of a competent professional body, the Regulator may have no alternative but to directly regulate some providers.

8 Chapter F – Alternative Business Structures

F1 Is there potential demand, from users and providers, for Legal Disciplinary Practices (LDPs)?

- 8.1 ASA does not have any specific knowledge of unmet demand for Legal Disciplinary Practices in the commercial sector. However, the development of LDPs in the not-for-profit sector indicates that they can provide a useful service to clients. Organisations within the sector have many years of experience of different lawyers working together to provide services in social welfare law.

F2 How do you see the advantages and disadvantages of LDPs? Can the current restrictions (by professional bodies) preventing the development of these practices still be justified?

- 8.2 The advantages of LDPs are that clients have access to the different and complementary skills needed to solve their problems.
- 8.3 As pointed out in the Consultation Paper, LDPs have existed for many years in the not-for-profit sector. Law Centres and similar organisations have been regulated by the Law Society which has enabled LDPs to provide services to the public where solicitors are employed by “charitable or similar non-commercial organisations”. ASA’s experience is that, on the whole, these arrangements have worked well, although there can be a lack of clarity about the respective roles and responsibilities of solicitors and non-solicitors. The Regulator, in conjunction with professional bodies, may need to review these arrangements with a view to relaxing unnecessary requirements and ensuring clarity.

F3 What restrictions, if any, would you wish to see imposed on LDPs in the area of management? What restrictions, if any, would you wish to see imposed on LDPs in the area of ownership?

F4 Is there any reason why the regulatory system should distinguish between practices in the commercial and the not-for-profit sector?

- 8.4 ASA has serious concerns about extending the circumstances in which organisations can have different owners and managers. We believe that there are grave issues around “fitness to own” and that these must be addressed.
- 8.5 It is true that, for the most part, the separation of ownership and management within the advice sector has not caused problems which would be of concern to a legal services regulator. This may be because most advice sector organisations are registered charities where “ownership” is regulated by the Charity Commission, and because of the absence of commercial pressures.
- 8.6 However, even in the not-for-profit sector, we believe that non-managing owners should be under a duty to protect lawyers from pressures to breach professional standards, and that there should be sanctions against non-managing owners who fail to do this. This, in effect, involves the regulation of non-managing owners. Further, there needs to be a clear prohibition on lawyers acting for clients where there is a potential conflict of interest with any aspect of the non-managing owner’s business.
- 8.7 In our view, the problems surrounding fitness to own are significantly more serious in the commercial sector where the profit motive is powerful. One option would be to limit the development of LDPs to the not-for-profit sector. Alternatively, the potential sanctions against non-managing owners would need to be sufficiently serious to deter wrong-doing.

F5 What body would you expect to regulate LDPs? What, if any, additional safeguards do you believe need to be put in place to protect the consumer?

- 8.8 We consider that an LDP, as an organisation, would need to be subject to regulation by either a professional body or, if this is not possible or appropriate, directly by the Regulator.
- 8.9 We consider that LDPs should be required to inform the consumer about who regulates the organisation as well as whether any individual is regulated by professional body.

F6 Is there potential demand, from users and providers, for MDPs?

F7 How do you see the advantages and disadvantages of MDPs? Can the current restrictions (by professional bodies) preventing the development of these practices still be justified?

- 8.10 Again, ASA is not in a position to comment about whether there is potential demand in the commercial sector for MDPs.
- 8.11 However, this model has enabled some voluntary sector agencies to combine legal and non-legal services for the benefit of members of the public. For example, Shelter advice agencies offer legal advice, advice on housing options and support services to people in housing need. Streetwise Law Centre, based in Bromley, employs solicitors, advice workers, and personal advisors to work with young people aged between 13 and 25 on a range of issues which may have legal and non-legal solutions.
- 8.12 In the not-for-profit sector, the development of MDPs has been allowed by the Law Society.

F8 What restrictions, if any, would you wish to see imposed on MDPs in the area of management? What restrictions, if any, would you wish to see imposed on MDPs in the area of ownership?

- 8.13 ASA considers that MDPs pose different problems to LDPs in the area of management.
- 8.14 MDPs raise the issue of whether all the services provided by an organisation should be regulated within a legal services framework. ASA consider that this is both unrealistic and undesirable.
- 8.15 One option, proposed by some members, would be to “ring-fence” the legal services and thereby separate them from any other services. The legal services inside the “fence” would be regulated by the legal services Regulator, and those outside would not. It would be important for members of the public to be very clear about whether they are receiving a service from a regulated or non-regulated part of the organisation.
- 8.16 We are aware of potential difficulties with this proposal. Firstly, there are potential pressures on the strength of the “ring-fence”. These pressures are likely to be particularly strong in the commercial sector, where we would want to see stringent controls.
- 8.17 Secondly, there would need to be clarity about the respective roles and responsibilities, particularly in relation to the legal services Regulator, of the managers of the legal services and of the managers, governors or owners of the whole organisation.
- 8.18 We believe that MDPs raise similar issues to LDPs in relation to fitness to own. However, the development of MDPs raises an additional issue about the relationship between different regulators which might be involved.
- 8.19 Finally, we consider that there is a substantially increased risk of conflict of interest where an owner has extensive commercial interests. For example, it would not be appropriate for an organisation to provide welfare benefits advice in a locality where it also has a contract to administer the payment of such benefits.

F9 What body would you expect to regulate MDPs? Would your answer be different if lawyers were not in a majority? What, if any, additional safeguards do you believe need to be put in place to protect the consumer, and to ensure respect for independence and integrity in the exercise of professional judgment?

- 8.20 As already stated, we have concerns about how different regulators could work together to effectively regulate MDPs in the commercial sector.

F10 What are the international implications for the legal professions in England and Wales if legal services were allowed to be delivered through alternative business structures?

- 8.21 This issue is outside of our expertise.
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