



Enhancing consumer protection, reducing regulatory restrictions

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

November 2011

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 UK
 - Citizens Advice
 - DIAL UK (part of Scope)
 - Law Centres Federation
 - Shelter
 - Shelter Cymru
 - Youth Access
- 1.3 Our members represent over 1,700 organisations in England and Wales which provide a range of advice 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.
- 1.4 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, mental health and community care. We estimate that roughly a hundred of those organisations employ solicitors. 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"
- 1.5 A draft of this response has been sent to our members and their comments taken into account. However, our members may not agree with all of the views expressed in this response. We are aware that some of our members are intending to submit their own responses.

2 Response to questions

1. What are your views on the three themes that we have put at the core of our vision for the legal services market? If different, what themes do you believe should be at the core of our vision?

- 2.1 We agree that regulation should be appropriate for the particular market. However, we have some concerns that regulation that is tailored too closely to particular markets will produce a system that is difficult for consumers to understand.
- 2.2 One of the purposes of the Legal Services Act was to simplify the complex and piecemeal regulatory system. We therefore think that a balance must be struck between the appropriateness of regulation according to risk in particular markets, and consumer understanding.

- 2.3 We also agree that regulatory obligations should not overburden providers of legal services. Currently, parts of the NfP sector are subject to overlapping regulatory regimes covering the provision of immigration advice. We accept that the results of poor immigration advice are sufficiently serious to warrant stringent regulation but have always felt that the requirement that NfP solicitor agencies providing immigration advice must be regulated by the OISC on top of holding Law Society accreditation and being subject to SRA regulation is not proportionate to the risk posed. We are therefore sympathetic to attempts to reduce unnecessary regulation and are optimistic that the new regime will resolve these issues.
- 2.4 Having said that, we have some concerns that reliance on consumer and competition law may not provide sufficient consumer protection. For example, it will be much more difficult to identify systemic problems or persistent offenders if consumers are left to take their cases individually rather than being able to complain to a comprehensive complaints service.
- 2.5 The LSB may also want to bear in mind the fact that consumer and competition law applies differently to the voluntary sector. For example, it is not obvious that statutory consumer protection applies to the provision of services by the NfP sector because of a lack of a contract between advice agency and client.

2. What is your opinion of our view that the purpose of regulation is to ensure appropriate protections and redress are in place and above this there are real competitive and cultural pressures for legal services to deliver the highest possible standards with a range of options for consumers at different prices? If different, what do you consider that the role of regulation should be?

- 2.6 We agree with the purpose of regulation set out in the question. However, for the NfP sector, we think that regulation can also serve the important function of protecting the independence of those regulated. Voluntary sector organisations receive significant amounts of funding from central and local government and can face direct and indirect pressure to alter the nature of their service. This is likely to increase during a time of overall funding reduction. An external regulator can help regulated staff resist pressure to reduce quality or act in ways that are more acceptable to government funders. We understand that recent LSB research shows that consumers value independence in their legal services providers.¹
- 2.7 We also agree that competition plays a part in the maintenance of high quality services but would like to point out that this operates differently in the NfP sector when compared with the private sector. The recent Frontier Economics research report states that while there is competition *for* the market in the NfP sector, there is little competition *in* the market.² Whilst it is true that the absence of charging means that a major factor affecting client choice is removed, clients still exercise choice about whether or not to return to an agency they have visited previously. And perhaps more importantly, the organisations that refer clients to NfP agencies are frequently well-equipped to make judgments about the quality of services provided and make informed recommendations.

3. In light of the changing market do you think that specific action may be needed to ensure that more legal services activity can

¹Opinion Leader, March 2011 *Legal Services Board: Developing measures of consumer outcomes for legal services* p.8.

² Frontier Economics, July 2011 *Understanding the supply of legal services by 'special bodies'* p.59.

unequivocally be included within the remit of the Legal Ombudsman and, if so, how can this best be achieved?

- 2.8 We think that there are good reasons for extending the remit of the Legal Ombudsman. As we have said in our answer to question 1, we think that clarity for the consumer should remain an important goal for the LSB. We believe that having a single complaints service for all consumers of legal services will take the LSB a considerable way towards achieving this goal.
- 2.9 Having said that, we are very aware of the difficulties of defining the legal services market. In our earlier response to the LSB,³ we pointed out the difficulties of regulating special bodies which provide reserved legal activities alongside a range of other services, some of which may be legal services, such as generalist advice or telephone helplines. We have also discussed the possibility that some charities may provide occasional general legal advice during their provision of another service.⁴ These services may be of great value to the organisation's users. In these circumstances, we think that requiring the HoLP to be responsible for all these services would place a disproportionate regulatory burden on the organisations concerned.
- 2.10 However, we think the LSB should explore the option of bringing these services within the remit of the Legal Ombudsman, possibly on an opt-in basis. This would provide consumers with some redress without placing a regulatory burden on services such that they may withdraw the service altogether.
- 2.11 The LSB might also choose to explore this option for all providers of general legal advice which do not employ solicitors and therefore do not currently fall within the remit of the Legal Services Act 2007. Again, we would favour an opt-in system because of the difficulties of determining which organisations should be included and which should not. There are many non-solicitor agencies whose main work is advice but there are many, whose main role could be, for example, support or befriending, who give occasional advice as part of their service. Such organisations could be encouraged to opt-in for the benefit of their clients but should not be punished for failing to be part of the scheme.

4. What are your views of our diagnosis of the weakness of the existing system and the problems within it?

- 2.12 We recognise the weaknesses set out in the paper. In particular, we agree that the regulatory system is opaque and that consumer understanding of the system is poor. Therefore, people are unlikely to choose a provider on the basis of whether or not that provider is regulated. Furthermore, it is difficult for consumers to make a judgement on the grounds of quality. Firstly, their need for legal services may not arise often in their lives and therefore they may have no previous experience on which to base their choice. Secondly, the provision of legal services requires specialist knowledge. This is why people seek advice. Therefore it is unlikely that consumers will be able to make judgements about the quality of the work done on their behalf. For this reason, it is imperative that any new regulatory system that is developed must be clear for consumers and have a much higher profile than is presently the case.

³ [ASA response](#) to *Alternative business structures: approaches to licensing*.

⁴ 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.

- 2.13 In the NfP sector, as we have said above, there is not currently competition on price in the way that there is in the private sector but there are often intermediaries, for example doctors, social workers and community groups, between clients and advice agencies, who are able to assess quality. However, as funding to the voluntary sector is cut, it is likely that some of these intermediary services will cease to exist. It is also increasingly likely that in some geographical areas a consumer will only have one provider, if that.
- 2.14 We are also familiar with some of the provider concerns set out in the paper, in particular concerning the uneven playing field. For NfP agencies, the most regulated area of law is immigration. As we have explained above, Legal Services Commission immigration contract holders are required to hold the Specialist Quality Mark (SQM), Law Society accreditation and, in many cases, OISC registration. We think that the overlapping regulatory systems are unnecessary but we do believe that immigration is a high risk area of law and that clients should be properly protected. Whilst private sector non-solicitors are regulated by the OISC, private practice solicitors require no accreditation beyond their solicitor qualification to practise immigration law. Our concern is not so much the competitive advantage this gives solicitors (the likelihood that private solicitors will take NfP sector clients is low), as the lack of protection for their clients who, we feel, are equally in need of protection.

5. What do you see as the benefits and downsides of regulating through protected title such as solicitor and barrister?

- 2.15 We see the academic and practical training necessary to become either a solicitor or barrister as a benefit in the provision of specialist legal advice. Whilst it is the case that most people who have these qualifications go on to specialise in one or two areas of law, we think that it is helpful that providers of legal services have access to staff with a broad legal knowledge. This is not to suggest that this knowledge qualifies people to provide advice in multiple areas of law, however, it does mean they are more likely to spot issues beyond the presenting problem.
- 2.16 Having said that, we recognise that qualification routes into the legal professions remain difficult to access for those without considerable financial means, and, especially in the case of the Bar, discourage diversity.

6. What are your views on whether there should be a consistent approach to the allocation of title to authorised persons? What are your views on whether the title should be linked directly to the activities that a person is authorised to undertake or linked to the principal approved regulator that authorises them?

- 2.17 We take the view that rights of audience and the conduct of litigation should remain reserved to those who have undergone rigorous training, not only in law but in professional ethics.
- 2.18 However, we can see the benefits of activity-based regulation. As we said above, we think a general legal training is beneficial but do not believe it qualifies people to practice in all areas.⁵ This is something that is often misunderstood by consumers who believe that that is exactly what it does do. We therefore think it would benefit consumers to regulate by activity in some areas of law and not to exempt solicitors from that regulation.

⁵ R. Moorhead and R. Harding, 2004 *Quality and Access: specialist and tolerance work under civil contracts*, The Stationery Office.

- 2.19 We have expressed our concerns above about the lack of protection for privately-paying clients of immigration solicitors who are not accredited under the Law Society scheme. Whilst we have some reservations about the manner of accreditation of immigration providers under this scheme, we think that, in principle, it could be extended to solicitors in private practice so that they were required to demonstrate their knowledge and skills on a regular basis, in the same way as LSC-funded providers. This could be on an opt-in basis initially. There would be an incentive to opt in as the provider would receive an accreditation that they could make public. This would have the potential of attracting more clients whilst also providing them with more protection.
- 2.20 If successful, this type of scheme could be extended to other areas of law.

7. What are your views on our proposal that areas should be examined “case- by- case”, using will-writing as a live case study, rather than through a general recasting of the boundaries of regulation? If you disagree, what form should a more general approach take?

- 2.21 The case-by-case approach described seems sensible. However, we are not clear whether carrying out reviews of areas of law in this way will take in non-specialist advice.
- 2.22 As well as giving specialist advice, many of our members give what is known in the NfP sector as “generalist advice” on social welfare law. This might be a short piece of one-off advice but could cover casework. We note that you propose a review of general legal advice as part of your future programme. However, given that different areas of law carry different risks, we wonder whether it might be more useful to review the provision of general advice as part of the reviews of each area of law, rather than as a category by itself. We believe it will be easier to determine the point at which regulation becomes necessary in each area of law than by lumping all of general advice together.

8. What are your views on our proposed stages for assessing if regulation is needed, and if it is, what regulatory interventions are required?

- 2.23 We agree with the proposed stages, in particular having regard to the level of sophistication of consumers in each area.

9. What are your views on the implications of our approach for professional privilege?

- 2.24 We believe that, as with regulation, it is important for consumers to be able to understand when privilege applies. Given that this can be determined by case law, we know that this may be difficult to achieve. However, we think that the Legal Services Act sets out the basic position as clearly as it can.
- 2.25 We recognise, however, that this clarity may come at the expense of fair competition between “relevant lawyers” under the Act and other providers of legal services. We would therefore not be opposed to the future extension of privilege beyond the boundaries set out in the Act.

10. Do you believe that any of the current reserved legal activities are in need of urgent review? If so, which activities do you think should be reviewed and why?

2.26 No.

11. What are your views on our analysis of the regulatory menu and how it can be used?

2.27 We are happy with the analysis given. However, we would like to suggest that the ability to complain should not be regarded as having equal status with other regulatory tools. As we said above, we are in favour of an extension of the remit of the Legal Ombudsman (to those whose main role is advice-giving and to those who opt into the scheme) and we believe that a complaints service should be a regulatory baseline to which other regulatory tools can be added.

12. Do you have any comments on our thoughts on other areas that might be reviewed in the period 2012-15, including proposed additions or deletions, and suggestions on relative priority?

2.28 For reasons given above, we think immigration should be made a priority for review. It is an area of law in which clients are highly vulnerable and the potential detriment of receiving poor advice is severe. We are particularly concerned about private practice solicitors giving advice in immigration as they face no requirements to demonstrate their knowledge of the area. Given that much immigration law is being removed from the scope of legal aid, it is likely that previously legal-aided clients will seek advice elsewhere. It is therefore particularly pressing that these issues are reviewed.

2.29 We would be keen to see a review of services typically delivered by special bodies. We believe that until now it has been correct to say that special bodies present a lower level of risk than private organisations as they do not charge for advice or hold large sums of client money. Having said that, the potential detriment of losing a home or job may be very serious for the clients concerned.

2.30 Furthermore, given the changes to the funding of many special bodies, we are aware of a number that are thinking about charging some of their clients for advice. We think that an examination of the risks that this throws up and the potential regulatory requirements for managing those risks would be very useful.

2.31 We also think that an examination of general legal advice would be a good idea (although please see our answer to question 7 above). As there are proposals to remove areas of law such as welfare benefits from the scope of legal aid, we are concerned that this may prompt the growth of private organisations seeking to charge for such advice. This means that such areas of law may become much higher risk than they are at present.

2.32 The LSB may also want to examine advice delivered via telephone helplines. We are concerned that clients may be unclear about the remit of these services and confused about whether they are being offered information or legal advice.

13. Do you have any comments on the approach that we have adopted for reviewing the regulation of will- writing, probate and estate administration?

2.33 The approach seems very sensible.

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