



## **Regulating Alternative Business Structures**

The Advice Services Alliance's response to the Solicitors  
Regulation Authority's consultation paper

August 2009

## 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 (the disability information and advice service)
  - Law Centres Federation
  - Shelter
  - Shelter Cymru
  - Youth Access
- 1.3 Our members represent some 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 and community care.
- 1.5 We focus our response on how the new regulatory framework should apply to special bodies such as Not for Profit (NfP) organisations.
- 1.6 A draft of this response has been sent to appropriate member networks (adviceuk, Citizens Advice, Law Centres Federation, Shelter and Shelter Cymru), and we have discussed its content with some of them. However, the views expressed do not necessarily represent their views.

## 2 Background to the advice sector

### *Diversity of the sector*

- 2.1 The advice sector is very diverse. Of the 1,700 organisations mentioned above, some 400 have contracts with the Legal Services Commission (LSC) to provide legal aid services.
- 2.2 We estimate that about 100 of these organisations currently employ solicitors (or other authorised litigators) to carry out reserved activities. In relation to organisations under the "ASA umbrella" this breaks down roughly as follows:
- 58 Law Centres
  - 20 Citizens Advice Bureaux
  - 20 adviceuk members
  - Shelter and Shelter Cymru (both national organisations)

- 2.3 This is likely to increase as a result of Legal Services Commission (LSC) reforms.
- 2.4 Most NfP organisations which carry out reserved legal activities also provide many other services: counselling, information provision, campaigning, and policy work as well as legal, financial and health advice. It is one of the strengths of the sector that we can provide a range of services that (often disadvantaged) people need.
- 2.5 The consultation paper describes three broad types of model of ABSs. Most NfP organisations come within the third model - the multidisciplinary practice.
- 2.6 Having said this, even within this relatively small group of NfP organisations which employ solicitors, there is significant diversity. Some organisations, for example Law Centres, focus most of their resources on specialist legal advice and representation, activities which should be covered by legal services regulation.
- 2.7 However, for other organisations the provision of specialist legal advice and representation is a relatively small area of their work. Such organisations may have a greater focus on other activities which should not come within the remit of a legal services regulator.
- 2.8 Any regulatory system that covers NfP organisations will need to take these differences into account.
- Multiple regulation*
- 2.9 Any regulatory system should also take into account the many ways that NfP organisations are already regulated.
- 2.10 Most NfP organisations which provide legal services are registered charities and companies limited by guarantee and therefore already regulated by the Charity Commission and Companies House. However, there are exceptions - for example two Law Centres are Industrial and Provident Societies.
- 2.11 Organisations providing immigration advice are regulated by the OISC and those providing financial advice are regulated by the Financial Services Authority.
- 2.12 A substantial number of organisations are subject to quality assurance auditing under the LSC's Specialist Quality Mark or General Help Quality Mark. In addition, advice networks require their members to meet minimum membership requirements.
- 2.13 The resources required to meet existing regulatory requirements are already substantial, particularly for small organisations. There is significant concern within the sector about LSC proposals to charge organisations for Specialist Quality Mark audits. Similarly, the OISC is currently consulting on charging agencies that they regulate.
- 2.14 NfP organisations represent a relatively low risk to regulators. Most organisations do not charge for their services and people working in the sector are generally motivated by values rather than financial reward.
- 2.15 Any system for regulating the sector should therefore ensure that the cost is affordable and proportionate to the risks presented by the sector. Access to justice for some of the most disadvantaged people may be threatened if the burden of regulation is too high.

### 3 Regulation of special bodies

3.1 We welcome the introduction of entity regulation. The current regulatory framework as it applies to NfP solicitor agencies is unsatisfactory. It is the employed solicitor, and not the organisation, that is regulated and there is little clarity about exactly what they are responsible for. Further, that responsibility has not always been aligned with the authority necessary to ensure that regulatory requirements are met.

3.2 We consider that it is essential that NfP organisations which carry out reserved legal activities work within a clear regulatory framework. This will help to deal with conflicts such as:

- potential pressures from funders not to act in clients' interests
- potential conflicts between the client's interests and the interests of the organisation (or parts of it).

3.3 A number of issues arise in relation to the future regulation of NfP organisations. These can be broadly discussed under two headings:

- who should be responsible?
- what should be regulated?

#### **Who should be responsible?**

3.4 Any rules on the future licensing of NfP organisations will have to take into account our legal structures. It is important that there is clarity about who is responsible for meeting regulatory requirements in an NfP organisation.

3.5 One suggestion is that responsibility for meeting regulatory requirements should be shared by

- the Trustee Board/Company Directors (or some of them) and
- someone with a HoLP-type role (with a HoFA-type person where a client account is maintained)

#### *Board responsibility*

3.6 In NfP organisations it is the Board that has ultimate responsibility for the governance of the organisation and it seems appropriate that they share responsibility for compliance with legal services regulation. However, we are concerned that not all Trustees will want or be able to take on this responsibility and therefore some organisations may prefer to appoint specific Board members to take on this role.

3.7 This proposal raises the issue of "fitness to govern". Our suggestion is that Board members who take on regulatory responsibilities should, in addition to the requirements of the Charities Commission and Companies House, not have been struck off or barred from practice by a legal regulatory body. We do not consider that it is practical to require that the responsible Board member(s) are themselves solicitors.

3.8 It is also necessary to consider sanctions for Board members who fail to meet their obligations. The sanctions need to be sufficiently serious to deter wrong-doing.

#### *HoLP-type role*

3.9 We consider that NfP organisations would benefit from having someone in a HoLP-type role with responsibility for ensuring compliance with legal services regulation

and a responsibility to disclose non-compliance to a licensing authority. It is most likely that this person will be an employee. Therefore, it is important that anyone undertaking this role should have sufficient authority within the organisation to ensure that requirements are met. We anticipate that this role will be similar to that of "Senior Solicitor" in many Law Centres.

- 3.10 For most NfP organisations the HoLP should be a legal professional meeting the regulator's minimum requirements for practice. However, there may be a need for modifications in the case of some NfP organisations. For example, some NfPs have found it difficult to meet the requirement for a 3-year post qualification solicitor and have needed to recruit less experienced solicitors who have been granted a waiver by the SRA.
- 3.11 Organisations which hold client money should also be required to nominate an individual to a HoFA-type role. Any qualification requirements for HoFAs may need to be modified for NfP organisations which, for example, are extremely unlikely to employ a qualified accountant. In small NfP organisations, it is possible that the HoLP and HoFA will be the same person.

### **What should be regulated?**

- 3.12 As we have already stated, many NfP organisations provide a range of services, not all of which can or should be regulated by the SRA. We agree that the SRA should not regulate activities that are clearly not legal.
- 3.13 Whilst some organisations, such as Law Centres, focus mainly on reserved and non-reserved legal activities, there are other NfP organisations for whom the provision of legal advice is a small but important part of their work. It is therefore necessary to distinguish between activities which are regulated and those which are not.
- 3.14 We do not think that it would be necessary or desirable to require NfP organisations to create separate legal bodies to deliver regulated and unregulated advice. As we have already stated, one of the strengths of the sector is that we can provide a range of connected services to our users.
- 3.15 One option might be to consider requiring NfP organisations to create an *internal* ring-fence between their regulated activities and their unregulated activities. We propose that such a ring-fence should protect clients of the regulated service and ensure that:
  - confidential information about clients should not pass outside the ring-fence (this could involve ensuring that IT and accounts functions are properly separated within and outside the ring-fence)
  - there is clarity within the organisation on both sides of the ring-fence about the obligations of those within the ring-fence to comply with regulatory requirements.
- 3.16 It will be necessary to consider what activities should be included as part of the regulated services. We are sympathetic to the principle that organisations which do reserved and non-reserved legal work should have all of their legal work regulated. This would result in greater clarity for clients about whether or not they are protected by legal services regulation.
- 3.17 However, the application of this principle may lead to a disproportionate regulatory burden in some NfP organisations which, as a result, may be tempted to stop providing reserved legal activities (with a consequent reduction in access to justice).

- 3.18 Therefore, we propose that the licensing authority consider modifying this principle in relation to NfP organisations in exceptional circumstances. For example, where nearly all of an organisation's work involves non-reserved legal activities (e.g. information, helpline services and generalist advice) with only a very small legal department engaged in reserved and non-reserved legal work, it may be proportionate to limit the scope of regulation to the work of the legal department. In this case it would, of course, be essential that clients were at all times clear about whether their case are protected by legal services regulation.
- 3.19 We are not aware of any service combinations in the NfP sector that would cause regulatory difficulties and would need to be prohibited. However, we suggest that this is something that would need to be kept under review.
- 3.20 We look forward to working with the SRA to develop appropriate modifications to the ABS rules in order to meet the needs of both clients and NfP organisations.



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