

# Consultation Response

## Shelter's Response to the Legal Services Board Consultation: Alternative Business Structures: Approaches to Licensing

10<sup>th</sup> February 2010

[www.shelter.org.uk](http://www.shelter.org.uk)

© 2010 Shelter. All rights reserved. This document is only for your personal, non-commercial use. You may not copy, reproduce, republish, post, distribute, transmit or modify it in any way.

This document contains information and policies that were correct at the time of publication.

# Shelter

## Introduction

Shelter is a national campaigning charity that provides practical advice, support and innovative services to over 170,000 homeless or badly housed people every year. Our services include:

- A national network of over 30 advice centres offering specialist legal advice in housing, welfare benefits, debt and community care law, funded by legal aid contracts
- Shelter's free advice helpline, which runs from 8am-8pm, providing generalist housing advice
- The Community Legal Advice helpline, providing specialist telephone advice and casework in housing, debt and welfare benefits
- Shelter's website which provides advice online
- The Government-funded National Homelessness Advice Service, which provides second tier specialist housing advice, training, consultancy, referral and information to other voluntary agencies, such as Citizens Advice Bureaux and members of Advice UK, which are approached by people seeking housing advice
- A number of specialist support and intervention projects including housing support services
- A children's service aimed at preventing child and youth homelessness and mitigating the impacts on children and young people experiencing housing problems. These include pilot support projects, peer education services and specialist training and consultancy aimed at children's service practitioners.
- We also campaign for new laws and policies - as well as more investment - to improve the lives of homeless and badly housed people, now and in the future

About 10 of our advice centres have solicitors on site providing specialist expertise and litigation services in housing and homelessness law. Our central legal services team also provide litigation services, policy and campaigning, our Children's Legal Service and second tier support to housing lawyers via the Legal Services Commission's Specialist Support Service.

We employ approximately 30 solicitors and over 200 advisers providing legal services to the public.

## Response to the Consultation

### **Question 1 – What is your view of basing the regulation of ABS on outcomes?**

Outcome based regulation can be effective and welcome in ensuring that clients are protected whilst not over-burdening practitioners. A clear set of outcomes can provide a useful focus and expression of core principles around which regulation can be designed.

However, we do not consider it sufficient to have outcomes supported by guidance. There will be circumstances when clear rules are required, most obviously around issues of finance and the handling of client money, but also probably including factors such as confidentiality and disclosure, duties to the court, and conflict. It may be appropriate that the drawing up of detailed rules is best left to LAs, within the framework of outcomes set by the LSB.

However, there must be consistency of regulation, both as between ABS and traditional models of practice, and as between differing LAs insofar as they are regulating entities undertaking similar activities. Competition between regulators should not lead to a driving down of professional standards in a way that would affect client protection.

We consider the balance between entity and individual regulation proposed in the paper to be appropriate, although many of the points for individual regulation are also likely to be the responsibility of the entity, if only through creating a climate in which compliance can take place and ensuring the absence of obstacles to compliance.

### **Question 2 – Do you think the approach set out in this chapter to the tests for external ownership is appropriate?**

We are not able to comment on some of the complexities of possible ownership structures. We are a special body, and in common with almost all special bodies are a charity. The broad approach set out in this chapter seems appropriate to special bodies, but the detailed approach to be taken in respect of special bodies (in view of the power to vary the requirements) should be set out in future consultations by the LSB and potential LAs.

### **Question 3 – Do you have any views on how indemnity and compensation may work for ABS?**

ABS should clearly be required to have indemnity insurance. Currently we are required to have insurance cover to the level of £1M per claim. Given the acceptance by the LSB that special bodies present low risk, and given that the nature of the work such bodies do is

unlikely to give rise to high value claims, there is an argument for allowing LAs to vary the insurance rules for special bodies. A substantial increase in the level of cover required is likely to lead to a significant increase in the cost of premiums. Such an increase would form part of the costs of regulation associated with the transition to ABS status, and as we have set out in previous responses to the LSB we are concerned about the costs of transition and ongoing regulation to charitable bodies operating on small margins.

Indeed, there is an argument for ending the current one size fits all insurance regime and allowing regulated bodies to arrange insurance at a level appropriate to their type of work (subject to thresholds set by the LA). A high street firm doing residential conveyancing will not need the same level of insurance cover as a commercial City firm, any more than a special body providing social welfare advice will.

The risk with such an approach is that parts of the profession may be priced out of insurance; however, that happens under the current system and an extension of the ARP would assist to deal with that. Currently, requiring all to have insurance to the same level effectively means that low value low risk parts of the profession are subsidising high value high risk parts.

We have no particular views on the requirements for run-off insurance, but note the views of the Advice Services Alliance in this regard.

We consider it appropriate that there should be a compensation fund. However, the current arrangement of a flat rate levy on the practising certificate fee is a further instance of low risk parts of the profession subsidising high risk parts. We note and approve the changes the SRA are to make next year in this regard. For the future, we do not see that there needs to be a separate compensation fund for ABS as opposed to traditional forms of practice. The likely LAs, particularly the SRA, have already operational compensation funds and they could be extended to include ABS regulated by that LA. Contributions to the fund could be related to risk rather than by way of a flat levy by, for example, tying the level of contribution to the insurance premium.

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

We set out our views on reserved and non-reserved legal activities in our response to the LSB's previous consultation, and therefore broadly endorse the approach taken by the LSB.

We remain of the view that where an entity is regulated in the conduct of some legal activities, it should be regulated in the conduct of all legal activities. We also support the application of a provision equivalent to the separate business rule. We consider both to be

necessary in the interests of equivalence between different types of entity and most importantly of client protection.

There is merit in considering whether the boundary between reserved and non-reserved activities is currently drawn in the appropriate place, but such a debate is for another occasion.

#### **Question 5 – Are enforcement powers for LAs suitable?**

We support the broad approach set out by the LSB. The key is that any penalty should be proportionate to the offence and not be set at a level that would have an effect greater than desired – for example, where it is decided not to remove or suspend a licence but to impose a financial penalty, the penalty should not be at a level that drives the entity out of business since that would be directly contrary to what the decision to impose a fine entailed. Similarly with fines imposed on individuals.

Although outside the scope of this consultation, we are concerned that enforcement powers can be extremely draconian, and therefore there must be proper safeguards surrounding their use, particularly around the burden and standard of proof, proportionality and appeal remedies. Such matters will need to be the subject of consultation in due course.

#### **Question 6 – What do you think of our approach to access to justice?**

It is difficult to see that ABS, by fact of being ABS, will have any impact on access to justice. Decisions that individual entities may take around location, size and range of services, and the impact of those decisions on other providers in the market may well impact on access to justice, However, that is a function of business decisions of an entity, not its ownership structure, and a differently owned entity (such as a traditional solicitors firm) may well behave in the same way.

However, there is potential for the introduction of the regime to have an impact on access to justice, particularly if it leads to a shake up and consolidation of the market. We consider that it is crucial that the LSB and all LAs / ARs monitor and promote access to justice. But it is difficult to see how that would affect the way individual entities are regulated. This is an area that requires close monitoring and development of an appropriate way forward as the regime is being implemented and into its first few years.

#### **Question 7 – What is your view of our preference for a single appeals body?**

It seems appropriate, for reasons of consistency of decision making and the development of coherent jurisprudence, for all appeals relating to all matters concerning the regulation

of legal services to be heard by a single body, and for that body to be part of the GRC. Further consideration should be given to the make up and procedures of the body and whether it should include lay members and members of the profession or paid judges. This ties in with our concerns expressed at question 5.

**Question 8 – Do you agree with our approach to special bodies?**

We do agree with the approach to special bodies. As a special body ourselves, we welcome the opportunities of becoming an ABS, but are also wary of the costs and risks involved. 12 months seems a sensible length for the transitional period as it will allow learnings to be taken into account without building in undue delay. We consider that in general special bodies will not require substantially different regulation to mainstream ABS, and therefore the discretion allowed by the Act should be used to vary the standard rules on a case-by-case basis. The starting point should be consistency with variation, not re-building the regulatory requirements anew for each special body.

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

Yes. We consider that the emphasis of both these roles (which may or may not be filled by the same person) on client protection to be of vital importance, and therefore the requirement of seniority in the organisation to be necessary. The fit and proper person test proposed is appropriate, and we agree that notification of change is preferable to annual renewal. Training for both roles would be welcome.

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

We believe that all complaints regarding regulated legal services, whether concerning an ABS or a traditional structure, should be dealt with in the same way. Where ABS have an existing internal complaints structure they should be permitted to continue to use that, but ARs should lay down minimum standards for internal complaints and a consistent approach for complaints to the regulator. We endorse the proposed guidance at para 295.

**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?**

We do not know how the introduction of ABS will impact on the diversity of the professions, either in terms of ownership or individual membership. It is likely that any impacts will be unpredictable and therefore we welcome the suggestion that further research and data collection be undertaken. We share the desire to encourage diversity.

**Question 12 – Do you agree with our approach to international issues?**

This is not relevant to our practice

**Question 13 – Should LDPs, recognised bodies and other similar firms have transitional arrangements into the wider ABS framework in the way we propose?**

These provisions are not relevant to us.

**Question 14 – Should ABS licenses be issued for indefinite periods?**

We agree that the obligation to notify of changes as they arise makes periodic re-applications unnecessary. Regulators will need to follow up intelligence to ensure that appropriate reports are made as required.

We are concerned, as a special body and a charity, that the level of the annual licensing fee not be set too high. A flat fee risks low risk bodies such as ourselves subsidising higher risk but higher earning bodies. The level of the fee could be set by level of risk that the ABS represents, by sector if individually is too complex, or be set by reference to the fee income per head as a proxy for that.

**Question 15 – Do you agree with our approach to managing regulatory overlaps?**

This does not appear to be relevant to our work.