Consultation response

LSB: Regulation of non-commercial providers

Overview

1. **Our goal is that providing legal advice remains sustainable for non-commercial providers, while ensuring that clients are properly protected. These consumers are vulnerable due to their life situations and personal characteristics, while the third sector accounts for a significant proportion of advice delivery. In all, this is an area of high regulatory risk.**

2. **Existing regulation of in-house solicitors offers some protection, but the entity needs to be regulated too. While the Charity Commission and funders play a valuable role, we agree with the LSB's analysis that, taken together, the current framework does not provide sufficient assurance that all the risks can be mitigated. We are also unconvinced that self-regulation is the answer; although some internal arrangements seem good, there appears much variability in quality controls and governance in the sector.**

3. **The transitional protections should be introduced in 2014, as proposed. We note that non-commercial providers accept the need for regulation and do not wish for further delay. The general legal advice project is important, but does not justify a longer timetable. Certainty is needed to minimise disruption to clients.**

4. **Confusion could increase once the transitional protections are lifted. This is especially true for membership and federated networks, as one branch or group would be regulated and another not depending on whether they conduct reserved activities. Also confusing are the varying levels of protections depending on the licensing authority.**

5. **We do not support a continued ban on charging clients, which is the legacy of a historic anti-competitive deal. However, the separate business rule should be retained to avoid providers setting up separate trading arms to escape regulation which is necessary to protect consumers and minimise confusion. In a competitive market, it would be wrong to have one rule for commercial providers and another for not for profit providers.**

6. **Many concerns that non-commercial providers have would be partially allayed by proportionate regulation in practice. The use of activity-based regulation and earned recognition policies, for example, would mean the level of regulation is of the amount and nature necessary to offer consumers adequate protection, but no more than this. Striking the right balance is key, otherwise there is a real prospect that non-commercial providers could exit the market and consumers would lose a vital source of support.**

The proposals

7. The introduction of alternative business structures (ABS) means that providers with non-lawyer owners and/or managers need to be licensed to provide reserved legal activities. Some not for profit agencies and Community Interest Companies – referred to in the Act as "special bodies" – are exempt from this requirement for a transitional period. The consultation document discusses the implications of ending that transitional period, both for the bodies that will then need to be licensed, and for the licensing authorities that will regulate them.

8. The LSB has previously announced that the transitional protections should be lifted. The issues that it is consulting on now relate to how regulation should work in practice, although the timetable for when regulation should be switched on is also discussed.

The Panel's response

9. The Panel responded to the LSB's previous consultation described above, when we agreed with the view that non-commercial bodies should be regulated. We have since assisted the LSB by helping to commission the Frontier research report, participating in a workshop on this report hosted by the LSB and collaborating on the development of this consultation document.

10. In addition, after the consultation was published we held our own meeting with some non-commercial providers to inform our views on the best way forward. We felt it important to hold such a meeting as our organisations have shared goals around ensuring that vulnerable clients can continue to access legal advice from these bodies, while ensuring they are properly protected when using their services.

11. Statutory services, such as advice services provided by local authorities, are excluded from the special bodies regime in the Act. However, local authorities represent another major non-commercial legal services provider, when the nature and volume of advice provision is considered. These providers also present risks to the often vulnerable consumers who use their services. This consultation is not the place to explore this further, but it provides added context for this exercise and the LSB may wish to reflect on the issue in future.

Q1. To what extent do you think the current non-LSA regulatory frameworks provide fully adequate protection for consumers?

12. Consumers using non-commercial bodies already benefit from some degree of protection as solicitors employed by them are treated by the Solicitors Regulation Authority (SRA) as in-house solicitors and therefore they are regulated as individuals. This means, for example, that they carry insurance and the SRA Handbook applies. However, the entities themselves are not currently regulated. This is important since, as the Frontier report identifies, in-house lawyers may have a weak influence over the management of these organisations, especially when provision of legal advice is a small part of what they do. The shift towards entity-based regulation in the legal sector reflects recognition of the importance of organisational-level controls for achieving a good level of consumer protection.

13. For consumers, this partial scope of regulation is very confusing. They could complain to the Legal Ombudsman about poor service provided by a solicitor employed by a non-commercial provider, but they could not do so if they received the same advice from a non-authorised person. Consumers will be unaware of the different protections. Indeed, these providers could be independently constituted charities which are part of the same umbrella body, but located on either side of town.

14. Similarly, consumers could be subject to different protections depending on which type of authorised person they dealt with. Annex A of the consultation document highlights inconsistencies of approach between approved regulators, for example solicitors uniquely cannot charge and levels of minimum insurance cover may differ. Entity regulation would help to rationalise this, although scope for regulatory competition means this will not completely disappear. The LSB has an important role to ensure 'regulatory shopping' does not lead to the lowest common denominator.

15. We agree with the LSB's analysis as to the impact of the Charity Commission and the Legal Services Commission (LSC). The former is concerned with governance matters but does not monitor the quality of advice. The LSC exerts a degree of quality control through its contracting process, but the narrowing scope of legal aid from April 2013 will significantly reduce this. We also note that some non-commercial bodies interviewed for the Frontier research were critical over the focus of the LSC Specialist Quality Mark being too much on proper process rather than the quality of advice.

16. With respect to self-regulation, we are impressed by the quality controls put in place by some membership networks. These can include processes, such as file reviews, which exceed the checks made by approved regulators. However, the Frontier research highlighted a varied picture across the sector, which suggests that it would not be appropriate to rely on self-regulation. Despite this, licensing authorities could design their regulatory arrangements so non-commercial providers demonstrating good internal quality controls and sound governance are supervised less intensively. Such earned recognition approaches, which the Panel has previously explored in our report on Voluntary Quality Schemes, are consistent with risk-based regulation.

Q2. Do you agree with the LSB's assessment of the gaps in the current frameworks?

17. Yes, as discussed above. The key point is although there are requirements that may mitigate some of the risks, taken together, they do not provide sufficient assurance that all the risks can be mitigated.

Q3. What are the key risks to consumers seeking advice from non-commercial providers?

18. Our starting point is the nature of the client base using non-commercial providers. The research evidence suggests they tend to be among the most vulnerable in society, and who are least equipped, for example due to their lack of knowledge about the law, to assess the quality of legal advice. The gravity of situations in which these clients require help, such as facing eviction or loss of employment, means the consequences

of legal advice can be life changing. Some organisations in the sector offer services to client groups in vulnerable circumstances due to their specific needs, such as a disability. All this suggests non-commercial providers operate in high risk areas in terms of advice outcomes, even if the technical difficulty of the legal advice area is low.

19. Layered on top of this, is the proportion of the population's legal needs that the sector deals with. The BDRC research for the LSB indicates that 18.9% of people with legal needs who sought advice did so from a non-commercial provider. Individual bodies advise large numbers of people; Citizens Advice says it helped 2.1 million people over the last year with over 7 million problems, while Law Centres claim to advise over 120,000 clients a year. Some non-commercial providers attract large sums of public money. Therefore, the scale of impact is also very significant.

20. We agree with the Frontier classification of the key risk areas: governance and funding; sustainability and lack of alternative providers; and quality. With regard to each:

- Governance and funding – we note from the Frontier research that the strength of governance controls varies across the sector. A key governance feature is the network of local offices and organisations, some of which are constituted as separate charities. This raises challenges over the quality and consistency of advice and service, and the degree of control exerted by 'head office' over its members;

- Sustainability and lack of alternative providers – we note here the sometimes heavy reliance on external funders and increasing scarcity of these funds. Increasingly, funders expect providers to maintain existing provision following a funding cut and therefore with insufficient resource. Another feature is mergers and closures of advice agencies which can cause significant disruption to clients who have urgent problems, as seen with the two immigration advice charities which went under during 2011; and

- Quality – the Panel has previously commented on quality problems with authorised persons; these issues do not disappear by virtue of their employment within non-commercial providers. The absence of a profit motive does not mean that risks stemming from financial considerations do not apply. The sector is under severe funding pressure – pressure that could result in corners being cut or key areas being under-resourced, for example staff expertise. In this context, these bodies compete hard to win work, such as legal aid contracts, both between each other and with traditional firms.

21. In addition, it is possible, although we do not have any direct evidence for this, that clients of non-commercial providers will be less likely to complain. This is because they may not feel 'entitled' to complain about something they are getting for free or they have higher expectations when paying for something. In addition, clients are more likely to be from lower socio-economic groups; our Tracker Survey suggests that

52% of ABC1s would be confident about complaining about lawyers compared to 45% of C2DEs. The risks of this inaction are that consumers are not compensated when they suffer detriment and providers are not able to learn from complaints. This dynamic means that regulators should focus on this area in their supervision work, for example by actively monitoring compliance with signposting rules.

Q4. What are your views on the proposed timetable for ending the transitional protections?

22. We agree with proposed timetable. Given the risks to consumers discussed above the introduction of regulation should not be delayed for any longer than is necessary. However, we note practical implementation issues and acknowledge that changes to legal aid coming into effect in 2013 mean the degree of upheaval would make this date a bad time to commence regulation.

23. Some non-commercial providers have told us they do not want delay either, not least as the LSC has previously indicated it is thinking of making being regulated a future condition of legal aid contracts. Whatever the timing, the sector requires certainty to assist providers to plan in advance and minimise disruption for clients.

24. We encourage the LSB and licensing authorities to consider issues around managing the post-transition phase. This may particularly be relevant to smaller charities, where the Panel's research indicates a lack of awareness of legal responsibilities. The scope for confusion over permitted business structures and other requirements identified in this consultation response may exacerbate matters. Licensing authorities should have a role to work with regulatory and other organisations in the affected sectors to raise awareness, while taking a sensible approach to ensuring compliance in the early days.

Q5. Should we delay the decision of whether to end the transition protection for non-commercial bodies until we have reached a view on the regulation of general legal advice?

25. No. This would incur lengthy delay, which is undesirable for the reasons above. Moreover, there are other policy reviews that might also be used to justify delay, such as regulation of immigration advice and services, and the Legal Education and Training Review.

26. The importance of general legal advice work for non-commercial providers is clear, as this would cast the regulatory net very widely. However, the practical significance of the LSB's project is perhaps less than it first appears given the SRA's policy of regulating entities for all legal work, rather than just those reserved activities. Should this continue for non-commercial providers, as we think it should (see Question 8), then general legal advice would effectively become regulated once the transitional protections end (for those also doing reserved work). The SRA's policy does bring certain issues to a head, in particular the definition of general legal advice. The LSB has indicated it will use the definition in the Act, but non-commercial providers have told us this is difficult to interpret. Moreover, they say that the LSC appears to define the term differently to the Act. Clearly, it is vital

for consumers and providers alike to be clear about what falls within scope.

Q6. Do you have any comments on the Impact Assessment? In particular do you have any information about the likely costs and benefits of the changes set out in this document and/or information about the diversity of the workforce or consumers that use non-commercial organisations?

27. We have no comment to make on the Impact Assessment itself.

28. The Panel conducts an annual Tracker Survey with both a representative sample of the general population and recent users of legal services. This confirms the findings of other research (for example, Causes of Action and the forthcoming BDRC study), and data collected by non-commercial providers about their client base, that the legal needs of the population vary across socio-economic groups. In addition to legal need, our research indicates a wide gap in attitudes and experience of legal services across the population – for example, in measures of trust, confidence, shopping around and satisfaction with outcomes and service received. Therefore, it is important to consider consumer vulnerability in relation to people's engagement with legal services, as well as why they have legal needs in the first place.

Q7. What are your views on allowing non-commercial organisations to charge for advice? What do you think are the key risks that regulators should take into account if these bodies can charge?

29. Charity Commission rules allow charities to trade as long as this activity is consistent with the charitable purposes for which they are authorised. Although the Charity Commission does not take a specific view on charging for providing legal advice, or actively supervise other trading activities, it can respond to allegations that a charity is acting outside of its constitution. Its main concern about charging is likely to be that in doing so the charity still meets its wider aims of providing public benefit regardless of a person's means to pay. For example, if law centres charged they would have to offer something everyone could access, such as a legal information website. The level of charges may also be relevant – the more they restricted their legal advice by charging high fees, then more is likely to be expected in terms of services to the general public that was free to access.

30. With this wider Charity Commission regulatory framework in mind, it would seem odd if a licensing authority decided to ban non-commercial bodies from charging for advice unless there were good reasons specific to legal services to do so. We are not aware of any specific reasons to justify a prohibition on charging. However, charging does change the nature of the risk in some situations. For example, there is a risk of consumers paying for legal advice in advance and a provider becoming insolvent before this is delivered. Therefore, charging may justifiably alter the regulatory arrangements which licensing authorities design. Even so, some authorised persons employed by non-commercial providers already hold client money and are thus already subject to accounts rules. This suggests that the difference in terms of financial protection risk for consumers might be less significant than at first thought.

31. We understand that the SRA's current prohibition is a legacy of a historic deal where the Law Society and Law Centres reached a compromise whereby the latter could provide advice as long as they did not do private work. This is even more of an anti-competitive measure now than it was at the time given non-commercial bodies and traditional firms are competing for the same work, in particular legal aid contracts. The Frontier Research, and our discussions with non-commercial providers, makes clear that they are, and see themselves as, fighting for limited work in a tough market.

Q8. What are your views on our proposed approach to allowing a full range of business structures?

32. Consumer confusion is an important consideration. In the case of membership networks, It is already unsatisfactory that one local citizens advice bureau or law centre, for example, will be regulated because it does reserved work, but the one down the road will not be as it only does non-reserved work. However, allowing separate business structures would be even more confusing since a regulated agency could then pass clients to a linked unregulated entity to conduct the reserved element of their case. Consumers quite reasonably expect the entirety of the legal advice to be regulated and to have the protections which come with that.

33. The Panel has previously commented on the separate business rule when the SRA applied to become a licensing authority and this consultation has not changed our view. We said that the rule's main purpose is to prevent solicitors from avoiding regulation by establishing a separate entity to conduct unreserved activities. It is vital to retain the rule given the existing reserved activities are very narrowly defined. Without the rule, the logical response of solicitors would surely be to establish unregulated entities to carry out the majority of their work and sub-contract the small reserved element to separate regulated entities. This might be acceptable if the list of reserved activities was based on consumer needs, but this is patently not the case given what we know about the history of why the activities were reserved. Should the separate business rule be removed, consumers would lose the protections they currently enjoy without any proper analysis of whether these protections should be retained.

34. There is no reason to suppose the reaction of non-commercial providers would be any different to traditional firms, as they will be keen to minimise the costs of regulation. As non-commercial providers and solicitors are competing for the same business, the same rule should apply to both to ensure a level playing field. The shadow of general legal advice becoming reserved also looms large here, as non-commercial providers would be faced with the prospect of bringing this work in-house again should the goalposts change in future.

35. In fact, non-commercial providers have told us they would rather not create separate structures, which are administratively burdensome, make quality control harder and means that authorised persons and other staff lose the benefits of working together. They suggested that the need to do this would fall away if regulation was proportionate. Therefore, the way in which licensing authorities regulate becomes all

important. An activity-based approach to regulation would offer this assurance, if it meant, for example, that general legal advice and litigation were subject to different levels of regulatory control. Each would be regulated, but the insurance requirements might differ depending on the risks. Similarly, the use of earned recognition would mean a lighter touch approach for membership networks demonstrating good internal controls.

36. In sum, the separate business rule may be imperfect, but it is a necessary evil given the state of the reserved activities. It may actually be something of a red herring, as the key factor for non-commercial providers is ensuring a proportionate approach to regulation. If this is achieved, there is less need to create separate structures.

Q9. Do you agree with our analysis of group licensing?

37. Yes. We agree with the issues of quality control identified in the consultation document. The variable robustness of these controls identified in the Frontier research, and the constitutionally separate status of entities within some membership and federated networks, makes us uncomfortable with this approach. The regulatory independence issues are also of genuine concern and we do not consider that the lack of profit motive justifies any special treatment in this area.

38. Our discussions with the sector suggest that a very small number of providers would have the internal structures to allow such an approach. Therefore, even if desirable, it would not be appropriate to create a special rule for such a small number of entities, which could also give them a competitive advantage over other non-commercial providers. Again, proportionate regulation should ease the concerns of those wishing to obtain a group licence. For example, one example of earned recognition in practice would be lighter touch supervision of those networks that are able to demonstrate sound quality controls across the network.

Q10. What are your views on these issues that may require changes to licensing rules?

39. We agree with the LSB's analysis of the relevant issues and have no further comment.

Q11. Are there any other areas where the LSB should give guidance to licensing authorities?

40. There are none which come to mind.

July 2012