The Law Society

LSB Consultation - Regulation of special bodies / non-commercial bodies

Law Society response

July 2012

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This response has been prepared by the Law Society, the representative body for more than 140,000 solicitors in England and Wales. The Law Society negotiates on behalf of the profession, and lobbies regulators, government and others.

The Law Society welcomes the opportunity to comment on the Legal Services Board's (LSB) consultation on the regulation of special bodies and non-commercial bodies. These bodies play an important part in the legal services market because they provide services to vulnerable people, many of whom would not be able to afford services at the normal commercial rate. It must, however, equally be remembered that their existence does affect the market in that they are providing services that could be provided by others at a commercial rate. Where, in practice, it would be impossible for the bulk of clients to pay a commercial rate for those services, it is important that their work should be encouraged and there is justification for a special regime to cover them. Where, however, these providers compete with others in the market for work, then the question becomes less clear-cut and it is more difficult to see why there should be significant differences in approach.

In summary, we agree that non-Legal Services Act (LSA) regulatory frameworks do not provide satisfactory protection for consumers who use special / non-commercial bodies, especially in view of the likely vulnerability of their clients. We therefore agree that the transitional period should be removed, and that this should be delayed until April 2014 in view of funding cuts and the burden these bodies are already facing.

While we understand the motivation behind proposals to enable such bodies to charge for their services, we believe that there needs to be very clear ground rules governing this if they are not to have inappropriate advantages against commercial bodies that, inevitably, they will be competing against.

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

We believe that non-LSA regulatory frameworks do not provide satisfactory protections for consumers. The disparity in safeguards offered by different bodies points to inconsistency in the level of consumer protection offered, placing clients – who are often vulnerable – at significant risk.

2) Do you agree with the LSB's assessment of the gaps in the current frameworks?

We agree with the LSB that the present arrangements provide inconsistent regulation and a clear risk of detriment to consumers. Generally, the advice that has been provided has been of a high quality, but the absence of any regulatory control has caused considerable potential for problems if such agencies close or become insolvent. If these bodies are likely to take a more commercial approach following the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), the risks are likely to increase.

3) What are the key risks to consumers seeking advice from non-commercial advice providers?

As stated in the consultation document, the risks are unlikely to be as acute as those presented by commercial firms. However, many of these clients are vulnerable, and in the absence of proper safeguards coupled with inconsistent regulatory provision, they may be exposed to significant regulatory risk, including:

- An inability to take complaints to the Legal Ombudsman;
- Clients may not be in a position to make informed decisions about how their matter is handled and the options open to them without additional support;
- Lack of recourse if a firm becomes insolvent; and
- Lack of professional indemnity insurance provision leaves clients exposed and unprotected should they be subject to professional negligence.

Principle 5 of the SRA Code of Conduct 2011 states that solicitors should provide a proper standard of service to all clients. Ensuring that a set of minimum standards are delivered by firms with a vulnerable client base must be a priority. Further, an outcomes based approach will allow different firms to tailor the measures they need to put in place in order to serve their client base.

4) What are your views on the proposed timetable for ending the transitional protection?

We agree that the removal of the transitional period should be delayed until April 2014 for the reasons stated in the consultation document. In our view, it is important that both the

bodies themselves and those that will be licensing them should have time ensure that proportionate systems are in place and that compliance will be possible. Having said that, we note that there is no assessment in the paper of the number of bodies likely to be affected and of their clients. It would be unfortunate if, as a result of this, bodies decided that they did not wish to undertake the services which would need regulation or were unable to comply.

5) Should we delay the decision of whether to end the transitional protection for special bodies/non-commercial bodies until we have reached a view on the regulation of general legal advice?

We have no strong views on this point. In principle, it is unsatisfactory for this separate part of the market to exist with inconsistent regulation and that points towards implementing the proposals as soon as is practically possible. It is likely that the review of the regulation of legal advice may take some time and even longer to implement and it would therefore be likely to create delay and uncertainty in dealing with the existing position. Moreover, the fact that not all special bodies would be affected by this might well be an argument for dealing with this group first so that any lessons can be learned.

Equally, however, we do not perceive that there is an urgency here and, if there were concerns about a new regime creating major problems for bodies providing important public services, then we do not think that the delay would be disastrous.

6) 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 special bodies/non-commercial organisations?

We do not have any more information to share about the costs and benefits of the measures outlined in the consultation document. We are concerned, however, that there could be implications for the availability of advice, and these need to be studied.

7) What are your views on allowing special bodies/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?

The reason why special bodies existed in the first place was because they operated to provide free advice on a not-for-profit basis, taking advantage of funding from Government, public bodies and charities, often where there was a gap in the market. We recognise that the funding basis is now changing and we can see why it might be appropriate for such bodies to charge fees in appropriate circumstances, provided that, in charging those fees, the body did not compromise its not-for-profit status.

It needs to be recognised, however, that there is a significant risk that clients may not understand the charging structure and this will leave room for disputes. In our view it will be essential that clients have:

- Clarity as to the nature of the services that are being provided for the fee;
- Clarity about when other charges may be made; and
- The opportunity to dispute and question the level of service.

These are likely to be strongly in the interests of clients and we consider that there should be rules and guidance so that special bodies are aware of the requirements here. Such charging is likely to change the culture of such bodies and may, over time, diminish the distinction between them and firms providing advice on a commercial basis.

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

The position of a body offering, through a separate business, advice on a commercial basis, albeit with profits going to fund not-for-profit advice, raises very different issues which are not unique to special bodies.

First, it seems to us that there are major concerns about clarity and client protection. The aim of the separate business rule is to ensure that firms are not able to avoid regulation through such structures. We believe that there is a danger that (a) clients may not be clear about which services are regulated and what measures of recourse they have, and (b) there is scope for referrals between the two bodies which may not be in clients' interests. While we accept that this may be against the current ethos of most special bodies, the involvement of commercial considerations may well have an effect on that ethos.

Secondly, it seems to us that the commercial arms will be in competition with other law firms. We can see no justification for separate rules to exist for these bodies simply because they may have a charitable arm. There may be arguments for reviewing the Separate Business Rules but this should be in the context of the whole of the regulated community, not just special bodies.

9) Do you agree with our analysis of group licensing?

We agree with the LSB's analysis and views on group licensing. We do, however, have some concerns about activity-based regulation and feel that some further thought on this may be required.

We agree that it may well be appropriate for rules concerning clients' money to be relaxed if the body does not handle such funds. It may also be appropriate for insurance rules to be relaxed if the body confines itself to low risk work. However, where the body is conducting

work in competition with other firms on a commercial basis, then our view is that it should be regulated on the same basis as any other law firm.

We are not clear about exactly what is meant by the proposals in paragraph 43 and whether it is suggesting that some parts of a special body's service provision would, effectively, be unregulated while others were subject to supervision. If this is the proposal, we identify a number of dangers in this approach. In our view, clients going to a special body are unlikely to differentiate between services which are licensed or unlicensed. It is possible that a single client may use an advice agency for advice on, say, employment and housing - where there might be a licence for litigation – as well as advocacy and debt, where there might not be. It would be confusing and wrong for different standards to apply to different areas of work. In our view, the position should be that - as with solicitors - the whole spectrum of legal work provided by the body be regulated, and the same client protections should apply irrespective of whether all, or only part of, the work is licensed.

10) What are your views on these issues that may require changes to licensing rules?

Licensing rules should reflect the level of risk posed. If special bodies continue to be restricted from charging for their services and do not hold client money, they would likely represent a lower risk than other ABS firms for licensing purposes. It would therefore be proportionate to allow lower minimum levels of insurance cover and compensation fund contributions. Further, we agree that it would not be proportionate to insist on compliance with a full complement of accounts rules if a body does not charge fees or hold client money, and it would be unnecessarily burdensome to insist upon the appointment of a HOFA for special body ABSs.

We believe that, for consistency, all appeals should be heard according to those already in place for Licensing Authorities (LA). Under the Authorisation Rules, ABS firms that are regulated by the SRA have a right of appeal to the appropriate appellate body, and provision should be made so that any new ABS firms has the same recourse.

11) Are there any other areas where the LSB should give guidance to licensing authorities?

We would urge the LSB and LAs to provide clear guidance as for the circumstances in which a body should apply to become an ABS.