



**REGULATION OF SPECIAL BODIES/
NON-COMMERCIAL BODIES**

A CONSULTATION PAPER ON THE REGULATION OF
SPECIAL BODIES/NON-COMMERCIAL BODIES THAT
PROVIDE RESERVED LEGAL ACTIVITIES

**A RESPONSE BY
THE CHARTERED INSTITUTE OF LEGAL
EXECUTIVES
AND
ILEX PROFESSIONAL STANDARDS LIMITED**

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Introduction

1. This response represents the joint views of The Chartered Institute of Legal Executives (CILEx) an Approved Regulator under the *Legal Services Act 2007 (the 2007 Act)*, and ILEX Professional Standards Limited (IPS), the regulatory body for 22,000 members of CILEx. The consultation was separately considered, in the case of CILEx by a committee comprising of the President and the Vice President together with a number of Council members; and in the case of IPS its Board. The outcomes of those respective considerations were exchanged and with no significant difference of opinion between the two organisations, a joint response is tendered. For the purposes of this response, 'we' is used to mean both CILEx and IPS unless the context suggests otherwise.
2. CILEx and IPS promote proper standards of conduct and behaviour among Chartered Legal Executives and other members of CILEx. We aim to ensure CILEx members are competent and trusted legal practitioners and are fully aware of their obligations to clients, colleagues, the courts and the public. We aim to help good practitioners stay good and improve throughout their careers and to ensure the public know the quality of work Chartered Legal Executives can provide.
3. We welcome the opportunity to comment on proposals put forward by the Legal Services Board (LSB) on the regulation of special bodies and non-commercial organisations. We hope the responses to questions below may be of value to the LSB and help to inform its approach.

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

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

Answer to questions 1 and 2:

4. We agree that the non-commercial sector is not "risk free" simply because of the not-for-profit nature of the services. Relatedly, the current non-LSA regulatory frameworks do not appear to provide adequate protection for consumers against the risks posed in the sector. Special bodies are subject to quasi-regulation through various mechanisms including, amongst others, requirements relating to the Charity Commission, quality marks (via the Legal services Commission, funding providers and umbrella bodies like Citizens Advice). As evidenced in the LSB's assessment of the current framework, the requirements in each strand of regulation overlap in some areas, but may leave gaps in others. Providing targeted and proportionate regulation that does not duplicate some of the non-LSA regulation already in place will be a

difficult task. However, the existing quasi-regulatory framework is fragmented resulting in an inconsistent approach across the not-for-profit sector to quality assurance and professional conduct.

5. This will be further compounded by the abolition of the Legal Services Commission (LSC). For example, large sections of the voluntary sector have legal aid contracts for the provision of welfare rights and debt advice and as such these providers have to comply with LSC quality marks and audits. With the cut in the scope of legal aid resulting from the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO Act) this will no longer be the case.
6. We would like to point out the work we have done with the not-for-profit sector and other approved regulators to establish National Occupational Standards for the legal advice sector which are designed to raise standards in a uniform way. Those standards provide a benchmark for potential regulators to use to quality assure individuals within the differing services.
7. It is important that special bodies and not-for-profit organisations that undertake reserved legal activities as defined by the Legal Services Act 2007 (the 2007 Act) submit to a single form of oversight regulation and that such regulation is entity based. Entity based regulation of special bodies will address the gap that exists when lawyers are employed by not-for-profit organisations. It will also bring much needed consistency in the sector and an independent form of redress for consumers via the Legal Ombudsman.

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

8. The risk of consumer detriment may not be less in the not-for profit sector than in the commercial/private sector just because the service is provided free or at a lower cost. Often not-for-profit sector clients are very vulnerable and place considerable reliance on the service. Also, clients are often of low income and in receipt of state benefits which can limit their choice of legal advice/service provider. This will be compounded by cuts to legal aid provision by the implementation of the LASPO Act in April 2013 cutting scope to legal aid.
9. Although there is greater potential for risks to have an impact in the not-for-profit sector (presumably because of the vulnerability of the client) there is little evidence that these potential risks, as identified by Frontier Economics, are having a real impact on the ground. There is no client money being held (even in cases where welfare benefits appeals are successful, benefits awards are always paid directly to clients); there is little scope for monetary fraud; and the advice is free in the sense that it is given for no fee, gain or award. We also understand that the not-for-profit sector also has very good referral systems in place. This recognises that a particular advice centre/CAB may not be most suited for the client. For example, a majority of CABx are

now offering a gateway service to ensure that the client is sent to the most appropriate agency for advice.

10. Notwithstanding the above, the quality of advice provided by special bodies can be affected by the likely turnover of staff or rota systems in place. There may be risks to the continuity of case handling possibly leading to inconsistency of advice. Staff turnover may be a result of staff working on a voluntary basis or at reduced rates, which can cause conflicts when better paid work is offered. Quality of advice can also be affected by inadequate supervision arrangements given that advice staff are unlikely to hold legal qualifications. However, we understand that CABx have regular audits undertaken by Citizens Advice (the operating arm of the National Association of Citizens Advice Bureaux). Further information may be useful about the nature, extent and frequency of these audits.
11. Where consumers are seeking a reserved activity from a non-commercial body, it follows that there must be in place one or more individuals with the rights to carry out that work. The main risk therefore is in poor initial advice from non-qualified personnel which could cut off access to the qualified personnel.
12. It is essential that organisations that do provide reserved legal activities to members of the public submit to a single form of oversight regulation to ensure much needed consistency in the sector. This will also improve the sector's complaints handling systems when things do go wrong and this can only be in the consumer interest.

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

13. We recognise that legislation requires an end date to transitional arrangements. The LSB needs to assess whether current and prospective licensing authorities will have sufficient time to research and work with special bodies before the transitional protection is removed in April 2014. Furthermore, all of the different special bodies will need time to adapt to a different regulatory regime, a task which cannot be assumed to be straightforward.

Question 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?

14. Delaying the decision on transitional protection until a view on general legal advice has been reached could be beneficial. General legal advice is currently not a reserved activity, but is provided by many voluntary sector organisations for example, law centres, CABx, welfare rights organisations, and community rights' groups. If as a result of a review of general legal

advice, general legal advice became reserved the number of special bodies that would require licensing would increase. Delaying the decision on transitional protection until general legal advice is reviewed, would provide a smooth transition with the least negative impact for all special bodies.

15. On the other hand ending the transitional period in April 2014 would enable licensing of special bodies that carry out the current list of reserved activities. Special bodies that provide general legal advice could be regulated at a later date, if it became regulated, providing a staggered approach to regulation of special bodies. However, such a staggered approach as a result of general legal advice becoming reserved may not be suitable for special bodies that may experience numerous shifts in their model of delivery of legal services to meet changing regulatory demands.
16. The approach to risk will be different depending on whether general legal advice is a reserved activity or not. It will also depend on whether general legal advice, if a reserved activity, can be carried out by 'exempt persons' for no 'fee, gain or reward'. If such an exemption is included, arguably special bodies could continue to provide general legal advice once it is provided free of charge.

Question 6: Do you have any comments on the Impact Assessment? In particular do you have any evidence about the likely positive or negative impacts 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?

17. The LSB will be seeking more evidence and information as part of the consultation process. The LSB should consider looking in particular at vulnerable clients who will gain better protection when the transitional period ends.
18. We have also started the process of engagement and facilitating relevant dialogue with the special bodies from the non-commercial sector. This will be an on-going process to ensure that we are fully aware and alive to the particular concerns of the sector. Amongst others, the concerns appear to be as follows:
 - The governance structures that apply to commercial ABS' may not be appropriate for non-commercial organisations. The prescribed governance structures for ABS' for ownership and material interest are very different to those that currently exist in special bodies. A one size fits all approach cannot be adopted.
 - The "fit and proper test" is a concern for special bodies. Trustees and Management Committee Members have other duties and obligations to fulfil and there could be scope for regulatory conflict.

- Regulatory conflicts could exist whereby members of special bodies are subject to regulation as an individual whilst the entity they work in is also regulated. This is not a new phenomenon, and is something CILEx currently deals with as Chartered Legal Executives working in solicitors firms are regulated by IPS as an individual and by the SRA through the entity they work in. We recognise that the rules of the entity regulator prevail.
- The whole organisation and its entire staff come within the regulatory reach of a licensing authority which has the same powers of discipline, sanction and intervention over ABSs as it does over private practice. All employees, whether or not engaged in legal activity themselves, have a duty to ensure that they do not cause or contribute to a breach of the rules. This will affect non-commercial bodies that also carry out non-legal work, or have fundraising or campaigning arms.

19. Licensing authorities would therefore have to ensure that regulation of the sector is targeted, proportionate and does not impose unnecessary costs, increased regulatory burden and complexity.

Question 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?

20. Charging for advice and services in the not-for-profit sector is gaining popularity and becoming increasingly necessary. Whilst IPS does not currently have restrictions on CILEx members charging for legal advice whilst working in not-for-profit organisations we believe that the LSB's proposal for the removal of restrictions on charging should be considered in an impact assessment so that all relevant ethical issues and obstacles to charging can be examined.
21. We recognise that charging can ease difficulties of funding and sustainability; a more prevalent issue in light of legal aid cuts. Charging can also enable not-for-profit organisations to provide better resourced services to more people if the income made through charging is reinvested into charitable services. However, the introduction of charges for advice services would change the nature of not-for-profit organisations and in some cases have an impact on their charitable status if they are a charity. Charging for advice could be viewed as introducing a barrier and risking the reputation of the not-for-profit sector which was founded on philanthropic traditions. For example, one of the founding principles of the CAB is that all advice is free regardless of status and means.

22. The current client base of the not-for-profit sector may find it difficult to pay for legal advice. Many current clients are on the minimum state benefits/low incomes and could not afford to pay a fee. There are also moral issues about charging for clients on low incomes/benefits. Charging for advice could result in (i) access to justice issues arising; (ii) certain sectors of the not-for-profit sector expanding its client base away from disadvantaged groups to capture fee paying clients.
23. For those that make a decision to charge, the level of fee is also an important factor. Some organisations may believe in charging only a modest fee, other organisations may charge a similar rate to the private sector in order to make a surplus. Therefore, rules may need to be in place relating to fee structures and levels. What is abundantly clear is that an impact assessment is required as there is little or no evidence of the not-for-profit sector desire to charge for the provision of advice services
24. Charging could isolate vulnerable clients and as a result reduce access to justice and cause irreparable harm to the sector, relied on by the vast majority of vulnerable clients. Measures would need to be put in place to ensure that those who need free legal advice continue to receive it. Furthermore, if not-for-profit organisations deliver both fee paying and free services it could result in a two-tier system where fee paying clients receive higher quality services. Vulnerable clients who are unable to pay for services could be put at a disadvantage if priority is given to fee paying clients especially during financially difficult periods. Relatedly, flexibility must be made where advice continues to be without fee, gain or award. Otherwise, this may be seen to be the beginning of the end for free legal advice in the sector limiting access to justice. Those organisations which are charities may also need to review their charitable status.
25. The current law and regulations that apply to the not-for-profit sector need to be considered in relation to charging. For example under charity law, whilst there is no specific barrier to charging for advice, charity rules require that fee-paying services must fit within a charity's charitable objectives and public benefit rules. In relation to immigration advice, organisations providing immigration advice or immigration service must be registered with the Office of the Immigration Services Commissioner (OISC) and different rules apply to organisations that charge for advice and those that do not charge. Furthermore, the Solicitors Regulation Authority Handbook imposes restrictions on solicitors charging for advice when working in not for profit organisations.
26. There are practical and regulatory issues to the collection of fees. We recognise that there are risks and difficulties associated with holding client money. The holding of client money is a new competence area that special bodies would need to develop. IPS is looking at different options for protecting client money which may be of interest to special bodies.

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

27. We agree with the LSB allowing a range of business structures in the not-for-profit sector as this is in accordance with the philosophy behind the Legal Services Act 2007 of opening up the legal services market and introducing Alternative Business Structures. An organisation may want to set up a separate trading arm in order to deliver fee-paying services; effectively ring fencing fee-paying services from other free services and activities within the organisation. Such an approach may work for some organisations and not for others. We will welcome the provision of legal services through any legal structure provided risk assessments show adequate protection for clients.
28. The consultation highlights that in order to provide targeted and proportionate regulation a clear understanding of the governance structures of special bodies/non-commercial organisations is required. The Legal Services Act 2007 defines a non-commercial body as a (a) not-for-profit body; (b) a community interest company or (c) an independent trade union. In relation to charging for services, it is unclear if an organisation ceases to be non-commercial once it starts to make a profit and whether a difference is made if the profit is spent on non-charitable rather than charitable services. It is not enough to solely rely on the definition in the Act.

Question 9: Do you agree with our analysis of group licensing?

29. Umbrella/group licensing limits risk assessment to policy and procedure at corporate level rather than a risk assessment of how policies and procedures operate in practice within each entity. Regulation at group level is too removed and can result in risks and issues being missed as different bodies within groups can work very differently from each other.
30. Group licensing may work where the umbrella organisation has criteria which match the licensing authority and all offices under a licence conform to the criteria through uniform policies and procedures. However, further work is needed to see whether the risks attendant on such structures can be managed by regulators.

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

31. We appreciate the potential modifications that may be required to licensing rules. It is likely that the modifications will be required to counteract highly negative impacts licensing arrangements will have on special bodies.

32. We recognise that, for example, there may be different minimum terms and conditions of insurance that apply to special bodies. Through our work with Associate Prosecutors IPS has experience of adapting its regulatory arrangements to suit niche groups and the risks they pose to consumers.

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

33. We have no comment on question 11.

CILEx/IPS