

# Consultation Response

## By the

# Disability Law Service

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**Regarding:**        **Consultation paper on the regulation of special bodies/non-commercial bodies that provide reserved legal activities**

*This is a response to the Legal Services Board's ('LSB') Consultation Paper on the regulation of special / non-commercial bodies that provide reserved legal activities. On a prima facie basis the Disability Law Service ('DLS') welcomes the LSB's investigation into the regulation of this sector. DLS notes the recommendations of the LSB to remove the transitional protection given to this sector and the proposed timeframe of 2014.*

*Whilst DLS welcomes such a change, we have heavy reservations as to the drafting of the Legal Services Act 2007 ('LSA 2007') which appears not to have been drafted with special bodies / non-commercial bodies in mind. We also have concerns over the associated Impact Assessment and its possible lack of understanding of the sector when it comes to the impact upon organisations. We feel that if the following reservations noted within this response are not adequately dealt with, then the ending of transitional protection may have a devastating effect upon the sector. This comes at a time when the sector is being relied upon more than ever before to provide access to justice for the most vulnerable in society. Additionally we are concerned about the timescale of removing the transitional protection in 2014 when there are currently no regulations, systems or agreed regulator in place to provide post 2014 regulation.*

*18<sup>th</sup> June 2012*

## DLS History

1. DLS has been providing free legal advice and representation for disabled people since 1975. DLS has over 30 years experience providing specialist legal information, advice, casework and representation for disabled people, their families and carers nationally. It is a charitable company limited by guarantee, incorporated on 11 January 1979. Its purpose is to challenge the poverty and inequality of disabled people by securing them equal access to their legal rights and entitlements. DLS' objectives are:
  - a) To ensure disabled people have access to high quality, specialist legal services.
  - b) To improve awareness and understanding of the legal rights of disabled people and of the range of legal and advice services available to them.
  - c) To challenge discrimination, exclusion and poverty by enforcing and strengthening laws that affects the opportunities, choices and legal rights of disabled people.
  - d) To ensure DLS is high performing, well run and well regarded.
  
2. Uniquely we are the only organisation controlled by disabled people providing a specialist legal service for disabled people. Our legal team specialise in the areas of community care, welfare benefits, employment, and disability discrimination law. We have many years experience of representing our beneficiaries in tribunals and courts including judicial review. To meet our purpose we provide a range of activities including:
  - a) Acting as a first port of call for disabled people seeking legal advice through our legal access service. This service deals with over 5,000 requests a year for advice and provides diagnostic advice, legal information, referrals to DLS legal advisers and signposting for those whose problems fall outside DLS's areas of legal expertise or capacity.
  - b) Providing specialist legal advice to disabled people in employment, consumer/contract, discrimination, community care and welfare benefits law. Some 2,500 disabled people a year benefit from this service.
  - c) Providing legal casework and representation.
  - d) Producing legal information via a range of factsheets, downloadable from our website, on legal issues relevant to disabled people.

- e) Delivering training to other organisations and professionals working with disabled people.
  - f) Responding to consultation papers. .
3. The work of DLS in representation of the interests of its clients has led to a number of high profile cases including the following:
- a) Megarry v Chief Adjudication Officer [1999] All ER (D) 1183
  - b) R v Islington ex parte Rixon (1997-8) 1 CCLR 119,
  - c) R (Garnham) v Secretary of State for Health [2009] EWHC 574 (Admin),
  - d) R (on the application of McDonald) v RBKC [2011] UKSC 33.
4. This year DLS brought a case within its own name against the Ministry of Justice to challenge the removal of the welfare benefits from the scope of legal aid. The case was considered by Court of Appeal.

### **DLS Response**

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

Until the consumer is able to make a complaint to a single body then there will not be adequate protection. Additionally the consumer should be indemnified against negligent advice (by whom?)?. We also believe there should be a regulator that could intervene in the event a firm becomes bankrupt in order to ensure that a client continues to receive representation.

As the LSB has identified, this is not the case for most organisations at present. There is no organisation (including the SRA) which currently has the jurisdiction to make an 'intervention' should a firm become bankrupt. Furthermore there is no blanket requirement for indemnity insurance, nor a requirement that firms have solicitors in charge of legal departments.

It is welcomed that the LSB has identified the fact that there are many organisations that do provide regulation for those 'special bodies'. However, many of these organisations already face onerous regulation. For example DLS is required to have indemnity insurance, is regulated by the Charity Commission and the Legal Services Commission. However, were our organisation to become bankrupt, there would not be a regulator for clients to turn to for intervention. We also note that many other legal organisations within the special bodies category face a less rigorous level of regulation than ourselves and in some cases no regulation at all.

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

We agree with the majority of the LSB's assessment in that there are major gaps in the current regulatory framework in relation to protection for the consumer. We do feel that the key problem with the consumer being able to gain advice or representation without worry as to the quality rests squarely with the definition of non-reserved activity. The framing of 'non – reserved activity' shows an extremely large ocean of activity. This ranges from initial advice in any area of law through to advocacy/representation in tribunals or county courts.

This is innocuously known as 'general advice' but which appears to be seen as everything from filling in Disability Living Allowance forms through to litigation. We do not believe that advice on the basics of welfare benefits for example should fall within the remit of a reserved activity but we do believe that if a person takes on a case to represent a client then the client should then have the right to complain when legal matters go wrong.

It is stated in the consultation paper page 7, paragraph 19: ***"In considering the approach to regulation of special bodies/non-commercial bodies we are focused on the existing reserved legal activities. Although precise data on the types of activities undertaken by special bodies/non-commercial bodies is limited, from the information we have available, we consider the most relevant reserved activities from this sector to be litigation and rights of audience. However we also think it likely that many and perhaps the majority of special bodies/non-commercial bodies are providing general legal advice in areas such as housing, welfare benefits or debt and may not therefore carry out any of the reserved activities."*** This acknowledgement within the consultation points to the lack of protection that consumers have due to the present definition of general advice.

The key issue is that currently the list of reserved activities includes an exemption which allows bodies to provide legal representation and conduct litigation within a variety of areas. These areas include employment law, social security law at the first tier and upper tribunals, special educational needs and many other areas of law. The problem means that the only way that a body would be regulated when conducting these and many other areas of law is if they have a solicitor or barrister conducting the matter. The possible effect on the consumer is well summarised below by the Law Society in their response to a separate consultation as seen below: 'A consultation paper under section 70 of the Legal Services Act 2007 on proposals to modify the functions of two approved regulators.'

***Defining reserved activities***

***2. The Law Society understands that the SRA will be proposing that the definition of reserved activities under the Act should be extended to cover all "solicitors activities". Under the Act providers of legal services can only be regulated as an ABS if they undertake one or more of the reserved activities. Accordingly those***

*entities that only provide unreserved legal activities cannot be regulated, even if they wished to be.*

*3. Many important legal services, such as will writing, much business related legal advice, mediation and employment tribunal work are outside the current scope of "reserved activities". We agree with SRA that where such activities are not conducted through regulated firms people are exposed to much greater risks, including financial default, negligent advice and being misled as to costs.*

*4. The best way to secure consistent consumer protection and avoid consumer confusion over which legal services in this new market are regulated or not is for the LSB to work with the SRA to extend the definition of reserved activities to cover all "solicitor activities". If the LSB consider that this is too radical an approach for a Order under section 69, they may wish to consult on making a recommendation to the Lord Chancellor under section 24 of the Act, to achieve the same result.*

[http://www.legalservicesboard.org.uk/what\\_we\\_do/consultations/closed/pdf/section\\_69/law\\_society\\_response.pdf](http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/section_69/law_society_response.pdf)

The issue has been created due to the drafting of the Legal Services Act 2007. Section 12 defines reserved legal activities which a body cannot carry out unless they are licensed to do so. Without the consideration of this matter at the same time as those currently under transitional protection there will never be adequate protection for the consumer.

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

There are large risks to consumers. They will find themselves being provided with bad advice without any method of redress or compensation. We agree with the LSB as stated above that this may come in the form of the organisation having no indemnity insurance, no one qualified to undertake their case, no one qualified to supervise legal activities and no one organisation regulating the organisations providing advice. By default this does create the risk of a two tiered system of legal advice.

The consumers in this area are often the most vulnerable and therefore do not have the means or the capability to commence civil action after negligent work. The consumers are also often those who have suffered discrimination as a result of a 'protected characteristic' as defined by the Equality Act 2010 and therefore require assistance.

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

Currently the proposed timetable appears to be almost impossible to achieve bearing in mind we are now at the end of July 2012 and in less than two years there is theoretically the removal of the transitional protection.

Why might this seem a difficult target? Firstly there is unlikely to be a response to this consultation until around November 2012. There is currently no regulator in place nor is there by default any agreed regulations. Draft regulations would themselves have to go out to consultation and it is unlikely that responses would be submitted until the summer of 2013. This would leave less than a year for organisations and the proposed regulator to put a system in place for organisations to make applications to the regulator and have them considered so that they can be regulated by 2014. This also fails to consider the fact that many organisations may have to change their structure so as to be able to operate under a new regulatory system. Many of these organisations are charities which will need time to create new processes and change their constitutions whilst still following the regulation that they face from other bodies (including the Charity Commission).

As considered below, there is also the added issue that LSA 2007 does not appear to have been developed with organisations such as Law Centres like ourselves in mind. Therefore if it was implemented as drafted it may lead to unforeseen and unintended consequences (please see trustees point below).

- 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?** As stated above, we submit that general legal advice should be reviewed and should have some sort of regulation. We do not think a delay is necessary, but submit that where a special body/non-commercial organisation decides to take a case involving potential court or tribunal action then the matter should be considered a reserved activity. There is a clear potential danger with the up and coming changes to legal aid, where firms are allowed to charge for legal advice but may not be regulated by the SRA or the LSB.

This does impose a deadline upon the LSB to consider what consumers can do to gain assistance in those situations. With the removal of so many areas of law from the scope of legal aid, consumers will have to take whatever advice that is available and they may have to pay for this. It is unfortunate that the many of the areas of law taken out of scope are classified as non-reserved activities. There will not only be less regulation but no one to look out for the interests of those whom utilise those areas of law. .

- 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?**

Originally we had felt that the impact assessment had taken into account the full if not slightly generalised impact of the proposed changes. Unfortunately it is only when the detail of LSA 2007 is considered that we become of the opinion that the Act was not designed with charities in mind. We think it likely that charities will make up a bulk of the organisations which would be affected by the proposed changes.

It appears that when drafting LSA, no consideration has been given to the pressures or current regulations charities face. As a result untold damage could be done to the sector without adequate safeguards. With this in mind we refer the LSB to the Review of the Charities Act 2006 entitled: "Trusted and Independent: Giving charity back to charities". We note from this document that the High Court and the Charity Commission has the power to remove liability of a Trustee where it was considered that they had acted in good faith. We request that the LSB take this into consideration, specifically the duties of organisations such as the Disability Law Service and their trustees. This is available at [www.civilsociety.co.uk/docs/charities\\_act\\_2006\\_review.pdf](http://www.civilsociety.co.uk/docs/charities_act_2006_review.pdf) undertaken by Lord Hodgson of Astley Abbots.

The primary concern is the effect that LSA 2007 has on those defined as a 'manager' and also of those whom maybe seen as having an interest or voting interest in an organisation. We are extremely concerned that trustees for charities will be regulated in a way that causes them to have to leave the sector.

This, we believe, will have a huge effect on the running of charities. The sector could lose a great deal of experience. Charities are also unlikely to attract trustees who are within the financial or legal professional as a result of section 99 of LSA. This is because our understanding of this section would mean that present or future trustees could face being banned from holding a variety of positions from manager or employee to head of legal or finance.

#### **99 Disqualification**

**(1) A licensing authority may in accordance with its licensing rules disqualify a person from one or more of the activities mentioned in subsection (2) if—**

**(a) the disqualification condition is satisfied in relation to the person, and**

**(b) the licensing authority is satisfied that it is undesirable for the person to engage in that activity or those activities.**

**(2) The activities are—**

**(a) acting as Head of Legal Practice of any licensed body,**

**(b) acting as Head of Finance and Administration of any licensed body,**

**(c) being a manager of any licensed body, or**

**(d) being employed by any licensed body.**

**(3) The disqualification condition is satisfied in relation to a person if, in relation to a licensed body licensed by the licensing authority, the person (intentionally or through neglect)—**

**(a) breaches a relevant duty to which the person is subject, or**

***(b) causes, or substantially contributes to, a significant breach of the terms of the licensed body's licence.***

***(4) The relevant duties are—***

***(a) the duties imposed on a Head of Legal Practice by section 91,***

***(b) the duties imposed on a Head of Finance and Administration by section 92,***

***(c) the duties imposed by section 176 on regulated persons (within the meaning of that section), and***

***(d) the duty imposed on non-authorised persons by section 90.***

This is a key worry as the LSA 2007 has a definition of manager which could include trustees. Even if assurances can be given that this will not be the case, there is still the more basic issue of schedule 13 which considers those who have a voting interest. This states that those with such an interest means they may be liable for actions carried out by the organisation regardless of the fact that they may have and most likely will have delegated the responsibility to paid directors or managers.

Trustees are volunteers who receive no reward and give up their own time to assist charities. It would appear unfair to place what we consider to be too onerous a regulatory burden on them. It is entirely possible this would dissuade people from assisting such a charity, considering it too high a risk.

We also note that any manager or employee of a person that is authorised to conduct a reserved activity faces a duty as seen below by section 90 of LSA 2007:

***90 Duties of non-authorised persons***

***A non-authorised person who is an employee or manager of a licensed body, or has an interest or an indirect interest, or holds a material interest, in a licensed body, must not do anything which causes or substantially contributes to a breach by—***

***(a) the licensed body, or***

***(b) an employee or manager of the licensed body who is an authorised person in relation to an activity which is a reserved legal activity,***

***of the duties imposed on them by section 176.***

One partial way of assisting charities is to allow an automatic exemption for organisations that are regulated by the Charity Commission to tick a box on an application for a licence that requests a waiver of schedule 13 which covers those with an interest. This could be carried out using the exemption under section 106 of the LSA 2007. This would of course assist charities heavily in keeping hold of trustees especially as being charities they would be heavily regulated already.

## Section 106 exemption

We are concerned that even if there is an automatic LSA 2007, section 106 exemption of schedule 13 for trustees regulated by the Charity Commission, trustees may still be caught by being defined as managers and as such held liable.

This is primarily because of the wording that the articles of governance of charities such as DLS define the duties of trustees. To provide an example of this we have provided below a basic guide as to the design of the Disability Law Service to illustrate our concerns.

The trustees duties are defined in the DLS amended articles which can be found on the DLS website as well as the Charity Commission website. As seen below they do indicate that the duty of the trustees is to manage DLS.

### ***TRUSTEES' POWERS AND RESPONSIBILITIES***

#### ***Trustees' general authority***

***5. Subject to the articles, the Trustees are responsible for the management of the Charity's business, for which purpose they may exercise all the powers of the Charity.***

The management of DLS as a charity starts with the Board of Trustees who have overall control and who are regulated by the Charity Commission. The Board of Trustees currently has 11 members including seven practicing lawyers of which two are circuit judges. The board of trustees are described (please see below) in the 2011 Financial Accounts sent to the Charity Commission as being directors whose role includes taking 'decisions on all matters concerning governance, major strategic plans and finance'. Each year usually sees new trustees voted on the Board of Trustees. DLS appreciates the experience that we have on our Board of Trustees and also appreciates the level of risk that they could face if they were to fall within the remit of the regulation if our concerns are not alleviated.

#### ***Board of Trustees and staff***

***The Board of Trustees comprise 11 members, 6 of whom are disabled people and one the parent of a disabled person. Trustees are also Directors of the Company. The Board considers that its primary role is to establish and monitor the strategic direction of the charity, ensure financial viability, adhere to the highest standards of governance and actively maintain its commitment to equal opportunities and combating discrimination. The Trustees are committed to maintaining and increasing the balance of disabled Board members to non-disabled. The Treasurer has special responsibility for DLS finances, with overall responsibility resting with the whole Board of Trustees.***

***The Board meet once quarterly and hold an Annual General Meeting each calendar year. Trustees take decisions on all matters concerning governance, major strategic plans and finance. Day to day operational matters, including staffing, work planning and finance are delegated to paid staff through the Director who acts as Chief Executive Officer (and is in fact not a trustee of the charity or a director of the company).***

The duties of our trustees are as follows:

The Board of Trustees meets once every quarter, and holds an Annual General Meeting once every calendar year. The Board has overall responsibility for the work of DLS, the employment of staff and all other legal obligations of the company as detailed in the Memorandum of Articles & Association.

The responsibilities of the Board of Trustees include:

- setting policy
- informing development work
- setting work priorities
- approving budgets
- business planning & reviews
- legal obligations of DLS
- ensuring compliance with procedures laid down by Charity Commission, Companies House & The Law Society
- & other matters as appropriate.

It is the above which would immediately give cause for concern as to the definition of manager under LSA 2007.

DLS is run on a day to day basis by a director with the assistance of a management team made up from differing members of DLS. DLS is split into an Administration team, Development team, Triage team, Communications and finally the Legal Team. The Legal Team is run by a Head of Legal which is split into two teams and includes 7 employees and a number of volunteers. The paid employees presently include 5 practising solicitors.

We would submit that the duties as stated for the Head of Legal, Head of Finance, employees and an (employed) manager should be enough to satisfy the most stringent of inspections.

#### ***91 Duties of Head of Legal Practice***

***(1) The Head of Legal Practice of a licensed body must—***

***(a) take all reasonable steps to ensure compliance with the terms of the licensed body's licence, and***

***(b) as soon as reasonably practicable, report to the licensing authority any failure to comply with the terms of the licence.***

***(2) Subsection (1) does not apply to the terms of the licence so far as they require compliance with licensing rules made under paragraph 20 of Schedule 11 (accounts) (as to which see section 92).***

***(3) The Head of Legal Practice of a licensed body must—***

***(a) take all reasonable steps to ensure that the licensed body, and any of its employees or managers who are authorised persons in relation to an***

*activity which is a reserved legal activity, comply with the duties imposed by section 176, and*

*(b) as soon as reasonably practicable, report to the licensing authority such failures by those persons to comply with those duties as may be specified in licensing rules.*

**(4) The Head of Legal Practice of a licensed body must—**

*(a) take all reasonable steps to ensure that non-authorised persons subject to the duty imposed by section 90 in relation to the licensed body comply with that duty, and*

*(b) as soon as reasonably practicable, report to the licensing authority any failure by a non-authorised person to comply with that duty.*

#### **92 Duties of Head of Finance and Administration**

**(1) The Head of Finance and Administration of a licensed body must take all reasonable steps to ensure compliance with licensing rules made under paragraph 20 of Schedule 11 (accounts).**

**(2) The Head of Finance and Administration must report any breach of those rules to the licensing authority as soon as reasonably practicable.**

In the above break down of DLS it would then mean that those in charge of the organisation on a practical day to day basis i.e. the Director, the Head of Legal, Finance and those under the Head of Legal would have the day to day job of making sure the licence from the regulator was correctly followed. As they would be the only persons in a position to take action it would follow they should be the only ones to face the responsibility, assuming reasonable scrutiny and governance processes were being employed

We note that if it were clarified that the definition of manager was that they were employed by the organisation then this should alleviate those concerns.

#### **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?**

We agree with the proposals that the LSB has submitted in relation to charging. However, this added with the general advice issue create a situation where organisations may be allowed to charge for legal services without anyone like the LSB, the ombudsman or the SRA or Bar Council regulating them.

We submit that the definition of general legal advice must change in order that Not for Profit organisations such as the CAB and many other advice centres can provide basic non legal advice such as benefit eligibility and basic debt advice with a limited regulation by an external body.

However, the definition of general advice should not include conducting litigation or representing clients at a tribunal for a fee, external funding stream or other type of payment. This could be dealt with by amending schedule 2 of the Legal Services Act 2007 paragraphs 3 and 3 which define litigation and representation.

Alternatively, as a stop gap measure this could also be dealt with as part of changes introduced by the Solicitors Regulation Authority when allowing charging. It could be set so that firms can only charge for services which are reserved activities and by default would be regulated.

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

We can see no concern with allowing a full range of business structures as long as they face regulation and do not impact negatively on 'Access to Justice'.

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

We agree with the LSB's analysis of group licensing as if group licensing was allowed then there would effectively be a multi tier quality of legal advice whereby a person would see a lower level of regulation and would foresee a lower level of service.

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

We have nothing to add other than what we have stated in our response to question 6 save for the following. In the event the LSB agrees with the problems identified in LSA 2007, we would prefer that time is taken to rectify these problems rather than pushing the special body/non commercial sector through an unworkable system simply in order to meet a deadline. If this matter was given additional time, it would also give the LSB an opportunity to clarify the issue of general advice.

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