

# Regulation of special bodies/non-commercial bodies

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## **Response to consultation and next steps**

December 2012

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## Introduction

1. The introduction of Alternative Business Structures (ABS) means that legal services providers with non-lawyer owners and/or managers need to be licensed to provide reserved legal activities. Some organisations, such as not for profit agencies (for example Law Centres and Citizens Advice Bureaux) and Community Interest Companies are given protection for a transitional period, which means that they can currently provide reserved legal activities without a licence. Trade Unions that provide reserved legal services to their members also benefit from transitional protection. However, in most circumstances, the Legal Services Act 2007<sup>1</sup> (LSA 2007) means that Trade Unions will not have to be licensed to provide reserved legal activities to their members even after the transitional period has ended.
2. Only the Legal Services Board (LSB) can make a recommendation to the Lord Chancellor that he should end the transitional period.
3. **It is important to note that this issue currently only applies to bodies that are providing reserved legal activities.<sup>2</sup> Hence, those advice agencies which only provide advice and guidance will not be affected, unless they wish to add to the services they provide.**
4. The LSB published a public consultation on 23 April 2012 which lasted for 12 weeks. The consultation set out eleven questions arranged in themed areas. This document summarises the responses and sets out our current view about an appropriate regulatory framework and timescales for ending the transitional period.
5. The following organisations responded to the consultation; their responses are on the LSB's website:
  - Advice UK
  - Advice Services Alliance (ASA)
  - Action Against Medical Accidents (AvMA )
  - Child Poverty Action Group (CPAG)
  - Chartered Institute of Legal Executives and ILEX Professional Standards (CILEx/IPS )
  - Citizens Advice
  - The Council for Licensed Conveyancers (CLC )
  - The Legal Services Consumer Panel

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<sup>1</sup> LSA section 15(6)

<sup>2</sup> These are defined in the LSA 2007 s12 as: the exercise of a right of audience; the conduct of litigation; reserved instrument activities; probate activities; notarial activities; and the administration of oaths.

- Disability Law Service
- Friends of the Earth (FoE)
- The Institute for Chartered Accountants, England and Wales (ICAEW )
- LawWorks
- Law Centres Network
- Liberty
- Northumbria University School of Law
- Prisoners Advice Service
- Shelter
- The Solicitors Regulation Authority (SRA )
- The Charity Commission
- The Law Society
- The Public Law Project
- Trades Union Congress (TUC)
- UNISON

There were also three confidential responses.

6. The LSB also met a number of stakeholders during and after the consultation period, for example current regulators and not for profit bodies – including members of the Public Lawyers in Non-Governmental Organisations group (PLINGO) and the Trades Union Congress (TUC). These discussions, together with our consideration of the responses, have significantly influenced our thinking on the regulation of special bodies/non-commercial bodies.
7. There are currently two licensing authorities: the CLC and the SRA. Both the CLC and the SRA have licensing rules which set out the regulatory requirements on all ABS. However, currently only the SRA can regulate the two reserved activities that special bodies/non-commercial bodies are most likely to carry out: the conduct of litigation and rights of audience. Other bodies may apply to the LSB to become a licensing authority.
8. One issue of particular significance to special bodies/non-commercial bodies (but which is not related to ending the transitional period) is the fact that the SRA currently only allows solicitors to work in them if no fees are charged (unless the client gets legal aid or the organisation indemnifies the client in relation to costs). As we explain in this document, we can see no justification for continuing with this prohibition. Nor is this change dependent on wider decisions about the framework for the regulation of special bodies/non-commercial bodies. We therefore expect the SRA to remove it as a matter of urgency.
9. Another issue of particular significance is the SRA's separate business rule (this too is not related to ending the transitional period). This prohibits solicitors from

owning or actively participating in, or working in an entity that owns/is owned by or is connected with legal services providers that do not need to be regulated. This rule is likely to severely, and unnecessarily, constrain the innovative solutions that special bodies are developing (for example setting up Community Interest Companies to provide immigration advice or will writing). Again, action to correct this must not be dependent on decisions on the wider special bodies/non-commercial bodies framework or any consideration by the LSB of whether general legal advice should be reserved. We therefore see no justification for continuing with this prohibition and expect the SRA to remove it as a matter of urgency.

## LSB's view

10. This section summarises our current view on each issue included in the consultation document. Further details on each issue are contained in subsequent sections of this document.

**Consumer protection issues** - on balance, we consider that the additional protection provided to consumers (in particular the right to complain to the Legal Ombudsman) by licensing special bodies/non-commercial bodies within a proportionate regime is justified and would be beneficial to the advancement of the regulatory objectives in the LSA 2007.<sup>3</sup>

**Ending the transitional period** - our current thinking is that the transitional period should not end before April 2015. However, we recognise the significant concerns about the complexity of the current regulatory framework and the LSB will not make a recommendation to end the transitional period until it is confident that there is an appropriate regulatory framework in place; no regulator has an appropriate framework at the moment. Before the transitional period ends we want special bodies/non-commercial bodies to be able to apply for licences to try to reduce the likelihood of a bottleneck of applications. We will work with potential licensing authorities, special bodies/non-commercial bodies and Ministry of Justice (MoJ) to work out how this can be done in practice with a view to enabling applications from April 2014. Some significant momentum will need to develop in the course of 2013/14 to put the necessary framework in place. For the avoidance of doubt, our current view is that it would be appropriate to end the transitional period for other law firms before that for special bodies/non-commercial bodies, perhaps in April 2014 providing there are licensing authorities with appropriate powers to license them. We will confirm our approach as soon as we can.

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<sup>3</sup> LSA 2007 s1: protecting and promoting the public interest; (b) supporting the constitutional principle of the rule of law; (c) improving access to justice; (d) protecting and promoting the interests of consumers; (e) promoting competition in the provision of services; (f) encouraging an independent, strong, diverse and effective legal profession; (g) increasing public understanding of the citizen's legal rights and duties; (h) promoting and maintaining adherence to the professional principles.

## **An appropriate approach to regulation:**

**(a) Prohibition on charging** - the LSB has seen no evidence to support the SRA's current ban on charging by not for profit bodies. We do not consider that it would be proportionate for the ban to remain in place until the outcome of any LSB review into whether general legal advice should be reserved as this will take some years, given the complex process set out in the LSA 2007. Nor do we consider that the SRA's current approach of considering waiver applications is sufficient to remedy the impact of the ban on the sector. Preparing a waiver application is itself an unnecessary burden on a provider and the fact that the SRA has granted a significant number of such waivers recently is further evidence that a general ban is wholly disproportionate to the risks posed and, by lessening the funding flexibility available to special/non-commercial bodies, may even add risk to them and hence threaten the regulatory objective of improving access to justice. The government's current approach<sup>4</sup> of encouraging not for profit agencies to work together to provide innovative services to consumers makes it all the more important that they are not prevented from doing so by unnecessary regulatory restrictions.

**(b) Restrictions on business structures** - it is clear that there is potential for consumer confusion if regulated entities inappropriately separate businesses to avoid regulation. However, the LSB considers that through the broad powers to attach conditions on licences any risks can be adequately managed without the damping effect that a blanket ban has. Again, action to correct this must not be dependent on decisions on the wider special bodies/non-commercial bodies framework or any consideration by the LSB of whether general legal advice should be reserved. We therefore see no justification for continuing with this prohibition and expect the SRA to remove it as a matter of urgency.

**Activity based regulation and group licensing** – the 2007 Act requires that licensing decisions must be based on the risks posed by the activities that the individual organisation undertakes. Group licensing is therefore not appropriate but the requirements imposed through membership of groups and networks must be taken into account by licensing authorities in deciding whether the special body's arrangements are adequate.

**Insurance arrangements** - we consider that consumers who use special bodies/non-commercial bodies are entitled to the protection that PII provides in the same way as clients of traditional law firms. Licensing authorities must be flexible in considering alternatives to their standard requirements, whether that is related to the level of cover or the terms and conditions of the insurance.

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<sup>4</sup> <http://www.cabinetoffice.gov.uk/news/65-million-free-advice-services-help-vulnerable>

**Compensation arrangements** - we consider that it is appropriate for special bodies/non-commercial bodies that carry out activities that may be open to fraud to be covered by their licensing authority's compensation arrangements and contribute towards their cost. It may be that umbrella organisations can have a role to play in reducing risk (perhaps by maintaining an escrow account for their members who hold client money) and we would encourage them to discuss with potential licensing authorities how this could be done in practice.

**Accounts** - we consider it is likely that there will only need to be special requirements if client money is held. In this case as well, it may be that umbrella organisations are better placed to fulfil this role (for example, if they are able to operate an escrow account this would remove the need for an individual body to have a specific client account) and we would encourage them to discuss with potential licensing authorities how this could be done in practice.

**Conflict of interests** - we will consider further the position of volunteers (and pro bono advice). Licensing authorities will have to work through a number of different possible conflict issues in order to ensure that their regulatory arrangements are proportionate and targeted.

**Appeals** - we want to ensure that decisions taken by different regulators (or the external body that takes decisions) are consistent, at least in the final, appeal stage, not least because of the regulatory objective about the rule of law. Decisions on an appropriate appellate body must be based on the needs and context of special bodies/non-commercial bodies rather than for historical reasons. It is essential to ensure that special bodies/non-commercial bodies can easily appeal against licensing authority decisions in an environment where they are not exposed to costs they cannot control. We have not identified any body other than the First Tier Tribunal of the General Regulatory Chamber (GRC) (which already has experience already of considering appeals from decisions of the Charity Commission) being able to fulfil these requirements.

**Schedule 13 – ownership and fit and proper person tests** - where those who are able significantly to influence the special body are already subject to a fit and proper test (such as those conducted by the Charity Commission or another regulatory body) there is unlikely to be any need for a licensing authority to introduce additional tests. We consider that it will be more proportionate to have an approval process once those people are in post rather than considering their suitability pre-appointment, again taking into account checks made by other regulatory bodies.

**Requirement for Head of Legal Practice (HoLP)/Head of Finance and Administration (HoFA)** - having a HoLP is an appropriate requirement for special bodies/non-commercial bodies in most cases where there is substantial provision of advice to individuals. It may be that umbrella groups could provide

this function and we encourage potential licensing authorities and special bodies/non-commercial bodies to explore that option. There will be a need for a HoFA in cases where organisations hold client money, although if umbrella organisations operate a central escrow account (see paragraphs 73 and 77) the HoFA role may also be able to be provided centrally. We consider that if the organisation does not hold client money it will only be in exceptional circumstances that a HoFA role is required.

**Training requirements** - we consider that training requirements must be focused on outcomes, flexible and targeted on the risks posed by the activities the body is carrying out.

**Consistency with the LSA requirements for employers and employees** - the LSA 2007 (section 15) requires entities that provide reserved legal services to the public to be licensed as an ABS. This applies to ABS now and will apply to special bodies/non-commercial bodies once the transitional period ends. In policy terms, we can see little or no case for further restrictions. Whether certain categories of people fall within the definition of “members of the public” will always be a matter of judgement for a regulator, based on the particular facts of the case. We cannot therefore at present see any need for a specific Order to define what constitutes a member of the public, and certainly not one that appears to go further than the minimum statutory requirements.

### **Other issues**

A number of other issues were raised by respondents that were not covered explicitly in the consultation document:

**“Regulatory creep”** - we understand the sector’s concerns about the potential for regulatory reach to be increased as part of the licensing process. We do not consider that such an approach is consistent with either market liberalisation or better regulation. Where there are serious risks to consumers, licensing authorities have the power to impose licence conditions to address them (and the special body can appeal against the imposition of a condition); this is more proportionate than automatically extending regulation to activities not previously subject to it.

**Responsibilities of “managers” and “employees”** - we do not consider that the burden on governors/trustees (who are categorised as “managers” in the LSA 2007) for ensuring responsibility with licence conditions for the provision of legal services is significantly different from their obligations to, for example, comply with charity law. These mean that they are responsible for ensuring compliance with the requirements of charity law, other legislation and other regulators, that they have a duty of prudence and a duty of care to exercise



reasonable care and skill as trustees to ensure that the charity is well-run and efficient.

**Application process and fees** - a fundamental requirement for licensing special bodies/non-commercial bodies will be that a licensing authority must have detailed guidance and its application form on its website in advance of designation and that the application process must be one stage only. We will consider in more detail the issue of application and licence fees. We expect licensing authorities to develop “model” modifications that will be appropriate for special bodies/non-commercial bodies and consistent with our guidance, thus helping to reduce the complexity of the application process for special bodies/non-commercial bodies and regulators.

**Conflicts between individual and entity requirements** - the LSA 2007 makes provision<sup>5</sup> for dealing with regulatory conflict, but we accept that there may need to be more detailed guidance about how this is likely to operate in practice and the implications for individual lawyers.

**Pro bono work** - a number of respondents asked for clarity on whether an organisation that uses lawyers acting pro bono would need an ABS licence. We will consider this in more detail with the organisations concerned.

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<sup>5</sup> LSA 2007 ss 52-54

## Background

11. The LSB has already put forward the view that the transitional period should come to an end and that special bodies/non-commercial bodies should be subject to regulation where they provide reserved legal services to the general public. In our decision document on guidance for licensing authorities published in March 2010,<sup>6</sup> we proposed that the transitional arrangements for special bodies/non-commercial bodies should remain in place for 18 months after ABS started. We also said that we would consult further on the regulation of special bodies/non-commercial bodies. We have maintained some flexibility in this timetable to ensure that the right approach to regulating special bodies/non-commercial bodies is put in place and that those affected have an appropriate period of time to prepare.
12. The issues raised in our April 2012 consultation and the responses summarised below will allow the LSB to develop guidance to licensing authorities on their approach to licensing special bodies/non-commercial bodies. Only once we are confident that there will be at least one competent licensing authority that will regulate in a targeted and proportionate way will we make a recommendation to the Lord Chancellor to end the transitional period. We consider that licensing authorities will need to make changes to their regulatory arrangements in order to give the Board the necessary confidence about their approach to regulation.
13. Currently individual solicitors, barristers and legal executives who work in special bodies are regulated as individuals by an approved regulator (the SRA, the BSB, IPS respectively) but the entities they work in are not regulated by a legal services regulator. Ending the transitional period would mean that the entity will be regulated as well as the individual lawyer.

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<sup>6</sup> [http://www.legalservicesboard.org.uk/what\\_we\\_do/consultations/closed/pdf/abs\\_guidance\\_on\\_licensing\\_rules\\_guidance.pdf](http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/abs_guidance_on_licensing_rules_guidance.pdf)

## Consumer protection issues

### Summary of consultation paper

14. The consultation document set out the LSB's view that there are strong consumer protection reasons for the regulation of special bodies/non-commercial bodies providing reserved legal services. The LSA 2007 provides a framework for these bodies to be regulated. Special bodies/non-commercial bodies deliver reserved services to many of the same consumers as traditional firms; some of these are the most vulnerable and disempowered consumers. The LSB considers that while regulation should not impose unnecessary burdens, these consumers should not be afforded significantly less protection because of the type of organisation providing the advice. However the risks are rarely identical to, or as great as, those presented by large scale commercial firms and it is therefore more than usually important that licensing authorities ensure that any regulation does not impose unnecessary costs, operational inflexibility and complexity.
15. Research undertaken by Frontier Economics<sup>7</sup> reported that funding is likely to be placed under further pressure in the future. This may lead organisations to face some challenging decisions around options for alternative funding streams (for example charging in some form), changes to business structures (such as mergers or consolidation) and the type of advice they are able to provide.
16. Based on the Frontier Economics' research and consultation with key stakeholders, the consultation paper set out an assessment of the types of risks that may be posed by non-commercial providers, focusing on three main areas:
  - a) **Governance and funding:** Unstable or uncertain funding sources, poor financial management and lack of appropriate controls, potential conflicts of interest between funder and provider.
  - b) **Sustainability and lack of alternative providers:** Potential impact of closure or bankruptcy, lack of arrangements for case transfer, consumers may be disempowered, unable or unwilling to go elsewhere or to complain if something goes wrong.
  - c) **Quality:** Poor technical or service quality may arise from different training approaches and/or supervision arrangements, lack of expertise in certain areas of law, clients may also be disadvantaged and vulnerable and therefore even less able to judge quality and make informed choices, impact of funding cuts/legal aid changes and significant fluctuations in revenue generally on levels of staff experience (for example the potential for a

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[http://www.legalservicesboard.org.uk/news\\_publications/latest\\_news/pdf/rep\\_lsb\\_special\\_bodies\\_final\\_report\\_07\\_07\\_11\\_stc.pdf](http://www.legalservicesboard.org.uk/news_publications/latest_news/pdf/rep_lsb_special_bodies_final_report_07_07_11_stc.pdf)

reduction in number of legally qualified staff because they are no longer required due to the loss of a legal aid contract).

17. The consultation paper noted that there were a number of requirements (including regulation by the Charity Commission) that could be considered to be equivalent to some of the regulatory functions required by the LSA 2007. However, while these requirements may mitigate some of the risks, taken together, the LSB considered that they do not provide sufficient assurance that all the risks can be mitigated. This therefore means that the LSB cannot be satisfied that all the regulatory objectives in the LSA 2007 can be met, in particular improving access to justice and promoting and protecting the interests of consumers by relying solely on non-legal regulators.

### **Summary of consultation responses**

18. Most respondents agreed with the general need for adequate regulation for special bodies/non-commercial bodies. However, there was some difference in views of what was justified given the current levels of oversight of the conduct of special bodies/non-commercial bodies. This was particularly the case with those organisations that provided services under legal aid contracts from the Legal Services Commission (LSC). The LSC was seen to provide a high degree of control over the providers through requirements on the provision of services, governance and file keeping that provide a quasi-regulatory framework.
19. The SRA's preferred approach would be to modify only the mainstream ABS licensing rules where the special body requested a change. This would have the effect of not having a distinct special bodies/non-commercial bodies framework and largely place the same regulatory burdens on the special bodies/non-commercial bodies as other types of ABS.
20. The Legal Services Consumer Panel's response was explicit in its position that while the regulation of in-house solicitors provided consumers some protection, the entity in which they work needs to be regulated as well. The Consumer Panel said for consumers this "is very confusing [...] they could complain to the Legal Ombudsman about poor service provided by a solicitor [...] but they could not do so if they received the same advice from a non-authorized person" (if the special body is regulated it would be an authorized person for the purposes of the Legal Ombudsman's rules). The Disability Law Service had a similar view and said "until the consumer is able to make a complaint to a single body then there will not be adequate protection". The Law Society in its response also saw the need for entity regulation stating: "non-LSA regulatory frameworks do not provide satisfactory protections for consumers".
21. Generally there was doubt raised about whether the risks in the not for profit sector were significantly different from other legal providers. Some disagreed with the risks identified in the consultation paper, arguing that the issues were

not specific to special bodies/non-commercial bodies. Many of the providers who responded noted that the SRA's in-house provisions<sup>8</sup> apply to solicitors working in not for profit bodies and these then mean that the provision of services is controlled by suitably regulated individuals. One respondent explained that because its non-solicitor casework staff are supervised by solicitors, the SRA's regulatory standards are cascaded throughout the advice team, providing an effective system of managing the risks associated with advice work.

22. However, many respondents thought that there was little coordination between the different bodies that provided oversight. Some respondents thought that there would be merit in a single body to help coordinate the regulatory demands placed on them by legal regulators like the SRA, governance regulators such as the Charity Commission and bodies that perform a quasi-regulatory role such as the LSC.
23. Some respondents referred to the collapse of Refugee and Migrant Justice and the Immigration Advisory Service as evidence of gaps in the regulation of not for profit bodies. As the Prisoners Advice Service put it: "when they collapsed there was no equivalent of an SRA intervention to protect the interest of clients and many clients were unable to access their files for some months. There was real and significant consumer detriment to a particularly vulnerable group".
24. The regulatory risks that were discussed in the consultation paper were set into a broader context of risk by some respondents with many citing the changes to legal aid funding and the other changes in the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 as being factors that influence risk. CPAG said in its response: "the biggest risk to claimants seeking advice in the present climate is that they will not be able to find a provider, or if they do, that the organisation will close before the matter is concluded. It is difficult to see how greater regulation by the LSB will assist with funding problems". However, Law Centres Network did not agree with the conclusions from the Frontier Economics research that the funding environment may place consumers at risk, rather it argued that the risk was borne by the provider because they are at risk of losing their business.

### **LSB's view**

25. Among the special bodies/non-commercial bodies the LSB has met, there is clearly already a wide variety of business models. Some are nearly identical to high street law firms except in charitable status and non-lawyer involvement on governance boards, others provide legal services only as part of wider packages of services while others take on only a few test cases that support their wider aims. All of these are models have evolved to meet legitimate consumer and organisational needs.

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<sup>8</sup><http://www.sra.org.uk/solicitors/handbook/practising/part2/rule4/content.page>

26. We consider that the case for increased regulation (ie of entities as well as legally qualified individuals) is finely balanced. The reaction of those who are concerned about ending the transitional period is understandable, given the complexity and extent of the current regulatory framework, both in the LSA 2007 and in the way it is applied by regulators in practice. Regulation of special bodies/non-commercial bodies must be flexible enough to enable retention of the current diversity in the provision of services and encourage innovation going forward. It also needs to take into account wider government policy on not for profit advice services<sup>9</sup> as well as developments by the Charity Commission and statutory funders.
27. However, we cannot see why consumers who use the services provided by special bodies/non-commercial bodies should be afforded less protection than consumers who use traditional law firms. Equally, authorised individuals working in special bodies/non-commercial bodies must be treated in a consistent manner to lawyers working in other types of providers, with the same statutory protection of their professional principles.
28. Special bodies/non-commercial bodies have unique characteristics that regulators need to take into account when developing proportionate regulation. We consider that explicit recognition must be given to the other regulatory requirements that many special bodies/non-commercial bodies are already subject to; additional burdens must only be imposed where there is actual evidence (or a statutory requirement) that there is significant risk to consumers that cannot be reduced in any other way. Many of the checks that the Charity Commission has appear to us to be appropriate in the context of the requirements of legal services.
29. On balance, we consider that the additional protection provided to consumers (in particular the right to complain to the Legal Ombudsman) by licensing special bodies/non-commercial bodies within a proportionate regime is justified and would be beneficial to the advancement of the regulatory objectives. However, we recognise the significant concerns about the current regulatory framework and the LSB will not make a recommendation to end the transitional period until it is confident that there is an appropriate regulatory framework in place; there is no such framework at the moment.

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<sup>9</sup> <http://www.cabinetoffice.gov.uk/sites/default/files/resources/not-for-profit-advice-services-england.pdf>

## Ending the transitional period

### Summary of consultation paper

30. The LSB can make a recommendation to the Lord Chancellor to end the transitional period. The consultation paper set out the previous and proposed approach to ending the transitional period.
31. We had previously expressed a view that the transitional protection should end 18 months after ABS started – that would be around April 2013. However, the consultation paper noted that there is insufficient time before April 2013 to create an appropriate regulatory framework and license those bodies carrying out reserved legal activities and it therefore proposed that the transitional period should end around April 2014. The LSB estimated that approximately 330 organisations are likely to require a licence. The consultation also outlined some of the evidence about the bodies likely to be affected by the change and included a draft impact assessment.
32. The consultation paper also made the link to the LSB's consultation on the scope of regulation. This work may lead to an investigation that could expand the range of legal services that can only be carried out by an authorised person. This would have an impact on special bodies/non-commercial bodies. In this context the option of delaying ending the transitional period until the scope of regulation work was complete was discussed.

### Summary of consultation responses

33. The majority of respondents agreed that it was unlikely that a suitable licensing framework would be able to be put in place and special bodies/non-commercial bodies issued with licences by April 2013. However, most respondents were also concerned that the changes should not be delayed indefinitely, with recognition of the need for an entity regulation framework.
34. However, there was not complete agreement with postponing the 2013 date. For example one response acknowledged that it might not be possible to meet the 2013 date but that putting it back to 2014 will simply disadvantage trade unions who it considered would be held back from developing new business models around the regulatory requirements. The respondent considered that unions are effectively in competition with traditional law firms/ABS.
35. Some respondents considered that April 2014 would be premature, with one noting that “there must be the opportunity for further detailed consultation between the licensing authority and non-commercial bodies so that proportionate regulation takes place and that this will not be possible in such a short period of time...”. The Public Law Project thought that the April 2014 date “appears likely to unrealistic”.

36. Others like the Law Centres Network thought that the transitional period should end before April 2014 as it did not believe “specialist organisations should have to wait for more generalist non-commercial providers”. Its preference was to end the period “at the earliest possible opportunity but certainly no later than March 2014”.
37. Many of the special bodies/non-commercial bodies who responded called for clarity on the timing for the end date. For instance Shelter in its response said:
- “However, what is absolutely key is that there has to be certainty. Over the last year or so, the end date has slipped three times, each time by a matter of months. Either it should not slip further and the date of April 2014 should be the final date; or the LSB must clearly state that it will not end until a clear fixed date in the future.”
38. The timing issues that arise from the consideration of the regulation of general legal advice were considered by most to be too uncertain to accurately predict. As such there was broad agreement that ending the transitional period for special bodies/non-commercial bodies should be considered independently from that decision. However, some respondents noted that, should general legal advice become a reserved legal activity, it was likely to have a significant impact on special bodies/non-commercial bodies and that this impact would need to be considered very carefully.
39. The draft impact assessment that was published as part of the consultation was also commented on. The Disability Law Service thought that the impact assessment had taken a generalised view of the impacts and that the impacts of specific requirements of the LSA 2007 were more troubling. Other respondents including the Legal Services Consumer Panel and LawWorks provided additional information that may help to improve of the evidence base for the impact assessment. One respondent noted that it employs a significant number of staff with protected characteristics and that this may be true of other non-commercial bodies.

### **LSB's view**

40. When considering the end date for the transitional period the LSB will need to be sure that there is a proportionate and targeted approach to licensing special bodies/non-commercial bodies . The guidance that will be developed by the LSB (and which we will aim to publish in April 2013) will help define what that will look like. What is clear is there will need to be some time between when the special bodies/non-commercial bodies are first able to apply for a licence and when all special bodies/non-commercial bodies are required to have a licence (i.e. the end of the transitional period).



41. The LSB's preferred approach is to focus on beginning a proportionate special bodies/non-commercial bodies licensing regime as soon as possible so that there can be an orderly transition to licensing for those organisations providing reserved legal activities but ensuring that no organisation is rushed into an ill-fitting regime. Notwithstanding the strong case to end the transitional period at some point, the risks of continuing the status quo are relatively low when weighed against the risks of a disproportionate licensing regime. We will therefore work with regulators and MoJ to work out the best way to achieve this technically.
42. However, we recognise the significant concerns about the complexity of the current regulatory framework and the LSB will not make a recommendation to end the transitional period until it is confident that there is an appropriate regulatory framework in place; no regulator has an appropriate framework at the moment. Before the transitional period ends we want special bodies/non-commercial bodies to be able to apply for licences to try to reduce the likelihood of a bottleneck of applications. We will work with potential licensing authorities, special bodies/non-commercial bodies and MoJ to work out how this can be done in practice with a view to enabling applications from April 2014. Our current thinking is that the transitional period will not end before April 2015. In the meantime there is nothing to prevent special bodies/non-commercial bodies applying for an ABS licence if they consider it is the right approach for them. We understand that one has already done so.
43. We understand the concerns about the overall complexity imposed by the LSA 2007 and our forthcoming draft Business Plan for 2013/14 will propose undertaking analysis of the cost and complexity of regulation.

## An appropriate approach to regulation

### Summary of consultation paper

44. The consultation set out the approach to regulation that the LSB expects licensing authorities to take in licensing and regulating special bodies/non-commercial bodies . This included an explicit focus on the outcomes that regulation is trying to achieve.
45. In the guidance<sup>10</sup> on the contents of licensing rules for ABS, we set out the expectation that regulation of ABS should be based primarily on clear outcomes supplemented by guidance, with rules where there is only one appropriate way to ensure consumer protection and broader public interest. We also set out a series of defining outcomes by which licensing authorities should develop their licensing rules. These were considered to also be applicable for special bodies/non-commercial bodies.
46. We proposed that existing licensing authorities would need to review the suitability of their existing regulatory arrangements for the regulation of special bodies/non-commercial bodies and, where necessary, amend them.
47. The consultation paper identified two key areas where regulatory rules currently restrict special bodies/non-commercial bodies. These are the SRA's restrictions on charging for advice and restrictions on business structures.

### Summary of consultation responses

48. Many of the special body respondents to the consultation supported the removal of the bans on charging for advice. The Public Law Project said that there is “no valid policy rationale for the SRA's blanket restriction on charging in the NfP sector”. One response said “the existing restriction [...] prevents innovative ways of working being developed [...] we [...] submit that this restriction should be removed without delay and irrespective of this consultation”.
49. The SRA in its response considered that the issue required more consideration:

“The SRA is not prejudging the outcome of any consideration of this issue, and it is clearly open to question whether the current restriction on charging is addressing an identifiable and current regulatory risk (rather than being a legacy of the initial arrangements put in place in the 1970s to enable law centres to operate).

In the interim, the SRA will proceed to consider applications for waivers of the existing charging provisions in the Practice Framework Rules. A number of organisations have approached the SRA with a view to such waivers being granted and these will be considered against the published waiver criteria.”

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<sup>10</sup> [http://www.legalservicesboard.org.uk/what\\_we\\_do/consultations/closed/pdf/abs\\_guidance\\_on\\_licensing\\_rules\\_guidance.pdf](http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/abs_guidance_on_licensing_rules_guidance.pdf)

However, the SRA considers that its policy on charging should remain until the LSB's wider review whether general legal advice should be regulated is complete.

50. On the issue of the separate business rule the view was more mixed. The Legal Services Consumer Panel reiterated its position on the rule stating that given the relatively narrow definition of the reserved legal activities, consumers may face additional risks without the separate business rule as “consumers quite reasonably expect the entirety of the legal advice to be regulated and to have the protections that come with that”.
51. The ASA on the other hand noted the intention of the rule but considered the ban to be “unduly restrictive”. The TUC agreed that the full range of business models should be available for special bodies/non-commercial bodies.
52. The Law Society thought that the issue was wider than just special bodies/non-commercial bodies and that “there may be arguments for reviewing the Separate Business Rule but this should be in the context of the whole regulated community, not just special bodies”.

### **LSB's view**

53. The LSB has seen no evidence to support the current ban on charging by not for profit bodies. The SRA has issued a number of waivers to not for profit bodies; the fact that waivers can be issued and the risks can be managed is further evidence that the rule is not necessary. We do not consider that it would be proportionate for the ban to remain in place until the outcome of any LSB review of general legal advice as this will take some years, given the complex process set out in the LSA 2007. Preparing a waiver application is itself an unnecessary burden on a provider and lessening the funding flexibility available to special/non-commercial bodies may even add risk to them and hence threaten the regulatory objective of improving access to justice. We also consider that action can and should be taken ahead of final decisions on the remainder of the special bodies/non-commercial bodies framework. The government's current approach<sup>11</sup> of encouraging not for profit agencies to work together to provide innovative services to consumers makes it all the more important that they are not prevented from doing so by unnecessary regulatory restrictions.
54. On the issue of the separate business rule, it is clear that there is potential for consumer confusion if regulated entities inappropriately separate businesses to avoid regulation. However, the LSB considers that through the broad powers to attach conditions to licences any risks can be adequately managed without the damping effect that a blanket ban has. Many special bodies/non-commercial bodies will have legitimate business structures, designed around the needs of

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<sup>11</sup> <http://www.cabinetoffice.gov.uk/news/65-million-free-advice-services-help-vulnerable>

consumers (and possibly funders) that may currently fall foul of the separate business rule, further emphasising that a blanket approach is untargeted and disproportionate. Again, action to correct this must not be dependent on decisions on the wider special bodies/non-commercial bodies framework or any consideration by the LSB of whether general legal advice should be reserved. We therefore see no justification for continuing with this prohibition and expect the SRA to remove it as a matter of urgency.

## Activity based regulation and group licensing

### Summary of consultation paper

55. The consultation paper set out the LSB's view that regulation of special bodies/non-commercial bodies should be based on the activities they undertake and not on the qualification of the person giving the advice. This would allow for more proportionate requirements depending on the risks posed by different activities undertaken.
56. The consultation paper also discussed a group licensing regime akin to the Office of Fair Trading (OFT) scheme for consumer credit.<sup>12</sup> However, the LSB did not consider that this approach was appropriate given the potential risks around competence and quality, both in provision of services and governance. A group licensing regime may not necessarily address all of these risks and could have the added effect of placing a significant compliance burden on the lead body which in reality would be taking on the role of regulator.
57. Furthermore, the consultation paper discussed legal difficulties with such an approach. While the LSA 2007 does not explicitly prohibit group licences, its drafting does not facilitate them in the same way that as the consumer credit legislation. We consider that there is a clear expectation in the LSA 2007 that each body providing reserved legal activities must have its own licence to continue to conduct these activities.

### Summary of consultation responses

58. The majority of respondents who answered the question relating to group licensing agreed with the LSB's analysis.
59. However, Citizens Advice did not agree with the analysis. Citizens Advice cited the example of the group licensing regime for the Office of the Immigration Services Commissioner (OISC) and the OFT consumer credit licence as two areas where group licensing worked effectively. It considered that membership of an umbrella organisation should be taken into consideration when developing the regulatory approach:

“At the very least, the regulatory regime should operate a system where equivalent membership requirements could be ‘approved’ by the regulator and the organisation could be in effect passported to compliance for the relevant requirements. Where membership requirements comply with all regulatory rules a straightforward passporting to licence should be possible.”
60. Furthermore, it did not agree with the analysis that membership bodies would not be in a position to agree changes to the regulatory regime as they applied to

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<sup>12</sup> [http://www.offt.gov.uk/shared\\_offt/business\\_leaflets/credit\\_licences/OFT990rev.pdf](http://www.offt.gov.uk/shared_offt/business_leaflets/credit_licences/OFT990rev.pdf)

particular providers. Instead it thought that “regulators should be encouraged to ensure that as much central negotiation is undertaken [...] to minimise the burden of the application process to special bodies for individual frontline NfP agencies”.

### **LSB's view**

61. While membership of groups and networks should contribute to overall compliance with licensing rules, the LSB considers that the special bodies/non-commercial bodies framework should not allow group licensing. The provision of legal services requires a level of oversight and supervision that justifies the licensing of each provider. Indeed, it is unclear how the structure of the authorisation requirements would work where groups of providers had separate legal identities.
62. However, we do consider that the requirements imposed through membership of groups and networks must be taken into account by licensing authorities in deciding whether the special body's arrangements are adequate. For instance if members used a common IT infrastructure, some or all of the record keeping requirements could be met by the centrally provided service. Similarly, the licensing authority must consider whether it would be reasonable to impose additional burdens over and above any requirements of the group/network for file maintenance. Citizens Advice provided a helpful example of its agreement with OISC that maintains OISC rights to monitor the effectiveness of Citizens Advice's oversight against an agreed framework covering issues such as case checking, auditing, training and information materials. This model may well be one that could be developed for legal services.
63. We expect potential special bodies/non-commercial bodies regulators to work with groups and networks to establish the extent to which regulatory requirements are met by existing umbrella organisation requirements. We also expect them to act on Citizens Advice suggestion to negotiate centrally to minimise the burden of the application process.
64. Our view remains that licensing decisions must be based on the risks posed by the activities that the organisation undertakes. So, for example, it is very unlikely that most special bodies/non-commercial bodies will be permitted to undertake conveyancing (but for the avoidance of doubt, we would consider it disproportionate to impose a blanket ban in rules). However, they (or businesses associated with them) may be permitted to provide commercial will-writing services and all are likely to be able to provide advice on welfare rights. If a licence did allow conveyancing, we would expect the licensing authority to also impose conditions about handling client money and compensation arrangements.

## Contents of licensing rules

### Summary of consultation paper

65. The consultation document set out a number of policy areas where the LSB considered that there may need to be modifications to licensing rules to ensure that the rules are targeted and proportionate for special bodies/non-commercial bodies:

- Insurance arrangements
- Compensation arrangements
- Accounts
- Conflict of interests
- Appeals
- Schedule 13 – ownership and fit and proper person tests
- Requirement for Head of Legal Practice (HoLP)/Head of Finance and Administration (HoFA)
- Training requirements
- Consistency with the LSA requirements for employers and employees<sup>13</sup>

66. The responses to the consultation paper provided a number of detailed responses to these issues. Many respondents, like the TUC, reiterated the need for “future regulation should be proportionate, and targeted, reflecting the nature of special bodies and non commercial bodies”. Not all respondents commented on all the issues and some raised additional issues that we had not previously considered in detail.

### Insurance arrangements

#### *Summary of consultation paper*

67. Professional indemnity insurance (PII) provides insurance cover for claims of negligence. Depending on the activities that the body is carrying out, it may need a lower minimum level of cover than a commercial ABS or traditional law firm.

#### *Summary of consultation responses*

68. A number of respondents pointed out that they currently have to have PII because of SRA and/or LSC requirements. Liberty emphasised the importance of requirements (for this and the other issues) being “flexible enough to allow their application to be varied according to the nature of the organisation, the type of work it undertakes, the other obligations to which it is subject and the risk it presents”. A similar point was made by LawWorks which said that it has a waiver in place to allow it to have a lower level of PII than would normally be required by the SRA.

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<sup>13</sup> LSA section 15

69. The SRA said that it would start from the position of requiring a policy of qualifying insurance but would consider granting an order under section 106 of the LSA 2007 to allow different insurance if the special body could demonstrate that it was reasonably equivalent to that required for traditional law firms. It considers that the market would be able to judge the risk and the premium for the special body would reflect that.

### ***LSB's view***

70. We consider that consumers who use special bodies/non-commercial bodies are entitled to the protection that PII provides in the same way as clients of traditional law firms. Licensing authorities must be flexible in considering alternatives to their standard requirements, whether that is related to the level of cover or the terms and conditions of the insurance. It may be that umbrella organisations such as Citizens Advice are able to purchase PII for their members; this option should be acceptable to licensing authorities.

## **Compensation arrangements**

### ***Summary of consultation paper***

71. These can provide compensation in the event that a consumer has been the victim of fraud. Depending on the activities that the body is carrying out, it may not be necessary for it to contribute to compensation arrangements.

### ***Summary of consultation responses***

72. Very few respondents commented specifically on this point. The SRA pointed out that currently it only requires contributions to its compensation fund from solicitors and entities holding client money. It will ensure that its current review of compensation arrangements takes special bodies/non-commercial bodies into account.

### ***LSB's view***

73. We consider that it is appropriate for special bodies/non-commercial bodies that carry out activities that may be open to fraud to be covered by the licensing authority's compensation arrangements and contribute towards their cost at a proportionate rate, determined by the risks of the activities undertaken. However it appears that this is likely to be limited to instances where the body holds client money (for example from a personal injury claim). It may be that umbrella organisations can help to reduce risk (perhaps by having an escrow account) and we would encourage them to discuss with potential licensing authorities how this could be done in practice.

## **Accounts**

### ***Summary of consultation paper***

74. These normally concern the arrangements for holding client money (for example an award from a tribunal) and keeping it separate from the body's own money. If



the body does not hold any client money it is unlikely to be proportionate to require it to go to the expense of setting up a separate bank account. This approach is consistent with authorisation based on the activity that a body is carrying out. We would also expect licensing authorities to take into account the requirements of funding bodies when deciding what accounts rules are appropriate.

### **Summary of consultation responses**

75. Very few respondents commented specifically on this point. Liberty explained that it currently operates a client account, largely to process the payment of damages/compensation to clients and *inter partes* costs to counsel. LawWorks considers that it would be “highly inappropriate” to have the same accounts rules for special bodies/non-commercial bodies and that particular allowance should be made for organisations that only deal with disbursements on behalf of law clinics; for those cases it wants a “simple and clear method” of dealing with those monies separately.
76. The SRA said that its Accounts Rules are “intentionally prescriptive and detailed” and that it can see “no justification” for having anything different for special bodies/non-commercial bodies. It says that there are no waivers to the rules but it may grant dispensation from the obligation to provide an accountant’s report. However, there will be no obligation to have a client account if no client money is held.

### **LSB’s view**

77. As for compensation arrangements, we consider it is likely that there only need to be special requirements if client money is held. In this case as well, it may be that umbrella organisations are better placed to fulfil this role (perhaps by having an escrow account) and we would encourage them to discuss with potential licensing authorities how this could be done in practice. The current accounts rules tend to be complex; we consider that there is a good case for reviewing them to see whether they can be simplified for all types of legal services providers.

### **Conflict of interests**

#### **Summary of consultation paper**

78. These concern how potential conflicts are identified and managed. For special bodies/non-commercial bodies, it may be necessary to include guidance about conflicts concerning members of its governing body and/or dealing with cases against a local authority when the local authority contributes to the body’s funding.

### ***Summary of consultation responses***

79. Very few respondents commented specifically on this point. The ASA said that licensing authorities “should be alert to the potential for new funding models to have a detrimental effect on the independence and integrity of legal advice” and that “payment by results” models might create incentives for providers that conflict with regulatory principles. LawWorks asked for clarification about whether individuals who are employed by a law firm but also volunteer at a law clinic are subject to the potential conflicts associated with their firm or only those of the non-commercial provider. The SRA said that its outcomes on conflicts will apply to special body entities and individuals and that it would consider “the most appropriate way of addressing the issue of conflicts concerning members of the governing body and with funders”.

### ***LSB’s view***

80. We will consider further the position of volunteers (and pro bono advice). Licensing authorities will have to work through a number of different possible conflict issues in order to ensure that their regulatory arrangements are proportionate and targeted.

## **Appeals**

### ***Summary of consultation paper***

81. The LSB has published guidance<sup>14</sup> on the types of decisions that should have a right of appeal. We consider that it is important that decisions concerning restrictions on trade or livelihood can be appealed to an independent body. For special bodies/non-commercial bodies, we consider that it is particularly important that they are not deterred from appealing because of uncertainty about whether they will have to pay the licensing authority’s costs. Our view is, therefore, that the appellate body for appeals that affect special bodies/non-commercial bodies should be the First Tier Tribunal of the General Regulatory Chamber.

### ***Summary of consultation responses***

82. Very few respondents commented specifically on this point. Citizens Advice welcomed the acknowledgment “of the extent to which uncertainty about costs will deter special bodies from appealing decisions” and that this issue needs to be addressed for the appeals process to work effectively for the sector. LawWorks expressed a similar point of view, saying that there should be no risks of unforeseen costs once a body decides to appeal.

83. The SRA was concerned with the suggestion that the appellate body should be the First Tier Tribunal of the GRC. It said that it remains of the view that “the payment of costs for failed appeals should be borne by the person who brought the appeal”, otherwise the cost of “potentially unmeritorious appeals is passed

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<sup>14</sup> [http://www.legalservicesboard.org.uk/what\\_we\\_do/consultations/closed/pdf/supplementary\\_guidance\\_on\\_licensing\\_rules.pdf](http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/supplementary_guidance_on_licensing_rules.pdf)

on to all other regulated persons and ultimately the consumer”. It is also concerned about the costs involved in appointing and training a new appellate body for some SRA decisions; it considers that the Solicitors Disciplinary Tribunal (SDT) already has the required expertise and that having the same appellate body for all its ABS appeals “would improve consistency of decision making”. It considers that this is particularly important because “there will be little practical distinction between some special bodies and other ABS – low risk bodies in particular”.

### ***LSB’s view***

84. We want to ensure that decisions taken by different regulators are consistent. The need for consistency (at least at the highest level of enforcement/sanctions) and removing the ability to game play/shop for the regulator with the weakest powers becomes more important as the market develops. In addition, if not more importantly, we consider that the regulatory objective on the rule of law demands that arrangements that provide consistent outcomes and the evolution of a consistent set of decisions are put in place
85. We consider that decisions on an appropriate appellate body must be based on the needs and context of special bodies/non-commercial bodies rather than for historical reasons. It is essential to ensure that special bodies/non-commercial bodies can easily appeal against licensing authority decisions in an environment where they are not exposed to costs they cannot control. It is reasonable that the cost of unmeritorious appeals is not borne by a licensing authority; the GRC’s rules allow costs to be awarded where a party has acted unreasonably in bringing, defending or conducting the proceedings. The GRC currently has expertise in hearing appeals from charities against decisions of the Charity Commission and its members have expertise in, amongst other things, the not for profit sector, whereas the SDT does not.
86. Our guidance to licensing authorities on appeals already states that their decisions about requests to make orders to modify the application of licensing rules to special bodies (sections 106 and 107 of the LSA 2007) should be subject to external appeal. We consider that the right of appeal should also extend to decisions about waiver requests made as part of the licensing process.

## **Schedule 13 to the LSA 2007 - ownership, influence and governance**

### ***Summary of consultation paper***

87. This schedule to the LSA sets very detailed definitions of and requirements on the owners of ABS. It is possible that much of the schedule will not be applicable to special bodies/non-commercial bodies given the types of governance structures they often have and the fact that there is no “owner” as such. Nevertheless, we consider that licensing authorities must be able to carry out

checks on those who are able to influence the way in which the body is run and to refuse to license the body if they consider that some or all of those people are not fit and proper. We would also consider it necessary for the licensing authority to be able to require the body to remove people whom it no longer considered to be fit and proper. That would be equivalent to its powers to divest shareholders of commercial organisations.

### ***Summary of consultation responses***

88. A number of responses including that of Liberty focused on the challenges that its particular constitutional structure may face if the transitional period ended without careful consideration of the impact of licensing requirements. This included discouraging individuals from sitting on management committees if they were subject to excessively rigorous suitability tests. Similarly, due to the way Liberty's Executive Committee is appointed (through election) the requirements in the LSA 2007 for pre-approval may cause problems in practice both practically and strategically, leading to the perverse effect of "diluting the protection afforded to the organisation's clients".
89. The Prisoners Advice Service (PAS) identified similar concerns stating that "there is a risk that the additional obligations could deter people from volunteering to act as trustees" and that it would be "concerned if the regulatory arrangements put in place for NfPs such as PAS once the transitional period under section 23 LSA ends should put this type of governance structure under threat".
90. The Public Law Project was also concerned about the application of the fit and proper persons test. In particular it is said that it "should not be permitted to operate so as to preclude organisations from recruiting trustees representative of their client base or of disenfranchised groups generally (such as ex-prisoners or drug users) who might not traditionally be regarded as 'fit and proper'".
91. Other respondents noted the role that the Charity Commission and Companies House played in governance reporting. The Disability Law Service also raised concerns about the potential for disproportionate regulation impacting on its trustees who are not involved with day to day decisions relating to the provision of legal services.
92. FoE thought that licensing rules should allow for the delegation of responsibility of the requirements imposed by a licensing authority from the Board to the legal unit, with reporting back to the Board at quarterly intervals. More detailed oversight would be considered to be "a disproportionate burden on the Board/s or Senior Management of FoE, given its other activities". Furthermore this might lead to the organisation deciding to "discontinue providing external legal advice altogether".

93. The SRA said that it broadly agreed with the LSB's high level views, but that it would welcome greater clarity on our proposals. It recognised that this is a complicated area that would benefit from more analysis. However, it considers that Schedule 13 is capable of being applied "to most if not all special/non-commercial bodies". The CLC said that the LSB guidance should make it clear which class(es) of persons should be required to satisfy the fit and proper tests.

### **LSB's view**

94. We agree that this is a very complex issue that will benefit from further, more detailed discussion before we issue final guidance. Although issues around governance and control are at the heart of the legislation relating to ABS, there is emerging evidence that the requirements imposed by Schedule 13 to the LSA 2007 may be excessively burdensome in practice. In any event, it is clear that the approach required by Schedule 13 (which is in turn modelled on requirements in the financial services sector) is unlikely to be proportionate in the vast majority of cases in a special bodies/non-commercial bodies context.

95. The desired outcome of avoiding improper influence remains the same for special bodies/non-commercial bodies as for mainstream ABS, but the LSB considers that a different approach for special bodies/non-commercial bodies is needed. The LSA 2007 allows licensing authorities to make an order that Schedule 13 does not apply in relation to the body, or that it applies with modifications.<sup>15</sup> The LSB considers that where those who are able significantly to influence the special body are already subject to a fit and proper test (such as those conducted by the Charity Commission or another regulatory body) there is unlikely to be any need for a licensing authority to introduce additional tests. If the licensing authority has evidence that means that it needs to restrict the activities of individuals then it can impose licence conditions to achieve the desired outcome (e.g. allowing participation on strategic but not on financial matters).

96. Aligning incentives to ensure that special bodies/non-commercial bodies can attract and keep people to provide high quality governance is in the interest of everyone. From the discussions we have had, we consider that the potential chilling effect of any requirement for pre-approval of significant interest holders could be significant. We therefore consider that it will be more proportionate to have an approval process once those people are in post, again taking into account checks made by other regulatory bodies. There are in any event requirements in the LSA 2007 that mean that no one should do anything that causes or substantially contributes to a breach of duties as required by the Act or the licence.<sup>16</sup> Licensing authorities will need to strike a balance between

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<sup>15</sup> LSA 2007 s106(6)

<sup>16</sup> LSA 2007 s90 and s176

strong governance, effective management and independence of delivery to ensure that consumers receive good quality, regulated services.

## **Requirement for Head of Legal Practice (HoLP)/Head of Finance and Administration (HoFA)**

### ***Summary of consultation paper***

97. All ABS must have a Head of Legal Practice (HoLP) who must be a person who is authorised to carry out at least one of the reserved legal activities that the body carries out. Although the HoLP will play a key role in ensuring compliance with licence conditions, as with commercial ABS, it is essential that the senior managers and governing body play key roles in ensuring that the body meets all its regulatory requirements. The Head of Finance and Administration's (HoFA) role is to ensure compliance with accounts rules. It seems appropriate that there should be a requirement for the body to have HoLP but, depending on the accounts rules that apply to the body, there may not be any need for a HoFA.

### ***Summary of consultation responses***

98. The suggestion of a normal requirement for a special body to have a HoLP was considered by some such as LawWorks to potentially be disproportionate if this resulted in the need to have a permanent member of staff. This may particularly be the case in a legal advice clinic that provided one-off advice where there was not going to be ongoing client relationships. Liberty considers that both roles will be important and can see no reason why their role should be less in special bodies/non-commercial bodies, but accepts that a HoFA will not be necessary if the organisation does not hold client money.

### ***LSB's view***

99. The LSB still considers that having a HoLP is an appropriate requirement for special bodies/non-commercial bodies in most cases where there is substantial provision of advice to individuals. This need not be a full time position, but having an authorised and named individual who acts as the first, internal, part of regulatory compliance seems to be good practice. It may be that umbrella groups could provide this function and we encourage potential licensing authorities and special bodies/non-commercial bodies to explore that option. There will be a need for a HoFA in cases where organisations hold client money, although if umbrella organisations operate a central escrow account (see paragraphs 73 and 77) the HoFA role may also be able to be provided centrally. We consider that if the organisation does not hold client money it will only be in exceptional circumstances that a HoFA role is required.

## **Training requirements**

### ***Summary of consultation paper***

100. If the licensing authority's rules include training requirements, these must be based on the activities that the special body will carry out.

### ***Summary of consultation responses***

101. Very few respondents commented specifically on this point. Liberty emphasised the importance of requirements (for this and the other issues) being "flexible enough to allow their application to be varied according to the nature of the organisation, the type of work it undertakes, the other obligations to which it is subject and the risk it presents". The SRA explained that its training requirements only apply to individual solicitors and trainees. It said that its outcomes require staff to be trained to a level of competence appropriate to their work and level of responsibility.

### ***LSB's view***

102. We consider that training requirements must be focused on outcomes, flexible and targeted on the risks posed by the activities the body is carrying out.

## **Consistency with the LSA requirements for employers and employees**

### ***Summary of consultation paper***

103. This section of the LSA sets out the circumstances in which a body will be carrying out a reserved legal activity and will therefore need to be licensed. We consider that the licensing authority's rules must not introduce unnecessary regulatory burdens on individuals or the entities in which they work and must not impose requirements over and above those in the LSA.

### ***Summary of consultation responses***

104. The SRA stated that it "intends to develop the special/non-commercial bodies framework in parallel with a wider review of the regulation of in-house practice. In undertaking this work, the SRA will, in the public interest, consider carefully the most appropriate regulatory approach in accordance with the statutory remit and obligations under which it operates". The SRA's view is that it may be desirable to seek an order under section 15 of the LSA 2007 which would define what does or does not constitute a section of the public "with a view to ensuring a consistent framework across the sector". LawWorks said that any rules on this issue should be more accessible to special bodies/non-commercial bodies and that clear guidance would be advantageous. We also understand from our discussions that some in-house lawyers have expressed concern about the possibility of their employers becoming commercial ABS in order to provide legal services to local communities and that the current restrictions are seen as offering protection to in-house lawyers from such moves.

### **LSB's view**

105. The LSA 2007 requires those bodies that provide reserved legal services to the public to be licensed as an ABS. This applies to ABS now and will apply to special bodies/non-commercial bodies once the transitional period ends. In policy terms, we can see little or no case for further restrictions. Whether certain categories of people fall within the definition of “members of the public” will always be a matter of judgement for a regulator, based on the particular facts of the case. We cannot therefore at present see any need for a section 15 Order, and certainly not one that appears to go further than the minimum statutory requirements.
106. We do not consider that it is appropriate for regulatory arrangements to seek to protect in-house lawyers from the legitimate commercial decisions of their employers; that is a contractual matter between those parties. It is, however, essential that lawyers are protected from undue influence, are able to adhere to their professional principles and have an effective mechanism for reporting concerns to their regulator. But that is no different for lawyers who are in-house, in mainstream ABS or in special bodies/non-commercial bodies .

### **Other issues**

107. A number of other issues were raised by respondents that were not covered explicitly in the consultation document:

#### **“Regulatory creep”**

#### **Issue raised**

108. This concerns the fact that the LSA 2007 allows licensing authorities to grant an ABS licence with conditions that relate to non-reserved (ie other legal and non-legal) activities.<sup>17</sup>

### **Summary of consultation responses**

109. One respondent thought that there was an urgent need for guidance “as to the boundary of legal activity”. In its response it highlighted situations where specialist case workers may provide general legal advice to clients, having consulted legally qualified colleagues about the issues as part of holistic client care. The Prisoners’ Advice Service said that guidance needs to be given “as to where the boundary of legal activity is, and to what extent regulators can insist on particular delivery models or methods of supervision”. Shelter made a similar point and gave the example of a support worker helping a family to sustain them in their housing by helping them with various aspects of their daily life. It queried whether explaining the requirement to attend school or helping someone to apply for welfare benefits would be regulated as legal advice. It pointed out that

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<sup>17</sup> LSA 2007 s85(7)



such a change would require “significant organisational change” and would also alter the relationship between a support worker and their client.

110. The Law Society said that special bodies/non-commercial bodies should be subject to the same requirements as solicitors and that “the whole spectrum of legal work provided by the body [must] be regulated”. It is particularly concerned about instances where the commercial arm of a not for profit organisation is in competition with traditional law firms and can see no justification for different rules in such circumstances.

### **LSB’s view**

111. We understand the sector’s concerns about the potential for regulatory reach to be increased as part of the licensing process. We do not consider that such an approach is consistent with either market liberalisation or better regulation. Where there are serious risks to consumers, licensing authorities have the power to impose licence conditions to address them (and the special body can appeal against the imposition of a condition); this is more proportionate than automatically extending regulation to activities not previously subject to it. This issue is closely linked to the discussion on separate businesses (see paragraph 54).

112. The regulation of special bodies/non-commercial bodies will always occur in a wider context. As questions about the scope of regulation are considered it will be important for all, including the LSB, to consider the impact on any change on special bodies/non-commercial bodies.

## **Responsibilities of “managers” and “employees”**

### **Issue raised**

113. A number of respondents expressed considerable concern about the implications for individual governors/trustees of licensing authorities’ ability to impose sanctions on them if a licence condition is breached. Respondents also raised concerns about whether the distinction in the LSA 2007 of “managers”<sup>18</sup> and “employees”<sup>19</sup> could work in practice in the context of special bodies/non-commercial bodies .

### **Summary of consultation responses**

114. Liberty said: “we are particularly concerned about the position of lawyers who volunteer to sit on a body such as our Executive Committee/Board. The prospect, however remote, of being held responsible for any failings of the not for profit body and the consequences for that person’s own professional

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<sup>18</sup> LSA 2007 s 207 defines “manager”: in relation to a body, means [...] a person who (a) if the body is a body corporate whose affairs are managed by its members, is a member of the body, (b) if the body is a body corporate and paragraph (a) does not apply, is a director of the body, (c) if the body is a partnership, is a partner, and (d) if the body is an unincorporated body (other than a partnership), is a member of its governing body.

<sup>19</sup> There is no definition of “employee” in the LSA 2007

standing (or even ability to practise) may be a particular disincentive to becoming involved. It would be deeply regrettable if the new regulatory arrangements for not for profit bodies were to have the effect of discouraging solicitors and barristers from taking on an oversight role". It also said that: "any lack of clarity in regulatory rules about the functions of the managers of a not for profit body or any suggestion that they may be personally liable for failings of the employed staff of the organisation may have the effect of increasing managers' involvement in the organisation's work". And: "perversely, placing considerable responsibilities on the managers of a not for profit body, particularly those who are not themselves lawyers and will not therefore be trained and experienced in professional ethics, may have the effect of diluting the protection afforded to the organisation's clients. Managers uncertain of their role but concerned that they may be liable for any failings of the organisation may be inclined to meddle in the day-to-day work of the body in a way that they do not currently".

115. The ASA was also concerned "that some organisations that will be affected by special bodies' regulation are not sufficiently aware of what it will mean for them or may be confused about what actions they will need to take when the time comes". It asked for additional guidance on the role and responsibility of those who sit on governing bodies.
116. The Disability Law Service said that because the directors, HoLP, HoFA and those reporting to them would "have the day to day job of making sure the licence [...] was correctly followed" and would be the only people in a position to take action, they should be the only people to face the responsibility, providing reasonable scrutiny and governance processes were in place. They also noted that if there was clarification on the definition of manager (in that they were people employed by the organisation) that would alleviate their concerns.
117. CPAG considers that there is a "misunderstanding of the role of trustees". It is concerned that entity regulation would mean that its trustees would be regulated by the LSB and be held responsible for the reserved legal activities being carried out. CPAG does not consider that this is appropriate or proportionate for charitable organisations. It states that the role of the trustees is to set the strategic direction and ensure it meets its charitable objectives; they are not involved in operational matters, which is the role of employed managers. CPAG considers that this distinction is essential for good governance and does not want it to be blurred or compromised.

### ***LSB's view***

118. We recognise the important role that those on governing bodies play in ensuring that essential services are provided to local communities. We agree that it will be important to provide clear guidance on the roles and responsibilities of governing bodies in the context of providing legal services and entity regulation. However, we do not consider that the burden on governors/trustees

(who are categorised as “managers” in the LSA 2007) for ensuring responsibility with licence conditions for the provision of legal services is significantly different from their obligations to, for example, comply with their duties as trustees of a charity (which many special bodies/non-commercial bodies are). For example, the Charity Commission website sets out the duties of trustees which include:

- a) Ensuring compliance with charity law and “the requirements of other legislation and other regulators (if any) which govern the activities of the charity”;<sup>20</sup>
- b) A duty of prudence; and
- c) A duty of care: “exercise reasonable care and skill as trustees, using personal knowledge and experience to ensure that the charity is well-run and efficient”.<sup>21</sup>

119. The Charity Commission website<sup>22</sup> explains that trustees are:

- a) liable to the charity for breach of their trust or fiduciary obligations under trust or company law;
- b) additionally responsible generally for any breaches of the criminal law they commit;
- c) also sometimes liable under civil law to third parties either for breaches of contract or for infringement of another’s rights.

And: “charity trustees may find themselves held liable for the defaults of employees. If they are liable, they will have to meet whatever sum the court awards in compensation. That sum cannot be limited by the charity trustees or the Charity Commission. However, the charity trustees should not normally have to bear any loss themselves, unless they have somehow been at fault or have breached some duty which they owe”. Charities are also able to buy insurance, in particular professional indemnity insurance.

120. Providing there are proper processes in place to ensure good governance within the special body, it is reasonable that the day to day running of the organisation is delegated to its employees. But it must ultimately remain the responsibility of the governing body to ensure that those who do run the organisation on a day to day basis are complying with the organisation’s regulatory obligations. It should not just be seen as an individual lawyer’s responsibility to ensure compliance for the whole organisation with licence requirements.

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<sup>20</sup> <http://www.charitycommission.gov.uk/Library/guidance/cc3atext.pdf> page 3

<sup>21</sup> <http://www.charitycommission.gov.uk/Library/guidance/cc3atext.pdf> page 4

<sup>22</sup> [http://www.charity-commission.gov.uk/charity\\_requirements\\_guidance/charity\\_governance/managing\\_risk/vicarious.aspx](http://www.charity-commission.gov.uk/charity_requirements_guidance/charity_governance/managing_risk/vicarious.aspx)

121. Concerns about the potential for inappropriate influence on individual lawyers' decisions on cases is dealt with by the LSA 2007. The requires<sup>23</sup> all non-lawyer managers, employees and those with a direct or indirect interest in the body not to do anything which causes or substantially contributes to a breach of the duties placed on regulated persons to comply with regulatory arrangements. The role of the HoLP in reporting all licence breaches to the licensing authority is also designed, amongst other things, to safeguard lawyers' independence from undue influence.

### **The application process and fees**

122. Concerns by Citizens Advice about the burden of the application process were echoed by Prisoners' Advice Service which raised concerns about the cost of the licensing process and the annual licence fee. It considers that fees should be set on the basis of the agency's ability to pay as well as the regulator's costs.

### **LSB's view**

123. A fundamental requirement for licensing special bodies/non-commercial bodies will be that the licensing authorities must have detailed guidance and its application form on its website in advance of designation and that the application process must be one stage only. We will consider in more detail the issue of application and licence fees.

124. The LSA 2007 enables special bodies/non-commercial bodies to ask licensing authorities to change certain aspects of their licensing rules. This has the potential to make the application process more complex for special bodies/non-commercial bodies than it is for commercial ABS. We do not consider that it is practical or efficient to place the emphasis on special bodies/non-commercial bodies to conduct detailed analysis of complex licensing rules and draft proposed changes. Rather, we expect licensing authorities to develop "model" modifications that will be appropriate for special bodies/non-commercial bodies and consistent with our guidance. Licence applicants will identify from the model which modifications suit their requirements, and request additional ones if needed. This will make the application process more straightforward both for the special bodies/non-commercial bodies and the licensing authority.

### **Conflicts between individual and entity requirements**

125. CILEX noted in its response that there may be conflicts between individual and entity requirements within a special body that may need to be managed. It also noted that these issues were not unique to special bodies/non-commercial bodies. This issue was also raised by the number of members of PLINGO.

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<sup>23</sup> LSA 2007 s90

### **LSB's view**

126. The LSA 2007 makes provision<sup>24</sup> for dealing with regulatory conflict, but we accept that we will need to provide more detailed guidance about how this is likely to operate in practice and the implications for individual lawyers.

### **Pro bono work**

127. A number of respondents asked for clarity on whether organisations that use lawyers acting pro bono would need an ABS licence. We will consider this in more detail with the organisations concerned.

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<sup>24</sup> LSA 2007 ss 52-54

## Next steps

128. We see the next steps as:

- a) December 2012 – end March 2013
  - Working with special bodies/non-commercial bodies and potential licensing authorities to develop and test our draft guidance
  - Working with special bodies/non-commercial bodies, potential licensing authorities and MoJ to develop an approach to ending the transitional period that allows for an orderly application process from April 2014 to April 2015 (the end of the transitional period). (Note that these dates assume that there will be a licensing authority with appropriate arrangements in place by April 2014.)
- b) April – June 2013
  - Consultation on draft guidance to licensing authorities
- c) July 2013
  - Publication of final guidance to licensing authorities
  - Approved regulators/licensing authorities consult on required changes
- d) End November 2013 - consideration of changes to licensing rules and/or applications for designation as a licensing authority for special bodies/non-commercial bodies
- e) February 2014 - LSB recommendation to Lord Chancellor
- f) April 2014 – application process starts
- g) April 2015 - transitional period ends