

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

Liberty's response to the Legal Services Board consultation on the regulation of special bodies/non commercial bodies that provide reserved legal activities

July 2012

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at

<http://www.liberty-human-rights.org.uk/publications/1-policy-papers/index.shtml>

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Liberty's legal work

1. Since its foundation in 1934 Liberty has provided advice and assistance to members of the public on civil liberties issues and, in more recent times, cases engaging the European Convention on Human Rights. We continue to do so, providing advice through a telephone advice line and in response to written queries submitted both by post and through our website.

2. Further, for several decades now Liberty has employed in-house lawyers to represent members of the public in legal proceedings. We are, however, selective in the cases that we take on; we only take on cases which we believe will be test cases, setting useful precedents in the areas of law that are of most concern to us. Our in-house lawyers (currently three in number, two solicitors and a barrister) also act as Liberty's lawyers in interventions before the higher courts.

3. Liberty's lawyers have acted as lawyers in the following leading cases, amongst others, before the domestic courts and the European Court of Human Rights:

DPP v Jones [1999] UKHL 5

Smith & Grady v UK (2000) 29 EHRR 493

Condrón v UK (2001) 31 EHRR 1

Pretty v UK (2002) 35 EHRR 1

Peck v UK (2003) 36 EHRR 41

R v Katharine Gun (unreported)

R (ERRC) v Immigration Officer at Prague Airport [2004] UKHL 55

R (W) v Commissioner of Police for the Metropolis [2006] EWCA Civ 458

R (Watkins-Singh) v Aberdare Girls' High School [2008] EWHC 1865 (Admin)

R (Wood) v Commissioner of Police for the Metropolis [2009] EWCA Civ 414

R (AM) v Secretary of State for the Home Department [2009] EWCA Civ 747

Liberty v UK (2009) 48 EHRR 1

Gillan v UK (2010) 50 EHRR 45

Paton v Poole Borough Council IPT/09/01/C

JM v UK (2011) 53 EHRR 6

Inquest touching the death of Naomi Bryant (unreported)

Funding our cases

4. We do not conduct litigation on behalf of clients in order to make money. We represent many of our clients without any expectation of payment (and prevail on counsel to do so as well.) However, where we can make money from our cases without prejudicing the interests of our clients, we do so. We have a contract with the Legal Services Commission to conduct cases which fall within the public law category. While it is clearly beneficial to us that we get paid for conducting the case whether we win or lose, being legally aided is also crucial for many of our clients because of the “costs protection”¹ that this provides.

5. Where our client is not legally aidable and the proposed proceedings are ones where an inter partes costs order may be made – most of our cases are applications for judicial review, where this is the case – we will consider entering into a conditional fee agreement with the client which will allow us to claim our costs of representing the client, sometimes with a success fee, if he/she is successful². Obviously, a client that we represent on a conditional fee basis exposes him/herself to the risk of being ordered to pay his/her opponent’s legal costs if he/she is unsuccessful. To protect our client against such a risk, in cases where our client’s opponent was amenable we have agreed to forego the possibility of claiming our costs inter partes on the basis that our client’s opponent would do likewise. We have also on occasions applied for protective costs orders.

6. We assume that when section 44 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“LASPOA”) comes into force, Rule 4.16(b)(ii) of the SRA Practice Framework Rules 2011 will prevent us claiming any success fees from our clients.

Liberty’s constitutional arrangements

7. Liberty exists as two separate but linked bodies: an unincorporated membership organisation and a company limited by guarantee. There is also a linked charity, the Civil Liberties Trust.

¹ Under section 11 Access to Justice Act 1999.

² To the extent that we cannot recover our costs inter partes we indemnify our client against our costs as now required by Rule 4.16(b)(ii) of the SRA Practice Framework Rules 2011.

8. The members of the unincorporated organisation elect a 30-member policy making body, the Council³. From its members the Council elects eight members of Liberty's Executive Committee. The Executive Committee comprises Liberty's Chair and Vice-chair (each elected annually), six ordinary members (three elected each year for a two-year term), a co-opted treasurer and a representative of the Civil Liberties Trust. The members of the Executive Committee are the only shareholders in the company and serve as its directors. There is no requirement that a proportion of the members of the Executive Committee / Board of Directors be practising lawyers, but given Liberty's areas of interest there has always been heavy involvement by lawyers in the running of Liberty. We are, however, keen to retain the active involvement of non-lawyers. Currently, three members of the Executive Committee / Board are practising barristers and one a solicitor.

9. It is the company Liberty that employs Liberty's staff. The company is not a charity because we do not want any constraint on our ability to conduct campaigns.

10. The Civil Liberties Trust is a charity which owns the premises in which Liberty's staff is housed and lets them to Liberty. The Civil Liberties Trust funds many of those elements of Liberty's work which are charitable. This includes our conduct of legal cases to the extent that these are not funded through legal aid or by inter partes costs orders.

11. We consider that the company Liberty comes within the definition of a "not for profit body" in section 207 Legal Services Act 2007 ("LSA").

Bringing not for profit bodies within the alternative business structure ("ABS") framework

12. The lawyers employed by Liberty have always been subject to personal regulation by their respective professional bodies (the Law Society, now Solicitors' Regulation authority ("SRA") and the Bar Council, now Bar Standards Board). However Liberty itself, as it does not come within the definition of a "legal services body" in section 9A Administration of Justice Act 1985, has never been subject to direct regulation by the Law Society / SRA or any other legal regulatory body.

³ Each member of the Council serves for two years, half of the Council being elected each year.

13. The Consultation asks whether respondents consider that the existing non-LSA regulatory frameworks provide adequate protection for consumers. Liberty is not a member of the Law Centres' Federation, nor is it a CAB. As already stated, we are not a charity. We are therefore not subject to the corresponding regulatory requirements. We do, however, have a contract with the Legal Services Commission ("LSC") and are required to comply with the standards set by the standard civil contract and the specialist quality mark. We accept that the LSC's requirements are at least in part driven by the need to get value for money from public expenditure but it would seem to us that they are also motivated by a desire to ensure that standards of service are maintained, albeit in a context where reductions in payment rates are putting tremendous pressure on legal aid practitioners. Our main criticism of the standards set by the LSC is that they are largely procedural and do not do enough to ensure the quality of the legal work undertaken. But it is worth noting that they provide for regular supervision of those undertaking legal work and that they require organisations that do legal aid work to have professional indemnity insurance⁴.

14. As things currently stand – and the changes to the legal aid system that will be made by the LASPOA will change this – we cannot conceive that any not for profit body would engage in reserved legal activities without having a contract with the LSC. What we consider that the Consultation ignores is that in addition to being subject to the standards set by the LSC most not for profit bodies will be subject cumulatively to regulation from other sources: as a law centre, CAB or charity. We suspect that Liberty is unique in only being subject to regulation by the LSC.

15. We also consider that the Consultation overlooks the regulatory effect that flows from individual lawyers working for a not for profit bodies being regulated themselves by their professional bodies (the SRA or the BSB) and lawyers' general professional ethos, which is itself likely to be more marked among those who have chosen to work in the voluntary sector. Almost all solicitors working for not for profit bodies will have qualified and often then worked in private practice; our direct experience and our contacts with organisations similar to us suggest that these solicitors bring the practices and standards that they have learnt in the private sector to the voluntary one.

⁴ In our case, because we are not a charity, we are required to have cover of up to £2 million.

Ending the transitional period

16. The Consultation asks when the transitional period for not for profit bodies provided for by section 23 LSA should be brought to an end. In deciding this question we would encourage the LSB to have regard to the diversity of the not for profit bodies that will need to be licensed as ABSs and the considerable adjustments, often structural, that may need to be made. By way of example, Liberty the unincorporated association might need to amend its Constitution to introduce a requirement that at least one member of the Executive Committee / Board of Directors be a practising lawyer. Such a constitutional amendment would need to be put to an annual general meeting. It would then take effect if it is passed with a three-quarters majority; if it is passed with a two-thirds majority it would have to be put to our membership in a postal ballot. Laying the ground for and achieving such an amendment may take considerable time.

17. We therefore agree with the proposal to delay the end of the transitional period under section 23 LSA. We would also encourage the LSB to keep even the proposed April 2014 date under review in case the difficulties faced by not for profit bodies getting themselves ready to apply to be licensed and then obtaining one necessitates a further extension.

18. The Consultation raises the question whether the LSB should delay the decision on whether to end the transitional protection under section 23 until it has reached a view on the regulation of general legal advice. At this point Liberty takes no view on whether providing general legal advice should be deemed a reserved legal activity. However, were general legal advice to be made subject to regulation it seems clear that this will have the effect of considerably increasing the number of not for profit bodies that will need to be licensed. We consider that there might be merit in delaying the end of the transitional period until after a view has been taken on the regulation of general legal advice if it were thought likely that a body other than the SRA might be prepared to seek approval from the LSB as regulator for not for profit bodies. Were the number of not for profit bodies that would need to seek to be licensed to be increased by making general legal advice a reserved legal activity, setting up an approved regulator for not for profit bodies would be more commercially viable.

The appropriate approach to regulating not for profit bodies

19. Liberty is very concerned that safeguards and procedures put in place to ensure public confidence in ABSs, a new species of commercial legal structure, should not be applied to us in a manner that will substantially affect our governance structures and will require us to depart from a system of internal oversight that has worked very well for us and our clients hitherto.

20. To be more specific, we understand the emphasis put on the ownership and control of ABSs by the LSA and the rules developed for ABSs by the SRA. Now that for the first time non-lawyers are permitted to make a profit from the ownership and management of organisations providing legal services, it is very important that strict safeguards be put in place to make sure that members of the public can have confidence in the independence and professionalism of lawyers acting for them as employees of such bodies.

21. Non-lawyers have always been involved in the management and control of Liberty through being elected to our Executive Committee / Board. Further, all members of our Executive Committee / Board are unpaid and give of their time voluntarily, typically while holding down full-time, demanding, remunerated jobs of their own. Not only is Liberty a not for profit organisation but our Executive Committee / Board members make no personal financial gain themselves through their involvement in Liberty.

22. While the details may vary – and we appreciate that we are perhaps unusual in our democratic structure – the involvement of unpaid volunteers in the nominal ownership and strategic oversight of the organisation is standard for the not for profit sector. In our experience, for such a structure to work well there has to be a clear division of responsibility between the members of the body similar to our Executive Committee / Board and the employed staff. The Executive Committee / Board should set strategic objectives for the organisation and, through the consideration of regular reports, ensure that these are being pursued. Applying this to Liberty's legal work, while our Executive Committee / Board defines the areas of law and issues that should be a priority for the whole organisation, it is the employed staff that decide which cases to take on to give effect to those priorities. We then report on the progress of those cases to the Executive Committee / Board. The Executive Committee / Board should also exercise particular oversight of the organisation's

finances. In Liberty's case the Executive Committee / Board approves our budget before the start of each financial year and reviews our performance against the budget quarterly.

23. We are concerned that the regulatory arrangements put in place for not for profit bodies such as Liberty once the transitional period under section 23 LSA ends should not put this type of governance structure under threat. We can see this happening in three ways:

- (i) The requirement that the "managers" (within the meaning of section 207 LSA) of a not for profit body be subject to approval may act as a significant disincentive to those considering putting themselves forward as members of a management committee.

The SRA's existing rules for ABSs make anyone who is the manager of an ABS within the meaning of section 207 LSA (other than a practising solicitor) subject to the SRA Suitability Test 2011. The test itself applies the standards that would be required of someone seeking admission as a solicitor, with a number of additional requirements relating to disqualification from involvement in charities or companies and to insolvency. While on one view this might seem entirely reasonable – why should someone involved in the management of an organisation providing legal services be subject to less stringent standards than the lawyers directly acting for clients – the information that will inevitably be required to allow the test to be applied will be viewed by many as very intrusive. Many people may take strong objection to having to fill in a lengthy form in order to take up a voluntary post, even if there are no grounds on which they might fail the suitability test. It may be instructive to consider the strong and vocal opposition expressed by many to having to submit to a CRB check before being allowed to volunteer to work with children.

Particular problems will be caused for Liberty by a requirement for prior approval of members of our Executive Committee / Board. As described above half the ten members of our Executive Committee / Board (the Chair and Vice-chair and three ordinary members) are elected each year (possibly more if one of the ordinary members not up for re-election that year resigns or loses his/her right to sit on the Executive Committee / Board by virtue of not being elected to our Council.) Further, the Treasurer is co-opted annually. It is therefore theoretically

possible for more than half the members to be replaced in one go (although in the recent past membership of the Executive Committee / Board has been very stable.) It would be hugely disruptive to Liberty's good governance arrangements if following the annual election to our Executive Committee / Board several new members could not take office until they had been externally approved by the SRA or another approved regulator. Moreover, it is highly unlikely that our membership would take kindly to the idea that our internal organisation should be subject to indirectly state-sanctioned approval.

We accept, of course, that members of our Executive Committee / Board as directors of Liberty the company have to supply their details to Companies House. But the information required for that purpose is far less extensive than that which is required under the current arrangements by the SRA.

In our view the information required of prospective managers of a not for profit body and the grounds for refusing approval should be the minimum necessary. Moreover, arrangements should be put in place that would allow new managers to take up their position on a temporary basis pending formal approval.

(ii) The obligations placed on "managers" may also have a chilling effect on prospective managers' willingness to become involved in not for profit bodies.

The LSA itself imposes a number of obligations on the managers of an ABS. Of these perhaps the most important is the obligation under section 90 not to do anything which causes or contributes to a breach by the organisation or the lawyers employed by it of the regulatory obligations placed on them. In addition to the requirements in the Act the existing rules for commercial ABSs promulgated by the SRA create many further obligations. The SRA Handbook is notoriously long and convoluted. Again, while each requirement placed on the manager of an ABS may itself be reasonable, the cumulative effect of the requirements and, perhaps more significantly, the fear that a manager may fall foul of them if he/she is not completely on top of the obligations him/herself is likely to prove a significant disincentive to taking on the unpaid, voluntary role of a manager within a not for profit body.

Liberty considers that the obligations placed on those involved in the strategic oversight of a not for profit body should be kept to a minimum, should be negative

in nature wherever possible and should aimed at ensuring appropriate arm's length oversight of the body. Above all, they should be simply stated in one document so that someone considering putting him/herself forward for such a role can clearly understand and be confident in the responsibilities of his/her role.

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 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.

(iii) The division of responsibility between "managers" and employed staff may break down.

As set out above we consider that it is important that our Executive Committee / Board exercises strategic oversight of the work of Liberty and does not become involved in day-to-day management of the organisation. 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. This possibility is reinforced, in our view, by the use of the word "manager" in the LSA to describe those who may in reality have very little to do with the day-to-day management of the organisation. The concept of a "manager" suggests a hands-on approach, not, for example, the arm's length oversight role that our Executive Committee / Board performs.

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. As it is, members of our Executive Committee / Board do not feel a need to become involved in the work of the organisation.

Moreover, if they ever did seek to interfere improperly in the conduct of one of the cases conducted by our lawyers, the latter can rely on the professional obligations to which they as lawyers are subject to resist this pressure. This leverage will be lost once everyone, employees and managers, lawyers and non-lawyers, are subject to the same code of conduct.

24. Given these risks and given that Board members of not for profit bodies are typically unpaid volunteers, Liberty considers that the regulatory arrangements for ABSs should clearly distinguish between those who are involved as managers in a commercial ABS for profit and those involved as public-spirited, volunteer Board members in not for profit bodies. As light a burden as the LSA permits should be placed on the Board members of a not for profit body such as Liberty, while the primary responsibility for ensuring compliance with regulatory requirements should be placed on the body's employed members of staff.

Contents of licensing rules

25. Given our view about the importance of placing responsibility on employed staff for ensuring compliance with regulatory requirements, it follows that the HoLP and HoFA roles will be important internal functions. We see no reason why these roles should be in any way diminished in not for profit bodies, although we accept that a HoFA will not be necessary where the organisation holds no client money. (Liberty does operate a client account but, as we cannot charge clients, this is largely used to process the payment of damages / compensation to clients and inter partes costs to counsel.)

26. As to the other matters listed in paragraph 49 of the Consultation (leaving aside the approval of managers that we have already addressed) we agree that there may be good reason to modify rules that would apply to commercial ABSs in their application to not for profit ones. We take the view, and understand this to be implicit in the Consultation, that the rules as applied to not for profit bodies (e.g. as to professional indemnity insurance and as to the operation of a client account) should also be 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 licensing application process

27. As the Consultation notes, section 106 LSA permits not for profit bodies, amongst others, to seek a waiver from certain regulatory requirements, in particular those giving effect to Schedule 13 of the Act. Section 83(9) provides that, except where such a waiver has been granted, licensing rules must apply in the same way to not for profit bodies (and the other types of body that can seek a waiver under section 106) as they apply to commercial ABSs.

28. Liberty agrees with the view expressed in the Consultation that approved regulators should make clear the circumstances in which they will grant waivers under section 106 and the types of waiver they will grant (although they should of course retain a discretion to depart from these in individual cases, not least so that the flexibility we have called for in the last paragraph can be applied.) Without such “broad parameters”, as the Consultation describes them, it will be very difficult for not for profit bodies planning for the end of the transitional period under section 23 LSA to make the necessary arrangements to meet the licensing requirements to which they will be subject.

29. Of course, a route round the problems posed for both an approved regulator and not for profit bodies by section 83(9) LSA would be for the LSB to approve a body specifically to regulate not for profit bodies (and possibly other bodies that come within section 106.) That approved regulator could then develop a set of rules appropriate for not for profit bodies that could be applied consistently (subject to the power to grant a waiver under section 106) to them. Liberty can see considerable merits in such a possibility.

Restrictions on charging for advice

30. The Consultation raises the question whether to abolish the long-standing rule⁵ that employed solicitors working for not for profit bodies cannot charge clients for advice and representation. Liberty has no view as yet as to whether it would wish to charge clients were this rule to be abolished; this would be a significant step and would fundamentally change the nature of our relationship with both existing and prospective clients. We can, however, see that abolishing the rule may assist not for

⁵ Currently embodied in rule 4.16(b) SRA Practice Framework Rules 2011.

profit bodies facing the restrictions on legal aid imposed by LASPOA to continue to provide a service free of charge to other of their clients.

31. What we would invite the LSB and SRA to clarify is whether the current prohibition on charging will prevent solicitors working for not for profit organisations charging their clients success fees once section 44 of LASPOA comes into force and success fees cease to be recoverable from a client's opponent.

James Welch
Legal Director