Consultation response: July 2012

Legal Services Board: Regulation of special bodies
Introduction

The Legal Ombudsman welcomes the Legal Services Board’s call for evidence in relation to the regulation of special bodies. In responding, we have considered how ending the transitional period will affect consumers who want to complain about legal services received from a special body. There is a lot of uncertainty about how complaints handling for special bodies will operate when this time comes. We would like to work with the Legal Services Board (LSB) and other stakeholders to address these issues before the transitional period ends.

The Legal Ombudsman is a creation of the Legal Services Act 2007 (the Act). We were established by Parliament to simplify the system of redress by resolving complaints independently and informally alongside a rapidly changing legal sector. Our role is two-fold: to provide consumer protection and redress when things go wrong within the legal services market; and to feed the lessons we learn from complaints back to the profession, regulators, and policy makers to allow the market to develop and improve.

The Act requires that all firms offering reserved legal activities⁠¹ are licensed by an approved regulator. The Act provides a period of grace for charities, independent trade unions and community interest companies (special bodies) allowing them to perform reserved legal activities without a license for a limited amount of time⁠². The LSB is now consulting on plans to end the transitional period.

Currently, complaints about the service provided by authorised persons (or lawyers) working in special bodies, in regard to both reserved and non-reserved activities, can come to the Legal Ombudsman. We cannot deal with complaints about non-lawyers working within charities unless they have been supervised by a lawyer.

Part 5 of the Act allows lawyers and non-lawyers to share management and ownership of firms providing reserved legal activities, these firms are called alternative business structures (ABS). Firms have been able to apply for ABS licenses from the Council for Licensed Conveyancers since October 2011 and the Solicitors Regulation Authority (SRA) since January 2012. When the LSB chooses to end the transitional period,

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¹ Section 12 and Schedule 2 of the Act define reserved legal activities
² Section 23 of the Act
special bodies will need to apply for licenses from licensing authorities if they wish to continue providing reserved legal activities. Once a special body has been granted a license it will in affect become a special type of ABS.

The Legal Ombudsman will then be able to look into complaints about the service of non-lawyers working within special bodies and complaints about non-reserved legal activities; although, it is currently unclear how far the Legal Ombudsman’s remit will extend. Consumers who access non-reserved legal activities from special bodies who do not provide reserved legal activities – and therefore are not required to be authorised by a licensing authority – will not be covered by our scheme.

We recognise the efforts of the LSB to strike a balance between opening up the legal profession and responding to consumer needs. Many of the issues we anticipate when dealing with complaints about special bodies, we expect to encounter first with ABSs. Our experience handling ABS complaints should prove useful when forming an approach to special bodies.

Consultation questions

Consumer protection – current issues

The LSB is correct to highlight the risk that changes to funding pose to the sustainability of not for special bodies and concerns about limiting access to redress for vulnerable consumers. We have received enquiries from members of the public wishing to complain about services provided through special bodies which have closed down due to funding pressures.

Currently, under the transitional period, there are gaps in redress for consumers accessing some legal services from special bodies. As already mentioned, when a consumer instructs a law firm to undertake a legal service, they can complain to the Legal Ombudsman, even if the service is not a reserved activity or if it is not performed by a regulated practitioner. We cannot take complaints about non-lawyers offering legal services within special bodies unless they are supervised by an authorised person. In which case, the supervising lawyer is responsible for any poor service. Once the transitional period has ended this gap in
protection should close. However, it is unclear how far our jurisdiction will extend.

Jurisdictional overlaps both with regulators and complaints handlers provide a further consumer protection issue. For example, some charities which provide reserved legal activities also provide immigration advice and services. Non-lawyers providing these services are required to be regulated by the Office of the Immigration Services Commissioner (OISC) whereas lawyers providing immigration advice and services are regulated by the SRA, the Bar Standards Board (BSB) or the Chartered Institute for Legal Executives (CILEX). We cannot currently accept complaints about OISC regulated practitioners but we can receive complaints about lawyers providing immigration advice and services. So if, for example, a special body provides identical immigration advice and services through two immigration advisors; one an OISC regulated person and the other a solicitor, and something goes wrong, only consumers who have used the solicitor will be able to complain to the Legal Ombudsman. OISC does receive complaints from members of the public but, as a regulator, they do not have the same powers as an Ombudsman scheme.

Another jurisdictional issue is where there is more than one Ombudsman scheme associated with an activity. This is fairly common with conveyancing complaints, where legal and financial services can be closely linked. In these cases it can be difficult separating the issues which fall under the remit of the Legal Ombudsman and those which fall under the Financial Ombudsman Service. This, perhaps, is of less concern in relation to special bodies due to the type of legal work provided by the voluntary sector. The LSB estimates that the main reserved activities in this sector are litigation and rights of audience. At the moment it is hard to envisage how another complaints handler would be responsible for these complaints, particularly since the Hodgson Review of the Charities Act has signalled a reluctance to support the notion of a Charities Ombudsman.

Depending on the outcomes of other LSB reviews – notably the consultations on immigration advice and services, and will writing and estate administration – it is possible that special bodies will increasingly operate under more than one regulator. It is important that however complicated the regulatory arrangements are for an entity, access to redress and outcomes when people make complaints about legal services are consistent.
Consumer protection – potential issues relating to practitioners and legal activities

Once the transitional period ends, arrangements for complaint handling and redress should be clear to avoid jurisdictional wrangles. There needs to be agreement amongst the regulators and redress mechanisms regarding which activities and persons fall under the Legal Ombudsman’s jurisdiction.

When special bodies receive their licenses to conduct reserved activities we should be able to receive complaints about the legal services provided by non-lawyers as we already do with traditional law firms. We have already received – and not been able to accept – enquiries from people trying to complain about the head of a charity, a non-practising barrister working within a charity, and a lay member of a charity advising on tribunal dates. It is unclear whether, once the transitional period ends, we would be able to deal with all, or any, of these complaints.

This will largely depend on the scope of activities that the licensing authorities adopt. Should, for example, the SRA seek to modify their license to regulate a wider scope of activities, (that is, those not traditionally considered legal services), these could, in theory, fall within the remit of the Legal Ombudsman. Presumably, the same would apply to special bodies, where non-traditional legal activities, undertaken by the regulated entity, could fall under our jurisdiction. When considering any changes to the licensing arrangements of Special Bodies – and other ABSs - the Legal Ombudsman would welcome the opportunity to engage with these discussions to ensure redress for consumers.

Similarly, clarity needs to be gained on which activities are covered by our jurisdiction. Some activities, such as will writing or immigration advice – which the LSB have recently consulted on and we have responded to - are widely held to be legal activities, even though they are not currently reserved. Other services provided by charities are more ambiguous and opinions are likely to be divided on whether they should be considered to be legal activities. In the consultation document, the LSB include housing, welfare benefits and debt advice as examples of general legal advice. It is unclear whether these would fall under the Legal Ombudsman’s jurisdiction if a special body is licensed.

The LSB are planning to run a consultation on whether general legal advice should be regulated. The potential for general legal advice becoming a reserved activity complicates this even further. The
consultation paper mentions a definition of general legal advice; it will be interesting to see how the LSB define this in their paper in the autumn. If legal advice services become reserved, this could have huge ramifications on the voluntary sector depending on the definition.

**Ending the transitional period**

We agree that sufficient time should be given before the transitional period ends to allow special bodies, regulators and other affected organisations time to get the relevant arrangements in place.

We are currently looking into the possibility of establishing a voluntary scheme which providers of legal services could potentially sign up to. As part of this, we are exploring with the LSB – and other interested parties – the possibility of a scheme which would cover unregulated activities provided by special bodies. This would improve redress for consumers until the LSB are in a position to end the transitional period.

As already mentioned, this would be an opportunity to identify any issues regarding complaints and redress related to ABS firms which may help inform an approach to special bodies.

**Indemnity insurance**

We are glad that the LSB have highlighted the importance of including insurance and compensation arrangements in their licensing rules. We recognise the important work that special bodies do in facilitating access to justice. Accordingly, we would welcome a risk-based approach to redress arrangements for Special Bodies. Such an approach would take account of the regulatory objective to improve access to justice, subjecting Special Bodies to redress arrangements that are necessary and proportionate, thereby ensuring that they are able to continue to facilitate access to justice.

To place the same regulatory burden on charities as is placed on law firms would, we suggest, be disproportionate to the risk posed by many charities. Indeed, resources expended in dealing with the regulatory burden are resources that cannot be put into pursuing the aims of the Special Body. This may reduce access to justice. That is not to say that there are / will be some bodies which sit on the fringe between law firm and Special Body. These bodies may well engage in activities which
pose a significant regulatory risk, and therefore require redress arrangements more in line with law firms.

Thank you again for the opportunity to respond to this inquiry. If you would like to discuss in more detail any of the issues raised here, please contact Laura Wigan, Policy and Research Associate, Legal Ombudsman at laura.wigan@legalombudsman.org.uk