



**LSB Discussion Paper**  
**Wider Access, Better Value, Strong Protection**  
The CLC's response  
June 2009

## **The CLC's response to the LSB's Discussion Paper Wider Access, Better Value, Strong Protection**

### **Introduction**

1. The Council for Licensed Conveyancers ("the CLC") was established under the provisions of the Administration of Justice Act 1985 as the Regulatory Body for the profession of Licensed Conveyancers. As set out at section 28 Legal Services Act 2007 the CLC must, so far as is reasonably practicable, act in a way—
  - (a) which is compatible with the regulatory objectives (set out at section 1 of the Legal Services Act 2007), and
  - (b) which it considers most appropriate for the purpose of meeting those objectives.
  
2. Further, the CLC must have regard to-
  - (a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and
  - (b) any other principle appearing to it to represent the best regulatory practice.

### The purpose of the CLC

3. To set entry standards and regulate the profession of Licensed Conveyancers effectively in order to:
  - secure adequate consumer protection and redress;
  - promote effective competition in the legal services market, and;
  - provide choice for consumers
  
4. The CLC welcomes the opportunity to respond to the LSB's discussion paper on Alternative Business Structures.

### Alternative Business Structures and the CLC

5. The CLC will make an application to become a licensing authority with a view to it having the necessary powers to regulate ABS at the earliest opportunity. The CLC has in fact, if not in name, regulated Alternative Business Structures for a number of years. The CLC's view has been (and remains) that the establishment of a separate, though parallel, regime to regulate ABS will not provide additional protection to the consumer, will not generally be in the public interest and will almost certainly lead to unnecessary additional costs which will ultimately be borne by the consumer.
  
6. It is imperative for the CLC to become a licensing authority to enable it to continue to regulate those practices which overnight will be designated ABS. The CLC will have to split the practices it regulates between those which are wholly owned and managed by licensed conveyancers (and other lawyers) which will remain regulated legal practices (or, to use the term now applied to all practices it regulates, recognised bodies). These will continue to be regulated by the CLC, acting as an approved regulator. Those practices which have any element of non-lawyer management or ownership (whilst also

remaining recognised bodies) will have to be regulated as ABS (or licensed bodies) by the CLC, acting as a licensing authority.

7. A number of the recognised bodies which the CLC currently regulates are quasi-partnerships. Some are owned and managed by licensed conveyancers (and so would continue under the new regime as recognised bodies regulated by the CLC as an approved regulator). Others are part owned by spouses who are not licensed conveyancers. Those practices would become ABS. The CLC can envisage situations arising, because of change in the ownership and management structures, where practices move (perhaps a number of times) between being regulated legal practices and licensed bodies.
8. Inevitably, there will be additional costs associated in moving from one regulatory regime to the other, most probably in moving from being a regulated legal practice to being a licensed body. The CLC's view is that it is in the interests of all parties that these are kept to a minimum. It therefore considers that the relevant rules should be structured so that licensed bodies are a sub-set of the CLC's regulated legal practices (ie all the CLC's Rules which apply to regulated legal practices apply equally to licensed bodies; licensed bodies will in addition be required to comply with the HoLP, HoFA and "fitness to own" requirements). Of course, there would be nothing to prevent the other regulated legal practices electing to comply with those rules intended to be applicable only to the licensed bodies.

#### The CLC's experience in regulating legal practices with non-lawyer participation

9. Since 2000 the CLC has issued certificates of recognition to limited companies. The Recognised Bodies Rules 2000 which were in force until 31 March 2009 required that the Chairman and not less than half of the directors of a recognised body were licensed conveyancers. There was no restriction on who could own shares in a recognised body.
10. Recognised Bodies were treated as a species of licensed conveyancer, though there were additional safeguards. The major concern was that a company would be set up, accept client monies, apply those monies dishonestly and disappear. The experience of the CLC has been that those recognised bodies with external (ie non-licensed conveyancer ownership) were concerned to ensure there was compliance with the law and with the CLC's Rules, and they should be regarded no differently to corporations in other markets which need to comply with specific regulatory requirements. Those recognised bodies have been intent on protecting their brand and (if applicable) their group brand.
11. Those recognised bodies accepted the need to ensure regulatory compliance. They have had their HoLP and HoFA in place for a number of years.
12. With effect from 31 March 2009 all practices regulated by the CLC are now designated "recognised bodies". The requirement for the Chairman and not less than half the directors to be licensed conveyancers has been replaced by a requirement that at least one of the Managers of a recognised body must be a licensed conveyancer. This change accepts the reality that practices should be able to appoint the right person for the right job. A licensed

conveyancer (or indeed any other type of lawyer) may not have the right skill set to be the Chief Executive or Head of Finance of a conveyancing practice.

### **Discussion Questions**

#### **Question 1 - What are your views on whether the LSB's objective of a mid-2011 start date for ABS licensing is both desirable and achievable?**

13. The CLC agrees this is desirable and achievable.

#### **Question 2 - How do we ensure momentum is maintained across the sector towards opening the market?**

14. Momentum can be gained by engagement with the legal profession, directly and through their representative bodies, by encouraging debate through seminars and articles in the legal press, through the LSB, the potential regulators and leading supporters within the sector. Furthermore, demonstrating that any valid concerns from the legal profession with regard to implementation have been carefully considered and not dismissed primarily on the basis of perceived professional interests.

#### **Question 3 – What are your views on whether the LSB should be prepared to license ABS directly in 2011 if necessary to ensure that consumers have access to new ways of delivering legal services?**

15. The CLC does not consider it necessary for the LSB to license directly in 2011 particularly as existing Approved Regulators have clearly signalled their intention to qualify as competent licensing authorities. The CLC is concerned that for the LSB in the early years of its operation to address a relatively low risk appears to be a disproportionate use of resources. Furthermore, the CLC is concerned that the diversion of the LSB's resources to prepare for the direct licensing of ABS in 2011 will inevitably restrict the LSB's ability to address the needs of Approved Regulators on other aspects of the existing regulatory framework

#### **Question 4 - How should the LSB comply with the requirement for appropriate organisational and financial separation of its licensing activities from its other activities?**

16. For the reasons given in response to Question 3, the CLC considers it inappropriate for the LSB to license ABS directly in 2011.
17. At a minimum, in the event that the LSB were to undertake such a function, that function must be at arms' length in separate premises and financially independent. There should be no cross-subsidy from the LSB parent.

#### **Question 5 - How do you expect the legal services market to respond and change as a result of opening the market to ABS?**

18. The CLC does not expect there to be an overnight revolution. Much will depend on the perceived experience of the first ABS – their profile, their apparent success and the approach to regulation of licensing authorities.

19. It is likely that there will be new entrants into the legal services market who will seek to leverage their strong brands and drive for consolidation and market share and economies of scale, which is likely to result in more intense competition in the market, particularly for smaller firms.
20. Whilst there will be opportunities for smaller firms to up-skill and deliver more specialised services, it is possible that the market for such services may shrink, if in-house departments are converted from cost centres to profit centres because they have elected to provide services as ABS direct to the public.

**Question 6 - In what ways might consumers of all types – including private individuals, small businesses and large companies – benefit from new providers and ways of delivering legal services?**

21. There is potential for:
  - (a) reduction in the cost of legal services by efficiencies and competition; and;
  - (b) increase in the value of services received because of the potential to bring together different services within one organisation for the convenience and advantage of the consumer.
22. The CLC commissioned IPSOS MORI in 2008 to carry out a survey which reinforced the view that consumers have a preference of obtaining their conveyancing services through estate agents i.e. through one stop services.

**Question 7 - What opportunities and challenges might arise for law firms, individual lawyers, in-house lawyers and non-lawyer employees of law firms as a result of ABS?**

23. The opportunities for law firms are relatively clear – they will have access to funding from individuals and organisations which are not lawyers and have the opportunity to appoint as Managers (whether lawyers or non-lawyers) those who have the skill sets best suited to meet the needs of the law firms. Law firms which do not take these opportunities may find themselves disadvantaged within the market.
24. It is unlikely to be sufficient for individual lawyers to rely on their legal expertise to qualify them to become Managers. We believe that they will have to demonstrate they have specific managerial skills.
25. There is the potential opportunity for in-house lawyers to provide services directly to the customers which would foster the increasing trend of packaging of legal services with other services. The associated challenge with this opportunity is how a career as an in-house lawyer is perceived compared to a career in private practice in the medium or longer term.
26. Non-lawyers are already employed in different capacities within law firms. The opportunities for them to be promoted to Managers are likely to increase, though their employers are likely to require such Managers to demonstrate they have a good working knowledge of the regulatory environment within which the firm functions, as well as appropriate skills.
27. The increased opportunity for more non-lawyers to operate in the delivery of legal services at all levels should hopefully also help in demystifying legal

services and improving public understanding of and accessibility to the profession.

**Question 8 - What impact do you think ABS could have on the diversity of the legal profession?**

28. Potentially ABS will facilitate a change in the dominant structure for delivery of legal services which to date has restricted the rate of progression for some from diverse backgrounds. However, any increased consolidation in the legal services market if the ABS model proves to be successful may have an adverse impact on the diversity profile of the legal profession.

**Question 9 - What are the educational and developmental implications of ABS and what actions need to be taken to address them?**

29. Our initial view is that we cannot see any justification for imposing mandatory training requirements for ABS, which are supplemental to those currently demanded from existing practitioners. However, we agree that the roles of HoLP and HoFA are likely to require targeted training within the existing framework for individual practitioners because of the pivotal nature of those roles.
30. The training for lawyers will invariably change if the ABS proves to be successful. If the market becomes increasingly segmented into commoditised/packaged services and specialist/niche services, the demand for different types of lawyers to operate in the new landscape will increase. This will inevitably influence the design of educational programs so they meet the changes in skills demanded of lawyers in the market place.
31. Steps need to be taken to ensure that non-legal Managers are aware of their duties and responsibilities. One of the functions of the HoLP would be to ensure all Managers are made fully aware of these duties and responsibilities.

**Question 10 - Could fewer restrictions on the management, ownership and financing of legal firms change the impact upon the legal services sector of future economic downturns?**

32. Given the recent experience of the UK economy and the banking sector in particular, it would appear to be counter-intuitive to suggest that fewer regulatory restrictions would enable legal firms to be better placed to resist the adverse effect of future economic downturns. However, we do not consider that we are able to usefully comment further.

**Question 11 - What are the key risks to the regulatory objectives associated with opening the market to ABS and how are they best mitigated?**

33. The key risks are:
- (a) The level of legal service provided to consumers falls below the standard reasonably expected of a legal practice; and
  - (b) The systems and controls of the ABS are inadequate to prevent the clients of the ABS from being defrauded.

34. Both these risks can be mitigated by the regulator setting clear standards, monitoring compliance with those standards by a series of different strategies and calling the HoLP (and ultimately the ABS) to account where those standards are not met.

**Question 12 - Are there particular types of business structure or model which you consider to present a particular risk to the regulatory objectives?**

35. We suggest that the risks associated with those ABS which are essentially legal practices are capable of being identified reasonably easily.
36. The risks associated with practices which have significant non-legal functions do not appear to have been specifically identified. However, that does not mean that the risks associated with such practices are inherently greater than those of traditional legal practices.

**Question 13 - What conflicts of interest do you think might arise in relation to ABSs and how should they be managed?**

37. The inherent conflict is between the desire of the practice to maximise revenue against what is in the proper interests of the client. In our experience it is present whether a practice is owned exclusively by lawyers or whether it is owned by non-lawyers.
38. The role of the HoLP and the HoFA is to manage such conflicts on a day to day basis. If that is not possible, then the ultimate sanction of the regulator is to prevent that practice from continuing to trade.

**Question 14 - How should licensing authorities approach entity-based regulation and what are the main differences from the traditional focus on regulating individuals?**

39. Both the CLC and the SRA have already moved towards entity based regulation. This reflects the reality that in many practices the majority of the services delivered are now provided by employees, rather than Managers of the practice. The role of Managers is to ensure that appropriate systems and controls are in place so that employees comply with the standards the practice has set (which themselves are compliant with the rules of the relevant licensing authority).

**Question 15 - Do you agree with our view that licensing authorities should take a risk-based approach to regulation of ABS, and if so, how might this work in practice?**

40. Yes.
41. Licensing authorities will have to develop the capability to understand, anticipate and measure the risks posed by individual practices based on information provided by the practices themselves as well as independent sources. In practice, this will require the licensing authorities to have the resources (which would result in additional costs for some existing approved regulators) including staff and technology to understand systemic risks in their respective market sectors and adopt the right regulatory response.

**Question 16 - What is your preferred balance in regulating ABS between a focus on high-level principles and outcomes and a more prescriptive approach?**

42. The CLC's preference is to have high-level principles and "middle level" flexible rules, supplemented by helpful guidance. As a default position each practice is expected to comply with that guidance unless it can satisfy that the system it has adopted provides a level of protection for the consumer which is equal to or better than that set out in the guidance.

**Question 17 - What are the advantages and disadvantages of a requirement on ABS to have a majority of lawyer managers?**

43. The advantage of an ABS having a majority of lawyers is that they can be regulated directly by a legal regulator (which ultimately has power to withdraw a Manager's right to practise).
44. The primary disadvantage is that the lawyer managers may not have the right skill sets to be effective Managers.
45. As we already regulate ABS-type firms which require only one licensed conveyancer Manager, we propose adopting similar requirements if we become a licensing authority.

**Question 18 - What are your views about how licensing authorities should determine whether a person is a "fit and proper person" to carry out their duties as a HoLP or a HoFA?**

46. The CLC favours a broad test to determine whether an individual is a "fit and proper person" since the appointment of a HoLP or a HoFA is primarily a matter for the individual practice.
47. We suggest that the licensing authority should require appropriate evidence of identity and proof of professional qualification. In addition it should make specific enquiries of the relevant regulator, obtain references from former employers and undertake the usual credit searches. The CLC does not believe that CRB checks provide appropriate assurance, and may give a false sense of protection.

**Question 19 - What is the right balance between rejecting "higher-risk" licensing applications and developing systems to monitor compliance by higher-risk licensed bodies?**

48. In our view a licensing application should be approved where an applicant can demonstrate it meets the minimum regulatory requirements. Clearly, if the "fitness to own" tests are not met, then the application will be refused.
49. The approach adopted depends on what is meant by 'higher risk' licensed bodies. If the suggestion is that such firms inherently pose a higher risk to clients than is normally acceptable (and is currently the norm), then it is questionable why such applications should be accepted particularly as the scrutiny of applications is a key element of the regulator's toolbox.
50. However, if the licensed body is deemed a higher risk relative to a set of tests which may not be in step with the proposed innovation in the market which that body intends to provide, then arguably a provisional licence should be

issued subject to closer monitoring. However, in such cases it should be expected that arrangements will be in place to minimise the exposure of the regulated community to additional costs arising from the experimental nature/higher risk development in the market.

**Question 20 - How should regulators ensure a level playing-field between regulated legal practices and licensed bodies?**

51. Our current intention is that licensed bodies should be regulated as if they are regulated legal practices, subject in addition to the HoLP, HoFA and fitness to own test.

**Question 21- How should licensing authorities approach the access to justice condition, and do you agree that it is unlikely that many licences should be rejected on the basis of the condition?**

52. We propose to adopt a cautious approach in weighting the criterion of 'access to justice' when determining applications as a licensing authority.
53. First, there will need to be a common understanding as to what access to justice means particularly in different sectors of the legal services market. Secondly, there is the risk of inconsistencies in the approach taken by regulators faced with similar applications particularly if there is insufficient information to measure the impact on access to justice. This is likely to lead to lengthy, costly and potentially damaging litigation.

**Question 22 - How should licensing authorities give effect to indemnification and compensation arrangements for ABS?**

54. We consider that the correct approach is to consider the position from the point of view of the consumer rather than the ABS. The CLC's current practice is that all the practices it regulates (including those with external managers or owners) should have equivalent indemnification and compensation requirements.
55. Whilst in principle, we understand the need to accommodate the supply of legal services by ABS; we believe that any new arrangements to accommodate ABS should not be to the detriment of the existing regulated practices. The existing arrangements for indemnity insurance and compensation fund reflect the profile of the respective regulated community for each approved regulator and it is important that any efforts to adapt existing arrangements to facilitate entry for ABS providers do not result in a detrimental impact for the bulk of that branch of the legal profession.

**Question 23 - How should complaints-handling in relation to legal services provided by ABS be regulated?**

56. Complaints handling for ABS should be regulated in the same way as for regulated legal practices.
57. Licensing authorities will need to ensure that ABS have set up a robust complaints-handling process, that clients are advised about such process when the ABS first receives instructions and again when a complaint is made, and that the ABS follows that procedure when a complaint is received.

58. The CLC intend to increase the monitoring of practices' performance on complaint handling when it inspects practices. Currently, the CLC's Investigating Committee directs the payments of compensation to a complainant where it is satisfied that a practice did not at the relevant time have a complaints-handling function in place, or, if it did, that the process was not followed. We hope that the CLC will be notified routinely by the Office for Legal Complaints of the receipt and outcome of complaints (to include the position on complaints handling) so that it can monitor effectively the performance of practices.

**Question 24 - How should licensing authorities approach the "fit to own" test and how critical is it in mitigating the risk to the regulatory objective of promoting lawyers' adherence to their professional principles?**

59. See response to Question 18.
60. The "fit to own test" is one of the checks the CLC would have in place to ensure that lawyers adhere to the professional principles. We accept that the 'fit to own test' will have similarities with the 'fit and proper person test' for the HoLP and HoFA.

**Question 25 - Are there are any particular risks to the regulatory objectives that arise from or could arise from ABS offering non-reserved legal services?**

61. The CLC considers that the risk arises where non-reserved legal services are delivered by an entity which has close associations with an ABS providing reserved legal services. In these cases, the consumer may not be made fully aware of the distinction in regulatory terms between the two entities and the level of protection afforded.

**Question 26 - What are the risks to the consumer associated with the delivery of legal services by special bodies and which more general risks are less relevant to these bodies?**

62. The CLC's view is that special bodies should be required to comply with exactly the same standards, and have the same level of assurance, as other regulated legal practices unless the risks posed by such organisations are significantly different

**Question 27 - Is it in the consumer interest to require special bodies to seek a licence, and if so, what broad approach should licensing authorities take to their regulation?**

63. Yes.
64. As set out in the response to Question 27, special bodies should have the same level of regulation as other regulated legal practices, unless such approach is disproportionate in view of the risk profile of the organisation.

**Question 28 - Are there any other issues that you would like to raise in respect of ABS that has not been covered by previous questions?**

65. No.

## **Summary**

66. The CLC accepts that ABS will be introduced as quickly as possible. It is committed to becoming a licensing authority primarily because the practices with non-lawyer Managers and owners which it currently regulates increase the choice of providers for consumers.
67. Generally, the CLC agrees the approach taken by the LSB and looks forward to engaging with the LSB and other parties in the implementation of the ABS regime.