

WIDER ACCESS, BETTER VALUE, STRONG PROTECTION

Discussion Paper on developing a regulatory regime for alternative business structures

Response by the Faculty Office on behalf of the Master of the Faculties, an Approved Regulator

General Comments (Question 28)

1. The Discussion Paper understandably “sets out plans for when and how the market will be opened” (para. 1.6), because the principle of having Alternative Business Structures (ABS) is established in the Legal Services Act 2007. The Paper also recognises that developing the regulatory framework to facilitate ABS is a goal which cannot be achieved overnight (paras 2.16 and 2.17). That must be correct. We are pleased to see that approved regulators, of which the Master of the Faculties is one, will be included in the ABS Implementation Group to be chaired by the Chief Executive of the LSB (para. 3.6). This form of co-ordination should enable as many potential problems as possible to be discussed and resolved in the course of practical preparation of the ABS project and before it is brought into full effect.
2. At present there can be no certainty about what market changes are going to take place following the introduction of the ABS regime. It is not currently anticipated that the Master of the Faculties will at the outset be seeking to be designated as a licensing authority by the Lord Chancellor. However, circumstances will no doubt change in the future, and it is possible that the Master would seek such designation if a firm of notaries became interested in forming an ABS. The advantage of being a licensing authority in such circumstances is that the notaries would remain under the same approved regulator, the Master of the Faculties, and the licensing rules could take account of that whilst making appropriate provision for regulation of other persons wishing to work with the notaries within an ABS.
3. The Notarial Profession

We believe that it is necessary to set out in this Response, as we have done in our responses to other LSB Consultation Papers, some

explanation of why the notarial profession is in a different position from other branches of the legal profession in this country. The office of “notary public” (otherwise known as “public notary”) originated in Roman times and the notary plays a central part in legal systems in the rest of Europe and further afield. Since 1533 notaries in England have been authorised to practise as such by the Master of the Faculties. The most distinctive feature of their practices is that they verify and authenticate documents in a manner which will make them acceptable without further proof to judicial or other public authorities in countries, which have legal systems based on civil law.

4. Scrivener notaries working in the City of London have to be proficient in at least two foreign languages as well as being familiar with the principles and practice of foreign law, because they prepare important commercial documents intended to be used abroad in civil law jurisdictions. Notaries need to be viewed as members of a profession, which stands on its own and does not form part of the mainstream of legal providers in England and Wales.
5. Many notaries wear ‘two hats’ in that they are able to practise as solicitors or barristers but also practise as notaries. If they do so, then they are subject to two regulatory systems. The Master of the Faculties regulates them in their practices as notaries, whilst work done in the capacity of a solicitor or a barrister is subject to the remit of the regulator of the profession in question. As the Solicitors Regulation Authority has pointed out in relation to the FSA , where there are separate well-known regulatory systems operating alongside each other in relation to the same person it does not usually create difficulty.¹ This is equally true of solicitors and notaries. However, not all notaries wear ‘two hats’. For example
 - Scrivener notaries practise full-time as notaries whether as partners or employees of a firm;
 - Some notaries practise full-time as such having retired as solicitors, or possibly as barristers;

¹ ‘Regulating alternative business structures’: Consultation Paper 18 1 June 2009 of Solicitors Regulation Authority para L2

- Some notaries in practice have never been members of another legal profession.

All these categories fall only within the regulatory regime of the Master of the Faculties.

6. Independence of notaries

The notaries are not only regulated separately from other legal providers. Their independence in regulation, and generally, is critical. For a long time notaries in this country were viewed by their counterparts abroad as being inferior to them. It is only in recent years that the international associations of notaries have given recognition to Scrivener notaries and, to some extent, general notaries, as having similar standing to themselves in relation to notarial acts. This recognition is of considerable value to consumers, who are able to use the services of English notaries with confidence and do not have to incur the expense and inconvenience of engaging a notary abroad, when they have overseas matters to be dealt with.

7. English and Welsh notaries achieved international recognition largely due to their independent regulation through the Faculty Office, their high standard of training, and their rigorous practice rules made by the Master of the Faculties. During the passage of the Legal Services Bill the Government was supportive of the continuation of independent regulation of notaries because of the implications internationally if that independence were lost. Parliament has accepted this approach by sanctioning the position of the Master of the Faculties as an approved regulator.
8. Practising notaries look to their regulator to help them to protect their international standing, and our major concern is that the independent regulation of notaries must be preserved within any ABS in the same way as it is at the present time alongside a solicitor's practice. If notaries within an ABS were made subject to regulation from an additional body, such as a licensing authority, it would seriously jeopardise the standing of English and Welsh notaries abroad, because it would be perceived in Civil Law countries that they had lost their independence. That would be

a retrograde step so far as the consumer is concerned, because it would be likely to revive the earlier adverse view taken of English notaries referred to above. It could also present a notary with the choice of having to leave the ABS in order to continue in practice as an independent notary, or to cease to practise as a notary in order to remain within the ABS. Either scenario could be regarded as anti-competitive. Cessation of practice as a notary would certainly not be in the interest of the consumer.

9. By way of illustration of the emphasis placed on the independence of a notary we draw attention to the Notaries Practice Rules 2001. Rule 5 provides amongst other things that a notary shall not do anything “which compromises or impairs or is likely to compromise or impair any of the following:
 - the notary’s independence or integrity;
 - a person’s freedom to instruct a notary of his choice;
 - the notary’s ability to act in the best interest of the client;
 - the good repute of the notary or of the notarial profession;
 - the notary’s proper standard of work;
 - the notary’s duty of care to persons in all jurisdictions who may place legitimate reliance on his notarial acts.”
10. An employed notary is required to maintain his/her independence and to ensure that this independence is fully recognised in writing in any contract of employment (rule 8.2). The employee is also required annually to send to the employer a written statement of professional independence and to declare in the application for renewal of the annual practising certificate that this has been done. The relevant part of the form of words presently in use, as approved by the Master, is

“This statement is therefore to remind you that in the exercise of my notarial practice I am bound to observe the professional standards and requirements of a notary public, and that in so acting I must maintain my independence of you as my employer and give precedence to my professional duties over my duties to you as your employee.”

11. Regulatory Conflict

It would be contrary to the intention of Parliament that the independence of notaries should be safeguarded through their regulator, the Master of the Faculties, if the position of individual notaries, or the notarial profession at large, were to be prejudiced by licensing rules for an ABS which were made to apply to them. In order to avoid a conflict there would have to be a condition on the licence that the licensing rules should not apply to any member of the ABS who was a notary.

Specific Questions

Responses are given to those questions on which the Faculty Office considers it appropriate to comment.

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

Response

Despite the well-intentioned plan to facilitate the introduction of ASBs the time-table set seems to be very challenging. This is a new and unknown area with much work to be done on both principle and detail. It would be prudent for the LSB not to constrain itself at this stage by sticking rigidly to a fixed start date.

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

Response

As setting up an ABS will be a voluntary act, regular progress reports on what is entailed in the licensing scheme will provide the guidance needed to help those who are interested to think and plan ahead.

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?

Response

Because of the many duties imposed on the LSB by the Act it is doubtful whether the power to be a licensing authority should be regarded by the Board as other than residual, to be used only in the longer term if sufficient approved regulators do not apply to be designated as licensing authorities.

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

Response

We do not attempt to suggest how this could be achieved. The power of delegation given in section 73 (3) (a) is a starting point. Becoming a licensing authority and direct regulator could conflict with the overriding supervisory role of the LSB. Only a separate department, with consequential costs, would create the necessary 'Chinese wall,' and this would be an uncalled for burden to the professions unless it proved to be essential.

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

Response

As paragraph 4.13 points out, ABS may not be relevant to certain firms or impractical because of operation "across a number of jurisdictions where ABS models would not be permitted". This is apt in relation to notaries whose standing abroad could be jeopardised by entering into a new regulatory regime (see our para. 8 above).

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?

Response

Consumers who wished to consult a notary would suffer a disadvantage, if the effect of the introduction of ABS in their area were to result in a notary ceasing to practise in a local firm. This would because he/she was unable to comply

with the Practice Rules for notaries and at the same time belong to an ABS, because of the nature of the licensing rules (see our paras. 6 to 10 above).

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?

Response

In a law firm which included one or more notaries, regarded as assets to the firm, the challenge would be to ensure that the position of a notary partner or employee was not prejudiced by the terms of the ABS licence to the extent that the notary would be unable to demonstrate the necessary independence and would be refused a renewal of the practising certificate by the Faculty Office for non-compliance with the Practice Rules. If this were not resolved, then, instead of finding that a variety of services were available under one roof as at present, the consumer would be disadvantaged by having to go elsewhere for a notary because there was no notary within the new ABS.

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

Response

There would be a risk that by size and extensive advertisement the ABS could dominate an area so that the consumer was left with less choice than at present, because smaller firms ceased to practise. In some areas this could result in the supermarket syndrome, i.e the effect of closing smaller competitors.

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

Response

We agree with the statement in paragraph 4.20 that "it would not be appropriate to impose any mandatory training requirements for ABS other than those which are required of individual practitioners at present." However, if different disciplines are to be brought together then it would be prudent for the LSB to ensure that satisfactory instruction or guidance is given

to explain the principal differences in approach and regulation of the different disciplines before they join together in an ABS. This would particularly apply in the case of notaries.

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?

Response

So much depends on the causation, severity and rapidity of any future economic downturn that we do not consider that it is possible to make any useful prediction as to what changes could afford any protection.

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

Response

Paragraph 5.5 records concern about the effect of introducing ABS “which could reduce the accessibility of face to face legal advice for people living in more remote areas”. This could be true in respect of notaries. Whilst it may be financially worthwhile for a practising solicitor also to qualify and practise independently as a notary, if the notarial practice had to be terminated because of lack of independence within an ABS (see our para. 8 above) then consumers would be prejudiced and disadvantaged. Attendance in person before a notary is essential for authentication of many documents and the consumer might have to travel a considerable distance to find a notary. There are only 850 notaries in practice throughout England and Wales, so any reduction in the number of notaries could have this effect in various parts of the country.

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

Response

Whilst firms of solicitors at present understand the need for a notary partner or employee to keep separate his/her practice as a solicitor from that as a notary, non-lawyers in an ABS “with a material interest in the firm” (para.5.11)

could be less tolerant and could press the notary to bring into account all professional fees earned as a notary, which would be in conflict with the principle of separate accounting and record-keeping required of a notary. Such a possibility would make it essential for the licence given to an ABS to contain a condition preventing interference with the independence of a notary where a notary was to be included in the membership of the ABS.

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?

Response

If the risk-based approach concentrates on the firm as a whole, then any inappropriate action by a member of the ABS could reflect adversely on the reputation of a notary member irrespective of the fact that he/she was not involved in the action in question. It would be imperative in order to maintain the independence of a notary practising as such within the ABS to ensure that a condition was attached to the licence making it clear that the notary was subject to separate regulation by the Master of the Faculties.

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

Response

Lawyers are accustomed to complying with the high standards expected of them by the professional bodies of which they are members. A majority would ensure that those high standards would be maintained, which is in the interest of the consumer. The complexity of the law makes it likely that one firm will contain partners and employees with different specialities so that, in itself, could mean that the majority need to be lawyers in order to offer the best service to the consumer.

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

Response

They should remember that the Better Regulation principles require

regulatory activities to be “targeted only at cases where action is needed” (para. 6.6). Otherwise there would be a strong risk of complexity and overkill in regulation with professional bodies, licensing authorities, and the LSB all having a say in regulation thus creating an unwieldy and potentially conflicting administrative and regulatory nightmare.

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?

Response

Every effort should be made to ensure continuation of access to justice. In the case of notaries this should be achieved by attaching a condition to the licence protecting the independence of a notary within an ABS (see our answers to Questions 11 and 13 above). If that were done it would avoid the situation that the licence for the ABS made the services of a notary less accessible. Generally the licensing authority should consider with care what the likely effect would be in terms of access to services if the ABS were to be authorised. As access is a fundamental principle this should not be ruled out as a reason in itself for rejection of an application for an ABS.

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

Response

The Master of the Faculties requires individual notaries to have in place an approved level of professional cover and fidelity insurance in respect of dishonesty in relation to the handling of clients’ funds. This sets a good standard which should be followed in every ABS.

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

Response

We agree with the LSB that the arrangements for complaints handling specified for ABS should not “be materially different from those specified by regulators for the non-ABS environment” (para. 7.23). Because the role and

function of a notary requires special knowledge and understanding, any complaint against a notary, practising independently within an ABS, should be dealt with under the arrangements contained in the Notaries (Conduct and Discipline) Rules 2009 and should not be subject to any complaints-handling arrangement applying to the rest of the members of the ABS.

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