

Mr James Hutchinson  
Legal Services Board  
7<sup>th</sup> Floor, Victoria House  
Southampton Row  
London WC1B 4AD

*By e-mail and post*

11 August 2009

Dear Sirs,

**Response to consultation paper “Wider Access, Better Value, Strong Protection” – alternative business structures (ABS)**

The Society of Scrivener Notaries would like to like to make the following comments on the above consultation paper.

We recognise the importance of proper regulation for there to be a healthily competitive market, in which the needs of consumers and notaries are fairly balanced. We welcome the opportunity for continued dialogue on such issues.

We also feel that there is an overlap between the subject of this paper and the consultation paper entitled “Designating new approved regulators”. The latter issue is of particular importance to us and therefore some of comments contained here will be reiterated in our response to that consultation paper.

We take the opportunity to make the following general comments on alternative business structures (Question 28).

**Representation and regulation**

Notaries have always enjoyed a separation of responsibilities when it comes to representation and regulation. The former is handled by the Society of Scrivener Notaries and the Notaries Society. The Faculty Office is responsible for the latter. We are not aware that our regulator has any interest in becoming an ABS licensing authority.

We are concerned that some approved regulators may be tempted to view ABS as an entrepreneurial opportunity. There will be pressure to license ABS because of the potential increase in revenue. There will be pressure to offer “favourable” licensing rules.

There is a risk of creating an uneven playing field with distortions in competition resulting from notaries being treated differently, depending on whether or not they are practising within ABS.

Any approved regulator wishing to become a licensing authority should not therefore be able to “undercut” the regulatory standards for notaries that already exist to protect consumers. If the licensing authority is unable to guarantee this or breaches the requirement, then the LSB should withdraw the powers from the authority.

### **Notaries and impartiality**

We would refer the Legal Services Board to the provisions of the Practice Rules which govern notaries. Notaries are prohibited by their Practice Rules from “doing anything in the course [of practice] ... which compromises or impairs ... the notary’s independence or integrity.”

There are similar prohibitions on favouring the interests of one client over another. Whilst it is true that “multi-disciplinary partnerships” do exist for those who are qualified both as solicitor and notary, there are strict rules regarding fee-sharing and the independence of notaries.

We believe that it should not be possible for any ABS licensing authority to develop a parallel system of regulation that compromises the fundamental role of the notary as a public, independent certifying officer, his duty to all parties to a transaction and, crucially, his duty of care as enshrined in the Notaries Practice Rules 2001 (r. 5.6) “to persons in all jurisdictions who may place legitimate reliance on his notarial acts.”

### **Notaries and the rest of Europe**

We draw the attention of the Legal Services Board to the fact that notaries practice at the “interface” between the common law and civil law systems, with the latter being dominant throughout the rest of Europe and the European Union member states in particular.

Under the Brussels I Regulation, the acts of most EU notaries are accorded greater effect in England and Wales than those of domestic notaries; the proposal before the European Parliament to create a “European authentic act” is likely to exclude the acts of English and Welsh notaries, thus further disadvantaging consumers of notarial services in England and Wales. The creation of a level playing field for English and Welsh notaries within the EU ultimately depends upon the perceived independence of notaries from commercial and other external pressures.

Nearly all UK consumers require assistance from notaries only when they are required to deal with business in another country, i.e. a property matter in Spain, an inheritance in Italy. The impartiality of the notary is particularly important in civil law jurisdictions. As it is, notaries in England and Wales are not always given the respect they deserve by their counterparts in other EU countries. Civil law notaries in other countries will be confused by ABS and the notion that a notary can set up shop with, say, an accountant. We strongly suspect that ABS will not help English notaries in their campaign for fair treatment and recognition across the EU. Indeed, it is to be expected that some civil law notaries (and/or their representative organisations) will use ABS as an excuse to spread disinformation about the standard of notarial services provided by notaries in England and Wales.

We therefore urge you to proceed with caution. If the credibility of English and Welsh notaries is undermined abroad, there will be a “knock on” effect on the services they can offer, as their notarial acts would be “devalued” in comparison with acts issued by other European notaries. This will mean less choice for UK consumers, and reduced “access to justice”. The LSB’s concern is the same as ours, to ensure that consumers have more choice and value for money.

As far as the remaining questions in the consultation paper are concerned, we are responding to those questions that relate to the Society’s role as an association of legal practitioners. We have not responded to those questions that do not fall within our remit, or if the question relates to issues on which we either have no opinion or feel unable to comment at the present time.

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

This is a huge task in terms of manpower and resources. Does the Legal Services Board think that by 2011 it will have completed the preparations required for it to be ready to license ABS directly? Is the LSB satisfied that it would have no conflict of interest with other licensing authorities (particularly as far as fees are concerned)?

The following passage in paragraph 3.17 is of particular concern: “Licensing authorities must require licensed bodies to pay periodic fees, so this aspect of the LSB’s operations might be self-financing.” There does not appear to be much confidence that the LSB could break even as a licensing authority. How therefore would any potential losses be underwritten? Would the Levy be increased to make up the shortfall? This would mean that the professions as a whole would be indirectly subsidising ABS regulation.

6. *How do you expect the legal services market to respond and change as a result of opening the market to ABS?*

There is little evidence from notaries to demonstrate that there is much interest in ABS at the present time. The market for notarial services is already highly competitive and consumers are not lacking in choice.

There are no reports from our members to indicate that clients feel a need for a “one stop ABS shop”. It therefore remains to be seen whether there really is a gap in the market for new entrants using ABS.

7. *What conflicts of interest do you think might arise in relation to ABS and how should they be managed?*

We refer you to the general comments made above.

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

Notaries are required by their regulator to maintain a minimum level of professional indemnity insurance cover. Similarly the regulator requires them to have “fidelity insurance”, to cover dishonesty in management of client funds. We would be opposed to any attempt by a licensing authority to set requirements for ABS that are lower than those required of notaries in the non-ABS environment.

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

We welcome the statement contained in paragraph 7.23: *“We would need strong evidence to persuade us that the arrangements for complaints handling specified for ABS should be materially different from those specified by regulators for the non-ABS environment.”*

Nevertheless, we are concerned that the proliferation of regulators (ABS licensing authority, non-ABS approved regulator, LSB, OLC etc.) will create bewilderment in the mind of the consumer.

Yours faithfully,

Jonathan Coutts  
Secretary  
The Society of Scrivener Notaries