

Solicitor Sole Practitioners Group Response to the Legal Services Board Discussion Paper on Developing a Regulatory Regime for Alternative Business Structures.

Introduction

1. This paper is the response of the Solicitors Sole Practitioners Group of the Law Society.
2. This Group comprises an Executive Committee of approximately 15 members and covers approximately 4500 individual sole practitioners. There is an opt in membership scheme operated by the Law Society and the majority of sole practitioners have opted in to membership. The group has a periodical magazine "Solo" and a website. It has a well attended annual conference and provides training sessions.
3. It involves itself in regular consultations with the SRA but not as yet with the LSB.
4. The Group consists of independently minded solicitors who make their decisions without the need for partnership or corporate decision-making processes. For this reason the views of the members are their individual views. Those views have been canvassed on several occasions by the Executive Committee in the process and development of the concept of Alternative Business Structures. Firstly in relation to the original Law Society responses. Secondly in relation to the Clementi review. Thirdly in relation to the Joint Parliamentary Committee on the Legal

Services Bill. Finally in respect of the Parliamentary consideration of the Bill itself.

5. The Group has canvassed its members views by a circular questionnaire and taken their views at most of its annual conferences over the last few years. The almost unanimous view of sole practitioners is that Alternative Business Structures are wrong in principle in so far as they allow the introduction of commercial financial control into the provision of legal services.
6. The Group have accepted the fact of changes to regulation by the separation of the Law Society and the Solicitors Regulation Authority and accept, without necessarily approving, the Government's wish to have the Legal Services Board as an overall body in control of legal services. They object however to the considerable additional expense which falls on the legal profession, and ultimately on the customer, without there being any significant apparent benefit.
7. Sole Practitioners' major concern is the fact of the complete and irrevocable change of the legal landscape by the introduction of commercial interests into the provision of legal services, thereby creating another dimension which has every prospect of prejudicing the independence of the provision of legal services, without any apparent benefit.
8. There is very little public pressure for ABS. There appears to be little pressure from the legal system itself, although there is

substantial pressure from some existing commercial organisations that see this as a way of improving their profitability.

9. The suggestion of learning from another retail sector, such as the retail opticians services liberalisation, is just not a valid comparison, in a situation where the provision of spectacles do not affect significant issues in people's lives involving their liberty and finances, and where there are not going to be any conflicts of interest between the various providers or between the customer and its own provider of legal services. It is facile to compare such an important issue as the English legal system, which constitutes one leg of the constitutional separation of powers, with the provision of spectacles.

10. The whole difficulty with the introduction of commercial finance in whatever manner, in a way that produces majority control of legal firms, is that the commercial imperative and commercial ethos will eventually dominate the system, as opposed to the current ethos which is the provision of access to justice and independence both in the interests of the individual customer and in the interests of society as a whole.

11. The Group's members have authorised the Group's committee to work towards either the repeal of Part 5 of the Act in relation to Alternative Business Structures involving majority ownership by commercial organisations, or delay their introduction whilst the existing system of regulation beds in together with the existing permission for up to 25% of non lawyer ownership of legal firms.

12. This is a proposal that was first made by the Group to the Joint Committee of both Houses of Parliament and recommended in that Report. In the event Alternative Business Structures were delayed to at least 2011, and it was a continues to be the Group's submission that they should be delayed for significant additional period whilst the effect of the existing changes can be seen, and it can be established whether any potential disadvantages outweigh the potential benefits.

13. That is a view which is adopted by the Bar Council's submission. Indeed in the past at a pre-Clementi stage it was a Bar Council's view that ABS was completely wrong in principle.

14. The SPG would comment that reading the Bar Council's report, whilst it "welcomes the introduction of ABS and the liberalisation of legal services market as providing opportunities innovative responses to changes in demand to the provision of such services," it says nothing in the remainder of the consultation response which supports that. Indeed the response produces numerous arguments, many of which reflect the views of the Sole Practitioners Group, as to the drawbacks and defects in the proposed system.

15. The Groups view is that, contrary to the intention to liberalise and deregulate the market, the amount of regulation that will be required to protect the provision of legal services from the natural impact of commercial ownership will be greater than the current degree of regulation which it is sought to reduce.

16. It is an unavoidable observation that the only other country in the world, in part at least, which has adopted this system is Australia. America has considered and rejected it and it is not compatible with European systems. English firms which adopt commercial ownership will not be able to operate in other jurisdictions which do not permit commercial ownership. This will only hold back the export of English legal services which are present and highly regarded in the world market.

17. Having made the Group's position clear in the preamble this paper goes on to deal with the individual questions.

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

18. Firstly you appreciate from the preamble that the Group has no comment as to whether it is achievable. The Group can see no possible benefit being achieved from a responsible body such as the Legal Services Board in rushing forward to bring in such a significant change prematurely to no apparent benefit to the public, but every risk, if it is not done correctly. Accordingly the 2011 date is premature and not desirable.

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

19. By involving the legal profession as much as possible to express its concerns. The Group notes that the Board of the LSB is currently

made up predominantly of non-legally qualified individuals. It will be interesting to see whether there is any pressure for speed from more than a few individual organisations for ABS as a whole, given the very minor take-up of the 25% availability.

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

20. Presumably this question is a development of the proposal by the Legal Services Board that if bodies such as the SRA do not produce their own regulatory regime quickly enough to have ABS available by 2011 then the Legal Services Board will consider that the SRA have not complied with their obligations and regulate ABS directly instead. If this is the case then it is an entirely inappropriate suggestion to make to Regulators such as the SRA.

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

21. The Group anticipates that there will be a slow take-up of ABS except by one or two organisations who have been lobbying for access to legal services for sometime such as the Co-op.

22. In due course other organisations may feel they have to buy legal firms in order to sell their own products through them. Other organisations may see the provision of legal services during a period of economic buoyancy as a valuable revenue stream and

will enter the market, and then leave the market when the returns diminish.

23. We note the Bar Council's view that there should be rules to prevent the withdrawal of capital. This will be an impossible interference in the market and would be impossible to regulate by insisting on a commercial organisation continuing to support an uneconomic unit. The effect of this will be to provide lack of continuity in the provision of legal services and market disruption not to mention the destruction of the professionalism of a stable market.

24. At this point in their response the Bar Council mentions the risks to the Bar. The Bar is one of the most valuable features of our legal system enabling the greater body of general practitioner solicitors to be able to access expertise for their clients at reasonable cost through the choice of an appropriate barrister whose fees are kept reasonable by competition. If that facility is lost and the independent Bar dissipated by becoming advocates in large commercial organisations, the principle of independence will be lost and also access to expertise at a reasonable price, because such expertise will only be accessible through large organisations at high rates.

25. As the Bar Council's response says, the commercial provider of legal services is going to want to maximise its return by employing its in-house advocates so that the self-employed bar is reduced.

26. We already have the example of claims farmers having arisen and being discredited leaving a considerable number of dissatisfied customers. The recent miners compensation debacle would probably not have arisen if it had not been for the interaction of certain firms with claims farmers on a commercial or referral fee basis.

27. One of the major concerns of sole practitioners has been the potential conflicts of interest created by commercial ownership of legal firms. That commercial ownership may well not be obvious to the client and it may be very difficult to distinguish whether the firm has a conflict with the interests of the client because of its other commercial activities.

28. There will be very considerable dissatisfaction in the minds of the public if there is any perception that there is a conflict of interest between themselves and their legal service provider or with a third party as a result of the commercial ownership of their legal service provider. The one issue that the public currently has confidence in is the provision of legal services in this country is the independence of lawyers, whatever other complaints they might have. ABS has the potential to destroy that confidence for no measurable benefit.

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

29. The answer to this question is probably going to be as short as that of the Bar Council. The Bar Council having given their negative

reply, it is really impossible to see why the Bar Council is supporting the principle of ABS.

30. The only beneficiaries are going to be large companies who will be able to make a profit by providing legal services in bulk. This will not be in the long run cheaper for the customer because the customer will have to contribute to the commercial profit of the organisation, without which the commercial organisation would not be involved.

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?*

31. Such opportunities have always been promoted on the basis that many lawyers these days do not wish to become involved in the responsibility of a partnership based career but would prefer to be employed by a large organisation. Obviously they are able to do that in the existing system if they wish.

32. The challenges are going to be that, working in a commercial profit making organisation, lawyers are going to be subject to pressure from managers requiring returns on capital to work in certain ways which may not be compatible with their independence. Of course, whilst they can formally resist under the protections which are proposed under the Act, any commercial organisation will have ways of ensuring that careers are not advanced unless the employee is compliant with the ethos of the organisation.

33. This will inevitably result in the potential for advice being skewed or slanted in a way which may be more in tune with the wishes of the organisation rather than the interests of the client. The Group see this as one of the major and indeed overriding objections to the full ABS proposal.

34. At this point reference is made in the discussion paper to learning from ABS and Australia. The Group has no direct knowledge of this but has been made aware that the American Bar Association has considered these proposals on more than one occasion and has completely rejected them. Surely as well as identifying one state of Australia which has adopted these procedures, the discussion paper should refer to the other more substantial issues of the conflicts with other European jurisdictions and the fact that the Americans have considered these proposals and rejected them.

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

35. If by diversity it is intended to mean a number of different ways in which legal services can be provided, the likely ultimate result is that legal services will be provided by a few large organisations and that small providers will be unable to continue. The Group have always made it clear that they believe that large to medium-size firms would be more at risk of changes from ABS. Among smaller firms it is quite likely that Sole practitioners from ethnic backgrounds will be most at risk. However there will always be a significant number of people who want a personal relationship with their lawyer and in that respect sole practitioners are very well

placed to provide such a service at an economic cost because of their low overheads. The Group emphasise that practitioners are not putting these arguments forward primarily from a position of self-interest.

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

36. This question can either refer to the education and development of lawyers or to the education and development of the public. If the latter it presumably refers to the Legal Services Board's proposal to make a further financial levy on the profession to educate the public which is another cost which will in due course have to be passed on to the public.

37. If the former, the question really is too general to be responded to at this stage until it is seen how ABS develops in practice, although during the period of uncertainty it is likely that it will be more difficult for solicitors to obtain the usual training contracts. Is a call centre based legal services provider going to be best placed to provide the sort of all-round training that is required for a training contract. In addition if training contracts are going to be limited in a reduced number of conventional professional firms but training has to take place in commercial entities will not the new ethos to be passed on be that of a commercial ethos rather than a professional ethos so that in due course the professional ethos withers.

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?*

38. In an economic downturn, if the provision of legal services is provided by commercial organisations, those commercial organisations will just withdraw from the market regardless of whether that leaves employees unemployed or clients without any service. The commercial imperative of commercial firms is to protect their shareholders funds. On the other hand existing professional firms will soldier on through a downturn trying to retain staff as much as possible and with the individual partner owners foregoing profits or looking to new forms of work.

39. A large commercial organisation which sees its legal service arm as unproductive is likely just to close it. The Bar Council suggestion that there should be a restriction on the withdrawal of capital by outside investors in ABS, although laudable, is firstly unlikely to encourage outside investors and secondly unlikely to work.

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

40. The key risks are as follows:

Lack of independence of provision of legal services.

Lack of long-term independence of lawyers.

Serious risk of depletion of the bar.
Lower quality of service from commoditised legal services.
Loss of current established providers.
Loss of easy geographical access to legal services.
Disproportionate prejudice to ethnic minorities.
Eventual dominance of commercial organisations over the legal profession itself.
Eventual potential impact on the quality of judicial decisions to the prejudice of the quality of advocacy.

41. How are they best mitigated. By carrying out a risk assessment on ABS and deciding not to proceed with it.

42. In that regard the Group notes and supports the proposition by the Bar Council that it is the Legal Services Board's duty to promote and maintain adherence to professional principles, and if those principles are found to be breached by ABS then the aspects of ABS which breach them should not be permitted.

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

43. Yes. Those which involve the majority non lawyer ownership of the provision of legal services. The current permitted non lawyer ownership of 25% is reasonable to involve key non lawyer employees in the ownership of a firm.

Question 13. *What conflicts of interest you think might arise in relation to ABS and how should they be managed.*

44. We agree that all the conflicts of interest which have been set out in the discussion paper have such potential, the most potentially pernicious being the last two

- *lawyers under undue pressure from non lawyers with a material interest in the firm*

which is the point made as to the commercial non lawyer managers needing to maximise profit and putting lawyers under pressure.

In addition

- *the conflict between the duties to shareholders and clients within the company (and particularly publicly floated company) providing legal services.*

In this respect in particular there could be applications to own firms from organisations backed by wealthy individuals who may use such firms to their own advantage but in such a way that they could challenge or avoid the fitness to own test.

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

45. The regulation of individuals is the most effective way of imposing regulation on a profession because individuals have to be responsible for their own actions. In entity based regulation an individual can hide behind the entity and not take personal responsibility. This is going to diminish the responsibility of individuals to comply with the appropriate codes of conduct.

46. Entity based regulation has been introduced by the Act and the regulators will just have to do what they can to operate it. Hopefully this will be at the least possible charge to the profession.

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

47. Yes. Consider ABS on a risk-based approach and decide that the risks outweigh the benefits. Will this happen in practice? No.

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

48. If the existing system of professional ethics is maintained and not muddied by the involvement of third-party commercial pressures then any properly qualified lawyer will provide his client with the appropriate or best outcome without the need for a prescriptive regime in order to achieve it.

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

49. This would redress the issues raised about majority non lawyer ownership of a legal firm but of course if there is a majority non lawyer ownership it will be able to eventually override or get its way with the majority of lawyer managers by exerting commercial pressures.

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*

50. The suggestion in the discussion paper is that there should not be too much emphasis on whether a person or organisation is a fit and proper person and his capacity to hold a licence. This puts very much more responsibility on to the Head of Legal Practice. The Group has believed ever since such designations were proposed in the Clementi report that any commercial organisation wishing to achieve its own way would soon find ways to override the protections which the holders of those posts could provide.

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

51. This question indicates the problem of allowing such bodies in in the first place. One either tries to keep them out, in which case there may well be a judicial review to enable them to come in, or

one lets them in and tries to regulate them. In either case it is a no-win situation.

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

52. There will be an outcry in the profession if there is a differential system of regulation putting traditional firms at a disadvantage because of the lax regulation of ABS firms. If anything the controls for commercially owned legal services firms will have to be stronger than for existing traditional firms because of the non legal management of the commercial firms as opposed to the complete legal management of the traditional firms.

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.*

53. This was the condition put into the Act in Parliamentary debate stage to protect access to justice and to prevent an ABS having the effect of denuding an area of legal services other than its own, or indeed of any legal services.

54. The discussion paper states “ for some groups of consumers (e.g. the elderly) easy access to face-to-face legal advice and representation could still be important to their ability to access justice. We would be interested to see any evidence to support this proposition”.

55. The proposition is self-evident. The writer, as a solicitor providing services to the elderly, knows that face-to-face contact is important. One does not usually deal with a will by letter or telephone call or e-mail for an elderly person. They wish to have the implications and concepts explained face-to-face and they are entitled to have that service.

56. The eventual ABS landscape of legal provision will probably be a series of call centres operated by large commercial organisations. Is this the end result that the country or the public wants? Hopefully, sole practitioners will still be available to provide a traditional service.

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

57. On exactly the same terms as for other lawyers and no less stringently.

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

58. Once again on similar terms to existing providers so that the level of service is as similar as possible to create a level playing field.

Question 24. *How should licensing authorities approach the "fit to own" test and how credible is it in mitigating the risks to the regulatory objective of promoting lawyers adherence to their professional principles.*

59. The Group see the fitness to own test as much more important than the appointment of formal individuals to monitor adherence to good practice and regulation. Already it can be seen that the Legal Services Board is watering down the fitness to own test in its discussion paper so that almost anyone will be able to become an owner of legal firms.

60. Any organisation taking a greater than 50% share in a firm providing legal services must be carefully scrutinised to ensure that it has not got motives which are incompatible with the impartial provision of legal services. Even if that is done the risks are still considerable.

Question 25. *Are there any particular risks to the regulatory objectives that arise from or could arise from ABS offering unreserved legal services.*

61. It has always been the Group's view that non-reserved legal services such as Will writing should be regulated

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. It is accepted that some of the special not-for-profit and community interest companies are entirely suitable to provide legal services and indeed that is already done to a certain extent by Citizens

Advice Bureau who employ lawyers to provide welfare legal aid advice.

63. Those maybe low risk bodies because of the fact that they are not potentially looking to make a profit but at the same time they may give rise to other difficulties which prejudice the public because of the particular way in which they provide their services.

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.*

64. They should be licensed but with a view to the fact that the manner in which their services are provided could still create their own particular difficulties for the public.

Question 28. *Is there any other issue is that you would like to raise in respect of ABS not being covered by previous questions.*

65. We suspect by now the LSB are well aware of the views of sole practitioners in relation to ABS.