

ALTERNATIVE BUSINESS STRUCTURES: APPROACHES TO LICENSING

A Response by ILEX Professional Standards Ltd

Consultation by the Legal Services Board on draft guidance to licensing authorities on the content of licensing rules

12 February 2010

Introduction

1. This response represents the views of ILEX Professional Standards Ltd (IPS), which has responsibility for regulatory issues affecting the Institute of Legal Executives (ILEX) and its members. ILEX is an approved regulator under the Legal Services Act 2007.
2. ILEX and IPS are committed to regulating Legal Executive businesses and businesses in which Legal Executives are managers by 2012. IPS will be responsible for establishing that those regulatory arrangements are appropriate for public protection and comply with the requirements of the Legal Services Act and any regulations made by the Legal Services Board under the Act.
3. Currently, Legal Executives are not approved to provide regulated services in independent practice, other than in relation to the provision of immigration advice and services. We are in the process of applying for litigation and probate rights under the Legal Services Act. Only when ILEX is an Approved Regulator in relation to these, and potentially other rights, will it be possible to move towards becoming a licensing authority. IPS is aware of the challenges that will come with regulating independent practice, particularly in the areas of establishing viable indemnity insurance and compensation arrangements and managing the risks posed by practices as opposed to employees.
4. The ABS model represents a market led approach to the provision of legal services. Some potential service models have been identified but others, possibly some of them quite unexpected, may emerge. Liberalising the market for legal services will introduce new challenges in terms of consumer protection. It will be important that new service models are able to guarantee high levels of consumer protection.
5. Our answers to the consultation questions are set out below.

1. What is your view of basing the regulation of ABS on outcomes?

- a. Should all LAs have the same core outcomes?*
- b. Are the proposed outcomes appropriate?*
- c. Is the division between entity and individual regulation appropriate?*

6. The regulation of ABS through outcomes seems appropriate and reasonable. However, the LSB should be clear that the outcomes remain as that, i.e., outcomes (principles) and do not become confused with rules, which the LSB should not produce and are the responsibility of LAs.

7. All LAs should certainly have the same core outcomes to ensure consistency between the requirements that licensed bodies have to meet and therefore between the level of regulation and level of consumer protection.
8. The outcomes based approach will give flexibility to each LA to develop their approach towards regulating ABS, therefore providing some variety between regulatory regimes whilst still maintaining overall consistency.
9. Some of the outcomes set out in the LSB consultation seem to be appropriate. However, some appear to verge towards statements of opinion rather than outcomes. For example:
 - *Better information on diversity allows consumers a clearer insight into the providers they choose, provides individuals the information needed to make an informed decision about their careers and allows law firms to differentiate themselves in a liberalising market. This is a statement of opinion rather than a broad outcome.*
10. The LSB proposals appear to achieve an appropriate division between entity regulation and individual regulation. However, it is unclear whether the list in the consultation headed 'individual considerations' should include 'ensuring the entity meets the required standards'. This is because that should be a matter for the entity rather than individuals, although it is recognised that individuals will have collective responsibility for ensuring the entity meets the required standards. The outcomes should be clear on where responsibility lies between entities and individuals. We accept that in some instances responsibility may lie with both, but that will not always be the case.

2. Do you think our approach set out to the tests for external ownership is appropriate?

- a. Should the tests be consistent across all LAs?***
- b. Is our suggested approach to the fitness to own test the right one?***
- c. If declarations about criminal convictions are required, should these include spent convictions?***
- d. What is your view of our suggested approach for considering associates? Is there an alternative approach that would work better in practice?***
- e. Should there always be a requirement to declare the ultimate beneficial owner of an ABS?***

- f. Overall, are any modifications needed to ensure that our approach works in a listed company?***
- g. Overall, are any modifications needed to ensure that our approach works in very small companies?***
- h. Do you think that the definition of restricted interest should change?***
- i. Do you think that covenants should be required from those identified as having a significant influence over an ABS?***
- j. How should the LSB respond to the information it receives about information on action taken against people that falls short of disqualification?***

11. IPS agrees that tests for non-lawyers should be as high as the test for lawyers and should be consistent across all LAs. This will ensure that there is equality in approach and that all owners meet the same minimum standards.
12. It is appropriate to have a fitness to own test for all ABS owners. The suggestions in the consultation include the questions that IPS already asks of all people applying to become members of ILEX and of existing members of ILEX.
13. In answer to question (c) external owners should be required to declare all criminal convictions, including those that are spent. This is what IPS requires of members seeking to become Fellows of ILEX. Fellows are exempt from the provision of the Rehabilitation of Offenders Act 1974. It would be appropriate to require ABS owners to declare spent convictions and therefore fall in line with the requirement for Fellows of ILEX. IPS also requires members and applicants to declare cautions. The LSB should consider whether external owners should also declare cautions and other out of court disposals, particularly as more offences are being disposed of through these methods.
14. In answer to question (d) the approach to considering associates seems appropriate. It will be important to ensure that the approach is flexible enough to capture instances where a potential ABS owner has not made a full and frank disclosure and tries to avoid disclosing an associate who may fall outside the list on a technicality. For example, "various family relations of a" needs further definition as to who constitutes a family relation. This can vary widely between cultures. In the absence of clarity this will lend itself to abuse and non-disclosure on the grounds that a person is not deemed to be a family relation.

15. In answer to question (e) there should always be a requirement to disclose the ultimate beneficial owner of an ABS so that the licensing authority can ensure that it has full information about the licensed body and that it is fully aware of the person with overall responsibility and ownership of the body.
16. It will be very important to ensure that a person with a significant influence does not have a negative effect on an ABS.
17. The definition of material interest appears to be appropriate. However, there may be instances where a person with less than a 10% holding exerts significant influence or control over a licensed body. Therefore it might be appropriate for an option to be available for a LA to make a case to the LSB to allow its rules to define a material interest as an ownership of less than 10% in appropriate circumstances. For example, this might occur where there is a large corporation where a 7% shareholding may be deemed to be a large holding and allow the holder to exert significant influence and control over decisions.
18. It would be appropriate for covenants to be required from those identified as having a significant influence over an ABS to ensure that the licensed body and therefore the LA is able to meet the regulatory objectives of the LSA. A covenant should help to ensure that the person with the significant influence acts in accordance with the regulatory objectives.
19. Where action is taken against people that falls short of disqualification the LSB should note the action taken. The LSB should question action where it is necessary to do so in the public interest. Protocols could be developed outlining the types of circumstances where the public interest requires the LSB to call in action taken by a LA.

3. Do you have views on how indemnity and compensation may work for ABS?

- a. How should an appropriate level of PII be set for ABS that are carrying out a variety of different activities, not all of which are currently regulated by the ARs?*
- b. Should there be minimum PII levels, which are the same for all LAs for different types of activity?*
- c. Are Master policy arrangements appropriate for ABS?*
- d. What would be appropriate arrangements for runoff and successor practices to enable sufficient commercial freedom*

for ABS as well as protection for consumers after practice closure?

- e. What should the requirements be for compensation funds in ABS?***
 - f. How could a compensation fund work in an ABS environment, in particular when the services offered by the ABS may be much wider than legal advice and where an AR may not currently have a compensation fund?***
20. The LSB should set the PII standards. However, it should be a matter for LAs to determine the detail of the requirements including what level of PII to set for an ABS. This is because the PII requirements may vary depending upon the size and activity/ area of practice undertaken by the ABS. A broad approach will not be suitable for all ABS and may result in varying levels of consumer protection.
 21. The data collected by the LSB, as recorded in the consultation, is insufficient to enable PII requirements to be set in any event. It focuses upon minimum PII requirements primarily aimed at individual authorised members and small entities. An ABS may be a large commercial organisation, although the parts of it of interest to the LA will be those parts offering reserved legal activities. The current data would not assist in setting PII requirements for such entities.
 22. LAs will also need to assess what level of risk is attached to activities that ABS will be licensed to carry out. A LA will be better placed to assess risk to determine levels of PII, taking into account the likely volume of such activity that could be carried out by an ABS.
 23. If the LSB is to restrict its rules to requiring PII for regulated reserved legal activities LAs may be able to identify minimum levels of PII by assessing and making determinations using the minimum requirements used by the current ARs, and taking account of the risk attached to such activities. That would be a starting point. The LA will have to take into account that an ABS is a commercial organisation and therefore could be dealing with more volume transactions than a traditional practice: a higher level of cover would therefore be appropriate.
 24. Requiring minimum PII levels for all LAs will bring consistency into the market, but this may have an impact upon competition. The present arrangements where each AR determines its own minimum levels have worked well and therefore there is a case for allowing them to continue, although consistency between ARs could provide equal protection for consumers.

25. Master policy arrangements are unlikely to be appropriate for ABS. ABS are likely to be large organisations which have sufficient 'buying power' to obtain cover on the open market, probably at a competitive rate compared to a master policy rate. ABS are likely to want to obtain cover for both their legal and non-legal activities. This is likely to increase their 'buying power' and probably reduce the premium they have to pay, a cost which ultimately falls upon consumers. If there were an ABS master policy in respect of the legal activities alone it would impact upon the ability of ABS to negotiate premiums in respect of non-legal activities, again impacting upon costs faced by consumers.
26. It will be essential for an ABS to have run off cover when it is to close. This is essential to protect consumers. Where there is a successor practice it must be responsible for providing the run off cover to the original ABS. It would be appropriate for sliding cover to be provided for at least six years. This mirrors the approach taken by the SRA and the approach proposed by IPS. To achieve sufficient commercial freedom the rules could stipulate that a closing practice could decide to obtain its own run-off cover even where there is a successor practice. However, in either event it will be important to ensure that consumers are fully aware of the position. Communication by ABS will be important in that respect.
27. It is important to have a scheme of financial protection in place for consumers of ABS services. There are many options such as compensation funds, fidelity bonds and self-insurance.
28. Developing compensation funds may be problematic for ARs who do not currently have a compensation fund. It will impose a significant strain upon the regulated members to help set up and maintain a compensation fund. ABS will be an added complication given their size and the range of activities that they will undertake.
29. The alternatives to a compensation fund include self-insurance and fidelity bonds. These can provide an equal level of consumer protection. Such alternatives would avoid the problems associated with setting up compensation funds and the bureaucracy of administering them.

4. Do you agree with our position on reserved and non-reserved legal activities?

- a. Do you agree that ABS should be treated in a consistent way to non-ABS?**
- b. Should all legal activities undertaken by an ABS be regulated or just reserved legal services?**
- c. What role do you see consumer education playing?**
- d. How should ABS which are part of a wider group of companies be treated?**

- 30. IPS believes that consumers do not readily distinguish between reserved and unreserved legal activities or between regulated and unregulated activities. Consumers believe that regulatory regimes afford them with protection for all the advice they receive, regardless of whether it is a regulated or unregulated activity.
- 31. Consumer protection and education is therefore important. The LSB and LAs should ensure there is consistency in the protection afforded to consumers regardless of the activity undertaken by the ABS. The LSB should also work with LAs to produce information for consumers to help inform their understanding.
- 32. In answer to question (a) ABS should be treated in a consistent way to non-ABS. The SRA approach of prohibiting a solicitor from undertaking an activity through a separate business to escape the regulatory net is sensible. A similar approach should be taken in relation to an ABS.
- 33. If an ABS were to be regulated in respect of its reserved and unreserved legal services it would mirror the approach taken by IPS and other regulators. IPS regulates all members of ILEX, regardless of whether the services they provide are reserved or not. This provides a consistent regulatory framework and clarity for consumers who, as mentioned earlier, do not distinguish between what is and is not regulated. Therefore it would be appropriate for all legal services undertaken by an ABS to be regulated.
- 34. Consumer education is important to ensure that consumers are fully aware of what aspect of an ABS service is regulated and what is not. This will be particularly important as an ABS would be providing both legal and non-legal services, of which only the legal services would be regulated. The LSB and LAs should be responsible for ensuring that appropriate information is provided to consumers in an attempt to educate them. Consumer education should not be the responsibility of service providers, such as an ABS.
- 35. An ABS which forms part of a wider group of companies should be treated in the same as a sole ABS company: its legal services should be regulated

and non-legal services should not. However, again it will be important to ensure that consumers are aware of what falls within the regulatory ambit and what does not.

36. When regulating an ABS which forms part of a wider group of companies, an LA should make it clear that it regulates only the ABS which has sought a licence from it rather than the whole group of companies to which it belongs. Otherwise the regulatory remit would become unclear given the complex nature of such set ups. In these instances the ABS should be required to make the limits of regulated activity clear to its customers.

5. Are the enforcement powers for LAs suitable?

- a. What is your view on the proposed maximum level of financial penalty that a LA can impose on an ABS?*
 - b. If you do not consider the proposed maximum to be appropriate what amount or formula would you propose?*
 - c. Will LAs have sufficient enforcement powers?*
 - d. Will ABS have sufficient clarity as to how the enforcement powers may be used?*
 - e. In what circumstances should a LA be able to modify the terms of a licence?*
 - f. Are there appropriate enforcement options for use against non-lawyer owners?*
37. The range of enforcement powers set out in the consultation reflect the powers available to LAs under the LSA 2007. However, the LSB should consider whether in some circumstances it might be appropriate for a LA to rebuke/reprimand an ABS for misconduct which may be of a minor nature that does not warrant any of the more serious powers set out in the LSA 2007. Similarly there may be instances where a LA may require an ABS to make improvements, possibly by means of formal conditions, rather than use more drastic powers. In such circumstances the LA may work with the ABS, issuing them with guidance and advice to assist in making such improvements. Such a supportive approach might provide better assistance to an ABS and be in the public interest. The LSB should therefore consider including these powers within the range of powers available to a LA.
 38. The consultation, at paragraph 186, sets out information that a LA should obtain from various sources. This includes information to be obtained from a LA's regulated community. It is unclear what the status or purpose would be of such information, nor how it could be obtained.

39. In response to question (a) the LSB approach of not setting a maximum level of financial penalty will allow LAs to exercise a level of flexibility and to build up a body of precedent as to what level of fine is appropriate to different breaches. However, it could also result in significant disparities between LAs as to the maximum financial penalty they may impose in cases. Organisations may choose to be regulated by a LA which imposes lower penalties. It may also encourage the parties to challenge penalties because they are perceived to be too high.
40. It is up to LAs to develop policies to provide clarity to ABS on how the enforcement powers may be used. The LSB's consultation proposes the use of examples to provide information to ABS. Examples can also be important for LAs and for consumers to promote consistency of approach. However, they may be used by an ABS to pin a LA to a lenient penalty where a harsher penalty may be appropriate. IPS is currently developing a sanctions guidance policy in relation to its disciplinary powers against ILEX members. It will take the approach of setting out general norms, while recognising that mitigating and aggravating indicators may often be present. That approach may be better than the use of examples.
41. A LA must be able to modify the terms of a licence when it determines that an ABS may continue to practise and be regulated by the LA but subject to conditions or alterations to the powers or practice rights available to an ABS.
42. It is unclear from the consultation whether there are appropriate enforcement options for use against non-lawyers. The powers available are focussed upon taking action against the ABS rather than the individual. It would be possible for a LA to refer a regulated person on to their regulator. However, a non-lawyer may not be regulated by any regulatory body and may escape personal responsibility where action against them would otherwise be appropriate.
43. It follows that it should be possible for a LA to have a power to take action against an individual who is not regulated by any other regulatory body. This is similar to the power available to the SRA under s43 Solicitors Act 1974 in respect of all employees of a solicitor's practice.
44. One option available, to enable action to be taken against a non-regulated individual, is that in a very serious case involving misconduct on the part of an individual, an order could be made that a firm may not employ the individual without the prior consent of its LA. Alternatively a condition

could be issued against the ABS which regulates / controls the conduct and involvement of that individual in the practice of the ABS.

45. Consideration also needs to be given to powers to enforce non-payment of financial penalties both by a Licensed Body and by individuals.
46. There should be arrangements in place to enable LAs to share information about such individuals and regulatory orders made against ABS. This will reduce the risk of an unregulated individual seeking regulation of their ABS through another LA where the original LA has made an order against them. The LSB could also maintain a register of any orders made against individuals which ABS and LAs would be able to check.

6. What do you think of our approach to access to justice?

- a. Do you think the wide definition to access to justice that we have taken is appropriate?*
 - b. Is asking an ABS on application how they anticipate that they will improve access to justice a suitable approach?*
 - c. Do you agree that restrictions on specific types of commercial activity should not be put in place unless there is clear strong evidence of that commercial practice causing significant harm?*
 - d. Do you agree that LAs should consider how ABS in general impact access to justice rather than trying to estimate the impact of each application singularly?*
 - e. Do you agree that LAs should monitor access to justice?*
47. The consultation outlines that the LSB expects LAs to define access to justice as wider than face to face provision. However, the LSB has not actually provided a full definition of what it perceives access to justice to cover.
 48. In any event considering access to justice is a duty placed upon the LSB through the Legal Services Act. The LSB should be responsible for developing policies on and monitoring access to justice. It has available to it forums through which such research could be undertaken. These include its consumer panel.
 49. The consultation proposes that LAs should undertake research to measure performance of the market and impact of changes in the market on access to justice. The LAs should not be responsible for researching access to

justice. This would place a significant cost burden on LAs, particularly those which are small. The responsibility of LAs should be limited to seeking information from applicants to become licensed bodies about what impact their proposals will have on access to justice. However, that should not be a factor upon which alone applications would stand or fall.

50. We agree that restrictions on specific types of commercial activity should not be put into place, because it would unfairly restrict competition, unless there is strong evidence that they would cause significant harm. However, such responsibility should rest with the LSB rather than a LA. A LA would not have the jurisdiction to restrict specific types of commercial activities.

7. What is your view of our preference for a single appeals body?

- a. Should, in the future, a single body hear all legal services appeals?*
- b. If you don't think there should be a single body, who should hear appeals from LSB decisions should it become a LA?*
- c. Is the FTT, GRC an appropriate body to hear appeals?*
- d. What other options for the location of the body?*

51. It would be helpful for a single body to hear all ABS related appeals, reflecting the LSB proposed outcome in respect of appeals. However, it must be a requirement that an appellant should exhaust all their rights of appeal available within the LA before making an appeal to the appeals body.
52. The LSB has, however, proposed that a single body would hear all legal services appeals. It is unclear what is intended by the term all legal service appeals. It may be appropriate to hear all legal services appeals depending upon what is envisaged. Once clarity has been provided and agreed, a protocol could be developed setting out the arrangements for appeals and outlining what would fall within the ambit of 'all legal services appeals'.
53. It is assumed that appeals would be limited to those which would be relevant to judicial review, rather than constituting a re-hearing. It is also unclear whether there would be a right to judicial review after the single body appeal hearing.
54. Subject to the above IPS would benefit from a single body hearing appeals, particularly as it would provide consistency between decision making. A single appeal body would also enable there to be economies of scale on the

assumption that IPS/ILEX would contribute to the appellant body only for costs incurred in respect of appeals made against decisions made by IPS. The cost levy would have to be proportionate to the work undertaken by the body for each regulator.

55. A single body would provide the LSB with an appeal mechanism should it become a LA. This may reduce the cost burden of the other ARs in terms of the levy although ARs would expect Licensed Bodies regulated by the LSB to meet those costs.
56. It is unclear whether the GRC would be an appropriate body to hear appeals. The GRC is a first tier tribunal covering a range of activities. Discussions would need to take place with the GRC as to whether it would be able to incorporate legal services or ABS appeals within its jurisdiction and, more importantly, whether it would have the expertise and knowledge to be able to hear such appeals. Discussions are also needed on the costs of using the GRC as an appellant body.

8. Do you agree with our approach to special bodies?

- a. Do you think that special bodies' transitional arrangements should come to an end?*
 - b. Do you think 12 months after the start of mainstream ABS is sufficient time for them to gain a full licence?*
 - c. Do you think LAs should adapt their regulation for each special body?*
 - d. Do you agree there are some core requirements that all special bodies should meet? If so, what do you think these are?*
 - e. What are your views on the suggestion that the OLC should make voluntary arrangements with special bodies?*
57. Special body arrangements should come to an end and a transitional period is appropriate. The transitional period allows them an additional timeframe within which to position themselves to make an application for licensing, given the usually low level of resources available to special bodies. Special bodies by their very nature are likely to be busy dealing with client matters and have insufficient time to devote to developing themselves to make a licensing application within any shorter timescale.
 58. The requirement for LAs to adapt regulation for each special body will create differences in the market and in the level of regulation between mainstream ABS and special bodies, although it may be proportionate to the risk they pose. The inconsistencies would place greater regulatory

burdens upon LAs who have to amend their regulations for special bodies. It will also provide inconsistencies from a consumer's point of view and the level of protection afforded to them. Consumers expect and should receive the same level of protection from a service provider regardless of their structure or status.

59. Requiring all special bodies to meet some core requirements will help to provide a minimum level of consistency. The core requirements could include minimum levels of indemnity insurance, contribution to a compensation fund, proper client care and accounting procedures and first tier complaints handling. Otherwise arrangements for special bodies should be proportionate to the risk that they pose.
60. Development of voluntary arrangements between the OLC and special bodies may be appropriate for consumers because it would provide them with a route of redress, although a complaint against a lawyer working in a special body should already fall within the OLC remit. However, it is unclear whether the burden of the OLC levy falling onto the ARs will include the costs incurred by the OLC in dealing with complaints relating to special bodies under the voluntary scheme.
61. Voluntary arrangements may also create disparity in terms of consumer protection and redress between special bodies and other organisations. Consumers would be protected if they used the services of a special body but not if they used the services of another body, such as a union, unless they were also made the subject of voluntary arrangements.

9. Do you think that our approach to HoLP and HoFA is suitable?

- a. Do you think that our approach on focussing on compliance systems across the organisation is suitable?*
- b. Do you think that HoLP and HoFA should undergo a fit and proper test?*
- c. Should there be training requirements for the HoLP and HoFA?*
- d. Do you agree that the HoLP and HoFA could be the same individual (especially in small ABS)?*

62. The proposal to focus on compliance systems across the organisation is suitable. The HoFA and HoLP will be mainly responsible for compliance. However, all the managers of the ABS should carry responsibilities and be aware that the presence of a HoFA and HoLP does not absolve them of their own responsibilities.

63. The HoLP and HoFA should undergo a fit and proper test. This mirrors the approach taken by IPS whereby all members of ILEX undergo such a test and are required to make ongoing annual returns. It is noted in the consultation that the LSB does not consider it proportionate to renew the test on an annual basis. IPS has found that asking the questions on an annual basis allows it an opportunity to identify any members who have inadvertently forgotten or omitted to make a disclosure during the course of the year. It might be possible for core information to be provided in the first year, with reduced information sought on future returns, unless there is a change in any other information.
64. It is noted that the proposal is that the ABS would deal with any problems relating to the fitness of the HoLP or HoFA and notify the LA of the outcome. In some instances it might be appropriate for the LA to make a determination or recommendation to an ABS whether a HoLP or HoFA should remain in post, regardless of the action taken by the ABS, especially if they have been disciplined by an LA and been made the subject of a disciplinary order which makes them ineligible to continue as a HoLP or HoFA. An LA could make such a decision where an ABS has determined that a person should remain in post but the LA takes the view that their remaining in post may not support the regulatory objectives given the misconduct of the individual. Again, sharing of information about such decisions, between LAs, would be essential.
65. IPS takes the view that there should be minimum training requirements for the HoLP and HoFA, which may be set up by LAs rather than the LSB. This would provide LAs an opportunity to set out what they believe a HoLP or HoFA should be qualified to do as a minimum. Training requirements will ensure that the individuals are competent to undertake the roles. However, there could be flexibility to recognise alternative training undertaken by the individuals which meets the criteria specified by the LA. Alternatively an LA could set out criteria that a HoLP or HoFA should meet and then it would be up to the ABS or HoLP and HoFA to show how the criteria have been met through various forms of training.
66. It should be possible for the HoLP and HoFA to be the same person. This is particularly important for the small ABS.

10. Do you think that our approach to complaints handling is suitable?

- a. Do you think that ABS complaints should be handled in the same way as non-ABS complaints?***
- b. Do you think that ABS should be allowed to adapt their complaints handling systems if they already have one for their non-legal services consumers?***
- c. Do you think it is appropriate for the OLC take complaints from multi disciplinary practice consumers and refer where necessary?***

- 67. ABS complaints should be handled in the same way as non-ABS complaints to provide consistency in approach across all service providers.
- 68. ABS providers should be allowed to adapt their complaints handling systems used for non-legal work provided they meet the requirements of the LA for first tier complaints handling.
- 69. The OLC should be able to take complaints from ABS consumers and refer them on to other regulators where they fall outside the OLC jurisdiction (ie non-legal complaints that fall within the jurisdiction of another oversight or regulatory body).

11. What are your views on our proposed course of action to conduct research and, depending on the results, either compel transparency of data or encourage it?

- a. Do you agree with our position on diversity and ABS?***
- b. Do you agree that the overall impact is unlikely to be adverse to the diversity of the profession?***
- c. Do you agree that non-lawyer managers may open new career paths to lawyers and these may have a positive impact on career progression?***
- d. Do you agree that the demand for diverse legal professionals will, largely, offset the potential impact due to the closure of small firms?***
- e. Should the LSB require information about the diversity of the workforce in ABS? If so when and should this be a requirement for other legal service providers?***

- 70. The LSB consultation predicts that ABS will encourage diversity and provide opportunity for minorities that may not have been available to them through other business structures. It is uncertain whether an ABS would provide opportunities additional to those that are available at present.

Many BME individuals practise in small partnerships or as sole practitioners. ABS may allow BME individuals to practise in partnership with other BME professionals and therefore encourage larger practices bringing in additional expertise. However, that remains to be seen. BME professionals could practise in some of these practice structures now but may not have done so. Therefore it is uncertain what the attraction of ABS will be for them.

71. The overall impact may not be adverse to the diversity of the profession. The non-lawyer managers may open new career paths to lawyers and therefore have a positive impact on their career progression. Lawyers will be able to focus upon using their legal skills rather than focussing upon business and management issues which can take up significant amounts of their time and in which they are not experts. ABS should help from a regulator's point of view because the non-lawyer would be appropriately trained and experienced to undertake the important aspects of practice management and hopefully reduce the regulatory risks and breaches.
72. It is unclear whether the demand for diverse legal professionals will offset the potential impact of the closure of small firms. Offset can occur only where it is assured that an ABS will bring about a diverse profession. It remains to be seen whether there will be more opportunities available to BME individuals through an ABS. BME individuals may find it more difficult to practise in new firms and may be forced to find lower status work in legal organisations.
73. The requirement for the LSB to collect information about diversity of the workforce in ABS places additional data collection responsibility both on LAs and ABS. The LSB needs to be clear whether such data is necessary and what will be done with the information.

12. Do you agree with our approach to international issues?

74. The LSB feels that ABS should be able to operate internationally. This is unlikely to be practical for small regulators who may have to focus upon ABS operating within England and Wales and developing appropriate regulatory regimes for that jurisdiction before negotiating with international regulators and developing broader regulatory regimes.
75. Of particular importance will be the ability of a regulator to introduce appropriate monitoring, enforcement and data correction procedures to enable it to effectively regulate practices that operate in foreign jurisdictions.

13. Should LDPs, Recognised Bodies and other similar firms have transitional arrangements into the wider ABS framework in the way we propose?

a. Is 12 months after the start of mainstream ABS sufficient time to allow this to happen?

76. It is reasonable to have transitional arrangements to allow existing bodies to determine whether to make an application for licensing. A 12 month period will also provide them with time to meet the requirements needed to make the licensing application.
77. The LSB proposal at paragraph 341 indicates that the licence, which would be a transitional licence, would replicate the regulatory framework for non-ABS entities. It would enable the LDP to carry on as it is until it has sorted out its transition to licensed body status. Subject to the transitional arrangements all practices should be required to satisfy the same rules and standards.

14. Should ABS licences be issued for indefinite periods?

a. Should the annual charging process be broadly cost reflective or a fixed fee?

b. How should LAs ensure ABS are continuing to comply with their licence requirements?

78. Issuing of indefinite licences would allow an ABS clarity and certainty that it will be able to continue to trade from year to year. Subject to that a LA should have available to it the sanction to revoke the licence of an ABS if it fails to meet compliance arrangements.
79. Although a licence may be valid indefinitely there should be annual requirements of some form which may be reporting requirements or requirements to file annual returns with LAs. This will enable LAs to monitor the ABS and keep oversight over ABS activity to enable it to carry out its regulatory functions. Failure to meet these compliance arrangements may then call into question the continuity of the licence.

80. The annual charging process should broadly be cost effective to prevent the costs of regulating an ABS falling upon non-ABS regulated members. ABS should pay an annual licence fee which should be risk-based but that might be different to a sliding scale based on turnover.
81. LAs should ensure ABS are continuing to comply with the terms of their licence through annual returns, asking questions that might be appropriate to ensuring licensing conditions are complied with. Questions may include matters such as accounting returns, business management information and statistical returns including nature of the activities taken by the ABS and details of complaints. The annual return could also be used as a mechanism to enable ABS to update LAs on any changes to their policies and procedures which may be of regulatory importance to LAs.
82. LAs should also be able to monitor ABS through inspection visits which may be on a rolling programme basis, risk basis or in response to complaints received about an ABS.

15. Do you agree with our approach to managing regulatory overlaps?

- a. Is it desirable to have a framework approach to a MoU?*
- b. Do you think we have identified the right bodies to develop a MoU with?*
- c. Do you think we have identified the right issues to include?*

83. It is important to have a MoU with relevant bodies to manage regulatory overlap as undoubtedly an ABS will bring about such overlap and, with it, uncertainty/inconsistency as to the regulatory burdens placed upon the ABS.
84. The bodies identified in the consultation for a MoU appear to cover the main bodies regulating people with whom a lawyer is likely to form an ABS. However, the list of bodies may need to develop over time as ABS are formed with other regulated people.
85. The LSB will need to consider whether protocols should be developed between the LSB and other oversight regulators of the identified bodies or between LAs and the bodies. The latter approach will create a burdensome web which it will be difficult to untangle, particularly in the case of a large ABS which reports to a variety of regulatory bodies.

86. The issues to be covered in the MoU should also include overlap of codes of conduct and regulatory requirements. These will be particularly important where a code of one regulator requires something different to that of another.

BB/ABS cons