

**Response of the Faculty Office on behalf of the Master of the Faculties to
Consultation paper on Designating Approved Regulators as Licensing Authorities,
issued by the Legal Services Board in December 2009**

Introduction

1. The Faculty Office is grateful for the opportunity to respond to this Consultation paper, notwithstanding that it cannot at present envisage circumstances in which it would seek to be approved as a licensing authority (“LA”). As it has previously represented to the Legal Services Board (“LSB”) the Faculty Office remains seriously concerned about the practicability, and likelihood of acceptance abroad (which is the focus of almost all notarial activity), of Alternative Business Structures (“ABS”) in relation to notarial activities, and is unaware of any interest so far expressed by any person for ABS in relation to these.

2. The Faculty Office is also concerned at the possibility (however unlikely this may at present appear) that at some stage its traditional function of regulating public notaries may be taken over (at any rate in part) by an LA in respect of a notary operating through an ABS. It is considered that this is unlikely to promote the statutory regulatory objectives, and very likely to lead to confusion and a diminution of standards. Nevertheless it is appreciated that the LSB has to operate within the framework of the Legal Services Act 2007 (“the 2007 Act”) and that it is endeavouring to do so.

3. The Faculty Office is extremely concerned that it should not be asked to subsidise in any way the costs of approving LAs and regulating ABS. Any such subsidy would necessarily be at the expense of the relatively small body of practising public notaries, and the cost would have to be passed on to the public as “consumer”.

4. A number of the Questions asked appear repetitious. We hope we will be forgiven for cross-referencing our answers.

Question 1: What are the competencies that you would expect a Licensing Authority to demonstrate?

5.1 We agree with the statement of principle (p.5) that “any potential new LA needs to demonstrate to the LSB that it has prepared properly and thoroughly for its role as a LA, that it has the governance and institutional stability to discharge any functions on a proper basis and that it has appropriate regulatory arrangements to ensure that it can comply with the regulatory objectives”.

5.2 We would have supposed that “the competences” should reflect the matters set out in (a) to (g) in s.83(5) of the 2007 Act in respect of the (different) matter of Licensing rules. The LA should have to satisfy the LSB that if the licence were granted it would comply with those matters: see by analogy s.84(3). Some form of “fit and proper person” test would appear requisite, and should comprise part of the “other information” sought by the LSB of applicants under Sch 10 Part 1 paragraph 12(1)(b).

5.3 In respect of any applicant LA in respect of notarial services, the LSB would need to be satisfied that the LA was thoroughly familiar with the work undertaken by public notaries, including its international focus. Save in the case of those with experience of working in the Faculty Office, it is hard to see how this requirement could be met without the LA including one or more persons with both notarial qualifications and a number of years of post-qualification experience as a notary. Merely to require that at least one of the licensed body's managers is "an authorized person in relation to a licensed activity" (see Sch 11 Part 2 paragraph 9(2) of the 2007) Act appears insufficient in the case of an LA itself.

5.4 For this reason if another AR wishes to become an LA for ABS providing notarial activities the LSB must formally consult the Faculty Office about whether the applicant is knowledge-competent to be able to do that. We see no reason why the other ARs would take a different view. Therefore the application rules must provide that the LSB consults an AR if another body applies to regulate ABS which offer the reserved legal services regulated by that AR and the Board's decision must take the AR's submission into account when making a decision on whether to recommend the application to the Lord Chancellor.

Question 2 – What are your views on the continuity/transfer of licences and the alternative approaches suggested?

6.1 If the regulatory system is to be changed so as to allow private bodies to act as LAs (as appears to be envisaged by the 2007 Act), it appears to be necessary to make provision for continuity and transfer of a licence. But such conditions should be extremely strict.

6.2 We are concerned as to the implication in the first bullet-point in paragraph 28 (p.9) that there may be a time lag between change or transfer of business and assessment by the LSB of the fitness of "the new managers/owners". No new managers/owners should be allowed to act as an LA until they have satisfied the LSB of their fitness, by reference in particular to the competences, as well as personal considerations and characteristics.

Question 3 – Bearing in mind the Regulatory Objectives and the Better Regulation Principles, do you agree with the Board's approach to its requirements for the content of Applications?

7.1 We note the absence of any reference to information relating to the "fit and proper person" test we have suggested in 5.2 above.

7.2 See also 5.3 above.

Question 4 – If you do not agree with the Board's approach to its requirements for the content of Applications, what alternative approaches would you suggest and why?

8.1 See in particular 7.1 and 7.2 above.

Question 5 – What additions to or alterations to the Application process would you suggest?

9.1 See in particular 7.1 and 7.2 above.

9.2 See 5.4 and the need for the LSB to formally consult the AR when another body applies to licence ABS who engage in the reserved legal activity which it regulates.

Question 6 – What do you think the appropriate level of, and method of calculation of the Prescribed Fee should be?

10 The approach set out in paragraph 34 (p.11) appears appropriate. We take the opportunity to re-state the content of 3 above. ABS costs must be ring-fenced.

Question 7 – Do you think we should reduce the Prescribed Fee for Applications from (i) existing Licensing Authorities to take on additional Reserved Legal Activities; and (ii) AR Applicants?

11. The administrative burden of handling applications in both categories (i) and (ii) would appear to be smaller than in other cases. This will particularly be the case with AR applicants. Therefore the case for a reduced fee appears to be strong (see also paragraph 1 of Annex 1).

Question 8 – Do you agree that the Board should be able to use external advisors when necessary with the cost of these being met by way of an adjustment to the Prescribed Fee?

12.1 It appears unlikely that the LSB will have the skills and resources to deal with applications without taking some external advice, including use of external advisors (in so far as this differs from taking external advice).

12.2 The danger with using consultants is that the costs usually increase markedly. That is a matter of no concern to the Faculty Office, provided (and this is a critical caveat) no part of that cost is passed on to the Faculty Office.

Question 9 – Do you agree with the approach taken to oral representations?

13. This is not a matter the Faculty Office has a particular view upon, though it agrees that oral representations are generally to be discouraged (as is implicit in paragraph 43 of Annex 1 (p.28)).

Question 10 – Bearing in mind the Regulatory Objectives, the Better Regulation Principles and the need to operate efficiently in relation to the Freedom of Information Act, are there any changes you wish to suggest to the proposed process.

14. We have nothing to add to what has already been stated above.

Question 11 – Do you consider that these are the appropriate criteria?

15. Broadly “yes”. We have already, however, noted above the absence of a “fit and proper” test and a requirement for professional expertise in relation to the activity being regulated (see 5.2 and 5.3 above). The definition of competence should be expanded: “if the Applicant is not an Approved Regulator for the Reserved Legal Activity contained in the Order, ‘competence’ shall include knowledge and expertise about that Reserved Legal Activity”