

Draft Response to Legal Services Board (LSB) Consultation on Licensing ABSs

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

We agree, as outcomes are important.

a. Should all LAs have the same core outcomes?

It makes sense for all LAs to have the same core outcomes, given that they are all, ultimately, in the “same business”. At the same time, it must be recognized that there may need to be different non-core or LA-specific outcomes given the differences between the legal professions.

b. Are the proposed outcomes appropriate?

The majority of the proposed outcomes listed in the paper are appropriate, but the Commissioner has the following comments:

LA enforcement powers and financial penalties

The Commissioner considers that it is a strategic consideration rather than a “core outcome” that LAs enforcement powers are targeted on areas of high risk and consumer detriment.

HoLP/HoFA

The Commissioner does not agree that the competence requirements for HoLPs and HoFAs should be left entirely to individual ABSs. Some firms may have little idea how best to test HoLP/HoFA competence; others may have someone who is susceptible to influence.

The Commissioner therefore recommends that the LSB at least set some minimum requirements to be applied across all ABSs.

c. Is the division between entity and individual regulation appropriate?

The Commissioner feels that the paper gives a reasonable account of those types of issue that relate more to the conduct of the individual and those that relate more to the firm as a whole.

However, she considers that it is important to bear in mind that there is no rigid distinction between the two. In many cases, both the firm and the individual will share some responsibility and both must be capable of being held to account.

The requirement of the Act that non-lawyer managers and employees must also comply with licensing rules is a safeguard against undue pressure being placed on lawyers within an ABS. However, it is not clear that it will be adequate where a firm is controlled by non-lawyers and there are significant commercial interests at stake.

It may prove very difficult even for a relatively large regulator such as the SRA to enforce its licensing rules where the firm in question is very powerful, has extensive capital and resources at its disposal and significant commercial interests to protect.

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?

Yes. There seems no reason why one LA would need to employ a different test of “fitness to own” than another.

b. Is our suggested approach to the fitness to own test the right one?

The Commissioner agrees with the LSB’s approach for the most part, but she has the following reservations.

1. While she agrees that in most cases, “people with significant influence are unlikely to have a negative influence on an ABS”, she considers that it is very important to provide adequate safeguards against the minority of cases in which this does happen.

She is not entirely satisfied that measures such as the HoLP/HoFA and the application of licensing rules to non-lawyers will be adequate, particularly where the firm is controlled by non-lawyers who are very powerful and have extensive resources at their disposal (see above, response to question 1 (c)).

She is also concerned that even where individual managers and owners pass a fitness test, where stakes are high and the firm is controlled by non-lawyers, they may still exercise a negative influence by placing commercial interests over the interests of justice and the legal profession.

2. The Commissioner believes that there should be a requirement to undergo fitness to own tests on a regular basis. People’s circumstances change. In some cases it is important that the LA becomes aware of this without delay, and people cannot be relied upon to inform them promptly, especially if they believe that this may have an adverse effect on their business.

It is a requirement of the Commissioner's *Code of Standards* that all OISC regulated persons notify her of any significant changes to their circumstances within 10 working days.

3. The Commissioner believes that the LSB may be premature in deciding that there should be no limit on external ownership. She feels that the LSB should wait until it is in a position to properly assess the outcome of the experiment with LDPs before allowing majority or unlimited non-lawyer ownership.

Licensing Rules may specify that a licensed body may not have non-authorised persons holding more than a certain percentage of shares, and the Commissioner does not see why the LSB should act effectively to disallow this. This is not simply "a commercial decision". The percentage of shares can affect the balance of power within a firm away from professional to commercial interests.

4. The Commissioner does not see why it should be assumed that ABS will make the achievement of regulatory objectives more likely. At the moment, there is simply no way of knowing this.

c. If declarations about criminal convictions are required, should these include spent convictions?

It is important to maintain public trust in the legal profession and therefore it may be legitimate to apply higher standards to persons involved in the provision of legal services, whether directly or indirectly. The Commissioner feels that a requirement to declare all criminal convictions, spent or unspent, would enable the LSB to make a fully informed judgement about an individual's fitness and the level of risk involved in their ownership of a particular ABS.

d. What is your view of our suggested approach for considering associates? Is there an alternative approach that would work better in practice?

This is a very complex issue, but the LSB's approach seems to strike an appropriate balance between fairness and rigour.

e. Should there always be a requirement to declare the ultimate beneficial owner of an ABS?

Yes. In order to regulate an entity effectively, it is essential to be able to identify the person who ultimately controls that entity.

f. Overall, are any modifications needed to ensure that our approach works in a listed company?

The Commissioner supports the idea of requiring a listed company to set the duties the company has in virtue of being a regulated legal services provider and also the introduction of a measure allowing for the redemption of shares if a shareholder has been found unfit to own.

g. Overall, are any modifications needed to ensure that our approach works in very small companies?

Clearly, there will need to be some flexibility. It will not be appropriate for very small companies to introduce elaborate compliance systems.

h. Do you think that the definition of restricted interest should change?

No.

i. Do you think that covenants should be required from those identified as having a significant influence over an ABS?

Yes.

j. How should the LSB respond to the information it receives about action taken against people that falls short of disqualification?

The LSB should pass it on to the LAs and leave it to them to decide what to do with it (though it may be a good idea to have some sort of agreed policy so that there is consistency in the way such information is treated).

The Commissioner agrees that LAs should have the flexibility to disregard minor convictions and to place conditions on licences rather than disqualify applicants where appropriate.

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

The Commissioner supports the idea of establishing a task force with the SRA, Law Society and other interested parties to resolve the issues relating to indemnity and compensation discussed in the consultation paper.

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?

No comment.

b. Should there be minimum PII levels, which are the same for all LAs for different types of activity?

All LAs should clearly require the same minimum PII levels for the same types of activity, but these should be based on existing levels. There should not be new minimum levels created in the abstract and then imposed on LAs.

c. Are Master policy arrangements appropriate for ABS?

No comment.

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?

The Commissioner supports the SRA's current proposals for reforming the arrangements for run-off and successor practices.

e. What should the requirements be for compensation funds in ABS?

No comment.

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?

No comment.

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

Yes.

a. Do you agree that ABS should be treated in a consistent way to non-ABS?

Yes. This is not to say that they should necessarily be treated *the same*, only that they should not be treated differently unless there is a clear, specific justification for doing so.

b. Should all legal activities undertaken by an ABS be regulated or just reserved legal services?

The Commissioner agrees strongly with the SRA that both reserved and non-reserved legal services provide by an ABS should be regulated. The fact that certain activities are reserved to the members of certain professions is a privilege enjoyed by those members; it does not provide any justification for restricting the regulation of those persons to those activities.

The Commissioner strongly agrees that it is important to avoid a situation where a provider of legal services could escape regulation by creating a separate organization providing unreserved legal activities.

She has received applications from firms of solicitors attempting to set up a separate, OISC regulated immigration business and has had to refer applicants to the SRA's Professional Ethics team to be reminded of the need to comply with the SRA's Separate Business rule.

Her office also has experience of non-practising barristers or solicitors giving advice under the OISC's regulation (or even unregulated) but misleading clients into thinking they are practicing as solicitors or barristers.

c. What role do you see consumer education playing?

Consumer education is important, but the onus must be on LAs and licensed bodies making clear who is regulated by whom and creating user-friendly complaint procedures. This is because the LAs and licensed bodies ultimately have power only over what they do, not how consumers think.

d. How should ABS which are part of a wider group of companies be treated?

No comment.

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?

The Commissioner agrees with the LSB's view that there should be no limit on the financial penalty that an LA may impose on an individual or entity, provided that the level of the penalty imposed is proportionate to all the circumstances of the case.

b. If you do not consider the proposed maximum to be appropriate what amount or formula would you propose?

N/a.

c. Will LAs have sufficient enforcement powers?

The Commissioner is satisfied that LAs will have sufficient enforcement powers, though she remains concerned that in the absence of clear regulations, they may find that they are unable to make effective use of those powers.

d. Will ABS have sufficient clarity as to how the enforcement powers may be used?

This depends on the adequacy of the information provided to them by LAs and the LSB, including the clarity of the regulations in force.

e. In what circumstances should a LA be able to modify the terms of a licence?

Essentially, where it is necessary in the public interest to restrict the operation of the ABS in some way, but not to prevent it operating altogether. It is assumed that (unless the case is very serious) less formal methods of ensuring compliance would have already been tried and failed. The exact circumstances should be determined by the LAs in conjunction with the LSB.

f. Are there appropriate enforcement options for use against non-lawyer owners?

It is not clear from the discussion paper that there are any enforcement options available for use on non-lawyer managers apart from disqualification for breaching a relevant duty or licence term. If these are the only sanctions available, then they are inadequate. In order that action is both robust and proportionate, there need to be some intermediate measures such as warnings, the placing of conditions on a licence or financial penalties.

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?

It is not entirely clear from the discussion paper what the LSB's definition is. The Commissioner agrees that LAs should not be permitted to define access to justice purely in terms of the provision of face-to-face services, but she feels that, for some types of client, the denial of such services may nevertheless prevent access to justice.

For example, it may not be an issue if a Highly Skilled Migrant is unable to access a face to face service when he seeks advice about extending his stay in the UK, as such an application can easily be dealt with on-line and the individual should have the relevant skills to equip him to handle his affairs in that way.

However, it is likely to be an issue if a traumatized asylum-seeker with little education and little knowledge of English is unable to obtain a face-to-face interview with an adviser in the presence of a translator.

b. Is asking an ABS on application how they anticipate that they will improve access to justice a suitable approach?

It is one positive measure.

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?

The risk of significant harm to the public is a greater consideration than the restriction of certain types of commercial activity. Consequently, It is suggested that it may also be appropriate for restrictions be put in place where there is prima facie evidence that there may be significant harm to the public, while the risk is investigated.

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?

Both are important.

e. Do you agree that LAs should monitor access to justice?

Yes. There are genuine concerns on this issue and currently very little evidence on which to base policy decisions.

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?

The Commissioner considers that there should be such a body, for the reasons stated in the paper.

Given the principle that the handling of ABS complaints should be consistent with the handling of non-ABS complaints, she does not agree with the proposal to set up a separate appellate body to hear all ABS related appeals in the interim.

While it may be important to establish a body for appeals against licensing decisions, there would seem to be no reason to have conduct appeals dealt with in a different way for ABSs than other types of firm.

b. If you don't think there should be a single body, who should hear appeals from LSB decisions should it become a LA?

N/a.

c. Is the FTT, GRC an appropriate body to hear appeals?

No comment.

d. What other options for the location of the body?

No comment.

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

a. Do you think that special bodies' transitional arrangements should come to an end?

Yes, it is certainly unacceptable for consumers to have inadequate redress against special bodies because complaints about them are outside the jurisdiction of the OLC.

b. Do you think 12 months after the start of mainstream ABS is sufficient time for them to gain a full licence?

Yes, provided appropriate adjustments are made to the LAs requirements in the light of any exceptional circumstances relating to particular "special bodies".

c. Do you think LAs should adapt their regulation for each special body?

There must be consistency of consumer protection, but where a requirement is clearly inappropriate to the circumstances of a body, the LA should make the necessary adjustments.

d. Do you agree there are some core requirements that all special bodies should meet? If so, what do you think these are?

Yes. Examples are as follows:

- They must be fit and competent and act in the best interests of their members and/or clients.
- They must have an adequate complaints policy.
- They must have clear governance arrangements, including management structures and policies.

- They must keep adequate records, including accounting records.
- They must have adequate standards of financial probity.
- They must have adequate Professional Indemnity Insurance.

e. What are your views on the suggestion that the OLC should make voluntary arrangements with special bodies?

This may be useful as an interim measure, but they need to come under mandatory regulation as soon as possible.

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

As stated above (response to question 1), the Commissioner disagrees with the LSB's view that individual ABSs should be allowed to decide on commercial grounds what competence tests and requirements to put in place in respect of HoLPs and HoFAs. She believes that the LSB should at least set some minimum standards.

The Commissioner also has some other concerns, which are set out below.

a. Do you think that our approach on focusing on compliance systems across the organisation is suitable?

It is important for firms to have strong governance and compliance systems, but it should not be assumed (i) that because they have them on paper, they will have them in reality or (ii) that if they have them they will continue to operate effectively.

The Commissioner has found through her audits of immigration advice firms that the systems and procedures some purport to have in place are very different to the actual situation, either because they have never been implemented or because they have fallen by the wayside in the absence of a key manager.

It is therefore highly important that regular checks are carried out to ensure that these systems are in place and are working effectively.

b. Do you think that HoLP and HoFA should undergo a fit and proper test?

Yes, this is essential. The Commissioner also considers that the test should be undergone on a regular basis, in order to identify any changes that the individual may have failed to notify. She does not consider that LAs can afford to simply rely on the honesty of the post-holder, given the importance of the role in an ABS.

It also seems circular to rely on the strong governance of the ABS to lead to the identification of issues with the HoFA/HoLP when the HoFA/HoLP is meant to help assure strong governance.

If annual renewal is considered disproportionate, then perhaps consideration could be given to renewal every two or three years.

The Commissioner also feels that the LSB (or LAs) should at least introduce some minimum requirements for the qualifications and experience of the HoFA/HoLP.

c. Should there be training requirements for the HoLP and HoFA?

Yes. These are new roles and it is important that the post-holders are made aware of their responsibilities.

d. Do you agree that the HoLP and HoFA could be the same individual (especially in small ABS)?

The Commissioner sees no reason why the HoLP and the HoFA could not be the same person, particularly in a small organisation.

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?

There would seem to be no reason why not, except that there may be a need for greater co-ordination between LAs with an ABS complaint.

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?

Yes.

c. Do you think it is appropriate for the OLC take complaints from multi-disciplinary practice consumers and refer where necessary?

Yes.

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?

This seems a sensible course. The publication of data on diversity is important, but this is a very sensitive area and the LSB needs to be sure it takes the right approach.

a. Do you agree with our position on diversity and ABS?

Yes.

b. Do you agree that the overall impact is unlikely to be adverse to the diversity of the profession?

The Commissioner has no evidence on which to base a view, but she believes that the impact should be closely monitored.

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?

No comment.

d. Do you agree that the demand for diverse legal professionals will, largely, offset the potential impact due to the closure of small firms?

No comment.

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?

The Commissioner's view is that, provided the results of the LSB's research support it, this should be a requirement for all legal services providers and should be implemented as soon as practicable.

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

Provided that it is possible to maintain the same consumer safeguards in other jurisdictions, there is no reason to prevent ABS from expanding internationally.

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

Yes.

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

Yes.

14. Should ABS licences be issued for indefinite periods?

No. The Commissioner does not consider that the proposed requirement to notify an LA of any changes to fitness to own or licence breaches will be sufficient in the absence of regular checks. As indicated above, if an annual check is considered disproportionate, then consideration should be given to checks every two to three years.

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

The Commissioner is satisfied that the annual charging process should be broadly cost reflective, provided that it is done in a transparent way, so that each ABS is clear how the charges have been calculated.

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

It should ensure this through the requirements of the licensing process; through consideration of complaints against the ABS; and through risk-based audits.

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

The Commissioner's main concern is not "burdensome regulation" or regulatory overlaps", but people falling through the regulatory net or escaping regulatory action by moving between regulators before it can be taken. She is particularly concerned about non-lawyers providing immigration advice in ABSs and would welcome steps by the LSB to ensure swift, co-ordinated action by regulators.

a. Is it desirable to have a framework approach to a MoU?

Yes, provided a framework MoU can be drawn up which meets the needs of all the different parties involved.

b. Do you think we have identified the right bodies to develop a MoU with?

No comment.

The Commissioner has considered whether the LSB and OISC should have an MoU and concluded that this is unnecessary. However, we would expect to maintain good channels of communication and share information, which may assist each in their performance of their respective functions.

The Commissioner hopes in particular that the LSB will share any information it obtains in respect of poor service or misconduct by OISC regulated immigration advisers or persons giving unregulated immigration advice.

c. Do you think we have identified the right issues to include?

One possible omission is arrangements for the exchange of information between the different bodies (particularly ARs and LAs) on matters of mutual interest (for example, disqualified people and people who have had disciplinary action against them as mentioned at paragraph 90 of the discussion paper).