

**Solicitors Sole Practitioners Group Response to Legal Services  
Board ABS Consultation Paper entitled  
“Alternative Business Structures: Approaches to Licensing”**

1. This response from the Sole Practitioners Group follows on from the response by the Group to the earlier LSB paper on ABS -- "Wider Access, Better Value, Strong Protection" -- published on the 14th of May 2009. The preamble to that response is set out below as it acts as a similar preamble to the group's responses to this consultation paper
  - i. "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.
  - ii. It involves itself in regular consultations with the SRA but not as yet with the LSB.
  - iii. 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.
  - iv. 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.

- v. 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.
  - vi. 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.
  - vii. 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."
2. The process of admitting alternative business structures has now reached a position where the actual checks and balances for those structures must be looked at in detail. Hardly anywhere in any of the consultation papers for the previous consultation or the LSB's background paper for this consultation, is there any specific indication based on any survey, as to the likely benefits for the public, who are of course the consumers of legal services and whose concerns should be the main priority of this whole exercise. The generalised hope is that by throwing the alternative business services rock into the pond of an established provision of legal services, which has served the country well for many years, it is hoped that the public will dramatically benefit from new forms of service.
3. The only detailed benefits are set out by the response of the Co-Operative Legal Services Department which is based on the

premise that the existing provision of legal services by a face-to-face approach is dead and that presumably all future legal services will be given on a telephone or Internet basis.

4. Set against that are the continuing concerns of nearly all the respondents as to the potential risks involved particularly in relation to the ownership of commercial ABS and conflicts of interest in relation to MDPs.
5. Interested parties are asked to respond to the LSB guidance to the licensing authorities governing ABSs as to the way in which these matters should be dealt with. On the basis that the whole exercise is flawed that is difficult to do that, but in order to be a responsible contributor the Group will endeavour to make some suggestions.
6. This is from the point of view that it has always been maintained by the Group that Sole practitioners as a group do not have a significant self interest in the issue, except in the interest of the provision of efficient and independent legal services. People come to sole practitioners for a personal service and are unlikely to leave them for the sort of impersonal service which appears to be the most likely result of ABS structures. As Solicitors the Group are concerned that the consumers' Access to Justice is not diminished by ABS driving out of business small firms who provide that access, especially by Legal Aid, in like manner as Supermarket Chains have done in the High Street. Furthermore all providers should be subject to the same Core Duties and Regulatory Objectives, so that no one has an unfair advantage.
7. The Group notes from the executive summary at paragraph 4 that "all non confidential responses (to the previous consultation paper) can be found on our website and summaries of respondents' views are included at the beginning of each chapter of this paper". The Group's previous response is on the website but none of their views appear to be summarised in the paper, and it was disappointing to learn that the Board members of the LSB had not had the opportunity to read the individual responses to the last paper, which did not appear to be numerous.
8. Turning to the individual subjects.

**A new approach to regulation -- structuring of licensing framework**

9. The Group notes the intention to change from a rule-based to an outcome based system of regulation. The Group are not regulators but as lawyers can see that in the enforcement of an outcome based regulation is going to be a recipe for disputes and litigation. Rules are clear and need to be followed but non-compliance with outcomes will be subjective and open to all sorts of argument.
10. There is ample opportunity in this for new entrants to go "regulator shopping" for the easiest form of regulation. As to paragraph 66, at present there is no regulatory maze. Each provider of legal services is clearly and unambiguously regulated. Under the new proposal, the proposal: "the entity level requirements can then be considered alongside the other requirements made by other regulators providing a path through what might otherwise appear to be a regulatory maze", is going to add confusion and ease of avoidance of the regulatory obligations.
11. As to Question 1

*Q. Should all LAs have the same core outcomes?*

A. Broadly, but as they will be licensing different types of legal providers and then there will be some variations

*Q. Are the proposed outcomes appropriate?*

A. Yes, but unlikely to be achievable in the system that is being set up.

*Q. Is the division between entity and individual regulation appropriate?*

A. It is confusing.

### **Ownership Tests**

12. Stated "desired outcomes" set out in the consultation paper are as follows:

- *"Consumer confidence in ABS that are owned by nonlawyers is at least as high as other firms"*

SPG comment: The stated "desired outcome" is one which the Group have considerable scepticism as to whether it will be achieved

- *"The process for assessing fitness to own is consistent across all LAs and can be understood by consumers and ABS"*

SPG Comment: Consumers do not wish to take the time to understand how the legal services that they obtain are regulated. They expect to be able to have confidence that when they approach any legal provider that there will be no question about that legal providers independence. They will not wish to have to consider what licensing issues need to be dealt with in respect of that provider.

- *"The tests on owners and their associates are proportionate to identify and manage the risks (if any) posed by them for an individual ABS"*

SPG comment: The public will not have confidence unless the tests are stringent. The main difficulty will be in establishing who the "associates" are in the event that an "associate" wishes to remain anonymous behind a chain of offshore companies.

13. Question 2. *Do you think our approach set out in this chapter to the test external ownership is appropriate?*

*Q. Should the test be consistent across all LAs?*

A. Yes. If they are not then there will be regulator shopping to find the most lenient tests.

*Q. Is our suggested approach to the fitness to own, the right one?*

A. It is not the minority interests which give rise to concern but the potential major influences that can be exercised on the provision of advice and legal services by an owner. At this stage the regulations regulating ownership are becoming so complex that they must surely negate any benefits to be obtained from ABS. The issues will only become clear when problems arise and people attempt to circumvent the proposed protections. The LSB should give the Legal

Services Act its most stringent interpretation in respect of the regulation of ABS rather than seek to water down the protections which have been built into the act to mitigate the acknowledged consequences of deregulation in the interest of protecting the public.

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

A. Yes in so far as this is permitted. The public should not be at risk of a commercial owner of ABS convicted for a relevant fence whether the rehabilitated or not. Would the consumer as a consumer of the legal services from an ABS be happy that in the event of default the owner's convictions for misappropriation of monies for instance were in fact spent convictions?

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

A. Associates with modest interests are possibly not a great difficulty and a 10% rule could be appropriate. The difficulty is the hidden associate.

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

A. Obviously as that is the person who will exercise the greatest influence in the way in which the organisation is run. The question is whether it will be possible for that person or organisation to be identified.

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

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

*Q. Do you think the definition of restricted interest should change?*

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

A. Taking all these questions together the answer is repeated that the complications of these issues outweigh any perceived benefits of ABS to the consumer. The LSB is the overall regulator and it is not for us to second-guess these details at this stage.

## **Indemnity And Compensation**

### 14.Desired outcomes

- *Statement: "ABS provide appropriate levels of redress and protection against negligence and fraud"*

SPG Comment: Agreed on the basis that it is to the same level as non-ABS legal service providers

- *Statement: "Consumers are properly protected through regulatory requirements for insurance, based on evidence of likely consumer detriment."*

SPG Comment: The second part of the sentence seems to indicate a suggestion that the protection should be watered down which is not agreed

- *Statement: "Any requirement for insurance must be well consistent across all ABS, dependent on the activity being carried out. Individual ABS are able to increase levels of insurance to whatever they consider is appropriate "*

SPG Comment: Agreed

- *Statement: "Consumers make more informed choices about the risk that they are prepared to take when obtaining legal advice, but the burden of risk is not transferred to them"*

SPG Comment: Surely this is an inconsistent statement. How is someone able to accept a greater degree of risk without also having the burden of that greater degree of risk transferred to them.

- Statement: *"Regulatory requirements for insurance do not unduly restrict commercial decisions about corporate structure, changes to business structure, or closure of business"*.

SPG Comment: Again a proposal to lower the bar for ABS. If ABS organisations wish to get involved in the provision of legal services why should they have any greater facility for avoiding insurance than other legal service providers.

15. The Sole Practitioners Group are currently considering the issues of the assigned risk pool and the single renewal date, in conjunction with professional indemnity insurers

Consultation paper Statement: *"For ABS we have identified key issues that need to be resolved"*:

- Statement: *"What the requirements for professional indemnity insurance will be when an ABS undertakes a range of activities."*

SPG Comment: Such legal activities must be covered in the same way as other entities

- Statement: *"Run-off and successor practices -- the current arrangements might act as a barrier to ABS"*

SPG Comment: So be it. If they can't meet the requirements then they should not be ABSs.

- Statement: *"Compensation funds -- whether it is appropriate to require them and how they can work in ABS providing a range of different types of advice"*.

Comment: There is no reason why they should not be liable to appropriate compensation fund liabilities

16. As to Paragraph 22, the jury is out as to how insurance companies will view the risk of civil claims against ABS given the very careful risk analysis of risk that insurance companies adopt

17. Question 3

*Q 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 approved regulator.*

A. They should be no less stringent than those applied to non-ABS practices

*Q. Should there be minimum PII levels which are the same for all licensing authorities for different types of activity*

A. Yes

*Q. Are master policy arrangements appropriate for ABS*

A. Yes, if this means a set of minimum term is common to all entities

*Q. What will be appropriate arrangements for run-off and successor practices to enable sufficient commercial freedom to ABS as well as full protection to consumers after practice closure.*

A. The emphasis must be on full protection to consumers especially in respect of ABS which by their commercial nature may be prone to closure as soon as there is any question of profit targets not being met. An existing conventional professional practice will be less likely to close under commercial pressure. ABS should have no advantage of being able to avoid run-off and successor practices conditions applicable to professional practices.

*Q. What should the requirements people compensation funds in ABS*

A. No less than for professional practices

*Q. How can a compensation fund work in an ABS environment, in particular when the services offered by the ABS maybe much wider than legal advice and where an approved regulator may not currently have a compensation fund.*

A. It should be a condition of providing legal services that any licensed regulator should have the compensation fund

## **Reserved and unreserved legal activities**

18. This is where the blurring of the edge of the provision of legal services with straightforward commercial enterprises starts to create difficulties of regulation and consumer protection and is one of the reasons why Sole Practitioners Group is against the principle of alternative business structures.
19. The Group's view is that the consumer or client protection for legal services should be regulated to a similar standard, however they are provided and the Group considers will writers should be included in this protection.
20. As the consultation paper says there is opportunity for an ABS to have a limited regulated business and another commercial unregulated business giving scope for difficult as the regulation of reserved activities.
21. Putting those views into the context of the questions asked:

22. Question 4

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

A. Yes

*Q. Should all legal activities undertaken by an ABS be regulated or just reserved legal services.*

A. They should all be regulated

*Q. What role do you see consumer education playing?*

A. The Group anticipate the ordinary consumer as being fairly disinterested in the technicalities of regulated or non-regulated services. The consumer wishes to ensure that if he or she goes to a provider of legal services there is the same standard of regulation and protection whatever provider he goes to, in the same way that if one goes to a provider of medical services one does not expect to receive a second-class or unregulated service. It is contrary to the public interest to have to educate the public into different levels of protection and provision of legal services.

*Q. How should ABS which are part of a wider group of companies be treated.*

A. The ABS itself should be treated the same way as any other provider of legal services without reference to the fact that it is part of a wider ABS.

### **Licensing Authority Enforcement Powers and Financial Penalties**

23. The Group are content for the Legal Services Board to decide on the maximum levels of financial penalties and the details of enforcement powers and the details of licensing of alternative business structures.

24. The Group is concerned that the motivation for ABS, being the profit motive, will give rise to the frequent formation and closure of commercial enterprises leaving customers or clients disadvantaged by closure.

25. The various procedures and protections appear to the Group to be cumbersome and difficult to enforce against a failing commercial entity which will have shut up shop and be long gone before any form of regulation or consumer protection starts to bite.

26. From the questions the group is only concerned with the following question

*Q. Are there appropriate enforcement options for use against nonlawyer owners?*

A. It is difficult to see how a nonlawyer owner who wishes to take advantage of ABS for the wrong reasons can be sufficiently deterred.

### **Access to justice**

27. Parliament when passing the Legal Services Act was concerned that the provision of ABS would have an adverse impact on access to justice, particularly by the provision of face-to-face access to justice in certain areas being priced out of the market by ABS organisations. The relevant section of the Act is clear that in any application for a licence the Licensing Authority should take account of the regulatory objective to improve access to justice.

28. The interpretation of the provision in the Act must be the view of the Licensing Authority, and the Legal Services Board should not be able to influence the Licensing Authority's view of the interpretation of that provision. There is nothing to say that access to justice would not be improved by non-face-to-face provision of justice, but it is quite clear that access to justice will not be improved by the potential loss of face-to-face access to justice in any particular area. For this reason the Group will be concerned that the access to justice provision of the Act should be properly applied

29. Question 6

*Q. Do you think the wide definition to access to justice that we have taken is appropriate?*

A. No. In so far as it appears to unnecessarily benefit ABS at the expense of traditional firms and face-to-face provision of legal services

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

A. Bearing in mind the Section 83 requires the licensing authority to take into account the regulatory objective to improve access to justice such a requirement seems to be a reasonable approach.

*Q. 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.*

A. The burden of proof that an unusual or new commercial practice will not cause significant harm should be on the applicant for the ABS

*Q. Do you agree that licensing authorities should consider how ABS in general impact access to justice rather than trying to estimate the impact of each application singularly.*

A. They should consider both

*Q. Do you agree that licensing authorities should monitor access to justice.*

A. The Act appears to require them to.

### **Appellate bodies**

30. The Group have no specific views at this stage

### **Special bodies**

31. The Group have no specific views at this stage

### **Head of Legal Practice and Head of Finance and Administration**

32. The Group have always seen this as placing an undue burden on any person who is placed in this position and be likely to be made the fall guy for the failings of a commercial ABS which is more concerned with the profit motive than regulation. The Group have always felt that these positions are a fig leaf to cover the potential regulatory difficulties of enforcement and compliance by ABS where the commercial motive is the primary motive.

33. That being the case the group has no particular comments in response to Question 9.

### **Complaint handling for ABS**

34. Again there is the complication of complaints in respect of non-regulated services being provided by ABS. The Group are broadly in favour of the new approach being set up by the Office of Legal Complaints.

35. The Group agree that ABS will potentially have more complex accountability issues to address and that this complexity should not be passed on to the consumer through complaints process which is difficult to navigate. However it is likely that this will be the effect

36. In response to Question 10

*Q. Do you think that ABS complaints should be handled in the same way as non-ABS complaints.*

A. Yes

*Q. 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.*

A. Yes. So long as it is sufficiently rigorous and not just a PR exercise in obfuscation

*Q. Do you think it is appropriate for the OLC to take complaints from multidisciplinary practice consumers and refer where necessary.*

A. If this is a formula which enables people to have a complaints system in the case of multidisciplinary practices then this will have to be done.

## **Diversity**

37. The Group have always been concerned that a large number of sole practitioners are BME, and in providing a significant service, require consideration. The Group wish standards of all sole practitioners to be maintained.

38. One area of concern is that the potential marginalisation of profits in such practices by the commercial impact of ABS will have an adverse effect on the quality of service provided by such practices even if they are able to continue.

39. The Group do not see ABS as having an overall beneficial effect in relational diversity because many BME legal practitioners find it easier to service the BME community through the provision of legal services in sole practitioner or small firms, which do not lend themselves to ABS.

40. In answer to the Question 11

*Q. Do you agree with our position on diversity in ABS.*

A. Not insofar as it conflicts with the comments above

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

A. No. It is likely to be adverse to the diversity of the profession

*Q. Do you agree that nonlawyer managers may open new career paths to lawyers and these may have a positive impact on career progression*

A. Not to any great extent that can be achieved at present by nonlawyer employees of legal firms

*Q. Do you agree that the demand to diverse legal professionals will largely offset the potential impact due to the closure of small firms*

A. No. For the reasons given above

*Q. Should the LSB require information about the diversity of the workforce in ABS? If so when should this be a requirement of other legal service providers*

A. No comment

## **International Issues**

41. The astonishing thing about ABS in this country is that it is being introduced in the face of the statement in the consultation paper:

*“Currently, the international legal framework in many jurisdictions prohibits ABS”.*

The paper goes on to say:

*“We (the LSB) have been in contact with both the American Bar Association and the [European Bar Association]. The [European Bar Association] has stated in its response to our discussion paper on ABS that allowing nonlawyers into a law firm could compromise lawyers adherence to their professional principles.”*

The Sole Practitioners Group entirely agree with that statement of the European Bar Association.

42. The Group also agree with the statement at paragraph 329:

*"The safeguards inherent in ABS are viewed sceptically by several other national bars in Europe who may choose to prohibit ABS in some respects because of the perceived loss of the independence of lawyers who work within such ABS".*

43. The Groups consistent policy has been that in the contest between commercial profitability and regulation, commercial profitability will ultimately prevail over appropriate standards of professional regulation whatever the statutory and regulatory framework put in place seeking to mitigate that risk.

44. Accordingly in reply to Question 12

*Q. Do you agree with our approach to international issues*

A. In so far as the LSB seeks to persuade the rest of the world to adopt ABS -- no

### **Legal disciplinary practices, recognised bodies and other similar entities**

45. The main question here is whether legal disciplinary practices which would in due course need to be licensed as alternative business structures should have a 12 month transitional period in which to do so.

46. Question 13

*Q. Is 12 months after the start of mainstream ABS sufficient time to allow LDP's, recognised bodies and other similar firms to have transitional arrangements into the wider ABS framework.*

A. This would seem a reasonable transitional provision

### **Other Issues**

47. Duration of ABS licenses and licence fees

48. Question 14

*Q. Should ABS licenses be issued for indefinite periods*

A. They shall be renewable or annual basis

*Q. Should our charging process be broadly cost reflective or a fixed fee*

A. No comment

*Q. How should licensing authorities ensure ABS are continuing to comply with a license requirements?*

A. They should be relicensed every year as are existing recognised bodies

**Regulatory Overlaps**

49. The proposal is that there should be a memorandum of understanding between the different regulatory bodies to provide a uniform system of regulation to avoid advantages being achieved by ABS in regulatory "shopping". This has always been a potential risk in the way that the Act sets up regulation and a memorandum of understanding between the different regulatory bodies would appear to be one way of trying to minimise the risk.

Solicitor Sole Practitioners Group  
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