



The **co-operative** legal services

**Alternative business structures: approaches to
licensing – a response.**

19th February 2010

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

Outcome based regulation is the most appropriate form of regulation for ABS and non-ABS firms with diverse business structures that range from very small niche providers to very large consumer organisations. The two organisations will operate in vastly different ways with very different internal processes and procedures both of which are right in their circumstances. Only an outcomes based system of regulation will effectively regulate this without being a stifling influence on either or both of the businesses.

Outcome based regulation is also a recognition of the practical reality that there is more than one way to do something correctly.

a. Should all LA's have the same core outcomes?

CLS believes that all LA's should have the same core outcomes. In a regulatory system where different providers will be regulated by different front line regulators, each consumer of legal services must know that the provider they are using will provide the service with the same core objectives in mind.

From a licensing perspective, it is important certain LA's are not weaker than other LA's. The differences between the LA's should arise in their specialisms, not in the core principles of behaviour.

How those LA's choose to implement the regulatory regime that sits under these outcomes is for them to decide.

b. Are the proposed outcomes appropriate?

On the whole CLS believes that the proposed outcomes are appropriate. However, we would make the following observations:

- i. In the "Indemnity and compensation" section of the consultation document (page 11) it is stated that one outcome is that "Consumers make more informed choices about the risk they are prepared to take when obtaining legal advice, but the burden of risk is not transferred." Whilst such an approach to indemnity cover might well work in the commercial sector, it will not be realistic or practical in the consumer sector. A client who instructs a solicitor to pursue a personal injury claim will have no idea what their claim is worth (general damages, past loss of earnings, future loss of earnings etc). Consequently they will have no way of knowing what level of insurance cover is appropriate. They cannot ask their solicitor because of the inherent conflict of interest.

- ii. Reserved and non-reserved legal services (page 12). More clarity is required in what the LSB mean by the “current market”. As stated in our previous response, CLS believes that the ‘separate business rule’ needs to be scrapped to allow all regulated providers to decide whether they want to compete over unreserved services without the solicitor brand and title.
- iii. CLS believes that the roles of HoLP and HoFA are critical and that the requirement to nominate suitable persons should be placed on ABS and non-ABS alike. This will encourage best practice across the whole industry.

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

CLS believes that entity based regulation with appropriate enforcement against entities and individuals (e.g. being banned from involvement in an ABS or non-ABS) is the most appropriate regulatory structure to implement. Some of the issues listed in para. 64 should still be the responsibility of the individual in their capacity as an employee etc. of the entity and the entity should be responsible for ensuring, e.g. that personal conflicts of interest do not exist.

Question 2

Do you think our approach set out in this Chapter to the tests for external ownership is appropriate?

The ownership test that will be applied to ABS is crucial. It is critical that consumer confidence in non-lawyer owned ABS is at least as high as non-ABS. However, this level of consumer confidence should not be overestimated. The media storms around various solicitors and their firms in 2009 have led to a low confidence amongst consumers in the legal profession generally. Consumers are, on the whole, wary of solicitors because of the pre-conceptions that they have. CLS believes that the level of consumer confidence in big consumer brands is far higher than in the legal profession.

The question is posed in para. 82 of the consultation as to whether an ABS will enhance any of the objectives. CLS has always believed that ABS will prove to be of huge benefit to consumers of legal services. This will be particularly evident in the area of access to justice. ABS will greatly enhance the ability of consumers to get the help they need, when they need it and in a manner which suits them.

The overarching principle in deciding the requirements of the fitness to own test is not to impose restrictions which are not placed on individual solicitors, i.e. if something disqualifies a person from being a solicitor (criminal convictions etc) these should apply to ABS owners.

Once decided, it is important that the rules are adhered to rather than permitting the current status quo to continue whereby a number of existing law firms are currently “owned” by non-lawyers through intricate set-ups. The ABS rules must not be so restrictive that this status quo position is seen as an easy alternative.

a. Should the test be consistent across all LAs?

If any FLR decides that it wants to licence ABS's the ownership tests should be the same across all LA's. The decision of a potential ABS in deciding which LA to apply to for a licence should be based on the regulatory skill in regulating the type of work envisaged to be undertaken, not on the ease of passing the fitness to own test.

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

CLS agrees with the LSB's proposed approach to the fitness to own test.

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

CLS believes that the same rules which apply to solicitors currently should be made to apply to owners of ABS. All owners, whether they be partners in a traditional practice or non-lawyer owners in an ABS, should be subject to the same scrutiny.

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

Because CLS believes that it should be possible to identify the ultimate beneficial owner of an ABS (see below), we believe that it is necessary for associates to be identified. Any proposal which encourages this to be done up-front is preferable to something after the event.

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

CLS believes that the ultimate beneficial owner of all ABS's should be identified. The same should also be the same of firms that maintain an outward traditional partnership structure.

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

CLS has no views on the approach to listed companies.

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

CLS does not believe so.

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

CLS does not believe so.

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

CLS does not believe that covenants should be required from such persons. The rules as they are proposed are sufficient to allow proper regulation of all persons and entities.

Question 3

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

CLS believes that all ABS should be insured to the same level and with the same policy terms as traditional high street practice, i.e. if excesses are not permitted for high street practice they should not be permitted for ABS. It will be for the insurance market to assess the level of risk involved in insuring an ABS as compared to traditional practice.

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 AR's?

The requirements for PII should only be against those services that non-ABS are required to have indemnity insurance for. If other areas of work are not regulated, regulation should not be imposed on them.

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

CLS believes that there should be minimum PII levels across all LAs if they choose to regulate ABS. CLS believes that the current SRA limits are sufficient.

c. Are Master policy arrangements appropriate for ABS?

CLS does not believe that a Master Policy arrangement is appropriate as this does not take account of the risks of individual businesses. The low risk, well managed, successful business will be paying for the high risk, poor performers.

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?

If non-ABS are required to have run-off insurance following the cessation of practice, so should ABS. It will be for the ABS and the insurance market to determine to level of cost of this policy in view of the claims history and risk of the business. Large consumer organisations have a far wider portfolio of insurance covers in place than traditional practice. They currently work very constructively with the insurance

industry through specialist Group Risk departments. CLS experience in dealing with insurance has been one of constructive and reasonable dialogue with realistic outcomes.

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

Any compensation fund for ABS should be the same as that for private practice – particularly where client money is being held.

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?

This will depend on the type of service being offered and to whom. CLS believes that any organisation which wishes to employ solicitors in a non-solicitor owned LDP should to offer services to individual consumers, e.g. personal injury assistance, should pay the same into the SRA compensation fund as any solicitor owned practice operating in the same area.

CLS appreciates that the situation is more complicated for multi-disciplinary practices but is not in a position to pass comment on these areas.

Question 4

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

The questions asked in this section do not really go to the nub of the issue which is what services should be reserved. CLS is pleased that the LSB will be addressing this issue in the coming months.

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

CLS believes, as it has stipulated throughout this response, that ABS and non-ABS should be treated consistently across the whole regulatory regime.

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

CLS believes that the following activities undertaken by an ABS or non-ABS should be regulated:

- Reserved legal services; and
- Unreserved legal services where the provider elects to offer those services under the “solicitor” brand.

Where a provider elects to offer those services without the “solicitor” brand they should be free to compete with unregulated providers. CLS does not see why, if a

service is not deemed fit/necessary for regulation, it should be regulated if it is offered by those not holding themselves out as being regulated.

This position will necessarily require a change to the SRA's separate business rule.

c. What role do you see consumer education playing?

As stated above, this question is dealing with the consequences of a muddied situation rather than trying to clear the mud. Consumers do not understand the regulatory regime as it currently stands. They will not understand that providers who only provide unreserved services are not regulated. Whether consumers would be concerned about this were they to know is a moot point.

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

See above.

Question 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?

CLS agrees with the unlimited potential maximum, provided the same is applied to all providers be they ABS or not. Any limit will be arbitrary in some sense.

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 enforcement powers for LAs are far-reaching and sufficient to cover eventualities that may arise.

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

This depends on the LAs setting out their position in their rules properly. It is not possible to answer at present. It is vital that all regulated providers of legal services know the parameters in which they and their regulator operate.

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

CLS believes that licences should not be modified unless it is the only feasible way to deal with an unacceptable risk which has arisen.

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

The power to declare a non-lawyer owner as “unfit to own” is the ultimate sanction. The powers against the entity (be they financial or prescriptive) will obviously impact directly on the owner of that entity as well. These are adequate.

Question 6

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

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

CLS agrees with the LSB’s view of access to justice as we have previously outlined.

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

Solicitors are not required to submit an application on how they will improve access to justice when they are admitted to the roll. Similarly any solicitor wanting to set up a new partnership or establish themselves as a sole practitioner is not required to submit such a justification for their actions. It is not therefore appropriate for ABS to be required to jump through this hoop as if they were the sole cause/impact of any perceived change.

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?

CLS agrees.

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?

CLS believes that if the impact of ABS is to be considered on access to justice in isolation from all other factors (see comments in e. below) then that should be a general impact assessment only.

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

The LSB is correct to point out that much of the comment and discussion about access to justice has nothing to do with ABS’s. Rather they are issues which exist within the legal profession already, e.g. commoditisation of work, legal aid rates etc. CLS believes that LAs should monitor access to justice across everything that influences it.

CLS does not believe that any meaningful insight can come out of an access to justice review which does not include all of the many factors which influence it.

Question 7

Appellate Body

CLS agrees with all the recommendations of the LSB

Question 8

Special Bodies

CLS has no comment to put forward on issues relating to special bodies.

Question 9

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

CLS believes that the roles of HoLP and HoFA are excellent corporate governance roles. Therefore CLS believes that the requirement for such designated roles should also be extended from ABS to traditional private practice with all such persons having the same responsibility to the LA.

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

Yes.

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

Yes. The roles are such that they should only be carried out by appropriately qualified and experienced individuals.

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

A system of CPD rather than training would be more appropriate.

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

CLS agrees that this could be appropriate.

Question 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?

Yes.

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. Many customer organisations already have sophisticated complaint management processes in place. These could well be built around the FSA framework for example and provide evidence of best practice. The OLC complaint process should seek to implement best practice processes by drawing from a number of different industry sectors.

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

CLS has no firm views on matters relating to multi disciplinary practices.

Question 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?

CLS agrees with the LSB position. CLS is of the view that ABS will present a far greater opportunity for diversity in the profession than currently exists.

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

Yes. As stated above ABS will, on the contrary, lead to a more diverse profession. With different business models, different entry levels and a multiplicity of career paths, the options open to all actual and potential employees will be vastly improved.

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?

Yes. This is something that CLS has already seen in its own business. The opportunity to progress within an organisation which offers far more than legal services will be considerable. This could be into skills associated with the delivery of legal services – finance, HR, IT, marketing, general management etc or into different business areas altogether, e.g. in CLS staff have moved between the legal and funeral businesses.

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

Yes. No one has suggested that legal services should be offered by unqualified staff. Qualified staff from all backgrounds will be employed in ABS.

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?

It is hard to envisage what use diversity data from ABS would be if it were not to be compared with diversity data from all other legal services providers. The data should be requested from all providers when the LSB is in a position to meaningfully analyse it. Many large organisations who may establish ABS will already have HR measurements in place to monitor the diversity of their workforce and the information will be easily available.

Question 12

International Issues

CLS is not in a position to comment meaningfully on international matters.

Question 13

LDP's and Recognised Bodies

CLS is not in a position to comment meaningfully on matters relating to existing LDP's.

Question 14

Should ABS licenses be issued for indefinite periods?

Yes. There is no requirement for solicitor partners to resubmit their partnership for re-approval so there should be no requirement for ABS to keep submitting for a licence once they have been approved.

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

CLS agrees with the LSB position.

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

This question goes to the heart of how LAs conduct their activities on a day-to-day basis. CLS and others are currently engaged with the SRA to work out how this should be done and on what basis.

Question 15

Do you agree with our approach to managing regulatory overlaps?

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

CLS believes that a framework approach is the most realistic as it will be flexible enough to adapt to changing needs and requirements.

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

Yes.

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

Yes.