

Tunbridge Wells, Tonbridge and District Law Society

Response to the Legal Services Board (Board) Consultation paper on draft guidance to licensing authorities on the content of licensing rules issued on 18 November 2009 entitled 'Alternative business structures: approaches to licensing'.

This response to the consultation issued by the Board is made on behalf of Tunbridge Wells, Tonbridge and District Law Society by its Regulatory Committee.

Response to question 1

- (a) We believe the core outcomes should ensure that there is a level playing field for all providers of legal services. We note that a standard MOU is to be proposed to all LAs of ABS and consider this to be the correct initial position. However, we are keen to ensure that there is no distortion of the market which may result from individual ABS having geographic, financial or other dominance in the market, irrespective that such dominant position may not be sufficient to amount to abuse. Therefore the approach taken to regulation by LAs of ABS should be subject to an overall requirement that the objectives are consistent with those set out in the Legal services Act 2007 (LSA) and which are applicable to all providers of legal services.
- (b) We consider the high level core outcomes to be appropriate in relation to ABS.
- (c) This is desirable in relation to ABS, as it is with all providers of legal services.

Response to question 2

- (a) Yes. However, the BOARD should be responsible to ensure that a LA of a certain sector is not aware of the potential for the distortion of the entire legal services market by the application of its rules to the ABS regulated by it.
- (b) We are concerned that the BOARD may seek to require LA to apply Schedule 13 LSA requirements on existing firms (para 88) in addition to applicant ABS. We consider a consistent approach is required by all LA of ABS to ensure that fitness to own requirements are applied and enforced consistent with the risk to the public. In view of the fact that the ultimate ownership of ABS may change much more readily and often than in traditional structures we consider the LA of ABS must have a rigorous monitoring and reporting function. The costs of such function must be for the ABS and not for the legal services market as a whole.
- (c) A spent conviction of an owner and anyone with significant advisory, management or control functions of an ABS is quite likely to be a material consideration for a member of the public in deciding if he wishes to engage the professional services of an ABS. As with any other provider of legal services, a spent conviction should be declared.
- (d) Associates should be considered relevant to the same extent as an ABS owner, as suggested in our response to Q2(c). Not only is there a question of the actual risk to the public but also the perception of risk which may undermine the credibility of all legal services providers. There is every danger that a less stringent regime for the consideration of 'associates' may lead to the high reputation of the English legal system and the English lawyer being diminished by association with certain individuals and organisations. The approach that would work best in practice is to apply the same requirements of fitness on all owners, associates of owners and anyone with significant advisory, management or control functions of an ABS.

- (e) There should always be a requirement to declare the ultimate beneficial owner of an ABS.
- (f) We consider that the same approach as is taken by FSA in relation to authorised firms would be appropriate to listed ABS.
- (g) The question is not understood. We are in favour of seeking a light touch regulatory regime where there is less risk, and agree with the stated objectives of the BOARD of ensuring that the burden of regulation is targeted upon risk and is outcomes based.
- (h) The question is not understood. 'Restricted interest' is defined by Schedule 13 LSA paragraph 2 (1): ' "Restricted interest" means each of the following
 - (a) a material interest;
 - (b) if licensing rules are made by the relevant licensing authority under subparagraph (2), a controlled interest.
 (2) Licensing rules may specify that a controlled interest is a restricted interest for the purposes of this Schedule.'
 - (i) We consider that covenants should be required from those identified as having a significant influence over an ABS and backed by appropriate assurances, such as financial guarantees or bonds.
 - (j) BOARD should share information it receives about information on action taken against people that falls short of disqualification with ARs and any other relevant person having a direct interest.

Response to question 3

- (a) The level of PII must be commensurate with risk and take account of the PII of all providers of legal services in sectors that may be affected.
- (b) There should be minimum PII levels, which are the same for all LAs for different types of activity. These should be determined in accordance with the market for all providers of legal services and not ABS in isolation unless the risk to the public is materially greater.
- (c) We are of the view that all forms of PII should be considered.
- (d) What are appropriate arrangements for run off and successor practices to enable sufficient commercial freedom for ABS as well as protection for consumers after practice closure must be balanced with what are commercially acceptable or economically viable arrangements. Currently, the costs of dealing with run-off cover and so on lead to many practises closing rather than being acquired and this is an area for consideration not only for ABS but for all providers of legal services. The requirements of LAs upon ABS must not be less stringent in their outcomes than those applying to other providers of legal services.
- (e) We consider that the requirements for compensation funds in ABS should be the same as those for other providers of legal services.
- (f) No comment.

Response to question 4

- (a) We consider it is appropriate to adopt the same approach in ABS to regulating non-reserved activities in non-ABS firms.
- (b) We consider all legal activities undertaken by an ABS be regulated.
- (c) We take account of the statement made in relation to Option 3 adopted in the Board's general considerations of the impact of the regulation of ABS that:

"One option would be to increase consumer education about the general risks in both ABS and non-ABS contexts and allow them to make an informed choice. However, given the information asymmetry inherent in the lawyer-consumer relationship, it is doubtful that substituting market transparency for regulatory intervention will best bring about the desired outcome of strong consumer protection."

- (d) Where an ABS is part of a wider group of companies the group should be treated as an 'associate' and regulated accordingly.

Response to question 5

- (a) We believe that the exposure of ABS should be the same as for core regulatory outcomes. Penalties and disciplinary action should be applied as uniformly as possible over LAs to ensure that there is a level playing field for all providers of legal services.
- (b) A maximum of an unlimited penalty would reflect the position as it currently stands with the Solicitors' Disciplinary Tribunal.
- (c) It must be a matter for the rules of each LA as to whether it will have sufficient enforcement powers.
- (d) It must be a matter for the rules of each LA as to whether it will have sufficient clarity in its rules as to how the enforcement powers may be used.
- (e) The circumstances where a LA should be able to modify the terms of a licence include: breach of rules; lack of financial stability; conviction of an owner or associate of an owner; conviction of significant advisory, management or control functions of an ABS; or there is any other circumstances which gives rise to a greater risk to the public or other legal services providers. In the latter case, we are aware of complaints that underfunded sectors of legal work can presently result in inadequate client care and we consider that this risk is heightened where there is a significant detachment of the owner from client business.
- (f) We do not think there are all appropriate enforcement options for use against non-lawyer owners. If a level playing field for all providers of legal services is to operate then the same unlimited penalty should apply as it does to professionals. Alternatively, if the unlimited penalty is adjusted down to meet that of non-lawyer owners, the penalties for them should be increased.

Response to question 6

- (a) We consider that the definition of access to justice should be one which takes account the appropriateness and quality of advice as well as the price of that advice.
- (b) Asking an ABS on application how the applicant anticipates they will improve access to justice is not suitable. One might anticipate such statements of intent and aspiration in a sales pitch or political address but an application ought to be confined to how core objectives are to be met and how achievement is to be measured.
- (c) We consider that restrictions on specific types of commercial activity should be put in place on a risk-based assessment. That risk has to be assessed by reference to existing claims experience in the regulated sector where ABS are concerned. In the light of experience the regulatory burden may shift.
- (d) We agree that LAs should consider how ABS in general impact access to justice in addition to what we see as the statutory duty of the LA to estimate the impact of an individual application.

- (e) LAs should monitor access to justice and take appropriate enforcement action where appropriate.

Response to question 7

- (a) We see no objection in principle to a single body hearing all legal services appeals.
- (b) We do not think that the Board should act as a LA unless there are extraordinary circumstances.
- (c) We do not have sufficient information to make any comment as to whether either the FTT, GRC is an appropriate body to hear appeals.
- (d) We have no comment on other options for the location of the single body hearing all legal services appeals.

Response to question 8

- (a) We consider that special bodies" transitional arrangements should come to an end.
- (b) In the absence of more, we consider 12 months after the start of mainstream ABS is sufficient time for them to gain a full licence.
- (c) LAs should adapt their regulation for each special body given that there will be specific issues relating to the LA and the ABS it regulates. If there are not then the Board should consider refusing LA status and directing the proposed ABS to the existing LA with appropriate and necessary regulations.
- (d) All special bodies should meet the core requirements. Other requirements that are not core may not be appropriate and there may be additional regulations required.
- (e) We consider that the OLC should make voluntary arrangements with special bodies only where exceptional circumstances exist. All special bodies should be subject to the OLC regime immediately or as soon as possible.

Response to question 9

- (a) We consider that it is of first importance that compliance systems across the organisation are a paramount consideration in relation to the licensing of an ABS.
- (b) We consider that a fit and proper person test as used by FSA would be an appropriate model. HoLP and HoFA should undergo a fit and proper test as should owners and associates of owners.
- (c) There should be training requirements for both the HoLP and HoFA to ensure that the ABS is run in accordance with the LA's requirements.
- (d) Given the complexity of modern practise we take the view that the HoLP and HoFA could be the same individual only in the case of a small ABS.

Response to question 10

- (a) ABS complaints should be handled in the same way as non-ABS complaints.
- (b) ABS should be allowed to adapt their complaints handling systems if they already have one for their non-legal services consumers.
- (c) It is appropriate for the OLC take complaints from multi-disciplinary practice consumers and refer them where necessary.

Response to question 11

- (a) We have insufficient information to valuably comment on the Board's position on diversity and ABS. We would like more information.
- (b) We have insufficient information to valuably comment on the Board's position on the overall impact on the diversity of the profession. We suspect that there will be fewer professional roles in the context of the overall workforce as volume work is undertaken by unqualified staff. To this extent we consider that there should be further information made available on the possible adverse impact on diversity in the qualified professionals as salaries are driven down.
- (c) We did not understand the question. Most existing firms have non-lawyer managers presently. Lawyers often go into industry etc, so dividing the market a different way will not lead to there being more roles.
- (d) The closure of small firms will undoubtedly lead to disadvantaged people having less choice and a dissociation from locality. The high street firm disappears and is replaced by a call centre. The local population loses a local professional who must then join a larger organisation. Diversity is likely to have a considerable negative impact but we would like more information.
- (e) This is a matter for the LA and for ARs.

Response to question 12

This is a matter for a paper on its own. We believe the proposals need to be fully reconsidered in view of the global nature of the economy and the possibility of organised crime infiltrating ABS and undermining the high reputation of English lawyers worldwide.

Response to question 13

12 months after the start of mainstream ABS appears sufficient time to allow LDPs, Recognised Bodies and other similar firms have transitional arrangements into the wider ABS framework in the way the Board proposes to happen.

Response to question 14

- (a) The annual charging process should be broadly cost reflective comment.
- (b) LAs should ensure ABS are continuing to comply with their licence requirements in accordance with core rules applicable to all ABS.

Response to question 15

- (a) It is desirable to have a framework approach to a MoU based on core rules applicable to all LAs.
- (b) We believe the Board has identified the right bodies with which to develop a MoU.
- (c) The Board appears to have identified the right issues to include in managing regulatory overlaps.

We trust that this contribution to the consultation is of assistance to the Board.

Martin Varley,

Chairman Regulatory Committee,

Tunbridge Wells, Tonbridge and District Law Society

19th February 2010