



Legal Services Board: Wider Access, Better Value, Strong Protection

**This is the response of the Legal Aid Practitioners Group.
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Legal Aid Practitioners Group.

LAPG is an independent membership organisation representing several hundred firms and organisations working under LSC contracts.

Our members are spread throughout England and Wales. They range from sole practitioners to large legal aid firms, from firms with a contract in one area of law to firms with contracts in all or almost all areas. We have an increasing number of not for profit members.

LAPG is represented on numerous government and other stakeholder and advisory groups.

Background: summary of the consultation

The Ministry of Justice News Release in October 2007 stated that the Legal Services Act 2007 by introducing Alternative Business Structures will 'enable greater consumer choice and flexibility in legal services by removing disproportionate restrictions on business structures, allowing lawyers and non lawyers to set up businesses together for the first time ever and enabling services to develop in new, consumer friendly ways.' (See paragraph 2.6 of the consultation.)

The Legal Services Board consultation is described as a step towards a liberalised consumer-driven market for legal services. The aim is to scale back restrictions. Who will licence the new types of providers? Practices may have a majority of non lawyer managers, firms may offer accountancy services as well as legal services or a law firm may be floated on the stock exchange.

Sir David Clementi in his Review of the Regulatory Framework for Legal Services in England and Wales 2004 recommended that Legal Disciplinary Practices should be set up before Multi-Disciplinary Practices.

The LSB is convinced of the value of this agenda because of the potential benefits to consumers of legal services, whether private individuals or organisations of all shapes and sizes.

We agree that there may well be greater flexibility in service delivery particularly better use of new technology and more effective use of staff not necessarily with a legal background. We are not convinced that efforts will be made to better engage with the users of services because of these proposals.

The LSB is convinced of the benefits for individual lawyers and firms that embrace new opportunities in a more competitive market place. Increased access to finance, increased flexibility and new career options are highlighted. The Legal Services Act 2007 opened up the market place. How should it be regulated?

The LSB is insistent that clients will not have lower standards of protection using the services of licensed firms than if they went elsewhere. Actual or potential conflicts of interest have to be tackled. A good point is made that there are risks which are already a feature of the legal services sector today and that in identifying risks, thought must be given to if they are in that category or if genuinely unique to a more open market.

A major proposal is to move away from the regulation of individual lawyers to the regulation of the entity providing legal services. This is already happening among some regulators.

How should regulators regulate? Should they focus on principles or on more detailed requirements? How do they focus on the risks?

The LSB has to find a balance between identifying and managing risks associated with ABS but without erecting undue barriers to entry.

There is in the paper a section about 'special bodies' including trade unions and not-for-profit organisations. What regulation would be appropriate for these bodies?

Firms with ABS will apply for a licence to provide legal services. The Lord Chancellor will on the recommendation of the LSB approve regulators as licensing authorities. If there is no competent licensing authority the LSB could directly grant licences.

The LSB will set out procedures and criteria but applications must set out the regulator's proposed licensing rules i.e. to cover how an application for a licence will be determined and the continuing regulation. Licensing rules must cover inter alia

- conduct, discipline and practice rules
- how the licensing authority is to take into account the objective of improving access to justice whenever it grants a licence and
- appropriate indemnification and compensation arrangements

A licensed body must have

- a Head of Legal Practice (HoLP) and
- a Head of Finance and Administration (HoFA).

They must ensure that the licence terms are complied with and report any failings. They must be fit and proper persons.

There are detailed requirements on the *ownership* of licensed bodies. Non-lawyer owners must be fit and proper.

A modified licensing regime for 'special bodies' is proposed.

Timeline. Questions 1 - 4

Question 1 - What are your views on whether the LSB's objective of a mid-2011 start date for ABS licensing is both desirable and achievable?

Question 2 - How do we ensure momentum is maintained across the sector towards opening the market?

Question 3 – What are your views on whether the LSB should be prepared to license ABS directly in 2011 if necessary to ensure that consumers have access to new ways of delivering legal services?

Question 4 - How should the LSB comply with the requirement for appropriate organisational and financial separation of its licensing activities from its other activities?

The timeline seems ambitious but is not an issue on which LAPG has taken a view. Our experience of legal aid consultations and proposals is that timelines are often ambitious, that major changes cause a great deal of stress and work and that delays are often the inevitable result of ambitious programmes.

As our membership consists of firms and not for profit organisations with legal aid contracts we are approaching these questions from that perspective. At present our members have been involved in a large number of consultations regarding the future delivery of legal aid work both civil and criminal. We fear that the timing of this consultation may lead to a limited number of responses. We are grateful for the extension we have been allowed but due to the number of current consultations, proposed changes on legal aid issues particularly contracts and summer holidays we have not been able to consult as widely as we would have liked.

There is an added dimension to this from legal aid practitioners' perspective, namely the amount of 'regulation' imposed by the LSC to ensure that practitioners obtain and keep their contracts. Our members are already heavily regulated.

Our concern on behalf of our members is that with the 2010 LSC contracts deferred they will be very focused on that reality and will only have limited time to consider the implications of ABS.

Development of the ABS regime. Questions 5 - 10

Question 5 - How do you expect the legal services market to respond and change as a result of opening the market to ABS?

We consider that it is hard to predict the effect on the legal aid sector. At present government funding is £2 billion. Over the years fees have not increased. Fixed fees have been brought in. Opportunities for higher fees have been eroded either through legislation or case law or court practice (e.g. difficulties in obtaining inter partes orders in judicial review cases).

2010 contracts will see more churn with firms and not for profit organisations evaluating their role. With profit margins low it is difficult to identify how much interest there will be in providing legal aided work and who will carry out the work.

We could anticipate infrastructure companies being interested in legal aid work but low profit margins would mean that investment was worthwhile only if a large amount of work was obtained.

There is also a risk that new entrants will take on work that currently subsidises legal aid work. While it is unattractive that privately paying clients subsidise legal aid work nevertheless in many firms it is a reality. New entrants who cherry pick the more profitable work that legal aid practices carry out could de-stabilise the provision of legal aid work.

Question 6 - In what ways might consumers of all types – including private individuals, small businesses and large companies – benefit from new providers and ways of delivering legal services?

We believe that articulate clients with good IT skills could benefit from organisations that invest in technology and offer services in commoditised work.

Developments in IT could at some point mean that vulnerable people (e.g. with computer access through their television and with voice recognition) could seek advice in innovative ways. We think that that IT sophistication is some years away.

We are not convinced that there will be new and innovative ways of obtaining funding for legal aid work.

Question 7 - What opportunities and challenges might arise for law firms, individual lawyers, in-house lawyers and non-lawyer employees of law firms as a result of ABS?

We foresee that there will be opportunities for non lawyers and lawyers to work together better particularly at higher levels in organisations. There is likely to be more flexibility for non lawyers.

Many experienced lawyers have become managers rather than carrying out large caseloads. There is a possibility that professional managers will enable lawyers to take on casework. Some of our members would however identify that it is not possible for senior lawyers to bring in sufficient income in this model and that the only effective model is junior people carrying out legal aid work.

We agree with paragraph 4.18 that a less rigid management structure could be more attractive to newer entrants rather than partnerships as at present.

Question 8 - What impact do you think ABS could have on the diversity of the legal profession?

We believe that there is a need for a well devised impact assessment. Will BME firms if generally smaller be adversely affected? On the other hand will larger entities offer more opportunities? Will the ability to flourish in an ABS possibly regardless of a lawyer qualification enable people from a wider range of backgrounds to flourish?

Question 9 - What are the educational and developmental implications of ABS and what actions need to be taken to address them?

There needs to be clarity about the new regime. There should be training events, good online information, questions and answers pages and everything should be well written and clearly indexed. Everything on the internet should have a good search engine. Ideally the search engine should be trialled by practitioners at least.

Question 10 - Could fewer restrictions on the management, ownership and financing of legal firms change the impact upon the legal services sector of future economic downturns?

We do not feel able to answer this. We do note however the greater flexibility in the sub prime housing market and what that led to.

Section 5. Managing the Risks of Opening the Market. Questions 11 – 13

Question 11 - What are the key risks to the regulatory objectives associated with opening the market to ABS and how are they best mitigated?

The key risk is the conflict between running a business for profit and running a professional service. There can be a conflict between the profit motive and delivering a professional service. This is a risk at present but is likely to be more of a risk in future.

The risk is increased if the reason for running an ABS is money rather than wanting to practise as a professional and earn enough to live comfortably/well/very well depending on one's goals. Many legal aid practitioners want to make a profit – even better a healthy one – but put service to their clients higher up their priorities.

The risks are best mitigated by holding people to account and we welcome the proposal for named people to hold clear roles.

In the legal aid world we think that practitioners have had to balance fixed fees versus a professional service for some years and therefore would welcome an opportunity to discuss this further with the LSB.

Question 12 - Are there particular types of business structure or model which you consider to present a particular risk to the regulatory objectives?

The Clementi Review looked at this and identified risks. We would focus on the clients – would any aspect of the related work impact on their belief that the firm/organisation was independent and working in their best interest? Particularly for vulnerable people the importance of the advisor's independence cannot be stressed enough.

Question 13 - What conflicts of interest do you think might arise in relation to ABS and how should they be managed?

Paragraph 5.11 sets out potential conflicts such as acting for conflicted parties, lawyers trying to cross-sell services, sharing information inappropriately and making decisions that conflict with professional obligations because of financial pressures.

We would agree that current best practice, here and abroad, should be used to tackle these situations.

We would be concerned that existing company law and the obligations it places on directors should not be considered the answer to some of these questions.

Section 6. Risk-based Regulation of Entities. Questions 14 - 20

Question 14 - How should licensing authorities approach entity-based regulation and what are the main differences from the traditional focus on regulating individuals?

While we think that the HoLP is a good idea we do think that entity based regulation could mean that lawyers rely less on their consciences and more on the HoLP. It has been important to many professionals over the years that they can go to their employers or colleagues and state that their professional body has advised them that they should or should not take some step. We think that that is likely to be subsumed into doing what the HoLP advises. We simply do not know if this will happen or what effect this will have. Whoever is the HoLP will have to mediate between very conflicting demands.

Question 15 - Do you agree with our view that licensing authorities should take a risk-based approach to regulation of ABS, and if so, how might this work in practice?

Our main experience of risk based regulation had been the LSC auditing large firms which take most money from the legal aid firm. While we understand the reason for this it has become a wearying and expensive burden for those firms.

We are not clear if there is a risk assessment and an organisation is deemed to be high risk at what point they would be turned down for a licence, what if any restrictions would be placed on them and how they would be monitored.

We do accept that increased IT 'reporting' might assist but would urge any proposals to be fully consulted on and piloted.

Question 16 - What is your preferred balance in regulating ABS between a focus on high-level principles and outcomes and a more prescriptive approach?

We have some sympathy with those who want a high level approach which underpins a framework. Less regulation is usually welcomed. However the profession has at times found it difficult to know what it should do. If there is more detailed prescription at least you know if you are breaching any rules. An example not from the legal aid world is exactly what should be done in a conveyancing transaction to verify the identity of a client and to identify if funds comply with anti-money laundering provisions. Many conveyancing practitioners have done their best to interpret rules but are fearful that they could be criticised because the guidelines in their office have had to be extrapolated from loose guidance.

We note the reference to New South Wales' office for the Legal Services Commissioner and the setting of objectives which a good legal practice would adhere to. This would be similar in idea to the original franchise requirements of the LSC.

Question 17 - What are the advantages and disadvantages of a requirement on ABS to have a majority of lawyer managers?

While the LSB seems unconvinced that there needs to be a majority, there would seem to be less risk in at least at the beginning in trialling ABS with lawyers in a majority. That would be more likely to provide a transitional steady state.

For organisations seeking a small group of managers we could see that a structure of say a solicitor, an accountant and a practice manager who is not a lawyer could be attractive in which case the lawyer would be in a minority. We would however have thought that another regulated professional would reduce the risks involved.

Question 18 - What are your views about how licensing authorities should determine whether a person is a "fit and proper person" to carry out their duties as a HoLP or a HoFA?

We think that those with certain professional requirements should be passported through. We can anticipate that basic checks would be too little e.g. criminal records checks but that what would be needed to head up a large City firm would differ to running a smaller firm carrying out low risk work.

Question 19 - What is the right balance between rejecting "higher-risk" licensing applications and developing systems to monitor compliance by higher-risk licensed bodies?

We do not feel equipped to respond to this question.

Question 20 - How should regulators ensure a level playing-field between regulated legal practices and licensed bodies?

Requirements for ABS must be comparable with other practices in the same market. We would be most concerned about bulk providers wiping out smaller practices and what would happen in the event of the collapse of any major organisation.

Section 7 Specific Regulatory Issues Questions 21-25

Question 21 - How should licensing authorities approach the access to justice condition, and do you agree that it is unlikely that many licences should be rejected on the basis of the condition?

We repeat our concern that the legal aid sector is uncertain what will happen in 2010 and if they will secure contracts. If they do, will they be viable? It is uncertain how much will change. We think it reasonable to assume that fewer practices will survive after 2010 and that the impact in some areas of law and in some physical areas e.g. in rural parts of the country requires considerable

thought to ensure that there will be access to justice for vulnerable clients after all these changes. We want to see choice for clients and sufficient independence to reassure clients that they are receiving the best advice and representation possible.

De-regulation on other areas of life has not always led to the intended consequences. We are pleased that the LSB recognises the problems associated with the proposals and that parliament recognised the importance of ensuring that access to justice must be considered in all applications.

Question 22 - How should licensing authorities give effect to indemnification and compensation arrangements for ABS?

We agree that it is essential that clients have protection but that providers do not have to pay high amounts if a large provider collapses.

Question 23 How should complaints-handling in relation to legal services provided by ABS be regulated?

There should be a level playing field. We take the point that arrangements need to be robust to take account of complaints made against different professional who may operate under different disciplinary regimes. We agree that early dispute resolution is the goal.

Question 24 How should licensing authorities approach the “fit to own” test and how critical is it in mitigating the risk to the regulatory objective of promoting lawyers’ adherence to their professional principles?

We think that the ‘fit to own’ test is crucial for future success. The Act sets out various aspects of the test – a person’s probity and financial position, whether the person is disqualified from a management position within the firm and the person’s associates. The test, it is proposed, could be varied according to risk. We would support that.

Question 25 - Are there are any particular risks to the regulatory objectives that arise from could arise from ABS offering non-reserved legal services?

We are not in a position to answer this question.

Section 8 Special Bodies

Question 26 - What are the risks to the consumer associated with the delivery of legal services by special bodies and which more general risks are less relevant to these bodies?

Not for profit organisations, trade unions and charities may deliver advice and represent people. Again, clients need to be reassured that they represent them without other considerations overtaking the professional service. With financial constraints income generation is very important to all organisations. There should be licensing but it should be based on a lower risk.

Question 27 - Is it in the consumer interest to require special bodies to seek a licence, and if so, what broad approach should licensing authorities take to their regulation?

There should be a licensing scheme to protect clients but as many will hold very little client money they should have a lighter touch regulation.

Question 28 - Are there any other issues that you would like to raise in respect of ABS that has not been covered by previous questions?

We do not wish to raise any other issues at this stage. We will hold a workshop at our conference in October and we are delighted that that we will be welcoming a representative of the LSB to that conference to discuss these issues further.