

## **WIDER ACCESS, BETTER VALUE AND STRONG PROTECTION: DISCUSSION PAPER ON DEVELOPING A REGULATORY REGIME FOR ALTERNATIVE BUSINESS STRUCTURES (ABS)**

### **Response from the Legal Complaints Service to the Legal Services Board consultation**

The legal landscape with the provision of ABS will extend beyond the lifespan of the Legal Complaints Service (LCS). However, we believe that our position as the independent Regulatory Board of the Law Society charged with complaint handling for solicitors puts us in a unique position to comment on certain aspect of the LSB's discussion paper, and we welcome the opportunity to respond accordingly.

Our response is informed primarily by our experience in complaint handling and therefore we have not responded to all of the questions. We have structured our response to correspond with the chapters as set out in the discussion document.

### **Timeline (Question 1 – 4)**

Whilst we endorse the idea of ABS in principle, we believe that early focus on their introduction should not be at the expense of other work/initiatives that will be required of the LSB. In considering taking on a direct licensing role early it would appear that the LSB is in danger of taking on an extra workload which is strictly speaking not necessary, for the purposes of meeting the requirements set out in the Legal Services Act (the Act).

It will be important to ensure a smooth entry into the complaints handling market for the OLC. There are clear risks to the introduction of ABS before the OLC is well established and used to dealing with the existing legal market, exposing it to a new and potentially more complex regime. Any adverse consequences might compromise the LSB's ability to establish the regulatory excellence that it was set up to deliver.

We do consider that there is both the opportunity and the need for the LSB to work with the Approved Regulators to ensure that the consumer interest is fully considered and reflected in the licensing rules of the Approved Regulators. Moreover, this is an important opportunity to ensure that the concept of the level playing field informs the work of the Approved Regulators, minimising the need for subsequent revisions.

While the actions that are being taken by the LSB and the Approved Regulators to implement the provisions of the Act have the interests of the consumer as an important driver, we believe that the consumer benefit is better served by ensuring that decisions are as well informed as possible, both by the potential benefits and the risks of consumer detriment, than by simply maintaining momentum.

If, however, the LSB chooses to pursue the option of taking on a direct licensing role, then it will be important to ensure as full a separation of its licensing and other activities as possible. This is difficult without putting in place an appropriate structure of governance, ideally with both subsidiary activities managed independently and responsible to central board and management.

## **The benefits of opening the market (Questions 5 – 10)**

This is an area that will need to be monitored over time as it is likely that the structure of ABS will bring about a cultural change. Likely changes in the market will be driven by economies of scale, process innovation, commoditisation and market differentiation and segmentation. Consumers are likely to be offered a range of levels of service and, potentially, menu-driven pricing of services. Consumer choice will expand accordingly, albeit that some existing providers are likely to be driven out of the market. Others will embrace change. The challenge for the complaint handler will be to reconcile its concepts of acceptable levels of service and policies with this increased level of choice and diversity.

An important point is that the potential benefits to consumers of greater choice depend on the availability of data to inform their decisions. It is worth noting that the decision of the LCS Board not to go ahead with the publication of solicitors' complaint records in 2008 was driven partly by the inadequacy of the available data to support informed choices. Since ABS will be new into the market, data availability and how information on service offerings is presented and published will be an important consideration.

There is a danger that in the pursuit of market share through pricing initiatives, whilst possibly providing value for money for the consumer, issues around inadequate professional service may arise as margins are squeezed and processes possibly compromised. This is shown by our experience of complaint handling. For example, there is a clear correlation between claims management referrals and Inadequate Professional Service, albeit that no causal link has been established.

BME firms are disproportionately represented at the smaller end of the scale of firm sizes and incomes. Historically BME solicitors have tended to work in areas that are generally less profitable and these less profitable areas have to some degree been financed by more profitable legal work such as conveyancing. If, in the Tesco-law scenario, these more profitable areas were broken down into easy-to-process steps, thereby increasing the profit margin, then there is a risk that this profitable work is taken away from BMEs thereby undermining the less profitable work carried out by them resulting in the eventual demise of these BME practices. This has the potential for affecting accessibility adversely for minority consumers, as well as limiting the career opportunities for solicitors.

This situation could also apply to non-BME smaller/sole-practitioner firms which are at the lower end of profitability. The removal of market barriers may often sweep away the small generalist, the sole practitioners and the small high street firms, unless they become specialist or niche players, with potentially adverse implications for accessibility at the local level.

## **Managing the risks of opening the market (Questions 11 - 13)**

There is a significant risk of conflict of interest that could arise if a consumer's financial and legal affairs were handled by one entity, which raises a regulatory issue. Arguably, consumers will need to be protected from potential detriment when dealing with entities offering a range of services, legal and otherwise.

An example would be to consider a bank owning an ABS. What would happen in the event of a dispute over a legal bill and the client refusing to pay the bill. If the client had a current/savings account with the same bank could that bank access those

funds? There are already instances where banks have withdrawn funds from customer accounts after missed mortgage payments when the mortgage was through the same bank.

There must be a mechanism for dealing with complaints that cross both jurisdictions, to avoid a situation in which neither accepts responsibility. This happened recently in relation to remortgages, where consumers were in danger of falling between the two stools of financial and legal services regulatory provision.

Within an ABS the idea of the cross-selling of different services has always been a topic of discussion. Whilst it is in the consumer interest to be as well informed as possible by accessing as much information as possible there must be measures in place to avoid undue pressure being placed on customers within one branch of an ABS to use other services within the ABS.

We have also considered an instance where a client has, for example, an annual policy with Tesco for legal advice and that same client then becomes a PI claimant for a 'slip and trip' incident within a Tesco store – how would such an incident be regulated? This situation would be prevented by the existing rules relating to solicitors practices. Similarly, the idea of a 'hierarchy of duties' to address conflicting management and shareholder interests is welcome but does not address the underlying problem of conflicting pressures and interests, which could easily create conflict between the managers and the owners of an ABS, unless strictly regulated.

The often cited scenario of an ABS being the only recourse to legal advice within a certain radius could lead to more common instances of conflicts of interest occurring, for example in divorce cases where both sides were represented by solicitors within the same ABS. Under normal circumstances one party would go to another law firm, however in this instance effective regulation would need to ensure that an effective 'Chinese Wall' could be operated. This may be more difficult in an ABS resulting from the consolidation of smaller practices.

### **Risk-based regulation of entities (Questions 14 – 20)**

Entity based regulation has now been adopted by the SRA but for the LCS, our working relationship has always been with the firm as an entity, typically working with the partner designated to be responsible for in-house complaint handling, under the provisions of 'Rule 2' of the Solicitors code of Conduct. We see no need for adopting a different approach for the regulation of ABS. However, there is an important issue to be addressed, with respect to complaints relating to the actions of non-lawyer employees providing non-reserved services to consumers, under the umbrella of a legal services ABS.

A risk or outcome based approach to regulation is intuitively sensible. In terms of the provision of legal services by an ABS, the risks may be intimated but are in practice largely unknown. Risk management requires risks to be identified and mitigated but the data for making such assessment is not yet available. Using solicitors' practices as a proxy, there is a range of characteristics or indicators that can be associated with frequency of complaints, such as size of firm and area of law. The answer must be regulatory provision that is inclusive coupled with targeted support, training and communication with the weakest performers.

For a complaint handler, prescription has the virtue of simplicity and of being easy to reference. This enables faster complaint resolution that is less susceptible to

challenge. The best result for the consumer may well be a continuing emphasis on prescription but with stronger emphasis on the required outcomes. Such an approach would ensure that the consumer interest is enshrined in both the required outcomes and the proactive identification and management of associated risks.

In terms of structure and manager profiles, it is not clear that a majority of lawyer managers necessarily implies greater control over the adequacy of services provided by an ABS. It is important, however, that managers or owners should be 'fit and proper persons' and for lawyers, there is an established process and criteria to determine fitness to practice. A review of the tests applied by other regulators will be needed for the non-lawyers.

We do not see any need for a different approach to ABS to ensure a level playing field between legal practices and licensed bodies. The same service standards and criteria should apply, in the interests of providing the same level of assurance to the consumer. Of course, this does not mean that different levels or regulatory oversight might not be appropriate for ABS choosing different regulators. This would reflect existing differences in regulation and level of service requirements by the legacy bodies, which is not a problem if consumers are aware of the types of service on offer and their level of assurance. The recent issues and regulatory response by the Ministry of Justice in relation to the claims management industry serves to highlight the problems where this is not the case.

### **Specific regulatory issues (Questions 21- 25)**

Consumers need reassurance that they will receive the same levels of protection irrespective of which lawyer they chose to instruct. We found this to be particularly important in the handling of complaints against legal disciplinary practices. Working alongside the Council for Licensed Conveyancers (CLC), we identified the risk that consumers may perceive one redress scheme to be better than the other. This was because LCS and CLC operated two different compensatory limits. By ensuring that our limits were the same consumers could feel reassured they had the same access to redress irrespective of whether the firm was regulated by the SRA or the CLC. It is perhaps relevant to note that consistency was achieved by raising the limit of the CLC, rather than reducing that of the LCS.

Indemnification and compensation arrangements under ABS will need to be no less than those presently in place. For solicitors, the SRA's Claims Management Fund (formerly known as "the Compensation Fund") is a discretionary trust fund of last resort and it will consider claims for losses caused directly by a solicitor's dishonesty. The Fund will not generally be able to help with the payment of Inadequate Professional Service (IPS) awards, as these relate mostly to the payment of compensation and /or refund of costs. The Fund can, however, consider claims for findings of failure to account for client money, if there is evidence to substantiate this [e.g., a copy of a reliable ledger, completion statement, bank statement, receipts etc.] With regard to ABS therefore, we would envisage that a similar arrangement would need to be put in place. This might involve ABS contributions to the existing fund and equivalent for indemnification and compensation.

In terms of the regulation of complaints handling in relation to legal services provided by ABS, we would encourage the same principles that apply to individual solicitors and solicitors' practices to be applied equally to ABS. One aspect of this is that ABS will need to develop good in-house complaint handling procedures similar to those required for solicitors' practices under the Solicitors Rules. Another is that there will

need to be some provision for tracking service providers to ensure the availability of redress. This may be necessary where a corporate entity closes and subsequently re-emerges 're-branded' or indeed, it may require the traceability of individual lawyers, which is in any event necessary for conduct matters.

There appears to be a possible consumer detriment from ABS offering non-reserved services. The present position is that all services provided by a solicitor are regulated. It is envisaged that the OLC will be able to receive complaints about non-reserved activities. However, it will be difficult to judge what service standards should be expected and how these relate to the service standards required for reserved activities, particularly if they are provided by a non-lawyer employee.

### **Special Bodies (Questions 26 – 28)**

We have sought to base our response on our experiences of dealing with consumer complaints against not-for-profit bodies, community interest companies and trade unions. However, the data we have will not necessarily give a full reflection of the numbers of issues reaching us. Many consumers initially contact us on our helpline, at which point we will discuss their concerns and advise whether we can assist. Many complaints that are outside of our jurisdiction are identified at that stage and therefore are not formally referred to us.

In the past 12 months the outcome for complaints against special bodies is as follows (the figures in brackets are the outcomes for non-special body complaints): -

Conciliated	21% (34%)
Not upheld	37% (19%)
Outside Jurisdiction	26% (8%)
Investigation declined	16% (7%)

The main areas of law covered in complaints about special bodies are housing, discrimination and employment. The main issues of complaint are discrimination, rude or insensitive behaviour and the way the complaint was handled in-house. The issues raised tend to be specific to the consumer's individual matter and therefore focus upon the actions of the individual acting for them. However, some of these issues do identify wider management questions, particularly around the way complaints are handled by the organisation as a whole.

Supervision also arises as an issue. Most of those complaints that fall outside of our jurisdiction are matters where a solicitor has not carried out the work and where the work was not supervised by a solicitor. In some of these there may have been another qualified lawyer involved, such as a barrister, but in most we are unable to find evidence of a qualified lawyer's input.

### **Jurisdictional issues and concerns**

In many cases, complaints about special bodies will fall outside of our jurisdiction. We can only investigate the issues where the work has been carried out by a solicitor. As our redress powers cover individual solicitors, we are able to make

awards against them where there has been poor service. This does, however, run contrary to the idea of entity based regulation.

Difficulties arise where the work was not done by a solicitor, as is often the case in many special bodies and our redress powers do not cover special bodies as entities. Consequently, if the special body chooses to use staff who are not legally qualified we are unable to assist the consumer with their complaint.

We find there is great inconsistency in the handling of complaints by special bodies. Generally, Law Centres respond to complaints positively and take an approach broadly similar to many law firms. However, even those with good complaints processes tend not to publicise them. Often the consumer is still left unclear about how to make a complaint.

### **The need for regulatory intervention**

We believe that a proportionate regulatory framework is required for special bodies. Such a framework should ensure consumers are not subject to any greater risk from special bodies compared to other legal services providers. However, at the same time, such regulation should not impose an unnecessary financial burden upon special bodies.

Special bodies provide an invaluable, often pro bono, service to consumers, many of whom would be unable to seek access to justice through other means. The regulatory system would need to ensure these services are still financially viable. However, it should be recognised that at the same time as being amongst the most vulnerable consumers of legal services, users of special bodies often find themselves as the least protected. Advice with no cost should not mean complaints with no redress.

The heart of the issue for consumers is the lack of consistency in the way that their complaints are handled. Entity based regulation does not apply to most special bodies. Consumers may only be able to complain about the service provided if the work is carried out by a solicitor. However, they cannot seek redress if a non-solicitor was involved. This effectively leaves consumers playing 'regulatory roulette'; with the luck of the draw determining whether they can complain to the LCS, based solely on whether the special body allocates a solicitor to carry out the work. There is no obligation on a special body to make this clear to consumers prior to acting, so the consumer is left unable to make an informed choice.

Similarly there is no requirement on special bodies to advise about time limits for complaining to us. This is in contrast to solicitors' firms who are required to advise consumer about the LCS and the time scales for bringing a complaint. The impact of this is clear when you see that just 7% of all investigations are declined by LCS (this includes for being out of time) compared to 16% of complaints against Law Centres.

We note in your paper it states the TUC have indicated unions would not want to become ABS. We consider that this is not a strong enough argument to fail to create a regulatory framework. Our experience is unions are increasingly moving into the field of legal services, beyond the traditional provision on employment advice to their members. The ABS framework needs to be prepared and ready to regulate unions that do provide legal services.

## **Conclusions**

In conclusion, whilst we admire the concept and the intentions behind establishing ABS as soon as possible, we would encourage the LSB to take the time that is necessary, to ensure that their launch is not done at the expense of having a full and effective regulatory regime in place, that is at least the equivalent of that applying to solicitors' practices. Anything less would be a disservice to the consumer and to the public interest.