

**RESPONSES FROM BIRMINGHAM CITY COUNCIL LEGAL SERVICES DEPARTMENT
TO DISCUSSION PAPER - WIDER ACCESS, BETTER VALUE, STRONGER PROTECTION**

Question 1

What are your views on whether the Legal Services Board objectives of a mid 2011 start date for ABS licensing are both desirable and achievable.

Answer:

The time line is probably desirable but achievability will depend on clear regulation being forthcoming at least 6 months before licensing applications are accepted so as to allow business structures and supporting contracts to be devised and agreed with the knowledge of a fixed set of regulations before application is made. On the published timetable it is unlikely that any applications would be made for licences until the start of 2012 due to the lead time.

Question 2

How do we ensure momentum is maintained across the sector towards opening the market.

Answer:

Working to an agreed and tight timeframe with widespread publicity will assist.

Question 3

What are your views on whether the Legal Services Board should be prepared to licence ABS directly in 2011, if necessary to ensure that consumers have access to new ways of delivering legal services?

Answer:

The opportunity for direct licensing will potentially create a pick and mix regulatory regime, where a potential ABS can choose a "soft" regulator rather than one seeking to ensure greater consumer protection.

Question 4

How should the Legal Services Board comply with the requirement for appropriate organisational and financial separation of its licensing activities from its other activities.

Answer:

Avoid direct regulation of ABS.

Question 5

How do you expect the legal services market to respond and change as a result of opening the market to ABS.

Answer:

Some innovation will emerge but due to difficulties over international regulation and compatibility only regional and smaller firms are likely to consider the business structures with the small high street firm being squeezed out of existence by the need for increased capital, lower unit costs and the high risk of niche provision.

Question 6

In what way do consumers of all types - including private individuals, small businesses, large companies – benefit from new providers and ways of delivering legal services.

Answer:

The provision of legal services will cease to be regarded as a profession and will be regarded merely as another area of business services delivered in a multitude of different modes however at all times remaining constrained by significant regulation and operational requirements for the benefit of consumer protection. It is likely that there will be a major divide between those providing legal services purely for the financial reward and others possibly in the not for profit or public sector engaged in provision of legal services for the benefit of the common good and “to make a difference.

Question 7

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

Answer:

The majority of partners and owners of legal firms will remain as regulated lawyers, but a wider option of multidisciplinary partnerships could be delivered due to the watering down of requirements for a majority of lawyers on the controlling boards. Professional indemnity insurance will constrain in-house lawyers and may distort the market dependent on the regulatory regime and the perceived risks by specialist insurers.

Question 8

What impact do you think ABS could have on the diversity of the legal profession.

Answer:

The maximisation of profit/operating surpluses could constrain the opportunities for Trainees (other than as untrained labour) and there could be moves to reduce the ratio of qualified staff by diluting the need for legal supervisors. There is no reason that this should impact on the diversity of those admitted to the legal profession as the effect will be felt across the entire profession.

Question 9

What are the educational and development implications of ABS and what action needs to be taken to address them.

Answer:

See in part reply 8 above. The regulations should insist on BME/Trainee obligations as part of the ABS licence and there should be monitoring to ensure that there is a reflection of diversity within the wider community. This should be judged on the basis of not just the local authority area but the constituencies utilised for the European elections to the European Parliament thus giving a wider criteria and base for consideration.

Question 10

Could fewer restrictions on management and financial legal firms change the impact upon the legal services sector of future economic downturns.

Answer:

Regulation in relation to client account will be absolutely critical to ensure the maintenance of consumer confidence with effective Trust provisions held in accounts guaranteed effectively by FSA and not burdened by the current difficulties on Trust accounts of third parties (current FSA regulation).

Managing the risks of opening the market

Question 11

What are the key risks to the regulatory objectives associated with opening the market to ABS and how are they best mitigated.

Answer:

The potential risks of large ABS structures resulting in lawyers being precluded from acting against others of their clients (a bigger issue as the client list is expected to be larger). Risk of client confidentiality and the sharing of information within large commercial organisations of which the ABS is only a small part and risk to the independent advice to customers of the ABS from management resulting in divided loyalties between duty to client and duty to employer are significant. Regulation must ensure that the client must come first with integrity, honesty and financial cover the supreme objectives. Regulation should ensure that the profit motive does not supplant any of the above objectives.

Question 12

Is there any particular types of business structure or model which you consider to present a particular risk to the objectives.

Answer:

Yes, a large multi national or FTSE 100 company offering retail legal advice with perhaps one legal director at junior board level having no effective ability to influence the management of the business so that there is no de facto legal input and recognition of the regulatory requirements and consumer protection issues.

Question 13

What conflicts of interest do you think might arise in relation to ABS and how should they be managed.

Answer:

Conflicts of interest will undoubtedly arise due to the possibilities of an ABS being a substantially larger organisation than current firms, thus having a wider client base. The ABS are medium sized seeking to attract a large corporate client could find it difficult to resist the “do not act against us in any circumstances or we will not give you any business whatsoever, even though it is unrelated and does not offend your professional standards.

A quoted ABS would be exposed to rival organisations seeking to take control via stock exchange/share ownership as this could be commercially and financially viable in order to defeat high value commercial litigation.

Risk Based Regulation

Question 14

How should licensing authority approach entity based regulation and what are the main differences from the traditional focuses on regulating individuals.

Answer:

The standards of honesty, customer service, integrity and both professional and financial must be maintained whether regulated at entity or individual basis. There should not be the “fit and proper person test” other than for HOLP and HOFA, but requirement of professional education in terms of CPD refreshers courses for all those involved in the ABS to ensure knowledge of and requirements and terms of licence should apply on an annual basis to all engaged in the organisation, particularly including those with management and Board level responsibility.

Question 15

What is your preferred balance in regulating ABS between the focus on high level principles and outcomes and a more prescriptive approach.

Answer:

See reply 14. The high level principles and outcomes should be regarded as sufficient, but in the event of a regulatory inspection revealing shortcoming, a process similar to an OFSTED “notice to improve” should be available to Legal Services Board or approved licensing authority in default.

Question 17

What are the advantages or disadvantages of a requirement for ABS to have a majority of lawyer managers.

Answer:

Higher inherent standards due to greater knowledge of legal regulation requirements, but it should be acknowledge that lawyer managers have less involvement in major businesses in service industries and the retail sector, resulting in pressure for innovation and technological improvement.

Question 18

What are your views about how licensing authorities should determine whether somebody is a “fit and proper person” to carry out their duties as HOLP or HOFA.

Answer:

Both these officers should meet their own professions highest standards. The licence to practice in these circumstances be time limited and renewed on a 5 year cycle as per the latest suggestions from the Secretary for State for Children Schools and Families, for teachers. There should be no automatic presumption of renewal of entitlement which should be based upon compliance with terms of the licence, satisfactory financial and audit report and compliance with enhanced CRB check.

Question 19

What is the right balance between rejecting “higher risk” licensing applications and developing systems to monitor compliance by higher risk bodies.

Answer:

Limited licence with certification that in the estimation of the licensing authority the organisation meets the “higher risk category” and must therefore submit 6 monthly rather than annual compliance reports. It is suggested that high risk organisations should strive to achieve “regular risk” basis within 2 licence applications or be required to cease operations.

Question 20

How should regulators ensure a level playing field between regulated legal practices and licensed bodies.

Answer:

Ensure compliance with the same customer standards, including legal ethics, client privilege and freedom of advice free from external influences, also require the same level of professional indemnity cover so as to ensure that the consumer protection element, together with professional standards are identical in both methods of delivery of legal service.

Specific Issues

Question 21

How should licensing authorities approach the access to justice condition and do you agree that it is unlikely that many licenses should be rejected on the basis of that condition.

Answer:

The relevant licensing authorities should cooperate between themselves to ensure that only a small percentage of the legal services market is held by one brand, whether operating on a combined basis or through franchise so as to ensure that there is full diversity of legal services available. Care should be exercised in rejecting licenses on the ground of monopolisation, but the Competition Act contains the relevant guidance and this should be used with a much lower threshold due to the need for greater diversity.

Question 22

How should licensing authorities give effect to indemnification and compensation arrangements for ABS.

Answer:

Client account must be held in Trust and there needs to be adequate PI insurance cover. The alternative options would appear to be a cash bond held with third party trustees should the professional indemnity market be unable to price the risk in an appropriate manner. For a level playing field it is essential that the customer should not see any difference between the level of protection dependent on the category of the legal service provider.

Question 23

How should complaints handling in relation to legal services provided by ABS be regulated.

Answer:

Regulations should require an internal complaints process with the Office of Legal Complaints having the authority to regulate and impose adequate level of sanction to force on a commercial basis the ABS to take account of and remedy any malfeasance found.

Question 24

How should licensing authorities approach the “fit to own” test and how critical is it in mitigating the risk to regulatory objectives at promoting lawyers adherence to their professional principles.

Answer:

The fit to own test should seek to ensure that any owner has an address for service and place of business within the United Kingdom susceptible to action by the UK Courts and it should be clear that the owners adhere to a strict contractual obligation with the licensing authority to management, control and regulate the ABS in such a way as to allow and ensure compliance by its lawyers with their professional obligations. This should be a contractual requirement enforceable after notice of breach and failure to remedy by action through the Courts. A whistle blowers test needs to be adhered to without fear of dismissal for revealing potential breaches by the employer of its obligations.

Question 25

Are there any particular risks to the regulatory objectives that might arise from ABS offering non reserved legal services.

Answer:

The nature of the provider of services must be identifiable and disclose on all letterheads, correspondence whether electronic, paper or otherwise as to the majority legal services firm, ABS, LDS or any other variety subsequently authorised.

Special Bodies

Question 26

What are the risks for the consumer associated with the delivery of legal services by special bodies and what more general risks are less relevant to these bodies.

Answer:

The risk of provision of legal services by a specialist body such as Trade Union or debt advisory service are in some ways reduced if they stick with the activities for which they are licensed. Branching out or widening the terms of licence is a significant risk, higher than for a general legal service firm. Consumer protection standards needs to be maintained, with particular emphasis on financial resources to ensure that significant resources exist to enable the licence to organisation to deliver full professional compliance.

Question 27

Is it in the consumers interest to regulate special bodies to seek a licence and if so, what broad approach should licensing authorities take to their regulation.

Answer:

Yes, any organisation providing legal services needs to be licensed in the era where multiple provision is available with the category provider clear at all stages of delivery. Adherence to the same professional standards with consumer protection for any client monies held, freedom of advice, honesty and integrity must be maintained regardless of the nature of the licensed body.

Question 28

Are there any other issues that you may wish to raise in respect of ABS which are not covered by the previous questions.

Answer:

Technically local authority legal departments could be covered by ABS, but:-

1. Issues arise as to who actually owns a local authority and as such the questions in relation to "fit to own" seem inappropriate.
2. Local authority legal departments are traditionally managed or directed by a qualified lawyer with adherence to private sector quality standards by the nature of current practising obligations and requirements.

Local authority legal departments should however be excluded from regulation when they are not offering legal services to the general public as there is no risk to the general public and individual base regulation should be maintained.

If it is decided that local authority legal departments must be covered under the ABS structure then special categories are required, as it is suggested that:-

- Fit to own regulation would be inappropriate as there are no owners.
- There is no client account held therefore no compensation fund requirements.
- No compulsion and professional indemnity insurance as there is no risk to the general public who are not being served by such organisations.

It is suggested that regulation of HOLP as a fit person could be considered appropriate although regulation would have to ensure whether this person was the person with direct line management responsibility or overall responsibility at a higher executive level. Regulation of HOFA would not be appropriate as local authority financial function is already covered by a Section 151 LGA 1972 office and the Audit Commission have control over the public finances.

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