



**WIDER ACCESS, BETTER VALUE, STRONG
PROTECTION**

**A RESPONSE BY THE
INSTITUTE OF LEGAL EXECUTIVES AND
ILEX PROFESSIONAL STANDARDS LIMITED**

**CONSULTATION BY THE LEGAL SERVICES BOARD
ON DEVELOPING A REGULATORY REGIME FOR
ALTERNATIVE BUSINESS STRUCTURES**

DATE: 14 AUGUST 2009

1. This Response represents the joint views of the Institute of Legal Executives (ILEX) an Approved Regulator under the Legal Services Act 2007 (the Act), and its regulatory arm ILEX Professional Standards Limited (IPS). The consultation was separately considered, in the case of ILEX by a working party consisting of the President and Office Holders together with a number of Council members, and in the case of IPS, its Board. The results of these respective considerations were exchanged and with no difference of significance between the two organisations, a joint Response is tendered.

INTRODUCTION

2. IPS is a regulatory company established by the Institute of Legal Executives to take responsibility for the regulation of Legal Executives. ILEX is an Approved Regulator under the terms of the Legal Services Act and is also a qualifying regulator in respect of immigration advice and services. ILEX and IPS are committed to regulating Legal Executive businesses and businesses in which Legal Executives are Partners and Directors by 2012. IPS will be responsible for establishing that regulatory arrangements are appropriate for public protection and comply with the requirements of the Legal Services Act and any regulations made by the Legal Services Board under the Act.
3. Currently, Legal Executives are not approved to provide regulated services in independent practice, other than in relation to the provision of immigration advice and services. ILEX has recently submitted applications to enable Legal Executives to provide litigation and probate services under the terms of the Courts and Legal Services Act and/or the Legal Services Act. Only when ILEX is an Approved Regulator in relation to these and potentially other rights will it be possible to move towards becoming a licensing authority. IPS is aware of the challenges that will come with regulating independent practice, particularly in the areas of establishing viable indemnity insurance and compensation arrangements and managing the risks posed by practices as compared with employees.
4. The ABS model represents a market led approach to the provision of Legal Services. Although some potential service models have been identified others, possibly some of them quite unexpected, may emerge. Liberalising the market for legal services will introduce new challenges in terms of consumer protection. It is by no means clear that new service models will be able to guarantee the current levels of consumer protection.
5. Answers are set out below to the questions in the consultation, where ILEX and IPS are able to offer a view.

Part 3 – Timeline. Questions 1-4.

6. The timeline set by the LSB is challenging. It requires parallel running between the potential licensing authorities and the LSB. Whether that proves practicable will remain to be seen. Until rules which the LSB is required to make are made, it will be difficult for Approved Regulators to ensure that their own rules will be compliant. We are not able to comment on the timescales for any rule amendments by other Regulators. We do not expect to be able to meet the earliest date for introducing licensing arrangements.
7. In setting such a challenging timeline, which ILEX and IPS do not expect to be able to meet, we do have concerns that non-SRA Approved Regulators will be put at a disadvantage by putting competition between Regulators at risk and leaving the field open to a monopoly. The consultation paper, particularly at paragraphs 3.5 through to 3.7, does not reflect the assumption in the Legal Services Act that there will be an element of competition between licensing authorities.
8. Setting a target date for implementation will enable prospective entrants to the ABS market to plan. Firms, professionals and prospective investors need to see the benefit of establishing an ABS. For many potential interested parties, significant investment will be required and in the current financial climate the inability of businesses to fund investment through borrowing may well have an impact on the speed of developments. The licensing authorities will not welcome poor applications which might lead to refusals, and so adversely affect either the perception of ABS, or of the Regulators themselves. At the moment there is no obvious momentum to be maintained. There is no indication that consumers are particularly interested in the development of ABS. Genuinely commercial providers are unlikely to commit until they know what structures will be permissible. Time also needs to be built in to develop messages for consumers who may otherwise be confused by new entrants to the market. This may mean that consumers will either not take appropriate advantage of new business offerings, and/or will otherwise lack the knowledge and skills to exercise choice.
9. The LSB is defined in the legislation as a regulator of last resort in relation to licensing. Whilst it has an obligation to ensure that licensable bodies are able to be licensed when there is no existing or prospective licensing authority able or willing to regulate them, it must be careful about incurring expenditure on developing rules enabling it to become a licensing authority before it knows whether there is any demand, either from consumers or service providers, for licensing of service models which existing Regulators are unable or unwilling to licence. It would not be appropriate for the LSB to put in place the regulatory arrangements that would be necessary to act as a licensing authority, if there were no licensable bodies ready to apply to it.

10. Presumably the LSB would need to comply with the legislation and its own rules when establishing a scheme to licence service providers directly. It is not clear how the LSB will maintain a level playing field with Approved Regulators seeking to become licensing bodies. Licensing bodies are expected to compete with each other to some extent and the LSB will face some conflicts in carrying out the roles as licensing body and regulator of licensing bodies.
11. Any licensing activities which the LSB undertakes would have to be self financing and provided at arms length from the LSB. The LSB cannot be subsidised in its role as a licensing body by Approved Regulators against which it would be in competition. The LSB should not expect the Approved Regulators to finance the work undertaken by the LSB to prepare itself to be a licensing authority, in the absence of evidence that no alternative licensing authorities will meet the expected needs of the market.

Part 4 – The Benefits of Opening the Market. Questions 5-10.

12. The consultation paper focuses on the possible benefits of liberalisation of the market. The example given in the paper, drawn from the optical services market, demonstrates the control which a large scale provider can exercise over the level of service which practitioners are able to provide to individual clients. Large scale providers can provide services which are priced to suit the market but they will bring some new regulatory risks. These include the risk of cartels and pricing mechanisms that act against the interests of the consumer.
13. We also have some doubts about the case study used concerning the British Printing Industries Federation. We do not doubt that this membership/trade association would like to offer this particular service itself. No doubt it will be a much valued membership service, but we should not be surprised that it may be established as a commercial enterprise helping to fund the activities of the Federation and not necessarily because external lawyers lack knowledge of the printing sector or have opaque charging structures.
14. No one really knows for sure how the Legal Services Market will respond to the development of ABS capability. A number of models have been envisaged and a small number of potential commercial providers have expressed interest. The development of new models is likely to be slow, initially. ABS are likely to be driven by profitability. It is unlikely there will be commercial investors in low margin areas like legal aid.
15. Service provision will become more volatile. A commercial organisation providing services which proved not to be profitable will withdraw. Profitability is of course an important driver in current legal services

provision and it is difficult to see the traditional partnership model surviving as the main model on the high street. We agree with the comment in the consultation that the focus of regulation should be on the statutory objectives, rather than being designed to protect a particular organisation or model. However, there is actual evidence that when big Supermarkets or other large providers of goods and services set up in a town, a lot of small high street businesses close. The example in the consultation paper of optical services is a case in point. This may lead to access to justice issues which the licensing authorities will need to keep firmly in mind and take steps to monitor the impact of any large licensed body on the local community.

16. At least initially, there should be a wider range of service models available which will have the potential of providing a better fit for clients. In the end, models of potential ABS may be restricted. Regulation must focus on standards of delivery. We remain concerned that certain areas of law, already 'Cinderella' could be further marginalised e.g. social welfare, housing, debt and immigration. The socially disadvantaged and vulnerable will continue to require opportunities for face to face service provision. They need to be assured that they will be receiving the same level of service and expertise as others who go 'out of town' or to technology for the delivery of services. The Regulators will need to be constantly vigilant about standards, quality of service, independence of advice and representation, client confidentiality, conflicts of interest and other ethical issues, as well as issues around equality of access to services.
17. Many new forms of legal services business will be clear about where lawyers are needed, and will be clear about when non-lawyers can be utilised. Efficient models of delivery with more focus on deployment of appropriate skills will develop. The introduction of new forms of legal businesses may mean the demise of a number of individual law practices, but does not necessarily equate to fewer jobs for lawyers. We know that there is a large untapped market for affordable legal services in England and Wales. The challenge for lawyers, for legal services businesses and all those that they employ, will be to identify the right market for their expertise; to use technology to the fullest; to consider carefully the quality and level of staff employed to deliver services; to invest in training and education, and to take advantage of the ability to work with other legal professionals and non-legal professionals.
18. Certainly the larger corporate organisations will have an ability to invest in technology and to train staff to have the requisite expertise. Customer service training is 'bread and butter' training to many organisations. They may already use their marketing spend to acknowledge their corporate social responsibilities through the sponsoring of local schools, community groups, community events and so forth.

19. Commoditisation of legal services could improve diversity within legal service providers. High profile service providers in other sectors are more likely to have established recruitment and HR policies dealing with diversity issues than small legal practices. However, insofar as those from minority ethnic backgrounds are more heavily represented amongst the smaller legal service providers, they will be relatively more affected by the competition which ABS is likely to engender. In practice most lawyers work in the larger solicitors' practices and the recruitment practices of those firms determine, in large part, the diversity of the legal profession.
20. It is for Approved Regulators who are licensing authorities to identify the skills, knowledge and competence which licensed bodies need to have to provide legal services. Not all of the areas where new skills and knowledge are required will be for the law schools to provide. It is likely that many of the skills, knowledge and competences required will be able to be developed through existing qualifications and training, whether in law or otherwise. A changing pattern of legal service may, over time, require a review of the training models for Solicitors, Barristers and Legal Executives.
21. ILEX's long term strategy is based in part upon our belief that no one should undertake legal work for individuals and businesses without relevant education, training, qualification and regulation. This does not mean that each individual involved in providing advice and other legal services should have a qualification, let alone a standard qualification. They should however be competent to carry out their work and that will need to be evidenced in some manner. ILEX as an Awarding Body, through its unitised professional qualification, and in partnership with City & Guilds through its legal studies and legal secretaries programmes, has a wealth of experience in this field. ILEX has also been closely involved with the development of National Occupational Standards for the Legal Advice Sector, which standards can provide a benchmark for qualifications, but equally importantly for the development of in-house training and education covering the full range of occupations that can be found in any legal services business. ILEX sees it as its task to secure sufficient lawyers and other qualified advisers and support staff to ensure that every individual and every business has access to excellent legal services.
22. The LSB view that the current economic climate provides a reason for liberalising the market is tendentious in the extreme. The current financial difficulties arose from the liberalising of financial services, which led to the development of service models driven by profitability rather than probity. The legal services sector does not have a significant history of financial failure, even in difficult economic times. The impact on the consumer of the failure of a two partner small high street practice is small; the failure of a nationwide supermarket legal services business is far more considerable. Nevertheless, alternative sources of financing and

involvement of a wider range of service providers may lead to some additional resilience within the sector.

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

23. The consultation paper appears to have captured the principal risks which may arise from the development of ABS. They should all be capable of being managed. Particular issues which spring to mind are the lawyer's duty to the clients; the need to establish an appropriate ethos within the legal services part of an Alternative Business Structure and the clear need to protect client funds. However, the capture of Regulators by very substantial corporate providers is a possibility. An additional concern is in relation to the de-skilling of legal services and the risk to clients where it becomes unclear whether non-lawyers are subject to the full range of professional obligations imposed on authorised practitioners. An example of this is in the field of claims handling and claims management companies.
24. The main opportunities for conflicts of interest to arise will come when firms sell on ancillary services with the duty to promote their business rather than to focus solely on the client. However, the purpose of these reforms is to give clients more ready access to services at competitive prices. It will be important that licensing bodies ensure their rules require sufficient information to be given to clients to understand the basis on which services are being provided. Monitoring such arrangements will be challenging for Regulators. Further work might need to be done on reconciling the professional obligations of lawyers with those of other professionals entering into ABS.
25. Better management structures and management expertise are likely to reduce risk. Sole practitioners in small practices, statistically, pose greater risk of default and are responsible for more service complaints than larger service providers. Regulating businesses as well as individual lawyers should reduce the risk to consumers.
26. Clients' lack of knowledge of the law and of different types of legal services providers, costs and standards is a significant risk to the opening of the market. The Financial Services Market has produced chilling examples of mis-selling of financial services products. Regulators will need to pay particular attention to how clients can be protected from such pressures.
27. A particular concern centres on the ultimate ownership of a corporate owner of an ABS. Particular care will need to be taken to ensure that no legal services business can be used by organised crime or others wishing to use a legal services business as a front for other unlawful activities.

Part 6 - Risk Based Regulation of Entities. Questions 14 – 20.

28. Entity regulation has advantages over the professional regulation model. It is not dependent on establishing individual misconduct. Regulation of individual conduct will remain important but requiring compliance of firms, and monitoring it proactively, should prove to be more effective and give rise to a wider range of sanctions which are more relevant to consumers. Monitoring needs to be risk based if it is to be proportionate and affordable. We welcome the recognition in the consultation of the value of focusing enforcement on strategic, system led issues such as audit, risk management and governance. It is agreed that Regulators will need to develop their understanding of corporate risk and to collect information from ABS which will enable risk to consumers to be identified. That will include information on the qualifications and competency of the individual which the entity employs, their professional codes and any additional professional regulation.
29. A high level approach to the principles of entity regulation is preferred by ILEX/IPS. Prescriptive regulation inhibits the development of new service models whilst providing more opportunities for evading the precise terms of the restrictions imposed. That said, if there is to be competition between Regulators, and choice for consumers, there should be flexibility and indeed permission to be as detailed in their requirements as a licensing authority would like, if that meets market demands. There may well be businesses whose market edge will be that they operate to more prescriptive regulation than their competitors.
30. There do not appear to be any particular advantages in requiring a lawyer majority of managers when the entity is being regulated. The particular service model will define the balance of lawyers and other professionals within it, but this need not extend to the balance of owners. The 'fit and proper' test to manage should apply to lawyers and other managers equally and the test should not be enhanced unnecessarily for non-lawyer managers. The high level tests identified in the consultation paper are a suitable starting point. There will also need to be mechanisms for sharing information between licensing authorities regarding individuals who one or more licensing authorities have rejected as being fit and proper persons to own or manage legal services business.
31. Yet it is still unclear what "higher risk" might be. More thought needs to be given to examples. Caution should be exercised by the LSB when judging how Approved Regulators look at high risk, at least initially. Until there is greater knowledge and understanding of the types of models that emerge, Approved Regulators will need flexibility to judge risk against consumer protection. We are particularly concerned that customers of licensed bodies should know who is providing services to them. It will be very easy for service models to dilute or obscure the qualifications of

those who carry out the work. Unlike most other authorised practitioners, the title 'Legal Executive' is not protected. Anyone may use it, regardless of whether they are qualified with ILEX or have any legal qualification at all. Consumers need to know that a person who is described as a Legal executive is qualified in law and practice and has substantial experience of providing legal services, just as they are clear about what a Solicitor or a Barrister is. ILEX and IPS will look to the LSB to support the correct and appropriate use of qualification titles, through the licensing rules, and generally through regulation.

32. For a new regulator like IPS there will be applications which would constitute too high a risk for it to regulate. Regulators and applicants will need to be realistic about this. The cost of a detailed regulatory and monitoring regime will need to be weighed against the benefit to consumers of allowing an application which appears to pose significant risks.
33. ABS and other practices will be measured against consistent criteria relating to risk. It is accepted this will mean Regulators will need to have a sound basis for assessing risk.

Part 7 – Specific regulatory issues. Questions 21-25.

34. We accept the point made in the consultation paper at paragraphs 7.3 and 7.5, that access to justice can no longer be defined solely in terms of the distribution of lawyers' offices. If ABS are successful it will be because they find a market for the way they deliver services. This might affect current providers and probably will. Nonetheless, we refer to the point made about disadvantaged and vulnerable individuals and parts of society who are likely to continue to need face to face support.
35. It is difficult to see how any evidence based conclusion will be able to be drawn by Regulators, at least initially. As pointed out earlier in this Response, it is a fact that the arrival of a large national organisation such as a Supermarket has often devastating effects on smaller local businesses. Unless the national entity provides the range of services the smaller businesses offered, there may well be some access to justice issues.
36. We think it is also wrong to focus solely on the elderly, the disadvantaged and the vulnerable. The example of NatWest Bank is interesting. Going against the industry trend, it ensures that a very large number of its branches are open on a Saturday. It is evident from only a cursory visit to high street branches on a Saturday morning that the availability of face to face services is valued by a complete range of the local community in terms of ethnicity, age and social background.

37. Nevertheless it will be necessary for applicant organisations to state how their proposals will affect access to justice. If there appear to be risks to access to justice for particular groups or areas, then the licensing body will need to test the extent of the risk with the applicant. The impact of the new legislation should be monitored by the LSB.
38. We are concerned to see reference to pro bono activities when discussing access to justice. Pro bono activities should be an irrelevant consideration when granting a licence. The Attorney General's Pro Bono Protocol makes it quite clear that pro bono is not a substitute for an adequately funded system of legal aid. Nor do we believe it is desirable that a large retail organisation, for example, should seek a licence for a business offering x and y, on a fee paid basis, while expecting staff to do additional free work to cover the services that they know will disappear when they put competitor organisations out of business.
39. ABS will need to satisfy Regulators that they have indemnity insurance in place and that they subscribe to compensation schemes in the same way as other legal service providers. This is absolutely fundamental to consumer protection. We would, however, point out that the current compensation schemes operate on an ex-gratia discretionary basis and we would expect this to continue. The possibility of self-insurance exists for very large organisations. Licensable bodies will need to have clear proposals in their application and provide evidence of their insurability. The insurance industry will need to take a view of the risk presented by an ABS model. If it is uninsurable or the business model is too expensive to insure, Regulators will not be able to approve an application. Although detailed investigation into the capital adequacy of applicants could probably not be undertaken, Regulators will have to take a broad view on the viability of an applicant organisation and the business model it proposes. The regulator would otherwise be failing in its obligations to consumers.
40. ABS should be required to meet the same criteria for front line complaints handling as other service providers; with referral of service complaints to the OLC. Complaints regarding service provided by organisations regulated by the LSB would need to be dealt with in the same way. It is not clear who would be able to deal with any conduct issues arising against responsible persons in a licensed body in that situation. It should not be the LSB itself.
41. The rules drafted by the LSB will need to set the fit to own requirement in broad terms. As the legislation permits these models of service provision, Regulators will have to be very alert to ensuring the ultimate owners or controllers of ABS are disclosed and that opportunities for client interests to be subordinated to owners are limited. The rules need to make clear the hierarchy of obligations within licensed bodies: that is to the administration of justice, to the Courts, to clients and only then to owners.

There need to be clear protections for whistle blowers who identify conflicts of interest which go unchecked in licensed bodies. HoLP and HoFA roles are important and they should be subject to regulation themselves. They might need to be required to comply with specific training or competence requirements.

42. There do not seem to be any particular risks arising from ABS undertaking non-regulated activities. As the consultation paper observes, that can and does happen now. It would be wrong for consumers to be led to believe that services could only be provided by authorised practitioners when they were not regulated activities. However, that would not be an issue specific to ABS.
43. What is specific to ABS would be the ability to separate out its reserved services, offered through fully qualified and regulated lawyers and other professionals; and non-reserved services which are provided cheaply and by individuals not subject to regulation of any sort. There may well be a tendency for the consumer to regard the overall business in a favourable light and so make incorrect assumptions about the competency of the part of the business offering non-reserved activities. We are not convinced that this will be a serious issue for the majority of ABS owned and managed by lawyers, or owned and managed by larger well known retail names. Such businesses will at the very least be wary of the impact of any adverse behaviour or poor advice on their brand.
44. Equally, we once again refer to the arguments regarding the regulation of the title Legal Executive and the need for a level of consistent consumer protection which the consultation document itself raises.

Part 8 – Special Bodies. Questions 26 – 28.

45. It is in the consumer interest to require special bodies to secure a licence.
46. Not for profit organisations present more limited financial risks than commercial firms, because financial conflicts of interest do not arise in the same way as they do between owners and clients. However, there is a far greater likelihood that not for profit organisations will be dealing with individuals from disadvantaged and vulnerable communities, whether that vulnerability is due, for example, to a learning difficulty, ill-health or age. They are, if you like, fragile clients where poor advice even in non-reserved areas can be catastrophic for an individual.
47. We have referred earlier to the National Occupational Standards work that has been undertaken by ILEX, the Law Society and the not for profit organisations in the legal advice sector. The standards can be used as benchmarks to address the risk of varying standards of competency where volunteer staff and indeed paid non-lawyer staff (where they exist) within

not for profit organisations are the predominant frontline advice providers. A second risk that would need to be considered in relation to not for profit organisations is their often vulnerable funding basis and the risk of closure of services at little or no notice.

48. Trade Unions should be able to provide services to their members. However if legal services are being offered to non members they should be subject to the same standards as main stream practitioners, as concerns about the quality of advice and service will not necessarily differ between trade union services and private lawyer practices.

ILEX/IPS 14 August 2009