

**Legal Services Commission Response to a Consultation Paper from the Legal Services Board on Alternative Business Structures: approaches to licensing
15 February 2010**

Introduction

1. The Legal Services Commission (LSC) is a non-departmental public body sponsored by the Ministry of Justice (MoJ). The LSC is the biggest single purchaser of legal services in England and Wales with an annual spend of £2.1 billion; we are responsible for the delivery of civil and criminal legal aid and the development of community legal services.
2. The LSC welcomes the opportunity to respond to the Legal Services Board's (LSB) consultation on Alternative Business Structures (ABS). We have a strong interest in the regulation of legal services including ABS through our responsibility to legal aid clients. We strongly believe that improved regulatory performance will lead to better access to justice and outcomes for consumers.
3. Our comments on the consultation are outlined below. Our response focuses on the key themes raised by the paper rather than dealing with individual questions.

Regulation

4. We agree that any principle-based regime should be supported by some element of 'outcome focused' regulation. However we would expect detailed rules or guidance to underpin the outcomes and principles to ensure that standards are maintained. Outcome based regulation alone may not be in the clients best interest, and a more global approach to risk management, including targeting and identifying high risk individuals and entities will also be required.
5. It is paramount that mechanisms are in place to measure compliance against such standards / rules or principles. We agree that a key outcome for regulators should be that legal entities 'provide good standards of service to all their clients' (paragraph 37, page 11), however for this outcome to be meaningful there must be clarity on what constitutes a 'good standard' and then measurement of entities against such standards. In essence there is a need to 'assure' rather than 'assume' the quality of individuals or entities.
6. Consumers have problems in identifying the standard of professional services before purchase. If the standard is not maintained through regulation consumers will not be adequately protected. Under current regulation relevant legal professionals are subject to either the Bar or Solicitor Code of Conduct, however, neither regulator has any system in place to routinely measure compliance against the code or against their own standards. It is vital in the interests of consumers that this gap is addressed under any new regulatory approach, especially given that the new approach requires more sophisticated regulation.
7. Furthermore competition alone will not protect the interests of consumers. It cannot be assumed that ABS will compete in the market on the basis of high quality and excellent customer service. There are a number of different strategies business structures may use to gain market share and or maximise

profit in a competitive market. For example they may pursue strategies on basis of:

- Low cost (but potentially low value) services
 - Branding and marketing approaches
 - Innovation and excellent customer service
8. It would be helpful to have more detail on how the LSB will determine whether a Licensing Authority's (LA) regulatory approach is suitable, and how consistency between LAs will be achieved to ensure that consumers are protected from poor service. The consultation states that 'weaker' ABS regimes will be avoided through the provision of core outcomes for all LAs. However given the concerns raised above we strongly believe that the LSB should underpin the core outcomes with clear guidelines on the minimum requirements for the assessment of regulatory compliance of entities (and individual practitioners).
9. Whether or not services are provided through an ABS it is vital in the interests of consumers that this significant gap in this regulatory system be addressed and mechanisms for the assessment of performance are implemented.

Enforcement and penalties

10. Within the context of the comments made above regarding the measurement of standards, we agree that any approach to enforcement and compliance should be proportionate, targeted and risk-based. We would expect such a risk-based approach place a high priority on the nature of the consumers who use those services.
11. There is a clear public interest on enforcement and compliance that focuses on protecting consumers with legal cases for which their capacity to make informed choices about competent service provision (for whatever reason) is limited. We believe that needs of these consumer groups should be prioritised in any risk assessment process. We consider that the majority of legal aid clients would fall into this category as they are likely to be infrequent consumers of legal services and / or a vulnerable client (e.g. those with physical or mental disabilities, or with poor literacy in English). There are also certain areas of law, be they publicly or privately funded (e.g. immigration and asylum, mental health and public law children proceedings) where clients are likely to be particularly vulnerable, and where assuring services in their interests is of even greater importance.
12. We welcome the LSB's statement that they expect LAs to take a 'robust attitude towards compliance and enforcement' and that LAs must have a credible and effective compliance and enforcement policy. However we would like clarification on how the LSB intend to assess this and what the minimum criteria will be as this is not clear from the consultation.

Access to Justice

13. We agree that Access to Justice is much wider than enabling face-to-face contact or based on geographic proximity of provider and client. We need to ensure that full use is made of new delivery methods and technologies as well as changes to market structure.
14. We agree that LAs should monitor Access to Justice and we think that this analysis should take into account consumer perceptions and experiences of legal

services.

15. Overall the scale of ensuring Access to Justice will require support from a wide range of stakeholders including the regulators, representative bodies, purchasers, consumers and the LSB. Encouraging LAs to have a consistent approach to understanding the market is one means of starting this. We are keen to work with the LSB and others to deliver this programme.

Special Bodies

16. The LSC considers that all bodies that offer legal services to the public, including those in the Not- for- Profit (NFP) sector should be regulated and that they should be treated equally. The LSC is concerned that some NFP organisations tasked with delivering legal advice appear to be unregulated for the legal services that they provide. Whilst many NFPs are members of professional bodies, which have performance standards and codes of practice, they are representative bodies rather than independent regulators. The LSC believes there must be clear separation of the regulatory function from any associated representative or professional body to ensure independence and the confidence of the consumers, procurers and providers and to avoid conflicts of interests.
17. The introduction of ABS and the provisions for the regulation of special bodies is a welcome step, as this will go some way to close this significant gap. However as not all of these (currently unregulated) special/non commercial bodies undertake reserved legal activities there will still remain a proportion of such providers outside the regulatory structure. This is of particular concern in legal aid where some areas of law fall outside the reserved legal activity definition e.g. employment law. We would be interested to hear the LSBs views on how this can be achieved as part of its plans to review the issue of reserved and unreserved legal activities in 2010 – 2011. We are keen to work with the LSB on this area.
18. We do not agree that NFPs are lower risk in a regulatory context. The risk of poor advice/service being provided to consumers is just as likely for a Special Body as it is for a traditional law firm. We believe that it is in the interests of consumers and NFP providers that they are regulated equally where providing similar or identical services to traditional law firms or ABS. This is the approach that we follow with the legal aid scheme where we require all legal aid providers to meet the same standards and contract provisions whether they are a law firm or a NFP. Furthermore there is a danger that by creating different requirements this will create a regulatory maze, which is not in the interest of the consumer.
19. We recognise that the introduction of special bodies is a departure from what has gone before and further work is required before the requirements can be implemented. However we would encourage that, in the interests of consumers this is resolved as soon as possible.
20. It is not clear from the consultation paper whether LAs will be required to have arrangements in place to regulate special bodies or if they can choose only to regulate 'standard ABS'. We are concerned that there is a risk if LAs can opt out of such arrangements that special bodies may be excluded from the market, or have a restricted choice of LA. We do not believe that this would be in the best interests of the consumer.

Regulatory consistency in the interests of consumers

21. The comments we have made in this paper about the regulatory approach and structure for ABS applies equally to the regulation of any legal entity or individual. We would expect the regulations governing all legal practices to be consistent and robust with effective mechanisms in place to measure the performance of the entities and individuals it regulates.
22. We support the LSB's intention to collect evidence on how well consumers understand the current regulatory system. It is our view that, just as consumers are likely to assume that regardless of the type of legal advice they receive (reserved or unreserved) they will be protected, they are likely to assume that whatever entity provides them with help (ABS, special body or traditional law firm) they will be offered the same degree of protection.
23. With this in mind any form of regulatory maze should be avoided and clear communication channels put in place to provide consumers with meaningful and consistent information on;
 - The role of the regulators in ensuring standards and providing consumer protection.
 - The standards met by legal services providers
 - What services are not covered by regulation

We hope that you will find this response useful. If you have any queries about its content, please do not hesitate to contact Jennifer Will, Quality Manager, Strategy, at jennifer.will@legalservices.gov.uk.

Yours sincerely

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