



Bar Association for Commerce, Finance and Industry

Response to the Legal Services Board Consultation on Alternative Business Structures- approaches to licensing.

Introduction

The Bar Association for Commerce, Finance and Industry was founded in 1965 to promote the interests and professional status of barristers employed in commerce, finance and industry. BACFI is a Specialist Bar Association, affiliated to the Bar Council but operating independently to represent employed barristers practising outside chambers.

BACFI is keen to play its part as a representative organisation in helping shape the development of the Bar of England and Wales, by bringing forward the views of its members and pressing for appropriate change. BACFI actively supports the objective of an independent and high quality bar, accessible to all. It supports the opening up of the market for legal services by the creation of LDPs, BoPs and ABSs.

As business lawyers we consider that the interests of all “consumers” of legal services should be at the forefront of regulatory consideration. Commercial and public sector clients are as important as individual clients and the damage when things go wrong may be much greater.

Our response to the list of questions posed in the paper is set out below.

1. What is your view of basing the regulation of ABS on outcomes?

It is probably inevitable that as we cannot predict the variety of ABSs that may come about, we have to seek to regulate the “unknown” by reference to principles, or “outcomes”. In time, undoubtedly, experience will necessitate specific rules of a general nature or in respect of particular ABSs or activities. The outcomes should be as detailed as possible to reduce the necessity of extensive guidance - detailed guidance usually illustrates that the principle or outcome was unclear or ambiguous in the first place.

- a. Should all LAs have the same core outcomes? **Yes**
- b. Are the proposed outcomes appropriate? **Yes**
- c. Is the division between entity and individual regulation appropriate? The entity must be properly regulated, not least because the consumer is entitled to look to the entity to remedy the errors or failings of an individual and if necessary properly and fully compensate. However, this must not lessen the regulation of the individual within these entities. It is ironic that this paper places so much emphasis on regulating the entity in the interest of the consumer, when elsewhere other regulators have concluded that the regulation of the entity alone, or principally the entity, is failing and individual accountability of decision makers including criminal liability is “the future” eg the Bribery Bill. The FSA, OFT and SFO are all looking to make individuals responsible (or more responsible) in addition to the entity

2. Do you think our approach set out to the tests for external ownership is appropriate?

We do think the approach is correct but the LSB should stick as closely as possible to the requirements of the LSA 2007, with little additional requirements. While the precautionary principle should always be to the forefront in dealing with consumer interests, we should not assume that new (for legal services) more commercial forms of ownership and management will be any less ethical or customer focused than the current forms. It should also be recognised that with such greater commercialisation there are going to be ABSs that, while providing excellent legal services, will also make a lot of money at the consumers expense – the “outcome” for regulatory purposes being that the consumer/client understands what they are paying for and knows that before instructing the ABS.

- a. Should the tests be consistent across all LAs? **Yes**
- b. Is our suggested approach to the fitness to own test the right one? **Yes**
- c. If declarations about criminal convictions are required, should these include spent convictions? **They should be required, including spent convictions – offences can be forgiven but never forgotten and are relevant information.**
- d. What is your view of our suggested approach for considering associates? Is there an alternative approach that would work better in practice? **Yes – keep it simple.**
- e. Should there always be a requirement to declare the ultimate beneficial owner of an ABS? **Yes**
- f. Overall, are any modifications needed to ensure that our approach work in a listed company? **While the LSB may over estimate the attractiveness of legal services to investors, LAs should have to do no more than the FSA and other corporate regulators**
- g. Overall, are any modifications needed to ensure that our approach works in very small companies? **No**
- h. Do you think that the definition of restricted interest should change? **No**
- i. Do you think that covenants should be required from those identified as having a significant influence over an ABS? **No**

- j. How should the LSB respond to the information it receives about information on action taken against people that falls short of disqualification? Monitor and if concerned seek undertakings.

Finally, with reference to one of the suggested remedies in paragraph 86, the purchase price should be the current market value, regardless whether it has gone up or down. While the buy-back should not cause loss to the purchaser, nor should there be any opportunistic windfall if the market price is higher than the original purchase price.

3. Do you have views on how indemnity and compensation may work for ABS?

- a. How should an appropriate level of PII be set for ABS that are carrying out a variety of different activities, not all of which are currently regulated by the ARs? Here the precautionary principle should apply and the customer's interest should override even if this increases premium costs because of the variety of activities. We cannot expect the customer to be able to differentiate between the different risks he is taking in coming to use the services of an ABS. We do not agree with the sentiment of paragraph 120 because the toweringly strong today are an empty vessel tomorrow – if they are financially strong that will undoubtedly be reflected in their risk premium.
- b. Should there be minimum PII levels, which are the same for all LAs for different types of activity? Yes. The statement in paragraph 121 is correct but it is an imbalance which must be tolerated in the interest of consumer protection
- c. Are Master policy arrangements appropriate for ABS? Probably not but there may ABSs in niche areas where it is efficient and effective to have a Master policy. Nothing should be ruled out.
- d. What would be appropriate arrangements for runoff and successor practices to enable sufficient commercial freedom for ABS as well as protection for consumers after practice closure? Follow the SRA model
- e. What should the requirements be for compensation funds in ABS? LAs should satisfy themselves that the ABSs seeking licences have sufficient PII and are backed by an appropriate Compensation Fund. The LAs have good benchmarks in the Law Society and other funds so it would be for the ABSs to demonstrate the adequacy of their arrangements
- f. How could a compensation fund work in an ABS environment, in particular when the services offered by the ABS may be much wider than legal advice and where an AR may not currently have a compensation fund? See answer e

4. Do you agree with our position on reserved and non-reserved legal activities?

- a. Do you agree that ABS should be treated in a consistent way to non-ABS? Yes.
- b. Should all legal activities undertaken by an ABS be regulated or just reserved legal services? All legal activities.

- c. What role do you see consumer education playing? Low. The ABSs will be even more complicated than current forms of legal services which consumers understand very little about. The focus should be on imposing upon the ABS the mandatory obligation to be fully transparent with the consumer from the outset regarding what is being offered, the cost etc and drawing to their attention all remedies available to them if they are dissatisfied with the service they are receiving.
- d. How should ABS which are part of a wider group of companies be treated? We agree with the proposition in paragraph 168, even if it does increase compliance cost. We also agree with the content of paragraph 170.

5. Are the enforcement powers for LAs suitable?

- a. What is your view on the proposed maximum level of financial penalty that a LA can impose on an ABS? At the outset of this liberalisation with so many unknowns and the hindsight of so many mistakes and abuses of liberalisation in other industries - banking, mortgaging, telecoms, utilities, we believe that the maximum levels should be unlimited. However, we also believe that the regulators should also have the right to order a compensatory or disgorgement element rather than leaving it to consumers to pursue follow on actions for compensation. That will both impress consumers that it is their interests regulators are focused on and be the greater deterrent to ABSs that fail consumers.
- b. If you do not consider the proposed maximum to be appropriate what amount or formula would you propose? See 5 a. Answer.
- c. Will LAs have sufficient enforcement powers? They should also have the powers to order compensation to be paid to consumers and illegal profits disgorged.
- d. Will ABS have sufficient clarity as to how the enforcement powers may be used?
Yes
- e. In what circumstances should a LA be able to modify the terms of a licence? In any circumstance where it believes the current licence fails materially to protect the interests of consumers or is unintentionally materially burdensome on the ABS. There should of course be a process whereby the LA explains its reasoning for the change and the ABS has the opportunity to challenge or make its views known at first instance and an appellate level.
- f. Are there appropriate enforcement options for use against non-lawyer owners?
Yes.

6. What do you think of our approach to access to justice?

- a. Do you think the wide definition to access to justice that we have taken is appropriate? While ABSs may contribute to the survival of lawyers and legal services and may enable new or different services to be provided, there is understandable scepticism that ABSs will contribute to improved access to justice. While the LSB considers the debate to be closed (see paragraph 215) let it have the confidence to research this area and provide evidence that ABSs achieve this objective. The definition needs to be wide but the prefix “affordable” should be an important qualification and measure.

- b. Is asking an ABS on application how they anticipate that they will improve access to justice a suitable approach? **No** as the answer will be speculative or worse, exaggeration, and impossible to measure.
- c. Do you agree that restrictions on specific types of commercial activity should not be put in place unless there is clear strong evidence of that commercial practice causing significant harm? **Yes**. We need to recognise that we are commercialising legal services and must wait to see the outcomes, some of which may be failures or lead to unintended consequences, but that again would be speculation. The only course is to monitor and to take action promptly where there is evidence of consumer detriment.
- d. Do you agree that LAs should consider how ABS in general impact access to justice rather than trying to estimate the impact of each application singularly? **Yes**, one can only look at the big picture.
- e. Do you agree that LAs should monitor access to justice? **Yes** and with particular emphasises on affordability.

7. What is your view of our preference for a single appeals body?

- a. Should, in the future, a single body hear all legal services appeals? **Yes**, keep it simple!
- b. If you don't think there should be a single body, who should hear appeals from LSB decisions should it become a LA? **See answer 7 a.**
- c. Is the FTT, GRC an appropriate body to hear appeals? **Yes**
- d. What other options for the location of the body? **See answer 7 c. Let us not invent another wheel.**

8. Do you agree with our approach to special bodies?

- a. Do you think that special bodies' transitional arrangements should come to an end? **No**.
- b. Do you think 12 months after the start of mainstream ABS is sufficient time for them to gain a full licence? **Probably** but if they need longer, give it to them. **These are not bodies which the regulators should be overly concerned about, albeit the standard of legal advice/service must be the same as for the newer ABSs.**
- c. Do you think LAs should adapt their regulation for each special body? **No**. The adaptation should be generic and high level principles.
- d. Do you agree there are some core requirements that all special bodies should meet? If so, what do you think these are? **Yes** and they should be the same as for ABSs providing legal advice and legal representation.
- e. What are your views on the suggestion that the OLC should make voluntary arrangements with special bodies? **That could be the solution in the beginning and if it is satisfactory then let it continue and if not then more formal licensing and regulation could be put in place based upon the experience and evidence of the voluntary scheme.**

9. Do you think that our approach to HoLP and HoFA is suitable?

As we are commercialising legal services it is logical that we copy the structures and offices of existing and well regulated legal entities.

- a. Do you think that our approach on focussing on compliance systems across the organisation is suitable? **Yes**
- b. Do you think that HoLP and HoFA should undergo a fit and proper test? **No. Just specify the responsibilities.**
- c. Should there be training requirements for the HoLP and HoFA? **No. Just specify the responsibilities.**
- d. Do you agree that the HoLP and HoFA could be the same individual (especially in small ABS)? **Yes.**

10. Do you think that our approach to complaints handling is suitable?

- a. Do you think that ABS complaints should be handled in the same way as non-ABS complaints? **Yes.**
- b. Do you think that ABS should be allowed to adapt their complaints handling systems if they already have one for their non-legal services consumers? **Yes.**
- c. Do you think it is appropriate for the OLC take complaints from multi disciplinary practice consumers and refer where necessary? **Yes.**

11. What are your views on our proposed course of action to conduct research and, depending on the results, either compel transparency of data or encourage it?

- a. Do you agree with our position on diversity and ABS? **Yes. We particularly note the statement in paragraph 309 that, "given the diversity of the profession at entry level, attention should be brought to issues of progression and retention within the providers of legal services. The LSB envisages that ABS will create avenues for individuals to pursue new career paths and create new opportunities for progression and retention for those who wish to enter, or currently work within existing legal service providers". There is particular concern at the Bar in relation to the lack of professional training places (pupillages) for competent BVC graduates. Less than 30% of those graduating will obtain a pupillage. For those unable to complete their training and obtain a practising certificate, career progression is hampered. We hope that there will be opportunities for such lawyers in ABSs and that the BSB may introduce more flexible training requirements which reflect the needs of modern commercial organisations.**
- b. Do you agree that the overall impact is unlikely to be adverse to the diversity of the profession? **Yes.**

- c. Do you agree that non-lawyer managers may open new career paths to lawyers and these may have a positive impact on career progression? We are open minded but sceptical, but we cannot stand still and there is every reason to hope that lawyers can pursue career paths related to or parallel to the classic career of adviser and representative.
- d. Do you agree that the demand for diverse legal professionals will, largely, offset the potential impact due to the closure of small firms? We think it is too early to take a view on this.
- e. Should the LSB require information about the diversity of the workforce in ABS? If so when and should this be a requirement for other legal service providers? Yes. Target 5 years time. To do it too soon will gain little useful information. The whole regime and participants have to bed down.

12. Do you agree with our approach to international issues?

No. Focus on getting the ABS regime up and running smoothly in England and Wales.

13. /14. /15. No comments.

BACFI
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