

**Legal Services Commission Response to Solicitors Regulation Authority
(Consultation 18) on Legal Services Act: New forms of practice and
regulation**

3 August 2009

1. Introduction

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. Overview

An open and competitive market allows new models for legal services to develop. As the largest single procurer of legal services in England and Wales, the LSC welcomes increased competition and hopes that by supporting regulators to promote quality and modernise services to reflect consumer demand and choice, we will be able to purchase increasingly innovative and high quality legal services. Such services should be marketed in clear and concise user-friendly dialogue, ensuring the consumer is well informed and aware of how to access services that meet their individual requirements.

Regulation must be capable of supporting this type of open and competitive market. Regulators must assure the public, purchasers and the profession of the standards the legal profession are required to meet. These standards should support purchasers to buy the best value for clients and seek to drive standards above basic levels. In this context, allowing regulators to define their response to the risk of quality, as 'identification and management of the odd rotten apple' will not suffice.

3. Discussion points 1-5

We agree with the general principles laid out. The risks of ABS are essentially the same as existing structures –that financial interests will be put before clients interests, that there may be conflicts of interest, that matters will not be handled competently or that there may be dishonesty. There may of course be circumstances within some types of ABS that may make some of those risks more likely to materialise – for example the inclusion of large commercial organisations may raise more issues of conflict. Therefore any assessment of risk and targeted evaluation will need to be focussed, but this principle applies to current structures as well (for example it is known that sole practitioners can pose particular risks).

To enable a truly targeted approach regulation should be systematically reviewed to determine whether it is still necessary and effective. If not, it should be modified or eliminated.

Whatever the structures, principle based approach would be risky in this situation and must be supported by some form of assessment or audit. Hector Sants the Chief Executive of the Financial Services Authority admitted that within the financial services sector

“the limitations of a pure principle based regime have to be recognised. I continue to believe the majority of the market participants are decent people; however, a principle – based approach does not work with individuals that have no principles”.

The LSC fully supports a principle based approach but supported by outcome based regulation and is keen to understand what types of outcomes will be analysed to identify risk. In relation to the supervisory visits discussed within this consultation it would be useful to understand what the context of those visits will be, what the triggers are and why only large firms have been considered high risk? Any system that does not regularly assess compliance risks being a system that is always too late –too late for clients and, where public funds are involved, for the taxpayer.

The impact of ABSs and new business models on the existing market is not yet clear, but defining ‘access to justice’ will allow steps to be taken to ensure the market delivers services that meet all our consumer needs. The LSC has recently responded to the Legal Services Boards discussion paper on “Wider Access, Better Value, and Strong Protection”. In that response we suggested that a common definition of ‘access to justice’ is required. In order to reach a definition further research on the market and consumer needs will need to be undertaken.

4. Discussion points 6, 7, 8 and 9

Although there is agreement that business models should not be restricted and that there is huge benefit in outcome based regulation and intelligent supervision, the onus of regulation should be that it is in the client’s best interest. However services are delivered, and whatever other services are delivered by the owners of an ABS, those interests need to remain paramount and all legal services should be subject to clear standards.

Point 4.3 relies on the use of the Code of Conduct and other relevant rules and regulations to be applied to all individuals in an entity, as a method for future regulation. If this is to have any benefit then what’s required, in addition, is a mechanism to measure compliance with such rules. It is paramount that mechanisms are in place to measure compliance against such standards / rules or principles. Legal professionals are subject to either the Bar or Solicitor Code of Conduct, however, neither regulator has any system in place to systematically measure compliance against the code or against their own standards. What is required in the interests of clients is that this huge gap in this regulatory system be addressed and some form of routine assessment implemented.

5. Issues that need further consideration

In relation to the restriction on practicing solicitors to provide non - reserved legal activities through a separate business. The LSC agrees that this rule does operate in the client's interests and we therefore agree that this principle should apply to ABS.

6. The role of managers, HOLPS and HOFAs

We agree that the existence of the roles above will provide clarity of responsibility and accountability. The roles and responsibilities of those appointed should not be dissimilar but, the necessary skill and competence may vary as should be dependent on the business model. There is regulatory benefit in applying these roles to the traditional law firm, but from a risk perspective this may not be entirely necessary and may be disproportionate and costly for smaller firms or sole practitioners. If these positions were to apply to traditional law firms then the requirement that those positioned should be at manager or partner level may not be achievable.

The LSC considers these roles to be critical within an ABS but not necessary within a traditional law firm. Within an ABS the role will be vital in managing commercial success against solicitor requirements of independence and integrity.

7. Risk of financial collapse

In addition to the 'fit and proper test', systematic audit of an ABS's accounts may be required to safeguard against financial collapse. The compensation fund and or appropriate insurance should be in place to secure any financial losses incurred by clients.

We are grateful for the opportunity to respond to this consultation and hope you will find it useful. If you have any further queries please contact Louise Sowden at louse.sowden@legalservices.gov.uk or telephone 0117302312.

Yours sincerely

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