

Wider Choice and better protections – a consultation on the regulation of legal services in Scotland

Response to the consultation by the Scottish Legal Aid Board

Chapter 2: Alternative business structures

1. Do you agree that alternative business structure (ABS) should be permitted for the provision of legal services by solicitors in Scotland?

Yes.

The Board is supportive of the introduction of ABS for legal services in Scotland subject to there being robust but proportionate regulatory arrangements in place. ABS has the potential to increase access to justice by encouraging efficient business structures.

2. Are there any of the 3 business structures described in paragraphs 2.21 to 2.30 which should not be permitted?

No.

None of the structures being proposed appear to have any fundamental flaws. However, the key issue for the Board is that robust and proportionate regulatory regimes are put in place.

3. Are there any of these 3 business structures which should be permitted but which you feel would require additional safeguards?

No.

4. N/A.

Chapter 3: Who will be affected by the Bill?

5. Should the areas of business reserved to legal professionals as described in paragraph 3.3 remain as now?

Yes.

6. Do you support the proposals that the Bill should focus on the regulation of legal professionals and businesses where legal professionals are involved in the provision of legal services to third parties (for the reasons given in paragraph 3.8)?

Yes.

7. Do you agree that (subject to the issues discussed in chapter 7 and 8), the arrangements for regulation of solicitors and advocates in traditional forms of practice should remain as they are now?

Yes.

8. N/A

Chapter 4: Principles of regulation
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9. Do you agree that there should be a statement of regulatory objectives for providing legal services in ABS as proposed in paragraph 4.8?

Yes.

10. Do you agree that regulatory objectives should be supplemented by consideration which should guide the actions of regulators, as proposed in paragraph 4.9 and 4.10?

Yes.

11. Do you agree that there should be a statement of professional principles for those providing legal services in ABS, as proposed in paragraph 4.11?

Yes.

12. Are there any amendments which should be made to the Government's proposed listings at paragraphs 4.8, 4.10 and 4.11?

No.

13. Do you agree that it should be possible for regulators to grant conditions of licence or refuse a licence to operate an ABS where there is demonstrable evidence of a risk to access to justice (as proposed at paragraph 4.27)?

Yes.

14. Do you have any other suggestions as to how the regulatory objective of promoting access to justice can best be achieved?

The Board supports a mixed model of provision of legal advice services. This includes private sector provision, in addition to alternative forms of supply of legal advice services.

The key issue to be borne in mind is access to justice. We agree that explicit requirements to offer particular services would be very difficult to operate and would not be the best approach. It will be important for the regulator of ABS to have regard to the effect an ABS could have on access to justice. However, in exercising this control, preference should not be given to one supplier over another.

Chapter 5: The regulatory approach

15. Do you agree that ABS should be regulated at the entity level, with individual professionals regulated by their own professional bodies, as set out in paragraphs 5.1 and 5.2?

Yes.

16. Do you agree with our proposals for defining the ABS in paragraph 5.6?

Yes.

17. Do you agree with our proposals for dealing with regulatory conflict in paragraphs 5.10 to 5.12?

Yes.

18. Do you have any views on how the legal professional privilege should be protected in an ABS with reference to paragraphs 5.13 to 5.15? If so, please provide details below.

The approach suggested in the consultation appears to be appropriate.

19. Do you have any views on the setting up of some form of advisory panel to advise Ministers on applications as described in paragraph 5.21? If so, please provide details below.

We would be in favour of this but consideration should be given to how they will review regulator performance.

20. Do you agree that Ministers, with the agreement of the Lord President, should authorise ABS regulators as proposed in paragraph 5.16?

Yes, but there should be periodic review.

21. Do you agree that the Bill should set out the criteria for authorisation of ABS regulators, and that these criteria should relate to organisational capacity, independence, and an appropriate regulatory scheme (as proposed in paragraph 5.16)?

Yes.

Chapter 6: Ownership of legal services

22. Do you agree that there should be a “fit to own” test specified by the ABS regulator which should apply to anyone owning, or acting as a principal in an ABS as proposed to paragraph 6.5?

Yes.

23. Do you agree with the details of the test as proposed in paragraph 6.5?

Yes.

24. Do you agree that the proposals provide sufficient safeguards to ensure that professional principles are not compromised in ABS which are externally owned?

Yes.

25. N/A

Chapter 7: Law Society of Scotland

26. N/A

27. Do you agree that there should be significant non-lawyer membership on the Council of the Society?

Yes.

28. Should the representation and regulatory roles of the Society be split as proposed by the OFT (see paragraph 7.17)?

There needs to be adequate separation between the representation and regulatory roles of the Society, particularly if the Society is the regulator of ABS, to meet the dual interests of consumers of legal services and solicitors.

29. Should the Guarantee Fund or an equivalent provision be required for ABS?

Yes. There should be equivalent protection for the clients of ABS.

30. Should the liability under the Guarantee Fund be capped, either for individual claims, or the overall liability?

No. The Fund must to be able to meet the liabilities which may fall to it.

31. N/A

Chapter 8: The Faculty of Advocates

32. Do you agree that the Faculty should not be required to allow its members to form partnerships or participate in ABS, provided that those wishing to do so can easily become solicitor advocates?

The Board supports the ability of lawyers to work in partnership or participate in ABS, provided they are properly regulated.

33. Do you believe that the regulatory framework of the Faculty should be organised into a code set out in law?

Yes. The codification of the regulatory framework for the Faculty would be helpful to all.

34. N/A

Chapter 9: Regulation of claims management

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The Board has no direct experience of claims companies. However, where legal services are being provided, the Board considers that proportionate regulation is important.

SCOTTISH LEGAL AID BOARD

RESPONSE TO LAW SOCIETY OF SCOTLAND CONSULTATION ALTERNATIVE BUSINESS STRUCTURES IN SCOTLAND

Introduction

1. The Scottish Legal Aid Board welcomes this opportunity to participate in the debate over the future delivery of legal services and alternative business structures in Scotland. As the body responsible for administration of legal aid, the Board has a keen interest in any likely changes in the way the legal services market operates.
2. We have considered the consultation paper and the range of options for change identified within it. In response to the consultation we have identified a number of broad issues in which we have an interest, our views on which are detailed below.

Access to services of an appropriate quality

3. The Board's primary interest is in ensuring an adequate supply of legal aid services, that these services are of an appropriate standard and that there are adequate protections for clients and the public purse. In regards to each of these issues, we agree with the view expressed in the consultation that the option of no change is simply not an option in the current climate. Beyond that, with regard to the potential impacts of the range of alternative business structures explored in the consultation paper, at this stage we can identify a range of possible positive and negative impacts.
4. The Board is aware that a number of potential risks flowing from the various forms of ABS have been suggested:
 - An increased concentration of large-scale providers in urban areas, with fewer providers based in rural areas
 - Larger-scale providers "poaching" high income/regular income work from local firms – where this work might previously have provided a subsidy for doing a balance of perceived lower-value work, this could result in a shift in focus for remaining local firms away from legally aided work
 - Increased "business" pressure to focus on high-income-generating work at the expense of legal aid work
 - A reduction overall of smaller legal firms, which tend to be the firms that provide legal aid services
 - Undue influence being exerted at expense of independence of advice, or quality of advice provided
5. However, the Board would suggest that many of these risks are already inherent in the operation of the market vis à vis legal aid. Indeed, the consultation paper itself notes that there is already concern about future supply in specific areas of the market, including a number of areas key to legal aid provision.
6. The Board would argue that there is not currently a shortfall of practitioners engaged in criminal legal aid work, although we do have concerns about future supply. However, we do recognise concerns in relation to family law, welfare,

debt and housing law. Other than family law, it might be argued that the current market structures have never catered properly for these areas.

7. We would also observe that the civil legal aid 'market' is almost entirely reliant on firms being willing to undertake legal aid work and balancing this with private fee paying work that the firm does, or could, undertake. The reduction in firms undertaking civil legal aid work alluded to in the consultation paper is itself at least in part a result of some firms deciding that other work is more commercially attractive than legal aid work, particularly in the context of large increases in private fees in recent years. In other words, the Scottish legal aid system is already vulnerable to the kind of shifts in the market that the consultation suggests may arise from a relaxation on the rules regarding business structures.
8. It is not therefore clear to the Board how any such change from the current structure of the profession on its own is likely to pose any greater risk to stability of supply than we already face. Instead there might be potential advantages for consumers of legal advice services, which might be provided by way of a different type of structure that might be more suited to providing advice at different times of day, by different means and in a more holistic way.
9. The Board suggests the following possible positive outcomes of opening up new forms of business structure:
 - Small providers – the kind of firms more likely to provide legal aid services - may be able to spread their business risks by combining with other professionals to provide a wider range of services. This may make their businesses more sustainable both in the short term and, if the variety of business undertaken by such firms makes them more attractive to new entrants to the profession, the longer term.
 - Similarly, by coming together with other providers, firms may be able to provide services through a hub and spoke structure, without having to bear the full cost of additional service outlets.
 - An increase in competition for some of the traditional general civil private client work (and any reduction in price that this may bring) might actually result in more of a focus on legally aided work as a regular source of business
 - Combinations of services being provided from one core organisation might improve the outcomes for people requiring legal assistance
 - There might be increased specialisation but over greater geographic areas so that there may be a resultant increase in access to high quality services for people in rural areas
 - The newer models of service delivery might be more proactive in seeking to explain their services and marketing them
 - New forms of business, such as social enterprises, might seek to combine legal (aid) services with other services.
10. It is unclear how exactly the market might respond to the availability of any particular range of possible alternative structures. It is therefore impossible at present to say how or whether the risks and opportunities will balance each other.

11. This will very much be influenced by the precise range of models allowed, the regulatory structure put in place for them and the response of the market to their availability. This may well vary from place to place, firm to firm or type of work to type of work.
12. The Board can see no objection in principle to the various forms of ABS outlined in the paper and indeed believes that each has potential to offer benefits to consumers of legal services, including publicly funded legal services. The extent to which each might impact negatively on access to services may vary, but much depends on the way(s) in which the development and operation of any new business models are regulated. The Board would support the suggestion made in the paper that any change should be preceded by a regulatory impact assessment.

Regulation

13. With regard to regulation, we believe that it has the central role in managing the risks that may be associated with enabling change. It should seek to ensure that legal services are of an appropriate quality, regardless of what kind of business structure is used to deliver them. The Board is already involved in regulation of publicly funded legal services, and this is the approach we currently adopt, with a focus on the quality of the advice that is provided by way of public funding.
14. If the range of models of business structure is to expand, that would certainly have an impact on the kind of relationships that would need to develop between bodies already involved in regulating various aspects of legal service delivery, and the Board would wish to be an active participant in this.
15. However this is not an alien concept and would be a development of principles that are already in place, for example with regard to the regulation of the provision of immigration advice. The statutory framework for this already requires agreement to be in place between the Law Society and the Office of the Immigration Services Commissioner, which share responsibility for ensuring the quality of services provided by solicitors in this area. Similarly, where law firms provide financial services, they will be regulated by the Financial Services Authority as well as the Law Society.
16. The Board can therefore see no reason why suitable regulatory arrangements could not be put in place to ensure consumer protection where various services are provided through a single business entity, or where legal services are provided by non-lawyers. This could either take the form of additional regulatory requirements (like the FSA), shared responsibility for aspects of the work of the practice (like the Board and Society's roles in relation to criminal legal assistance), or coordination of existing structures e.g. where accountants or other professionals are already subject to significant professional regulation.

Conclusion

17. In conclusion, the Board believes that some change along the lines set out in the consultation paper would be beneficial. The Board does not believe that the current business structures, ownership rules and regulatory regimes are the only ones that can deliver high quality, ethically sound services to all parts of the legal

market. Indeed, the market for legal services as it stands does not currently appear to meet all consumers' needs for legal services in the most affordable and accessible way.

18. The Board sees no reason of principle for preventing the formation of the types of alternative business structures outlined in the paper and believes that these may offer distinct advantages to those in need of legal services.
19. However, the extent of the profession's desire to adopt the different models is inevitably unknown at present, and so it is very difficult to predict with any confidence exactly how the various risks and opportunities may balance each other. The Board believes that the development of appropriate regulatory structures is key to managing the risks identified in the paper. In this context, the Board also believes that some form of staged approach to what could be quite radical changes would be sensible.
20. Whatever the degree of change the profession proposes, and which Government decides to make, the Board would certainly wish to continue to monitor the operation of the legal services market as we do now to identify any negative shifts in accessibility. However, we would also want to work with the Society and the profession to identify any opportunities that the new business models might offer for achieving positive impacts for improving access to holistic and quality publicly funded legal services.