

# The potential impact of Alternative Business Structures (ABS) on the diversity of the legal workforce

## Introduction

1. The LSB is committed to placing equality and diversity at the heart of the regulatory framework. This short paper seeks to respond to concerns raised about the potential impact of ABS on the diversity of the legal workforce, and outline next steps. It deliberately does not cover the separate but related issue of how the introduction of ABS might impact on access to legal services for different groups of consumers.
2. The current legal workforce is now relatively diverse at entry level in terms of gender and ethnicity when compared with the UK population as a whole. However, it is less clear that progress is being made on retention and progression (for example, available data suggests that only 25% of partners in solicitors firms are women, and only 3.5% of partners in the top 150 firms are BME). There is evidence that the numbers of women and BME lawyers entering the profession has been increasing for a number of years. For example, in 1999, 53% of newly admitted solicitors were women and 13% were BME. However, the anticipated 'trickle up' effect to the senior levels of the profession has not materialised.
3. The introduction of ABS is about removing existing restrictions on the ownership of law firms. These structural changes may lead to changes in the market which have an impact on diversity, and this could include some adverse impacts in the short term. But we are convinced the fundamental underlying issue with diversity in the profession is cultural, and not to do with legal ownership structures. It is people - principally the owners and managers of law firms - that have the ability to change the culture of the profession. The statistics and the academic literature<sup>1</sup> suggest that current restrictions on business structures do not promote diversity, and in some respects may contribute to the barriers to the retention and progression of women and BME lawyers (for example opaque processes around promotion to partnership)<sup>2</sup>. It is therefore difficult to argue a case for maintaining the existing restrictions so as to avoid potential adverse impacts in terms of diversity.
4. The impact of ABS on the legal services market is difficult to predict, as it is entirely dependant on take-up by businesses already operating in the legal services market or seeking to enter it. One possible scenario is that ABS will hasten the consolidation of the market, leading to fewer, but larger, law firms and the entry of large corporate firms.

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<sup>1</sup> For example Bolton, S and Muzio, D (2007) *Can't Live With 'Em, Can't Live Without 'Em: 41(1) Gendered Segmentation in the Legal Profession*, pp.29-45

<sup>2</sup> Sommerlad et al, research for the LSB (to be published autumn 2010)

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Another possible scenario is that take-up will be low, with little impact on the structure of the market. The LSB is currently developing an ABS impact assessment, and the impact will need to be monitored once ABS has gone live in October 2011.

5. Modelling the potential impacts of ABS is hampered by the limited evidence base. However, it is important that the LSB, approved regulators and representative bodies engage with practitioners and interest groups to explore the concerns raised and, where possible and appropriate, agree on appropriate action to mitigate adverse impacts.
6. We consulted on the potential diversity impacts of ABS in our consultation *Approaches to Licensing* in autumn 2009. The majority of respondents agreed with the LSB's position that there were a range of potential benefits to the introduction of ABS that would in turn have a positive effect on the diversity of the profession. However, we acknowledge that there are also risks in that new business models could increase the competitive pressure on small firms. This could lead to adverse impacts, at least in the short term. We have also discussed the potential diversity impacts of ABS through the LSB's Diversity Forum of Professional Regulators, which highlighted the need to monitor the impacts closely and take action to mitigate these impacts where possible and appropriate.

### *Potential adverse impacts*

7. The main concern expressed about the diversity impact of ABS is the potential impact on small firms, which may struggle to survive in an increasingly competitive market. Some predict that ABS will lead to the closure of small firms, where BME practitioners are disproportionately represented – although recent research commissioned by the Law Society suggests that some small firms consider that they are likely to be resilient in the face of ABS<sup>3</sup>. The viability of small firms is an issue regardless of ABS, which is simply about removing existing restrictions on ownership. Consolidation within the market is already taking place as a result of a range of factors (for example the economic climate, legal aid reforms and changing consumer demands) – and even without ABS it is likely that some small firms would merge or close. Ultimately, the question of whether small firms and chambers survive will be determined by their ability to compete in the market (and, for some, ABS may be an opportunity to diversify and grow through greater access to capital and ability to innovate).
8. It cannot be the role of regulators to preserve a system which protects businesses from competition, for fear of an adverse impact on diversity. The more appropriate response is to examine the reasons underlying some of the current issues – for example why BME practitioners are disproportionately likely to work in small firms<sup>4</sup> - and take action to address them.
9. The removal of ownership restrictions could speed up the process of consolidation by increasing competitive pressures, and in that respect it could lead to a short term decrease in the number of BME practitioners. However, there is no reason to believe that any such impact would be sustained. Particularly if ABS leads to better value services and hence greater access to justice, it is quite probable that this increase in demand would lead to a

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<sup>3</sup> <http://www.lawgazette.co.uk/news/small-firms-will-be-resilient-face-abss>

<sup>4</sup> Law Society Statistics (2009) show that 50.2% of minority ethnic group solicitors work in firms with 4 or fewer partners, compared with only 28.1% of white Europeans.

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large majority of the practitioners who were based in these small firms going on to work in ABS (perhaps with greater opportunities for progression), rather than permanently leaving the legal workforce.

10. Some stakeholders have also argued that ABS will not have a positive impact in terms of gender equality, as ABS will be commercial entities driven by economic incentives and might not be encouraged to provide flexible working arrangements or employee benefits (e.g. maternity pay/leave) beyond the minimum statutory requirements. However, this assertion is not supported by evidence. In fact a number of large corporations (for example BT and Lloyds Banking Group) have many employees with flexible working arrangements and offer enhanced employee benefits such as generous maternity pay/leave. Also, it is not clear that existing small law firms provide anything above the minimum requirements in terms of maternity pay/leave.
11. Arguably large firms operating on a more 'corporate' basis are more likely to have better employee benefits and better integrated IT systems enabling more flexible off-site working – they can therefore be more responsive to employees who have specific needs. Further, if small law firms are not already being run on a so-called 'commercial basis' now then they are unlikely to survive in an increasingly competitive market.
12. The LSB therefore believes that the key to overcoming some of these issues is not to seek to delay or avoid ABS. It is to promote diversity as a mainstream issue across the profession, encouraging greater flexibility and fostering cultural change through increased transparency and accountability at firm or chambers level.

### *Potential opportunities*

13. The LSB considers that one major benefit of ABS could be to help accelerate changes in the culture of the legal profession. Many aspects of the existing culture and business structures prevalent in the legal sector do not promote the retention and progression of a diverse workforce – as evidenced by the persistent inequalities at the senior levels of the profession despite the increased numbers of women and BME practitioners entering the profession over a number of years. It is therefore difficult to make an argument that these structures ought to be preserved in order to avoid an adverse impact on diversity as a result of ABS.
14. Research highlights the barriers to entry and progression experienced by BME and female practitioners – which are both cultural and structural<sup>5</sup>. The academic literature also highlights that the tendency of women and BME practitioners to work disproportionately in particular areas of law (e.g. family law or immigration), and therefore small firms, is not necessarily the result of a choice<sup>6</sup>. Rather, some practitioners feel that they have been subject to differential treatment and have been pushed into particular areas which are traditionally the preserve of the white male lawyer (for example commercial law or shipping

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<sup>5</sup> See, for example, Shiner, M (2000) *Young, gifted and blocked! Entry to the solicitors' profession* in P Thomas (ed) *Discriminating lawyers*. London, Cavendish; Ashley, L (2009): *Making a Difference? The Use (and Abuse) of Diversity Management at the UK's Elite Law Firms*. University of Oxford

<sup>6</sup> Bolton, S and Muzio, D (2007), op. cit.

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law). This masculine ethos<sup>7</sup> is arguably reinforced by the partnership model, which relies heavily on networking and patronage – so to succeed in their career lawyers must “fit in, play the game, mix socially and look the part”<sup>8</sup>.

15. All this suggests that opening up the market as a ‘level playing field’, and creating an environment where new entrants to the market can innovate, will break down the prevailing culture and provide more opportunities for women and BME practitioners to progress. Changes to the legal market and new, innovative business models could help introduce greater flexibility (for example through virtual law firms) and new career paths, including in management roles.
16. There is also evidence that in-house, employed lawyers are currently considerably more diverse than solicitors in private practice or self-employed barristers. This may be down to more formal and objective processes for promotion, more opportunities for flexible working and a culture which is more accepting of diversity (for example in the public sector or large corporations). Again, this suggests that the introduction of new business models and the need for a competitive response to them from those firms who choose to retain more traditional partnership or Chambers models could lead to greater opportunities for women and BME practitioners to compete on an equal footing with their white male colleagues.
17. We consider that there is a significant role for professional bodies to play in helping their members find ways of realising the benefits of ABS. For example, small firms could be supported to adapt their business model and remain competitive; and awareness could be raised about the alternative business models already emerging (e.g. virtual law firms and partnerships between solicitors and barristers).

### Next steps

18. The LSB will be engaging with a range of interest groups (for example the Black Solicitors Network, Society of Black Lawyers, Association of Women Solicitors, Association of Women Barristers, the InterLaw Diversity Forum) to discuss this paper and seek the views of those affected. This will supplement the input already provided by the profession through consultation responses and the LSB diversity forum. The outputs from these discussions will feed into the impact assessment for ABS. We also welcome the submission of evidence from any interested party that will help us to assess the potential impact of ABS on diversity.
19. More broadly, we are working with approved regulators on the development of a framework for the collection and publication of diversity data by regulated entities (e.g. solicitors firms and chambers) across the whole legal workforce. We expect that licensing authorities will want to impose the same requirement on ABS. This should produce much more comprehensive data about the diversity make-up of the profession at entity level, enabling the impact of ABS to be measured in relation to diversity at all levels of seniority.
20. The LSB and the government are clear that ABS will be introduced - maintaining the status quo is not an option. The focus should therefore be on harnessing the opportunities

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<sup>7</sup> Francis, A (2006) *‘I’m not one of those women’s libber type people but...’: Gender, class and professional power within the third branch of the English legal profession* Social and Legal Studies 15(4). SAGE Publications.

<sup>8</sup> Sommerlad, H and Stapleford, J (2008) *Barriers to entry and progression in the solicitors’ profession in England and Wales*

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provided by opening the market. It will also be essential to monitor the impacts, although we will need to do this over the medium term (1-2 years after ABS starts) before we can assess the overall picture and what, if anything, needs to be done to mitigate any adverse impacts.

### *Summary of possible actions for discussion*

The following are possible actions that approved regulators, professional bodies and/or the LSB could take:

- Conduct research on underlying reasons for current issues - particularly why small firms are less diverse.
- Ensure co-ordinated action is taken to promote diversity, including flexible working, transparency of diversity make-up at firm level and other initiatives to support career development (mentoring, robust and transparent HR processes etc).
- Professional bodies to work with their members to offer support and guidance to maintain competitiveness in the changing market.