The Law Society

"ABS: Approaches to Licensing"
Law Society Response to the LSB Consultation

18 February 2010

supporting solicitors

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Introduction

1. The Law Society welcomes the opportunity to respond to the Legal Services Board consultation "Alternative Business Structures: Approaches to Licensing". The Law Society has been a very major player in the discussions about liberalisation of the framework through which legal services can be provided. The Society believes the way in which ABS are introduced is crucial in terms of maximising public access to justice; ensuring an independent strong diverse and effective legal profession; and securing the reputation of English legal services internationally.

2. The Law Society's detailed response to the questions posed by the Legal Services Board is set out in the Annex to this document. This introductory section sets out the background and highlights some key themes in the response.

Background

3. Until the late 1980's, the proposition that regulated legal services should be provided to the public only through firms comprised entirely of lawyers, with no external owners, went largely unchallenged.

4. A series of Green Papers issued by the then Government in 1989 considered a range of restrictions concerning the provision of Legal Services. One of these was the prohibition on lawyers acting in partnership with other professionals. Following response to the consultation, the Government eventually decided that it would lift the statutory prohibition on multi-disciplinary partnerships, but would leave it to the professional bodies concerned to decide whether to amend their rules so as to permit MDPs in practice.

5. During the 1990's, the Law Society (which was then, as now, the body responsible for regulating by far the largest number of lawyers) itself re-examined the existing code of conduct for solicitors with a view to seeing where existing restrictions could be relaxed. This led to some significant changes – including removal of the prohibition on advertising generally, and then on price advertising.

6. The Law Society also considered the restrictions on the entities through which Legal Services should be provided to the public. In October 1999, the Law

Society Council adopted the policy that "solicitors should be free to provide services to the public through any entity, provided that the necessary consumer protections could be maintained." At the time, this was regarded as referring to what has become known as Legal Disciplinary Practices – in which lawyers work together with non lawyers, but where the practice is owned by the managers of the practice, rather than by an external body.

7. However, the Law Society considered the question of external ownership of law firms in March 2002, when considering the restrictions the Practice Rules imposed on the work which solicitors employed by a non solicitor organisation could do for customers of their employers. In that context, the Law Society Council resolved that solicitors employed by such organisation should be able to provide services to their employer's clients provided that:-

    - The employers themselves were fit and proper persons to own a law firm.
    - The provision of services was governed by the same practice rules, and the same consumer protection arrangements, as ordinary law firms.
    - The law firm business was ring fenced from the rest of the employer's activities.

    This became colloquially known as "TescoLaw".

8. The Office of Fair Trading came to a similar conclusion when it reviewed the restrictions on competition in the legal professions in 2001.

9. The Law Society aimed to introduce these changes through liberalisation of its existing rules. However, it transpired that the statutory powers under which the Law Society regulated solicitors did not at that time enable it to regulate non-solicitors even with their consent. It was thus necessary for changes to primary legislation to be made before the Law Society could implement these proposals.

10. The matter was thus left to the Legal Services Act, which has established a structure under which the Legal Services Board will authorise approved regulators to become licensing authorities for what are now known as Alternative Business Structures – i.e. firms in which there are non lawyer managers, or external owners.

<u>The Legal Services Act provisions</u>

11. Although the provisions on ABS in the Legal Services Act were not controversial on party political lines, they were nevertheless closely debated. A number of Parliamentarians on all sides had some concerns about the provisions. The eventual outcome highlighted a number of key principles, which the Law Society strongly endorses.

    - There must be rigorous scrutiny of the fitness to own of external owners.
    - ABS firms must be regulated by the same regulators as ordinary law firms – only approved regulators under the Legal Services Act can become licensing authorities.
    - As with other law firms, the Legal Services Board's role is as a supervising regulator, not as a lead regulator.

- Proper arrangements must be made to secure public and consumer protection from ABS firms, as from other law firms.
- Specific attention must be given to the possible impact of ABS firms on access to justice.

Ensuring Successful Implementation

12. The Law Society is concerned that the LSB's current approach to implementation involves unnecessary risks.

13. The Society expressed concern at the Legal Services Board's intentions, set out in the first consultation paper, that ABSs should be implemented by mid 2011. That concern is magnified by the proposal in the current consultation paper that the Licensing Authorities should adopt an outcome focussed approach to regulation in order to license ABS firms. For reasons set out later in this response, it is in any event inappropriate for the LSB to mandate a particular approach to the regulation of ABS firms. But the Society's main concern is the impact this would have on implementation.

14. The SRA – and, we believe, other regulatory arms – will need to adopt the same approach to regulation of ABS firms as to other firms they regulate. This means that under the LSB's proposals, SRA will need to adopt an outcome focussed approach to regulation for all firms.

15. Although the Law Society agrees there is a good case in principle for introducing outcomes focussed regulation, requiring this to be in place by 2011 may well be unrealistic. Moving to outcomes focussed regulation will require from SRA substantial work in preparing the new rules and enforcement policy; in consulting the profession and other stakeholders about the proposals; bringing about a major culture change within SRA, particularly so far as the approach to enforcement is concerned; and effective communication to the profession about the changes. The Law Society is more than ready to help SRA with all this. But, as with any organisation, there is a limit to the number of major initiatives which SRA can successfully take forward simultaneously. Given the existing work on bedding in entity based regulation; developing a new approach to regulation of corporate firms; and introducing a new approach to charging for the costs of regulation, it may well be over ambitious to seek to introduce ABS during 2011 on the basis of an outcome focussed approach to regulation.

16. It is of crucial importance to the reputation of ABS firms (and legal regulation generally) that ABS are introduced successfully, and do not immediately give rise to serious regulatory issues. If that is not achieved, the likelihood of ABS firms being respected at home or accepted internationally will be seriously undermined for many years to come. It is far more important to ensure that ABSs are introduced on a sound regulatory footing, rather than to ensure that some arbitrary deadline for their introduction is met.

17. ABS could probably be introduced on broadly the current rule book during 2011, with LAs/ARs who wished to do so (including SRA) moving to outcome focussed regulation after ABS have been successfully introduced. Alternatively , if LSB are (wrongly in our view) determined that ABS should only be introduced if LAs adopt an outcome focussed approach from the outset , the timetable will need to be extended so that that can be done without running an unacceptable risk to the integrity of the regulatory regime.

Fitness to own

18. The Law Society supports the provisions in the Act on fitness to own. We are broadly content with the way in which the Legal Services Board sets out its approach to this. We recognise that fitness to own is an ABS specific issue, and that there may therefore be a strong case for the Legal Services Board giving clear guidance to prospective licensing authorities about the approach the LSB will expect them to take.

19. However, we do not think it appropriate for the Legal Services Board to require specific evidence from licensing authorities before the licensing authority might apply a lower percentage than 10% to the question of what is a "material interest". Bearing in mind the very strong public interest in ensuring that law firms cannot come into the hands of unsuitable owners, we do not think that prospective licensing authorities should be discouraged from taking a more cautious approach to what constitutes a material interest than is mandated by the Act.

Regulation by the same regulators as other law firms

20. It is a crucial part of the legitimacy and acceptability of ABS firms – not just in England and Wales, but internationally – that they are simply another variety of law firm, rather than an entirely separate breed, exempt from the requirements on other law firms. That is one reason why the Act requires that only approved regulators can become licensing authorities.

Regulation requirements on ABS firms

21. In the Law Society's view, it is essential that ABS firms are treated in the same way as other law firms which each licensing authority regulates, rather than as a separate species. Consequently, an ABS firm regulated by the Council for Licensed Conveyancers or by the Solicitors Regulation Authority would be expected to be subject to the same rules as all other firms regulated by the CLC, or by the SRA, respectively. ABS firms must be subject to the same regulatory requirements as other firms regulated by their particular regulator, rather than being subject to a separate set of rules applying to all ABS firms, whichever their regulator.

The role of the Legal Services Board

22. Although there are already some firms operating in the legal field which will become ABS firms (in particular some regulated by the Council for Licensed Conveyancers) the Law Society recognises that the ABS concept is relatively novel within the provision of legal services in England and Wales. For that reason, there is obviously some benefit in the Legal Services Board setting out what it would expect from a licensing authority on ABS specific issues such as fitness to own, rather than each licensing authority wrestling with those issues without any guidance.

23. But it is important not to allow that practical issue to lead the Legal Services Board to take a role in relation to ABS's which is not legitimate. The principle remains that LSB is a supervising regulator, rather than the lead regulator. To take a specific example: as it happens, the Law Society supports the LSB's proposition that regulation should become more

focussed on outcomes rather than detailed rules. But if a particular approved regulator preferred to retain a rules-based approach for the time being, it should not for that reason be prohibited from becoming a licensing authority. The LSB cannot credibly argue that a rules-based approach is inherently wrong. Accordingly, it cannot properly prohibit regulators from continuing to take that approach to ABS, as to other law firms they regulate.

Public Protection

24. In the Law Society's view, it is imperative that the public protections – in terms of indemnity insurance and compensation fund cover – enjoyed by consumers who choose ABS firms are the same as those provided by other law firms regulated by the same regulator. It could not be acceptable for the level of protection to differ depending on the nature of the firm. There cannot be any assumption that ABS firms will necessarily be large – it is perfectly possible for an ABS firm to be in the nature of a corner shop, rather than a supermarket.

25. The Law Society does recognise that there is a case for the Legal Services Board to look at indemnity insurance and compensation fund arrangements across the legal sector as a whole. It may be that there should be greater uniformity on these matters between the different approved regulators, although the Law Society is not aware of any significant consumer detriment arising from the present arrangements (unlike, for example, the major consumer detriment arising from the fact that will making and the administration of estates are not reserved activities.) But the principle must be, pending any sector-wide review, that the same level of protection should be available to consumers using an ABS firm regulated by a particular regulator as is available to those who use a non ABS firm regulated by the same regulator.

Access to Justice

26. The Law Society does not consider that the approach the Legal Services Board takes to access to justice issues concerning ABS is satisfactory.

27. The Legal Services Board consultation paper appears to be based on the proposition that ABS will self evidently lead to an overall improvement in access to justice, and that anybody who raises concerns about access to justice is doing so with the intention of seeking to obstruct Parliament's will that ABS should be permitted. That approach misrepresents the nature of the concerns.

28. The Law Society's proposition is not that ABS will, overall, damage access to justice. The Law Society has for many years consistently supported the introduction of what have come to be known as ABS, and the Law Society would not have done so had it considered that they were likely to have a damaging impact on access to justice overall.

29. But the Law Society does consider that there is a potential risk from some forms of ABS, at least in some areas of the country. In the Society's view, there is a particular risk if large new providers, concentrating on easily commoditisable work, provide a limited range of legal services in some less heavily populated parts of the country. The impact of that could be to render unviable existing suppliers, who provide services in more complex

areas of law. A similar concern might arise in more heavily populated, but ethnically diverse areas, where a greater diversity of providers may be needed to serve all communities in the area. This is not to imply that the new ABS providers would necessarily be acting improperly. It simply reflects a foreseeable risk from particular forms of ABS operation.

30. The Law Society alerted Parliamentarians to these concerns during the passage of the Legal Services Act. Consequently, the Act was amended at a late stage so as to introduce a specific requirement on licensing authorities to include in their rules "provision as to how the licensing authority, when considering the regulatory objectives…… in connection with an application for a licence, should take account of the objective of improving access to justice."

30a. The Legal Services Board argues that access to justice does not always require face to face contact with a lawyer. The Law Society recognises that that is correct for many consumers, for some types of legal need. But it is not true for all. The Legal Services Commission recognises that face to face contact is often essential, and requires firms seeking civil contracts to have offices within the relevant locality. Similarly, the licensing authorities for ABS firms will need to ensure that the introduction of ABS firms does not lead to a loss of local firms where they are necessary to secure effective access to justice.

31. The Law Society has commissioned some analysis from economic consultants designed to identify the degree to which this theoretical risk is a real possibility, and if necessary to suggest mechanisms which might be adopted to mitigate the risk. The Law Society anticipates the results of this work being available in good time to inform the development of rules by the SRA and other prospective licensing authorities.

32. The Law Society cannot say at this point precisely what mechanisms would be appropriate to reduce the risk of large ABS damaging access to justice in less populated areas. However, Parliament has included a specific duty on licensing authorities to take account of this issue. Accordingly, the Law Society believes that the Legal Services Board must not merely permit, but require individual licensing authorities to demonstrate that they have carefully considered access to justice in framing their proposed licensing rules.

<u>Multi Disciplinary Practice</u>

33. The Law Society supported the provisions in the Act enabling licensing authorities to regulate multi disciplinary practice – i.e. firms providing legal work together with other work which lawyers cannot properly do – to be permitted. But as David Clementi described, these forms of ABS raise substantially greater regulatory challenge than external ownership.

34. Partnerships involving non-lawyers are relatively straight forward. In the context of solicitors firms, the Solicitors Regulation Authority have already made arrangements to regulate LDP's under the powers acquired in the Legal Services Act. External ownership clearly raises additional issues, particularly around fitness to own and the relationship between ABS owners and between the law firm and the remainder of the ABS owners business, but these issues appear to the Society to be manageable.

35. But MDPs – providing through a single entity both lawyers services and services which lawyers are not generally permitted to provide - raise additional complications. These other services may be categorised as falling into one or more of the following categories:-

- Services which are subject to exclusive mandatory regulation by another regulator (such as some financial services work).
- Services where there is a potential conflict of duties in providing alongside Legal Services (such as audit services).
- Services which are otherwise regarded as inappropriate to provide alongside legal services.

36. The services coming within the first category can be brought within the scope of an ABS firm, provided satisfactory arrangements are made with the non-legal regulator, as has already happened with FSA in respect of solicitors' involvement in financial services work. Services in the third category will need to be considered case by case to determine whether it remains inappropriate for them to be carried out as part of a legal business. But services in the second category will need to remain prohibited so far as provision to clients of the law firm are concerned. The conflicts involved in providing legal and audit services to the same clients cannot readily be overcome by arrangements between regulators. Furthermore, the Law Society does not consider any significant consumer detriment arises from the fact that full blown multi-disciplinary partnership of that sort are not yet permissible. The Society certainly does not consider that consumer detriment (if any) is sufficient to justify taking significant risks with the integrity of the regulatory regime.

Appeal arrangements

37. The Legal Services Board suggest that there should be a single appeal tribunal for ABS firms. This proposal is misconceived. It assumes that ABS firms are a category all of their own, rather than simply one variety of law firm which each licensing authority may regulate. The Law Society's view is that issues arising from ABS firms should be dealt with by the same mechanisms as each regulator has for dealing with matters in respect of other law firms and lawyers it regulates. Any new issues specific to ABS firms – such as the application of the fitness to own provisions – could be dealt with by providing tailored training to some or all of those who currently serve on appeals tribunals.

38. Having said that, the Law Society recognises that there is a case for establishing a single disciplinary tribunal covering all law firms and lawyers within the regulated sector, along the lines of the arrangements being put in place in the medical field. The Law Society would welcome discussions with other approved regulators and the Legal Services Board about whether and how to move in that direction.

Responses to Legal Services Board Questions

39. The following section sets out the Law Society's response to the specific questions posed by the Legal Services Board.

The Law Society

Law Society responses to questions contained in the LSB consultation 'Alternative business structures: approaches to licensing'.

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

We support in principle a move towards outcome focussed regulation, but for most legal regulators there is a great deal of work to be done before outcome focussed regulation could be introduced successfully. Furthermore, we believe licensing authorities should be free to adopt any reasonable approach to regulation.

We believe that Licensing Authorities (LAs) should be allowed to regulate in the manner they choose and should not be forced to adopt a specific approach to regulation. The LSB has offered no evidence that outcomes based regulation is particularly suited to the regulation of ABS or that it is more effective than other types of regulation. Thus, LSB should not be unduly prescriptive and should allow regulators to choose whether they wish to use outcomes based regulation or another form that meets the principles of better regulation.

a. Should all LAs have the same core outcomes?

The Legal Services Act sets out for licensing authorities their core objectives (or outcomes). These objectives should remain at the heart of any regulatory framework and should ensure that LAs have consistent aims. We would not wish to see a situation where some regulators are perceived to set lower standards for ABS (or other law firms) than others or, as a consequence, for 'regulator shopping' for the lowest standards to become common practice. For this reason we would expect the LSB to be monitoring whether LAs are meeting the regulatory objectives set down in the Act.

We would not wish for regulators to approach regulating ABS as if starting from a blank piece of paper. Licensing Authorities have tried and tested systems for licensing non-ABS and many of these systems (for example the SRA's entity-based approach to regulation, described below) will be transferable to ABS. Creating a completely new regulatory system is likely to be costly and to make creating a level playing field between ABS and non-ABS difficult. It also carries an inherently greater risk of early system failure.

b. Are the proposed outcomes appropriate?

In general, we agree with the proposed outcomes for regulation. Where we disagree, we have commented within the detailed answers to the questions below. We do, however, note that the outcomes are generally very detailed and quite prescriptive, which may not be appropriate. The LSB needs to be conscious that its role is as an

oversight regulator, created to set guiding principles, not to lay down the detail of day-to-day regulation.

c. Is the division between entity and individual regulation appropriate?

The SRA have been moving towards entity based regulation with the support of the Law Society. Entity based regulation is particularly important where non-regulated professionals work together with regulated professional in a firm. This applies equally to ABS and traditional law firms. However there are still areas where individual regulation is important, for instance in areas relating to matters of professional integrity. A client should be able to trust the professional integrity of a solicitor or other lawyer regardless of the organisation he or she works for. We agree with LSB's outcomes for behavioural integrity, which are similar to Rule 1 of the Solicitors' Code of Conduct. We agree that the same outcomes should apply to lawyers and non-lawyers. This is essential to create a level playing field and provide the necessary consumer and public protection.

Having in place both entity and individual regulation does create the risk of double jeopardy for an individual and licensing authorities should be alert to this risk.

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

We agree with the outcomes regarding ownership tests. However, we consider the first outcome regarding consumer confidence may be difficult to measure.

a. Should the tests be consistent across all LAs?

The overarching principles should be the same, but there will need to be flexibility to allow LAs to respond to changing market conditions. The Act already sets out the fundamental issues that should be considered when carrying out a fit and proper test and we would expect all LAs to have regard to these.

b. Is our suggested approach to the fitness to own test the right one?

We agree that the requirement for an owner to declare –

- criminal convictions, cautions, and any pending criminal proceedings
- disciplinary action, pending or otherwise and
- IVA arrangement or undischarged bankruptcy
- disqualification

is sensible and we would expect all LAs to require these declarations and where necessary to make further investigations. We would expect that the tests for financial probity and integrity would reflect the tests put in place for solicitors on admission. We agree that potential owners may need to provide other information that may be relevant to the assessment of their fitness to own. LAs will need to provide further guidance on what might need to be provided.

The question of lawyers "fitness to own" is dealt with on admission to the relevant branch of the profession, and monitored thereafter. Since there are no significant additional requirements to be met in establishing fitness to own of an ABS firm, there is no purpose in requiring lawyers to be re-assessed for that purpose.

The LA is required to be satisfied that an unauthorised person's holding of a restricted interest does not compromise the regulatory objectives or duties of other authorised persons. The test as described is narrow and does not consider other areas, such as conflicts of interest, potential referral arrangements or whether the owner has other unregulated businesses providing legal services. These are equally relevant if the LA is to be satisfied that the regulatory objectives will not be compromised.

The LSB proposes that there should be no requirement to complete fitness to own tests on a regular basis. Instead, it proposes that owners should declare any changes in status or change in ownership. We agree with this proposal. However, while a requirement to report criminal convictions / disciplinary action or bankruptcy rather than an annual declaration may be sufficient, more active monitoring of conflicts of interest may be required depending on the risk posed by the external owner and any condition on the licence.

c. If declarations about criminal convictions are required, should these include spent convictions?

As with lawyers and non-lawyer mangers in LDPs, non-authorised owners should declare any spent convictions.

d. What is your view of our suggested approach for considering associates? Is there an alternative approach that would work better in practice?

We recognise the issues raised by the LSB regarding applying a fitness to own test to all associates, as described by the Act. We agree that putting in place a *de minimis* test to avoid those associates with a minimal connection being caught by the test is a sensible approach. However, this should not mean that regulators are left without a full picture of all associates: merely that they may choose not to apply the test to some of them. It will be particularly important for LAs to have this information, in order to identify situations where several associates together have more than a minimal interest and are likely to act in concert. In these cases the *de minimis* rule should not apply.

The LSB has also proposed that some associates should be presumed to be fit to own. However, they have provided limited information about who these associates might be beyond 'institutional investors'. Much greater thought would need to be given to this idea, with risk based arguments as to why certain associates may be exempted from test. The LSB has also stated that where associates appear to be acting in concert, then no presumption of fitness to own should be made. The type of information that LAs will need to hold to identify this type of behaviour and how it will be collected when an owner has been presumed to be 'fit to own' needs careful consideration.

The LSB proposes that where associates are identified as posing a risk, then the ABS should be required to monitor and report any concerns to the LA. This does not seem sufficient. It is unclear if the ABS will be in a position to identify when any given risk has reached a level at which it must be reported to the LA. More likely, the ABS will need to report any changes and the regulators will need to decide if it is to take further action. The appropriateness of obliging ABS to report their concerns where issues with a new owner have been identified would be dependant on the risk posed by the new owner. If the risk posed to the regulatory objectives is significant then the LA should proactively consider the external owner's on-going fitness to own, rather than awaiting reports from the ABS itself.

While the LSB's proposals would remove some associates from the need to pass a fitness to own test, it seems that the vast majority will still need to do so. As the LSB notes, this is likely to place a large regulatory burden on external owners. It should also be noted, that it will put a large burden on regulators. For this reason, much more analysis should be carried out on what risks are posed by different types of associate, and the type of fitness test that might mitigate the risk. ARs do not necessarily have experience in this area and thus may need to look to other regulators and other jurisdictions for examples of the good systems and processes. One essential feature of any system will be databases for storing and analysing data on associates. Without this, the process of identifying patterns and associates who may be acting in concert will be nearly impossible to undertake effectively.

e. Should there always be a requirement to declare the ultimate beneficial owner of an ABS?

The ultimate beneficial owner is likely to have considerable influence over an ABS and thus should be declared in all cases. Failure to ensure this would undermine the provisions concerning fitness to own.

f. Overall, are any modifications needed to ensure that our approach work in a listed company?

We agree that LAs should take into account the requirements of the FSA that shareholders with more than a 3% share are listed publicly. The LAs should regard this as an important source of data and should keep in close communication with the FSA on any changes to the listing. The LSB argues that as this data is available for public scrutiny then no further scrutiny of shareholders by LAs should be required. We do not think LAs should be precluded from scrutinising owners more closely where that is necessary to make the fitness to own provisions effective.

The current consultation document does not provide enough detail about the process for carrying out fit and proper tests on new external owners and their associates to enable the Law Society to comment on its appropriateness for listed companies.

There is a suggestion in paragraph 86 that the Australian model for divesting unfit owners of their shares and requiring them to be bought back by other shareholders of the firm could be followed. Since there are already provisions in Schedule 13 to facilitate divestiture of shares (which are consistent with the FSA model for unfit owners of FSA-authorised firms) then (assuming these provisions are commenced) the LSB should ensure there are no conflicting provisions or arrangements.

g. Overall, are any modifications needed to ensure that our approach works in very small companies?

The current consultation document does not provide enough detail about the process for carrying out fit and proper tests on new external owners and their associates to enable the Law Society to comment on its appropriateness for small companies.

h. Do you think that the definition of restricted interest should change?

Parliament defined 'restricted interest' in the Act. The definition should remain as it is unless persuasive evidence indicates it should be altered.

i. Do you think that covenants should be required from those identified as having a significant influence over an ABS?

It is suggested that enforceable covenants between an ABS and a 'person of influence' are put in place requiring that person not to exercise that influence. We agree; although we do not think relying on covenants alone is anywhere near sufficient.

j. How should the LSB respond to the information it receives about information on action taken against people that falls short of disqualification?

The LSB should only share information it receives about allegations against external owners with other licensing authorities.

Other comments

The suggestion that shareholders with a notifiable interest could gain a conditional approval and pass a fitness to own test at a later date has the advantage that it will remove the impact on liquidity of shares that would otherwise occur whilst the shareholder was approved. However, it does raise the risk that the new owner may fail the test and therefore, shares would have to be divested – thus potentially leaving a large number of shares for sale. This could also have a significant impact on the share price.

Foreign ownership (including ownership by nationals of other EU Member States, who may not be discriminated against in matters of freedom of establishment as compared with UK nationals) poses different risks and assessing owners and their associates will be more complicated. We therefore agree that the application cost should be greater, to the extent permissible under EU law.

The suggestion in paragraph 85 that a listed company should set out a formal hierarchy of duties in its constitutional documents needs to be refined. We agree with the suggestion that an ABS's constitutional documents should include the principle that duties to shareholders should not compromise duties owed to the court and the client (though this is already achieved in legal terms by s176 of the Act which elevates lawyers' professional duties to statutory status.) If, however, the LSB actually wants a formal hierarchy, with lawyers' duties prevailing over other duties under, for example, company law and the Financial Services Market Act then this could be problematic as it could result in breaches by the ABS of other legal/regulatory requirements. The LSB should give this matter further consideration.

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

ABS should be subject to the same indemnity insurance and compensation requirements as non-ABS firms. This would help to ensure appropriate levels of redress and protection for clients against negligence and fraud, while at the same time maintain a level playing field across the legal market. Indemnity insurance and compensation arrangements need to protect the consumer first and foremost, but should not unduly restrict firms' commercial flexibility.

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?

We think that the mandatory levels of PII that currently apply to different activities should continue to apply to those activities, regardless of whether they are carried

out by an ABS or non-ABS firm. This would ensure ongoing client protection, as well as a level playing field for ABS and non-ABS firms.

b. Should there be minimum PII levels, which are the same for all LAs for different types of activity?

We think that there should be minimum PII levels. Without a minimum PII level, the onus would be on ABS to demonstrate to the LA that it has sufficient PII for the risks it faces and the activities it carries out. In these circumstances, it is possible that firms would underestimate their risks, and if approved by the LA, obtain insufficient PII cover. This may leave clients with negligence or other civil liability claims uncompensated. Minimum PII levels would ensure consumer protection, and in turn, help to maintain public confidence in the legal profession generally. Together with the compensation fund, compulsory indemnification levels provide a strong protection for consumers when using lawyers.

We think that the LSB should set minimum PII levels for LAs. However, individual LAs should retain the ability to impose more stringent requirements if they choose to. Each LA/AR should set the same requirements for all firms it regulates, whether ABS or not.

We think that the consumer interest and ABS firms flexibility are best maintained by setting the same minimum terms for different types of activity. Basing the minimum requirements on the activity that the firm is carrying out would be difficult. An activity may involve different level of risks. For example, a conveyancing firm that undertakes buy-to-let work is likely to pose a greater risk than a conveyancing firm that does not. Using activity types as the basis for the minimum requirements is also likely to restrict a firm's ability to perform different types of work throughout the indemnity year in response to changing client demand. Similarly, we think it would be neither feasible nor desirable to base minimum requirements on the average value of transactions during a year, the number of fee earners or the turnover of the ABS for licensed activities. These are all risk factors that insurers take into account when providing quotes for PII. We therefore do not think it is necessary for the minimum PII levels to be based on these factors.

Our preference would be to retain high minimum PII levels and standards, similar to the minimum terms and conditions (MTCs) that currently apply to solicitors. The MTCs ensure a high level of protection for clients and solicitors alike. If the standards on issues such as precluding insurers from repudiating cover on grounds of non-disclosure were lowered, consumers would be disadvantaged, but there is no guarantee that insurers would reduce their premiums. Furthermore, insurers would have a much greater ability to avoid cover and, as seen in other professions, a lot of resources would be wasted on disputes about coverage. We think the risk that retaining the current standards deters insurers from entering the market may have been overstated. Most insurers are large institutions that are sufficiently well resourced to take steps to minimise any negative consequences of the MTCs. As the LSB states, insurers determine a firm's excess level and can sue for non-payment. In 2009–10, about 30 qualifying insurers offered PII to solicitors, including three new entrants. Insurers are able to use pricing to take account of the high MTCs. We think that the protection of consumers against loss arising from the action of lawyers is sufficiently important to justify increased fees, even though the burden of that is ultimately shared by consumers.

c. Are Master policy arrangements appropriate for ABS?

We think it is for each individual AR/LA to decide on what arrangements should be made, so long as minimum conditions are met. The Law Society prefers open market arrangements based on our experience of using master policy arrangements.

If however a master policy is used for ABS, then the arrangements should give firms as much flexibility as possible. For instance, firms should be able to choose their excess level.

Regardless of the type of arrangement used, we would like to reiterate that non-ABS firms should have access to the same arrangements as ABS.

d. What would be appropriate arrangements for run off and successor practices to enable sufficient commercial freedom for ABS as well as protection for consumers after practice closure?

As is the case under the current solicitors' PII arrangements, we think that all firms should be required to have PII in place to cover claims that arise after their closure, to ensure ongoing consumer protection. This could be provided through run-off cover or the PII policy of a successor practice. We think the protection of the client is sufficiently important to justify the expense involved in imposing this requirement.

However, we think that the successor practice rule that currently applies to solicitors should be amended as it deters firms from restructuring. Under the current rule, a firm that merges with or acquires another firm (the acquiring firm) will almost always become a successor practice, meaning that its insurer becomes responsible for the future claims arising from the former practice (the disposing firm). In the current hardened PII market, this is likely to significantly increase the acquiring firm's premium, if not prevent it from obtaining PII altogether. Instead, the disposing firm should be able to elect to trigger run-off prior to a merger or acquisition, so that any claims made against it in the future would be made against the run-off policy, rather than the insurance of the acquiring firm. By facilitating mergers and acquisitions, we think this would give firms sufficient commercial freedom, while at the same time providing ongoing protection for consumers after a firm's closure. This is particularly important with the restructuring of the legal market over the next five years for the reasons that the LSB points out. It would not be desirable to see firms setting up new entities rather than merging or acquiring existing firms merely to avoid the application of the current successor practice rule. This is neither in the firm's nor the clients' interests as the disposing firm receives no consideration for its good will, the acquiring firm loses an opportunity to expand, and the disposing firm's client is forced to find a new lawyer.

We note that contrary to paragraph 141, if a solicitor firm closes without paying the run-off cover premium, its insurer will still be required to provide six years' cover. The insurer would be able to sue the principals of the firm for non-payment. The solicitors' compensation fund does not become liable for the payment of claims.

We presume that in paragraph 144 of the consultation, the LSB is highlighting rule 5.1 of the Indemnity Insurance Rules 2009. Rule 5.1 states that a firm will be deemed to be ceased and run off will be triggered if it becomes a non-SRA regulated firm. However, paragraph 144 as drafted does not adequately highlight the distinction between a prospective ABS that continues to be regulated by the SRA and one that does not.
There is no reason why the run off provisions should be triggered if a firm becomes an ABS , but remains regulated by the SRA.

e. What should the requirements be for compensation funds in ABS?

We think that the compensation fund should apply to different activities of an ABS as it would apply to those activities if performed by a non-ABS firm. This would ensure a level playing field between ABS and non-ABS firms.

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?

We think that all AR should have a compensation fund for three key reasons. Firstly, it would ensure that all ARs operate on a level playing field. Secondly, it would help to protect consumers against fraud, and in turn, ensure public confidence in the legal profession generally. We think that many consumers of legal services would assume that they have access to a compensation fund in cases of fraud and could therefore unknowingly be left without this avenue of redress. Like compulsory PII cover, compensation funds give consumers a strong incentive to use lawyers. While compensation funds do involve well run firms paying for the wrong doings of other firms, this is the same principle on which all insurance schemes operate to ensure their ongoing viability. It is generally accepted that public and consumer protection are sufficiently important to justify this and outweigh the costs and difficulties of establishing a compensation fund. Thirdly, it would help ensure compliance with professional obligations. For instance, solicitors who work in an ABS that is regulated by an AR other than the Law Society.

We think that the funding arrangement that currently applies to the solicitors' compensation fund would be appropriate. Firms with access to client funds should pay a larger contribution towards the fund given that they pose a greater fraud risk. We do not think it would be appropriate to use interest on client accounts to fund the compensation fund. In any case, the currently low interest rates would mean that very little money would be collected.

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

We agree with the LSB's first stated outcome that levels of consumer protection for reserved and unreserved work should remain the same as is currently the case. This will help to ensure a level playing field between ABS and non-ABS. We are unclear what the second outcome would mean in practice. However we are anxious that rules such as the 'separate business rule' are not removed for ABS when they still are in place for non-ABS, as doing so would give ABS an unfair competitive advantage.

a. Do you agree that ABS should be treated in a consistent way to non-ABS?

We believe that there should be a level playing field for ABS and non-ABS firms. We agree with the LSB that providers of a legal service, including ABS, should not be able to set up separate unregulated businesses that undertake unreserved work. We do not see the distinction between setting up a separate business and having an associated business that is part of the same business group. If an associated business is providing legal services, it should be regulated, in the same way that an associated business of a non-ABS would have to be.

Currently, solicitors firms have some scope for outsourcing work as long as they continue to comply with the separate business rule. The Law Society agrees that

ABS should be able to outsource work in the same manner, providing that the regulated firm takes responsibility for the work carried out by the outsourcing firm and complies with the separate business rule.

b. Should all legal activities undertaken by an ABS be regulated or just reserved legal services?

To ensure necessary consumer protection, we believe that all legal services should be regulated. Consumers are unlikely to be aware of the distinction between reserved and unreserved legal activities and will be disadvantaged if only reserved work is regulated.

Indeed, all activities within an ABS need to be regulated to some degree, since consumers will otherwise be misled as to the protections they benefit from when using the ABS firm. The nature and extent of protection for non-legal activities which are regulated by another regulator, or which are generally provided by unregulated providers, will need further consideration, especially where the activities concerned are far from core legal work.

c. What role do you see consumer education playing?

We think the Legal Services Board should examine the extent to which the consumer interest requires some currently unreserved areas of legal work to be brought within the reserved area. Pending that, we think LSB should emphasise to consumers the benefits of using a regulated law firm and the protections they provide.

d. How should ABS which are part of a wider group of companies be treated?

As noted above, we consider that the separate business rule should apply equally to ABS as it does to non-ABS. Where there is an associate business within the same group carrying out legal work it should be regulated.

5. Are the enforcement powers for LAs suitable?

The Law Society agrees with the LSB's stated outcomes for enforcement.

a. What is your view on the proposed maximum level of financial penalty that a LA can impose on an ABS?

We believe that the penalties on ABS for breach of the ordinary requirement applying to law firms should be the same as for other law firms. We believe there should also be substantial penalties on owners for breach of the requirements relating to ownership, sufficient to act as an effective deterrent.

b. If you do not consider the proposed maximum to be appropriate what amount or formula would you propose?

We think a maximum in the order of the 10% of turnover suggested would be appropriate for breaches of the requirements relating to ownership.

c. Will LAs have sufficient enforcement powers?

We agree that in the first instance an informal approach to resolving any compliance issues should be taken unless the risk means that formal action needs to be taken

immediately. We also agree that intervention should only be used as a last resort, given the severe consequences and the cost.

The threat of financial sanctions or disqualification of a person will provide an incentive for ABS to comply with regulatory requirements. However, it should be noted that these measures do not help firms comply with regulatory requirements if firms are unclear what is required of them. Without clear requirements from the LA these deterrents are unlikely to improve compliance on their own. We therefore agree that consideration should be given to using measures such as conditions on licences. These can be used to provide clear direction as to what the ABS needs to do and the timeframe it must be achieved in.

The Legal Services Act gives LAs very wide ranging powers to modify an ABS licence without consent, including by means of adding conditions to it. The Act does however require that LAs include within their licensing rules the circumstances under which they would modify a licence without consent. We agree with the LSB that LAs should offer an indicative list. Any list should provide as much clarity as possible as to the circumstances when a licence may be altered.

The Act also requires the LA to put in place a review process to allow ABS to appeal against modification of their licence. Given the potential consequences of a modification of a licence, this review process should be similar to that provided for the refusal of a licence application.

As noted above, we believe that interventions should only be used when clearly necessary, given their cost and consequences. We also believe that more thought should be given to how interventions are carried out. Currently the cost of interventions is high and the costs recovered are limited. We consider that other options should be investigated, such as supervision of client accounts by an external lawyer or a supervised close down, carried out by the firm itself. These might be more cost effective processes than a full intervention and would cause less disruption for consumers.

d. Will ABS have sufficient clarity as to how the enforcement powers may be used?

We cannot be sure whether an ABS will have sufficient clarity about the LA's enforcement policies until we see what the LA puts in place. We would hope that LAs will put in place clear and transparent enforcement policies which provide practical examples of when powers might be used and the decision making criteria for both ABS and non-ABS. They should also make an effort to communicate this information to the regulated community at the earliest opportunity; otherwise such powers are unlikely to act as an incentive to meet regulatory requirements.

e. In what circumstances should a LA be able to modify the terms of a licence?

A LA should only be able to add a condition to a licence without consent where:-

- there has been a proven breach of the LA's regulatory requirements (as set out in the LA's rules) or of a condition of the licence and
- this breach represents a risk to clients or the public and
- it is proportionate, in all the circumstances, to so.
- there is a need to respond to a newly identified risk to the regulatory objectives.

Even here, consultation with licence holders will be needed prior to a decision to add a condition.

Modifying a licence to remove a reserved activity or adding a condition preventing key business activities is comparable to revoking a licence and thus should only be carried out where the conditions set out in the Act for revoking a licence are met.

f. Are there appropriate enforcement options for use against non-lawyer owners?

There are no direct enforcement powers against owners other than forced divestment of shares and disqualification. Financial penalties are needed for breaches of the requirements concerning ownership.

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?

The Law Society does not consider that the approach the Legal Services Board takes to access to justice issues concerning ABS is satisfactory. We do not agree with the LSB's proposition that ABS do not present any risk to access to justice that is different to those risks posed by other available structures. That is a mere assertion rather than an evidence-based conclusion. The Law Society has concerns that some forms of ABS may have a negative impact on access to justice in less heavily populated areas if the risk is not adequately measured and managed, especially if ABS focus primarily on the most easily commoditised work. The Law Society has commissioned independent economic analysis to test this proposition.

The issue of access to justice was discussed extensively during the Parliamentary debate on what is now the Legal Services Act and its importance was highlighted by its inclusion as a regulatory objective in Part 1 of the Act. Furthermore Parliament expressed specific concerns regarding the potential effects of ABS on access to justice. The Bill was amended to require licensing authorities rules to give specific attention to the question of access to justice when assessing applications for potential ABS.

During the debate on this amendment Lord Hunt of Kings Heath, speaking on behalf of the Government, said: - "the effect on providers is covered by our access to justice amendment. It does not need separate provision. The effect on existing provision will need to be taken into account, for the sake not just of providers but of their clients and the need for access to justice. I am confident that the vast majority of applications will lead to improvement in these areas, improving access to justice as a result. The amendments that we are making to Clause 83 reinforce this by signalling the importance of access to justice in the alternative business structure context."

Parliament clearly considered that ABS might pose a risk to access to justice and therefore safeguards were put in place. Regulators will need to ensure they are mindful of this when licensing ABS. It is very disappointing that the LSB have not themselves taken this issue seriously but have instead left it to the Law Society to commission the necessary analysis.

The LSB's definition of access to justice is unclear. We agree with the proposition that access to does not mean that all legal services must be delivered face to face. For many clients who wish to obtain straightforward legal services, such as the drafting of a simple will, online or telephone provision of services may be convenient.

However, it is important to recognise that many clients prefer face to face provision of legal services, particularly for complex or emotive matters, and for the most vulnerable in society this may be their only means of accessing legal services. The Legal Services Commission recognise this through their requirement that firms seeking civil contracts should have an office in the relevant location. Similarly, while having a certain number of high street firms in an area may not be the only indicator of access to justice, it is an important one. As noted above, some clients can only access legal services via face to face provision. Where there are few or no local firms these clients may be prevented from accessing the appropriate legal advice. Therefore consideration needs to be given to the number of firms and the type of advice they provide within an area when assessing the impact on access to justice.

In our view the definition of access to justice should involve access to a choice of appropriate legal advice which is of sufficient quality to be fit for purpose in all the main areas of law likely to affect those wanting or needing to use a service.

b. Is asking an ABS on application how they anticipate that they will improve access to justice a suitable approach?

We agree that asking an ABS about how they anticipate that they will improve access to justice may provide some useful information. The answer provided could form part of the data used by an LA to assess the impact that an ABS might have on access to justice.

However, it would be absurd for the impact an ABS might have on access to justice to be measured simply by asking the applicant. The LA will need in some cases to ensure that an objective assessment is made of the likely impact of a particular application.

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?

We agree that restrictions on specific types of commercial activity should only be put in place where there is a high risk of consumer detriment or that access to justice will be limited.

However, we believe it is inconsistent with Parliament's intention for regulators to have to wait until the damage is done in order to gain 'strong clear evidence'. We believe that they should take a risk based approach, as they would with other regulatory issues. Licensing authorities will thus need to give particular attention to applications for large scale provision of services, particularly where they are to be delivered in areas where there are comparatively few sources of legal advice at present.

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?

The Act requires that licensing rules contain a provision as to how a LA will consider access to justice in connection with a licence application. This implies that LAs must consider the impact on access to justice of particular applications and not just in general. We believe that wherever there appears to be a risk of a particular application having an adverse impact on access to justice, it will be essential to carry out an impact assessment on access to justice before deciding whether to grant an

application, and if so on what conditions. The cost of these assessments should fall on the applicants.

e. Do you agree that LAs should monitor access to justice?

Access to justice is not a mere technical matter, nor one of concern only to lawyers. It is a fundamental underpinning for a society committed to the rule of law. Improving access to justice is a regulatory objective which ARs are required to meet and thus we would expect that all ARs monitor the impact of ABS. However, to monitor the impact on access to justice successfully a broader overview is needed. This could be achieved by coordination of monitoring by ARs.

The LSB should also expect LAs to take action – including by adding additional conditions on a licence – should a risk to access to justice emerge after a licence has been granted.

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

ABS are simply an other sort of firm. In principle they should be regulated in the same way as other legal entities. It is important that there is consistency and fairness within regulatory systems. Having two separate appeal routes, one for ABS and one for other firms, would not be justified. We do recognise that there are one or two ABS specific issues, such as in respect to fitness to own and approving HOFAs, but see no reason as to why these matters cannot be integrated into the current SDT system.

a. Should, in the future, a single body hear all legal services appeals?

The case for having a single disciplinary tribunal, which hears all legal service appeals, is one which is worth investigating further. The new model for the medical profession, in which there is a single tribunal, whose composition may vary according to the background of the medical professional against whom proceedings are being brought, may be worth considering.

b. If you don't think there should be a single body, who should hear appeals from LSB decisions should it become a LA?

We do not think this question needs to be dealt with unless and until circumstances arise in which it would be legitimate for the LSB to become a LA.

c. Is the GRC an appropriate body to hear appeals?
d. What other options for the location of the body?

If the LSB is going to propose the creation of a single body to hear all legal service appeals it will undoubtedly look at all the options will need to be examined. The FTT and GRC are both well respected bodies who have experience in running appeal functions. It is not possible to state a preference until further research has been done.

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

We agree with the proposed outcome that consumer protections should be to a comparable standard, whether they use an ABS or a special body. We also agree that LAs should adapt their regulation and enforcement regimes according to risk, although this applies to all firms, not just to special bodies.

a. Do you think that special bodies' transitional arrangements should come to an end?

We agree that transitional arrangements should be put in place to allow special bodies a period of time to apply for a licence and for regulators to work with these bodies to ensure they meet the required standards. It is self evident that, by its nature, a transitional period will have to end at some point.

b. Do you think 12 months after the start of mainstream ABS is sufficient time for them to gain a full licence?

We agree that 12 months is sufficient time to allow for special bodies to prepare for and apply for a licence. We think that before this 12 month period commences, guidance will need to be given as to who will need to apply for a licence as a special body. Particularly crucial is that there should be clarity about relevant rules changes by LAs and how these will affect solicitors providing advice within special bodies and the bodies themselves.

It should be recognised that LAs will need to communicate these changes to a sector where the entities were previously unregulated. There will be considerable work involved in identifying those who might require a licence and providing them with information and guidance as to how to apply. It is important that this work is factored into any business plan.

c. Do you think LAs should adapt their regulation for each special body?

We do not believe it will be appropriate to provide a new framework of regulation for each special body. This will be time consuming, costly, make providing guidance complicated and lead to confusion. It may be that regulation can be adapted for different classes of organisation. However, there are core client protections that all legal service providers should meet regardless of their status.

d. Do you agree there are some core requirements that all special bodies should meet? If so, what do you think these are?

Special bodies should comply with all the high level outcomes for ABS. However, where there are fewer risks involved, less onerous systems may be more appropriate to ensure that they do so.

e. What are your views on the suggestion that the OLC should make voluntary arrangements with special bodies?

While the proposal, for the OLC to make voluntary arrangements with special bodies to ensure consumer redress is available during the transitional period, is well intentioned, we are unsure how practical this would be. It may be preferable to ensure that the transitional period is not extended so that special bodies are within the OLC regions as soon as possible.

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

Some of the outcomes suggested in this section are inappropriately detailed, particularly those on governance. While we agree that strong governance is required, it should be for LAs to define what good governance within an ABS might include. We are also concerned with the suggestion that commercial decisions should form

the basis of competence tests for HoLPs and HoFAs. While commercial decisions within a firm will play a part in who will be nominated we would expect there to be much more of a two way conversation between the regulator and the ABS about the appointment of a HoLP or HoFA than is suggested here.

a. Do you think that our approach on focussing on compliance systems across the organisation is suitable?

We agree that ensuring good governance and suitable compliance systems across an organisation is important and should be considered as part of an overall licensing framework. The HoLP and HoFA form an important part of a good governance system. However, we do not think that LAs or the LSB should put in place prescriptive requirements for ABS regarding internal governance or compliance systems. Instead the requirements should be based on over arching principles or outcomes.

We agree that LAs should not be prescriptive about whether the HoLP or HoFA is a member of the board (or its equivalent) of an ABS. However, when considering whether someone is suitable for the role of HoLP or HoFA their position within the organisation and their ability to effect change within the organisation should be considered by the LA. We agree that their role within a firm should be clearly defined and they should always have the ability make a report to the LA independently of the management of the ABS.

b. Do you think that HoLP and HoFA should undergo a fit and proper test?

A HoLP will be an authorised person and as such subject to tests of propriety which are at least as stringent as an external owner. Regulatory assessments should not be needlessly duplicated and LAs should use information available to them and only request additional information where necessary. We would not expect associates of HoLPs or HoFAs to have to be examined.

The LSB states that it may be appropriate for someone to fail the fit and proper test for probity and not to be approved as a HoLP or HoFA but be allowed to be an external owner. We think this will only rarely be the case. However, we do agree LAs should set out the criteria that will be used for deciding whether someone is suitable to be a HoLP or HoFA.

We agree that there is no need for the fitness test to be repeated annually provided it is a condition of the licence that any change in circumstances is declared to the LA immediately. We do not agree that information about an issue with a HoLP or HoFA should be provided to the LA only after an ABS has dealt with the issue to its own satisfaction. It is for the LA to decide if this information impairs the HoLP's or HoFA's fitness to continue in the role.

We agree that there should be no prescriptive requirement about the qualifications and experience of a HoLP or HoFA other than those required by the Act. However, we believe that LAs should provide guidance on what they might expect, in relation to different types of ABS and also the criteria they will use to make their decision. We do not consider that the information regarding qualifications and experience should mainly be used to inform risk assessments. The role of HoLPs and HoFA was set out in the Act as part of a set of safeguards to ensure that risks posed by external investors were mitigated. It is essential that HoLPs and HoFAs have the experience and qualifications to perform these important roles. There should not be

a situation where additional risk is created for an ABS because the right person for the role of HoLP or HoFA has not been identified.

c. Should there be training requirements for the HoLP and HoFA?

Training should be made available for both HoLPs and HoFAs. We are not clear why the LSB perceives there to be a greater requirement for training for HoLPs than HoFAs. The LSB has provided no justification for this view. While HoLPs have a greater role within the Act, HoFAs are much more likely to come from outside the legal services sector and thus are less likely to be familiar with the regulation of legal services. Thus it would seem to be a question of tailoring the training to the specific needs of HoLPs and HoFA rather than requiring one to undergo training and not the other.

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?

We agree with the proposed outcomes regarding complaints handling.

a. Do you think that ABS complaints should be handled in the same way as non-ABS complaints?

We agree that that the requirements on firms relating to complaints handling systems should be the same for ABS and non-ABS to create a level playing field and to ensure clients are not disadvantaged. We agree with the overall principles put forward by the LSB on complaints handling and believe that these should be incorporated into LAs' guidance.

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, as long as they meet any requirements set down by the LA.

c. Do you think it is appropriate for the OLC take complaints from multi disciplinary practice consumers and refer where necessary?

We agree that OLC should redirect complaints regarding non-legal services provided by an MDP to the appropriate body.

It is important that the costs of doing that are borne by MDP firms rather than by the profession as a whole.

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?

LSB need to carry out a full equality impact assessment to ensure that an informed judgement can be made regarding the introduction of ABS. Failing to put in place measures that will protect and enhance diversity as part of change process would

seem to fall short of any public duty to promote diversity. LSB will need to examine not just the numbers of potentially disadvantaged groups involved in ABS firms, but also the level within the firms at which they are involved, and their career progression.

b. Do you agree that the overall impact is unlikely to be adverse to the diversity of the profession?

The LSB assertion that ABS will increase the opportunities for greater equality and diversity within the legal profession seems to be supposition. A sound equality impact assessment is necessary to establish the probabilities as they relate to promoting equality. A thorough analysis of the research already available on disadvantage and the contributing factors in the legal profession would provide an informed starting point for LSB proposals. Evidence from other sectors would suggest that allowing market forces to determine workforce diversity undermines opportunities for those whose mobility and flexibility may be limited by disability or caring responsibilities and limits investment in actions to bringing about change.

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?

There is as yet no evidence as to whether or not ABS will have a beneficial impact on diversity within the profession.

Lawyers already have an extensive range of career opportunities outside of their chosen professional role. It seems likely that more opportunities for career managers from outside of the profession will be opened up.

d. Do you agree that the demand for diverse legal professionals will, largely, offset the potential impact due to the closure of small firms?

Lawyers choose to work either as sole practitioners or in small practices for a wide range of reasons. It could be argued that the high levels of BME and women in this segment of the market are there through life choices related to nationality, work/life balance and religion. They may also choose to work in areas of law aligned to social justice. They work on behalf of the most vulnerable in society. The demise of small firms would adversely impact on the clients who are the most disadvantaged often victims of discrimination, socio economic and /or historic disadvantage.

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?

This is an issue for individual AR/LAs rather than for LSB, and will apply equally to ABS as to other law firms. Sound baseline reporting data is vital to well managed businesses and it is increasingly the norm that workforce data is collected and analysed. However it is important that data collection and reporting activity have a purpose. Workforce monitoring data alone gives little insight into the equality climate in a business. The Law Society's Diversity and Inclusion Charter gives a framework within which firms can take action and report on progress and increasingly those purchasing legal services are utilising the Law Society's diversity purchasing protocol as to a range of questions that help purchasers to evaluate the prospective suppliers' diversity performance.

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

Practice vehicles providing cross-border legal services can face a series of barriers and limitations to their international expansion. This includes, inter alia, whether foreign practice vehicles are able to operate through branches or agencies in the host state, have to set up as local entities or cannot practise at all; what type of law they can practise in the host state; and whether locally qualified lawyers are able to practise with foreign lawyers and/or within foreign practice vehicles.

The existence of limitations on practice vehicles is all the more likely for practice vehicles including non-lawyers. This is because non-lawyer involvement (as managers, investors or other professionals) in law firms is still a relatively new phenomenon (even if they are being considered in a number of significant jurisdictions). In many jurisdictions the rules and regulations applicable to locally qualified lawyers would not lend themselves to the acceptance of ABS without radical change.

Three factors are likely to make international acceptance of ABS more likely:

- First, ABS will stand a greater chance of being accepted internationally if they are to be regulated by front-line regulators, for example the Law Society of England and Wales (through the Solicitors Regulation Authority) rather than directly by the Legal Services Board.

- Second, they will also stand a greater chance of being accepted if the licensing and regulatory framework put in place for the protection of the consumer puts ABS on a level-playing field with "traditional" law firms.

- Third, and most importantly for other jurisdictions, the regulatory framework governing ABS will have to be, and be seen to be, at least as effective in guaranteeing the independence of the profession and preserving other core values of the profession as the regulatory framework governing traditional practice vehicles. It is likely that this assessment will need some time in which to prove itself.

13. Should LDPs, Recognised Bodies and other similar firms have transitional arrangements into the wider ABS framework in the way we propose?

We agree with the outcomes relating to LDPs and other similar bodies.

a. Is 12 months after the start of mainstream ABS sufficient time to allow this to happen?

We agree with the proposed framework for LDPs and with putting in place a transitional period. For practical reason we believe that the transitional period should be longer than 12 months. This will ensure that the end of the transitional period does not coincide with the end of the transitional period for special bodies and allows LAs to spread the workload more evenly. We do not believe this represents a regulatory risk, as LDPs would continue to be licensed.

14. Should ABS licences be issued for indefinite periods?

Yes. Licences can be revoked if the ABS becomes an unsuitable operation.

a. Should the annual charging process be broadly cost reflective or a fixed fee?

This decision is one which each individual LA should take. From the Law Society's point of view, we believe that licence fees for all entities should be cost-reflective. The size, scope and risks associated with each firm can differ greatly amongst SRA-regulated entities. Other LAs may operate in a different environment; thus a fixed fee system may be the best option for them.

b. How should LAs ensure ABS are continuing to comply with their licence requirements?

The SRA already has in place a system for assessing the data it gathers. As they move towards a more outcome focused based regulatory regime regulators will have to ensure that their risk-based system is capable of assessing the likelihood of compliance.

The role of the HoLPs and HoFAs will be vital in providing the regulator with the correct information. Persons in this role should have a clear understanding of what information should be given to the regulator. This includes any changes in circumstances. The punishment for failing to do this important task should be severe.

15. Do you agree with our approach to managing regulatory overlaps?

a. Is it desirable to have a framework approach to a MoU?

The regulatory environment should not be any more complex or costly than it needs to be. Both those who work in ABS and consumers who purchase legal services from legal entities should have a clear understanding of the regulatory requirements. The best way to achieve this is to have commonality of rules and approach.

The regulatory overlap situation is not new or unique to ABS. For example, there are a significant number of law firms who have to abide by both the Solicitors Code and FSA rules.

b. Do you think we have identified the right bodies to develop a MoU with?

Yes. As any MoU will be put out to consultation other bodies who feel that they should be a part of this process will have a chance to make representations. It may also be worth talking to the Law Society of Scotland and the Law Society of Northern Ireland.

c. Do you think we have identified the right issues to include?

At first consideration the issues identified seem to be the most appropriate. It is possible that other issues may arise or that some of the issues identified may be modified during the negotiation process.