



Legal Services: removing barriers to competition

ICAEW welcomes the opportunity to comment on the *Legal Services: removing barriers to competition* published by Ministry of Justice on 7 July 2016, a copy of which is available from this [link](#).

This ICAEW response of 3 August 2016 reflects consultation with the Business Law Committee which includes representatives from public practice and the business community. The Committee is responsible for ICAEW policy on business law issues and related submissions to legislators, regulators and other external bodies.

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MAJOR POINTS

1. ICAEW welcomes the opportunity to comment on the Ministry of Justice's (MoJ) consultation *Legal Services; removing barriers to competition*. We congratulate the MoJ on these proposals, which evidence real efforts to remove unnecessarily onerous burdens on Alternative Business Structures (ABSs) and their regulators, and hope that they will be able to be implemented speedily.
2. As pointed out in paragraph 22 of the consultation, the evidence to date does not suggest that organisations that are licensed as ABSs provide a less professional service than other legal services providers and therefore require greater regulatory oversight. As a result we would suggest that the most effective way to remove barriers to competition would be to further harmonise the statutory provisions for the regulatory oversight of ABSs and traditional law firms. Such reforms would, of course, need to be carefully considered, in the light of the regulatory objectives including the need for consumer protection.
3. The ground breaking reforms of the Legal Services Act 2007 have now been in place for a number of years, and such innovation as has been seen in the legal market has not resulted in any concomitant prejudice to the public interest. When opportunity presents, the reform process should be continued, to delegate appropriate decision making procedures to the Legal Services Board (LSB) and the front line regulators rather than being bound by statute. A consolidation of all the legislation governing the provision of legal services and the role of lawyers would help to ensure that every relevant provision was given appropriate examination in the light of current conditions. It would also help consumers, their representative bodies and new entrants to the market to understand the legislative and regulatory environment.
4. A thorough review of the number and definition of the reserved legal services would also provide a regulatory structure far more targeted on controlling the risk of consumer detriment and supporting the other regulatory objectives.

RESPONSES TO SPECIFIC QUESTIONS

Q1: Do you agree with the proposal that there should not be a requirement to provide services consisting of or including reserved legal services from a practising address as currently required by paragraph 15 of schedule 11?

5. Yes. It is burdensome and counter-intuitive to legislate that a service provider must offer an unintended additional category of services to obtain a licence to provide non-reserved legal services. It is not appropriate for ABSs nor would be for traditional law firms.

Q2: Do you agree with the proposal that:

- a) The requirement for an ABS to have practising address in England and Wales is retained in paragraph 15 of Schedule 11 but Licensing Authorities may waive this requirement or may make licensing rules enabling them to waive this requirement; or
 - b) Alternatively, paragraph 15 is replaced with a power enabling Licensing Authorities to make licensing rules about addresses?
6. We consider that Licensing Authorities should be free to have as wide powers in relation to their own rules as is consistent with continued efforts towards the dismantling of unnecessary regulatory barriers and the furtherance of the regulatory objectives. Any concern that additional rules in this area could be used to add to barriers would be unlikely, given the LSB's oversight of new rules introduced by the Licensing Authorities. For these reasons, and for reasons of clarity and transparency, we would prefer Licensing Authorities to have the power to make their own rules in relation to practising addresses, rather than having to rely on what may be a significant number of waivers.

Q3: Do you agree with the proposals to amend Schedule 13 to the 2007 Act and allow Licensing Authorities to make their own rules around ownership of an ABS and to impose a statutory obligation on the LSB to provide guidance regarding ownership?

7. Yes. As much as possible, within the remit of the regulatory objectives, should be delegated to Licensing Authorities, under the oversight of the LSB.

Q4: Do you think amending Schedule 13 and giving Licensing Authorities greater discretion in deciding on the necessary checks for licensing, would encourage more applications from businesses to become ABSs?

8. Yes. Though the effect on ABS numbers may be relatively minor, this will give Licensing Authorities greater discretion and reduce barriers to competition.

Q5: Do you think giving Licensing Authorities greater discretion would reduce the timescales and cost of the licensing process and if so, by how much?

9. Removing onerous and prescriptive requirements and enabling a proportionate and risk-based approach should lead to a reduction in timescales and costs. The degree to which giving greater discretion would reduce the timescale and cost of the licensing process would then be in the hands of individual Licensing Authorities. In some cases costs and timescales could be reduced significantly.

Q6: Do you agree with the proposal to repeal section 83(5)(b) of the 2007 Act?

10. Yes. This provision seems an unnecessary addition to the application process for ABSs and contrary to the principle that ABSs should not be treated differently from other regulated legal service providers without clear reason.

Q7: Do you agree that Licensing Authorities and ABS applicants would make savings in terms of costs, time and resources, if we were to repeal section 83(5)(b)?

11. Yes. Any savings may be small, as Licensing Authorities and ABS applicants would still have to take into account all the regulatory objectives of the 2007 Act. But it is inappropriate to single out a single one.

Q8: Do you agree with the proposal to amend sections 91(1)(b) and 92(2) of the 2007 Act?

12. Yes. We agree that only “material” failures or breaches should be reported to avoid unnecessary workload but we suggest that the Licensing Authorities should retain the ability to make rules in relation to non-material failures, to ensure that these are not ignored.

13. Sections 91(3)(b) and 91(4)(b) should be amended in a similar way.

Q9: Do you agree with the proposal that regulators should provide guidance on how they define a “material” failure to comply with licensing rules?

14. Yes. Regulators should provide guidance not just on the definition of “material”, but also of “failure” and “breach” and the potential or likely consequences of each.

Q10: Do you agree that regulators and ABS businesses would make savings in terms of costs, time and resources if we were to amend sections 91(1)(b) and 92(2) as proposed, and if so by how much?

15. Any savings within ABSs may be relatively small, certainly in the short term while the new regime was bedded in. ABSs would still have to implement a system for identifying and addressing failures and breaches, material or not, and taking action to ensure that controls are strengthened to prevent more serious occurrences.

16. The savings to regulators could be significant. Further, the time saved from not having to review non-material breaches could be used to strengthen the checks to ensure all “material” failures or breaches were reported and remedial action taken. This could lead to a significant improvement in consumer protection.

Q11: Do you agree that the proposed changes to ABS regulations are sufficient to ensure a level playing field for entry to the market and regulation in the market for ABS and other firms? If not, what further changes do you think would be needed?

17. The proposed changes to the ABS regulations are very welcome, but they are not sufficient of themselves to ensure a level playing field for ABSs, either for entry to the market or for continuing regulatory barriers. The primary reason for this is because barriers may still exist within the rules of the Licensing Authorities – though we acknowledge the progress that has been made in relation to these, as well as in this initiative.
18. The complexity of the regulatory environment for lawyers and the provision of legal services, and the continuation in force of provisions contained in historic legislation, also makes it difficult to ensure that the statutory provisions for ABSs are appropriately consistent with those relating to traditional law firms. We think it likely that a thorough ‘equivalence’ review would reveal further areas overdue for reform.

Q12: Are there any further amendments that might be made to a specific provision of, or schedule to the 2007 Act which deals with the regulation of ABS? If so, please explain why and where possible provide evidence to support your argument?

19. Sections 91(3)(b) and 91(4)(b) should be amended, so that only material breaches in any statutory requirements are reported to the Licensing Authority. Because these changes would be so similar to those proposed in relation to Sections 91(1)(b) and 92(2) we do not think that a separate consultation process would be needed in relation to them. Rather, they should be enacted together with the other reforms proposed.

Q13: Cost /Benefit Analysis

20. The proposed changes will not necessarily directly reduce the cost of regulation very greatly, though the overall effect will be to harmonise the regulatory framework and make it more coherent, thus providing an environment where further change will be enabled.

Q14: Equality Impacts

21. We agree with your assessment that the proposals will not have an adverse effect on equality and by reducing the regulatory burden may have a positive effect on the diversity of ABSs and their clients.