

August 2016



**BAR
STANDARDS
BOARD**

REGULATING BARRISTERS

Response to Ministry of Justice consultation: Legal services: removing barriers to competition

Reducing regulatory burdens on ABS

Question 1: Do you agree with the proposal that there should not be a requirement to provide services consisting of or including reserved legal activities from a practising address as currently required by paragraph 15 of Schedule 11?

Yes. We agree that these matters are more appropriately left to regulators' rules and discretion.

Question 2: Do you agree with the proposal that:

a) the requirement for an ABS to have a 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?

Our preference is for option (b). It makes sense for Licensing Authorities to decide what rules are appropriate for the types of entity that they regulate. These rules are subject of course to approval by the Legal Services Board (LSB).

Question 3: 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?

Broadly yes. We have had the benefit of discussing the Government's plans for amending Schedule 13 in more detail with officials. To the extent that the proposed changes will remove prescription and permit regulators to make their own rules we agree that this would

be a sensible change. Our preference, wherever possible, would be to give discretion to the regulators to make such rules as they see fit, rather than obliging them to create rules (bearing in mind that the LSB will have ultimate oversight of the appropriateness of our rules). We believe this would be more proportionate and permit greater flexibility to adapt to changes in the market. This also applies to LSB guidance on ownership.

We understand that the intention is to remove all offences within Schedule 13. We agree that this is sensible – there should be a level playing field between ABS and other regulated entities and in any case the use of criminal charges is a blunt tool from a regulatory perspective. Control over criminal charges lies with other agencies and the use of those charges may be disproportionate. We would instead prefer to take regulatory action that is proportionate to the breach – this could include taking action against the ABS, such as imposing conditions on its authorisation, revoking its authorisation or otherwise taking disciplinary action (which could include fines). We could also take action against individuals who are managers or employees of an ABS, which could additionally involve disqualifying them from undertaking a number of roles with an ABS, using our power under section 99 of the Act. As with our general comment above, we believe that there should be a power (rather than an obligation) for regulators to make rules to replace any offences. If the Government decides to impose an obligation on regulators to have rules, it will be important that we retain sufficient discretion to decide on a case by case basis what action might be appropriate (we would take a risk-based approach to this).

We understand that the Government would particularly welcome comments on the enforcement of conditions at paragraph 46. We think that such powers would be used rarely, but see no harm in retaining them in case they prove useful.

We understand also that the Government proposes to retain provisions in relation to records of decisions (paragraph 47 and following). We note that these rules are currently very prescriptive and could usefully be less so.

Transitional arrangements will be important. Our understanding is that the Government proposes that Schedule 13 will continue to apply until new licensing rules are approved by the LSB, which is a sensible approach. When we ask the LSB to approve new rules, it is normally our practice to bring the rules into effect sometime after LSB approval (implementation normally being a matter for the frontline regulator, as it may be necessary to undertake communications with the regulated community or otherwise prepare for implementation in advance). We would advise that the Government consider this when deciding on the wording of the transitional arrangements – it may cause difficulties if, for example, the Schedule ceases to apply as soon as the LSB approves new rules. We would be happy to discuss this in more detail.

Question 4: 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 ABS?

Yes, or at least it should make the process more proportionate. However, it is difficult to estimate the impact at present as the BSB does not yet authorise ABSs.

Question 5: Do you think giving Licensing Authorities greater discretion would reduce the timescales and cost of the licensing process, and if so, by how much?

As above, yes but we cannot quantify the impact at present. However, the proposal will enable us to use evidence and proactively to refine / review the process on an ongoing basis to ensure it is proportionate, targeted and appropriate.

Question 6: Do you agree with the proposal to repeal section 83(5)(b) of the 2007 Act?

Yes. We agree there should be a level playing field between ABS and non-ABS regulation on this issue. For that reason, the BSB has in fact included a question about access to justice in its non-ABS entity application process. Our experience to date has been that it is not particularly helpful. Many entities struggle to articulate how they will promote access to justice and unless a proposed entity would actively restrict access then it is unlikely we would refuse to authorise for that reason. As noted in the consultation, the regulators have a general duty to promote access to justice and we believe this is more effectively done at an aggregate level than through the requirement in section 83(5)(b).

Question 7: 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)?

We do not think that cost savings would be significant, but it would potentially streamline application processes by removing one requirement that may not be adding value.

Question 8: Do you agree with the proposal to amend sections 91(1)(b) and 92(2) of the 2007 Act?

Yes. It is neither necessary nor proportionate to oblige the reporting of “any” breach to the regulator. The regulators should have flexibility to require an ABS to monitor its own compliance appropriately. Regulators’ rules should be able to specify which breaches (whether “material” or not) must be reported to the regulator and when. It is important, however, that the regulator is made aware of any material breaches. This aligns with rules that we apply to other regulated persons.

Similar principles should apply to 91(3)(b) and 91(4)(b).

Question 9: Do you agree with the proposal that regulators should provide guidance to businesses on how they define “material” failure to comply with licensing rules?

We would query whether there is a need to require this in legislation. However, we do not disagree that guidance would be helpful.

Question 10: 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?

Yes, although it is difficult to quantify any potential cost savings, given the BSB has no experience of regulating ABS entities to date. However, it would remove a disproportionate compliance burden for the regulated entity and also enable the regulator to take a more risk-based approach to supervision.

Question 11: Do you agree that the proposed changes to ABS regulation 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?

Yes.

Question 12: 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.

We have no suggestions to make at present.

Cost / Benefit Analysis

Question 13: We would welcome additional data or evidence in relation to these proposals, in the light of which the cost assessment will be revised and published with the government's response to this consultation.

We agree with the Government's summary of its cost-benefit analysis. As the BSB has not yet started to license ABSs, we are not in a position to provide any additional data, but we would be happy to discuss this further in due course.

Equality Impacts

Question 14. We welcome your views in terms of any potential equality impacts of the proposals. Are there other ways in which these proposals are likely to impact on race, sex, disability, sexual orientation, religion and belief, age, marriage and civil partnership, gender reassignment or pregnancy and maternity that you are aware of? If so, please tell us how, together with any supporting extra sources of evidence.

We agree with the Government's equality analysis and have not identified any other negative impacts of the proposals.