

RESPONSE TO SCOTTISH GOVERNMENT CONSULTATION PAPER

“WIDER CHOICE AND BETTER PROTECTION (REGULATION OF LEGAL SERVICES IN SCOTLAND)”

TABLE OF CONTENTS

1.	INTRODUCTION	2
2.	ABS AS A CATALYST FOR CONTINUING IMPROVEMENT TO THE REGULATION OF LEGAL SERVICES.....	2
3.	REGULATORY OBJECTIVES, STATEMENT OF PROFESSIONAL PRINCIPLES	4
4.	REGULATION FRAMEWORK.....	4
	The SLCC’s current role and functions.....	4
	Role of SLCC within regulatory structure	5
5.	REGULATION ISSUES	6
	Defining the ABS	6
	Conditions of licence	6
	‘Fit to own’ test	6
	Head of Legal Services / Practice Committee	6
	Dealing with regulatory conflict.....	7
6.	FURTHER PROTECTION FOR THE PUBLIC.....	7
	Guarantee Fund.....	7
	Master Policy Insurance	7
7.	CLAIMS MANAGEMENT COMPANIES	7
8.	CONCLUSION.....	8

1. INTRODUCTION

- 1.1 The Scottish Legal Complaints Commission (“SLCC”) is approaching the Scottish Government’s (“SG”) Consultation from a neutral position and expresses no firm view on the merits or otherwise of the introduction of alternative business structures (“ABS”) in Scotland. The SLCC has considered what effect the proposals for ABS may have on the organisation in the future and has confined its comments and observations only to those proposals contained in the Consultation Document which may impact on the SLCC’s current remit.
- 1.2 There will still be complaints about the legal services provided whatever decision is taken by the SG as to how ABS entities will be created, operated and regulated. As the SLCC is the Gateway for dealing with legal complaints, the SG may regard it as appropriate for the SLCC also to have the responsibility for acting as the Gateway for complaints about legal services provided by ABS. The SLCC therefore has an integral part to play in any regulatory regime insofar as ABS is concerned.

2. ABS AS A CATALYST FOR CONTINUING IMPROVEMENT TO THE REGULATION OF LEGAL SERVICES

- 2.1 Whatever model of ABS is adopted as appropriate by the SG, the SLCC agrees that certain regulatory safeguards will be required to ensure that ABS entities comply with certain professional standards and that they are properly regulated as an entity. This will ensure that the interests of the consumer are safeguarded.
- 2.2 The SLCC was set up under the Legal Profession and Legal Aid (Scotland) Act 2007 (“the Act”) to investigate complaints made by members of the public about services provided by legal practitioners in Scotland. The SLCC currently acts as the Gateway for all complaints against defined legal practitioners. Primarily, complaints received by the SLCC are against practitioner members of the Law Society of Scotland (“LSS”) (solicitors) and the Faculty of Advocates (“FoA”) (advocates) and also legal practitioners’ firms. At present, consumers make their complaint to the SLCC in the first instance and the SLCC either resolves their complaint through investigation and/or determination or the SLCC ensures that it passes the complaint onto the appropriate regulatory body for investigation. This occurs if the complaint involves a conduct issue, which is presently outwith the SLCC’s jurisdiction.
- 2.3 Some legal advice is presently provided by other individuals and organisations such as advice agencies and Claims Management companies. These bodies do not fall within the jurisdiction of the SLCC. If ABS are introduced, then further classes of business may emerge that might also not fall within the jurisdiction of the SLCC. Conversely, those legal practitioners who are already under the jurisdiction of the SLCC may find themselves not only subject to the SLCC’s process and procedures for complaints handling, but might also be governed by other regulators’ complaints handling processes, such as the FSA. Some rationalisation is therefore needed to enable consumers to clearly understand how to pursue complaints and to have easy access to redress when things go wrong.

- 2.4 With the proposed introduction of ABS, an opportunity may arise for the SG to strengthen regulation for legal services. As the SLCC is a strong independent body serving as a single Gateway for legal complaints, regulation could be improved if the jurisdiction of the SLCC was widened to investigate complaints against all existing legal service providers and any new ABS. This will ensure consumers and practitioners know who will handle complaints and will also avoid a patchwork of redress agencies for consumers with the concurrent risk of some claims falling by the wayside and added regulatory costs being passed to consumers.
- 2.5 The SLCC suggests the opportunity is taken to ensure consumers always have one point of redress where across the board legal services are provided. The SLCC further considers that this wider model would ease the path for users of legal services; create a level playing field between legal service providers; ease access for users; and prevent complaints falling through gaps or resolution being delayed, if consumers had to prove which redress system should be followed.
- 2.6 The SLCC has primarily approached the problem of regulating ABS from the perspective of the consumer. It considers that consumers may find it problematic to understand the proposal outlined in paragraph 3.9 of the consultation document. The SLCC considers that it is unlikely that service users will differentiate between legal advice provided by a 'legal professional' from that provided by another professional in consultation with a legal colleague, or from a voluntary advisor who has not had legal training. Service users may more easily understand concepts of 'financial advice', 'legal advice', 'accountancy advice' and 'surveying advice', but may not necessarily be alert to the providers' qualifications or the composition of ABS entities.
- 2.7 The SLCC therefore agrees that it would be preferable to provide a definition of legal services as discussed in paragraph 3.9 of the consultation document. However, it considers the way in which the definition is worded will be of paramount importance because, if a wide definition of legal services is not adopted, problems analogous to those identified within The Crerar Review 2007 could be created where consumer complaints about legal services bounce through complicated separate systems without a single body being in overall control. The result could be that complaints are abandoned, regulation remains patchy, cohesive responses to complaints are sometimes not provided to consumers, and not all learning points, regulatory issues or legal service trends are identified.
- 2.8 If a definition of legal services was provided, the SLCC could act as the single Gateway for all complaints about 'legal services' in Scotland. This would allow the SLCC, and not users or practitioners, to determine whether complaints were about 'legal services' or other services, such as financial or accountancy services. Responsibility would be placed on a public body (such as the SLCC) to secure regulation of services and consumer redress in circumstances where things go wrong and would reduce the risk of duplication of activities by regulators. Also, it is not left to the consumer to identify how or if the legal services provider is regulated; they know where to raise their concerns. The SLCC could also determine whether complaints were sufficiently serious to merit further action, if there was an alternative and more appropriate complaint system, and where and when complaints should pass as conduct or regulation issues to other appropriate regulatory bodies. This type of work is already carried out by the SLCC under its existing functions.

Such a system would allow the SLCC to continue to pass regulatory issues to, and monitor the performance of, continuing regulation by the Law Society and the FoA. It would simply mean that in addition, the SLCC would liaise with other regulators and their overarching bodies or potentially deal direct with conduct or regulatory activities if providers of legal services did not have a regulatory body.

3. REGULATORY OBJECTIVES, STATEMENT OF PROFESSIONAL PRINCIPLES

- 3.1 The SLCC recognises that regulation has to be proportionate. It may not be appropriate for all providers of legal services to be subject to equal systems of regulation. However, new service standards set by the LSS are capable of flexible interpretation. Moreover, as ABS may replace and / or exist alongside traditional firms, the SG may wish to consider that the professional principles which should be applied to ABS should be at least equivalent to the highest professional standards currently applicable to the legal profession, as set out in the Solicitors (Scotland) (Standards of Conduct) Practice Rules 2008 (superseding the previous Code of Conduct for Scottish Solicitors 2002 as mentioned in the Consultation Document). It would not be in the interests of the consumer for lower standards to be allowed. The SG may also wish to take into account the likelihood that many practitioners might not choose to form ABS and that traditional legal firms will operate alongside any new ABS entities. The SG may wish to consider how to ensure that there is a level playing field between the different forms of legal entity to enable fair competition whilst at the same time maintaining the highest professional standards. This should ensure that no single body is disadvantaged or suffers discrimination as far as professional standards are concerned.

4. REGULATION FRAMEWORK

The SLCC's current role and functions

- 4.1 Under the terms of the Act, the SLCC is responsible for investigating complaints made by members of the public about services provided by legal practitioners in Scotland. The Act also gives the SLCC a wide range of powers and responsibilities in terms of its regulatory and oversight functions. Whilst the SLCC is the Gateway for receiving all legal complaints, it does not directly investigate complaints about a practitioner's professional conduct. If it evaluates a complaint and decides that it relates to conduct, rather than the adequacy of the legal services provided, then the SLCC must pass the complaint on to the relevant professional body, being either the FoA or the LSS. The SLCC oversees how such conduct complaints are investigated and handled by the relevant professional body and has the power to audit and recommend changes to processes and procedures.
- 4.2 The SLCC also has a responsibility to share best practice, monitor trends and highlight areas of concern in relation to circumstances giving rise to service and conduct complaints. The SLCC may issue guidance and provide recommendations to practitioners about how they deal with complaints about their professional conduct. Where a service has been found to be deficient and the SLCC considers that the practitioner may not have sufficient competence in relation to any aspect of the law or legal practice, the SLCC may report the matter to the relevant professional organisation.

- 4.3 In addition, the Act gives the SLCC the option to monitor the effectiveness of the Scottish Solicitors' Guarantee Fund and the professional indemnity arrangements for members of the LSS (the Master Policy) and the FoA.
- 4.4 The SLCC notes that the Consultation Document envisages that the SLCC will continue to be the Gateway for all legal complaints and will also be responsible for investigating complaints about services provided by a legal practice or practitioner, including those against regulated ABS. The SLCC has a key interest in the regulation of any other form of business where legal services are being provided to third parties in Scotland, as this could impact on the quality and availability of legal services. It is likely that there will be an impact on the number and type of legal complaints referred to the SLCC following the introduction of ABS. Therefore, the way in which the SLCC handles service complaints and the oversight of the regulatory bodies engaged in investigating conduct complaints may need to be adapted to accommodate ABS within the Scottish legal services market.
- 4.5 The SLCC notes that the LSS currently has a dual role in representing and promoting the interests of solicitors while at the same time acting as regulator. In addition, the LSS has a duty to protect the interests of the public. If the LSS is to be the regulator of ABS, it would still be representing the interests of solicitors, who could be in direct competition with the ABS entity. The SG may wish to consider if there is potential for there to be a conflict of interest in these circumstances and how this could be addressed to ensure that the regulator of ABS is independent.
- 4.6 The SLCC agrees with the SG that one of the main focuses of the ABS regulatory regime and the responsibility of the regulator would be to ensure that the core values, codes and principles which affect the various professionals in ABS are maintained, without creating a regulatory conflict. However, the SG may wish to have due regard to how best to monitor the performance of the ABS regulator to ensure that there is confidence in the regulator and that it is seen to be independent, accessible, transparent and free from any conflicts of interest. The SG may also wish to consider whether it would be inappropriate and potentially confusing to a consumer to add an additional layer of regulation in Scotland by having a 'super regulator' equivalent to the Legal Services Board in England and Wales, given the much smaller size of the legal market in Scotland. In addition, consideration should be given as to whether the SG would be justified in incurring the costs of establishing a new regulatory body to monitor the performance of the ABS regulator and whether such costs would be proportionate to any perceived benefits when other lower cost alternatives may be feasible. One cost-effective option which the SG may deem viable could be to expand the SLCC's existing oversight function.

Role of SLCC within regulatory structure

- 4.7 Over and above its investigation of service complaints, the oversight of conduct complaints handling and the monitoring of trends in practice giving rise to complaints, the SLCC has the added responsibility of promoting professional standards across the legal profession. The SLCC must prepare and publish reports on any trends in practice which it identifies through its monitoring functions, which subsequently become the subject of service complaints and referrals of conduct complaints to the relevant professional organisations. It is the SLCC's aim that through the publishing route,

practitioners improve their professional standards and a better quality of service will emerge to the benefit of all users of professional legal services.

- 4.8 In order that the SLCC can perform its existing statutory functions effectively, the SG could consider imposing a statutory duty on the ABS regulator to co-operate and communicate with SLCC to a no lesser degree than exists at present with the professional bodies.

5. REGULATION ISSUES

Defining the ABS

- 5.1 The SLCC considers that any business where a legal professional is involved in the provision of legal services to third parties should be subject to regulation. However, the SG may wish to ensure that there should be some form of clear separation of the legal services, which are to be subject to regulation, from the remainder of the business. Consideration should also be given to how to ensure consumers are aware of this distinction.
- 5.2 In order to further ensure that there is a clear resolution path for the consumer, the SLCC considers that it should continue to be the Gateway for all legal complaints and should be responsible for investigating complaints about the service provided by the legal entity of the ABS in the same way as it does at present for traditional legal service providers.

Conditions of licence

- 5.3 The SG may wish to consider whether it might be appropriate for the regulator to be able to grant conditions of licence in order to ensure access to justice in circumstances where it could be demonstrated that there was a serious risk that the establishment and operation of an ABS in a geographical area or in a particular area of legal practice would have a wider negative effect on supply. If the SG is to allow the ABS regulator to impose conditions on licence, the questions of how to oversee this to ensure the regulator's processes were fair and transparent and whether an applicant should have the right of appeal would have to be considered.

'Fit to own' test

- 5.4 The SLCC considers that if the SG decides that the regulator should have the power to apply a 'fit to own' test for ABS, it may again wish to consider how this could be overseen and monitored to ensure that the test is applied fairly and transparently and whether there should be a right of appeal. The question of whether the 'fit to own' test would apply only to the legal entity within the ABS or to the wider company may have to be considered. One of the SLCC's functions is to promote good practice and public confidence in the profession. The SG may also wish to consider how the ABS regulator applies any 'fit to own' test to ensure compatibility with these functions.

Head of Legal Services / Practice Committee

- 5.5 The SLCC notes the concern that the business interests of ABS may not be wholly compatible with the core values of the legal professional and there might be a risk that legal practitioners could be placed under pressure to compromise their own professional standards. The SG may wish to consider,

therefore, whether to make it a requirement for the legal entity of the ABS to have an individual Head of Legal Services or a Practice Committee responsible for ensuring ethical and practice standards in ABS owned by non-legal owners. This individual or Committee could also be the point of contact for responding to and dealing with complaints against the legal entity. In determining whether the requirement should be to have one individual or a Practice Committee, the legislation should take into account what is proportional to the size of the organisation and the complexity of the organisational structure of the ABS entity.

Dealing with regulatory conflict

- 5.6 The SLCC notes that the SG proposes that the ABS entity regulator should have primacy over any other regulator, as its rules apply to all legal professionals and others practising in the business. However, the SG may wish to consider how the primacy of the ABS regulator over another professional body will be achieved, especially if the ABS entity was comprised mainly of non lawyer professionals. In addition, the question of how to resolve conflicts between different regulators and how they apply different standards may have to be addressed.

6. FURTHER PROTECTION FOR THE PUBLIC

Guarantee Fund

- 6.1 The SLCC considers that the operation of an equivalent to the Fund may be necessary in order to protect the public from dishonest legal service providers in circumstances where a client's loss may not be covered by insurance. The SLCC has exercised its statutory option to oversee the LSS's operation of the Guarantee Fund and is currently awaiting the results of research on the ambit and operation of the Fund. The SLCC does not consider that it can comment further on this until the research is completed (expected Summer 2009).

Master Policy Insurance

- 6.2 The SLCC considers that there should be a mandatory requirement for an ABS to have professional indemnity insurance. However, the SLCC has exercised its statutory option to oversee the operation of the Master Policy and is currently awaiting the results of research on the ambit and operation of the policy. The SLCC does not consider that it can comment further on this until the research is completed (expected Summer 2009).

7. CLAIMS MANAGEMENT COMPANIES

- 7.1 The SLCC considers that any organisation offering Claims Management services should be regulated in order to monitor standards of competence and professional conduct and to promote good practice. The SLCC recognises that a Claims Management Services Regulator has been created in England and Wales and considers that Claims Management companies in Scotland should be regulated to bring these in line with those operating in England and Wales and to avoid such entities evading regulation by crossing the border. For example, a definition of legal services might be capable of including the type of service provided by Claims Management companies.

- 7.2 The SLCC considers that Claims Management companies could be classified as ABS and be regulated under the provisions introduced for regulating such entities. However, if such a company does not have a legal owner or legal professional within its employment, the company would fall outwith the classification and remain unregulated. The SLCC considers, therefore, that the SG give thought to the introduction of specific provisions to ensure that Claims Management companies fall within any new regulatory framework.

8. CONCLUSION

- 8.1 The SLCC considers that its primary function must remain to be, and be seen as being, the provision of an easily accessible and effective complaint investigation and resolution service. As an independent organisation, the SLCC considers that its role should be to continue to investigate complaints in an impartial manner about legal services provided by any legal services provider including any ABS or Claims Management company. In addition, the SLCC considers that it should continue to act as the Gateway for all legal complaints, whether relating to conduct or service, or both. The SLCC also considers that its further oversight functions of the handling of conduct complaints by the LSS and FoA and the operation of the Guarantee Fund and Master Policy mean that it should be an integral part of any ABS regulatory framework.