



Bar Council response to the 'Legal Services: removing barriers to competition' consultation paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Ministry of Justice consultation paper entitled 'Legal Services: removing barristers to competition'.¹
2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

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?

4. This question appears to be asking about two aspects: the need for a business address, and whether it should be a requirement that an ABS provides reserved legal activities.
5. So far as the first of those aspects is concerned, the Bar Council agrees that it is not essential that any legal services consisting of or including reserved legal activities (or, indeed, any other legal activities) must be provided *from* a practising address; but it *is* essential that every licensed body should have a practising address, in the sense of having a business address in England and Wales from which that body controls and manages its business. This is important in order to ensure that the relevant statutory powers (such as powers of intervention) can be exercised effectively and efficiently, but we also suggest that it would be wrong in principle to allow bodies licensed to provide reserved legal activities in England and Wales to be controlled or managed from outside England and Wales. This should not be a

¹ [Ministry of Justice \(2016\) 'Legal services: removing barriers to competition'](#)

matter of discretion for legal regulators, but should continue to be insisted upon by Parliament, as it is currently. We suggest that the right approach is to revise paragraph 15(2) of Schedule 11 only to this limited extent.

6. As for the second of those aspects, as we read Part 5 of the Act, this permits the granting of licenses *only* to bodies which wish to be authorised to carry on reserved legal activities: see, e.g. s.71(1), 85(1)(a) and 111(1). A licence is, of its essence, a licence to carry out reserved legal activities: there is nothing else that needs to be licensed. This is consistent with the purpose of the Act, which is predicated on the regulation of reserved legal activities. This aspect of the Act could not be altered simply by revisions to Schedule 11.

7. The suggestion of removing this requirement also begs the questions why a body might wish to be licensed, and whether it is appropriate for such a body to be licensed, when it has no intention of carrying out any reserved legal activities. We have some real difficulty in principle with the concept of granting a licence to a body to carry out its activities when it does not intend to carry out, and is not to be authorised to carry out, any activities which actually *require* a licence. This is more than the removal of regulatory restrictions; rather, it cuts across a more fundamental aspect of the Act.

8. We can readily see that a solicitors' firm which wishes to continue to hold itself out as a solicitors firm, even though it does not intend to carry on any reserved legal activities, should continue to be regulated as such: it remains a body of solicitors (who are, themselves, all regulated personally), and will be seen by the public as such. By way of contrast, in the case of bodies that could be licensed only under Part 5 of the Act, the proposal would appear to permit bodies to be regulated as ABSs which do not conduct any licensable activities, and which may not even employ any legal professionals at all. We find that to be an odd concept, and one that gives rise to a very real risk of adding confusion in the market place and resulting consumer detriment, for no obvious benefit.

9. We are not opposed to allowing greater flexibility for bodies that have a genuine reason to wish to be regulated, even though they may not, strictly, need to be regulated; but we suggest that this needs more carefully considered amendments, in order for the proposal to respect the provisions of the 2006 Act, and for the government (and Parliament) to be confident that it will not have unintended and undesirable consequences that undermine the structure of the Act.

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 of 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?**

10. We repeat what we said in answer to question 1. Whatever activities a licensed body is carrying on, those should be controlled and managed from an address in England and Wales.

Question 3: Do you agree with the proposal 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?

11. It is essential (and of constitutional significance) that the public and the courts can have complete confidence in those who exercise control over any body that is licensed to carry out reserved legal activities. We do not oppose some greater flexibility than is currently permitted under Schedule 13, but given the importance of this issue, the Act ought at least to contain clear, minimum requirements in this regard. Any change should also recognise that the 10% figure in paragraph 3 of Schedule 13 is the mirror of the 90% figure in s.111(2)(d).

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?

12. It is possible that these reforms could encourage more applications from businesses, but we are sceptical.

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?

13. It is possible that these changes could reduce the timescales and cost of the licensing authorities but it will be for the Licensing Authorities to confirm this. We are cautious about the real impact of this, given that only one example of difficulties has been given (in paragraph 37 of the consultation paper), and no information has been provided as to why this was necessary or disproportionate in that particular case, or whether this is likely to happen in other cases.

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

14. No. The Competition and Markets Authority has looked at the impact of ABS regulation in its interim report² and found that ‘the authorisation process for ABSs does not create a substantial barrier to entry.’ In addition, the purpose of this provision within the Act was to ensure that ABS licensing contributes to access to justice. We consider that this objective continues to have merit, not least in ensuring that access to justice is at the centre of ABS licensing. It is for the Board and regulators to decide how to comply with this provision, in the same way as they must decide how to comply with their duties under ss.3(2) and 28(2). If they are imposing unnecessary costs, then the solution lies in changing their own approach to this, and not in this repeal. It does not seem to us that s.83(5)(b) imposes an inappropriate, excessive or unnecessary burden.

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)?

15. We repeat our answer to question 6.

² [Paragraph 6.31 Competition and Markets Authority \(2016\) interim report](#)

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

16. Yes.

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

17. Yes.

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?

18. We cannot answer this.

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?

19. The Bar Council considers that the LSB and frontline regulators should regularly review the market to ensure that there is a level playing field for entry and that regulation is proportionate. These are not the only factors that should be kept under review. We note that many of the restrictions that were placed on ABS arose because of concerns that they posed a greater risk to consumers and the public interest. The LSB and all frontline regulators should continue to monitor the market to ensure that the public is properly protected.

Bar Council
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