

New entrants will influence the regulatory landscape

There are still too many unknowns in the way the various regulators will police the provision of legal advice in the age of ABSs, warns **Susanna Heley**

Alternative business structures are often discussed as if they're some kind of exotic curiosity instead of simply a way of allowing law firms to be run or owned by people other than lawyers. Many have been predicting the demise of the high street firm ever since the concept was first mooted; others are convinced that the introduction of ABSs is the future of effective legal services provision.

As of January this year, both the Council for Licensed Conveyancers and the SRA are licensing authorities approved to authorise firms to practise as ABSs. The Legal Services Board has, however, deferred its decision on the CLC's application to regulate litigation services in addition to the reserved activities it currently regulates. The decision is now due by the summer.

At present, this means that only ABSs not interested in providing litigation services can be authorised by the CLC. If the CLC's application is granted, this could change. We may finally be faced with the reality of regulator shopping – a prospect that has lurked uncomfortably but has not really been addressed.

Regulatory crossover

I have concerns that the prospect of regulator shopping, and, indeed, the desire to increase competition in the legal services market may lead to a lowest common denominator approach resulting in either a lowering of standards or a reduction in consumer protection.

The recent SRA consultation on indemnity insurance is an example of commercial pressures being brought to bear which may have the effect of eroding the current level of protection offered to clients

of solicitors' firms by replacing the assigned risks pool (ARP) with possible discretionary awards from the Compensation Fund.

It is true that the change to the indemnity regime will still comply with the protections required under the Legal Services Act. That said, any reduction in protection for consumers justified by compliance with the statutory minimum requirements looks like the first step on a slippery slope. My concern is that entrants to the legal services market will be able to select a regulatory regime that best suits their needs.

Naturally, the regime that results in minimal regulatory burden will look attractive. If new – or even existing – regulated entities decamp en masse to a different regulator, it seems to follow that regulators may have difficulty maintaining their position if their source of revenue – the profession – dries up.

ABSs present a particular challenge, particularly where an ABS is a multidisciplinary practice. Even now, law firms occasionally struggle with the conduct of an employee personally regulated by another legal regulator. I have come across cases where the SRA has conducted an investigation in its capacity as regulator of the firm, and, subsequently, the employee has been personally investigated by their own regulator. This strikes me as particularly harsh, not least because it increases stress and results in delayed investigations. In an ABS, there may be occasions where the jurisdiction for an employee's misconduct is not at all clear and there may be multiple regulators involved in an investigation. One issue that prospective MDPs face is how well the relevant regulators will be able to work together if such a situation arises.

Ongoing compliance

Much has been written about the likely impact of ABSs, the commercial realities as to whether it's all really worth it or not. It seems that the profession is expecting something of a perfect storm when it comes to ABSs. I am told that the impending ban on referral fees is forcing claims management companies to rethink their strategies – the obvious strategy apparently being to convert to an ABS and avoid the need for a referral by bringing the legal services provision in house.

Little has been written in the legal press about how tensions between the traditional firm regime and the ABS regime may be resolved. I have the impression that the answer to any number of specific queries about regulator shopping and tensions between the different regulators and regimes they're running is a variation on the theme: 'We'll cross that bridge when we come to it.'

I am certain that applications for ABS authorisation have carefully considered not only the regulatory burden involved in gaining authorisation but also the ongoing regulatory burden of complying with a regime that simply has to be flexible enough – and reviewed often enough – to meet challenges that are, as yet unknown. Fingers crossed.



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