

BAR
STANDARDS
BOARD

REGULATING BARRISTERS

Licensing Authority Application
BSB Representations
October 2015

Introduction

1. In April 2015 the Bar Standards Board (BSB) submitted its licensing authority application to the Legal Services Board (LSB) to become a licensing authority for alternative business structures (ABS).
2. In reaching its decision the LSB is required to consult with the mandatory consultees which comprise of the Competition and Markets Authority (CMA), the Legal Services Consumer Panel (LSCP) and the Lord Chief Justice. This document contains our written representations in response to the advice given by the mandatory consultees.

Background

3. At the time of making these representations the BSB has been authorising non-ABS entities for 5 months. The introduction of non-ABS entities has provided barristers the opportunity to liberalise the business models and structures through which they can provide legal services. With the regulation of ABS and non-ABS entities our aim is to operate as a specialist entity regulator, providing a regulatory regime suited to the efficient and cost effective regulation of entities whose permitted range of services is broadly the same as those permitted to the self-employed Bar and whose risks and regulatory requirements are similar. Wherever possible therefore we have sought to ensure that the licensing arrangements are consistent with those for BSB regulated individuals.

Advice and responses to mandatory consultees

Competition and Markets Authority

4. We welcome the CMA's overall advice that it finds no current evidence to suggest that the Bar Council becoming a licensing authority under the Act would (or would be likely to) prevent, restrict or distort competition within the market for reserved legal services to any significant extent. We will respond to the CMA's specific observations below.

Restrictions and proportionality

5. The CMA has noted that allowing the BSB to authorise ABS entities will create extra choice for both providers and consumers. However, in competition terms, it has advised the LSB that *'the relevant provisions of the BSB's regulatory scheme [should not be] so disproportionate in seeking to meet the BSB's other regulatory objectives under the Act (such as supporting the rule of law or protecting consumers) that they unnecessarily restrict competition in the relevant markets.'* In particular, the LSB is invited to consider whether some of the limitations on the scope of the BSB's proposed ABS regime are proportionate in nature.
6. Part of the rationale for imposing restrictions on the types of entity we are seeking to regulate is to ensure that the BSB does not regulate too far beyond its existing experience and does not seek to authorise entities that it is not competent to regulate. Overall the aim of the licensing regime is initially to be as consistent as possible with the regime for self-employed barristers and the BSB's existing expertise and therefore the scope of services regulated should be similar. This is not because the BSB is seeking to

limit the scope of legal services available in the market, quite the opposite is the case. The BSB believes that there is little value in simply seeking to replicate the regulatory regimes of other Licensing Authorities (such as the Solicitors Regulation Authority (SRA) for example) and that the added value the BSB can provide is by offering both potential entities and potential clients a choice of regulatory regime, which is proportionate and targeted to a specific set of risks, with which the BSB is already broadly familiar.

7. In considering whether its proposals are proportionate, the BSB has viewed the issue in a wider context: these proposals broaden competition and broaden the scope for innovation in the sector when viewed alongside the other regulatory regimes that are in operation. The BSB has not sought to argue that the potential risks of a wider scope of operation (which, as the CMA acknowledges, are managed by other licensing authorities) could not possibly be mitigated by the BSB. But the absence of such risks will significantly help to keep the BSB regime relatively simple and costs down. If we were to start by offering unrestricted non-lawyer ownership and regulation of multi-disciplinary practices then we would be creating something that closely resembled the SRA's regime. That would have significant operational implications for the BSB (in terms of authorisation and supervision requirements, cost of regulation etc.) with minimal benefit for the sector because applicants can already go elsewhere for authorisation of that type of entity. This is particularly important as the BSB has only recently started regulating entities and the numbers of ABS and other entities we are likely to regulate in the foreseeable future is relatively low, so if we had to gear up to regulate more complex operations, the cost per ABS would be high. Creating a new 'niche' regulator for certain ABS entities cannot be a restriction on competition: other licensing authorities provide a regulatory home for those who want to establish other types of entity, while a more limited BSB regulatory regime provides a regulatory choice for those who do not do so (hence we believe we are increasing choice overall in the sector for both the regulated community and consumers).

Scope limited to practices that are solely legal, with a substantial part being advocacy, litigation and expert legal advice

8. For reasons discussed above, the BSB does not propose to authorise multi-disciplinary practices initially. Such activity would additionally require significant consideration of: the additional risks posed by the inclusion of non-legal services in a firm's activities; the relationship between the BSB's regulatory regime and that of other non-legal regulators; clarification as to which activities were to be regulated by the BSB and which by another regulator (whilst ensuring transparency and seamless protection for consumers); and a review of our risk framework and supervision processes.
9. Nevertheless, we will not enforce the discretionary criteria rigidly (our approach will be determined by our evolving understanding of the risks presented by ABS entities once we start regulating them). In addition to the scope for incremental change as we see real proposals from potential entities, we aim to review the restrictions after two years from the start of ABS authorisation, subject to having enough available information by then to take an informed view, given the possibility of slow initial take up. This will ensure that our overall approach remains proportionate.

Non-lawyer ownership

10. The CMA has also queried whether the discretionary 25% limit on non-lawyer ownership and management is necessary given that other licensing authorities do not maintain such

a restriction for ABS applications (even though they license entities that provide advocacy and litigation services).

11. Although a 25% discretionary limit has been set, the BSB is not proposing to exercise an overly rigid approach to this limit or any of the other criteria, but will allow a degree of discretion around this, by reference to the primary objective and purpose of providing for specialist regulation of low risk, advocacy focussed entities. The BSB would regulate entities which were in some respect outside of the structural requirements but would otherwise meet the BSB's niche (for example, in terms of advocacy focus) and, on the other hand, may refuse to authorise entities which met the letter of the structural requirements but for other reasons were judged to be high risk or unsuitable, in terms of scope of services, for example.
12. Although the Authorisation Team will not apply the 25% lay ownership limit as a rigid one, this is intended as an indicator that an entity might be better suited to a different regulatory approach, with less focus on individual responsibility and accountability and/or that the focus of services provided by the applicant will not be specialist legal advisory, advocacy and/or litigation services and is therefore incompatible with the BSB's decision to be a specialist regulator. As above, our approach will be determined by our evolving understanding of the risks presented by ABS entities once we start regulating them. This mirrors our approach to the regulation of non-ABS entities.

Sunset clause

13. In its advice the CMA has invited the LSB to consider periodically the BSB's exercise of discretion to ensure that, in light of practical experience, these criteria would be amended to allow for greater variation in ABS entry that might facilitate competition. The CMA has stated '*the LSB might also consider whether these provisions should be subject to a 'sunset clause' in order to ensure a review of their proportionality at a later date when any evidence to suggest a detrimental effect on competition and choice in the relevant markets may have come to light.*
14. The BSB does not believe that a specific sunset clause is necessary in order to review the discretionary criteria. The BSB has chosen to put such discretionary factors in its policy statement rather than in its rules so that we can be flexible in response to developments in the market and our evolving understanding of the risks presented by different business models and structures. By setting out these factors in the policy statement there is scope for incremental change outside any formal review period. The BSB's intention is that the policy statement may be reviewed and updated in the light of experience. In addition to the scope for incremental change as we see real proposals from potential entities, we would in any event aim to review the restrictions after two years from the start of ABS authorisation, subject to having enough available information by then to take an informed view, given the possibility of slow initial take up. We believe that this approach would be more effective than a "sunset clause".

Overall impact on competition

15. For the various reasons discussed above, the BSB believes that the benefits to competition of the BSB's proposals significantly outweigh any potential adverse effects. As compared with the status quo, the introduction of greater choice for both providers and consumers will promote competition. As the CMA also notes, the introduction of a

“niche” licensing authority may well encourage applications from barristers and other types of lawyers that would otherwise not consider this type of business structure.

Legal Services Consumer Panel

16. The LSCP has stated in its advice to the LSB that it "*welcomes the BSB's efforts to engage consumer representative organisations as it consults on proposals and in developing its consumer strategy*" and that it "*has no serious concerns about the application, given that it seeks to open up the entity regulation regime to ABS entities*".

Future consumer work

17. As a public interest regulator the BSB has a commitment to understand the role of the consumer within the legal services market and to ensure that it seeks engagement from consumers and their representative organisations as it develops policy or takes regulatory decisions. The BSB has commenced a structured programme of consumer engagement and awareness which, through training and guidance, will ensure that the BSB engages effectively and routinely with consumers. In addition, we have developed, and continue to develop, relationships with consumer organisations such as Victim Support, Citizens Advice and the National Children's Bureau. These relationships provide valuable means of structured feedback on policy initiatives such as the development of an ABS regime and will be an important source of information as we review the effectiveness of its operation.

Indemnification and compensation arrangements

18. As part of the licensing authority application the BSB submitted a note on compensation arrangements, giving detailed consideration to what would be “appropriate” by way of compensation arrangements. The note explained that the BSB does not consider it appropriate to put a compensation fund (or equivalent arrangements designed to perform a similar function) in place, as the risks currently do not justify such a regulatory intervention. However, as the LSCP has highlighted in its advice, an order under section 69 of the LSA is being drafted so that if policy changes were required in the future, the BSB would have the power to establish such a fund. The LSCP did however state that it ‘remains interested to see the results of the research into the likely cost of an insurance premium for compensation arrangements, though it would have been helpful to have this research available to accompany this application in order to provide a fuller picture of what the BSB regime could look like.’ The BSB has undertaken some initial research into the costs of such arrangements as part of its assessment of the impact of the proposed order. The draft impact assessment will be published in due course.

Lord Chief Justice

19. The BSB welcome's the Lord Chief Justice's support for the BSB's application. In particular, he agrees that operating as a niche licensing authority is a sensible starting point.

Regulatory competition and standards

20. The Lord Chief Justice states that he "*...is firmly of the view that the risk of "shopping around" for the least restrictive regulatory regime must be avoided.*"

21. Whilst the BSB is keen to regulate a range of entities to allow innovation in the provision of legal services, the licensing application is premised on the view that there would be

little advantage to the market, the profession or clients in the establishment of a regulatory regime which simply replicates that of other licensing authorities. The proposed licensing arrangements draw on the BSB's existing entity regulation policy statement which describes the BSB as a specialist legal services regulator with a specialist focus on the regulation of advocacy, related litigation services and expert legal advice. In designing its entity regulation regime it has analysed the legal services market, its own capacities and capabilities and the opportunities for regulation offered by other licensing authorities and has identified the most appropriate market segment within which to operate.

22. By adopting this approach, the BSB is offering a choice of regulation (whilst not seeking to provide direct competition with other regulators), which is attractive to certain types of business, and by widening the types of business, increases the public's choice in access to justice. Importantly, the BSB believes this approach will help to ensure that there are no potential entities which operate on a specialist basis in the market that cannot find an appropriate regulator. The practical application of the regulatory regime will reflect the BSB's regulatory and policy objectives.

Professional standards and individual responsibility

23. The Lord Chief Justice states that "*in my view, one concern that underlies many, if not all the Regulatory Objectives is professional standards of practice required in litigation, which necessarily impacts upon the courts in England and Wales.*" Individual responsibility and the maintenance of professional standards is central to the BSB's regulatory regime and has been a key factor in developing the new arrangements. The responsibility of the individual advocate to the Court and to the client should remain at the heart of regulation of advocacy regardless of whether that advocate is operating within an entity or on a self-employed basis. The BSB believes it to be in the public interest that we should maintain our influence over standards of advocacy as a specialist regulator of that service, and as far as possible, extend that influence to those types of entity whose structure, services and risks are such as to make them suitable candidates for our type of regulation, and to those who choose to work within such entities.
24. The BSB is of the view that allowing new structures and a range of services (including litigation for example), will not lead to a reduction in expertise or standards in advocacy, advice or litigation. Higher court advocates and advocates in other jurisdictions, are able to maintain such skills in business settings. Furthermore, barristers naturally have an investment in their expertise and status as advocates and have strong incentives to ensure that the development of their advocacy expertise is not undermined. Any risks to consumers will be mitigated by training, having appropriate systems in place and insurance cover.
25. We further note the Lord Chief Justice's support for the BSB's discretionary criteria relating to non-lawyer ownership and management, as a means of promoting individual responsibility and accountability in litigation and advocacy services.

Sunset clause

26. The BSB welcomes the Lord Chief Justice's comments on the necessity for a sunset clause. As stated above the discretionary factors in the policy statement could be subject to incremental change in any event, if that was felt necessary. Furthermore the policy

statement was designed to allow the BSB to adopt a flexible approach to authorisation as opposed to a rigid one. Even in the absence of a sunset clause the criteria would be subject to ongoing review and a more formal review 2 years after the start of ABS authorisation.

Policy statement

27. The BSB is encouraged by the Lord Chief Justice's comments about how it assesses access to justice as part of the non-ABS application process. Whilst the impact varies according to the size and complexity of each entity, the BSB requires confirmation in every case that consideration has been given to the potential for change or improvements. As the Lord Chief Justice notes, the specific nature of these changes or improvements is construed broadly to include a wide range of activities, ways of working or providing legal services. It is intended that a similar approach will be adopted to the authorisation of ABS.