



## **Legal Services Board – Decision Notice issued under Part 1 of Schedule 10 to the Legal Services Act 2007**

**The Legal Services Board (LSB) has decided to make a recommendation to the Lord Chancellor that an order be made designating the Bar Council as a licensing authority for the following existing reserved legal activities for which it is currently an approved regulator.**

- **The exercise of a right of audience**
- **The conduct of litigation**
- **Reserved instrument activities**
- **Probate activities**
- **The administration of oaths**

This Notice sets out the basis for the LSB decision.

### **Authority for the decision**

1. The authority under which the LSB has made this decision is set out in **Annex 1**.

### **Background and scope of application**

2. The Bar Standards Board (BSB) made an application on behalf of the Bar Council under Part 1 of Schedule 10 to the Legal Services Act 2007 (the Act), for the LSB to recommend to the Lord Chancellor that an order be made designating the Bar Council as a licensing authority for its existing reserved legal activities.
3. The regulatory functions of the Bar Council are delegated to the BSB. The effect of the application therefore, would be to allow the BSB to authorise and regulate entities as alternative business structures (ABS) on behalf of the Bar Council.<sup>1</sup>
4. Under the Act, the BSB authorises individual barristers to carry on reserved legal activities. In September 2013, the Bar Council amended its constitution (which determines and constrains the powers and functions that can be delegated to the BSB) to allow the BSB to also make regulatory arrangements for the authorisation and regulation of non-barristers, including entities. An application from the BSB to regulate non-ABS entities was approved by the LSB in November 2014.

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<sup>1</sup> An Alternative Business Structure is a “licensable body” as defined in section 72 of the Act.

5. This application is made with a view to extending the BSB's entity regulation regime and does not seek to go beyond the BSB's current overall strategy of being a niche regulator of advocacy focused legal services.

### **Assessment of the application and key issues considered**

6. The LSB undertook an assessment of the application against the criteria for designation as a licensing authority as set out in its Rules for Licensing Authority Designation Applications (LSB Rules)<sup>2</sup>, which have been made for the purposes of paragraph 11 of Schedule 10 to the Act. The table at **Annex 2** summarises the LSB's assessment in respect of the key criteria for designation as a licensing authority. The main conclusions of the LSB's assessment are set out below.
7. The BSB has the required licensing rules, which are contained in its Handbook. The LSB is satisfied that the BSB's licensing rules comply with the requirements under the Act and with the LSB Rules.
8. The BSB will use the General Regulatory Chamber of the First Tier Tribunal (FTT) to hear appeals against licensing decisions it makes when acting as a licensing authority.<sup>3</sup> An order under section 80 of the Act will be made to establish the FTT as the appellate body.<sup>4</sup>
9. The BSB has appropriate internal governance arrangements. The Bar Council has put arrangements in place which observe and respect the principles of regulatory independence (as defined in rule 1 of the LSB's internal governance rules).<sup>5</sup> The BSB and Bar Council have also jointly agreed a protocol for ensuring regulatory independence, following undertakings made to the LSB in 2013.
10. The LSB is satisfied that the BSB is competent and has sufficient resources in place. It has demonstrated its capability as an approved regulator. It has completed research to estimate the demand for ABS licensing and assessed its capacity and capability to ensure it is able to cope with this demand. Reassurance has also been provided on its capacity and capability should actual demand be higher or lower than expected.
11. The LSB is satisfied that the BSB approach to the drafting of the licensing rules, is compatible with section 28 of the Act in respect of the regulatory objectives and Better Regulation Principles. The BSB's regulatory arrangements have been designed to ensure that persons regulated by the BSB (individuals and entities) act with independence, integrity and honesty, and so promote the interests of the public and of consumers, and uphold the rule of law. The LSB is also satisfied that the BSB has a set of regulatory arrangements complying with the better regulation principles.

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<sup>2</sup> The LSB rules for applications to be designated as an LA are published on the LSB website at: [http://www.legalservicesboard.org.uk/what\\_we\\_do/regulation/pdf/designating\\_la\\_rules\\_v2\\_june\\_2011\\_final.pdf](http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/designating_la_rules_v2_june_2011_final.pdf)

<sup>3</sup> The appeal route for disciplinary matters in relation to licensed bodies will follow the same route as disciplinary appeals for individual barristers, going to the High Court.

<sup>4</sup> Section 80 of Part 4 to the Act refers to Functions of appellate bodies.

<sup>5</sup> The LSB Internal Governance Rules 2009 are published on the LSB website at: [http://www.legalservicesboard.org.uk/what\\_we\\_do/regulation/pdf/Internal\\_Governance\\_Rules\\_Version%203\\_Final.pdf](http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/Internal_Governance_Rules_Version%203_Final.pdf)

12. The BSB included a policy statement in its application, in accordance with section 82 of the Act, which set out how it intended to exercise its authority as a licensing authority in accordance with the requirements in section 28 of the Act (to act in a way which is compatible with the regulatory objectives, for example).
13. During the assessment process the LSB also identified the following specific substantive matters.

*Proposed licensing restrictions for ABS*

14. The BSB aims to restrict its licensing regime to low risk, advocacy focussed ABS, that is ABS whose activities are broadly similar to those of self-employed barristers and which pose similar risks and requirements. This is compatible with its stated aim of being a niche regulatory and reflects its relative inexperience as an entity regulator.
15. A set of licensing criteria have been developed to describe the types of ABS that may be suitable for BSB authorisation. These licensing criteria are published as part of the BSB's entity regulation policy statement, allowing potential applicants to see the matters that are considered in the application process.
16. Taken as a whole the licensing criteria may appear quite restrictive and might infer that non-lawyer ownership creates a significantly higher level of risk (a view that is not shared by the LSB). However, they are in the main discretionary and the BSB has confirmed that as it develops a better understanding of how the market develops (and increases its own experience), it will have flexibility to authorise a wider range of ABS businesses. Subject to there being enough information to take an informed view, the BSB has committed to carrying out a formal review of its restrictive licensing criteria after two years of operation as a licensing authority.
17. In its advice as a mandatory consultee, the Competition and Markets Authority (CMA) noted the restrictive provisions in the BSB's proposed licensing authority regime. The CMA suggested the LSB needed to satisfy itself that the benefits of the BSB's most restrictive provisions outweigh any adverse effects to competition which may be caused as a result. The BSB explained that it aims to ensure it does not, at least initially, regulate too far beyond its existing experience and competence. In his advice as a mandatory consultee, the Lord Chief Justice (LCJ) supported this view, deeming it to be a sensible approach.
18. Although the BSB is taking a cautious approach, this can be viewed as sensible in the light of its limited experience of regulating entities to date. The LSB is satisfied that the proposed licensing rules are appropriate and that the BSB is equipped to consider and authorise a wide range of applications.

### *Approach to risk*

19. The BSB has continued to develop a risk based approach to regulation. Its establishment in 2012 of a Regulatory Improvement Programme began this process and led to the adoption of the BSB's first risk framework in 2013. In 2014, with the launch of its new Handbook and the establishment of its supervision function, the BSB aimed to reinforce a more outcomes focused and risk based approach.
20. In our assessment of the application we sought to understand how risk is incorporated into the BSB's work. The risk framework is the structured approach the BSB uses to collect, identify and mitigate risks. The risk index is a list of the risks the BSB has identified and categorised into particular groupings such as market and external risks and ethical conduct risks. The risk outlook sets out an overview of the key risks facing the legal services market for barristers. These documents are due to be published in April 2016.
21. The risk index is currently used in the assessment of applications from non-ABS entities for authorisation, with each entity allocated a risk rating. This process continues during the supervision of an entity with the risk rating regularly reassessed. Both non-ABS entities and chambers are currently segmented by their risk profile into high, medium and low risk categories and the supervision activity these bodies are subject to is driven by this segmentation. A similar approach will be followed with ABS.
22. In discussions with BSB staff and Board members we have been satisfied that risk is increasingly being embedded into the BSB's regulatory approach. Risk registers and a risk heat map showing the aggregation of risk and its movement are regularly reviewed by the Board.

### *Capacity and capability*

23. Having reviewed existing resources, processes, systems and controls in the BSB's current entity regulation work, we are satisfied that the BSB would be competent and have the resources to perform the role of licensing authority.
24. The BSB has used experience gained from the operation of its non-ABS entity regime, along with research on the potential ABS market, to estimate the demand for ABS licensing. It expects to receive 20 ABS applications per annum in the first three years of operation as a licensing authority. It also expects that applications for ABS licensing will come from similarly sized and structured entities to those from whom it has received applications for non-ABS entity authorisation.
25. The BSB has also considered how it would manage licensing if actual experience showed that it had under-estimated either the number or complexity of applications, or if other issues arise which put pressure on the resources. There is sufficient flexibility within the current resources to respond to changes in demand.

### *Compensation arrangements*

26. Following its assessment of the risks in its proposed licensing regime which compensation arrangements might be an appropriate mitigation for, the BSB concluded that, at this time, it does not believe it is necessary to establish a compensation fund. It has primarily reached this view because of the prohibition on BSB licensed ABS holding client money and the fact they are expected to offer the same range of services as self-employed barristers and non-ABS entities. A compensation fund has not been established in relation to self-employed barristers and non-ABS entities and there are no plans to do so.
27. The BSB is however taking steps which would enable it to put in place appropriate compensation arrangements if risks emerge in the market for which this would be an appropriate response.
28. The BSB is seeking a statutory power to ensure it has the means by which to establish a compensation fund, should this be needed in the future. This is a position the Legal Services Consumer Panel (the Panel) made clear it supported in its response to the LSB as a mandatory consultee to the BSB's application. The Legal Ombudsman has also expressed support for the BSB's proposal to seek this statutory power in its response to a BSB consultation on this issue.<sup>6</sup>
29. The BSB has also assured us that it will be alert to the emergence of risks which require it to review its compensation arrangements and shared with us its action plan to help inform any decision on future compensation arrangements. The BSB action plan includes:
- regular monitoring through supervision of fee and money-handling arrangements, as well as complaints from clients experiencing difficulties with barristers holding their money inappropriately (and/or the risk of loss to clients in those circumstances)
  - undertaking more detailed discussions with the insurance market to ensure that potential providers exist, should the BSB need to adopt an insurance policy as a compensation arrangement
  - reviewing the requirements the BSB places on its regulated community (particularly those engaged in direct access) to ensure clients are aware of the limitations on the services that may be provided by barristers and BSB entities.
30. Having considered the BSB's assessment of the risks a compensation fund would seek to address and its plans for ongoing monitoring, the LSB has concluded that this is a reasonable and proportionate approach.

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<sup>6</sup> See the Legal Ombudsman response to a consultation on proposed amendments to the BSB's powers <http://www.legalombudsman.org.uk/wp-content/uploads/2014/09/Final-Consultation-Response-Amendment-BSB-Powers-July-2015.pdf>

*Indemnification arrangements: professional indemnity insurance*

31. As required by section 83(5)d of the Act, the licensing rules set out appropriate indemnification arrangements. The BSB will require ABS to assess the appropriate level of professional indemnity insurance (PII) for their business. The BSB will also issue guidance as to the minimum acceptable terms and levels of PII that ABS will need to satisfy. These will follow the same principles as those applied to non-ABS entities, i.e. the minimum amount of cover required will be £500,000. The BSB's rationale for this similar approach is the scope of licensing will limit ABS to those which present similar risks to non-ABS entities.
32. We understand that the BSB intends to monitor how the insurance market for entities develops and will continue to assess whether its approach and the minimum level of cover remain appropriate. The BSB has also assured us it will monitor compliance with its guidance and be able to act should it not be adhered to. We are satisfied that the BSB's licensing rules will contain appropriate indemnification arrangements.

**Advice received on the application**

33. Under paragraphs 3(1) and 3(2) of Schedule 10 to the Act, the LSB is required to seek advice from the Competition and Markets Authority (CMA), the Legal Services Consumer Panel and the Lord Chief Justice (LCJ). The mandatory consultees were largely content to support the BSB application and the following key points emerged from their advice.

*'Sunset clause'*

34. As the ABS licensing criteria may be subject to incremental change the CMA invited the LSB to consider periodically how the BSB has exercised its discretion. It suggested that the LSB might wish to consider whether these provisions could be subject to a 'sunset clause', to ensure that, in light of practical experience, they could be amended to allow for greater variation in ABS entry that might facilitate competition.
35. This type of 'sunset clause' is not an option available to the LSB. It is not possible to issue a conditional decision on a licensing authority application, the validity of which is based on a future review. Furthermore, once a body is designated as a licensing authority, the LSB's powers are limited to those under Part 5 of the Act. These powers do not include anything comparable to the review and amendment of provisions as proposed by the CMA via a 'sunset clause'.
36. In its response on the specific 'sunset clause' point, the BSB confirmed its intention for there to be regular ongoing monitoring and review of the operation of its licensing criteria (including the use of discretion in relation to the ABS licensing criteria). As referred to above, subject to there being enough information to take an informed view, the BSB has committed to carrying out a formal review of its restrictive licensing criteria after two years of operation as a licensing authority.

### *Regulatory competition and standards*

37. The LCJ explained he is firmly of the view that the risk of ‘shopping around’ for the least restrictive regulatory regime must be avoided. In its response, the BSB confirmed it sees little advantage in establishing a regulatory regime which simply replicates that of another licensing authority. It believes the more limited scope of its regime will support innovation by opening up the benefits of ABS to providers whose business is advocacy focused. These providers, in the BSB’s view, are potentially being put off by demands they are unable to meet or see as unnecessarily burdensome in current licensing authority regimes.

### **Rules that are approved with effect from the date of this decision notice**

38. The rules that are approved are the BSB’s Handbook which includes the licensing rules a licensed body must adhere to. This document will be published alongside, and at the same time, as the decision notice.

### **Decision**

39. The LSB Rules giving effect to paragraphs 11(2) and 11(3) of Schedule 10 to the Act set out the matters on which the LSB must be satisfied when granting an application for designation as a licensing authority.

40. The Board has considered the application and satisfied itself that the issues raised have been satisfactorily addressed. It is satisfied that the criteria for granting a licensing authority application have been met.

41. Therefore the LSB has decided to:

- Grant the application in accordance with paragraph 12(1) of Schedule 10 to the Act.
- Recommend to the Lord Chancellor that the Bar Council be designated as a licensing authority for:
  - The exercise of a right of audience.
  - The conduct of litigation.
  - Reserved instrument activities.
  - Probate activities.
  - The administration of oaths.
- Include in the recommendation to the Lord Chancellor, the recommendation that the licensing rules be approved for use by the BSB when the Lord Chancellor exercises his authority under paragraph 16(1) of Schedule 10 to the Act.

42. This document constitutes the decision notice which is being provided to the applicant under paragraph 12(3) of Schedule 10 to the Act. It is being published under paragraph 12(5) of Schedule 10 to the Act.

## **Chronology**

- The application was formally made by the BSB to the LSB on 29 April 2015.
- The LSB confirmed receipt of the application on 29 April 2015.
- The decision period started formally on 29 April 2015 and ends on 28 April 2016.
- The application was published on the LSB website on 8 May 2015 (publication delayed at the BSB's request).
- The advice from mandatory consultees and the BSB's representations were published on the LSB website on 22 October 2015.
- The decision notice is being published on the LSB website on 30 March 2016.

## **Legal Services Board**

**29 March 2016**

## Authority for the decision

### *Applications for designation as a licensing authority*

1. Paragraph 1(2) of Schedule 10 to the Act enables a body to make an application requesting that the LSB recommends that an order be made by the Lord Chancellor to designate that body as a licensing authority in respect of identified reserved legal activities. Paragraph 1(3) of Schedule 10 to the Act provides that a body may only make such an application if it is an existing approved regulator in relation to the activity or it has made an application under Part 2 of Schedule 4 to the Act (designation of approved regulators) for the Board to recommend that an order be made by the Lord Chancellor designating the body as an approved regulator in relation to the activity.<sup>7</sup>
2. Part 1 of Schedule 10 to the Act also documents the processes, participants and criteria that will be applied to any such application that is made. These provisions enable the LSB to make rules at paragraphs 1(4) specifying the form and manner of the application and 1(5) for the amount of the prescribed (application) fee. In accordance with paragraph 2(2), the LSB must make rules about the procedures and criteria that it will apply when determining whether to refuse to consider or to continue its consideration of an application. Additionally, in accordance with paragraph 9(3) of Schedule 10 to the Act, the LSB must make rules governing the making of oral and written representations.
3. Paragraph 11(1) of Schedule 10 to the Act also requires the LSB to make rules about how it will determine if it should recommend to the Lord Chancellor that an application for designation by a body to become a licensing authority in relation to identified reserved legal activities should be made. These Rules for Licensing Authority Designation Applications came into effect on 1 January 2010 (LSB Rules).<sup>8</sup>
4. The LSB may only grant an application in relation to a particular reserved legal activity if it is satisfied in relation to the requirements under its Rules giving effect

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<sup>7</sup> The term “approved regulator” is defined in section 20 of the Act and a list of the Approved Regulators and the reserved legal activities for which they are approved is contained in Schedule 4 Part 1 of the Act. The term “reserved legal activities” is defined at Section 12 of the act and a list of the reserved legal activities and a definition of what is comprised within each of them is contained in Schedule 2 of the Act. Both Schedules will be amended from time to time in accordance with activities conducted in accordance with provisions of the Act.

<sup>8</sup> The Rules for Licensing Authority Designation Applications can be found on the LSB website: [http://www.legalservicesboard.org.uk/what\\_we\\_do/regulation/pdf/designating\\_la\\_rules\\_v2\\_june\\_2011\\_final.pdf](http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/designating_la_rules_v2_june_2011_final.pdf).

to paragraphs 11(2)<sup>9</sup> and 11(3)<sup>10</sup> of Schedule 10 to the Act. The LSB Rules provide the mechanism through which the LSB carries out its assessment against these requirements and the LSB has therefore satisfied itself of compliance with the requirements of paragraphs 11(2) and 11(3) by an assessment of the application and proposed regulatory arrangements against the LSB Rules.

5. Paragraph 16(1) provides that where an order is made by the Lord Chancellor under Paragraph 15 of Schedule 10, the applicant's proposed licensing rules are at the same time treated as having been approved by the LSB.

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<sup>9</sup> Paragraphs 11(2)(a) to (d) provide that the LSB may only grant an application if satisfied that the applicant's proposed licensing rules in relation to the activity comply with the requirements of section 83; that if an order to be made under paragraph 15 designating the body in relation to the activity there would be a body with power to hear and determine appeals; the applicant would have appropriate internal governance arrangements in place at the time the order takes effect; and the applicant would be competent, and have sufficient resources to perform the role of licensing authority in relation to the activity at the time the order takes effect.

<sup>10</sup> Paragraphs 11(3)(a) and (b) of Schedule 4 provides that the LSB must in particular be satisfied that the exercise of the applicant's regulatory functions would not be prejudiced by any of its representative functions and that decisions relating to the exercise of regulatory functions would, so far as reasonably practicable, be taken independently from decisions relating to the exercise of representative functions.

## Annex 2

### Extract from the Board paper

The following information sets out our assessment of the BSB’s application against the criteria for designation as a licensing authority as set out in paragraph 11 of Schedule 10 to the Act and the LSB Rules.

<b>Criteria for designation as an licensing authority</b>	<b>Summary of the LSB assessment</b>	<b>MET or not MET by the applicant</b>
<p><b>Licensing Rules</b> comply with section 83 of the Act. When considering the application the Board will consider how consistent an applicant’s proposed licensing rules are with the LSB’s rules.</p>	<p>We are satisfied that the BSB has drafted appropriate rules in its Handbook in relation to licensing bodies. We consider that these satisfy all the licensing rules requirements in the Act and in the LSB Rules.</p> <p>We note that the BSB expects to license ABS whose business is advocacy focused. In line with this aim, it has included certain requirements for licensing which may restrict the ownership, management and services provided by an ABS. The BSB will exercise discretion in relation to these restrictions. There is further information on this in paragraphs 18 to 28.</p>	<p>MET</p>
<p>An <b>appeals body</b> in place to hear and determine appeals against decisions of the applicant</p>	<p>We are satisfied that an appeals body will be in place to hear and determine appeals.</p> <p>The BSB will use the General Regulatory Chamber of the First Tier Tribunal (<b>FTT</b>) to hear appeals against decisions it makes when acting as a licensing authority. A section 80 order establishing the FTT as the appeals body needs to be in force at the point of designation along with a section 69 order which allows the BSB to make rules about appeals.</p> <p>There is further information on the section 80 order in paragraphs 62 to 66.</p>	<p>MET</p>
<p>Appropriate <b>internal governance</b> arrangements at point of designation;</p>	<p>We are satisfied that this criterion has been met in relation to the BSB’s status as a licensing authority.</p> <p>In Annexes N and O of the application the BSB has included its constitution and its</p>	<p>MET</p>

Criteria for designation as an licensing authority	Summary of the LSB assessment	MET or not MET by the applicant
regulatory functions not to be prejudiced by its representative functions; as far as reasonably practical, regulatory decisions to be taken independently of representative ones	December 2014 protocol for ensuring regulatory independence, developed following undertakings made to the LSB in 2013. <sup>11</sup> It has also confirmed a robust administrative system has been put in place to support and evidence compliance.	
Applicant is <b>competent</b> and has <b>sufficient resources</b> to perform the role of LA in relation to the proposed activities as defined in paragraph 14.	We are satisfied that this criterion has been met.  Based on its research the BSB has estimated the demand for ABS licensing and assessed its capacity and capability to ensure it is able to cope with this demand. Reassurance has also been provided on its ability to cope with any unexpected issues.  There is further information on this in paragraphs 46 to 54.	MET
Approach to licensing rules are consistent with requirements in <b>s.28 of the Act</b> (regulatory objectives, better regulation principles, etc)	We are satisfied that the BSB has framed its application with regard to the regulatory objectives and better regulation principles.  The BSB's regulatory arrangements have been designed to ensure that persons regulated by the BSB (individuals and entities) act with independence, integrity and honesty, and so promote the interests of the public and of consumers, and uphold the rule of law. By offering a different regulatory regime in its operation as a licensing authority, it also aims to promote competition.  We are satisfied that the BSB has a set of regulatory arrangements complying with the better regulation principles. Arrangements set	MET

<sup>11</sup> See Annexes N and O of the BSB's licensing authority application [http://www.legalservicesboard.org.uk/Projects/statutory\\_decision\\_making/pdf/2015/20150508\\_BSB\\_LA\\_App\\_Annexes\\_M\\_To\\_P.pdf](http://www.legalservicesboard.org.uk/Projects/statutory_decision_making/pdf/2015/20150508_BSB_LA_App_Annexes_M_To_P.pdf)

Criteria for designation as an licensing authority	Summary of the LSB assessment	MET or not MET by the applicant
	detailed expectations, including the types of ABS the BSB expects to license, with a view to enabling new business models and potential for competition and innovation in the delivery of services to consumers.	
In accordance with s.82 of the Act, an applicant must prepare and issue <b>a policy statement</b> as to how, in exercising functions under Part 5 of the Act, it will <b>comply with s.28 of the Act</b>	We are satisfied that the criterion has been met.  Annex C of the application sets out a statement of policy on how the BSB intends to exercise their authority as a licensing authority in accordance with the requirements set out in section 28 of the Act. <sup>12</sup> The statement (which is summarised in the row above) is aimed at demonstrating how the BSB’s proposed regulatory arrangements will support the regulatory objectives and professional principles in section 1 of the Act.	MET

<sup>12</sup> See Annex C of the BSB’s licensing authority application  
[http://www.legalservicesboard.org.uk/Projects/statutory\\_decision\\_making/pdf/2015/20150508\\_BSB\\_LA\\_App\\_Annexes\\_A\\_To\\_C.pdf](http://www.legalservicesboard.org.uk/Projects/statutory_decision_making/pdf/2015/20150508_BSB_LA_App_Annexes_A_To_C.pdf)