



Decision notice

Issued by the Legal Services Board under Part 3 of Schedule 4 to the Legal Services Act 2007

The Bar Standards Board's application for approval of changes to its regulatory arrangements to enable the authorisation and regulation of entities

1. The Legal Services Board (LSB) has granted an application from the Bar Standards Board (BSB) approving alterations to the BSB Handbook to enable the authorisation and regulation of entities. The Bar Council is an approved regulator and BSB is the regulatory arm to which The Bar Council has delegated its regulatory functions.
2. This decision notice sets out the decision taken, including a brief description of the changes. The notes at the end of this notice explain the statutory basis for the decision. The chronology for LSB's handling of this application is set out at the end of this decision notice.

Proposed changes

3. Barristers have traditionally either been employed or self-employed – usually running their own business from a chambers. BSB has therefore always regulated barristers 'individually' (although has recently introduced a chambers based supervisory approach).
4. However, BSB considers that there is an increasing demand for barristers to be able to establish a legal services business – called an entity – and be regulated by BSB as a 'BSB authorised body'.
5. BSB applied to LSB on 25 June 2014 to regulate entities. The application comprised of a number of changes to BSB's current Handbook to make it applicable to entities and those working within them.

Key issues considered in the assessment of the application

Source of BSB's powers to regulate entities

6. When making a decision about whether to approve a change of regulatory arrangements, LSB must be satisfied that an approved regulator has the power to make the changes. The powers and functions of approved regulators are set out in a number of different sources – statutes, charters, constitutions – reflecting the different historical development of each. The Legal Services Act 2007 (the Act) did not significantly amend any of these but it does contain a provision (section 69) which

allows for the functions of approved regulators to be modified through secondary legislation¹.

7. Before receipt of BSB's application and during the assessment period, we undertook extensive work with BSB to understand the source of its powers to regulate entities, as opposed to individual barristers. In particular, we were concerned about the statutory basis for BSB's regulation of entities.
8. Historically, The Bar Council has regulated the conduct of individual barristers and, since the Act came into force, has authorised individual barristers to carry on reserved legal activities. In September 2013, The Bar Council amended its constitution to allow BSB to make regulatory arrangements for the authorisation and regulation of non-barristers, including entities. We agreed with BSB that this amendment provided it with a basis for entering into a contract with entities (as it currently does with individual barristers), with entities agreeing to be regulated by BSB and adhere to its rules as part of the authorisation process.
9. However, while we consider that this contractual basis for regulation may be appropriate for arrangements where the interests of the regulator and the regulated are aligned (for example, in relation to education and training arrangements), it may not be as appropriate in other areas, such as interventions and other enforcement action. Although remedies may exist under the contract, enforcing them may not be straightforward. This is particularly a risk where there is a need to take action in a 'hostile' situation and where co-operation between parties may not be guaranteed. Therefore we consider that grounding enforcement powers in statute is essential for consumer protection.
10. In its application to us, BSB proposed that section 20(6)² of the Act in effect gave it a statutory basis for the proposed arrangements. LSB and BSB therefore jointly sought an opinion from Nigel Giffin QC which supported LSB's view that section 20(6) is not itself a source of vires but is concerned with where the power to authorise lies.
11. As part of our assessment of the application, LSB has considered whether the provisions that rely on contractual arrangements are proportionate at the point that BSB starts to regulate entities, given the likely low number of entities and low risk that BSB will need to use its powers at an early stage. BSB also undertook a consultation during the assessment period to seek views about this approach and confirmed in a report of the consultation issued in November 2014 that it would proceed with regulating entities on a contractual basis.³
12. We have therefore accepted a contractual arrangement for BSB's regulation of entities in the short term, and for the purposes of approving this entity application.

¹ An order under section 69 can be used, amongst other things, to ensure that an approved regulator is able to carry out its role more effectively or efficiently.

² Section 20(6) of the Act states that "An approved regulator may authorise persons to carry on any activity which is a reserved legal activity in respect of which it is a relevant approved regulator."

³ See <https://www.barstandardsboard.org.uk/about-bar-standards-board/consultations/closed-consultations/entity-regulation-rule-changes-and-insurance/> for BSB's consultation on entity regulation rule changes and insurance, published in July 2014 and its summary report of responses, published November 2014.

However, we do not consider that this is a sustainable long term position and we have agreed with BSB that the interests of consumers would be better provided for if the arrangements for entity regulation, in particular enforcement powers, were underpinned by legislation. BSB, LSB and Ministry of Justice, have concluded that BSB can use section 69 to obtain a statutory underpinning for its regulatory functions in relation to entities and have been working on a statutory order that we anticipate will be in place by mid to late 2015.

13. In addition to providing a statutory basis for its regulation of entities, it is anticipated that the order will strengthen BSB's powers in relation to individuals in several key areas⁴ and will cover appeal arrangements for BSB regulatory decisions about entities (see below).

Approach to regulating entities

14. BSB has developed an entity regulation policy statement⁵ which sets out the types of entities BSB will normally regulate. The statement emphasises that the first entities BSB is seeking to regulate are likely to undertake activities similar to those traditionally undertaken by the Bar, would not hold client money and are of a simple structure. In the statement, BSB commits to consider widening the scope of its entity regulation once it gains more experience and the market develops. For example, it has for the time being decided against regulating multi-disciplinary practices but by stating this in the policy statement, it has the discretion to do so in future. BSB's approach also means that barrister owned entities with more complex structures are not prevented from seeking to be regulated by another approved regulator.
15. We welcome BSB's use of the policy statement to enable it to be more flexible and adaptable than rules would provide for. However, as part of the assessment process, we did seek to understand how BSB would ensure that its broad discretion does not mean entities are treated unfairly. BSB has assured us that underpinning this flexible approach will be careful monitoring of decision making processes to ensure consistency. We also consider that communications with and guidance for potential entities will be key to ensuring that entities understand at an early stage the likelihood of BSB authorising and regulating them.

Public access

16. The public access scheme allows those barristers who have met BSB's requirements to accept instructions direct from the public.
17. BSB's application proposed that the detailed public access rules which apply to self-employed barristers are not applied to BSB entities, although the rules should be considered best practice for entities. We accepted this approach on the basis that individuals who owned and worked within an entity would have to be appropriately trained to provide advice direct to the public. We were therefore concerned by a proposed rule in the Handbook which we thought could be interpreted as meaning

⁴ The exact content of the section 69 order is still subject to consultation by BSB. Any changes made to BSB's regulatory arrangements as a consequence of the section 69 order will be subject to LSB approval under Part 3 of Schedule 4 to the Act.

⁵ BSB's entity regulation policy statement is available here:
https://www.barstandardsboard.org.uk/media/1625055/entity_regulation_-_annex_b_policy_statement_final.pdf

that an entity could provide public access work without anyone in the entity having been appropriately trained.⁶ While BSB stressed to us that this was not the intention, we did not think that the proposed rule made this clear.

18. LSB and BSB both agree that entities taking instructions direct from the public must ensure they have appropriately trained and supervised authorised persons working for them. For barristers, this means that they have either undertaken public access training or have been exempted from it. However, such training may not be necessary for other types of authorised persons working in an entity. BSB therefore agreed to amend its proposed rule and supporting guidance to better reflect this. We are satisfied that the proposed Rule rS28 and supporting guidance now meets the policy intention.

Supervision

19. As part of the assessment process, we wanted to understand how BSB had assured itself that it will have the capacity and capability to authorise and regulate entities. We therefore welcomed the open and honest approach shown by BSB at our regular meetings with members of the supervision team during the assessment process. At these meetings we were kept updated on BSB's entity regulation implementation work, particularly communications, risk management, resource and IT. It was particularly helpful for our assessment of the entity application to be able to see in practice, BSB's new approach to supervising chambers, which it introduced in January 2014.
20. The assessment process included LSB attending a detailed session with the supervision team, as well as a member of LSB's team attending to observe a supervision visit to chambers undertaken as part of BSB's chambers supervision pilot. These activities and the chambers supervision pilot report, published by BSB in October 2014, greatly assisted our assessment of BSB's capacity and capability to regulate entities.
21. We have also noted as part of our regulatory standards work BSB's successful completion of its Regulatory Improvement Programme and the comprehensive and candid closedown report it published about the project. We consider this an example of good practice in delivering a regulatory change project, which puts BSB in a good position for its future supervisory work.
22. While we understand that the originally planned IT systems for entities will not be in place for when BSB begins to authorise entities, BSB has assured us that it has made plans to ensure that its systems are prepared for the authorisation of entities from early 2015.

Appeals

23. Having appeal arrangements in place is fundamental to the principle of the rule of law, one of the Act's regulatory objectives.

⁶ Rule rS28 of the Handbook submitted with the application stated that "to do public access work, BSB authorised bodies will have to be authorised to do litigation or to employ at least one person who is entitled to do public access work".

24. In its application, BSB proposed that appeals against regulatory decisions it makes about entities would be heard by the General Regulatory Chamber of the First Tier Tribunal (FTT). We agree that this is an appropriate route for such appeals. However, during the assessment process, it emerged that the arrangement would require a statutory basis. The proposed section 69 order, detailed above, will therefore make provision for appeals of BSB regulatory decisions about entities to be heard by the FTT.
25. As it will take some time for the section 69 order to be in place, BSB has proposed, and we have accepted as an interim arrangement, that the High Court can hear such appeals. This interim arrangement required an amendment to a Practice Direction to the Civil Procedure Rules (CPR) and required LSB to issue a warning notice⁷, under Part 3 of Schedule 4 to the Act, on 18 September 2014. This allowed BSB time to seek the approval of the CPR Committee to have the amendments made. The amendments were considered and approved by the CPR Committee at its meeting on 7 November 2014. The BSB has confirmed to us that the updated Practice Direction, enabling appeals against BSB regulatory decisions to be heard by the High Court, will be issued in April 2015.
26. Given the necessity to have appeal arrangements in place, BSB and LSB have agreed that BSB cannot begin to make any decisions about any entity applications until the Practice Direction has been updated in April 2015. BSB has committed in an undertaking to us that this will be the case. The undertaking is annexed to this decision notice.

Standard of proof

27. In considering the application, we noted that appeals against regulatory decisions will eventually be heard by the FTT, which operates under the civil standard of proof, whereas the criminal standard of proof will be applied to disciplinary tribunal decisions and related appeals about entities. BSB is reluctant to bring the standards of proof into line, given the possibility for inconsistency with SRA's approach to disciplinary hearings and appeals which are heard under the criminal standard of proof.
28. However, our policy approach is that the civil standard of proof should be used in all regulatory decision making. We would expect this to be considered in future policy debates about the standard of proof used by approved regulators and we urge BSB to keep its approach under review.

Insurance

29. BSB proposed that its Handbook rules require entities to have professional indemnity insurance at a minimum level that reflects BSB guidance. At the point of submission of the application, BSB had not finalised guidance for the minimum amount of

⁷ LSB's warning notice issued to BSB on 18 September 2014 is available here:

http://www.legalservicesboard.org.uk/Projects/statutory_decision_making/pdf/20140918_Stephen_Crowne_Warning_Notice.pdf

A letter from LSB to BSB setting out in more detail the reasons for issuing the warning notice is available here:

http://www.legalservicesboard.org.uk/Projects/statutory_decision_making/pdf/20140918_Vanessa_Davies_Warning_Notice.pdf

professional indemnity insurance it would require of entities. It consulted on the requirements during the assessment period. LSB has reviewed BSB's report of the consultation⁸, which sets out its intended approach. We are satisfied with the proposed requirement for entities to have a minimum level of insurance of £500k.

30. One source of assurance to us was the evidence provided in the consultation response of Bar Mutual Insurance Fund (the current insurer of all individual barristers) which states that the £500k minimum is sufficient for individual barristers. BSB anticipates that the majority of its initial entities are expected to be single-person entities, consisting of those currently working as self-employed barristers. This suggests that the nature of their practice is not expected to change even if the legal status does, meaning that a minimum level of £500k remains appropriate.
31. BSB will issue guidance setting the minimum level. BSB has assured us that the combination of the general obligations of the Handbook and this guidance gives it sufficient ability to act where necessary, should the guidance not be adhered to. We understand that BSB intends to monitor how the insurance market for entities develops and will continue to assess whether its approach and the minimum level remain appropriate.

Guidance

32. There are a number of pieces of guidance that BSB has committed to produce as part of its communications work, which we consider would greatly assist with understanding of entity regulation. This includes guidance for consumers of BSB entities and guidance for employees of BSB regulated entities.

Definitions

33. We were concerned that BSB had sought to apply different definitions in the glossary of its Handbook to terms that are already defined by the Act. This led to several glossary changes during the approval process.
34. We consider that where an approved regulator uses a term in its regulatory arrangements in the circumstances that the Act intended, then it must use the Act definition. Where a term is used differently to the circumstances intended by the Act, we think it is broadly acceptable to redefine it, although this does risk confusion.
35. Therefore, should BSB submit a licensing authority application to us, we will need to discuss with BSB how it can make its glossary clearer in relation to terms it uses differently, which are already defined by the Act. One such example is that we have agreed with BSB to revisit its glossary definition of 'BSB regulated person', before Easter 2015.

⁸See <https://www.barstandardsboard.org.uk/about-bar-standards-board/consultations/closed-consultations/entity-regulation-rule-changes-and-insurance/> for BSB's consultation on entity regulation rule changes and insurance, published in July 2014 and its summary report of responses, published November 2014.

Administrative breaches of the Handbook – level of fines

36. We noted in our assessment of BSB's application that the maximum BSB proposed to charge entities for administrative breaches of the Handbook was £1,500 compared to £1,000 for individuals.
37. We sought to understand from BSB how the impact of the current level of the fine had been assessed to determine its effectiveness and deterrent effect and therefore whether it was appropriate to set entities a similar fee. BSB felt that this relatively low level of administrative fine for entities was appropriate initially, given by definition the low-risk nature of the breaches that would be dealt with in this way and the size and composition of entities that BSB envisages being the majority of those it authorises.
38. BSB has assured us that for a breach that was relatively serious, it would be treated as misconduct and dealt with appropriately via a Disciplinary Tribunal. BSB has indicated to us that it intends to keep the level of the fine under review and has provided us with an outline of its plans for doing so.

Fees

39. BSB is proposing to charge an application fee to all potential entities, and an authorisation fee and annual fee to all entities who are successful in the application process.
40. Under section 51 of the Act, any fee that is a condition of authorisation to carry on a reserved legal activity is only payable if it has been approved by LSB. Most commonly this is a 'practising certificate fee', although section 51 refers to 'practising fees' without reference to a certificate. We therefore consider that the authorisation fee and annual fee BSB is proposing to charge entities are 'practising fees' for the purposes of section 51. Accordingly, we have assessed an application from BSB seeking approval of the level of authorisation and annual fees.
41. Following an assessment of the proposed fees under section 51, we have approved the level of fees and our decision letter about entity fees will be issued at the same time that we issue this decision notice.

Suitability checks

42. In considering the application, we sought to confirm that the suitability criteria to be applied to role holders within entities as part of the entity application and authorisation process reflect the requirements of the Rehabilitation of Offenders Act 1974. In response, BSB has inserted guidance in relation to, and additional text within, associated rules and has assured us that it will review its application forms and guidance on authorisation of entities to ensure that its authorisation staff understand what information may be requested and/or taken into account in the making of decisions. BSB has said that it will revisit these rules as part of its licensing authority application to us.

Academic offences

43. We sought to confirm why text concerning the consequences of academic offences was included at rQ17.3 and rQ103.4 within Section B of Part 4 (Qualification Rules)

of the Handbook. We have clarified that these formed part of an application to LSB “Amendments to the provisions in the Bar Training Regulations relating to Admission and Call Declarations”, which we approved as exempt changes on 23 January 2013, but which BSB had not inserted into the version of the Handbook produced on 1 January 2014.

Decision

44. LSB has considered BSB’s application against the criteria in paragraph 25(3) of Schedule 4 to the Act. We consider that there is no reason to refuse this application; accordingly, the application is granted.
45. However, as set out at paragraph 26 above, BSB has agreed in an undertaking to us that it will not make any decisions about entities until the updated Practice Direction setting out appeal arrangements for BSB regulatory decisions is in place. This is expected to be in April 2015. BSB’s undertaking is annexed to this decision notice.
46. BSB’s full Handbook is annexed to this decision notice. The changes approved by LSB are highlighted in bold.

Chronology

- LSB confirmed receipt of an application from BSB on 25 June 2014.
- The 28 day initial decision period for considering the application ended on 22 July 2014.
- LSB issued a notice extending the initial decision period to 22 September 2014 on 14 July 2014.
- LSB issued a warning notice on 18 September 2014, extending the decision period to 17 September 2015, in order for BSB to make appropriate provision for the hearing of appeals against regulatory decisions made by BSB about entities.
- This decision notice is effective from 28 November 2014.
- The decision notice will be published on our website on 01 December 2014.

Chris Kenny, Chief Executive
Acting under delegated authority granted by the Board of the Legal Services Board
28 November 2014

Notes:

1. LSB is required by Part 3 of Schedule 4 to the Act to review and grant or refuse applications by approved regulators to make alterations to their regulatory arrangements.
2. Paragraph 25(3) of Schedule 4 to the Act explains that LSB may refuse an application setting out a proposed change to the regulatory arrangements only if it is satisfied that
 - (a) granting the application would be prejudicial to the regulatory objectives
 - (b) granting the application would be contrary to any provision made by or by virtue of this Act or any other enactment or would result in any of the designation requirements ceasing to be satisfied in relation to the approved regulator
 - (c) granting the application would be contrary to the public interest
 - (d) the alteration would enable the approved regulator to authorise persons to carry on activities which are reserved legal activities in relation to which it is not a relevant approved regulator
 - (e) the alteration would enable the approved regulator to license persons under Part 5 [of the Act] to carry on activities which are reserved legal activities in relation to which it is not a licensing authority, or
 - (f) the alteration has been or is likely to be made otherwise than in accordance with the procedures (whether statutory or otherwise) which apply in relation to the making of the alteration.
3. The designation requirements referred to in paragraph 2(b) above are set out in paragraph 25(4) of Schedule 4 to the Act and are
 - (a) a requirement that the approved regulator has appropriate internal governance arrangements in place
 - (b) a requirement that the applicant is competent, and has sufficient resources to perform the role of approved regulator in relation to the reserved legal activities in respect of which it is designated, and
 - (c) the requirements set out in paragraphs 13(2)(c) to (e) of Schedule 4, namely that the regulatory arrangements are appropriate, comply with the requirements in respect of resolution of regulatory conflict (imposed by sections 52 and 54 of the Act) and comply with the requirements in relation to the handling of complaints (imposed by sections 112 and 145 of the Act).
4. In accordance with paragraphs 20(1) and 23(3) of Schedule 4 to the Act, LSB has made rules⁹ about the manner and form in which applications to alter regulatory arrangements must be made. Amongst other things, the rules highlight the applicant's obligations under section 28 of the Act to have regard to the Better Regulation Principles. They also require applicants to provide information about each proposed change and details of the consultation undertaken.
5. If LSB is not satisfied that one or more of the criteria for refusal are met, then it must approve the application in whole, or the parts of it that can be approved.

⁹ Rules for Rule Change Applications – Version 2 (November 2010)