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23 July 2013

Dear Vanessa

Decision Notice for the Bar Standards Board (BSB) application for approval of a new Handbook replacing the Code of Conduct and its Annexes

Please find enclosed our final decision notice granting the BSB's application for approval of alterations to its regulatory arrangements in the BSB Handbook as it applies to individuals.

This notice should be considered effective as of today, 23 July 2013. A copy of the decision notice will be published on our website on 24 July 2013.

Yours sincerely

A handwritten signature in black ink that reads 'Chris Kenny'.

Chris Kenny
Chief Executive

E chris.kenny@legalservicesboard.org.uk

CC: Maura McGowan QC, Chairman, Bar Council



Legal Services Board – decision notice issued under Part 3 of Schedule 4 to the Legal Services Act 2007

The Bar Standards Board’s rules change application for approval of alterations to regulatory arrangements: the Bar Standards Board Handbook

The Legal Services Board (LSB) has granted an application from the Bar Standards Board (BSB) who sought to make changes to its regulatory arrangements and introduce a new BSB Handbook to replace the existing Code of Conduct and its Annexes.

This decision notice sets out the basis for the LSB granting the application and the decision taken, including a brief description of the changes.

Introduction

1. The LSB is required by Part 3 of Schedule 4 to the Legal Services Act 2007 (the Act) to review and grant or refuse applications by approved regulators to make alterations to their regulatory arrangements. The Bar Council is an approved regulator and the BSB is the regulatory arm to which the Bar Council has delegated its regulatory functions.
2. Paragraph 25 of Schedule 4 to the Act explains that the LSB may only refuse an application setting out a proposed change to the regulatory arrangements if it is satisfied that by granting the application one or more of the criteria specified in sub-paragraph 25(3) (and listed in the footnote below¹) will be met. For example, the LSB’s granting of the application to alter the regulatory arrangements must not be prejudicial to the regulatory objectives overall. Accordingly, if the 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.
3. As provided for by paragraphs 20(1) and 23(3) of Schedule 4 to the Act, the LSB has made rules² about how the application to alter the regulatory arrangements must be made including the contents of that application. The rules highlight the applicant’s obligations under section 28 of the Act to have regard to the better regulation principles. The rules also require that the applicant provides information about the nature and effect of each proposed change and of appropriate consultation undertaken. Sub-paragraph 25(3)(f) of Schedule 4 to the Act requires that each proposed alteration has been made or is likely to be made in accordance with the

¹ The Board may refuse the application 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 the 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 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.

² [Rules for Rule Change Applications – Version 2 \(November 2010\)](#)

procedures (whether statutory or otherwise) which apply in relation to the making of the alteration. This therefore includes the LSB's rules.

4. The chronology for the LSB's handling of this application can be found towards the end of this decision notice.

Proposed alterations

5. The proposed alterations to regulatory arrangements involve the introduction a new BSB Handbook to replace the current 8th edition of the Code of Conduct (the Code), its Annexes and The Bar Training Regulations (effective from 1 October 2012).
6. The revised BSB Handbook is the culmination of an extensive period of review and revision by the BSB which has included consideration of changes to the current code as it affects individuals; the changes that will be needed to allow the BSB to authorise entities; and the decision to seek designation as a licensing authority. The BSB's application, and hence this decision notice, concern only the introduction of the BSB Handbook for individuals. The BSB will make a separate application which will cover the proposed regulatory arrangements for entities (other than Alternative Business Structures) and a further application seeking a recommendation for designation as a licensing authority for Alternative Business Structures.
7. The proposed new Handbook is divided into six sections:
 - Part I Introduction
 - Part II The Code of Conduct
 - Part III Scope of Practice and Authorisation Rules
 - Part IV Qualification Regulations
 - Part V Enforcement Regulations
 - Part VI Definitions
8. The Code of Conduct has sections on Core Duties (of which there are ten that apply to all barristers) and the Conduct Rules. The Conduct Rules are in sections on 'You and The Court', 'Behaving Ethically', 'You and Your Client', 'You and Your Regulator', and 'You and Your Practice'. For each of these sections the BSB has developed outcomes. In addition there are provisions with rules that apply to specific groups of barristers, e.g. public access rules and Registered European Lawyers, for which there are also outcomes. Parts IV and V are largely the same as the existing provisions though it has been noted that the Enforcement Regulations are in a slightly different style in places which makes them much easier to read.
9. The principal proposed changes are:
 - a. the introduction of ten core duties and ten sets of outcomes in the Code of Conduct;

- b. authorising self-employed barristers in the conduct of litigation, subject to having appropriate case management and administration systems in place;
- c. removing detailed prescriptive provisions relating to rules on sharing premises and associations with others, where barristers will be able to work with others (including via outsourcing arrangements) as long as clients' interests are protected;
- d. allowing for the development of a payment service, provided this can be done in a way that protects clients' interests and does not involve barristers themselves holding client money.

A more comprehensive list of the changes is explained in the application (pages 38 to 50), which can be accessed on the [LSB website](#)³.

10. A substantial amount of guidance is incorporated into the Code and some other sections of the Handbook as attached to this decision notice (using shaded boxes). The BSB will use a new online tool as the primary publication mechanism for the new Handbook, which will involve the presentation of relevant guidance alongside the rules in the Handbook and allow quick access to defined terms as they appear in the Handbook. The BSB has indicated that some existing additional guidance not included in the version of the Handbook submitted in the application will also be available on the BSB's website.

Assessment of the application

11. The stated principal purpose of the alterations is to continue the process of moving away from restrictions on the way barristers conduct their practice, where these restrictions are no longer in the interests of clients or consistent with the wider regulatory objectives.
12. While not as purely outcomes focused as the codes of some other approved regulators, the proposed revised Handbook is a significant step-change for the BSB. The next challenge for it is to continue to develop and implement a new approach to supervision and enforcement so that effective risk-based and outcomes-focused regulation is delivered. It has set an ambitious and stretching action plan for improving its regulatory standards in these areas as part of the recent self-assessment process.
13. The establishment of a central monitoring unit and the creation of a new complaints database planned to coincide with the introduction of the new Handbook are positive steps. The BSB believes these will enable it to undertake more detailed layers of analysis of the effectiveness of its regulatory arrangements and to respond appropriately.
14. The LSB's assessment of the application comes following work over a number of months with BSB colleagues, including prior to submission of the BSB's application. In this time the LSB has raised, and resolved, a number of queries (both of major and more minor significance). The key issues discussed with the BSB during our assessment are set out below.

³ http://www.legalservicesboard.org.uk/what_we_do/regulation/applications.htm#2013

Outcomes-focused approach to regulation

15. We recognise that progress has been made in devising outcomes in many areas of the BSB's regulatory arrangements. We note that "Core Duties", although always defined in terms of barristers' behaviour rather than outcomes for clients, are, in many cases, outcome-like in enabling a variety of acceptable ways for their achievement.
16. The BSB will place reliance on the Core Duties (which are prescriptive, e.g. Core Duty 2, 'You must act in the best interests of each client') when considering enforcement action and the achievement (or not) of an Outcome will contribute to the assessment of whether a Core Duty has been breached. Further, the BSB indicates that "in any situation where no specific rule applies, reference should be made to the Core Duties. In situations where specific rules do apply, it is still necessary also to consider the Core Duties, since compliance with the rules alone will not necessarily be sufficient to comply with the Core Duties". It is important that this is well understood by the BSB's regulated community and the LSB believes that, together, the Core Duties and Outcomes form a far more effective model for regulation of barristers than the previous Handbook.
17. However, it is disappointing that the BSB has not taken the opportunity to go further in removing rules that appear to be unnecessary, duplicative, overlapping or that repeat a concept using different wording. For example, Core Duty 4 states "You must maintain your independence [CD4]". Within the Code of Conduct there is a rule which says "You must not accept instructions to act in a particular matter if ... there is a real prospect that you are not going to be able to maintain your independence" (II.C3.R7.10) and this is supported by guidance that "Rule II.C3.R7.10 is an aspect of the broader obligation to maintain your independence [CD4]". It is not clear to the LSB that such elaboration helps either the barrister or a member of the public understand the application of the Core Duty: at worst, there may be a danger that greater elaboration could be seen as limiting the scope of what is intended, rather than simply reflecting its exemplification in set circumstances.
18. It is important that outcomes are seen as being at the core of regulatory enterprise, rather than simply a descriptive drafting exercise. The LSB is therefore disappointed that the BSB has not indicated a willingness to take disciplinary action against Outcomes as well as Core Duties, instead asserting that it "would have to completely redraft the Handbook if we were to move to mandatory outcomes and there is no appetite for this from any of our stakeholders". The LSB is not convinced that this is the case and certainly regards further simplification and greater transparency in the handbook as a whole as an achievable objective. The LSB encourages the BSB to pursue this in coming years, whilst also looking for, and taking, opportunities for simplification in individual areas.
19. The failure to remove duplication, and the risk of confusion in the delineation of obligations imposed on individual barristers that this creates, leads the LSB to be unconvinced that the Handbook fully achieves the BSB's aim of being easy to understand and follow for barristers and enabling consumers to better understand what to expect from a barrister. However, the BSB's plans to publish a 'plain English' summary of the Handbook should help clients' understanding in this regard.

20. The BSB recognises that more work is needed on consumer engagement. It will need to develop a broader understanding of consumer risk and in due course to critically review its Handbook as that understanding emerges, with a view to improving targeting of its interventions and removing unnecessary and prescriptive rules.

Application of the Cab Rank Rule

21. The proposed Handbook includes a provision on the requirement not to discriminate on the grounds that a case is objectionable, the client's opinions or beliefs are unacceptable or on any ground relating to the source of financial support (rule II.C3.R14). This is followed by the 'Cab Rank' Rule (II.C3.R15) where, if a self-employed barrister receives instructions from a professional client, they must accept the instructions addressed specifically to them (if appropriate taking into account their experience, seniority and field of practice), irrespective of the nature of the case or client. A number of exceptions to the rule are then listed (rule II.C3.R16), which included circumstances in which a barrister is specifically prohibited from accepting instructions (under rule II.C3.R7).

22. The key changes relating to the provisions around the Cab Rank Rule are the following.

- a. The Bar Council will no longer be able to "deem" fees as reasonable (the principal effect of the deeming provisions previously had been to exclude the large majority of family and criminal legal aid cases from the obligations under the Cab Rank Rule) .
- b. The Cab Rank Rule will be extended to all instructions (including non-advocacy instructions) rather than advocacy-only services as in the current Code of Conduct. It will also be extended to instructions from lawyers in Scotland, Northern Ireland or EEA Member States to do work in England and Wales.
- c. The drafting has been slightly revised and, in the LSB's view, it is now clearer that the rule only applies when a professional client is instructing a barrister. In all other cases the general requirement not to discriminate (II.C3.R14) applies.

23. The current Cab Rank Rule means that, unlike instructions from professional clients, there is no positive duty to accept a public access case. There are, however, two rules in the Handbook (II.C2.R5 and II.C3.R14) which have the effect of requiring barristers not to discriminate in the way they accept, refuse or carry out public access instructions. This is clarified in the newly revised guidance to public access barristers⁴. This appears to go some way to ensuring that public access clients have access to representation, and is consistent with the analysis in the LSB-commissioned research on the Cab Rank Rule⁵.

24. The LSB's overall position remains that the application of the Cab Rank Rule itself needs to be considered further and the BSB needs to demonstrate clearly that the overall effect is compatible with the regulatory objectives. Importantly, approval of the Handbook does not in itself mean that we are concluding that the current rule operates in the public interest.

⁴ <https://www.barstandardsboard.org.uk/regulatory-requirements/the-code-of-conduct/code-guidance/>

⁵ https://research.legalservicesboard.org.uk/wp-content/media/Cab-Rank-Rule_final-2013.pdf

25. The BSB indicated in its application that it intends to discuss with the Solicitors Regulation Authority whether a Cab Rank-type rule should apply to solicitors. In the meantime, reliance will be placed on the wider duty not to discriminate and the BSB will need to consider how, through its supervision of the new public access rules, it can demonstrate that consumers are able to reasonably access barristers' services.
26. Further, the BSB has agreed to review by March 2014 its policy position on the obligation to accept instructions in order to avoid any fact or perception of the Cab Rank Rule not applying where commercial interests are at stake. It foresees that any possible changes to the provisions around the Cab Rank Rule would come into force in early 2015.

Referral fees and arrangements

27. In its application, the BSB states that the outcome they wish to achieve is that "referrals to or by BSB authorised persons by third parties are made solely in the interests of clients and are not influenced by the financial interests of the person making a referral", which seems to fit within the broader stated aim of moving to an outcomes-based approach where barristers can work with others to deliver services in innovative ways as long as clients' interests are protected.
28. There is a provision (II.C2.R3) which prohibits the payment or receipt of a referral fee which is described as "any payment or other consideration made in return for the referral of professional instructions by an intermediary". There are further provisions on referral arrangements (not specifically fees) in the section of the Code of Conduct on associations with others (II.C5.R7 to R13).
29. The effect of the provisions in the Handbook is that a payment (financial or in kind) between a barrister and a third party making a referral constitutes a prohibited referral fee where that party is a professional client (solicitor) or where the payment is a direct reward for a specific piece of work.
30. A payment would be permitted however if it is for marketing, advertising or sourcing work where the third party is not a professional client and the barrister:
- a. ensures the introducer is not paying or receiving any payment which is in any way comparable to a prohibited referral fee;
 - b. can demonstrate that the third party has made an independent judgement as to which barrister is the most appropriate for the client in question; or,
 - c. where paying an introducer, pays a fixed sum or percentage regardless of the number of referrals the introducer makes to each barrister.
31. The BSB has considered whether the risks associated with referral fees could be mitigated by a disclosure regime and have concluded that this would be insufficient mitigation (although it

has judged disclosure of material commercial interest as a sufficient mitigation in respect of associations with others).

32. We recognise that the proposals, despite some complexity that may result in uncertainty as to when payments can and cannot be made, do represent a liberalisation of the regulatory arrangements that is in the public interest. We expect that the BSB will need to monitor these arrangements to ensure compliance with the better regulation principles and the regulatory objectives.

Authorising barristers to conduct litigation

33. The new Handbook proposes to allow all barristers to apply to the BSB for an extension to their practising certificate authorising them to conduct litigation; barristers will not automatically be authorised to conduct litigation. Until now, authorisation for this activity has been limited to employed barristers.

34. The BSB sees the handling of the administrative aspects of litigation as the main area of risk. Accordingly, barristers applying for authorisation will be obliged to confirm that they have the appropriate business systems and controls in place.

35. The authorisation process will involve a self-assessment questionnaire covering:

- a. Skills, knowledge and experience of litigation
- b. Completion of or waiver from the Public Access Course (which covers the key issues of case management, client interaction and dealing with vulnerable clients)
- c. Assurance that appropriate administrative systems are in place to manage work
- d. Assurance that appropriate professional indemnity insurance is in place

36. As is the case with barristers carrying out public access work, self-employed barristers of less than three years' standing will be able to conduct litigation only under the guidance of a qualified person (who must themselves be able to conduct litigation).

37. Applications for a litigation extension will be considered by BSB authorisation staff and, given the level of discretion which necessarily comes with a self-assessment approach, the BSB will be developing guidance for staff decision-making and external guidance for barristers, explaining how the discretion will be exercised.

38. Having considered all of the information provided, the LSB has concluded that there is nothing in the proposals that satisfy any of the statutory refusal criteria in the Act. The BSB has given consideration to the risks that arise from this change and has proposed appropriate mitigation. It is also making the necessary changes to its own systems and practices to prepare to regulate this area effectively.

39. Until such time as the arrangements are operational, we are only able to conclude that these arrangements appear fit for purpose and the BSB recognises that there will need to be monitoring of both the application process and how it works in practice. The BSB has confirmed that it will, in January 2015, undertake a 'census' first-stage review of the first 12 months of allowing barristers to seek authorisation to conduct litigation and subsequently complete a second-stage review by the end of October 2015.

Operational readiness

40. In discussions with the BSB, the LSB has emphasised that it needs assurance that the BSB is capable and ready to deliver effective regulation against the new Handbook.
41. The main new regulatory activity as a result of the changes in this application is the authorisation of barristers to conduct litigation. At this stage the LSB is satisfied that, if delivered as scheduled, the BSB's Handbook implementation planning would mean that the BSB has in place a set of operational arrangements which should allow it to regulate against the Handbook changes. The BSB will also need to ensure that the introduction of Core Duties and Outcomes, together with the other changes to its regulatory arrangements, are effectively communicated to and understood by its staff and across its regulated community.
42. However, there is a risk that the timetable may not be met, bearing in mind that developing and implementing new supervision and enforcement strategies over the coming year is a major task and forms only part of a stretching action plan for increasing its level of regulatory standards more generally. The BSB has committed to keeping us regularly informed on the progress of its implementation plan leading up to Handbook introduction in January 2014.
43. The LSB's decision to approve the new BSB Handbook as it relates to individuals does not guarantee the approval of any future application by the BSB for the regulation of entities. The BSB recognises the scale of work needed in order for it to be appropriately prepared to regulate entities, as set out in its own self-assessment and will need to critically assess how it is progressing against its plan before it introduces changes. The LSB will maintain ongoing discussions with the BSB as it progresses its proposed regulatory arrangements.

LSB decision

44. The LSB Board (the Board) considered the BSB's application at its meeting on 10 July 2013. The Board noted that the proposed Handbook represents a significant change in approach for the BSB and welcomed the steps it is taking to become a more outcomes-focused regulator.
45. The LSB is satisfied that, having considered the application against the criteria in paragraph 25(3) of Schedule 4 to the Act, there is no reason to refuse this application; accordingly, the LSB grants this application.
46. Appendices 1-6 of this decision notice contain the six Parts of the new BSB Handbook.

47. All of the changes are approved by the LSB from this date. The BSB has indicated that the new Handbook will come into force on 1 January 2014.
48. For the avoidance of doubt, text marked using 'strike-through' formatting relates to arrangements for the regulation of entities and is not approved under this decision notice. As per paragraph 6, regulatory arrangements for entities will form the subject of a separate application by the BSB and hence separate statutory decision by the LSB.

Chronology

- The LSB confirmed receipt of the application from the BSB on 29 April 2013.
- The LSB extended the initial decision period to 27 July 2013 on 22 May 2013.
- This decision notice will be issued to the BSB on 23 July 2013.
- This decision notice will be published on the LSB's website on 24 July 2013.

Chris Kenny, Chief Executive
Acting under delegated authority granted by the Board of the Legal Services Board
23 July 2013