

Annex A: Table of mandatory consultees advice and BSB representations

Mandatory Consultee	Advice	BSB Representation	LSB comment
<p>Competition and Markets Authority (CMA)</p>	<p>As with its predecessor the Office of Fair Trading, the CMA's default position is that an application to become a licensing authority is unlikely to raise any substantive concerns; this is because it is likely to increase choice for consumers and professionals, unless there is compelling evidence to show a significant detriment to competition.</p> <p>While raising the points listed below, the CMA advised that it finds no current evidence to suggest that allowing the BSB to become a licensing authority would (or would be likely to) prevent, restrict or distort competition within the market for reserved legal services to any significant extent.</p>	<p>The BSB welcomed the advice from the CMA.</p>	<p>We also welcome the advice from the CMA.</p>
	<p><i>Restrictions:</i> The CMA noted the BSB's proposed regulatory scheme, and mandatory and discretionary criteria, will tend to limit the scope of services to be provided by BSB licensed ABSs to practices solely providing legal activities, with a substantial part</p>	<p>The BSB reiterated the rationale for its proposal to be a 'niche' regulator, regulating services similar to those provided by self-employed barristers. Explaining that it does not want to regulate too far beyond its existing experience, nor seek to authorise entities that it is not competent to regulate.</p>	<p>While mindful of the need to be satisfied that the benefits outweigh any adverse effects, we are satisfied that the proposed approach is a reasonable one. The BSB's justification and rationale for operating as a 'niche' regulator being sensible, both in relation to its capacity and capability,</p>

	<p>being advocacy, litigation and expert legal advice.</p> <p>The CMA suggested the LSB must be satisfied that the benefits of the BSB's most restrictive provisions outweigh any adverse effects to competition that may be caused as a result.</p>	<p>The BSB suggested the benefits to competition of its proposals significantly outweigh any potential adverse effects. By not simply replicating the regulatory regimes of other licensing authorities but instead offering a regime that is both proportionate and targeted to a specific set of risks, with which it is already broadly familiar. The BSB believes its licensing authority regime would create extra choice for both providers and consumers. Particularly, the specific providers it envisages authorising, for whom it believes the regulatory regimes of other licensing authorities may be unnecessarily burdensome.</p> <p>It also believes the introduction of a 'niche' licensing authority would potentially encourage applications from barristers and other lawyers who otherwise would not consider this type of business structure.</p>	<p>as well as, its limited entity experience.</p> <p>In our discussions with the BSB, they have confirmed that they are alert to the risk licensed firms may develop into something beyond providers of the traditional barrister services that they envisage BSB ABS providing, and will keep their proposed restrictive approach, and the ABS they have authorised, under review.</p>
	<p><i>Discretionary criteria:</i> Many of the BSB's restrictions are discretionary in nature and thus flexible and subject to incremental change.</p> <p>The CMA invited the LSB to consider periodically the BSB's exercise of discretion. To ensure that, in light of practical experience, the criteria could be amended to allow for greater</p>	<p>The BSB explained it chose to put discretionary factors in its policy statement rather than rules so it can be flexible in response to market developments and its evolving understanding of the risks posed by different business models and structures.</p> <p>The BSB believes there is no need for a formal review by the LSB of its licensing restrictions. As the</p>	<p>We understand that, due to the numbers of licensable entities the BSB is expecting to have to deal with, and the closeness to the process of relevant staff, the BSB believes it will be able to constantly monitor the applications it is receiving. Consistent challenges to the policy statement or decision making criteria, indicating the need for change, will</p>

	<p>variation in ABS entry that might facilitate competition. Suggesting that the LSB might want to consider whether the provisions should be subject to a 'sunset clause' ensuring a review of their proportionality at a later date.</p>	<p>approach it is proposing to follow will include regular ongoing monitoring and review of the operation of its licensing regime (including the use of discretionary criteria). In addition, a formal review will be completed by the BSB after two years.</p>	<p>specifically be monitored and responded to appropriately. This appears a reasonable approach to take.</p> <p>In relation to the 'sunset clause' which the CMA suggested we might consider. We cannot issue a conditional decision on the application, the validity of which being based on a future review. Our powers, once a body is designated as a licensing authority, being limited under the Legal Services Act 2007 (the Act).¹</p>
	<p><i>Ownership and management limits:</i> The CMA have queried the necessity of the discretionary 25% limit on non-lawyer ownership and management given other licensing authority regimes do not maintain such a restriction. It recognised, however, that this alongside the discretionary criteria that a substantial part of the services provided are advocacy, litigation and expert legal advice, are part of an overall approach to foster ABSs that present similar regulatory risks to the individuals the BSB typically regulates.</p>	<p>The BSB suggested this limit will not be applied rigidly but used on a discretionary basis with reference to the primary objective and purpose of providing for specialist regulation of low risk, advocacy focussed entities. More than 25% non-lawyer ownership and management will also be an indicator that an entity might be better suited to a different regulatory approach and therefore a different licensing authority.</p> <p>Again it stressed that its approach will evolve as its understanding of the risks presented by the ABS it regulates develops.</p>	<p>The CLC, ICAEW, IPReg and SRA licensing authorities do not impose similar ownership and management limits to those being proposed by the BSB. However, discussions with the BSB have confirmed there is flexibility with these criteria. Specific evidence of this can be seen in the BSB's current entity regulation work where, for example, a solicitor only (i.e. non-barrister) entity has been authorised.</p>

¹ See the Legal Services Act 2007 section 76 (6)

Mandatory consultee	Advice	BSB Representation	LSB comment
Legal Services Consumer Panel (the Panel)	The Panel confirmed it had no serious concerns about the application given that, in its view, it essentially seeks to open up the BSB's entity regulation regime to ABS entities.	The BSB made no direct comment on this.	We welcome this advice from the Panel.
	<i>Consumer work:</i> The Panel welcomed the BSB's efforts to engage consumer representative organisations as its proposals and consumer engagement strategy develops. It suggested that many of the proposals, such as provisions for background checks for HoLPs and HoFAs, complaints handling arrangements, and consumer guidance, provided a clear demonstration of a strong commitment to consumer issues by the BSB.	<p>The BSB confirmed its commitment to understanding the role of the consumer within the legal services market.</p> <p>It has commenced a structured programme of consumer engagement to ensure it engages effectively and routinely with consumers and their representative organisations, as it develops policy or takes regulatory decisions.</p> <p>It has developed relationships with consumer organisations such as Victim Support, Citizens Advice and the National Children's Bureau which will provide a valuable means of structured feedback on policy initiatives such as the development of its ABS regime. The BSB views these relationships as an important source of information as it reviews the effectiveness of the regimes operation.</p>	<p>The BSB's actions in this area appear satisfactory.</p> <p>Over the last 9 months the Panel has held a series of sessions with BSB staff and Board members on the Panel's consumer principles. These sessions were set up at the request of the BSB as they look to embed the principles into their policy development work.</p>

	<p><i>Indemnification and compensation arrangements:</i> The Panel previously raised some concerns about the proposed arrangements in the BSB's entity regulation plans when it consulted on them.² In its advice to the LSB it confirmed it was pleased to see that a number of issues had been addressed in the proposed arrangements in the BSB's licensing authority application.</p> <p>It also welcomed the further information provided in the compensation arrangements note included with the application.³ In particular, the Panel commended the BSB's decision to seek a statutory power by way of a section 69 Order, so that they have the means by which to establish a compensation fund in the future, should this be needed.</p> <p>The Panel expressed an interest in seeing the results of the BSB research into the likely cost of an</p>	<p>The BSB confirmed it does not consider it appropriate to put a compensation fund (or equivalent arrangements) in place, as the risks currently do not in its view justify such a regulatory intervention. And that, as the Panel highlighted, an order under section 69 of the Act is being drafted so the BSB would have the power to establish such a fund if required in the future.</p> <p>The BSB confirmed its research into the cost of an insurance premium for compensation arrangements is part of its assessment of the impact of the proposed draft section 69 order which is expected to be consulted on imminently by the LSB.</p>	<p>Having considered the reasoning behind the BSB's decisions on indemnification and compensation arrangements and discussed this with them, we are satisfied that this is a reasonable conclusion for the time being. We support the proposal to put in place the necessary statutory power so that the BSB will be in a position to make arrangements (subject to LSB approval) should it be deemed to be necessary in the future.</p>
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² See:

LSCP response to the BSB consultation on entity regulation - 5 September 2014

http://www.legalservicesconsumerpanel.org.uk/publications/consultation_responses/documents/20140905%20BSB%20Entity%20Regulation%20final.pdf

LSCP response to the Bar Standards Board consultation on new BSB handbook and entity regulation

http://www.legalservicesconsumerpanel.org.uk/publications/consultation_responses/documents/2012-06-29-BSB_Handbook.pdf

LSCP response to the Bar Standards Board consultation on whether to regulate entities – 22 December 2010

http://www.legalservicesconsumerpanel.org.uk/publications/consultation_responses/documents/2010-12-22_BSB_RegulatingEntities.pdf

³ See Annex I: note on compensation arrangements of the BSB licensing authority application

http://www.legalservicesboard.org.uk/Projects/statutory_decision_making/pdf/2015/20150508_BSB_LA_App_Annexes_H_To_I.pdf - page 10 onwards

	insurance premium. Suggesting it would have been helpful if this had accompanied the application, but accepted the BSB has set out clearly that it intends to keep under review its assessment of risks, and will factor in any learning gathered from the experience of licensing entities.		
Mandatory Consultee	Advice	BSB Representation	LSB comment
Lord Chief Justice (LCJ)	The LCJ shares the concern of his predecessor that regulatory competition might have a negative impact on regulatory standards. However, subject to the advice below, he is content with the BSB's application and supportive of the LSB making a positive recommendation to the Lord Chancellor	The BSB welcomed the LCJ's support for its application.	We also welcome the advice from the LCJ supporting the BSB application.
	<i>Regulatory competition and standards:</i> The LCJ noted that, at least, initially the BSB plans to be a 'niche' licensing authority regulating ABS whose activities and regulatory risks are broadly similar to the Bar in general. He believes this is a sensible approach, while explaining that he is firmly of the view that the risk of 'shopping around' for the least restrictive regulatory regime must be avoided.	The BSB explained its rationale (as explained above) for acting as a 'niche' regulator and that while it is keen to regulate a range of entities to allow innovation in the provision of legal services, its 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 explanation provided by the BSB, seems a reasonable response to the risk highlighted by the LCJ.

		<p>By offering a choice of regulation which is attractive to certain types of business (whilst not seeking to provide direct competition with other regulators), and by widening the types of business, the BSB believes it will increase the public's choice in access to justice. The BSB also believes this approach will help to ensure there are no potential entities operating on a specialist basis in the market that cannot find an appropriate regulator.</p>	
	<p><i>Ownership and management limits:</i> In the LCJ's view, one concern that underlies many, if not all, of the Regulatory Objectives is professional standards of practice required in litigation, which necessarily impacts upon the courts in England and Wales.</p> <p>He believes it is right that the BSB should use its licensing rules to emphasise the continuing importance of individual responsibility and accountability.</p> <p>In his advice he strongly disagreed with the CMA's concerns that the BSB rules on non-lawyer owner-management of ABSs are overly restrictive.</p> <p>To ensure that litigation, in particular, is properly conducted, standards maintained, and duties</p>	<p>The BSB noted the LCJ's support for the discretionary criteria relating to non-lawyer ownership and management, as a means of promoting individual responsibility and accountability in litigation and advocacy services. The BSB supported his view of the importance of individual responsibility and the maintenance of professional standards, which it sees as central to its regulatory regime and a key factor in the development of its licensing authority proposals.</p>	<p>We recognise the views of the LCJ and BSB on the importance of individual responsibility and accountability in ensuring that the duties owed directly to the court are observed, so as to serve the public interest.</p> <p>As explained above, discussions with the BSB have also confirmed there is flexibility with discretionary criteria around ownership and management criteria.</p>

	<p>owed directly to the court strictly observed. The LCJ believed it was absolutely critical that the obligations on an ABS are supported by the obligations an individual barrister, or other authorised person, needs to comply with.</p>		
	<p><i>Sunset clause:</i> The LCJ disagreed with the CMA suggestion that a ‘sunset clause’ might be an appropriate way to keep the proportionality of discretionary criteria under review. Believing this would introduce uncertainty into the regulatory framework.</p>	<p>The BSB welcomed the LCJ’s comments on the necessity of a ‘sunset clause’.</p>	<p>As explained above. The BSB’s approach for reviewing the proportionality of discretionary criteria appears satisfactory. In relation to the ‘sunset clause’ which the CMA suggested we might consider, we cannot issue a conditional decision on the application, the validity of which being based on a future review. Our powers, once a body is designated as a licensing authority, being limited under the Act.⁴</p>
	<p><i>Policy statement:</i> The LCJ was encouraged to see how access to justice is assessed as part of the non-ABS application process and that this is considered broadly to include, for example, catering for different languages, persons with disabilities and extended hours.</p>	<p>The BSB welcomed the LCJ’s comments on how it assesses access to justice as part of the non-ABS application process and explained it is intended a similar approach will be adopted in the authorisation of ABSs.</p>	<p>This seems a satisfactory approach to take.</p>

⁴ See the Legal Services Act 2007 section 76 (6)