

To:	Legal Services Board	
Date of Meeting:	23 March 2015	Item: Paper (16) 14

Title:	Application from the Bar Standards Board on behalf of the Bar Council for a recommendation for designation as a licensing authority
Workstream(s):	Statutory Decisions
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Status:	Official

Summary:

This paper provides our assessment of and conclusions on the application by the Bar Standards Board for the Board to recommend to the Lord Chancellor that the Bar Council be designated as a licensing authority. It covers:

1. The LSB's assessment of the application.
2. A recommendation to grant the application.
3. The timetable for approval of the recommendation by the Lord Chancellor and the process for associated statutory orders.

The application is not included with this report but is available on the [LSB website](#) (where it has been published since 8 May 2015). A copy is available to any board members and will be available at the Board meeting.

Recommendation(s):

The Board is invited to:

1. Grant the application for a recommendation to the Lord Chancellor (under paragraph 12(1) of Schedule 10 to the Legal Services Act 2007 that the Bar Council is designated as a licensing authority
2. To delegate to the Chairman approval of the drafting of the recommendation
3. To delegate to the Chairman and the Chief Executive approval of the drafting of the final decision notice.

Risks and mitigations	
Financial:	N/A
Legal:	The decision to recommend designation must meet the statutory criteria. The analysis has been the subject of internal and external legal advice.
Reputational:	[REDACTED]
Resource:	There is a Statutory Orders process following a recommendation in favour of designation. Once we have made the recommendation there should only be a limited involvement required from us, but we will continue to liaise with the Ministry of Justice until the designation and associated orders are in force

Consultation	Yes	No	Who / why?
Board Members:	√		As the Board members allocated to this licensing authority application, Marina Gibbs and Anneliese Day have been kept informed of progress.
Consumer Panel:	√		Statutory requirement to consult (see paragraphs 39 and 55 to 56).
Others:			The Lord Chief Justice and the Competition and Markets Authority - Statutory requirement to consult (see paragraphs 20, 22 and 55 to 61).

Freedom of Information Act 2000 (Fol)		
Para ref	Fol exemption and summary	Expires
Risks and Mitigations: Reputational	Section 36(2)(b) – information intended to promote a free and frank exchange of views for the purposes of deliberation by the Board	

LEGAL SERVICES BOARD

To:	Legal Services Board	
Date of Meeting:	23 March 2015	Item: Paper (16) 14

Application from the Bar Standards Board on behalf of the Bar Council for a recommendation for designation as a licensing authority for its existing reserved legal activities

Executive Summary

1. In this paper we propose that the LSB grants the application for a recommendation to the Lord Chancellor that the Bar Council is designated as a licensing authority for alternative business structures (**ABS**). If designated, the functions of a licensing authority will be delegated to the Bar Standards Board (**BSB**).
2. This application represents the final stage in the BSB's development as a regulator of entities. During the assessment of the application we have paid particular attention to the proposed licensing regime, the approach to risk, compensation arrangements and indemnification arrangements. The BSB's capacity and capability (notably in the areas of authorisation and supervision) have also been a key consideration. The matters that we have considered and our assessment of them are described in paragraphs 16 to 54.
3. The BSB has developed licensing rules under which it will authorise ABS whose business activities are broadly similar to self-employed barristers - low risk and advocacy focused. This is consistent with its overall strategy of being a "niche" regulator. While (at least initially) the types of structures that may be licensed are quite narrow, it will provide opportunities for innovation.
4. Based on research, the BSB expects that over the first three years, it will receive 20 applications from ABS firms each year, the vast majority of which are expected to be small and with uncomplicated structures. This is in line with its experience to date of regulating non-ABS entities. It has developed a set of criteria which describes the types of ABS that may be suitable for BSB authorisation. The criteria are published allowing potential applicants to see the matters that are considered in the application process.
5. Taken as a whole the 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 as the BSB 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.
6. 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. We are satisfied that the proposed licensing rules are appropriate and that the BSB is equipped to consider and authorise a wide range of applications. A review is planned of the operation of the regime after it has been in place for two years.

The BSB's approach to licensing ABS is described in more detail in paragraphs 18 to 28.

7. Having considered the application and all of the information that has been provided during the assessment of the application, we are satisfied that the criteria for designation have been met and that the application should be granted.

Introduction

8. Under Part 1 of Schedule 10 to the Legal Services Act 2007 (**the Act**) the BSB submitted an application on 29 April 2015 seeking a recommendation that the Bar Council be designated as a licensing authority. The regulatory functions of the Bar Council are delegated to the BSB. The effect of this application would be to allow the BSB to license and regulate ABS on behalf of the Bar Council.
9. This report summarises our assessment of the application against the criteria set out in the Act, on which the Board must be satisfied before making a recommendation to the Lord Chancellor for designation.¹ It confirms our view that the proposed regulatory arrangements have met the criteria set out in the Act.
10. This paper therefore recommends that the application is granted under paragraph 12(1) of Schedule 10 to the Act. If the Board agrees, the LSB will make a recommendation to the Lord Chancellor under paragraph 14(2) of Schedule 10 to the Act that the Bar Council be designated as a licensing authority. The Lord Chancellor will have 90 days in which to make a decision on that recommendation (paragraph 15(4) of Schedule 10 to the Act).

Background to the application

11. The Bar Council is an approved regulator under the Act. In order to meet the requirements for separation of regulatory and representative functions,² it has established a regulation board, the BSB. Historically the Bar Council regulated the conduct of individual barristers. Under the Act, the BSB now authorises individual barristers to carry on reserved legal activities.
12. 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 make regulatory arrangements for the authorisation and regulation of non-barristers, including entities.
13. An application from the BSB to regulate non-ABS entities was approved by the LSB in November 2014. Since it began authorising non-ABS entities in April 2015, the BSB has authorised 40 non-ABS entities.³ All owners and managers

¹ See paragraph 11 of Schedule 10 to the Act, and the LSB rules for applications to be designated as a licensing authority.
http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/designating_la_rules_v2_june_2011_final.pdf

² Internal governance rules:
http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/Internal_Governance_Rules_Version%203_Final.pdf

³ Figure correct as of 1 March 2016.

of BSB regulated non-ABS entities must be authorised individuals, but they do not need to be barristers.

14. In April 2015, the BSB submitted an application to the LSB seeking a recommendation that the Bar Council be designated as a licensing authority for the same reserved legal activities for which it is currently an approved regulator:⁴
- The exercise of a right of audience
 - The conduct of litigation
 - Reserved instrument activities
 - Probate activities
 - The administration of oaths
 - The provision of immigration advice and services.⁵

Process of assessing the application

15. The following bullet points summarise the key steps taken by the LSB in assessing the application:
- A completeness check and detailed review of the application and accompanying annexes against the requirements set out in the LSB's Rules for Licensing Authority Designation Applications (**LSB Rules**); we are satisfied that the LSB rules requirements have been met⁶
 - Compilation of an 'Issues Log' highlighting specific parts of the application where further information or clarity from the BSB has been required
 - Legal opinion on the content of the application has been sought from the LSB Legal Team during the assessment phase
 - Regular communications and detailed discussions with the BSB to obtain additional information and gain increased reassurance as to its capacity and capability to act as a licensing authority
 - Three site visits of the BSB offices to review existing processes, systems and controls in its current entity regulation work. During these visits, authorisation licensing, supervision, complaints handling and disciplinary processes have been reviewed (reflecting that these are likely to be key areas for new business structures)

⁴ The Act requires the approved regulator to agree to an application (which the Bar Council has done). The BSB, as the regulation board established by the Bar Council, is solely responsible for licensing and regulation thereafter (reflecting the separation of representative and regulatory functions required by the Act).

⁵ While not a reserved activity for the purposes of the Act, the provision of immigration advice and services is a regulated activity requiring authorisation. The BSB permits barristers to act as supervisors for the purposes of immigration advice and services, in accordance with the Immigration and Asylum Act 1999.

⁶ See paragraph 11 of Schedule 10 to the Act, and the LSB rules for applications to be designated as a licensing authority.
http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/designating_la_rules_v2_june_2011_final.pdf

- A meeting between LSB staff and the Chairs of the BSB’s Supervision Committee and the Governance, Risk and Audit Committee; this was a very useful meeting and, as a result, an appreciation of the experience and views of BSB Board members in this area was gained
- Advice was obtained from mandatory consultees as required in the Act in relation to all designation applications.⁷ The advice, the BSB response and our own conclusions are summarised in Annex A

Assessment of the application against the criteria for approval in the Act and the LSB’s Rules

16. The following table is a summary of the assessment of the application against the criteria for designation as a licensing authority as set out in paragraph 11 of Part 1 of Schedule 10 to the Act and in the LSB’s Rules.

Criteria for designation as an licensing authority	Summary of the LSB assessment	MET or not MET by the applicant
Licensing Rules 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>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>	MET
An appeals body in place to hear and determine appeals against decisions of the applicant	<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 (FTT) 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>	MET
Appropriate internal governance	We are satisfied that this criterion has been met in relation to the BSB’s status as a licensing authority.	MET

⁷ See paragraph 3 of Schedule 10 to the Act

Criteria for designation as an licensing authority	Summary of the LSB assessment	MET or not MET by the applicant
arrangements at point of designation; regulatory functions not to be prejudiced by its representative functions; as far as reasonably practical, regulatory decisions to be taken independently of representative ones	In Annexes N and O of the application the BSB has included its constitution and its December 2014 protocol for ensuring regulatory independence, developed following undertakings made to the LSB in 2013. ⁸ It has also confirmed a robust administrative system has been put in place to support and evidence compliance.	
Applicant is competent and has sufficient resources to perform the role of LA in relation to the proposed activities as defined in paragraph 14.	<p>We are satisfied that this criterion has been met.</p> <p>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.</p> <p>There is further information on this in paragraphs 46 to 54.</p>	MET
Approach to licensing rules are consistent with requirements in s.28 of the Act (regulatory objectives, better regulation principles, etc)	<p>We are satisfied that the BSB has framed its application with regard to the regulatory objectives and better regulation principles.</p> <p>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.</p> <p>We are satisfied that the BSB has a set of regulatory arrangements complying with the better regulation principles. Arrangements set 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.</p>	MET
In accordance with s.82 of the Act, an applicant must	We are satisfied that the criterion has been met.	MET

⁸ 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

Criteria for designation as an licensing authority	Summary of the LSB assessment	MET or not MET by the applicant
prepare and issue a policy statement as to how, in exercising functions under Part 5 of the Act, it will comply with s.28 of the Act	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. ⁹ 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.	

17. During the process of the LSB's assessment of the application, we identified the following specific matters which required further detailed analysis; in each area we have been able to satisfy ourselves the criteria have been met. There are however, some instances where there is some residual risk and we will monitor this as part of our ongoing normal oversight activities.

Proposed licensing restrictions for ABS

18. When considering if the BSB's licensing rules are consistent with requirements in section 28 of the Act (regulatory objectives, better regulation principles, etc.) we reviewed the BSB's proposal to restrict its licensing regime to low risk, advocacy focussed ABS. The BSB believes that regulating ABS whose activities are broadly similar to those of self-employed barristers and which pose similar risks and requirements, will allow it to limit its regime to ABS it currently has the capacity and capability to regulate. This is the approach it has followed in relation to the regulation of non-ABS entities.

19. The BSB has developed an entity regulation policy statement which in summary states that, while not an exhaustive list, the following factors when present would tend to indicate it may be appropriate for the BSB to license an ABS:

- Any owner of the entity is also a manager¹⁰
- There is at least one non-authorized manager
- 50% or more of the owners and managers are entitled to exercise rights of audience in the Higher Courts
- A substantial part of the services to be provided are advocacy and/or litigation services and expert legal advice
- The entity is not intending to provide high-volume, standardised legal transactional services

⁹ See Annex C of the BSB's licensing authority application http://www.legalservicesboard.org.uk/Projects/statutory_decision_making/pdf/2015/20150508_BSB_L_A_App_Annexes_A_To_C.pdf

¹⁰ Ownership of licensed bodies is defined in Schedule 13 to the Act and a manager is defined in section 207 of the Act

- 75% or more of owners and 75% or more of managers are authorised individuals
- A substantial proportion of employees are going to be authorised individuals
- The entity will not be a multi-disciplinary practice.

These are the discretionary criteria that the BSB will consider when assessing the risk that any individual application represents.

20. In its advice as a mandatory consultee on the BSB's application, the Competition and Markets Authority (**CMA**) noted the restrictive provisions in the BSB's proposed licensing authority regime. In particular, it highlighted that the scope of services provided by BSB-licensed ABS will be limited, and the ownership and management limits were restrictions other licensing authorities have not deemed necessary. 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.¹¹
21. The BSB confirmed the basis for the restrictive elements in its approach arises from an assessment of its own capabilities and that these lend themselves to the regulation of ABS whose business is advocacy focused. It has explained that it aims to ensure it does not, at least initially, regulate too far beyond its existing experience and competence.
22. The Lord Chief Justice (**LCJ**), in his advice as a mandatory consultee, supported this view. Deeming it to be 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.¹²
23. The BSB has said it sees little advantage in establishing a regulatory regime which simply replicates that of another licensing authority. It believes the more limited scope described above 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.
24. Additionally, at this time, widening the scope of its proposed licensing authority regime would have significant operational implications for the BSB; for example it would need to increase its authorisation and supervision capacity which in turn would have implications on the cost of regulation.
25. While, for the above reasons, the BSB does not envisage licensing ABS that do not meet the criteria summarised at paragraph 19, it has said that the limits on ownership or scope of legal activity, for example, will not be rigidly enforced. A degree of discretion will be allowed, while maintaining the primary aim of specialist regulation of low risk, advocacy focused ABS.

¹¹ See the CMA's advice in relation to the BSB application for designation as a licensing authority http://www.legalservicesboard.org.uk/Projects/statutory_decision_making/pdf/2015/20151022_BSB_L_A_Application_150721_CMA_Advice.PDF

¹² See the LCJ's advice in relation to the BSB application for designation as a licensing authority http://www.legalservicesboard.org.uk/Projects/statutory_decision_making/pdf/2015/20151022_BSB_L_A_Application_LCJ_Advice_190815.pdf

26. The BSB has confirmed that its approach will be determined by its evolving understanding of the risks presented by ABS once it starts issuing licences. This offers scope for incremental change which relaxes the restrictions. It has committed to carrying out a formal review of the restrictions after two years of operation as a licensing authority, subject to there being enough information by then to take an informed view.
27. The BSB has also confirmed that if at any point there are consistent challenges to its entity policy statement or decision making criteria, it will review them and respond appropriately.
28. The proposed restrictions may limit some of the opportunities for innovation. As they are discretionary in nature, the criteria themselves are not part of the regulatory arrangements that are to be approved. While it may be appropriate for the BSB to give itself the ability to limit the types of structure it licences, we consider that this is a reflection of the BSB's current experience rather than a reflection of the risks associated with non-lawyer ownership and management.

Approach to risk

29. We reviewed the BSB's approach to risk in relation to compliance with section 28 of the Act. The BSB has been developing a risk based approach to regulation over a number of years. Its establishment in 2012 of a Regulatory Improvement Programme¹³ 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.
30. The BSB's risk framework, index and outlook are due to be published on 4 April. 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, 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.
31. In its application, the BSB described:
 - How it is continuing to take a risk based approach to regulation
 - The continued evolution of its regulatory risk framework to gather further evidence about risks in the market
 - Its categorisation of different regulatory risks in relation to the non-achievement of regulatory objectives
 - Its approach in the identification, assessment, monitoring, mitigation and evaluation of regulatory risks, articulated in a risk management cycle.
32. 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

¹³ The BSB's Regulatory Improvement Programme began in October 2012 and sought to establish the revisions to regulation that would be necessary to comply with the LSB's 2012 regulatory standards framework and the cultural change that would be required by staff, board and committee members to accommodate the new requirements

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.

33. Discussions with BSB Board members who have chaired the Supervision Committee and the Governance, Risk and Audit Committee, confirmed how risk has increasingly been embedded in the BSB's regulatory approach. The Board has participated in a number of risk workshops and the members reported that they have seen an increasing consideration of risk throughout the BSB's work. They also believe the BSB is generally becoming more risk orientated and skilled at developing mitigation actions. Risk registers and a risk heat map of the BSB's activities showing the aggregation of risk and its movement, are regularly reviewed by the Board.
34. We are satisfied the BSB have developed and are continuing to develop an appropriate risk framework.

Compensation arrangements

35. The Act says the licensing rules of a licensing authority must contain appropriate compensation arrangements.¹⁴ However, it is silent on what is meant by "appropriate". In its application the BSB suggested that, based on an analysis of risk, "appropriate" could mean none.
36. Having considered the risks in its proposed licensing regime for which compensation arrangements might be an appropriate mitigation, the BSB reached the view that in it is not necessary to establish a compensation fund.
37. When explaining the rationale for its decision, the BSB referred to:
 - Its long-standing prohibition on individuals and, since their authorisation, non-ABS entities, handling client money – which, it suggests, is a principal reason for compensation funds
 - BSB licensed ABS having to comply with this same prohibition and being expected to offer the same permitted range of services
 - No compensation fund having ever previously been established by the BSB in relation to self-employed barristers and non-ABS entities and there being no plans to establish such a fund.
38. The BSB is not seeking to establish an entirely risk free environment; it is seeking to take proportionate action in response to the risks it observes in the market. The relative newness of the BSB's supervision function, however, limits the evidence available to it and the BSB has recognised that risks in the market may evolve as it develops.
39. The BSB is 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. 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

¹⁴ See section 83 (5)(e) of the Act and paragraph 19 of Schedule 11 to the Act

consultee to the BSB's application.¹⁵ 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 the Section 69 Order.¹⁶ A section 69 order including such a provision is expected to be consulted on imminently by the LSB. A verbal update on this will be provided at the 23 March Board meeting.

40. The BSB has also undertaken research into the practicalities of establishing a compensation fund, including the alternative of taking out an insurance policy to cover any losses suffered by clients (which it believes could be done using existing powers). Indicative costs associated with these actions have also been obtained (although it should be noted that these are unavoidably uncertain at this point because of limitations on data available to the BSB and insurers).
41. The following action plan has also been developed by the BSB to help inform any decision on future compensation arrangements:
 - 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.
42. There remains some residual risk with the proposed approach, however, having considered the BSB's assessment of the risks a compensation fund would seek to address and its plans for ongoing monitoring, we have concluded that this is a reasonable and proportionate approach.

Indemnification arrangements: professional indemnity insurance

43. As required by section 83(5)d of the Act, the licensing rules must set out appropriate indemnification arrangements. The BSB's approach is to require ABS to assess the appropriate level of professional indemnity insurance (PII) for its business. The BSB will 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.

¹⁵ See the Panel's advice in relation to the BSB application for designation as a licensing authority http://www.legalservicesboard.org.uk/Projects/statutory_decision_making/pdf/2015/20151022_BSB_L_A_Application_20150721_Consumer_Panel_Advice.pdf

¹⁶ See the Legal Ombudsman response to the BSB section 69 order consultation <http://www.legalombudsman.org.uk/wp-content/uploads/2014/09/Final-Consultation-Response-Amendment-BSB-Powers-July-2015.pdf>

44. The minimum terms for entity PII were considered and accepted by us when we assessed the application on regulatory arrangements for non-ABS entities. As the BSB will limit licensing to ABS that present similar risks, the proposed requirements again appear satisfactory.
45. 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.

Capacity and capability

46. Paragraph 11(2)(d) of Schedule 10 to the Act requires that we need to be satisfied that the BSB would be competent and have sufficient resources to perform the role of a licensing authority. The application makes reference to how the BSB has used the introduction of its non-ABS entity regulation regime to gain skills and experience relevant to its operation as a licensing authority. Annex M of the application provides specific details on the structure of the authorisation and supervision teams and information on their capacity and capability.¹⁷ This has been supplemented by a capacity and capability audit.
47. From both the operation of its non-ABS entity regime, as well as its completion of research at the end of 2015 on the potential ABS market, the BSB has gained a more accurate understanding of the demand for both ABS licensing and non-ABS entity authorisation.
48. Specifically the BSB has found that:
 - Applications for authorisation as a non-ABS entity have been considerably lower than expected. In April 2015 the BSB's three year estimates projected that in the first year of operation it would approve 388 non-ABS entities. In its first year of operation which will end in April 2016, it has so far approved 40 non-ABS entities (only seven of these non-ABS entities contain more than one authorised person).
 - The types of applications received for authorisation as non-ABS entity have been relatively uncomplicated. The majority being single person entities or entities with a small number of authorised persons. For example, the largest is a two owner and two employee entity and the most complex a solicitor owned entity.
49. The BSB has used its experience, along with the research, to estimate 20 ABS applications per annum being made 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.¹⁸

¹⁷ See Annex M of the BSB's licensing authority application http://www.legalservicesboard.org.uk/Projects/statutory_decision_making/pdf/2015/20150508_BSB_L_A_App_Annexes_M_To_P.pdf

¹⁸ See paragraph eight of the BSB consultation on the cost of licensing of a BSB regulated ABS - December 2015

50. BSB has 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.
51. The authorisation team sits within the supervision team with some team members skilled in both authorisation and supervision processes. This means, if there are unexpected demands on the authorisation or supervision functions, the BSB has sufficient flexibility to move resources between them. This movement and multi-skilling of resources should also assist in ensuring a consistency of approach, between the supervision and authorisation functions, when considering risk and the exercise of discretion in relation to the ABS licensing criteria.
52. The BSB has also confirmed regular communication between the teams, and analysis of performance data, supports early identification of issues and reallocation of resources to where they are needed. Succession plans are also in place in relation to senior positions.
53. Finally, related to knowledge and skills of the authorisation team, we checked how the BSB had dealt with an issue that had been carried forward from the application to regulate non-ABS entities (we had identified a misunderstanding of the powers the BSB has to check criminal records of certain individuals by virtue of exceptions to the Rehabilitation of Offenders Act 1975). We have assured ourselves that the BSB has taken positive steps to ensure that its staff are properly trained on the limitations of the powers.
54. We are sufficiently reassured that the BSB would be competent and have the resources to perform the role of licensing authority in relation to the proposed activities as defined in paragraph 14.

Mandatory advice

55. Under paragraphs 3(1) and 3(2) of Schedule 10 to the Act the LSB is required to seek advice from the CMA, the Panel and the Lord Chief Justice (**LCJ**). The Act also allows the LSB to seek advice from such other persons as it considers reasonable to consult regarding the application; we did not consider it necessary to seek such additional advice for this application.
56. The consultees were largely content to support the BSB application. The table at **Annex A** provides a summary of their advice, the BSB's representations on this and our views. Where relevant the advice has been referred to in the discussions above, some additional key points to note are as follows.

'Sunset clause'

57. As the ABS licensing criteria may be subject to incremental change, as discussed at paragraph 26 above, 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.

58. 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'.
59. The exercise of discretion by the BSB in its proposed licensing regime has been discussed above. 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 regime (including the use of discretionary in relation to the ABS licensing criteria). In addition, the BSB plans to complete a formal review after two years of operation as a licensing authority.

Regulatory competition and standards

60. The LCJ explained he shared the concern of his predecessor about what, in his view, is the premise upon which the LSA proceeds. Namely that regulatory competition will improve regulatory standards, and, in so doing, further the public and consumer interest. The LCJ confirmed he is firmly of the view that the risk of 'shopping around' for the least restrictive regulatory regime must be avoided.
61. In our consideration of all applications for designation, we consider whether the regulatory arrangements meet the requirements and criteria for being an approved regulator or licensing authority and the competence and capacity of the applicant in the areas of legal activity they are proposing to regulate. Consistency of arrangements between regulators is not one of the criteria against which our assessment is made.

Statutory process and impact on designation timetable

62. In addition to the designation order, there are two other statutory orders related to the BSB's designation as a licensing authority.
63. A section 69 order is intended to give:
- the BSB information gathering powers when acting as an approved regulator
 - the BSB intervention powers when acting as an approved regulator to match those that would be granted automatically for the BSB on designation as a licensing authority (under schedule 14 to the Act)
 - the BSB disciplinary arrangements (including powers of disqualification) in relation to barristers, and non-ABS entities and their managers and employees
 - the BSB a power to set up compensation arrangements to help mitigate losses or hardship suffered by individuals and bodies as a result of certain failings or dishonesty by barristers or entities, or their employees
 - the BSB a power to create regulatory arrangements and licensing rules providing for appeals against non-ABS entity authorisation and ABS

licensing decisions to be heard by the General Regulatory Chamber of the FTT

- the FTT a standalone power to hear and determine appeals on BSB decisions (whether acting as an approved regulator or licensing authority).
64. The section 69 order is expected to be consulted on imminently by the LSB. Once the process is complete and clearance obtained from the Joint Committee on Statutory Instruments, we will ask the Board to make a recommendation that the order be made.
65. A section 80 order will establish the FTT as the body to hear and determine appeals against decisions by the BSB when acting as a licensing authority. Our consultation on the draft section 80 order closed on 16 March. An oral update on the outcome of that consultation will be given at the meeting.
66. As an appellate body needs to be in place at the point of designation, the section 80 order and the powers related to appeals in the section 69 order need to be in force at that point.

Conclusion and Recommendation

67. In conclusion:

- The LSB considers that the BSB's proposed licensing rules comply with the requirements in the Act and the LSB's Rules.
 - Our assessment is that the BSB is a competent body to license and regulate ABS. It has a track record and experience as an approved regulator of individuals and some experience of regulating non-ABS entities. It is not seeking to extend the activities it already regulates. It is also taking a measured approach to both the speed and scale of the development of its proposed licensing regime.
 - The LSB is satisfied that the BSB has properly considered the particular risks associated with licensing and regulating ABS and has systems in place to understand and mitigate those risks.
 - While the BSB has demonstrated that it has met the criteria for designation as a licencing authority, as referenced above, some residual risks do remain with, for example, the proposed licensing restrictions and approach on compensation arrangements. While not sufficient to prevent the application from being granted, we will monitor these as part of our ongoing normal oversight activities.
 - We will specifically monitor progress with the work still needed on staff training, finalisation of licensing and supervision materials and processes (including intervention work) and the completion of an ABS licensing pilot scheme. The BSB has shared with us its ABS implementation plan to deliver this and we will be monitoring its progress against this.
68. The Board is invited to:
- Grant the application for a recommendation to the Lord Chancellor (under paragraph 12(1) of schedule 10 to the Act that the Bar Council is designated as a licensing authority

- To delegate to the Chairman approval of the drafting of the recommendation
- To delegate to the Chairman and the Chief Executive approval of the drafting of the final decision notice.

23 March 2016