

To:	Board
Date of Meeting:	9 July 2014
Item:	Paper 14 (37)

Title:	Update on the Bar Standards Board's entity application
Workstream(s):	Statutory decision making
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Status:	Official

Summary:
<p>This paper seeks the Board's views about handling of the key issues which have emerged so far in the assessment of the BSB's application under paragraph 25, Schedule 4 to the Legal Services Act 2007 (the Act) to amend its regulatory arrangements to enable it to regulate entities.</p> <p>The Board's views are being sought in advance of the Chief Executive exercising the authority delegated to him by the Board to make a decision about the application.</p> <p>The paper also provides an overview of the application and the BSB's proposed approach to regulating entities and highlights some points for the Board to note.</p>

Recommendation(s):
<ol style="list-style-type: none"> 1. The Board is asked to comment on the issues raised in this paper, in particular, the points raised in paragraphs 23, 28 and 33. 2. The Board is asked to nominate Anneliese Day, David Eveleigh, and Bill Moyes to provide further guidance to the executive as the assessment of the application progresses.

Risks and mitigations	
Financial:	N/A
Legal:	There may be risk of legal challenge if we do not follow due process or if we turn down the application.
Reputational:	There is a risk to our reputation if we do not follow due process and/or if we approve the application and BSB proves incapable of adequate regulation of entities. BSB are likely to be critical if they perceive undue delay in handling the issue, irrespective of its cause.
Resource:	There may be resource implications should the LSB decide to issue a Warning Notice about the application.

Consultation	Yes	No	Who / why?
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Board Members:		X	
Consumer Panel:		X	
Others:			

Freedom of Information Act 2000 (Fol)		
Para ref	Fol exemption and summary	Expires
3, 16-22	Section 44: restricted information under s167 LSA which was obtained by the Board in the exercise of its functions and therefore must not be disclosed	
13-15	Section 42: information subject to legal professional privilege	
23, 36	Section 36(2)(b)(i): information likely to inhibit the free and frank provision of advice	

LEGAL SERVICES BOARD

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Update on the Bar Standards Board's entity application Executive Summary

Background

1. On 25 June 2014, we received an application under Schedule 4, paragraph 25 to the Legal Services Act 2007 (the Act) from the Bar Standards Board (BSB) to amend its regulatory arrangements to enable it to regulate entities, with a particular focus on entities offering advocacy and related litigation services, and expert legal advice. The [full application](#) has been published on the LSB website.
2. This application represents the culmination of several years of preparation work by the BSB, the first stage of which was the development of a new Handbook, approved by the LSB in July 2013.
3. We have been involved in an extensive pre-application process with the BSB and reviewed and provided feedback on draft applications received in August 2013 and April 2014. [REDACTED]
[REDACTED]
[REDACTED].
4. This is a complex and significant application for the BSB and will introduce a fundamental change to the way in which barristers may provide legal services – as noted in our response to Sir Bill Jeffrey's review of criminal advocacy, some barristers are likely to organise themselves as entities to bid for upcoming legal aid contracts. Numbers are small at present, but likely to expand over time. The ability of the BSB being able to regulate these entities will depend on our assessment of this application. In that event, such entities would not be excluded from contracting, but would need to be regulated as entities by the SRA, which some of them would regard as less than ideal.
5. The BSB plan to make an application seeking designation as a licensing authority once approval is granted for the introduction of regulatory arrangements for non-alternative business structure entities.
6. This paper provides an overview of the application and the BSB's proposed approach to regulating entities. It seeks the Board's views about handling of the key issues which have emerged from the assessment process so far, in

advance of the Chief Executive exercising the authority delegated to him by the Board to make a decision about the application.

Overview of the BSB's approach to regulating entities

7. The BSB aims to operate as an efficient and cost effective „specialist regulator’ of entities which undertake activities similar to those of the self-employed Bar and whose risks and regulatory requirements are similar. Where possible, the BSB has sought to ensure that the requirements for BSB regulated entities are consistent with those for BSB regulated individuals.
8. The BSB proposes to offer an alternative to SRA and other entity regulation regimes, rather than replicate anything that currently exists; for example, BSB entities will not be permitted to hold client money. The BSB considers that its entity based regime will allow greater choice of provider in the legal market, and promote competition to bring further benefits of choice and accessibility for consumers.
9. The BSB proposes that potential entities must meet a range of general criteria, which include:
 - having arrangements in place to ensure that at all times, any obligations imposed by the BSB on the entity and its managers, owners and employees are complied with and provide explicit consent that the entity is bound by the arrangements
 - confirming that at all times they have in place a Head of Legal Practice (HOLP), who must also be a manager, and a Head of Finance and Administration (HOFA)
 - insurance arrangements
 - confirming that there will not be any holding of client money.
10. If a potential entity meets the general criteria, the BSB will then consider whether the entity is an appropriate one for it to regulate, based on the factors set out in its policy statement. These factors include that:
 - all owners and managers are individual authorised persons
 - most owners and managers are entitled to exercise rights of audience in the higher courts
 - a substantial part of the services provided will be in advocacy, litigation and expert legal advice and not high volume, standardised legal transactional services
 - a substantial proportion of employees are going to be authorised individuals and each manager supervises only a small number of employees.

11. Any new HOLP, HOFA or manager will be required to consent to the jurisdiction of the BSB and be bound by its regulatory arrangements. However, as all owners and managers of legal services bodies will be authorised persons, the BSB considers that it does not need to require each of them to have demonstrated their individual suitability to be owners and managers of entities (although they will need to do if they were subsequently to become an ABS). We will explore this point further with the BSB as part of the assessment process.
12. The application also sets out a high-level risk framework for regulating entities, focused on the key risks the BSB has identified in relation to entities. It states that a more comprehensive approach to risk will be developed. While a plan for development of the framework is set out in the application, we will need further information from the BSB before being able to inform an assessment of the suitability of the BSB's approach to risk-based regulation. In particular, we will need to be clear about the BSB's plans for how it will respond as the market and business models of those it regulates change.

Key issues

Vires and a Section 69 order

13. [REDACTED]
14. [REDACTED]
15. [REDACTED]
16. [REDACTED]

[Redacted text block]

17.

[Redacted text block]

18.

[Redacted text block]

19.

[Redacted text block]

20.

[Redacted text block]

21.

[Redacted text block] n.

22.

[Redacted text block]

23. [REDACTED]:

[REDACTED]

Insurance

- 24. The BSB’s final approach to insurance requirements for entities is still outstanding in the application. The BSB previously consulted on setting a minimum insurance level, as well as minimum terms in guidance (not Handbook rules) and this approach is reflected in the current version of the Handbook (which was published in January 2014 with the rules for entities ‘struck through’).
- 25. However, on further reflection, the BSB has provisionally concluded that it would be more appropriate for its guidance to propose a minimum level of insurance cover per claim, with a requirement for entities to have adequate insurance in the light of the legal services that they provide. The BSB considers this a more appropriate approach given that it may authorise entities ranging from those with numerous fee-earners to one person companies or firms. This approach, rather than a simple blanket requirement, is increasingly emerging as the norm for all regulators.
- 26. The approach is still subject to further assessment and expert advice. As it is a new approach to insurance, a consultation will be required. The BSB has confirmed that this consultation will be published by 4 July 2014; it is expected to last for six weeks. Again, we will not be able to make a final decision on this application until the outcome of that consultation is known.

27. As part of our assessment, we would need to consider the extent to which the guidance is simply guidance or whether there are any mandatory aspects to it requiring further LSB approval. The BSB's proposed approach is one that we have approved in rule changes for other approved regulators.
28. The Board may wish to consider the extent to which the LSB can adequately assess the application in the absence of a final approach for insurance. While the BSB's proposed approach is one that we are likely to support, it is unlikely that we will know the final outcome of the consultation until very late on in our decision making process, after the BSB Board has considered the final approach at its 18 September meeting.

Public and licensed access rules

29. The application states that provisions in the Handbook relating to the scope of practice for BSB authorised bodies are similar to those for self-employed barristers, except in relation to licensed and public access arrangements.¹
30. The BSB has proposed that the detailed public and licensed access rules which apply to self-employed barristers are not applied to BSB authorised bodies, although the guidance draws attention to them as a statement of good practice. To do public access work, BSB authorised bodies will have to be authorised to do litigation or employ at least one person who is registered to do public access work.
31. The BSB considers it disproportionate to apply the more detailed rules to entities and considers that this would restrict the ways in which the entities organise their business. It is planning a general review of the public and licensed access rules (on which a consultation paper is expected in the autumn) and will consider whether a similar approach should be adopted in relation to self-employed barristers.
32. It therefore appears at least theoretically possible that an entity will be able to provide public access work without anyone working in the entity actually being registered to do so. We will need to better understand this proposal, specifically what has informed the BSB's conclusion that the public access rules are unnecessary for entities and particularly in light of the risks posed by managing the needs of vulnerable clients, as highlighted in our decision notice of March 2013 about changes to BSB's public access rules and the risks recently highlighted by the Legal Ombudsmen in relation to cases where properly authorised barristers have nevertheless shown significant inexperience in

¹ Licensed access arrangements allow organisations or individuals that have an identifiable area of expertise or experience to apply to the BSB to be licensed to instruct barristers directly. Public access arrangements allow anyone to instruct a barrister directly as long as that barrister has met the BSB's requirements to undertake public access work.

managing direct interaction with the public. We have already started discussing this with BSB and there may be more to report by the meeting.

33. We would welcome the Board's comments on the BSB's approach.

Other points for the Board to note

The Cab Rank Rule (CRR)

34. The CRR has been extended to apply to all BSB authorised bodies and authorised individuals working in them, where instructions are given on a referral basis and seek the services of a named authorised individual. This obligation will apply to any authorised individual within the entity, not just barristers.
35. The BSB had considered whether it would be appropriate to bind entities as a whole to the cab rank obligations. However, as the exemptions (designed with individual practitioners in mind) would not apply, the BSB considers that the overall regulatory impact is likely to be more burdensome for entities. The BSB states that in practice, it would be possible for clients to obtain a list of advocates from the entity so that they could seek to instruct an alternative authorised person, so the client will be able to make use of the CRR in the same way as in a chambers structure.
36. [REDACTED]

Disciplinary Tribunal

37. Disciplinary tribunals will continue to be administered by the Council of the Inn of Court (COIC). Its decisions will continue to be made on the basis of the criminal standard of proof (beyond reasonable doubt). The BSB has considered whether to change the standard of proof required to civil (the balance of probabilities) but has concluded that it is important to apply the same standard as the Solicitors Disciplinary Tribunal so that if a solicitor and a barrister face charges on related matters, the same standard of proof will apply to both of them. The BSB has decided in principle to review the applicable standard of proof, but in co-operation with the SRA.
38. We will need to consider this proposed approach in more detail. In particular, we will seek further information from the BSB about what will happen in instances where there are individuals in a BSB entity who are regulated by another approved regulator operating its disciplinary arrangements under the civil standard of proof. While there appears to be scope for the apparent perversity of different findings on the same facts, if such outcomes help to hasten the emergence of a more consistent approach, it may be that the risk is acceptable.

Appeals

39. The BSB predicts that it will regulate entities composed of barristers and solicitors (and possibly other authorised persons, although it considers that solicitors are likely to be the most common non-barrister authorised persons in these entities), and may be taking disciplinary action at both an individual and entity level. In the event of both the BSB and SRA needing to take disciplinary action in relation to the same or similar events, the BSB considers it desirable that both sets of disciplinary processes be broadly consistent. Consequently, appeals on disciplinary matters decided by COIC will be heard by the High Court.
40. However, a different approach is proposed for what the BSB terms is “regulatory decisions”. Regulatory decisions are those related to the authorisation of entities (e.g. refusing an application, imposing conditions). Anticipating that it will need to develop a separate appeal route for decisions it would make if it became a licensing authority, the BSB has decided that appeals against regulatory decisions should be heard by the First Tier Tribunal.
41. The LSB’s publically stated policy is that the FTT is the desired route of appeal for decisions made by approved regulators and licensing authorities.
42. We will seek further information from the BSB about this approach – in particular we are unclear about what would happen should the same case require both disciplinary and regulatory action (and would therefore be considered under different standards of proof)

Timetable

43. Given the complexity of the application we expect to issue an extension notice allowing 90 days to assess it. This will also allow us time to fully consider the application and seek advice from others should we think we need it (for example, we may ask the Legal Services Consumer Panel for its views about aspects of the application).
44. We are meeting the BSB every other week during the assessment period to discuss progress against the BSB’s implementation plan.

Activity	Date
BSB entity application submitted	25 June 2014
LSB Board meeting to discuss entity application issues	9 July 2014
End of the 28 day initial decision period - LSB to issue extension notice providing for 90 day assessment period	22 July 2014

BSB consultation on intervention approach (and section 69 policies)	30 June 2014 – 15 August 2014
Update on outcome of consultations to BSB Board	18 September 2014
End of the LSB 90 day assessment period	22 September 2014

Recommendation

45. The Board is asked to comment on the issues raised in this paper, in particular, the points raised in paragraphs 23, 28 and 33 above.
46. The Board is asked to nominate Anneliese Day, David Eveleigh, and Bill Moyes to provide further guidance to the executive as the assessment of the application progresses.
47. Should issues prove intractable, there is of course provision for further extension of our timescale via issuing of a warning notice and more formal engagement of the full Board or a sub-group in decision-making.

9 July 2014