

BAR STANDARDS BOARD

REGULATING BARRISTERS

LSB Consultation – Developing Regulatory Standards BSB Response

The BSB welcomes the opportunity to comment on the LSB's latest consultation regarding its proposed approach to developing regulatory standards. In this response, we make some initial comments relating to the introductory sections of the paper before turning to the specific questions asked.

Executive Summary section

1. The BSB notes that the Better Regulation Principles, as articulated by the Better Regulation Executive and incorporated into documents such as the Regulators Compliance Code do not refer to "outcome focused regulation" specifically. They do make it clear that all regulation should consider the impact that any interventions may have on all the people and organisations being regulated to ensure that the burden falls fairly and proportionately on those regulated and ultimately, has the desired effect. However, the LSB's statements in this paper could be interpreted as saying that broad statements of principle will be all that is required in all cases.
2. The BSB considers that we must be able to balance high level outcome focused principles with more detailed rules where this is the best way to achieve the regulatory objectives. There may well be cases where the best way of achieving the desired effect is to employ a degree of prescription. It is agreed that this should not be overdone (it would not be proportionate if it were) but there must still be a place for prescription where that is justified. In the BSB's view, a blend of principles, rules and guidance is going to be necessary. The front line regulators are well placed to judge what blend is right for the problems their regulated constituency encounter.
3. There are some areas where decisions are required on the spot where prescription will be of most assistance in helping barristers to comply with their duties to the court and to their clients. The cab rank rule is one such example. It should also be noted that members of the Bar use the ethics helpline operated by the Bar Council a great deal. Callers to that line are seeking immediate help on issues they are facing on the spot regarding compliance with the Code. Broad statements of principle are not always sufficient in those situations where immediate detailed information is needed. At the other end of the spectrum, when dealing with systematic risks, it will often be more appropriate to require there to be business systems in place that address and mitigate those risks, rather than prescribing particular solutions.
4. In paragraph 8 the BSB considers that the level of risk should not be limited to those that attach simply to different businesses but are more properly addressed towards

the risk that particular types of businesses pose to the regulatory objectives. The regulatory objectives must, in our view, be the central pillars to which all relates.

5. As stated in previous consultation responses, the BSB does not agree with the LSB's interpretation of section 4. The paper refers to the explanatory notes but does not refer to the explanatory notes relating to section 4 itself, which after outlining the terms of the section say "For example, the Board may issue guidance on, or disseminate examples of, good education and training practices or principles of professional conduct that have been developed for a reserved legal activity by one approved regulator to all approved regulators". This shows clearly that the intention of section 4 was one of assistance and advice only. If it were envisaged that the Legal Services Board should undertake a primary role then that would have been clearly stated as an obligation to act rather than an obligation to assist in the legislation.
6. The BSB considers that the proposed framework could pose a similar risk to that which the BSB identified in its response to the LSB's draft business plan, namely that of transferring the initiative in setting the regulatory agenda from front line regulators to the LSB. As was stated in response to that consultation, the BSB considers that as a frontline regulator, it must have the ability to set its own agenda. To do otherwise risks taking the initiative away from Approved Regulators and requiring them instead to prioritise in the way that the LSB deems appropriate, within the timeframes the LSB determines. This framework again raises the possibility of making the Approved Regulators, in effect, merely the agents of the LSB in implementing global regulatory requirements produced by the LSB for regulation of the legal services sector as a whole. We believe the direction of travel should be the other way: the LSB's oversight should grow out of dialogue with Approved Regulators and an understanding of their needs and sector of the market. One of the key elements of the Code of Practice for Regulators is that regulators understand those whom they regulate. We would expect the LSB to be putting this into practice and understanding the ARs and how they operate rather than imposing its view on the regulators.
7. The BSB expects that over time risk based regulation with a greater element of outcome focused regulation will indeed be the approach taken by all approved regulators. That being said, that change will happen incrementally as regulators introduce modifications to their regimes to meet specific needs. No regulator should be forced to prioritise modernisation solely for modernisation's own sake, to the extent that this prejudices getting on with the job they have to do as regulators. Above all, the LSB itself should be taking an outcome focused and risk based approach to the front line regulators: that means allowing them to get on with the job, guided by the regulatory objectives and principles, rather than prescribing how the job is to be done and only intervening where there is evidence of a need to do so.

Question 1: Do you agree with our analysis of the changing legal services market? Are there other factors that should be taken into consideration?

8. The section regarding the changing context seems to a large extent to be focused on solicitors. It would be welcome if there was more of a demonstration of an understanding of all of the areas regulated.
9. There is also a strong focus on private practice whereas there are significant proportions of all branches of the legal profession who are in employment. The

practice of law is much wider than just private practice and as the LSB often points out in other contexts, is changing even more.

10. While greater entrepreneurship may be a driver for change, we think that one cannot downplay the effect of client demand. As others sectors have changed, the legal profession has also changed in response.
11. As has been previously outlined to the LSB, the BSB also sees that the changes in legal aid also have an effect on the regulatory objectives, particularly in relation to access to justice and the diversity of the profession. We would welcome more comment or understanding of these effects by the LSB.

Question 2: Do you agree with our focus on outcomes focused regulation: risk identification framework; proportionate supervision; and, appropriate enforcement strategy?

12. Provided that “outcome focused regulation” allows for flexibility about the method of implementation, ie allowing for prescription where necessary, the BSB is broadly in agreement that responding to risk with appropriate interventions, supported by effective compliance and enforcement activities, is the correct approach.
13. We query whether the LSB means to say that legal service providers are responsible for securing the regulatory outcomes and deciding how their firm will do so (paragraph 53). There is no statutory obligation for firms to pursue the regulatory objectives so this statement is somewhat confusing. It is for the regulator to set a regulatory framework which secures the regulatory objectives, sometimes by setting outcome focussed rules, sometimes more prescriptive rules. The duty on legal service providers is to comply with those rules.
14. The BSB also notes that in assessing risk and deciding upon appropriate standards, all of the statutory objectives must be considered and weighed. For example, in some circumstances the interests of consumers may be in tension with duty owed to the court, the rule of law or access to justice. Prioritising the consumer and their expectations may not be appropriate if the duty to the court, the rule of law or access to justice is going to be unacceptably compromised as a result. It is for the front line regulators to strike a balance between competing regulatory objectives, in such cases.
15. The BSB has some concerns about leaving it to the market to decide how it will comply in all cases. There may be some risks where this is not acceptable and should not occur. Previous experience is likely to be helpful in this regard. While it is right that rules should not be solely addressed at things that have happened, we must bear in mind experience in order to be properly mindful of the extent of the risk. To simply write rules because it might pose a risk cannot be right if experience indicates that the risk is unlikely to occur.
16. The BSB agrees that looking at the systems and controls that an organisation or individual has in place is a vital component of assessing how much risk is posed by that organisation or individual. However, the extent to which supervision at entity level is needed, in addition to supervision at individual level, will vary as between different practice structures. In some the risks may be primarily at the level of the entity, in others they may be primarily at the level of the individual. Some business structures (eg a chambers) are not entities requiring authorisation under the LSA 2007 but do nevertheless have certain systematic risks. It is not appropriate for the LSB to prescribe a “one size fits all” approach of focussing on supervision at entity

level. These are judgments for the front line regulator, who will have a better understanding of its own constituency.

Question 3: How do you think that a more flexible and responsive regulatory regime should be developed?

17. We consider that changes to regulatory regimes should not be made unnecessarily and must be carried out with care and not unduly rushed. There is a danger that if this is done with haste then an unacceptable level of risk may be created or not addressed. All regulatory change involves cost. A number of regulatory programmes are already under way which have been identified as necessary for better meeting the regulatory objectives (for example, the overhaul of the code of conduct, and the forthcoming further consultation on entity regulation). In the absence of clearly evidenced need, regulators should not introduce further change for its own sake and certainly not if doing so prejudices the timescale of completing existing programmes. The BSB asks that the LSB remains mindful of the tight economic climate for many practitioners and the need for any requirements to be proportionate in terms of when they must be put into effect. Any increase in costs will ultimately be borne by consumers.

Question 4: We would welcome views on whether self-assessment is an appropriate approach or whether LSB should deliver its oversight by conducting its own reviews?

18. The BSB thinks that it is more consistent with the LSB's oversight role to allow self-assessment in the first instance. We support this approach. It would provide a useful opportunity for the BSB as this stage of its development and may, in particular, contribute helpfully to thinking about entity regulation and how that may be put into practice.

Question 5: What are your views on the benefits, costs and risks to ARs and their regulated communities of our proposals?

19. The BSB has significant concerns about the timeline for any changes that the LSB requires. Paragraph 80 says that the standards would be developed and phased in over a 12 month period, however, the next steps section on page 23 says that the self assessment and action plan will be required by December 2011. This is a very short timeframe for what may be quite a comprehensive undertaking. These proposals are important and warrant having proper time spent on them so that they can be done with the thoroughness and thought that they deserve. However, in the BSB's case this also coincides with considerable activity in order to facilitate the regulation of ABSs as well as the completion of a new Code, advocacy quality assessment and monitoring policy (all sizeable projects with several commenced well before the advent of the LSB and certainly before these principles were conceived of). If the LSB takes a more interventionist approach to this then we will have significant difficulties in complying with the timeline and even greater difficulty if it affects the timelines or content of key projects. Instituting a system that may require significant redrafting or reworking of well advanced projects at this late stage would be problematic for us and does not seem to be a proportionate approach from the LSB, especially when there does not appear to be any evidence that there are significant regulatory failures at present. We would like to see any evidence that the LSB holds which demonstrates that there is an adverse impact which justifies insisting upon a 12 month timeframe, in circumstances where in our view this would

20. The LSB should also note that the BSB and Bar Council are engaged in business and budget planning for 2012-13 now. The budget will be set by December 2011 so if the action plan requires additional funding in any areas, that may not be possible until the 2013-14 year.

Question 6: We would particularly welcome feedback on the criteria at Annex A, including suggestions on others that might be appropriate.

21. Outcomes-focused regulation

The BSB considers that the focus should be on ensuring that all codes of conduct and behaviour of authorised persons reflect or support all of the regulatory objectives, not just the consumer experience.

22. Risk assessment

Collection of data is indeed important but the BSB considers that a balanced approach must be taken to this. It would be unacceptable, for instance, if the BSB did not intervene because hard data was not yet available when a clear issue had arisen or was arising. The collection of data requirement must not be a fetter on the undertaking of early regulatory action when that is necessary. The amount of data collected must also be reasonable in all the circumstances. Any requirement to obtain large quantities of information without a clear purpose would be both disproportionate and burdensome.

Any research undertaken to help form views about particular activity must also be carefully coordinated across all regulators to avoid duplication and unnecessary cost being incurred. All research activity undertaken should also be of the highest quality, fully peer reviewed by outsiders. This will deliver the most robust evidence to help guide the practice of all regulators, including the LSB.

23. Supervision

A balanced approach must also be taken to supervisory activities. In line with acting proportionately and undertaking activity that is targeted only at cases in which action is needed, the front line regulators should not be compelled to be pro-active for pro-activity's sake. Simply undertaking activity reactively is not going to be sufficient but proactive action must be judiciously and sensibly approached.

24. Enforcement

While publicity is indeed an important part of any enforcement strategy, the BSB considers that it must not be publicity at all costs. The rights and interests of all parties must be considered. That certainly does not mean that details of transgressions should be hidden or not publicised but it may mean, for instance, that sunset periods for older details may be warranted.

25. Capacity and capability of ARs to deliver regulatory standards

We agree that a regulatory board must be in a position to effectively hold its executive to account and must not be involved in dealing with individual cases or

micromanagement. However, a sensible division of activities between boards and their executives must be found that takes account of differing circumstances and in particular the size of the organisation and the impact on the regulated profession.

All other principles seem reasonable.

Bar Standards Board
18 July 2011