



Entity Regulation: Consultation

Introduction

1. The Bar Standards Board (BSB) has submitted to the Legal Services Board (LSB) an application for approval of a number of changes to its Handbook, the effect of which will be to permit the authorisation of (non-ABS) entities by the BSB. The application is available on the [LSB website](#). If approved, this will enable the BSB to authorise entities whose owners and managers are all authorised persons under the Legal Services Act 2007 (LSA). The BSB proposes to authorise entities that are focused on advocacy, litigation and specialist legal advice, subject to other considerations about whether the BSB is the most appropriate regulator – the types of entity that we envisage authorising are described in the attached policy statement. In due course, the BSB proposes to become a Licensing Authority for alternative business structures (ABS), which would enable us to authorise entities with lay owners and managers (but this will be the subject of a later application to the LSB).
2. The purpose of this paper is to consult on some policy changes that have been developed by the BSB since its [last consultation](#) on entity regulation. These are:
 - a. reinforcement of the consent based contractual regime discussed below;
 - b. changes that follow from further examination of the remedies outlined in the previous consultation that could be pursued by the BSB if entities were failing, abandoned or engaged in significant dishonesty; and
 - c. proposals relating to the minimum insurance terms that entities would be expected to have in place.
3. The changes proposed in this consultation will not directly affect individual barristers authorised by the BSB. They will only affect entities, their owners and managers who have consented to be bound by these new rules (although paragraph 33 and question 6 make reference to a proposal on insurance that may have more general application in the future).
4. As the consultation is taking place during the LSB's statutory decision-making period the time available for responses has been shortened, but the BSB is proactively engaging with key stakeholder groups to ensure that all those with an interest are able to contribute. We are specifically contacting the following stakeholders and offering to discuss our proposals with them:
 - a. previous respondents to consultations on entity regulation;
 - b. participants from recent entity regulation focus groups;
 - c. Specialist Bar Associations;
 - d. the Institute of Barristers' Clerks and Legal Practice Managers' Association;
 - e. the Legal Services Consumer Panel;
 - f. organisations representing consumers of legal services;

- g. specialist brokers in the professional indemnity insurance market; and
 - h. the Association of British Insurers and specialist insurers.
5. We will also be holding briefing sessions and arranging meetings with those who would like to contribute to the consultation during July. It is not necessary to submit a formal written response, as we will be taking minutes of any discussions. If you would like to meet BSB staff to discuss any of these matters then please contact us on entityregulation@barstandardsboard.org.uk as soon as possible. The deadline for responses is **5 September 2014** and responses should be sent to the same address.

Contractual regime: consent to regulation by the BSB

6. The constitution of the Bar Council was amended in 2013 to permit the Bar Council (via the BSB) to authorise and regulate non-barristers (including entities and their managers). The Bar Council therefore is permitted by its constitution to enter into contractual arrangements with non-barristers that are authorised by it, under which those entities and individuals agree to abide by the Handbook and submit to the jurisdiction of the Bar Tribunal and Adjudication Service in disciplinary matters. It is not necessary for them to become members of the Bar Council in order to be bound by that agreement for the purposes of being regulated by the BSB (and, indeed, membership of the Bar Council is entirely a matter for the Bar Council in its representative capacity). The s69 order discussed further below will simplify the legal basis of the entity regime by giving the Bar Council express authority to authorise and discipline persons other than barristers (including entities, their owners and managers). In the meantime, a consent-based contractual regime will be in place.
7. In order to make explicit the consent to our regulatory jurisdiction, and hence the contractual relationship with the BSB, we have amended the proposed authorisation rules for entities to require explicit consent from both entities and their managers to be bound by the BSB Handbook and disciplinary arrangements. This consent will be required as a condition of authorisation and will be evidenced as part of the initial application and in the event of any change of management.
8. The BSB proposes to amend the mandatory requirements for authorisation at rS83 to require an entity to have arrangements in place to provide explicit consent by the entity, its managers, Head of Legal Practice and Head of Finance and Administration to be bound by the BSB's regulatory arrangements (including its rules and disciplinary arrangements). A similar change will be made in relation to approval of changes in management personnel.

Question 1: Is this change to the authorisation criteria a proportionate way of clarifying the BSB's regulatory jurisdiction?

Remedies

9. In its last entity regulation consultation, the BSB considered whether it was necessary to acquire a statutory power of intervention. In broad terms, intervention is the process by which the regulator is able to take control of client money and client files in the public interest when something has gone seriously wrong. Schedule 14 to the Legal Services Act 2007 provides a statutory power of intervention in relation to licensed bodies (ABSs), which the BSB will acquire if it becomes a licensing authority for ABS entities. The grounds for intervention under the LSA can be broadly summarised as:
- a. Failure to comply with one or more terms of the license;

- b. The appointment of a receiver or another defined insolvency event;
 - c. Suspected dishonesty by a manager or employee;
 - d. Undue delay in dealing with a matter;
 - e. It is necessary to exercise the power for the benefit of clients.
10. The power to intervene in a solicitors' practice has existed since 1943. The power is closely linked to, and was introduced at the same time as, the Law Society's Compensation Fund. Together these two elements of the solicitors' statutory scheme are primarily directed at the protection of client money. To contextualise the risk of the BSB needing to exercise intervention powers in relation to a non-ABS entity, it is worth considering the operation of the SRA's intervention regime. The SRA's regulated community is over eight times the size of the BSB's with 130,612 practising solicitors and 10,589 entities at January 2014. The SRA carried out only 47 interventions in 2013; the majority of which were into practices run by a sole practitioner (accounting for 34 of the interventions). Put another way, in 2013 the SRA intervened into 1 in approximately every 225 entities.
11. In the original Handbook consultation our stated view was that it was not necessary to acquire a statutory power of intervention for non-ABS entities. This was primarily because the need to take control of client money does not arise, given the prohibition proposed for BSB regulated entities.
12. However, the BSB has concluded that in the longer term it would be desirable to have the statutory power of intervention over all entities to eliminate any residual risk in the event of significant dishonesty, insolvency or abandonment preventing the regulator from taking action to protect clients where something had gone very wrong. These events would fall into the 'high-impact, low-likelihood' category, but there may be situations where a statutory power of intervention, or the threat of it, is necessary in the public interest.
13. It is therefore proposed that in parallel with the LSB application to become an entity regulator we should seek their recommendation that the Lord Chancellor grant an order under s69 of the LSA to grant the Bar Council (via the BSB) a statutory power of intervention. This would not be in place at the beginning of our entity regulation regime, so we have considered whether any changes are needed to our proposed rules in the interim, to ensure that there is sufficient public protection in place. **We will consult separately on the policy issues relating to the s69 order – this consultation focuses on the Handbook rules that may be needed in the interim before we have the new statutory powers.**
14. In situations where an entity is failing, entering administration or insolvency, is unable or unwilling to co-operate with its regulator or has been abandoned by its owners and managers, the regulator needs to be able to move in and take charge of affairs so as to protect the interests of clients, to obtain alternative representation for them and to secure papers or other assets which may belong to them. In our original proposals, we highlighted a number of tools that the BSB could use as alternatives to statutory intervention powers in such circumstances. These included, if necessary:
- a. imposing a requirement on BSB regulated individuals within entities that they will take all reasonable steps to inform clients and distribute files if the organisation itself is unable to do so, in order to ensure continued representation for clients and otherwise to ensure that the entity is wound down in an orderly manner;

- b. seeking the co-operation of any administrator and establishing protocols and procedures to ensure that any insolvency is undertaken in a manner that ensures clients' interests are protected. Such co-operation would be in the interests of an administrator because the alternative would be for the BSB to withdraw authorisation from the entity, the effect of which would be to prevent it from continuing as a going concern; and
 - c. applying for a court supervised receivership in the public interest.
- 15. On the basis that entities will be contractually bound to comply with the BSB's regulatory regime, the BSB will be able to make use of the additional remedies available to enforce a contract. The BSB's cause of action would arise following an actual or threatened breach of contract by the entity, in the form of a regulatory breach. There are a range of remedies for breach of a contract; however the most relevant in these circumstances are specific performance and injunctions. In seeking specific performance or an injunction the BSB will be seeking the court's support to grant a discretionary remedy in the public interest.
- 16. An alternative route would be the court's power to appoint a receiver who could take control of documents and, if necessary, could manage the affairs of the entity including its assets for instance in circumstances where the practice had been abandoned. The High Court has a jurisdiction to appoint a receiver by an interim or final order in all cases in which it appears to the court to be just and convenient to do so (s. 37(1) Senior Courts Act 1981). The objective of a court-appointed receiver would be to preserve or safeguard property from any danger with which it is threatened. The appointment of a receiver by the court to preserve property may be made when litigation is pending to decide the rights of the parties or where misconduct or maladministration is alleged against persons who are in a fiduciary capacity.
- 17. Following further consideration, we believe it is necessary to introduce some further additional rules to the Handbook, which will supplement the general duty to co-operate with the regulator as required by Core Duty 9. This will strengthen the BSB's ability to act where necessary to protect clients' interests – the purpose of these is to give effect to the type of remedy that was originally envisaged, building on the general duty to co-operate with the regulator but enabling the BSB to take action where the entity is either unable or unwilling to co-operate. The changes primarily enable the BSB to act quickly where (for example) it is necessary to take control of client files in a situation where an entity is being non-co-operative or has been abandoned. In all cases where these new rules have been introduced these powers would only be exercised by the BSB in the most serious of situations, where it was clearly in the public interest to act.
- 18. The circumstances in which these powers would be exercised are set out in the proposed rS113.5 (which is based on the corresponding provisions of the intervention powers in the Legal Services Act):
 - a. one or more of the terms of the entity's authorisation have not been complied with;
 - b. a person has been appointed receiver or manager of property of the entity;
 - c. a relevant insolvency event has occurred in relation to the entity;
 - d. the BSB has reason to suspect dishonesty on the part of any manager or employee of the entity in connection with:
 - i. that entity's business; or

- ii. the business of another entity in which the manager or employee is or was a manager or employee, or the practice (or former practice) of the manager or employee.

19. If the BSB considers that one or more of the conditions are satisfied, it will then consider whether in all the known circumstances it is in the public interest to act. Such an assessment will take into account not only the need to protect the public and safeguard public confidence in the profession of regulated legal services but also the inevitably serious consequences of the regulatory action for the authorised body. In addition to the rules listed below, there would be a standard condition placed on any entity's authorisation that would enable the BSB to modify or revoke the authorisation or take any other necessary action (including potentially recovering the costs of such action from the entity) if these conditions are met.

Question 2: Do the criteria proposed at rS113.5 offer appropriate grounds to enable the BSB to act when it is necessary in the public interest to do so?

rC22 – defining the terms or basis on which instructions are accepted

20. This rule will be amended to ensure that the terms under which an entity accepts instructions from clients includes consent from clients to disclose and give control over files to the BSB or its agent in certain circumstances, where it is necessary for the regulator to act in the public interest as described above. This will enable the BSB to take urgent action without first needing to get clients' consent to access their files. The BSB will not provide legal services to clients, but will seek to ensure that clients are able to access alternative representation.
21. This is similar in effect to the contractual arrangements entered into with the Legal Aid Agency, whose contract standard terms impose a duty on the provider to supply to the Agency certain third party documents that it may request (in the case of legal aid, clients consent to this by signing an application form which includes a clause on access to personal data specifying that the Agency may need to access the information in the file for audit or bill assessment purposes).

rC64 – provision of information to the BSB

22. This rule will be amended to introduce a duty (when the circumstances above are satisfied) on the entity and its owners/managers/employees to give the BSB whatever co-operation is necessary, including delivering all documents under its control to the BSB or its agent and assisting with the redirection of communications (including post, email, telephones etc.) This is an extension of the duty to co-operate with the regulator, set out at Core Duty 9 in the Handbook, but will make explicit the need to assist in circumstances where this will be needed urgently.

rC70 – access to premises

23. This rule will be amended to introduce a duty (when the circumstances outlined above are satisfied) not only to permit the BSB or its agent to enter an entity's premises (which was in the earlier version of the Handbook) but to operate from those premises for the purpose of taking such action as is necessary to protect the interests of clients. This further clarifies the need for the BSB to act urgently in certain situations to protect clients' interests.

Question 3: Are the proposed amendments to rC22, rC64 and rC70 feasible and proportionate, in order to ensure the BSB can access client files and take action when it is necessary in the public interest to do so?

Insurance requirements

24. Rule rC76 of the Code of Conduct requires that BSB regulated persons have adequate insurance (taking into account the nature of their practice) which covers all the legal services that are supplied to the public. There is a further requirement to comply with any notice from the BSB stipulating a minimum level of insurance and/or minimum terms for the insurance. rC77 also requires all self-employed barristers to be members of BMIF.
25. Whilst all members of the self-employed Bar are covered by BMIF, this may not be sufficient for their needs. The minimum level of cover provided by BMIF is £500,000 and the maximum is £2,500,000. Depending on the nature of a self-employed barrister's practice they may have to top up their cover with additional insurance purchased from the wider insurance market.
26. BSB regulated entities will be subject to the general duty to have adequate insurance in addition to a condition of their authorisation that they confirm (and provide evidence) that they have obtained adequate insurance sufficient to meet their obligations under rC76 (the relevant authorisation rules are at rS83). There will also be a requirement on entities to undertake an annual risk assessment and confirm that they have undertaken such an assessment and that they continue to have reasonable insurance for all their legal services which takes account of that assessment. Nevertheless, we believe that some minimum terms are necessary in order to ensure consumer protection, especially in circumstances that might not otherwise be covered by insurance policies. It is also desirable to have certainty for consumers, the regulated entities and their insurance providers, and to avoid regulatory arbitrage due to significant differences in the minimum required by different regulators (for example, entities might choose one regulator over another because of a perception that their rules required less comprehensive, and hence cheaper, insurance with a consequent impact on consumer protection).
27. This part of the consultation relates primarily to the BSB's intention to issue a notice under rC76, specifying certain minimum terms for entities. The BSB will require annual evidence of the level of cover and the terms of insurance, either in the form of a certificate from the insurance company or a broker's letter of undertaking. The BSB will have a power to revoke authorisation if adequate insurance is not in place and the entity's risk analysis in order to determine its level of cover will be scrutinised by our Supervision Department.
28. In determining the minimum terms that we will set for entities, we have considered the terms on which the self-employed Bar is currently mandatorily insured by the BMIF and compared these terms with the requirements of other regulators of entities. Our main objective is to ensure that consumers should, substantively, have no less protection if they are clients of a BSB authorised entity than they would if they were clients of a self-employed barrister or an entity regulated by another Approved Regulator. In addition to the obvious consumer protection issues, there is a risk of regulatory arbitrage if Approved Regulators adopt significantly different insurance terms. With this in mind we will continue to monitor developments in the market and discuss minimum insurance requirements with the other Approved Regulators – it is possible that our minimum requirements will evolve over time, with experience of authorising entities and further analysis of the market. The key policy issues in relation to insurance terms are summarised below. Our starting point is that the insurance required for entities should be broadly similar to that currently provided to the self-employed Bar unless there is a regulatory reason to treat them differently. An example of where a difference is dictated by the fact of being an entity is the need for there to be provisions dealing with successor practices.

29. An important point to bear in mind when considering professional indemnity cover is that it is provided on a claims-made basis – the cover available is determined by the policy in place at the time of a claim against the insured professional (or the time the professional becomes aware of a potential claim and notifies the insurer) rather than the policy that was in place at the time of instruction or at the time of the error. Professionals must ensure on an ongoing basis that they are appropriately covered for past activities in addition to the current ones, in order to ensure that clients are fully protected. This should be borne in mind when considering a number of the issues below (and will be reflected in any guidance issued by the BSB in due course).

Minimum level of cover per claim

30. It is anticipated that the entities authorised by the BSB will vary in size and corporate structure. We envisage significant numbers of ‘one person’ companies, but also much larger companies or partnerships with several managers, many fee-earners, significantly higher turnovers and a potentially wider range of activities than that usually undertaken by a single self-employed barrister. We therefore need to set a minimum level of cover that does not overburden the smallest/lowest risk structures. As a matter of principle, any minimum that avoids imposing excessive burdens on those at the low end of the scale is unlikely to be adequate for those at the other end of the scale. However, the right way to address that issue is for the BSB to ensure that the overriding obligation to hold reasonable insurance cover is understood and observed, rather than imposing a minimum which might represent an obstacle to smaller entities entering the market.
31. As the risks associated with the work done by a ‘one person’ entity are likely to be broadly similar to those at the self-employed Bar, we believe that it is appropriate to require the same minimum level of cover per claim as the self-employed Bar. This is currently £500,000. That also accords with the SRA’s recent proposals in relation to its own minimum. The minimum would apply to each and every claim. The BSB does not consider that it would be in the interests of clients to cap the overall amount of insurance cover required as that could mean that a few large claims early in the year would leave no insurance cover for later claims.

Question 4: Is the proposed minimum level of cover per claim (with proposed accompanying guidance) sufficient?

Question 5: Do you agree with the absence of a cap on the overall level of insurance required?

32. It is important to note that this will only be a minimum. Accompanying guidance will clarify the steps that entities should go through to satisfy themselves that they are appropriately insured – this is likely to include considering a multiple of turnover.
33. The BSB is considering whether, in due course, it should propose in a separate consultation a future requirement (for both the self-employed Bar and entities) that they carry whichever is the higher of a minimum level of insurance cover per claim and a multiple of turnover (possibly subject to a maximum above which it would be a matter for the entity whether to carry additional cover). The ICAEW has provisions to this effect in relation to accountancy regulation and the BSB considers it possible that this might, in future, represent a more effective approach than setting a minimum level alone (which at present is the approach taken by both the BSB and the SRA). However, it would not, on any view, be appropriate to make such a change solely for entities. Moreover, any such change should also be

coordinated with other Approved Regulators to avoid risks of arbitrage. At this stage, therefore, the BSB simply wishes to gauge interest and collect views with a view to assessing whether to engage in further dialogue with stakeholders, including the BMIF, other Approved Regulators and the LSB, about this possibility. We would welcome views on this.

Question 6: Do you have any views on the possible future requirement (for both the self-employed Bar and entities) that they carry whichever is the higher of a minimum level of insurance cover per claim and a multiple of turnover?

Aggregation

34. 'Aggregation' is the process by which several claims from different clients can be treated as a single claim by the insurer (therefore with a single excess and a single limit of cover). The current minimum terms for the SRA and the BMIF terms allow aggregation into one claim in certain circumstances, largely relating to whether they arose out of a single act or omission or a series of related acts or omissions. For example, one missed deadline by a litigator may result in a loss for several clients, but for the purposes of the excess and any limit of cover, the claims of all the clients would be treated as one.
35. In the regulatory context, it is necessary to balance the interests of consumers against the cost and availability of insurance within the market. The interest of particular consumers will depend on their situation. In some cases consumers may benefit from aggregation as there is only one excess payable, and firms that have to pay multiple excesses may find themselves in financial difficulties. In others they may lose from aggregation as it would result in multiple claims becoming subject to a limit of cover. However, it is in the interests of all parties that there is a high degree of certainty as to the construction which will be placed upon the relevant clauses.
36. As to aggregation clauses defining what is to count as one claim for the purposes of the excess and limit of cover for any one claim, the BSB is not aware of any evidence that the aggregation provisions in the BMIF cover have been problematic in the past. We therefore propose to take broadly this approach in defining our minimum terms. This would permit a single limit of cover for all claims which, in the reasonable opinion of the insurer, arise from or are attributable to:
 - a. The same act or omission;
 - b. A series or group of related acts or omissions;
 - c. A series or group of similar acts or omissions; or
 - d. The same originating cause.

Question 7: Do you agree that the proposed aggregation clause is appropriate?

37. We are aware of considerable uncertainty in the solicitors' insurance market at the moment, given the ongoing litigation about the interpretation of the aggregation clause in the SRA's minimum terms in *Godiva Finance v Travelers Insurance* (yet to come to trial). Clearly the BSB will monitor that litigation and its implications for the future.

Run-off and successor practices

38. For reasons discussed above, the fact that professional indemnity insurance is provided on a “claims made” basis means that consumers must continue to be protected for a reasonable period in the event that an entity ceases practising or its practice transfers to another entity.
39. The terms of cover for the self-employed Bar need not deal with successor practices, although self-employed barristers have run-off cover in place on retirement. When the BSB authorises entities the insurance requirements must include provisions to deal with the entity ceasing to practise or merging with another practice (in which case there must be continuity of insurance provision for the clients of the previous practice). There are two ways in which this could happen:
- a. The original practice may simply choose to cease and obtain run-off cover. The minimum terms should require this run-off period to cover at least the statutory limitation period of six years. The purchase of run-off cover is a significant expense and can be a barrier to exiting the market for some firms, with particular difficulties in recovering run-off premiums where a business is insolvent. Providers may wish to offer different ways of managing this – for example, a run-off deposit might be held in escrow for the duration of cover, which would be relatively low initially but topped-up after each year of practice to acknowledge increases in exposure over time. We have considered whether there would be any value in reducing the run-off period, as there is evidence that the majority of claims occur in the early years following cessation. However, precisely for this reason, most claims would still be covered even if the period of run-off cover was reduced and therefore we do not believe that reducing the run-off period (and the consequent loss in consumer protection in respect of claims that manifest towards the end of the six years) could be justified by the likely small reduction in premium;
 - b. The liabilities of the previous practice will continue to be insured under the policy held by the new practice.
40. The BSB is likely to adopt a format for defining successor practices similar to that which has been operated by the SRA for some years, albeit that the provisions in respect of corporate succession are likely to be revised to ensure that succession is not easily avoided. This may involve concentrating on the destination of the major fees earners of the original practice at the point it comes to an end. The policy priority in drafting successor practice terms is that an entity which takes ownership of any part of a previous entity’s practice must become a successor and have insurance in place to cover claims relating to the previous practice. Failing this, the original entity must enter run-off cover.

Question 8: Does the proposed approach in relation to run-off cover and successor practices provide the right amount of protection for consumers?

Avoidance for misrepresentation and non-disclosure

41. The BMIF has traditionally been able to avoid liability on the grounds of fraudulent misrepresentation or non-disclosure of a material fact by the person insured. Whilst this has not led to problems in relation to insuring individuals, that may be because the BMIF has rarely if ever declined cover on this ground. In an entity structure, it is much more likely that an individual within the entity might fail to disclose a material fact, or make misrepresentations in the hope of covering up something that they had done that might lead to a claim. In such situations, the entity as a whole should not be denied cover by the insurance provider.
42. The BSB therefore proposes to include minimum terms preventing the insurer from avoiding, repudiating, reducing or denying liability on grounds of non-disclosure or misrepresentation,

whether fraudulent or not, but permitting recovery of any payments resulting from such misrepresentation or non-disclosure from those shown to be responsible for it.

Question 9: Do you agree that minimum terms should prevent avoidance for misrepresentation and non-disclosure?

Who should be protected by compulsory insurance cover?

43. We have considered whether the compulsion in respect of insurance cover should apply only to more vulnerable or unsophisticated client groups (leaving, for example, corporate clients to negotiate their own arrangements with an entity when instructing it) as the SRA proposed in its recent consultation. We have rejected this option for a number of reasons, largely due to difficulties related to the nature of claims-made cover. For example, any assessment of the status of the client would have to be made at the time of instruction, whilst the client (particularly if it is a business) may have changed significantly by the time of claim. We doubt that clients would be in a position adequately to negotiate the terms of cover they require, even if they are wealthy individuals or businesses. In any case, such negotiation would not guarantee that any additional cover agreed would be maintained in subsequent years, in order to ensure it was in place when a claim was made. For these reasons, we will apply the minimum terms to all clients. We note that the SRA has concluded that a further review is needed before it takes any further steps in relation to this proposal and we will monitor developments in our own regime and keep this matter under review.

Question 10: Do you agree that the minimum terms should apply to all clients?

Bar Standards Board

July 2014

Annex A: Summary of questions

Contractual regime

Question 1: Is this change to the authorisation criteria a proportionate way of clarifying the BSB's regulatory jurisdiction?

Remedies

Question 2: Do the criteria proposed at rS113.5 offer appropriate grounds to enable the BSB to act when it is necessary in the public interest to do so?

Question 3: Are the proposed amendments to rC22, rC64 and rC70 feasible and proportionate, in order to ensure the BSB can access client files and take action when it is necessary in the public interest to do so?

Insurance requirements

Question 4: Is the proposed minimum level of cover per claim (with proposed accompanying guidance) sufficient?

Question 5: Do you agree with the absence of a cap on the overall level of insurance required?

Question 6: Do you have any views on the possible future requirement (for both the self-employed Bar and entities) that they carry whichever is the higher of a minimum level of insurance cover per claim and a multiple of turnover?

Question 7: Do you agree that the proposed aggregation clause is appropriate?

Question 8: Does the proposed approach in relation to run-off cover and succession practices provide the right amount of protection for consumers?

Question 9: Do you agree that minimum terms should prevent avoidance for misrepresentation and non-disclosure?

Question 10: Do you agree that the minimum terms should apply to all clients?

Annex B: Entity regulation policy statement

1. Part 3 of the Handbook sets out the requirements for authorisation as an entity by the BSB. This paper expands on the discretionary criteria in those rules and is the entity regulation policy statement referred to in rS99, gS20 and rS101.
2. To be authorised by the BSB as an entity, an applicant must:
 - a. Satisfy the mandatory requirements in rS83 and rS84
 - b. Be considered by the BSB to be an appropriate entity for it to regulate (rS99)
 - c. Satisfy the BSB that it will be competently managed and comply with the rules, and that its owners, managers, HOLP and HOFA meet the suitability criteria rS101)
3. If an applicant does not meet the mandatory criteria, it cannot be authorised by the BSB and its application will be refused.
4. If an applicant does meet the mandatory criteria, then the BSB will consider whether it is an appropriate entity for it to regulate. If it concludes that it is, the BSB may nevertheless refuse to authorise it if it is not satisfied that it will be adequately managed and run in compliance with the rules. This is discussed further in paragraphs below.
5. In reaching its decision on whether an entity is an appropriate one for it to regulate, the BSB must take account of its analysis of the risks posed by the applicant, the regulatory objectives and this entity regulation policy statement.

BSB Policy Objectives

6. The Bar Standards Board (BSB) is a specialist legal services regulator. Its particular specialist focus is on the regulation of advocacy and related litigation services and expert legal advice. In designing its entity regulation regime it has analysed the legal services market and its own capacities and capabilities, in addition to the opportunities for regulation by other Approved Regulators and identified the market segment that is appropriate for BSB regulation.
7. The overall policy objectives of the BSB are that:
 - a. The market should have the opportunity to develop, with authorised persons being able to innovate in ways that are compatible with the regulatory objectives and the associated risks being managed effectively and proportionately;
 - b. As business models change, the specialist skills and expertise associated with the Bar should be preserved and standards of advocacy should be maintained, thereby safeguarding the public interest;
 - c. Individual responsibility (in particular the accountability of the individual advocate or other authorised individual to the Court and the client) should be at the heart of the regulation of advocacy and related services;
 - d. Regulatory arbitrage is minimised;
 - e. The BSB should build on its regulation of individual barristers to give entities the option of being regulated by the BSB, particularly those wanting to specialise in advocacy and litigation;
 - f. The BSB minimises the risk of regulatory failure by regulating only those entities that fit well with its capacities and capabilities, ensuring that entities and their managers consent to the jurisdiction of the BSB;
 - g. Risk assessment and management should be at the heart of the BSB's regulatory arrangements;

- h. Entities which the BSB authorises should manage their own risks well and comply with their regulatory obligations;
- i. The BSB regulatory regime is proportionate to the risks it needs to regulate.

BSB approach

8. The BSB has developed its policy on what entities it would be appropriate for it to regulate in the light of these objectives. In exercising its discretion, the BSB will be sensitive to developments in the market and innovative practices that might be in clients' interests and which might differ from the type of entity described below. In such cases, the BSB will assess the risks posed by the entity in question and decide whether it is in the public interest for the BSB rather than another Approved Regulator to authorise such an entity.
9. This policy statement reflects the BSB's decision that it should be a niche regulator concentrating on those entities whose activities are similar to those traditionally undertaken by the Bar (and which the BSB therefore has experience of regulating), which do not hold client money, whose structure is simple and transparent, with work being closely overseen by authorised individuals and minimal risk of divergent interests between owners and managers. As both the BSB and those it regulates gain experience, and as the market develops, the BSB will consider whether it would be in the public interest for it to widen the scope of its entity regulation and if so it will publish a revised policy statement.
10. The BSB's risk framework (published alongside this policy statement) will be central to any decision to authorise an entity and to the BSB's approach to ongoing supervision of the entity. The BSB will assess the nature of the risks posed by an entity, taking into account its structure and governance arrangements, the kind of the services it is intending to provide, its impact on the wider legal services market and its own risk assessment and mitigation procedures.
11. The BSB would normally only authorise an entity if:
 - a. any owner¹ of the entity is also a manager;
 - b. the entity will not be providing any services other than legal work², subject to any minor or incidental examples of other activities which are carried on in the course of supplying the main service and do not materially detract from the focus being legal work.
12. There may be exceptional circumstances where the BSB would authorise an entity that is not able fully to satisfy the criteria in paragraph 11 but, in the BSB's judgment, poses similar risks to those posed by entities which do satisfy the criteria.
13. When assessing the risks associated with an entity, the BSB will also take other factors into account, including:
 - a. the services that the entity intends to provide and the nature and extent of any non-reserved activities;
 - b. the proposed proportion of managers to employees;
 - c. the proposed proportion of authorised individuals to non-authorised individuals;

¹ Owner as defined in the BSB Handbook as person who holds a material interest in the entity

² Defined as reserved legal activity and any other activity which consists of the provision of legal advice or assistance in connection with the application of the law or with any form of resolution of legal disputes or the provision of representation in connection with any matter concerning the application of the law or any form of resolution of legal disputes, and includes activities of a judicial or quasi-judicial nature (including acting as a mediator and other forms of alternative dispute resolution) and legal academic work such as lecturing.

- d. the extent to which its managers have been and/or are going to be actively involved in advocacy and/or litigation services or related advice;
 - e. whether any persons with an ownership interest (whether material or not) are not individuals;
 - f. whether any managers are not individuals;
 - g. whether the entity is intending to provide high-volume, standardised legal advice or standardised legal transactional services direct to lay clients and, if so, whether this is likely to constitute a substantial or significant proportion of its practice; and
 - h. the systems that the entity will have in place to manage such services and associated risks.
14. The following factors, when present, would tend to indicate that it may be appropriate for the BSB to regulate an entity:
- a. all owners and all managers are individuals;
 - b. 50% or more of the owners and 50% or more of the managers are entitled to exercise rights of audience in the Higher Courts;
 - c. a substantial part of the services to be provided are advocacy and/or litigation services and expert legal advice;
 - d. the entity is not intending to provide high-volume, standardised legal transactional services;
 - e. 75% or more of owners and 75% or more of managers are authorised individuals³;
 - f. a substantial proportion of employees are going to be authorised individuals; and
 - g. each manager supervises only a small number of employees.
15. The following factors, when present, would tend to indicate that it may not be appropriate for the BSB to regulate an entity:
- a. not all owners and managers are individuals;
 - b. fewer than 50% of owners and fewer than 50% of managers are entitled to exercise rights of audience in the Higher Courts;
 - c. the provision of specialist advocacy and/or litigation services or other expert legal advisory services is not a significant proportion of the proposed practice;
 - d. a substantial part of the services to be provided are high-volume, standardised legal transactional services direct to lay clients;
 - e. fewer than 75% of owners and 75% of managers are authorised individuals⁴; and
 - f. a substantial proportion of employees will be non-authorised individuals.
16. The factors listed above are not exhaustive of the matters that may be relevant to the BSB's consideration of the appropriateness of an entity for BSB regulation. In each case, the BSB retains a discretion to grant or refuse authorisation in the light of its overall consideration of the risks posed by the entity, the regulatory objectives and the BSB's policy objectives.
17. In particular, even if the factors listed in paragraph 14 are present, the BSB may refuse authorisation if its analysis of the risks posed by the entity indicate that it may not be appropriate for BSB regulation. In making this decision it will take into account not only the extent to which the entity has assessed its own risks and put in place appropriate systems to manage those risks, but also whether the BSB itself has the necessary experience and skills to regulate the entity effectively.

³ Only relevant to ABSs

⁴ Only relevant to ABSs

Management and compliance

18. Rules rS101 and rS102 set out the aspects of management, control and compliance about which the BSB must be satisfied before granting authorisation. In exercising its discretion under these rules, the BSB will consider whether the arrangements are satisfactory for the nature and type of business which the applicant intends to provide. If the BSB concludes that the minimum requirements are satisfied and that it should therefore authorise the applicant, it will take account of its conclusions about the strength of the controls and management in its assessment of the risks posed by the entity and hence the future monitoring and supervision arrangements which would be appropriate.
19. In considering whether a person meets the suitability criteria despite having disclosed an event which might call that suitability into question, the BSB will have regard to when that event took place and any evidence about subsequent behaviour. The test it will normally apply is whether the person is currently suitable for the role concerned and whether it and the public can have confidence in that person in that role.

Annex C: BSB Handbook References

Text shown in bold is new (strikethrough text relates to ABS entities and will form part of the Licensing Authority application).

rS113.4-.5 – Terms of Authorisation

Authorisations and licences must, in all cases, be given on the conditions that:

.4 if the conditions outlined at rS113.5 apply, the *Bar Standards Board* may without notice:

.a modify an authorisation granted under rS116;

.b revoke an authorisation under rS117;

.c require specific co-operation with the *Bar Standards Board* as provided for in rC64 and rC70;

.d take such action as may be necessary in the public or *clients'* interests and in the interests of the regulatory objectives; and

.e recover from the *BSB authorised body* any reasonable costs that were necessarily incurred in the exercise of its regulatory functions.

.5 The conditions referred to in rS113.4 are that:

.a one or more of the terms of the *BSB authorised body's* authorisation have not been complied with;

.b a person has been appointed receiver or manager of the property of the *BSB authorised body*;

.c a relevant insolvency event has occurred in relation to the *BSB authorised body*;

.d the *Bar Standards Board* has reason to suspect dishonesty on the part of any *manager* or *employee* of the *BSB authorised body* in connection with either that *BSB authorised body's* business or the business of another body of which the person was a manager or employee, or the *practice* or former *practice* of the *manager* or *employee*;

.e the *Bar Standards Board* is satisfied that it is necessary to exercise any of the powers listed in rS113.4 in relation to the *BSB authorised body* to protect the interests of *clients* (or former or potential *clients*) of the *BSB authorised body*.

rC22 – Accepting Instructions

Where you first accept *instructions* to act in a matter:

.1 you must, subject to Rule rC23, confirm in writing acceptance of the *instructions* and the terms and/or basis on which you will be acting, including the basis of charging;

.2 where your instructions are from a *professional client*, the confirmation required by rC22.1 must be sent to the *professional client*;

.3 where your instructions are from a *client*, the confirmation required by rC22.1 must be sent to the *client*

.4 if you are a *BSB authorised body*, you must ensure that the terms under which you accept instructions from *clients* include consent from *clients* to disclose and give control of files to the *Bar Standards Board* or its agent in circumstances where the conditions in rS113.5 are met.

rC64 – Provision of Information to the Bar Standards Board

You must:

.1 promptly provide all such information to the *Bar Standards Board* as it may, for the purpose of its regulatory functions, from time to time require of you, and notify it of any material changes to that information; and

.2 comply in due time with any decision or sentence imposed by the *Bar Standards Board*, a *Disciplinary Tribunal*, the *Visitors*, an *interim panel*, a *review panel*, an *appeal panel* or a *medical panel*

.3 if you are a *BSB authorised body* or an *owner* or *manager* of a *BSB authorised body* and the conditions outlined in rS113.5 apply, give the *Bar Standards Board* whatever co-operation is necessary, including:

.a complying with a notice sent by the *Bar Standards Board* or its agent to produce or deliver all documents in your possession or under your control in connection with your activities as a *BSB authorised body* (such notice may require such documents to be produced at a time and place fixed by the *Bar Standards Board* or its agent; and

.b complying with a notice from the *Bar Standards Board* or its agent to redirect communications, including post, email, fax and telephones.

rC70 – Access to Premises

You must permit the *Bar Council*, or the *Bar Standards Board*, or any person appointed by them, reasonable access, on request, to inspect:

.1 any premises from which you provide, or are believed to provide, *legal services*; and

.2 any documents or records relating to those premises and your *practice*, **or *BSB authorised body*,**

and the *Bar Council*, *Bar Standards Board*, or any person appointed by them, shall be entitled to take copies of such documents or records as may be required by them for the purposes of their functions **and, if you are a *BSB authorised body*, may enter your premises and operate from those premises for the purpose of taking such action as is necessary to protect the interests of clients.**