



## **Consultation on the cost of authorisation of a Bar Standards Board regulated entity**

### **Introduction**

1. The Bar Standards Board (BSB) has submitted to the Legal Services Board (LSB) an application to permit the BSB to authorise (non-ABS) entities. This is available on the LSB website. If approved, it 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 focused on advocacy, litigation, and specialist legal advice, subject to whether the BSB is considered the most appropriate regulator. The types of entity we envisage authorising are described in the policy statement attached at Annex A.
2. 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. This will be the subject of a later application to the LSB.
3. This consultation invites comments on the proposed fee structure for the authorisation of entities by the BSB.

### **The approach to fees**

4. The infrastructure established to authorise and supervise entities builds upon the BSB’s existing systems and resources. However, the introduction of this activity has increased the organisation’s operating costs.
5. The BSB intends to operate entity regulation on a cost recovery basis. This is to ensure that the entire practising bar does not subsidise, through the payment of the practising certificate fee, barristers who wish to practise through an entity. The fees for the authorisation process and the subsequent annual fees will be set at a level designed to cover the BSB’s operational costs for entity regulation. Initially, the small number of expected applicants will mean that costs will exceed income. These initial losses will be recovered over subsequent years with the intention of breaking even over a three year period. The BSB anticipates that the full costs of authorisation and supervision of entities will have been recovered by 31 March 2018. This approach necessitates making assumptions about likely take-up, which have informed the fee calculations below.

### **The approach to authorisation of entities**

6. Entity-based regulation and the delivery of legal services through entities is a new area of activity for both the BSB and the Bar. The policy statement annexed to this paper sets out the BSB’s view on the types of entities it is prepared to authorise. Within that statement there is a reasonable degree of flexibility so as not to fetter innovation or competition. The BSB’s approach to authorisation will be risk-based. This means that decisions on whether to authorise an entity will be determined by the risks that a potential entity presents to the regulatory objectives (set out in the LSA)

and what that entity is doing to mitigate or control those risks. Risk assessment will not be the only factor when taking authorisation decisions. The legal services market continues to evolve and the BSB would not wish to constrain that evolution through the decisions it takes on the authorisation of entities. Whilst cautious when taking decisions it will not be so cautious as to restrict creativity and competition. The corollary of that approach is that the level of supervision of authorised entities is likely to be enhanced – at least in the first few years of entity regulation. This is to ensure that entities function in line with the information provided at authorisation, but also so that the BSB can support new entities as they operate within a new regulatory regime.

7. The above approach is reflected in the BSB's proposed fee structure. The approach (and the fees) will be subject to review as the BSB gathers evidence about the implementation of entity regulation within the barrister's profession and its wider impact on the legal services market.

### What the fees will cover

8. The BSB has undertaken detailed financial and resource planning to establish what additional costs will be incurred should the LSB approve its application to become a regulator of entities. Below is a high level break down of the anticipated annual operational costs (rounded to the nearest thousand).

Category	Cost (£)
Staff	161,000
External expertise	15,000
Executive support (including Board involvement, communications and strategy and Executive Office input)	85,000
Central services ( including HR, Finance, IT, percentage of premise costs)	149,000
<b>TOTAL</b>	<b>410,000</b>

9. A more detailed description of each of the above cost categories is set out below, so as to provide greater clarity about the costs of entity authorisation.

### Staff

10. The BSB's Supervision Department will manage the authorisation (and subsequent supervision) of entities. All staff within the Department will be able to undertake activities relating to the authorisation of entities. However none will be exclusively dedicated to authorisation – at least at the outset. The figure of £161,000 reflects the likely amount of staff time (across a range of levels of seniority) involved in considering applications, taking authorisation decisions, and supervising entities.

### External expertise

11. This category relates to costs associated with the BSB obtaining external advice on legal or other technical matters relating to the regulation of entities.

### **Executive support**

12. When considering full operational cost recovery, in addition to the cost of resourcing the authorisation function of the BSB, a proportion of the total cost of executive and central services support needs to be taken into account.
13. The figure of £85,000 is the proportion of the cost of the BSB's executive function (including Board and Director General input) that is attributable to entity regulation. This is calculated using the percentage of total BSB staff time involved in entity regulation.

### **Central services**

14. This category of costs relates to the corporate services provided to the BSB in relation to HR, IT and finance. It also includes a percentage of the costs of the premises. The figure is a proportion of the overall cost to the BSB, and is calculated using the percentage of total BSB staff time involved in entity regulation

### **The types of entity**

15. The policy statement at Annex A sets out the types of legal service that the BSB would be prepared to authorise an entity to undertake. In effect, this opens entity regulation to the entire Bar. However, our market research suggests that a relatively small percentage of barristers or Chambers wish, at least initially, to seek authorisation as an entity. Therefore, the level of the fee has been based on a conservative estimate of the number of applicants. The table below sets out the anticipated number of applications over the first three years of operation. Applicants have been divided into a range of categories so that the BSB can operate a tiered fee structure. The larger or more complex the entity the higher the fee. The fee level is directly proportionate to the amount of resources needed to deal with an application and, if authorised, supervise that entity.

<b>Entity category</b>	<b>Year one</b>	<b>Year two</b>	<b>Year 3</b>
<b>Single person entity</b>	200	300	400
<b>2-5 person entity</b>	2	4	3
<b>6-15 person entity (simple)</b>	1	4	3
<b>6-15 person entity (complex)</b>	5	5	4
<b>15 + person entity</b>	1	2	2

16. For the purposes of determining the category that an entity comes within a 'person' is an authorised person/individual as defined within the BSB Handbook.
17. The 6-15 person entity category has been split into simple and complex subcategories. This is because it is possible to have within this category both a very

straightforward entity (which broadly replicates the chambers model), and a complicated entity (which seeks to involve both barristers and solicitors or is structured in an unconventional manner). The more complex entity will involve substantially more resource time and this is reflected in the proposed fee structure. The BSB will provide guidance on what constitutes complex and simple, so that applicants understand which category they will fall within. For example, the BSB is likely to view an entity with a large number of employees, but with only a small number of authorised persons, as complex because of the regulatory risks it presents and the enhanced supervision arrangements that would be required as a result. It will be open to the BSB to change its initial assessment of that category should further information come to light during the application process which suggests the entity should be in the complex (or simple) category. The price difference between simple and complex will be charged or refunded as necessary.

18. It will be possible for the complexity of the entity to be increased or decreased once authorised. This will depend on whether its structure is modified or other issues come to light. In those circumstances, the subsequent annual fee would be revised in line with the new category of that entity. Again, any decision on that change would be with reference to the guidance referred to in paragraph 17 above.

### **The application and authorisation process**

19. Applicants seeking authorisation as a BSB-regulated entity will be required to complete an on-line application form. This form will seek information that will determine whether or not an applicant should be authorised.
20. The application will seek the information relating to entities as set out in section E of Part III of the BSB Handbook and which addresses the fundamental business structure and governance of the entity. In addition, the BSB will require further information on such issues as management of conflicts of interest, financial control, risk management, supervision of employees, and compliance with general regulatory requirements in respect of equality and diversity and complaints handling. This information will enable the BSB to establish what risks that entity presents and what they are doing to mitigate and control them.
21. Applicants will need to provide evidence that they meet the fundamental Handbook requirements. They must demonstrate how they will manage the other regulatory issues, highlighted in paragraph 20 above, before the BSB takes a decision on whether to authorise the entity. Guidance will be provided to assist applicants on completing the application form.

### **The fee structure**

22. The BSB proposes that the fee structure be separated into three elements:
  - An application fee – payable by all applicants
  - An authorisation fee – payable by those who have been successful in their application and wish to be authorised by the BSB. The fee will cover the cost of regulating that entity in its first year of authorisation
  - An annual fee – payable by those authorised entities who wish to retain their authorisation. This fee covers a review of the entity and the on-going cost of supervision of authorised entities

23. The table below sets out the proposed fee structure. These fees are set using the estimated number of applicants in the table at paragraph 15 and are designed to enable the BSB to recover operating costs by March 2018 (the end of the 2017-18 financial year). As outlined in paragraph 5 above, given the number of applications initially anticipated, operational costs are likely to exceed income generated through authorisation fees. Instead of setting the fees to recover costs on annual basis, which would lead to disproportionately high fees in the first year of operation, the BSB will seek to recover operational costs over a three year period. This allows for the initial cost deficit to be offset by income generated over the full three year period, which means that the BSB will 'break even' by 31 March 2018.
24. It will be seen from the proposed structure that the total authorisation fee and the annual fee increase depending on the entity's size and complexity. This ensures the operational costs of authorisation and supervision of entities are borne proportionately by those who require the greatest level of BSB resources.
25. The fee structure also reflects the regulatory resource required at each stage. So the authorisation fee (which covers the regulation of that entity in its first year of authorisation) is less than the annual fee (which covers both the on-going regulation of that entity and an annual review of that entity).

<b>Entity category</b>	<b>Application fee (£)</b>	<b>Authorisation fee (£)</b>	<b>Total authorisation fee (£)</b>	<b>Annual fee (£)</b>
<b>Single person entity</b>	260	330	590	390
<b>2-5 person entity</b>	725	875	1600	1000
<b>6-15 person entity (simple)</b>	1000	1200	2200	1450
<b>6-15 person entity (complex)</b>	1350	1600	2950	2000
<b>15 + person entity</b>	1950	2300	4250	2900

#### **Other costs**

26. In addition to the fees listed above, the BSB may wish to carry out additional checks to establish whether the owners or managers of a potential entity have any adverse financial findings such as bankruptcies, IVAs, and County Court Judgments. Where this is necessary, the fee will be £75 per owner/manager.
27. Should an entity wish to conduct litigation it will need to be authorised to do so. This will be part of the general entity authorisation process but will require additional administration. Entities wishing to be authorised to conduct litigation will need to pay an additional fee of £90 (which is the same fee as for individual barristers seeking authorisation to conduct litigation).
28. The BSB has put in place staff with a wide range of skills and experience to consider applications for authorisation. So it is anticipated that the vast majority of applications

will be processed internally. However, if an entity application is particularly complex, unusual, or raises technical issues outside of the expertise of the BSB staff, then the BSB will seek external advice. The applicant will bear the cost of this external expertise. Before commissioning any external assistance, the BSB will discuss doing so with the applicant.

29. All fees will be reviewed annually as part of the BSB's budgeting process. The first review will apply to fees charged from 1 February 2016. The fees set out in this paper are based on all of the estimated numbers in the table at paragraph 15 applying. It will therefore be important to review fees if the take up is fewer or more than anticipated.

30. The BSB will also review its approach to setting the annual fee once we have more data from implementation from which to judge whether they are accurately reflecting where costs are incurred. In doing so, the BSB will consider the possible use of turnover or risk profile for ongoing fees (rather than the number of authorised persons), and whether they would prove better predictors.

### **Authorisation period**

31. In order to aid administration it is proposed that authorisation should be granted until January 31 of the following year, irrespective of the point in the year that the entity is authorised. This means the authorisation fee will be pro-rated depending on when the authorisation decision is taken. This will be done on a quarter year rather than monthly basis. The table below shows the authorisation fee pro-rated throughout the year.

<b>Entity Category</b>	<b>1 Feb – 30 April</b>	<b>1 May – 31 July</b>	<b>1 August – 31 October</b>	<b>1 November – 30 January</b>
<b>Singe person entity</b>	330	250	165	80
<b>2-5 person entity</b>	875	660	435	220
<b>6-15 person entity (simple)</b>	1200	900	600	300
<b>6-15 person entity (complex)</b>	1600	1200	800	400
<b>15+ person entity</b>	2300	1725	1150	575

### **Practising Certificate fees**

32. In addition to any authorisation or annual fee associated with authorisation as an entity, individual barristers will be required to pay the Practising Certificate fee. Barristers employed within a BSB authorised entity will be deemed to be employed barristers and will pay that Practising Certificate fee.

### **Question**

**Do you have any comments on the BSB's proposed approach to entity fees?**

**In particular, do you have any views on:**

- a. the proposed entity categorisation and the assumptions made around the associated complexity of each category?
- b. the apportioning of fees between application, authorisation and annual fees?

**Response to consultation**

33. Responses to the consultation should be sent to:

[entityregulation@barstandardsboard.org.uk](mailto:entityregulation@barstandardsboard.org.uk).

34. The deadline for responses is **10 October 2014**.

## **Annex A – 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 owner<sup>1</sup> of the entity is also a manager;
  - b. the entity will not be providing any services other than legal work<sup>2</sup>, 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;

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<sup>1</sup> Owner as defined in the BSB Handbook as person who holds a material interest in the entity

<sup>2</sup> 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.

- c. the proposed proportion of authorised individuals to non-authorised individuals;
  - 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 individuals<sup>3</sup>;
  - 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 individuals<sup>4</sup>; 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

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<sup>3</sup> Only relevant to ABSs

<sup>4</sup> Only relevant to ABSs

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.

### **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.