

Reshaping the authorisation to practice process

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Practice Management analysis: An increasing number of solicitors are evaluating the benefits of their practice being regulated by the Bar Standards Board (BSB) rather than the Solicitors Regulation Authority (SRA). David Bowden, solicitor-advocate of David Bowden Law examines what is needed to gain BSB authorisation and talks to Robin Charrot, director and founder of Evolve Family Law Ltd and Andrea Cohen of ARC Legal Consulting Ltd about the implications.

When did the BSB start authorising entities other than barristers and how many entities that are not barristers has the BSB authorised?

David Bowden (DB): The BSB has now authorised 50 entities which are not barristers. In October 2016 the BSB will also start regulating alternative business structures (ABSs).

The regulatory regime was changed when the Legal Services Act 2007 (LSA 2007) was enacted. LSA 2007 established the Legal Services Board (LSB). Only entities that are regulated by a regulator approved by the LSB can provide 'reserved legal activities' as set out in LSA 2007, Pt 3. In November 2014, the LSB granted the BSB's application to be able to authorise entities other than barristers. In April 2015, the BSB started to accept applications from non-barrister entities.

In June 2016, the BSB passed a key mile stone when it authorised its 50th firm which was not a barrister.

What sorts of entities has the BSB been authorising?

DB: The BSB has issued an entity regulation policy statement. Paragraph 14 of this sets out factors which tend to indicate that it is appropriate for the BSB to regulate an entity including:

- 50% or more of the owners are entitled to exercise higher rights of audience
- a substantial part of the services to be provided are advocacy, litigation or expert legal advice
- high-volume or standardised legal transactional services will not be provided
- a substantial proportion of employees are going to be authorised individuals, and
- each manager supervises only a small number of employees.

Just over one third of entities have been granted authorisation to conduct litigation. A small but increasing number of solicitors who practise on their own account (David Bowden Law or Captivate Legal & Sports Solutions Ltd) or with others (Evolve Family Law Ltd or Invictus Law LLP or TRP Limited) have been granted authorisation by the BSB.

About half of the entities which the BSB has so far authorised are limited companies with a barrister or QC as its sole member. It is beyond the scope of this piece to examine any tax implications. However it will not have escaped attention that the corporation tax rate (currently 20%) on profits of a limited company will reduce to 18% from April 2020. This compares with a rate of income tax of 40% applied to taxable income between £31,786 and £150,000 and an additional rate of 45% on income over £150k.

What is involved in BSB authorisation?

DB: There are five forms which the BSB requires an entity to complete and submit with its application. All applications are made on-line through a dedicated portal. These forms are:

- form A—Entity Members
- form B—Governance, risk management and compliance with regulatory requirements
- form C—Head of Legal Practice (HOLP) and Head of Financial Administration (HOFA)
- form D—Declaration

- form E—Litigation extension form

Form E is only needed where an entity is seeking authorisation to conduct litigation.

Which BSB questions require the most effort to answer?

Andrea Cohen (AC): Form B requires consideration and preparation in relation to how the entity will be governed, risk management issues and forward planning. If the entity has a risk and compliance and office manual (B26 requires confirmation of which policies will be in place—although copies do not need to be provided with the application), reference can be made to the policies and procedures, but answers do need to be thorough. In addition B13 (summary of key information security risks identified and how they will be managed or controlled) and B23 (key financial controls that will be put in place to mitigate financial risk) will require careful consideration.

DB: Question 9 on form A requires a detailed answer as to the legal services which will be provided which are not reserved legal activities under LSA 2007, pt 2. Questions 6, 7 and 8 on form E require detailed answers on how diary management procedures for litigation matters are documented, the procedures adopted for absence from practice and case management and/or time recording systems.

Form B is the most complex form because it does not seek 'yes' or 'no' answers but rather many of its 26 questions seek explanations about governance and risk management which require full answers often supported by empirical data. While the questions which generate the most effort will vary between entities, these questions are nearly always likely to demand attention:

- B1—explaining how the business model meets the BSB's regulation policy statement
- B2—how the entity would improve access to justice
- B4—description of operational support and infrastructure to ensure the business runs effectively
- B5/B6—summary of key risks identified and how they will be managed or controlled
- B22—key financial risks the entity faces

What else needs to be produced to accompany the authorisation application?

AC: If there are any issues relating to managers, for example relating to prior conditions on practising certificates, the evidence must be included. It is highly advisable that contact is made with the BSB prior to the application being submitted if there are any such issues.

DB: This falls into two groups. The first group is copies of documents (which need to be certified as true copies by a practising lawyer or similar) such as passports/driving licences of the HoLP and HoFA and utility bills or similar confirming the geographic address of the entity.

The second group is documents which are needed to complement the answers on the forms. As a minimum, these will include copies of:

- CVs for each owner, manager, HoLP and HoFA
- current practising certificates
- business plans for next three years
- financial plans for next three years
- organisation chart
- business continuity plan

Assistance is likely to be needed from the entity's accountant in producing the financial plans.

What tips or advice can you give to someone thinking of seeking BSB authorisation?

AC: Careful preparation is essential, as it would be if you are seeking SRA authorisation. Client care letters, terms of business, policies and so on, should be prepared (or updated) taking into account the BSB regulatory requirements, core duties and outcomes in the BSB handbook. For example you cannot handle client monies other than fees. Larger entities

will need to appoint a diversity data officer and have an equality action plan. In addition, entities will need to take account and make arrangements. For example if you are a personal injury firm and intend to act for clients under a conditional fee arrangement with after the event insurance, you should note that the BSB is not a 'designated professional body' for the purposes of the Financial Services and Markets Act 2000.

You will also need to ensure that professional indemnity insurance (PII) will be in place from the date of authorisation. Depending on your individual circumstances, you will need to have strategic plans in place to cover the period between seeking and obtaining authorisation—for example in relation to your present employment situation.

RC: I think there is a particular emphasis from the BSB's point of view on risk identification and management (market, operational, organisational and financial), as well as improving access to justice. That last issue can be tricky, but our approach is that we can handle the same quality of work as the firms that we had worked for before (Mills & Reeve, Irwin Mitchell, Pannone, Stowe Family Law) but because our overheads are far lower, we do it at a fraction of the cost. This has enabled clients who most would regard as comfortably off, but who couldn't afford the fees of those kind of firms, to obtain the highest standard of advice and support.

DB: You need to set aside enough time to prepare the answers to the narrative questions as well as producing the business and financial plans. It is better to try and front load this by getting your house in order before submitting an application. It is also a useful point to take the temperature of a business and deal with any loose ends that could benefit from a review anyway such as a client care letter or terms of business. It is useful to have your accountant look over the financial and business plans too.

What happens after an authorisation application has been submitted?

AC: The BSB will acknowledge the application, consider it and seek clarification. It may possibly ask additional questions or request information or documentation such as a client care letter, terms of business, anti-money laundering (AML) policy, or an equality and diversity policy.

RC: The additional documents Andrea mentions here were not required in the online application, but were requested by BSB after we filed our application with them. We had prepared them anyway because they were needed for our business.

DB: The BSB will come back with any queries it has on the application and will scrutinise the answers provided to the questions and seek clarification on points of detail.

How long does an authorisation application take?

RC: I spent a considerable amount of time (well over two months) on the application forms and supporting documentation, which I think is the right way of approaching it. After we filed our application, it took only five weeks (including further questions and answers) for the BSB to authorise us.

DB: The BSB sends out a system generated email on receipt of an application through its portal. That email says that authorisation could take up to six months and that the BSB reserves its right to seek an extension of a further three months if it needs to do so. I spent nearly two months working on the application before I submitted it. I dealt with the BSB queries as quickly as I was able to. I was fortunate that my application took eight weeks to approve including the time spent on obtaining PII.

What fees are payable?

DB: For a single person entity an application fee of £260 has to be paid to the BSB and a further fee of £330 is payable when the BSB grants authorisation. There is an annual fee of £365 payable to the BSB each April. Where an entity has between two to five people, these fees are £725, £875 and £1000 respectively. Higher fees are payable where the entity has between six and 15 people or more than 15 people. The fees are on the BSB website here.

Is there a public register of BSB authorised entities?

DB: The BSB has always maintained the barristers' register on its website which is a searchable database of barristers with current practising certificates which is updated monthly. In addition, the BSB is now publishing on its website its entities' register which is a separate spreadsheet of non-barrister entities that the BSB regulates. It can be found here.

What other aspects of a prospective BSB authorised business may also need work on as part of the authorisation process?

DB: While this will vary between entities, some documentation will need to either be produced or updated such as:

- client care letter
- standard terms of business
- fee agreement
- complaints procedure
- information security policy, and
- case file management policy

As regulated entities will be processing data, unless they can bring themselves within the exemption set out in the Data Protection (Notification and Notification Fees) Regulations 2000, SI 2000/188 they will also need to notify themselves as data controllers to the Information Commissioner's Office and pay its £35 annual fee too.

AC: In addition to the above, the application form at B26 lists the policies that the BSB require to be in place (and available if requested at a later stage in the process), including anti-harrasment, AML, whistleblowing, conflicts of interest, confidentiality, flexible working, equality and diversity (including an implementation plan), recruitment and staff training.

What else needs to be done after authorisation is granted?

DB: The business stationary and website of the business will need to be updated to include details of the BSB authorisation and the entity's registration number.

RC: We circulated an announcement to all client, contacts and suppliers because ours was a completely new business, but even if you are just switching regulators, I think it is a great idea to do this, and to explain all the benefits of your switch.

AC: You will also need to put PII insurance cover on risk.

What are the requirements for PII?

DB: The minimum level of cover that the BSB seeks is £500,000. Bar Mutual has said that it will provide PII to certain BSB authorised entities including single member entities. Bar Mutual provides cover of up to £2.5m. Entities requiring excess layer cover need to arrange this on the open market elsewhere. Bar Mutual's PII product satisfies the BSB but this is not guaranteed for other PII providers. There are obvious cost savings from having cover provided by a mutual fund.

RC: We approached the market for insurance quotes when we were authorised, but none of the insurers' policy wording met the BSB's required terms of cover. I am sure this is only because the insurance market had never been asked to cover a BSB authorised entity before, and the situation might have changed by now. So, we have coverage from Bar Mutual up to their maximum level, and we are very happy with the level of premium we pay.

What about client money?

DB: BSB regulated entities are not allowed to hold client money. This means that this route may not be attractive for those who need to hold money such as conveyancers or probate practitioners. The client care documentation needs to make this clear.

RC: I see not holding client money as a positive, because:

- the firm's administrative, accounting and compliance burden is much lower

- we can still take payment up front for agreed or fixed fee work—we do a lot of this, particularly for initial advice, for unbundled services, or for nuptial agreements
- where client money needs to be held—because the client is overseas or if we incur significant disbursements or if we need to distribute client money—we can set up an escrow account on a case-by-case basis.

There are various escrow providers out there, but we went with the provider we felt we could trust the most—Bar Services Company Limited (BARCO), a subsidiary of the Bar Council. BARCO's history is in providing escrow accounts to individual barristers, so an entity's needs are somewhat greater, but we have a good working relationship with BARCO and they are adapting their services to meet the demands of the new entity market.

What are the main differences to regulation by the Solicitors Regulation Authority?

DB: There are some subtle but important differences. The SRA requires a solicitor's practice conducted through a limited company to have its registered office at the practicing address. This is not the case with the BSB. While the SRA has recently lowered the minimum levels of PII cover it requires, such PII cover needs to be obtained on the open market from an SRA approved insurer. The SRA can no longer offer the benefits of mutual insurance that the Solicitor's Indemnity Fund used to provide. The SRA rulebook is lengthy, complex and keeps changing. The BSB rule book endeavours to strike a more proportionate balance to regulation. Finally the BSB is more accessible to those it regulates—it does not have the SRA call centre structure with the issues that causes practitioners. Solicitors who run a BSB authorised entity will have their foot in both camps with their practising certificate continuing to be issued by the SRA and the entity regulated by the BSB.

RC: I find the BSB handbook much easier to work with. The handbook app is also user-friendly. As David says, dealing personally with the BSB is a very positive experience—we recently had a query about what to say in a notification form regarding an associated business. I was able to speak to the head of the BSB department who handles those notifications within a couple of hours, who gave me an informed and helpful opinion.

Will the BSB authorise an alternative business structure ('ABS')?

DB: On 19 May 2016, the LSB recommended to the Lord Chancellor that the BSB be permitted to regulate ABSs by designating the Bar Council as a licensing authority. ABSs to be regulated by the BSB will be businesses that provide reserved legal activities focused on advocacy, litigation or specialist legal advice, which can be jointly owned and managed by lawyers and non-lawyers. The BSB says it wants to permit innovation in the legal services market which it hopes will increase choice and provide other lasting benefits for consumers. At the moment the BSB says it will start authorising appropriate ABSs starting in October 2016.

What has been the reaction from clients?

RC: There has not been a significant reaction from our clients because our choice of regulator has very little effect on how we run their case or how we charge. The only practical difference for them is how we handle their money using an escrow account. Clients have reacted positively to this in relation to payments on account of fees because they do not see it as 'us' taking their money before we have done any work. They also feel more secure knowing that an independent third party is holding their money.

Andrea Cohen is a solicitor with nearly 30 years' experience and a risk and compliance specialist, who set up ARC Risk and Compliance in May 2013.

Robin Charrot is a solicitor and co-founder of Evolve Family Law Ltd which obtained its BSB authorisation on 28 August 2015. Robin has over 20 years' experience in all aspects of family law, with a particular emphasis on resolving financial issues for divorcing couples involving companies, trusts or multi-jurisdictional elements. He is also one of the country's leading authorities on nuptial agreements. While Evolve Family Law is based in Alderley Edge in Cheshire, it provides legal services to clients throughout England and overseas.

Interviewed by David Bowden.

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