



Bar Council response to the Legal Services Board's draft Strategic Plan 2015-2018 and Business Plan 2015-2016

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Legal Services Board's draft Strategic Plan 2015-2018 and Business Plan 2015-2016.¹
2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Overview

4. The Bar Council welcomes the opportunity to consider the draft Strategic Plan 2015-18 and Business Plan 2015-16 proposed by the Legal Services Board (LSB). This response should be read in the context of the recurring themes as set in our responses to earlier draft plans² as well as the Government's call for evidence on the legal services regulatory framework³.

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http://www.legalservicesboard.org.uk/what_we_do/consultations/open/pdf/2014/20141209_Draft_Strategic_And_Business_Plans.pdf

² http://www.barcouncil.org.uk/media/275352/bar_council_response_to_the_lsb_s_draft_business_plan_2014-15_final.pdf; http://www.barcouncil.org.uk/media/207691/13.03.04_lsb_draft_business_plan_2013-14_bar_council_response.pdf

³ http://www.barcouncil.org.uk/media/230629/legal_services_review_call_for_evidence_final_160913.pdf

5. The Bar Council welcomed the Lord Chancellor's remarks in June 2014⁴ regarding the future of legal services regulation, as they largely accord with our own. His call for a "simpler, easier to understand regulatory framework, one that is proportionate, that promotes growth and innovation, while also providing the necessary protection for consumers and the wider public interest" is entirely correct, and one with which the LSB appears to concur as these words echo throughout their draft plans.

6. However, in that speech, the Lord Chancellor also stated:

"I also think there are too many layers of the regulators. I have said to Sir Michael Pitt that during his time at the Legal Services Board, success means creating an environment where that organisation is not necessary in the long term. This won't happen overnight but I am clear that this should be the direction of travel."

7. Sir Michael noted this request in his speech on 4 September 2014 at the Westminster Legal Policy forum on the future of legal services regulation:

"The Legal Services Act 2007 (the Act) will feature strongly in this talk. It provides the LSB with statutory backing and a unique vantage point, overseeing all aspects of the profession. The LSB is unfettered by vested interests and I intend to speak, without feeling intimidated by criticism or fearing a backlash. And the LSB is in the unusual position of anticipating its own demise once the job is done. I'm here to make change happen, not to have a job for life."

8. While the draft plans do set out ambitions to shape the future of legal services regulation and to address any inadequacies inherent in the Legal Services Act 2007, we have two concerns which are not addressed by the plans.

9. The plans set out worthy intentions to tackle the principal issue highlighted by the Government's call for evidence, namely the lack of consensus between oversight regulators, approved regulators, consumer bodies, practitioners, legal academics and the judiciary on the longer term vision for regulation. However, the plans do not set out details of any planned engagement with parties other than the frontline regulators. A body such as ours, an approved regulator with additional responsibilities for representing a profession, would welcome clarification on plans for consultation with a wider group of stakeholders. We are wholly unconvinced that any meaningful consensus can be found without that engagement.

10. We also note that the plans do not – despite the Lord Chancellor's and Sir Michael's comments – make any reference to a long-term ambition to find a framework which no longer requires the services of the Legal Services Board. While we recognise, like the Lord Chancellor, this this will not happen "overnight", we would have expected to see some reference in the Strategic Plan, which covers a three-year period. There is no sign, in the

⁴ <https://www.gov.uk/government/speeches/lord-chancellors-speech-at-cilex-presidential-dinner>

plan, of the LSB moving in the direction of phasing itself out of the regulatory framework nor any indication of how movement in that direction is being managed over the next three years.

11. It strikes us that the LSB's plans are largely generic. Since the outcomes of the first year of research will inform the next year's plan, we would expect to see an updated Strategic Plan next year.

12. However, we are unconvinced that those themes which the LSB has identified will result in any useful signposts after the first year. The legal services market is re-calibrating and requires time to develop trends. In essence, the plans reflect commitment to a direction which has yet to have the evidence to support it.

13. We are also not sure that the interpretation of the LSB's regulatory objectives has not been made too widely and that this is reflected in the identified themes.

Overview of strategic priorities

14. The overview recognises the impact of austerity measures on the provision of legal services. The LSB's focus is how the changing landscape may be used as an opportunity to deliver the benefits of growth, competition and innovation to consumers.

15. However, what the plans do not sufficiently acknowledge is that in our view the gaps in access to justice, that are now so evident, are unlikely to be filled by innovative methods of service delivery and by changing the way in which legal business is performed. This is why, in a representative capacity, we continue to lobby for access to justice at the political level. Whilst this aspect may be outside the remit of the LSB, it is important because it provides the context within which these remarks should be understood. Put plainly, it is accepted that the market needs to innovate but that is not to ignore that non-regulatory actions to address the gaps in access to justice are an absolute necessity.

16. We support the requirement for an evidence base in deciding on any specific policy action or general policy development. However, we would urge that proper consideration is given to research priorities and the weight given to their findings. We remind the LSB, for example, of the cab rank rule report of 2013, which was unnecessary, was roundly-criticised and cost £21,367.

17. We are very interested in the work of the LSB, the Ministry of Justice and the frontline regulators, following the Ministerial summit in July 2014, to collaborate and identify ways to reduce unnecessary regulatory burdens. However, as stated above, we feel that using only this forum to discuss and develop legislative options beyond LSA 2007, with a view to making representations to Ministers, is short-sighted.

18. The Bar Council – as an Approved Regulator and representative body – would hope that we would be given the opportunity to be heard on potential legislative change, no matter how early the stage in the process. When the Parliamentary Under-Secretary for State, Shailesh Vara, responded on behalf of the Government in May 2014 following the

unsatisfactory lack of consensus to their call for evidence, he expressed a “strong desire” for the LSB, Approved Regulators and frontline regulators to take forward quickly work to reduce regulatory burdens for legal service practitioners. We concur with this view but have not, as yet, been invited to the table and do not see any suggestion in this plan that we will. We would hope to see that rectified in the final version.

19. The Bar Council welcomes the LSB’s continuing consideration of business solutions that would enable all arms of the legal profession to avoid directly handling client money. In 2012, the Bar Council launched the BARCO escrow account, which provides a safe and insured facility to hold client funds relating to an ongoing legal matter. BARCO’s board of Directors has been discussing with the SRA how the service could be expanded to work with solicitors, and was subsequently invited to speak at the SRA’s Compliance Conference in November 2014 and then at a LSB event in January 2015. While there is no deliberate barrier to BARCO being used by all arms of the legal profession, BARCO’s executive team has been holding focus groups to look at how the service can be developed further to align it with different business models, e.g. law firms. The BARCO solution is fully insured and independently regulated by the Financial Conduct Authority under the Payments Services Regulations 2009. BARCO’s strategic objective is to be the client funds handling solution of choice, offering value and service to the legal profession and protection and reassurance to clients.

The role of the LSB

20. We note with interest that the cost per regulated person will remain at £26 for the forthcoming year and welcome efforts to keep the direct costs of the LSB as an organisation at a flat rate. We are pleased to see acknowledged under paragraph 65 that the LSB will “consider ways to reduce the risk that regulation unnecessarily increases the costs of delivering services, whether directly or indirectly” (emphasis added). Indeed, in earlier responses to business plans, we have stressed that although the direct annual cost to the Bar of regulation by the LSB is relatively small, this does not take into account the knock-on costs to the Bar of regulation by the BSB. As noted in this plan, the primary responsibility for devising, developing and implementing regulation for the legal professions lies with the frontline regulators. However, the drivers, we believe, come from the LSB in most instances. The LSB’s plans have an indirect effect on the costs of the BSB and therefore on the cost to each individual barrister.

Context for the plan

21. We refer to our points made above regarding context. The “unmet need” for legal services is, in many instances, being driven by reform from outside the community of providers. Recent reports and judgments, including the Public Accounts Committee’s report on Implementing Reforms to Legal Aid⁵ show that that the scale of the cuts made, and the way they have been introduced, have abandoned the most vulnerable and created disorder in the courts. Small businesses chasing late payments and other debts will be

⁵ <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmpubacc/808/80806.htm>

disproportionately hit by the Ministry of Justice's plans to impose a 5% court fee on such claims. Plans to impose a residence test were found unlawful. Legal providers may well have to adapt in order to fill deserts created by reform, but that is not to say that innovation will address the problems in their entirety. Just as pro bono work is no substitute for a proper legal aid system, nor is a remodeled market.

22. We agree that there will be diversification of the delivery of services available over time, but would add that given how recently many of the changes have been made, the impacts cannot yet be qualified or quantified, and the potential remedies are therefore not easily identified. The use of mediation has collapsed despite expectations that it would increase following the enactment of LASPO, for example.

23. The issue of unregulated legal services is one to which we shall return.

24. We note under "wider implications", that there are plans to work and engage with a number of stakeholders including regulators and consumer organisations. It is our recommendation that the LSB also considers engagement with providers of legal services. While the LSB does have a "unique perspective" afforded by its oversight role, it does not have, and does not appear to be seeking, the understanding of the frontline providers of legal services: their experience, their practices, their day-to-day knowledge and familiarity with how justice works. We suggest that this is invaluable. Indeed, it is essential: the job cannot properly or effectively be done without it.

Strategic priorities 2015-18

25. The Bar Council notes and acknowledges the LSB's wish to remain flexible and reactive in the current climate. To identify the majority of work for the first year of the plan is to leave the final two years somewhat in limbo, depending on findings in that first year. To that end, the activities in the second and third years are necessarily undefined and we would expect that to be addressed in an updated strategic plan at the end of the first year.

26. We would stress again that diversification and innovation within the market may result in less "unmet need", but that there are far more barriers – in some areas of the provision of legal services – than simply regulation.

27. While we acknowledge the imperative for the legal services market – like any market – to adapt, there is, however, a danger of overstating the extent of the changes taking place. The assertion that "traditional boundaries and the distinctions in the sector are blurring or even disappearing" is worrying. Although barristers may now apply to conduct litigation, few have done so. While solicitors may now gain higher rights of audience, reports such as that of Sir Bill Jeffrey's⁶ highlight concerns that the market may be operating unfairly and at variance to the public interest. The Lord Chancellor himself is on record expressing a wish for there to be a future for the independent Bar⁷. In some areas of legal endeavour, it is

⁶ <https://www.gov.uk/government/publications/independent-criminal-advocacy-in-england-and-wales>

⁷ <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/the-work-of-the-secretary-of-state/oral/11352.html>

becoming clear that there are very substantial existential risks should chambers, for example, seek to remodel their operation. Great care is required before changes, which could have catastrophic effects, are considered. It may be that in some areas of the market, there will be no alternative to more traditional methods of working. This is not a result of a backwards-looking philosophy. Rather, it is recognition that the current means of working have many benefits, which should not lightly be dismissed.

28. There are, as we say, benefits to a “traditional” system and it would surely be counter-productive to assume that innovation and growth will cause the extinction of every element of a system which has been in place for hundreds of years. That is not to deny the need to innovate and to look for new models of business, simply to warn that the assumption that within the next three years the system as it currently stands will be removed and replaced with something wholly different, and wholly better, is flawed.

29. Notwithstanding our continuing support for plans to improve efficiency, we would take exception to any plans which “may” include options for regulators to jointly commission “back office” functions. It is our belief that these functions are not simply administrative. The benefits of those responsible for the operation of a process understanding that particular part of the market are manifold. To extend this joint approach to the functions of investigation and enforcement is to reduce faith and trust within the profession that those responsible for regulation understand what it is that they are regulating.

30. We do welcome a consistent approach to regulation in principle and would particularly draw the LSB’s attention, once again, to the issue of referral fees. These are nothing more than a “kickback” paid out of public funds as a cost imposed by one provider to another for the privilege of conducting publicly funded litigation. It is our strongly held belief that a fee for legal services is properly calculated as a fair basis of remuneration for a piece of work done. It is not designed to include, nor should it, such a “kickback”. It is unconscionable that the public purse or any client should, in effect, subsidise such payments. Particularly, but not only, where the most junior practitioners are involved, referral fees in publicly-funded work involve an unjustified exploitation of unequal bargaining power, cutting across what is intended by way of proper remuneration for advocates.

31. The plan to “tak[e] forward our own initiatives in areas where consensus may be harder to achieve” in relation to legislative change brings us back to our earlier point. The LSB must consult all parties, including representative bodies. This statement implies that any ‘sticking points’ have already been identified and that the LSB’s “vision” will be imposed.

32. The Bar Council recognises the growing use of unregulated services and ‘self-provision’. While the LSB may wish to research and investigate options for extending the scope of the definition of reserved legal activities and ascertain whether it would be appropriate to bring some unregulated services into the fold, it should also take into account

how the regulated market adapts to change. The Bar, for example, is already taking steps to offer and promote its services as an alternative to the remunerated McKenzie Friend. It is also moving to market itself so that the Litigant in Person who does not realise that they can afford representation knows what they can afford from the range of services offered by the Bar. There are grave risks in permitting a wholly unregulated sub-group to undertake work in the courts in place of the regulated and insured profession. The Mackenzie friend does not owe any duty to the court and is not subject to the discipline of a professional body such as the BSB or the SRA. It is ironic that the super-regulator is not more concerned to remove these risks in the public interest. There are already a sufficient number of regulated providers of these services in the market to meet demand.

33. The Bar Council supports any strategy which widens access to justice and seeks to demystify processes for the consumer. We are unsure that there is a need to “incentivise” these behaviours from the Bar’s perspective. Much of what is stated here is activity already underway by the Bar Council in its representative capacity, including ‘unbundling’, direct access and educating the public on their legal rights and how to navigate the system. The Bar Council produced a substantial guide to assist LIPs in the wake of the LASPO changes.

34. Given that a scheme for quality assurance in crime has not yet been implemented, it is difficult to see what point there would be in broadening plans without a review of that. The concept of a quality scheme for the unregulated sector is impossible to understand from the viewpoint of a profession that is itself the subject of rigorous training, entry requirements and competition and one that is universally insured and owes duties to the courts.

35. The Bar Council welcomes the strategy of promoting and facilitating the development of “a shared approach to education and training”, insofar as this means that those who perform advocacy services should be required to undertake the degree and extent of advocacy training currently undertaken by the Bar. We assume that this refers to such inequalities raised by Sir Bill Jeffrey’s report between advocacy training for barristers and solicitors. We would, however, express alarm if this were a reference to a reduction in the training requirement for advocacy as currently undertaken by the Bar, or for ‘fused’ training.

Draft Business Plan for 2015-16

36. At paragraph 69, consultees are asked three specific questions:

- What kind of information could regulators collect from firms to aid consumers?
- Which areas of law should be priorities for the LSB’s work on enabling the demand for legal services to be met?
- Whether any individual or market risk factors that contribute towards making a consumer vulnerable should be priorities for regulators, for example, the individual risk factor of age?

37. In response to these questions, we return to the point made briefly above. The market is in flux. The Bar, for example, is reacting to, and proactively pre-empting, changes, with the consumer in mind. It is marketing its services as a preferable alternative to the remunerated, but unregulated, McKenzie Friend. It is exploring its options in relation to

forming entities. It is increasing its visibility through Direct Access and all at a time when legal aid cuts have been threatened or have been imposed and when the criminal solicitors market is in a state of uncertainty and upheaval.

38. Civil and family legal aid reform is similarly under the spotlight. Private civil work is facing change, and there are strong arguments about access to justice. There is also the uncertainty as to the future by reason of the General Election in May.

39. These points mean that at the current time there are few stable assumptions to work from. Since some of the legislative changes are relatively recent (e.g. LASPO), it is too early to accurately foretell the size and scope of the impact on the consumer. While there are some impacts which are undoubtedly already being felt e.g. the rise in Litigants in Person, the profession is making efforts, on behalf of the consumer, to address them. However, it is too early to assess the impact of those efforts either.

40. The Bar Council will continue to collect data to analyse the impacts but does not, at this stage, feel equipped to respond confidently to these questions.

Equality objectives

41. We support all attempts to encourage and promote equality and diversity across the Bar. We are, however, confused by the assertion that the LSB will “continue to engage with the approved regulators” to achieve this. As the Approved Regulator for the profession, we are unclear as to what engagement is currently taking place. What we can be clear about is that the Bar and Bar Council are involved in many initiatives to make the profession more diverse and to achieve the goal of making the profession representative in its composition of those it seeks to serve.

Draft work programme 2015-16

42. Again, we would dispute that it is a safe assumption that “traditional boundaries between different legal professions and models” will “disappear”. We would also encourage more engagement than is otherwise stated with “existing players” to provide evidence on barriers to growth and innovation.

43. The Bar Council will welcome the report into the cost of regulation but would urge caution on the conclusions drawn from it, owing to the poor response rate.

44. In relation to professional insurance, there is no evidence to suggest that insurance considerations have any impact on the Bar’s ability to innovate. We would therefore question whether such a thematic review is necessary given the other work contemplated by the Board.

45. We are also unconvinced that there is any evidence to support a review of the treatment of any underspend in practising certificate fees.

46. In reviewing the LSB's statutory decision-making process, the Bar Council would urge the Board to remember that any new regulatory arrangements fully take into account the inherent substantial differences between the needs and requirements of discrete parts of the legal profession.

47. We will not repeat here what we have already stated above regarding the delivery of options for legislative change. As the Approved Regulator, and a body with representative functions, we would expect to be involved in this work.

48. We will also not rehearse points made above in relation to researching the needs of consumers during a period of flux, or repeat our advice to consult legal services providers as well as consumers as to their needs.

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