



The Bar Council

Bar Council response to the Legal Services Board consultation on Draft guidance on promoting technology and innovation to improve access to legal services

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Legal Services Board (LSB) consultation paper on Draft guidance on promoting technology and innovation to improve access to legal services.¹
2. The Bar Council represents approximately 17,000 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 (BSB).

Question 1: Do you agree with our approach of using the guidance to set outcomes for regulators?

4. No. Our understanding of the limits of its role as defined by the Legal services Act 2007 is set out in our response to its most recent draft business plan consultation.² The LSB is not a regulator of the entire legal sector. Nor is it in any sense an economic regulator. Its role is oversight of the front line regulators. Nor, so far as know, does

¹ <https://legalservicesboard.org.uk/news/lbs-consults-on-tech-and-innovation-guidance-to-improve-access-to-legal-services>

² <https://www.barcouncil.org.uk/uploads/assets/8a77a3c4-b879-4731-a08e7a09c9b9dd10/Bar-Council-response-to-LSB-business-plan-2023-24-consultation.pdf>

the LSB have any particular expertise in technology and innovation. In any event, as we explain below, the LSB has no role in promoting the use of technology, and there are dangers in using regulatory levers to attempt to do so.

5. This consultation is another example of regulatory over-reach by the LSB.

6. While setting outcomes can provide helpful direction in some circumstances, the LSB has not demonstrated here that action is truly needed or that the guidance falls within the scope of their powers under section 162 of the Legal Services Act 2007. The justification presented does not meet the requirements in section 3(3)(a) that regulatory activities must be targeted, necessary and proportionate. More compelling evidence would be needed that regulatory barriers are inhibiting technology and innovation, rather than simply a desire to promote certain outcomes.

7. The proliferation of new pieces of guidance and statements of policy in recent years (e.g., ongoing competence and consumer empowerment in 2022) creates a regulatory burden for both authorised persons and entities as well as the Approved Regulators, diverting focus and limited resources away from what we consider to be the core regulatory activities of authorisation and enforcement. This all pushes up the cost of regulation for both the regulator and the regulated community and can lead to higher prices for legal services, inimical to efforts to increase access to justice.

8. Members of the Bar have used technology as an integral part of their practices for some time. Sophisticated internet research tools have formed part of most practices for two decades and are used on a daily basis. The same can be said of sophisticated tools used to manage large amounts of data or to present complicated cases in Court. The use of video-conferencing programmes such as Zoom or Microsoft Teams and cloud-based storage is now commonplace. Members of the Bar are open to the development and use of appropriate technologies to assist them in providing the best possible services to their clients. Regulatory guidance is not required to encourage barristers to do what they are already doing.

9. The Bar, the Solicitors profession and the judiciary responded very promptly to the demands for the increased use of remote hearings during the Covid pandemic, and all of that worked well without any regulatory intervention or encouragement.

10. Furthermore, the Bar is aware of the risks to the users of legal services by the inappropriate use of, or reliance on, technology. The Post Office scandal demonstrates the risks posed both by power imbalances between tech companies and members of the public and the danger of the widespread bias that technology is more accurate than human judgment. A similar and equally problematic bias is 'tech-solutionism' - the assertion that technology can solve a given problem without any analysis of

whether any appropriate technology exists and whether it can in fact solve the identified problem.

11. The Bar Council, like many other bodies (including, it would appear from recent public statements, the major tech companies themselves) recognises that the advent of AI creates potential risks to the public of a new magnitude. The need properly to assess these risks and to create appropriate legal and regulatory responses is now widely appreciated. The Bar Council also recognises that these issues are particularly pressing because most, if not all, new technologies developed for use in the legal sector (or indeed any sector) will use AI to some extent.

12. As the LSB will be aware, the most advanced attempt to regulate AI is the draft EU AI Act. It is anticipated that the AI Act will categorise AI systems that assist in law enforcement or in interpretation or application of the law as 'High Risk', a designation that will require such systems to be assessed before being put on the market and throughout their life-cycle.

13. The proposed statutory guidance fails to appreciate that the role of a legal services regulator is to create an appropriate regulatory regime to ensure that the public are protected from potentially risky technologies (while ensuring that appropriate technologies are able to exist). It is not the role of *regulation* to promote their use. There is a real danger that such regulatory guidance might create rather than reduce risks to consumers.

14. The Bar Council's concerns in this respect are underlined by those parts of the consultation that deal with existing regulation. Instead of encouraging regulation of emerging technologies in the legal services sector the consultation appears to suggest the opposite.

15. The LSB speaks of regulation as a 'constraint' (for example at paragraph 41). It relies for this conclusion on a series of responses to surveys (paragraph 39). However, there is no analysis of the particular regulations that are being complained about in the surveys and whether they are in fact important to be maintained in this context. Where the consultation does identify what it calls 'barriers' (for example paragraphs 34 and 81) a number of those that are identified are in fact important in the public interest. The seven 'barriers' listed in paragraph 81 include: "*understanding the boundary between legal advice and providing guidance*" (an important public protection); "*consideration of risks and legal requirements related to holding client data and privacy when adopting new technology, including AI*" (legal requirements for holding client data and data privacy are important protections that should be protected against inroads by new technologies – particularly AI); and "*lack of access to data and the asymmetry of data availability in the legal services sector*" (much data in the legal services sector is covered by legal privilege and related obligations of confidence, for important public interest

reasons. In so far as data is public there are now many online sources of such information).

16. The list of the concerns that have been expressed by consumers at paragraph 64 include the real risks posed by technology: lack of trust, data security, cybercrime and more human concerns such as empathy and human decision-making skills. These have not been sufficiently taken into account when deciding the appropriate regulatory regime as should the fact of a skills gap which is referred to at paragraphs 66.

17. The consultation refers to an 'evidence base' which it then uses as a foundation for many of its conclusions. However much of what is contained in this section is evidence of legal needs or aspirations as to what members of the public or legal professionals hope technology might be able to do. There is little analysis of any actual technologies and the risks or rewards that they might bring. In the context of something that is recognised to carry inherent risks and widely considered to require robust regulation this is a flaw in the analysis. In fact, the existence of needs, aspirations and hopes such as those identified should be a regulatory 'red flag'. They are evidence that the market may be more likely to be persuaded to try out a risky technology or put unwarranted faith in a new technical 'product'.

18. There is no adequate consideration of key risks of AI technologies (paragraphs 68 to 76 where one would expect to find this analysis does not really contain it). For example, there is now a widespread recognition that AI technologies, particularly those that rely on large data sets contain and perpetuate biases. These include biases on the basis of race and gender which should have no place in the provision of legal services. The lack of any reference to risks such as these in the equality impact assessment contained in the LSB document is a serious flaw in the document.

19. Having said all this there are measures in the document that should be supported. These include the collaboration and 'sandbox' activities referred to at paragraphs 36, 43 and 83 to 85. However, guidance of the kind that is proposed is not necessary for these activities to occur.

Question 2: Do you know of any case study examples it would be useful to share?

20. Case studies are not necessary. The LSB should acknowledge that statutory guidance goes beyond what is permitted under the Act and there is no need for it or case studies.

Question 3: Do you agree with the proposed outcome to ensure that technology and innovation are used to support improved access to legal services and to address unmet need?

21. Regulation should be to ensure that there are appropriate frameworks in place to ensure that any technology that is used in this context is safe and used appropriately. The example of the draft AI Act which classifies certain technologies used in the legal sector to be high risk and which proposes a system of assessment is instructive. An outcome such as this without such a framework is not appropriate.

22. In addition, it is wrong to hold regulators accountable for outcomes that depend on the voluntary actions of IT providers and consumers, which are outside their direct regulatory control. While technology and innovation should help address unmet needs, regulators should address risks rather than being required to actively promote uptake.

Question 4: Do you agree with the proposed outcome for regulatory frameworks to balance benefits and risks, and the opportunities and costs, of the use of technology and innovation in the interests of the public and consumers?

23. If there were to be guidance, this should be the primary focus, although it would need to follow a much more granular assessment of the key risks and benefits and appropriate frameworks for dealing with them. Regulators should already be balancing risks in all their regulatory activities. The draft guidance risks regulators becoming less rigorous in their own risk assessments if they draw comfort from the LSB's encouragement to adopt technology and innovation.

Question 5: Do you agree with the proposed outcome on ensuring the legal sector is open to technology providers and innovators?

24. No. For the reasons given above.

25. In addition, the LSB and frontline regulators lack remit over the entire legal sector, the LSB only has a role in relation to the approved regulators for the regulated activities (which do not include the giving of legal advice). Encouraging more innovation among unregulated providers risks increasing consumer harm from those not under regulatory purview.

Question 6: Do you agree with our proposed plan for implementation?

26. No. It should not be implemented.

Question 7: Do you have any comments or concerns about the equality impacts of our proposed guidance?

27. The draft guidance risks exacerbating access issues for vulnerable consumers less able to use technology and more prone to harm from unregulated providers. Regulators would be unable to protect such consumers due to limits in their remits. The LSB should consider how such guidance could disproportionately impact vulnerable groups.

28. As set out above, the equality impact assessment contains no consideration of the well documented risks of AI tools, such as in-built bias based on protected characteristics.

Question 8: Do you have any comments on the potential impact of the draft guidance, including the likely costs and anticipated benefits?

29. The increased burden on regulated persons and entities and risk of consumer harm from more unregulated provision are disproportionate given lack of evidence that regulatory change is truly needed in this area. The draft guidance does not meet the requirements of targeted, proportionate action.

Question 9: Do you have any other comments about the proposed guidance?

30. A convincing case for LSB regulatory action in this area has not been demonstrated. The LSB's proposed guidance towards regulatory promotion of uptake of technology and innovation are both unnecessary and inappropriate and risk unintended consequences which the LSB and the Approved Regulators would then have no power adequately to address.

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