



The Bar Council

Bar Council response to the Legal Ombudsman Business Plan and Budget consultation paper 2021-22

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Legal Ombudsman's "Business Plan and Budget 2021-22" consultation paper¹.
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).

Overview

4. The Legal Ombudsman (LeO) acknowledges the challenges of its recent performance and related staffing issues and has outlined an ambitious programme of transformation to address these issues. We support its aims of reducing its pre-assessment pool, caseload and waiting times for members of the public and legal service providers. However, we have serious concerns about the level of budget increase being sought and whether now is the right time to embark on such a radical

¹ Available here: <https://www.legalombudsman.org.uk/media/ezlpvyg1/olc-business-plan-and-budget-consultation-2021-22-web.pdf>

programme of change. We consider that the priority should be to shorten the pre-assessment and assessment waiting times and to maximise efficiencies using existing staff and resources before seeking to expand the team and exploring the use of technology to automate certain processes. Once the organisation and its work is on a more stable footing and it has demonstrated it can use existing resources effectively we anticipate LeO will more easily secure support for some of its more ambitious proposals, ideally sequenced over a longer timeframe. This business plan simply appears to be too demanding and we are concerned that LeO is setting itself up to fail by proposing to give itself more work than it can reasonably cope with. We do not think there should be any budget increase until the budget year 2022/23 at the earliest. Like other organisations it is also important to be adaptable to the ever changing and challenging circumstances created by the Covid19 pandemic whilst also maintaining core business operations.

Budget: Is the budget set at the right level to allow the actions in the Business Plan for 2021/22 to be completed?

5. We are not able to comment on whether the budget is set at the right level to allow the actions in the business plan to be completed. The key question that we wish to address here is whether the budget is set at the correct level because we do not support the proposal to increase the budget by 19% in 2021-22 and a smaller percentage the following year. This is an extraordinarily high increase, particularly when examined against the financial stresses that the pandemic has placed on the legal profession.

6. LeO is primarily funded by a levy imposed on authorised legal professionals, including barristers. Any budget increase would be directly borne by them and would represent one of many regulatory costs.

7. Covid19 has clearly had a far-reaching impact on the barristers' profession, of which we are yet to see the full extent. Many criminal trials were halted during the first lockdown and cases heard by the employment tribunals have fallen significantly, illustrated by an increase of 22% in the outstanding caseload.² Research we have conducted has revealed that the publicly funded Bar has been affected more severely than privately funded barristers. In our recent Bar survey³, conducted in December 2020, 84% of the publicly funded Bar were still billing lower fee income compared to their pre-Covid-19 usual. 43% of the publicly funded Bar told us their fee billing remains down by over half, with the median fee income reduction being in the region

² Increase of 22% in Q3 2020 compared to Q3 2019. Ministry of Justice (December 2020) "*Tribunal Statistics Quarterly, July-September 2020*" <https://www.gov.uk/government/publications/tribunal-statistics-quarterly-july-to-september-2020/tribunal-statistics-quarterly-july-to-september-2020>

³ Bar Council survey conducted in December 2020.

of 41-50%. 20% of the publicly funded Bar are unsure whether they will renew their practising certificates in 2021. If realised, the Practising Certificate Fee income collected by the Bar Council will be significantly reduced (estimated at between 20-25%).

8. It is particularly concerning that 56% of criminal barristers are currently experiencing financial hardship and a further 19% expect to. 83% of the criminal Bar have incurred personal debt or used savings to support their practice through the pandemic; 27% have taken on personal debt of over £20, 000. The Legal Ombudsman does acknowledge in its consultation paper the financial strain on the profession, but the proposed budget does not reflect this.

9. We are also concerned about the impact of Covid19 on diversity at the Bar. Many women who are pregnant or on maternity leave or have just returned to work from it, expressed very serious concern about their ability to remain in the profession, due to the downturn in their work and consequent reduction in their income. Those who are parents of young children are often experiencing challenges in juggling court work and childcare, and many are having to turn down work – the piloted Covid Operating Hours (COH)⁴ are of particular concern to barristers in this respect, with 9% of women and 5% of men having to turn down work under COH due to childcare.⁵

10. Barristers from ethnic minority communities/backgrounds are disproportionately suffering financial hardship and questioning whether they can stay at the Bar. 48% of barristers from ethnic minority or mixed communities/backgrounds are currently experiencing financial hardship, and 72% have at some point during the pandemic; 32% of white respondents are currently experiencing financial hardship, and 59% have at some point during the pandemic. As is stated in the report, BAME, women and state-educated barristers are triply hit – they are more likely to (i) be in publicly funded work (ii) face greater financial pressures and (iii) be primary carers for young children.

11. The point we wish to make is that any increase in regulatory costs borne by barristers, including the LeO levy, is likely to have a negative impact on the profession because it is already struggling financially, having being severely impacted by the pandemic. It is particularly concerning that the statistics illustrate that such an

⁴ HMCTS (8 December 2020) “HMCTS Covid Operating Hours Consultation: Readout from Presentation and Q&A Session” <https://www.gov.uk/government/publications/court-and-tribunal-recovery-update-in-response-to-coronavirus/hmcts-covid-operating-hours-consultation-readout-from-presentation-and-qa-session>

⁵ Survey conducted in December 2020.

increase will be most keenly felt by BAME, women and state-educated barristers and those at the publicly funded Bar.

12. The Bar Council and BSB have kept their budgets flat this year in recognition of the fragile state of many barristers' finances. This means the practising certificate fee (PCF) rates will remain the same this year as they were last year. It also means we have not included an increase to the LeO budget in our plans. The same PCF rates combined with the introduction of an option to split payment will help ease some of the financial pressure on barristers.

13. Another issue, identified in our response to last year's corporate strategy consultation⁶ that LeO is aware of, is the timing of the current consultation and the fact that by the time the consultation was published on 4 November 2020, the Bar Council and Bar Standards Board had already set their budget for the 2021-22 financial year. The Bar Council consulted with the profession on the budget just days later on 9 November 2020. The proposed increase of 19% simply cannot be accommodated within this year's budget.

14. As with the 2019 OLC Corporate Strategy Consultation, the request for a substantial increase in budget has been put forward without detailed costs provisions. In the 'Core Ask' section in Priority 1, the Legal Ombudsman states the budget proposed would enable them to "recruit additional staff into the operational delivery teams". In 2019 we expressed concerns that there was a lack of information quantifying how many staff were required, what training they would need and timescales. In our view, citing these details is crucial in any proposal for a budget increase. We are also concerned that the 'Core Ask' includes the recruitment of staff on a fixed term basis. There is a risk this is a short-term fix and at odds with the goal of sustained development of leadership and management that the Legal Ombudsman envisages in the second part of Priority 1. Additionally, before considering an extensive recruitment drive, we query whether there is scope to increase the productivity of current staff productivity.

15. The consultation figures illustrating actual and projected wait times in assessment and number of people waiting for assessment would not look so dramatic if it had not been for the already high numbers of untouched cases and long wait times in existence before the pandemic began. The pandemic unfortunately resulted in a further deterioration of these metrics. Whilst we recognise that this was and remains a challenging time for all and that there will have been need for staff to take time off, it is alarming to learn that some 1,250 staff hours were lost in a month during this

⁶ [Bar Council response to Office for Legal Complaints corporate strategy 2020-23 consultation paper](#)

period as a result of staff being on special leave⁷. This clearly had a detrimental impact on the Ombudsman's core operations.

16. In its response⁸ to the LeO in year budget variation application, the Legal Services Board (LSB) observed "*that OLC's total reserves greatly exceed the level of funds that would be required to wind-down the organisation*". With this in mind, we question whether some of the reserves could be used to fund LeO's activities, instead of being borne by the profession. We would be interested to know the source and level of the reserves. If some or part of it is derived from the levy on the professions, there is a strong case to be made to use any that is surplus to requirements in the day to day operations of LeO instead of raising fresh funds via the levy on the professions.

17. Although we do not know the full reasons behind the request, the in-year budget variation application request made to the Legal Services Board last Autumn raises questions about the LeO's planning and budget management capacity. We would want to see it demonstrate that it has the necessary systems in place to effectively manage the budget for the next two years. We also think it is vital that the LeO recovers from the impacts of Covid19 on its operational capacity last year whilst also managing the current Covid19 related disruption, before embarking on an ambitious programme of change and modernisation.

18. Notwithstanding the fact that we are not supportive of a budget increase at this time, if there were to be any increase a more achievable way of achieving it may be to spread out a much more modest increase to the budget over a greater number of years. This would lessen the detrimental impact of a sudden increase on regulated legal professionals and also give Approved Regulators time to plan for any necessary budget changes.

Priorities: Have the right priority areas for the Business Plan been identified? If not, what should the Legal Ombudsman be addressing?

19. In our view, priority 1, with the aim of, "Maintaining stable operational delivery and reduc(ing) wait times at pre-assessment by the end of the strategy period", should be focussed on at the present time. This is due to the fact that it directly addresses the deterioration in wait times and the increase in unresolved cases, as well as the increase in length of time taken to resolve complaints. We recognise that priorities 2 and 3 that involve making efficiencies and giving feedback to the sector are important and contribute to the achievement of the first priority but given the

⁷ Legal Futures [article](#), 12 August 2020

⁸ <https://www.legalservicesboard.org.uk/wp-content/uploads/2020/11/20201124-in-year-budget-decision-letter.pdf>

sharp deterioration in service levels at the LeO in 2020 and the ongoing impact of Covid19 on the legal sector, the focus must be first and foremost on priority 1. We consider that the LeO must first accomplish its core functions before investing in its second and third priorities. To attempt to focus on all three priority areas concurrently runs the risk of spreading resources too thinly and detracting from the urgent and core business of resolving complaints within a reasonable timeframe which has suffered in the last twelve months.

20. Reducing wait times at pre-assessment is paramount, as the consultation itself references that, “Complainants tell the Legal Ombudsman they are concerned to have to wait for help, and service providers find it challenging to respond to a complaint many months after their first-tier process concluded.”⁹ We note the point made in the consultation that, “reducing the wait time at the beginning of the process will improve the overall customer journey time.”¹⁰ As noted in a previous Bar Council consultation response to LeO, increasing the levels of operational staff so that people are not waiting at the front end of the service will not necessarily equate to improving the experience of users of the service if at the next stage of the process, complainants are still experiencing the same levels of delay. Therefore, we consider all stages of the customer journey should be given attention and improved, to the benefit of both complainants and service providers.

21. In delivering priority 1, we are concerned that the first focus is on recruiting additional staff into the operational delivery teams, some of whom will be employed on a fixed term basis. Detailed consideration has been given to the deliverables and outcomes as a result of the increase in staff, such as increasing the volume of cases the organisation can investigate at one time. There is though, no detail given as to how much the recruitment process would cost, the length of time it would take to recruit and train extra staff as well as the impact of training delivered by existing staff on their ability to fulfil their original roles. As noted in our response to the 2019 Office of Legal Complaints strategy consultation, citing these details is crucial in any proposal for a budgetary increase.¹¹

22. We support the key outcomes envisaged as a result of priority 2 but for the reasons outlined above, think that the timing of priority 2 activities needs to be delayed. Continuing to work on new approaches that have the potential to deliver efficiencies are to be welcomed, particularly where they have the potential to lower

⁹ OLC consultation, page 7

¹⁰ OLC consultation, page 10

¹¹ <https://www.barcouncil.org.uk/uploads/assets/ba347a50-4f69-481e-96accf5bca48880e/Bar-Council-response-to-the-OLC-Corporate-Strategy-2020-23-consultation.pdf>, para 20

the cost of regulation. However, new technology needs to be considered in detail and trialled before any investment is made in it.

23. With reference to priority 3, we support learning opportunities for barristers and chambers' professionals to improve complaints handling processes and will continue to work with the Ombudsman to deliver such events, as we have done in 2017, 2019 and 2020. Important though it is, we reiterate that we consider that this type of work should take lower precedence than the work outlined in priority 1, particularly given the challenges faced in 2020.

24. Concerns remain about proposals outlined in LeO's Transparency and Reporting Impact discussion paper last year that are repeated in plans under priority area 3 in the current consultation. Areas we are concerned about relate to developing opportunities for direct feedback to legal service providers through annual reviews and publishing full LeO decisions. The reasons for these reservations are outlined in our response to last year's discussion paper.¹² We struggle to support the initiation of the costly Transparency and Reporting Impact projects without full consideration of these concerns and because there is a risk that diverting budget and human resource towards them will detract from the implementation of the core work outlined in priority 1.

Engagement: Do you have any learning and experience to support the innovation work being undertaken under priority two?

25. We think the legal regulators and other Ombudsmen will be in a better position to advise LeO on these matters.

Bar Council

15 January 2021

For further information please contact:

Sarah Richardson, Head of Policy, Regulatory Affairs, Law Reform and Ethics

The General Council of the Bar of England and Wales

289-293 High Holborn, London WC1V 7HZ

Email: SRichardson@BarCouncil.org.uk

¹² <https://www.legalombudsman.org.uk/media/eh2h5pvh/bar-council-response-to-leo-transparency-jan-2020.pdf>