



The Bar Council

## **Bar Council response to the Legal services Board's (LSB) Draft strategy for legal services regulation and draft business plan 2021-22 consultation paper**

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 (LSB) Draft strategy for legal services regulation and draft business plan 2021-22 consultation paper.<sup>1</sup>
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: the LSB's role and parameters**

4. The Bar is a small profession unified by a focus on the provision of specialist legal services of advocacy and advice, usually in the context of crystallised and specific disputes which require individually tailored services. Under the scheme of regulation created by the Legal Services Act 2007 ("the LSA 2007") barristers are authorised by the Bar Standards Board.

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<sup>1</sup> Available here: <https://www.legalservicesboard.org.uk/wp-content/uploads/2020/12/Consultation-Document-FINAL.pdf>

5. The role of the LSB is defined by statute and is focussed on standards of Regulation, Education and Training. The LSB has a duty, imposed by section 4 of the LSA 2007, to assist in the maintenance and development of standards in relation to just two things: (a) the regulation by Approved Regulators<sup>2</sup> of persons authorised by them (i.e. barristers) to carry on activities which are reserved legal activities, and (b) the education and training of persons so authorised.

6. By section 3 of the LSA 2007, *in discharging its functions* the LSB must, so far as is reasonably practicable, act in a way which is compatible with the regulatory objectives, and which the LSB considers most appropriate for the purpose of meeting those objectives. The LSB must also have regard to the principle that regulatory activities should be accountable, proportionate, consistent and targeted only at cases in which action is needed.

7. Part 4 of the Act deals with the Regulation of Approved Regulators and gives an important role to the LSB in ensuring that the Approved Regulators carry out their duties in compliance with the Act, and gives the LSB various powers of intervention including setting of performance targets, the giving of directions, and in extreme cases, censure, the imposition of penalties, and intervention directions.

8. The LSB is not an economic regulator.

9. The regulation of competition under the LSA 2007 is entrusted to the CMA which has powers to prepare a report if it considers that the regulatory arrangements of an approved regulator prevent, restrict or distort competition within the market.

10. The appropriate characterisation of the LSB's role under the LSA 2007 is that it is a regulator of the various regulators, including the BSB. That role is one of an "oversight" regulator, which is required to *oversee* the regulation carried out by the various frontline regulators including the BSB. It also has oversight of the Approved Regulators. The LSB is responsible for *overseeing the regulation of legal services* in England and Wales:<sup>3</sup> it is not responsible for regulating legal services in England and Wales.

11. The LSB therefore has a very important role. But it has not been charged with oversight, still less regulation, of the entire legal services sector. That is firstly because not all legal services are regulated (anyone can give legal advice), and secondly because, insofar as the providers of legal services *are* regulated, they are regulated by the frontline regulators for each profession. Importantly, the regulatory functions of the LSB are confined by the statute that created it to regulatory matters properly so

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<sup>2</sup> ie for barristers, the BSB to whom the Bar Council has delegated responsibility for independent regulation

<sup>3</sup> And *this*, limited, role is accurately so described by the LSB in paragraph 8 of its Consultation Paper

called. It does not have a wider role in the professions or in the administration of justice.

12. We believe that the structure of the LSA 2007 reflects that there is a wide range of types of legal service, and that there is a wide range of ways in which those services are delivered, and a series of professions by whom they are provided. Parliament decided not to merge the various professions, decided not to create a single regulator for all legal professionals, did not seek to regulate all legal services, and certainly did not create a single regulator for the legal sector. Parliament must be taken to have considered that, ultimately, competition and a diversity of modes of delivery through different professions of providers, and by non-professionals, would be likely best to achieve a vibrant market and the regulatory objectives. We think that that is a good approach.

13. Regulating to achieve otherwise would, in our view, not only stray beyond the LSB's functions, but would be to act contrary to Parliament's intentions.

14. We recognise that some people may have different views as to the best way in which to organise and regulate the provision of legal services, and we have noted that in fact the corporate view of the LSB is that it does not approve of the statutory regulatory regime in which it operates:

14.1. The LSB is critical of "difficulties" created by "the focus on title-based regulation as opposed to activity-based regulation" and the "potential for different standards as a result of multiple regulators of the sector."<sup>4</sup>

14.2. "The LSB's position remains that ultimately moving to a single regulator for all legal services would have significant public benefits."<sup>5</sup>

14.3. "The current system of multiple organisations regulating the same activities does not deliver clarity and simplicity for consumers, risks inconsistency of standards and approach and duplicates cost."<sup>6</sup>

15. These positions could be the subject of a policy setting debate, though we do not agree with them. But more significantly, they are inconsistent with the regulatory regime in which the LSB in fact operates. We note that the LSB acknowledges that legislative reform would be required to achieve a regulatory system of the type favoured by the LSB.<sup>7</sup>

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<sup>4</sup> LSB report on The State of Legal Services, November 2020, paragraph 12

<sup>5</sup> LSB report on The State of Legal Services, November 2020, paragraph 73

<sup>6</sup> Ibid

<sup>7</sup> LSB report on The State of Legal Services, November 2020, paragraph 67

16. We believe that the LSB has fallen into the trap of behaving as though it were the regulator that it thinks it ought to be, rather than the regulator which in fact it is.

17. Those who regulate tend to be enthusiastic about the capacity of regulation to improve services. Those who are regulated, and who pay for the regulation and pass on those costs to their clients, are sometimes more sceptical<sup>8</sup>. Barristers recognise and support the role of regulation in setting and maintaining minimum standards, but regulation must be proportionate and only targeted where needed. The right balance has to be struck, in the public interest. That balance has been struck by Parliament. It must be respected both by the regulators and those whom they regulate.

18. In our view the LSB is not respecting the balance struck by Parliament.

19. The Consultation paper reveals that the LSB is treating its remit as wider than it in fact is:

19.1. The Foreword by the Chair explains that the LSB has decided “not just to create another corporate strategy for the LSB, but rather to develop a strategy for sector”;<sup>9</sup>

19.2. The Executive Summary explains that “Our vision was to develop a strategy for the entire sector and not just for the Legal Services Board.”<sup>10</sup>

20. If the LSB has a duty, or even just a power, to produce a “strategy for sector”, it is surprising that it has not done so before. We cannot see that either the role or duties or powers of the LSB have changed in any way, and we do not believe that they extend to producing a strategy for the sector.

21. In our view the LSB is overreaching its functions. It is trying to fulfil a role which it does not have. This creates the risk of an unwelcome additional costs burden on the professions, risks confusion as to who is responsible for what, and risks diverting the LSB’s attention and resources from the functions which Parliament has entrusted to it.

22. If the LSB were to attempt to exercise powers under the LSA 2007 in order to achieve its “strategy for sector”, it would be important to determine whether or not that was a proper and lawful exercise of the LSB’s powers. We think the answer would be no.

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<sup>8</sup> Barristers who are privately paid are able to pass on to their clients the additional direct and indirect costs of regulatory compliance and will do so, so that ultimately it is consumers who bear the costs of regulation. At the publicly funded Bar, Barristers cannot increase their fees to cover additional regulatory costs they must absorb those costs themselves.

<sup>9</sup> Consultation Paper page 4

<sup>10</sup> Consultation Paper page 6, para 1

23. We therefore have serious misgivings about the LSB's strategic plan. It is extremely ambitious, and stretches well outside the proper remit of the LSB and into policy questions for government.

24. It would be better if the LSB were to do less. It would then be able to do that better.

25. Despite these serious misgivings, in what follows we respond to the contents of the Draft Strategy and Draft Business Plan.

26. It may be helpful if at this stage we summarise our response.

### **SUMMARY OF BAR COUNCIL RESPONSE**

(1) For the reasons set out above, we believe that the LSB has misunderstood its role as a regulator and has fallen into the trap of behaving as though it were the overarching sector regulator which it says it wants to be, rather than the regulator of the frontline regulators, which is what it in fact is.

(2) The LSB should not be producing a "strategy for sector" at all. It should be producing a strategy focussed on its core purpose of overseeing the regulation of the legal profession by the frontline regulators and overseeing the Office for Legal Complaints (OLC).

(3) In all that it does the LSB must have regard to the eight regulatory objectives identified in the LSA 2007. It is inappropriate for the LSB to identify a single "golden thread" of "Reshaping legal services to better meet society's needs". It is of course desirable that legal services serve society's needs, but this is not the function of the LSB.

(4) The three "strategic themes" of Fairer Outcomes, Stronger Confidence and Better Services are so widely stated as to be of little utility but are unobjectionable in themselves, and indeed they identify objectives which are shared by the Bar and no doubt by all legal professionals. But what should be the focus, in terms of the LSB's policy, is the regulatory objectives which are already identified in the Legal Services Act.

(5) The impact of Covid19 means that there should, at the moment, be considerable focus on the regulatory objective of encouraging an independent strong diverse and effective legal profession. The LSB's strategy does not adequately recognise the adverse effect Covid19 has had on parts of the Bar, nor its potentially discriminatory effect.

(6) The LSB has identified 9 challenges and 24 priorities. That is too many.

- (7) The various frontline regulators are likely to be addressing all of the issues identified by the LSB: certainly it seems to the Bar that the BSB is doing so. The frontline regulators are entitled to a considerable margin of appreciation in the decisions they take. It is not for the LSB to tell the frontline regulators how to regulate, nor to impose priorities upon them.
- (8) We have made detailed comments on each of the challenges, and many of the priorities, below.
- (9) We do not agree that redrawing the regulatory landscape is a suitable priority for the LSB. The only role of the LSB here is to consider the list of regulated activities. As to that we agree with the LSB that such a review should not be embarked upon.
- (10) Of the 24 identified priorities, those on which it would be most appropriate for the LSB to focus are:
  - The three E&D priorities, under challenge 3, provided that the LSB recognises that its role is to check that frontline regulators are fulfilling their regulatory role in overseeing chambers' compliance with the E&D rules, including the fair allocation of work and fair recruitment. In the short term the focus should be on the E&D impacts of Covid19;
  - Improving complaints handling, under challenge 6;
  - The technology and innovation workstream should be adjusted to focus on the regulatory and access-to-justice and public-justice implications of the recent (Covid19-induced) changes to the delivery of legal services and in particular to court hearings.

**Question 1- Do you have any comments on the three strategic themes that we have identified?**

27. We agree that the three strategic themes that have been identified by the LSB (fairer outcomes, stronger confidence, better services) are all desirable aims. They are so widely drawn that it is difficult to imagine that anyone could object to them per se. But we are not persuaded that they capture what it is that the LSB is charged with doing, and we are surprised that the LSB considers it appropriate to set high level strategic themes of this sort when the regulatory objectives have been decided on, and formulated by, parliament, and are set out in the LSA 2007.

28. Although you have not specifically requested responses to it, we are also doubtful that the stated "Golden Thread" of the three strategic themes, that is to say "Reshaping legal services to better meet society's needs" is either an appropriate or

even permissible general theme for the work of the LSB. The reshaping of legal services, if it is needed at all, ought not to be regarded as the central tenet and purpose of the body mandated (and limited to) providing oversight of legal services regulation.

29. The very significant scale of the work identified under the three strategic themes is concerning. As outlined in the overview, we consider that the LSB's core focus should be the discharge of its statutory functions in a way that is proportionate and promotes cost-effective regulation by the frontline regulators as well as being compliant with the Legal Services Act 2007. With a 10-year strategic plan in place, we appreciate that the LSB has a long-term vision. However, we are concerned and disappointed that both it and the business plan for 2021/2022 only make fleeting reference to Covid19, essentially monitoring only as we understand it, and this gives the impression that the impact of the pandemic on the justice system and professions has not properly been taken into account. We think it is imperative that greater emphasis is put on the immediate impact of the pandemic in the business plan and that the strategic plan is flexible enough to adapt to any longer term challenges the pandemic creates.

30. Two recent Bar-wide surveys we have conducted<sup>11</sup> (and addressed further under Question 5 below) show that the pandemic (especially when coupled with the existing challenges created by cuts to the courts service, legal aid, etc.) has given rise to a real crisis in sustainability of practice at the Bar, access to justice, efforts towards encouragement of diversity in training and representation, and to a whole range of differing experiences for consumers of litigation services associated with delays, social distancing and online hearings.

31. While in a very general sense the Bar Council welcomes the positive spirit embodied within the proposed strategic themes, it would be more reflective of lived experience for one of the themes to be of "Recovery" or "Support for existing legal services" and for the challenges/business plan under this theme to be directed to regulatory support for a sector and access to justice that is, in places, on its knees as a result of Covid19. The Bar Council would anticipate that this would be most positively recognised in promotion of stability in regulation over the coming few years and a reduction, or at least, no increase in the cost of regulation for beleaguered practitioners and the customers who pay them.

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<sup>11</sup> <https://www.barcouncil.org.uk/resource/new-survey-from-bar-council-finds-barristers-at-breaking-point.html> and <https://www.barcouncil.org.uk/resource/new-survey-reveals-justice-system-hanging-by-a-thread.html>

**Question 2 – Do you have any comments on the nine challenges that we have identified for the sector?**

32. We plan to answer this as part of our response to question 4.

**Question 3 – How can you/your organisation contribute to overcoming the sector wide challenges we have identified?**

33. The Bar Council has for many years been addressing the challenges that have now been identified by the LSB.

*Lowering unmet legal need and achieving fairer outcomes (1,2)*

34. In terms of lowering unmet legal need and achieving fairer outcomes for people experiencing greater disadvantage, the Bar Council supports the charity that coordinates barristers' pro bono work, 'Advocate'. Nearly a quarter of practising barristers are Advocate panel members.<sup>12</sup> Advocate placed over a thousand pieces of work with barristers last year. Barristers frequently deliver pro-bono legal advice through legal advice centres and other programmes such as the Chancery Litigant in Person Scheme (CLIPS)<sup>13</sup>.

35. Our research informs policy and we have commissioned and published many reports on the impact of cuts to legal aid. The Bar Council has been a vocal proponent of increased criminal and civil legal aid funding. In our report titled, "Running on Empty, Civil Legal Aid Research Report", published in January, we summarised recent influencing work,

"In our March 2020 Budget Submission we asked for an increase in fees for publicly funded legal work, targeted re-introduction of civil and family legal aid, and additional resourcing of the Legal Aid Agency (LAA). In our September 2020 Spending Review submission, we asked for non means-tested legal representation to be made available for all domestic abuse cases, and for early legal advice to be made available for social welfare issues."<sup>14</sup>

36. Plans are underway to undertake research into the impact of Litigants in Person on the court process. This is relevant to access to justice given their proliferation in recent years, largely in response to legal aid cuts.

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<sup>12</sup> Bar Council website <https://www.barcouncil.org.uk/policy-representation/policy-issues/pro-bono.html>

<sup>13</sup> <https://www.combar.com/members-area/clips-pro-bono-schemes/>

<sup>14</sup> <https://www.barcouncil.org.uk/uploads/assets/6a65477c-9288-4db2-897b696f548813cd/Running-on-Empty-Civil-Legal-AidFull-Report.pdf>



*Dismantling barriers to a diverse and inclusive profession at all levels (3)*

37. Addressing the challenges of dismantling barriers to a diverse and inclusive profession at all levels, the Bar Council provides a range of support and programmes to ensure equality, diversity and inclusion in the profession. Support includes a helpline for individuals and chambers, equality and diversity guidance (including on positive action), toolkits and other resources and Equality & Diversity Training. Work is arranged across the themes of access, retention and progression. Attention is focussed on under-represented groups, including those from a lower socio-economic background. The Bar Council both runs its own programmes and supports Bar-based stakeholders (e.g. The Inns, Circuits and Specialist Bar Associations as well as chambers and networks) in designing and delivering their own initiatives. Access programmes for Years 12 & 13, undergraduates and BPTC students include careers advice and information, a Bar Placement Scheme, e-mentoring, the Pupillage Fair and Pupillage Gateway. We also support the Young Citizens' Bar Mock Trials competition and coordinate barristers visiting schools. Retention Programmes include fair distribution of work projects (clerking, client briefing, directories etc.), mentoring, promotion of flexible working and wellbeing. Progression programmes (also supported by our Retention work) include a pre-application judicial education programme and mentoring. Programmes are targeted based on evidence collected through research with Bar students and across the profession. Formal evaluation of programmes is currently underway.

38. The Bar Council develops programmes in partnership with the profession. An example of this includes the Race Working Group. This is a representative group of barristers from different circuits, practice areas and ethnic minority networks. It was formed in June 2020 following the death of George Floyd. This group is charged with developing our response to recognition of the need for a specific programme of work to tackle racism at the Bar and reports into the Equality Diversity and Social Mobility (EDSM) Committee.

39. The Bar Council is also committed to ensuring more diverse and inclusive leadership of the Bar. In 2020 the Bar Council introduced the Bar Council Leadership Programme to help develop practitioners from diverse backgrounds. We have also introduced a Modernisation Working Group whose remit includes making participation in the Bar Council's committees, working groups and panels more accessible, particularly for those with caring responsibilities. Examples of initiatives include more remote meetings and more flexibility in voting. We are also encouraging those from diverse backgrounds to stand for office.

*Ensuring high quality legal services (4)*

40. In terms of ensuring high quality legal services, the Bar Council is concerned with maintaining and raising standards of barristers' knowledge, advocacy skills and customer service. It delivers a wide range of training on public access work, conduct of litigation, mediation, anti-money laundering, the General Data Protection Regulations, fair recruitment, tackling harassment, as well as first tier complaints handling. It has also coordinated the roll out of vulnerable witness training for the criminal Bar. There is an extensive online guidance library that encompasses most of these topics as well as over fifty commonly arising ethical issues. These, together with the ethical enquiries service, assist barristers in complying with the BSB Handbook and encourage best practice.

*Closing gaps in consumer protection; reforming the justice system (5,6)*

41. Closing gaps in consumer protection is not our core work but we have conducted research into fee paid McKenzie friends which is one area where we consider that there is a lack of consumer protection. We have also encouraged robust first tier complaints handling by barristers by delivery of three seminars on the topic. This popular seminar will be repeated in late 2021.

42. The Alternative Dispute Resolution (ADR) Panel of the Bar Council works to encourage barristers to consider providing ADR services such as mediation, arbitration and adjudication. This widens the choice of dispute resolution services available to consumers, should a consumer choose to enforce their rights or settle a dispute in this manner.

43. Reforming the justice system and redrawing the regulatory landscape is not our core work either but we do seek to influence regulation to ensure it is consistent with the better regulation principles and that it is, "transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed", consistent with s. 3(a) of the LSA 2007.

44. The Bar Council's Law Reform Committee regularly produces balanced, high quality and well-informed responses to law reform consultations.

*Empowering consumers; fostering innovation around consumer needs, supporting responsible use of technology (7, 8, 9)*

45. In terms of empowering consumers to obtain high quality and affordable services, we have information clearly explaining what barristers do and how to find a barrister on our webpage. Our Direct Access Portal helps consumers search for public access barristers. We have assisted the Bar to implement the transparency rules by providing guidance via the ethics line and writing articles to raise awareness of the

rules amongst the profession. It is anticipated that the provision of more transparent information on price, quality and regulation will assist consumers to make informed choices about legal service provider. We have also raised with government where their websites and portals omit reference to barristers, artificially restricting consumer choice and sought for these oversights to be remedied.

46. In terms of fostering innovation that designs services around consumer needs, the IT Panel of the Bar Council supports the Bar and on occasion, HMCTS and the ICO on responsible use of data and technology. At the beginning of the pandemic when courts were using Zoom to conduct hearings involving privileged material, the IT panel contacted the ICO to ask them to consider whether it was GDPR compliant, due to data protection and encryption issues. The Panel's action encouraged the interrogation of early HMCTS policy. The Panel was also involved in road testing Cloud Video Platform (CVP) as its roll out was expedited in order to facilitate remote hearings. The IT Panel's guidance supports the profession's responsible use of technology and compliance with GDPR. The Panel also acts in a consultative role providing a response to data protection and information security queries from individual barristers. Further the Panel also keeps abreast of the development and deployment of emerging technologies (such as the use of artificial intelligence and blockchain) within the legal sector.

**Question 4– Do you have any comments on the suggested areas of priority for the sector 2021-24?**

47. We will take each of the nine priorities separately, noting at the outset that 9 is a large number of priority areas, and that there are apparently to be, in total, 24 priority workstreams.

**CHALLENGE 1: Lowering unmet legal need across large parts of society**

**Priority 1: Reduce financial barriers to access**

48. This is a laudable aim.

*Legal aid*

49. The Bar Council notes the LSB's more active approach in commenting on the current state of legal aid and agrees with the need for a properly funded legal aid system. Previous reviews carried out by the Bar Council on civil legal aid show that,

since the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) came into force, many people have struggled to find and pay for legal representation.<sup>15</sup>

50. What we would not support is any attempt to pursue an agenda of pushing regulation in a direction which seeks to compensate for the effect of LASPO. Nor do we consider that is part of the LSB's role. We ultimately consider that LASPO should be revisited and the availability of civil legal aid should be broadened.

#### *Payment by instalments or credit*

51. For clients using barristers there is already the option of staged payments – payment of fees at different stages in the case, as well as a variety of fee arrangements such as Contingency Fee Agreements and Damages Based Fee Agreements, which can make purchasing legal services more accessible.

52. The LSB appear to want to encourage barristers to have more credit or instalments arrangements for lay clients, presumably on the assumption that barristers have large reserves of cash. This is unrealistic. The Bar Council's most recent survey of the Bar undertaken in December 2020<sup>16</sup> found that 61% of barristers have taken on personal debt or used savings, with 17% incurring debts above £20,000. Cash flow and 'aged debt', where barristers are still waiting on payment years after completing work, has been a long-standing problem for barristers. For the LSB to suggest that barristers should wait even longer for their fees is misguided and runs the risk of putting barristers out of business altogether.

#### *Legal expenses insurance*

53. We consider this issue in our response to question 5.

#### *Unbundled legal services*

54. Barristers are well set up to deliver unbundled legal services, because of their traditional role as legal consultant, instructed for a specific piece of work. Self-employed barristers that work on a Public Access basis are particularly likely to engage in delivery of unbundled legal services.

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<sup>15</sup> <https://www.barcouncil.org.uk/uploads/assets/6a65477c-9288-4db2-897b696f548813cd/Running-on-Empty-Civil-Legal-AidFull-Report.pdf>

<sup>16</sup> <https://www.barcouncil.org.uk/resource/bar-survey-summary-findings-december-2020.html>

## **A general point**

55. We wish to sound one note of caution. There are many consumers who could access legal services but chose not to do so on grounds of cost. It should not be assumed that that is necessarily a bad thing in all cases. There are some types of legal dispute – boundary disputes being a prime example – which frequently become disproportionately expensive to the real benefit that might be achieved by either side. If people wish to spend their money fighting about that sort of dispute they should be free to do so, but the fact that some people cannot afford to do so is not a great social ill. Societies can be over-lawyered, just as they can be under-lawyered. Access to lawyers is not the same as access to justice.

### **Priority 2: Reduce non-financial barriers to access**

56. This too is a laudable aim.

#### *MoJ's Legal Support Strategy*

57. The Bar Council agrees that law reform is a useful tool to use in lowering the barriers to access to justice and is actively engaged in the law reform process, led by its Law Reform Committee with a view to making the law clearer and more accessible. But this is not a job for the LSB.

58. The Bar Council supports the concept of early intervention as a way of swiftly resolving legal issues at minimal cost to the consumer, before matters escalate in complexity.

#### *Legal Choices*

59. The Bar Council agrees that online portals and websites form a useful part of the Public Legal Education (PLE) programme and play a role in lowering barriers to access to justice.

60. For example, the Citizens Advice website contains a wealth of valuable information not only about the legal rights of consumers but about how to access legal services. In 2018-2019 it had 29 million visits,<sup>17</sup> and in March 2020 had 2.2 million views in a single week.<sup>18</sup>

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<sup>17</sup> <https://www.citizensadvice.org.uk/about-us/about-us1/media/press-releases/more-people-turning-to-citizens-advice-for-consumer-and-benefits-problems-in-its-80th-year-of-service/>

<sup>18</sup> <https://www.citizensadvice.org.uk/about-us/about-us1/media/press-releases/busiest-week-in-history-for-the-citizens-advice-website-with-over-22-million-views/>

61. We doubt that much is to be gained by trying to develop competing online resources, and note that the Legal Choices Website received only just over 3 million visits in a year of operation.

### **Priority 3: Develop a legal support strategy for small businesses**

62. The Bar Council welcomes initiatives to improve access to justice for small businesses and agrees that these should be built on a strong evidence base. However, in light of the financial pressures the sector is facing and the fact that the most recent research report was published just 2 years ago (and before that in 2015 and 2013), we question whether any new research plans that incur a cost to the LSB could be postponed until next year.

## **CHALLENGE 2: Achieving fairer outcomes for people experiencing greater disadvantage**

### **Priority 1: Create a fairer market for citizens in vulnerable circumstances**

63. The BSB Handbook provides a robust framework for ensuring vulnerable clients of barristers are treated fairly by them. For example, there is a duty not to discriminate in the BSB Handbook.<sup>19</sup> Consideration of a client's vulnerability also forms part of the Public Access training course and is detailed at length in the BSB's Public Access guidance for barristers.<sup>20</sup>

### **Priority 2: Measure outcomes for citizens in vulnerable circumstances**

64. We agree that reliable qualitative data is desirable.

## **CHALLENGE 3: Dismantling barriers to a diverse and inclusive profession at all levels**

### **Priority 1: Strengthen the evidential base on diversity and inclusion**

65. We entirely agree that discriminatory barriers to a diverse and inclusive profession – at all levels – should be dismantled.

66. In terms of the Bar, we and the BSB are strongly committed to measuring diversity at the Bar and drilling down into the data and understanding the challenges to diversity at different stages in a barrister's training, career and progression both to

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<sup>19</sup> Core Duty 8, rC12 and rC28 of the BSB Handbook

<sup>20</sup> <https://www.barstandardsboard.org.uk/uploads/assets/6cc15510-8da5-4620-ae99720af7be9464/Public-Access-Guidance-for-Barristers.pdf>

silk and the judiciary. This research underpins intervention work. We were pleased to see the results of the BSB's most recent survey which demonstrated that the profession became increasingly diverse in 2020 and that an increasing number of barristers were willing to share information on their background.<sup>21</sup>

## **Priority 2: Improve evaluation of diversity and inclusion initiatives**

67. We agree that this is important. It seems to us to be a matter for the professions to achieve, and for the frontline regulators to regulate as they consider most appropriate. The different frontline regulators may take different views.

68. We are in the process of developing a robust monitoring and evaluation system that will allow us to test the effectiveness of various schemes and ensure that we are focusing resources on activity that will maximise impact. We intend to implement this by the end of 2021. However, we expect that this system will take several years to embed and to demonstrate impact, so we would caution against any short-term expectations.

69. Better data will enable better judgments as to the important question of whether present day disparities between the representation of certain groups in, say, silk or the judiciary, reflect ongoing discrimination or barriers to progression, or reflect discrimination that took place in the past.

## **Priority 3: Address issues of retention and progression as well as entry**

70. We agree that it is right to consider whether issues surrounding retention and progression within our profession exist and, where there is unequal treatment or discriminatory outcomes, those issues should be addressed.

71. Again, this seems to us to be matter for the professions to achieve, and for the frontline regulators to regulate as they consider most appropriate. The different frontline regulators may take different views. Indeed given the different patterns of progression in different professions it would be surprising if a one-size-fits-all approach would be appropriate.

72. We do not understand what exactly is meant by the reference to "unfounded perceptions of 'hierarchy' between different types of legal professional". Clearly, it would be wrong for one type of legal profession to consider it is 'superior' to or 'better' than another. But it would also be wrong to ignore that each type of legal professional has different skills and abilities. After all, the 'legal sector' is not homogenous. The

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<sup>21</sup> <https://www.barstandardsboard.org.uk/uploads/assets/88edd1b1-0edc-4635-9a3dc9497db06972/BSB-Report-on-Diversity-at-the-Bar-2020.pdf>

different skills, abilities and experiences of the different types of legal professional are an important (and beneficial) aspect of the UK's legal sector.

#### **Priority 4: Building diversity and inclusion into our regulatory performance framework**

73. We agree that all who are capable of a career at the Bar should be able to attain it. Indeed, that is why we run a series of programmes aimed at diversifying the Bar. But we would be against the LSB seeking to impose targets on our profession or to set what it considers are suitable outcomes. We think the core role of the LSB is to hold the regulator to account for setting minimum standards for equality and diversity and ensuring compliance with them.

#### **An important omission**

74. The State of Legal Services 2020 report identifies at paragraph 55 the likelihood that the Covid19 pandemic has had a disproportionate impact on the groups with the most diverse representation.

75. It is disappointing that this issue is not reflected in the proposed priorities under Challenge 3.

#### **CHALLENGE 4: Ensuring high quality legal services and strong professional ethics**

##### **Priority 1: Ensure education and training evolves to meet changing expectations**

76. This is a sensible enough challenge but this should not at this stage be a priority, at least as far as the Bar is concerned, because new arrangements are in place, as the LSB recognises. Those arrangements need a chance to bed down, and then will need to be assessed. We think that it will be found that they have reduced the cost of legal education without compromising standards.

##### **Priority 2: Ensure legal professionals remain competent throughout their careers**

77. This is pre-eminently a matter for frontline regulators, not the LSB.

78. Bearing in mind the principle (in section 3(3) of the LSA 2007) that regulatory activities should be targeted only at cases in which action is needed, this should not be a priority, at least in relation to the Bar.

79. In responding to the LSB's call for evidence on ongoing competence last year, the Bar Council agreed with the notion of proportionate and targeted regulatory



action where there was good evidence of a problem in maintaining competence, but demonstrated that there is no reliable evidence. We want to reiterate that we did not find any evidence to suggest that competence falls as barristers become more senior. On the contrary, there is good objective evidence – particularly from the Bar Mutual Indemnity Fund’s data – that standards are generally high and continue to be so throughout barristers’ careers.

80. That is due in part to the fact that barristers who do for some reason lose competence also lose their work. Self-employment along with constant scrutiny by professional clients, judges and others all contribute to high standards of ongoing competence.

81. Moreover, various organisations at the Bar – including the Inns, the Circuits, and Specialist Bar Associations – make a great number of opportunities available to ensure ongoing competence among their members.

## **CHALLENGE 5: closing gaps in consumer protection**

### **Priority 1: Align regulation to risk so that the public is properly protected**

82. This is not a matter for the regulator but for government. The LSB should concentrate on putting into effect the statutory framework of regulation, not on amending that framework.

83. Quite apart from that point, we do not think that this is an appropriate priority.

84. We are not persuaded there is sufficient evidence of a problem with the reserved legal activities that warrants their being changed. Particular caution must be exercised when considering those activities which have a public interest role, namely, exercising a right of audience and conducting litigation.

85. The Bar Council believes that ‘conducting litigation’ and ‘exercising rights of audience’ are high-risk and vital to the administration of justice. These reserved legal activities have a clear public interest basis for a high level of regulation. Currently, only authorised providers can conduct both of these and that brings with it a high degree of consumer confidence and consumer protection as well as helping support the administration of justice and rule of law.

86. The quality of service would likely be reduced if rights of audience were not a reserved activity, and anybody could exercise one. For example, remunerated McKenzie Friends, who can sometimes be given permission by a judge to exercise a right of audience, have been the subject of criticism and their clients may not be aware that they are not afforded the same protections as clients of regulated lawyers such as

barristers or solicitors. Other interests and regulatory objectives would also be put at serious risk. It is vital for the proper functioning of our courts and legal system, that those exercising rights of audience and conducting litigation are properly trained, regulated and insured. This runs in tandem with the duty owed by those lawyers to the courts and judges they are appearing before, which is in the public interest.

87. On the question of whether the remaining four reserved legal activities, (administration of oaths, probate activities, reserved instrument activities and notarial activities) should remain reserved, in our view it is essential that any review of them contains an assessment of not only the public interest but also the risk of harm to individual consumers if they were to be altered.

88. The question of whether legal advice generally should be a regulated legal activity raises a host of issues. We think it highly likely that bringing all legal advice within the regulated perimeter would limit choice for consumers and could inadvertently increase the amount of unmet legal need.

89. In any event the time is not right for such a fundamental review.

90. In response to question 7, which we address later in this response, we are therefore in agreement that the LSB should not be carrying out a statutory review of reserved legal activities in 2021-22. Covid19 is clearly having a far-reaching impact on the barristers' profession, as well as the other legal professions and wider justice sector, of which we are yet to see the full extent. We have detailed some of the effects of this, such as on the income of barristers in our answer to question 9. Any review of the reserved legal activities would take considerable time and resource. Now is not appropriate for the LSB to be diverting resources to such a review.

## **Priority 2: Deliver universal access to redress across the market**

91. Research by the LSB and LSCP has shown that consumers of legal services often do not understand whether or not their legal service provider is regulated and if they are, what that means. This is far from ideal and we think there is a greater role for Public Legal Education to inform citizens of the important role of regulation and the protection it confers upon those who use regulated providers of legal services. This would help consumers to distinguish between the regulated and unregulated sector and make an informed choice as to what level of protection they would like to have in place when purchasing legal services.

92. We are still persuaded that educating consumers of legal services about the differences between authorised and unauthorised providers is a better approach than increasing the scope of regulation by way of introduction of a mandatory register. If all that is required is to pay a fee and provide some contact details, assuming there are

no entry requirements, we question whether the presence of an individual on the register risks giving potential clients the impression that they carry legal qualifications and insurance and are subject to rigorous regulation, which they are not.

93. Aside from our objection to the principle of it, there are the unresolved practical questions of who would set up and maintain such a register. It is not clear how unregulated providers would be required to contribute to the costs of such a scheme. We are clear that any seed funding for such an initiative must not come from the LSB's budget, derived as it is from the regulated sector. There is no justification for the regulated sector funding any extension of regulation to the unauthorised sector.

94. This also sits uneasily with the LSB's plans with regards to ongoing competence. We question why the LSB would increase regulation for the regulated professionals whilst simultaneously encouraging those with no qualifications, code of conduct, mandatory professional indemnity insurance, regulator, competence checks or duties to the court to enter the realm of regulation.

95. We are similarly wary of the idea of the clients of unauthorised providers being given access to the Legal Ombudsman (LeO). We think that this would blur the lines between the regulated and unregulated legal sectors and may well confuse consumers. We are concerned by the LSB's assumption that it would be inherently good to give more consumers the confidence to use unregulated providers and bring those providers inside the 'regulatory tent', even if it just means providing access to redress.<sup>22</sup>

96. We think it will be confusing for consumers to tell them that some legal services providers are regulated and others are not, but you can still complain to a statutory ombudsman about all of them equally. The proposal that the Legal Ombudsman should be given power to consider complaints against unregulated providers is not one that we support.

97. In any event this is clearly not the time to be expanding the role of the Legal Ombudsman. The LSB rightly recognises that, "there are a series of issues that would first need to be resolved; this includes addressing the complaints backlog at the Legal Ombudsman". In our view, this is unlikely to be quickly addressed. We are doubtful that the Legal Ombudsman will have the capacity to deal with the complaints that will arise from consumers of unregulated legal services providers in the near future.

98. Another point worth mentioning is that access to the Legal Ombudsman is not a panacea as they only deal with service complaints and complaints from individuals

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<sup>22</sup> The State of Legal Services report, 2020: paragraph 84

and “microenterprises”, after a complaint has gone through the legal service provider’s first-tier complaints process and if it remains unresolved. Bringing a civil claim in the courts or using Alternative Dispute Resolution (ADR) are other redress options.

99. In the State of Legal Services the LSB notes that the “immense influence of the solicitor and barrister ‘brands’ makes it tough for all types of alternative provider to make deep inroads.” What the LSB characterises as a brand is not a brand at all, but the name of a profession. These two professions command the confidence of the public because they have traditionally maintained high standards of work and the highest ethical standards.

100. Sometimes the LSB refers to “regulation by title”. This is an inappropriate expression to use. The scheme of regulation is regulation *by profession*. The fact that someone is a ‘barrister’ conveys that that person is regulated, insured, owes duties to their client and the Court and will deliver a high quality of work as well as abiding by a code of conduct. For barristers, membership of the profession and the use of the title fosters a strong professional ethos, mutual support and encourages high professional standards to be maintained.

### **Priority 3: Increase public understanding of the consumer protections in place**

101. As stated above, we are in support of increasing consumers’ awareness of regulatory protections in place for different legal professions. However, we do not agree with the idea of having a single register that replicates the information already available on the regulators’ websites. The BSB register, located on its website, makes a great deal of information about barristers’ regulatory status readily available. We question the benefit of having the same information available on another platform for the following reasons:

101.1. Funding for this project is from the professions via their practising certificates and we disagree that this is good use of those funds, given its duplicative nature;

101.2. Such a single register also runs the risk of conflating all the professions and possibly confusing consumers. It needs to be remembered that not all legal professionals are, in fact, the same or have the same skills or training. That is one of the benefits of the current structure, as consumers have a choice of legal professional and can choose the professional which is best suited to the task at hand. Implementing regulatory changes which make all legal professionals appear to be the same or equivalent blurs the lines in a way which may in fact be confusing;

101.3. The idea that there should be a single professional register is bad in principle, and fundamentally incompatible with the structure of the Legal Services Act 2007. There is not a single profession, and so there should not be a single register. On the contrary there are a series of professions, plus some legal services providers who are not professionals and who are not regulated. A single public register run and promoted by the LSB would send a false impression of equivalence as between all providers. It would lead to confusion, not clarity;

101.4. Even if the public register used information directly exported from regulators' existing registers, there may be compatibility issues in terms of different categories of information or incompatibility of IT systems. Would the lack of comparable information available from other regulators mean that for the sake of consistency, a narrower range of categories would be available on the public register? It would not be in the interests of consumers for the information about barristers to be artificially constricted and would mean the public register were an inferior source of information as compared to the individual regulators' websites;

101.5. If there is a difference in information, we wonder how a consumer will know which is to be regarded as the most up to date.

102. Including non-regulated providers is an even worse idea which will work to the detriment of consumers and is flatly contrary to the regulatory principles. It would be bound to lead consumers to think that regulated and unregulated providers were much of a muchness. They emphatically are not. Regulation brings with it professional standards which are independently enforced, plus the requirement to hold appropriate insurance. Unregulated providers are subject to neither of those requirements.

103. We note that the FCA's experience of operating a single register has not been happy: see the criticisms made in the Parliamentary report on the British Steel Pension Transfer debacle.

## **CHALLENGE 6: Reforming the justice system and redrawing the regulatory landscape**

### **Priority 1: Make Reforms so that regulation remains fit for purpose**

104. This is not the right time to be changing the regulatory landscape and, even if it were, that would not be something properly to be instigated by the LSB, whose role is to discharge the functions it has been given.

105. As to the various specific proposals in relation to a single register, varying the range of reserved legal activities and extending the Legal Ombudsman's ambit to unregulated providers, these are all undesirable ideas for the reasons explained above.

106. None of these changes are properly or fairly described as incremental changes.

107. The LSB should only seek to make regulatory changes where there is evidence of a specific hindrance that needs to be overcome.

## **Priority 2: Improve complaints handling**

108. In marked contrast, this is an area where the LSB does have a role.

109. The LSB acknowledges that the OLC is consulting separately on its plans for the Legal Ombudsman. We note that the LSB supports the focus by the Legal Ombudsman on the 'prevention agenda', including using complaints as a learning tool to help the sector raise standards and sharing data on its decisions to support consumer choice. We do not agree that this is the right time for the Legal Ombudsman to be concentrating on these areas. To attempt to focus on the 'prevention agenda' whilst at the same time trying to reduce the case backlog and wait times risks spreading resources too thinly. It could detract from the urgent and core business of resolving complaints within a reasonable timeframe, which has suffered in the last twelve months.<sup>23</sup>

110. The current focus should remain on what was described in LeO's business plan as priority 1: "maintaining stable operational delivery and reduc(ing) wait times at pre-assessment by the end of the strategy period". Addressing this issue first and foremost would raise consumer confidence in the Legal Ombudsman and the right to redress from regulated providers. We agree with the LSB when they say, "A clear priority is to reduce delays for people making complaints to the Legal Ombudsman as this is where regulation touches the public most directly".<sup>24</sup>

## **CHALLENGE 7 - Empowering consumers to obtain high quality and affordable services**

### **Priority 1- Enhance transparency by providers on price and quality**

111. We agree that clients need choice and should be able to obtain good quality advice and advocacy services at a fair price for the work to be undertaken. Where the Bar is concerned it needs to be remembered that, in cases where there is a professional

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<sup>23</sup> <https://www.barcouncil.org.uk/uploads/assets/7e174116-64e1-4a9f-a2518f5f77a8be27/Bar-Council-response-to-Legal-Ombudsman-draft-business-plan-2021-22-consultation.pdf>

<sup>24</sup> The State of Legal Services 2020 report, para 9

client, the professional client knows the market and is themselves able to assist the lay client to understand whether a fee is reasonable.

112. Price transparency is particularly challenging in areas where work tends to be of a bespoke nature, and its scope unpredictable. Much of barristers' work falls into this category. It is invariably easier to provide an estimate of costs after an initial conference with the client where an understanding can be gained on the nature of the issue and the scope of the barrister's involvement in it.

113. Even so, in many instances, how much work will be required on a particular type of case will depend on so many imponderables – including the (unpredictable) behaviour of the other side – that precise and reliable predictions of cost remain challenging. The provider may choose to take the risk of uncertainty by offering a fixed fee (and this is increasingly common), but cannot properly be compelled to do so.

114. Because most barristers are retained, most of the time, by solicitors, the ultimate consumer interest is mediated by a professional who will tend to have a good idea of the market, and more clout as a purchaser, since the solicitor is a potential repeat client even if the lay client is not. In any regulation in this area it is important to recognise that what may be appropriate at a consumer-to-professional interface is different to what is required at a professional-to-professional interface.

115. The BSB's more detailed rules about fee transparency in relation to barrister's direct access work reflect this distinction.

## **Priority 2- Facilitate tools enabling consumers to easily compare providers**

116. In terms of quality indicators, although we agree in principle that quality indicators have the potential to serve as a factor in consumers making informed decisions when purchasing legal services, we do not conclude that further quality indicators will add much value for consumers in relation to barristers.

117. As detailed in our submission to the CMA study in 2016, a wide range of information is readily available to all potential clients to assess the quality of a barrister.<sup>25</sup> As mentioned, the Bar remains primarily a referral profession. Professional and licensed access clients will generally be sophisticated repeat customers and will have in-depth knowledge of the market for barristers' services. Whilst potential Public Access clients, engaging the use of a barrister's services directly through the

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<sup>25</sup> [Bar Council response](#) to the Competition and Markets Authority paper 'Market Study into the Supply of Legal Services in England and Wales', paragraph 23

Public Access scheme, are likely to have less experience of the legal services market, all the tools that are referred to in our submission are available to them.

118. There are many challenges in developing further quality indicators in relation to barristers, and these should be considered carefully before concluding whether new quality indicators are in fact needed.

119. As stated in our October 2020 response<sup>26</sup> to the Calls for inputs on the assessment of the implementation and impact of the CMA's market study, recommendations,

“Whilst the idea of customer reviews works well in some other sectors such as the hospitality sector, we question their usefulness in the context of legal services. Consumers purchase legal services infrequently<sup>27</sup>, which means that any review provided would not necessarily be a useful indicator for future consumers of that service. There is a possibility that consumers when judging the work of a barrister, could judge the quality of a barrister's work on the outcome of the case as opposed to the quality of the barrister's work. Consumers are not necessarily best placed to make a judgement on the quality of the service they received as there are a number of issues that may be dealt with, of which the consumer is unaware. As an example, barristers have to adhere to a Code of Conduct which includes drawing the court's attention to any decision which may be adverse to the interests of their client.<sup>28</sup> The client may judge their barrister negatively in this regard without understanding the barrister's full ethical duty. Quality indicators would not therefore necessarily provide a true picture of the service received, as taking these issues into account is not as simple as being able to provide a review for another service such as a hotel room or use of a hired car.

The Legal Services Consumer Panel (LSCP) recognise this limitation in its report titled, 'Consumers feedback on quality indicators in legal services',

“Often their experience of customer service at this stage is used as a proxy for quality of service, regardless of the actual quality of legal advice offered.”

It might also be difficult to develop indicators for barristers as the work undertaken at the Bar is so varied with specialists practising different skills in

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<sup>26</sup> <https://www.barcouncil.org.uk/uploads/assets/3c5fbc22-dec9-4904-b531890bba68343a/Bar-Council-response-to-CMA-review-of-legal-services-market.pdf>

<sup>27</sup> As noted by the LSCP, “Seeking out a legal services provider is a rare and infrequent activity for most consumers”, '[Consumers feedback on quality indicators in legal services](#)' 20 July 2020, page 2

<sup>28</sup> gC5 of the BSB Handbook



different areas of law. How, for example, does one meaningfully compare a shipping barrister giving contractual advice with a criminal defence barrister doing advocacy work? We consider, for example, that it would be challenging to have quality indicators for advocacy as different barristers have different approaches, which may suit one client better than another. Overall, as noted in our response to a recent Legal Services Board (LSB) consultation on Ongoing Competence,

“The Bar is a highly competitive referral profession and its core service of advocacy is delivered in public and in front of judges and lay and professional clients. There is little chance of hiding incompetence. Barristers owe duties, sometime conflicting, to their client and to the Court. These distinguishing features of the Bar are important, and we do not think they are shared by any other profession.”<sup>29</sup>

This position has also been set out by the Chair of the LSCP who recently stated at a Legal Services Board summit that it would be very difficult to introduce quality indicators for advocacy, for the reasons set out above.

In noting the difficulties in developing indicators for barristers, we are also concerned that barristers could be disproportionately impacted by negative reviews than other legal services providers. In our Bar Council response to the Legal Ombudsman’s Transparency and Reporting Impact discussion paper, we noted that,

“barristers that practice in certain areas of law<sup>30</sup> or who are instructed in a certain way, can be more vulnerable to complaints being made against them to the Ombudsman. Consequently, the risk of prejudice is greater for such barristers, even where complaints are not upheld. At worst, this could act as a disincentive to practice in certain areas or law or to accept instructions in a certain way and could impede access to justice”.<sup>31</sup>

Considerations that exist for barristers in terms of vulnerability to complaints may also apply in the context of negative reviews. Self-employed barristers may be more adversely impacted by a bad review than employed legal professions operating from within an authorised body. Barristers, particularly as a referral profession, rely heavily on their reputation. Just as in complaints

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<sup>29</sup> [The Bar Council’s Response to the LSB’s Call for evidence on Ongoing Competence](#), paragraph 89

<sup>30</sup> Crime, Litigation, Family Law, Employment and Immigration and asylum were the top areas of law for complaints against barristers, source; email from the Legal Ombudsman in April 2019

<sup>31</sup> <https://www.barcouncil.org.uk/uploads/assets/0ca7c546-9677-423d-9ad862175f75a851/Bar-Council-response-to-LeO-transparency-discussion-paper-Jan-2020.pdf>, paragraphs 31 – 32

data held by the Legal Ombudsman, a review may focus on the name of a self-employed barrister, whereas an employed legal professional may to some extent have a complaint focussing on the organisation as opposed to tarnishing the reputation of a particular individual. Any move to develop quality indicators, therefore, should take into account that self-employed barristers are more vulnerable to complaints, and should be approached with caution.”

### **Priority 3- Reduce complexity – ‘Simple Legal Products’?**

120. We are doubtful about how many (if any) such “simple legal products” there might be. One of the reasons why legal services have traditionally been provided by professional people is because of a realisation that clients may not realise that they have some unusual or very specific need, and one size generally does not fit all.

121. We see superficial attraction in investigating whether some limited services like will writing or conveyancing could be reduced to a simple legal service but we tend to think that, if it were possible to do this in a reliable way, the market would already have identified the opportunities available. But there are strong grounds to be cautious. Cut price conveyancing has given rise to a large number of claims; and will writing is particularly susceptible to low standards because the person best placed to complain about a poor service is generally dead by the time the shortcomings are likely to emerge.

122. Other regulators have been very cautious in giving their imprimatur to particular products. We know of no similar examples in the healthcare sector and the FCA has declined to approve or endorse particular product offerings.

123. If this idea has any merit it seems to us it should be promoted and developed by the market, not by the LSB. We are not convinced that this kind of market engineering is within the remit of the LSB. If it were to be taken forward by a party then we think any products that fall into this category need to be carefully packaged to make any consumer aware of its limits, and that it is likely to be fairly standardised. We do not think that much, if any, of the Bar’s work will be amenable to this type of branding due to the fact that it is mainly specialist legal advice and dispute resolution.

### **CHALLENGE 8: Fostering innovation that designs services around consumer needs**

#### **Priority 1: Keep regulation under review so that it does not impede innovation**

124. This is an appropriate and sensible priority for the LSB. We suggest that a better formulation would be to “Keep regulation under review so that it does not inappropriately impede innovation.” Sometimes regulation will, quite properly, impede new, but worse, ways of doing things.

125. But those reviews should be mindful of the fact that if regulation is perceived as limiting the ability to profit (a common reason for innovation) then it will always be considered an ‘issue’ by those with that perception. We cannot agree, at least at the moment, that important protections for the consumer (and the rule of law) such as client confidentiality, anti-money laundering and data protection are “issues”.

## **Priority 2: Create a regulatory environment that fosters innovation**

126. We agree that the regulatory environment should not unnecessarily deter innovation.

127. We consider that the regulatory environment for barristers is sufficiently permissive and flexible to allow them to practice in a variety of ways to deliver legal services. For services that barristers typically deliver, such as advocacy and specialist legal advice, there is limited scope for innovation as these tasks are reliant on an individual’s performance of a skilled task.

128. We note with surprise the suggestion that “the sector’s regulators can help ... by support[ing] new entrants with information, ... innovation funds .. and similar initiatives”. We are not persuaded that this is an appropriate or lawful application of a professional regulator’s funds.

129. We note the reference to regulatory sandboxes. This is a term that needs careful definition and we would be interested to hear an articulation of the principles applicable to regulatory sandboxes to which the LSB refers.

## **CHALLENGE 9: Supporting responsible use of technology that commands public trust**

### **Priority 1: Develop more and better open data**

130. The perceived need for the development of more and better open data is so widely stated as to be difficult to comment on.

131. We do not see that this ought to be a priority for the LSB, save insofar as the issue is collecting data for the LSB to fulfil its statutory functions.

132. We strongly endorse the view that the law must be available freely (in both senses of that word) to all citizens. We particularly welcome the comprehensive coverage provided by legislation.gov in relation to legislation, but, in a common law system, case law should be equally available. Systems like Lexis and Westlaw make

such material available, but only on subscription. We believe that a priority should be to expand the material made available to open access sites such as Bailii.org.

133. However, the reference to open data suggests something more. The gathering of data regarding the performance of courts and the judicial system is a valuable tool in identifying problem areas and improving efficiency.

134. We welcome the acknowledgement of the importance of professional privilege, but are concerned at the suggestion that there could ever be such a collection of data as might cause such an impingement on Legal Professional Privilege as to require consideration to be given to protecting it. Legal Professional Privilege is inviolable and is an essential component of the rule of law.

135. The context of the LSB's focus on data seems to be to facilitate the development of legal AI. The sorts of development which may be possible are referred to under the next heading.

## **Priority 2: Ensure emerging uses of technology are ethical and 'socially acceptable'**

136. We endorse the need to develop emerging technologies (including AI) so as to enable their use to be ethical and socially acceptable, but are concerned that there is no reference to the need to deliver AI systems which are effective, free of inherent bias, and capable of delivering solutions which are consistent with the proper development of the law. In particular, in the present state of the art, AI systems are not capable of replacing advocates or judges,<sup>32</sup> though they can provide useful assistance to skilled professionals in analysing evidence, facilitating disclosure, assisting in research and other similar background tasks.

137. We draw attention to the detailed work which has been done by the CCBE in analysing the limitations of AI and its acceptability in the legal process.<sup>33</sup>

138. Although the level of AI is still within the 'narrow or weak' level, we note that the use of AI systems by advocates and judges to augment their services should be made sufficiently transparent not just as to its use, but also as to how reliable any algorithm is, and a clear explanation as to the counterfactuals relied upon, so as to display accountability in the process.

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32 Mitchell, *Predictive Justice in the UK*, in *La Nuova Procedura Civile*, 5, 2019 at

<https://www.lanuovaproceduracivile.com/wp-content/uploads/2019/11/MITCHELLpredictive.pdf>

33 CCBE *Considerations on the Legal Aspects of Artificial Intelligence* (2020)

[https://www.ccbe.eu/fileadmin/speciality\\_distribution/public/documents/IT\\_LAW/ITL\\_Guides\\_recommendations/EN\\_ITL\\_20200220\\_CCBE-considerations-on-the-Legal-Aspects-of-AI.pdf](https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/IT_LAW/ITL_Guides_recommendations/EN_ITL_20200220_CCBE-considerations-on-the-Legal-Aspects-of-AI.pdf)

### **Priority 3: Deliver effective regulation of services using emerging technologies**

139. We welcome the recognition of the need to ensure that legal regulators are properly equipped to meet the need to cope with a world in which increasing use is made of AI, especially given the danger of a too-ready assumption that AI can provide or ought to provide a panacea for all the challenges faced by the legal system, and the risks posed by the use of AI which may not be effective, appropriate, ethical or socially acceptable.

140. However, we do not accept that these issues necessitate a review of present regulatory structures, as the challenges are not only (or even substantially) issues of regulation. There is a role to be played also by the relevant professional bodies (including the Bar Council), HMCTS and other stakeholders in the delivery of justice. Further, since the issues raised by AI are wider than their effect on the legal system, any consideration of the use of legal AI belongs in a wider context and requires a joined-up approach amongst Government, legislators, and other stakeholders both nationally and internationally.<sup>34</sup>

### **Priority 4: Reduce digital exclusion and maintain alternatives for essential services**

141. We agree with the LSB's recognition that consumers who lack the technology or capacity to engage with online portals (e.g. the small claims court) and online courts will be disadvantaged and that their needs need to be addressed. We have mentioned some of the difficulties with online courts in our answer to question 5 below.

### **Question 5 – Do you agree with our proposal to pursue these workstreams? Is there anything missing that you think we should focus on in 2021-22?**

142. We do not agree.

143. We think the LSB should aim to do less, but do it better. The work programme is so ambitious that it risks spreading resources so thin that little is achieved. There should be a focus on achieving positive engagement with the frontline regulators to support what they are doing, rather than an attempt to set the overall agenda. And, as developed below, there should be a focus on ensuring that the legal professions can overcome the effects of Covid19 lockdowns.

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<sup>34</sup> See *European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their environment* (2018) (Council of Europe – CEPJ) at <https://rm.coe.int/ethical-charter-en-for-publication-4-december-2018/16808f699c>

## **Existing workstreams**

144. We have commented earlier in our response on the issue of equality and diversity, quality indicators, and ongoing competence.

## **Comments on specific possible new workstreams**

### **Legal Expenses Insurance (LEI)**

145. We think that some consideration of LEI as a means to addressing unmet legal need is worth exploring. We would emphasise that we think LEI could be a useful addition to a suite of initiatives and tools aimed at addressing unmet need, the most important of which is a return to adequate criminal and civil legal aid funding.

146. We note that the Jackson Report recommended that,

“positive efforts should be made to encourage the take up of BTE insurance by SMEs in respect of business disputes and by householders as an add-on to household insurance policies.”<sup>35</sup>

147. But LEI is no panacea. Those least well-off will be unlikely to pay premiums for legal expenses insurance. There are serious risks of moral hazard too: the risk that it is only those who are naturally litigious that will take out such insurance.

148. It seems to us that the market is likely to identify and develop LEI products when they are workable and profitable.

149. We understand that the issue of legal expenses insurance is already within the scope of the Civil Justice Council,<sup>36</sup> so we question whether the work by the LSB overlaps with or even duplicates their work.

## **Scope of regulation**

150. This is not properly a matter for the LSB. Its role has been defined and it should discharge it, not divert its resources to a consideration of whether parliament ought to give it a different role.

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<sup>35</sup> [Review of Civil Litigation Costs: Final Report](#), 2009: 79

<sup>36</sup> <https://www.judiciary.uk/related-offices-and-bodies/advisory-bodies/cjc/>

## What is missing?

151. We consider that a significant omission from the workplan is an analysis of the impact of Covid19 on the entire legal profession. This is consistent with the following regulatory objective; “encouraging an independent, strong, diverse and effective legal profession”. Our recent research into the impact of the pandemic on the Bar has illustrated that there is a high risk that many barristers may leave the profession, particularly those practising in the areas of crime and publicly funded law. Chambers may be forced to close. This will negatively impact diversity at the Bar and may also restrict consumers’ choice of legal service provider.

152. Research we have conducted has revealed that the publicly funded Bar has been affected more severely than privately funded barristers. In our recent Bar survey,<sup>37</sup> conducted in December 2020, 84% of the publicly funded Bar were still billing lower fee income compared to their pre-Covid19 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 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.

153. 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 LSB does acknowledge in its consultation paper the financial pressures on the justice sector, but the proposed budget does not reflect this.

154. 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.<sup>38</sup>

155. Barristers from ethnic minority communities/backgrounds suffer disproportionate financial hardship and question whether they can continue to practise at the Bar. 48% of barristers from ethnic minority or mixed

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<sup>37</sup> Bar Council survey conducted in December 2020.

<sup>38</sup> Survey conducted in December 2020.

communities/backgrounds currently experience financial hardship, and 72% have at some point during the pandemic; 32% of white respondents currently experience financial hardship, and 59% have at some point during the pandemic. As is stated in the report, those from minority ethnic backgrounds, 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.

156. The wider impacts on the justice system include well-publicised and startling backlogs in caseload particularly in the area of crime. The Magistrates’ backlog at 27 December 2020 stood at 468,035 cases – a reduction of 11% from the peak seen on 26 July, but still 15% up on the pre-Covid19 baseline.<sup>39</sup> The Crown Court backlog at 27 December 2020 has started to come down a small amount, but is still at 54,115 cases.<sup>40</sup> This is 38% higher than the pre-Covid19 baseline (which was even then at record levels), and is the highest for at least twenty years, with the backlog disproportionately composed of complex and lengthy cases needing jury trials. The backlogs will lead to significant delays for defendants and claimants, sometimes numbering years, and may put people off from reporting crimes to law enforcement agencies and from resolving disputes in the first place, with attendant consequences for business and the rule of law.

157. Online courts have been rapidly adopted but are not without significant issues, as you acknowledge in the draft strategy:

“This has raised public policy questions about the appropriateness of using technology in different situations, for example the use of remote hearings in family cases and for jury trials.”<sup>41</sup>

158. We agree with your conclusion that,

“Once the pandemic is over, questions need to be resolved about where technology should continue to be used, and where we need to continue to offer choice in how services are accessed.”

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<sup>39</sup> HMCTS (14 January 2021) “HMCTS weekly management information during coronavirus - March to December 2020” <https://www.gov.uk/government/statistical-data-sets/hmcts-weekly-management-information-during-coronavirus-march-to-december-2020>

<sup>40</sup> HMCTS (14 January 2021) “HMCTS weekly management information during coronavirus - March to December 2020” <https://www.gov.uk/government/statistical-data-sets/hmcts-weekly-management-information-during-coronavirus-march-to-december-2020>. The court backlog figures are published [here](#). They are due to be updated on 15 February 2021.

<sup>41</sup> <https://www.legalservicesboard.org.uk/wp-content/uploads/2020/12/FINAL-draft-strategy-for-consultation.pdf>



159. Online hearings must not be accepted as the new normal. They should be used where necessary and helpful and not as a default or simply as an expediency measure for courts. The Bar Council's Civil Remote Hearings Working Group summarised their views in an internal report in early December 2020 and outlined some of the challenges as including:

- a. Remote hearings take longer to arrange and take longer to conduct;
- b. Judges and practitioners are not always familiar with the technology being used and this can cause issues when the court estate does not have a sufficiently robust technology support facility to support them;
- c. The use by the courts of Cloud Video Platform (CVP) has not been without hitches, somewhat understandably, given the speed with which it was introduced. For example, it lacks breakout rooms and you cannot communicate privately with your client. It does not have privacy "built in" for users. It is noticeably inferior to MS Teams for document and screen sharing. These issues will need to be addressed in the future Video Hearing Service to ensure it has these essential features and is fit for purpose. We will keep an eye on its suitability for online hearings and work with HMCTS to ensure that it works for all court users;
- d. There is sometimes difficulty in seeing all the witnesses and the judge on the screen;
- e. There can be late notification of arrangements for/invitation to remote hearings;
- f. In family courts, there have been challenges reported in relation to vulnerable witnesses and litigants in person. Litigants in person have to contend with an unfamiliar process under ordinary circumstances and the move online has made the process even more challenging for them. Claimants and respondents are resorting to using their phones where they don't have technology, often relying on unstable internet connections. In family cases, if conducted by telephone, it can be difficult for the barrister to keep in contact with their client during the hearing;
- g. In many cases, the parties do not have access to the necessary technology to enable them to see the e-bundle during hearings.

160. The Bar Council's Restarting Criminal Justice Working Group identified the following issues in its written evidence to the Justice Select Committee's Inquiry into Court Capacity:

- a. Two barriers to efficacy that must be addressed are: prison video end point capacity and digital inequality. CVP was only ever intended to improve quality, not capacity;

- b. The correct balance between remote and in-person hearings is still being calibrated. In some cases, remote hearings take longer to conduct. This can be for a variety of reasons – not least simply getting used to using it; but, also, court staff levels, the robustness of the technology and bandwidth. Inefficiencies often increase when the court is trying to juggle a list of remote hearings.

161. There are also significant challenges with in-person hearings:

- a. Multi-handed trials present particular challenges as it appears that there are relatively few court rooms which permit the trial on indictments with more than four defendants and social distancing, particularly with defendants in custody (because of lack of space in the dock);
- b. Jury trials in Covid19 require far more staff than usual, as many as five where there might have been one or two. They must supervise or operate technology, marshal witnesses and the jury in a socially distanced and safe way. Moreover, the clerks cannot multi-task across different courts as they used to – as they are now also answering emails and performing other administrative tasks. Everyone has to be patient, and many tasks take longer. Trials are much more demanding of human resources than pre-Covid19.

162. Anecdotally, many barristers are reporting difficulties with speaking to their clients in a Covid19 compliant manner, there are dramatic variations in Covid19 safety measures amongst courts, expensive travel costs due to avoidance of public transport and the stress of putting their health at risk whilst attending court.

163. The problems with online courts are particularly acute in the family and criminal courts and are not conducive to the fair administration of justice.

164. We are deeply concerned that the foundations of the justice system are threatened by Covid19 and that the LSB, professional bodies and regulators must divert resources and attention to understanding the issues and supporting legal professionals to continue their practices. We understand that the LSB has set up a Covid19 tracking function and we think this is a good start, but that the business plan for next year needs to give greater consideration to Covid19 and its continuing impact.

165. Similarly, the impacts of Covid19 will have created a whole host of legal problems for individuals and businesses. It is important to understand the rapidly evolving demands for different types of legal services.

166. We would encourage the LSB to continue to use its voice to emphasise to government the importance of access to justice and how an independent, strong and thriving Bar is key to this, as well as highlight the impact that legal aid cuts have had on reducing access to justice. One of the nine challenges detailed in the business plan is, “Lowering unmet legal need across large parts of society”, and it appears to us that the legal sector is being given the unachievable task of plugging the gap left by successive government cuts to the justice budget and legal aid as a result of LASPO. Our research report titled, “Small Change for Justice “, concluded that the Legal Aid Agency saw a 37% reduction in spending per person in real terms between 2010 and 2019.<sup>42</sup>

167. It is laudable that the charity partly funded by the Bar Council, Advocate, which coordinates the pro-bono work of barristers, successfully placed 1,415 pieces of work with barristers last year on behalf of its clients.<sup>43</sup> However important this is to the individuals that have benefitted from this pro-bono work, as well as the unrecorded pro-bono work that individual barristers take on through legal advice centres and on behalf of charities, it cannot and arguably should not address unmet legal need. It can only form a part of any solution, which ideally would be driven by a higher level of government funding of legal aid and a well-resourced network of legal advice centres such as Citizens Advice.

168. We share the LSB’s view that, “Legal aid can play an important part in access to justice for those otherwise unable to meet their legal needs”,<sup>44</sup> and have repeatedly called on government to reverse the cuts made in 2013 as a result of LASPO. In our September 2020 Spending Review submission, we asked for non means-tested legal representation to be made available for all domestic abuse cases, and for early legal advice to be made available for social welfare issues.<sup>45</sup>

169. The Bar Council recently published a report that analyses the impact of the LASPO cuts to civil legal aid.<sup>46</sup> The report sets out some of the detrimental consequences of this policy, for example, bereaved families being unrepresented at inquest hearings and problems with retention at the junior end of the Bar because of increased workload and lower fees in civil legal aid work.

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<sup>42</sup> <https://www.barcouncil.org.uk/resource/small-change-for-justice-report-2020-pdf.html>

<sup>43</sup> <https://weareadvocate.org.uk/public/downloads/PieM-/Top%20Newsletter%20January%202021.pdf>

<sup>44</sup> [LSB response to MOJ LASPO Review 2018](#): 5

<sup>45</sup> Bar Council (September 2020) “Bar Council Spending Review Submission”  
<file:///C:/Users/RHolmes/Downloads/Bar%20Council%20Spending%20Review%20Submission%20September%202020.pdf>

<sup>46</sup> <https://www.barcouncil.org.uk/resource/running-on-empty-civil-legal-aid-full-report.html>

170. We note that in Paragraph 1 of the LSB’s submission to the Justice Committee’s Inquiry: The Future of Legal Aid<sup>47</sup> it is stated that,

“Civil society is underpinned by the ability of citizens to access legal services when they need to. When someone experiences a life event, such as the death of a relative or the breakdown of a relationship, they may need to access legal services. Legal aid ensures that a citizen's financial means does not unduly limit their access legal services. A well-funded legal aid system signals the importance that society places on the ability of those without means to access justice.”

171. We also support these views and the implicit recognition of the limitations of the legal sector in addressing unmet legal need without comprehensive funding of criminal and civil legal aid.

172. In summary, we suggest:

- a) Your existing workstream on diversity and inclusion ought specifically to focus upon the impact of the pandemic and whether and how the LSB’s role in the oversight of regulation may assist in recovery;
- b) The technology and innovation workstream ought to focus upon any regulatory impacts of the extended use of online courts and other services. For example, whether different considerations are needed when considering performance of the regulators by reference to legal professionals’ work online;
- c) It is not sensible to consider a number of the new workstreams identified without reflecting upon and responding to the challenges posed by the pandemic. We suggest a new different workstream of review of regulatory performance following the impact of COVID19. There are threats to the sector and to consumers as a result of the pandemic and the LSB has a role in understanding and responding to those threats so far as they impact upon regulation; and
- d) The widely cast workstreams (which in any event the Bar Council considers to be outside the proper remit of the LSB as explained in the introductory section) should be removed from the business plan to make way for COVID19 recovery work: for instance the regulatory performance framework review and the policy framework assessment. It is necessary, at this time, to set sights lower and aim towards ensuring basic cost-effective regulation of existing legal services.

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<sup>47</sup> <https://www.legalservicesboard.org.uk/wp-content/uploads/2020/11/Justice-Committee-Future-of-Legal-Aid-Inquiry-LSB-Submission-October-2020.pdf>

**Question 6 – Do you see any areas of joint working between the LSB and you/ your organisation?**

173. We think there is scope to work together to highlight access to justice and legal aid issues and to understand and react to the dynamic challenges created by the health crisis.

174. We would be glad to share the research we have conducted on the impact of Covid19 on barristers' practices and work plans. This has given us valuable insights into the different ways barristers practising in different areas of law are impacted as well, and will inform policy and projects.

175. As part of the desk-based research the LSB conducts on the unauthorised sector it may wish to look at research the Bar Council commissioned in 2017 on fee paid McKenzie Friends. The LSB may also be interested in learning about our imminent plans to conduct research into Litigants in Person in the justice system.

**Question 7 – Do you agree with our proposals that we should not undertake a statutory review of reserved legal activities in 2021-22?**

176. We agree that the LSB should not undertake a statutory review of reserved legal activities in 2021-22. The legal service sector is under considerable strain right now with the financial resilience of many barristers and the businesses they operate from significantly weakened. At the same time the Bar is trying to deal with a combined court backlog of well over half a million cases, growing daily under challenging circumstances with remote hearings and socially distanced juries in some instances.<sup>48</sup> We are wary of the potential for regulatory change (whether taking place within the LSA07 or outside it) to cause further disruption and damage to the Bar and its ability to meet the needs of consumers of legal services and the administration of justice.

177. We have provided more information under the LSB's 'Challenge 5' about our view of the reserved legal activities and, in short, we do not think that now is the correct time to be undertaking a review into the reserved legal activities. We note however, a statutory review should not simply be pushed back to a later year, such as 2023. Firstly, we do not agree that there is a fundamental problem with the current reserved activities, and secondly, the profession and the public need a stable regulatory system both during and after the pandemic to allow full recovery. We

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<sup>48</sup> Noted in the Bar Council response to the Competition and Markets Authority's (CMA) Review of the legal services market study in England and Wales:  
<https://www.barcouncil.org.uk/uploads/assets/3c5fbc22-dec9-4904-b531890bba68343a/Bar-Council-response-to-CMA-review-of-legal-services-market.pdf>

cannot support a review of the reserved legal activities which would detract resources from core LSB activities, and also the regulators and professional representative bodies, during a time when the professions most need support and stability.

**Question 8 – Do you have any comments on our proposed market intelligence work? Is there anything missing that you think we should focus on?**

178. We agree with the proposal to undertake a mapping exercise with regards the unauthorised sector. As we detailed in our response to the CMA Call for Inputs,

“Critical to any decision about whether regulation should be extended to include unauthorised providers of legal services is an understanding of the extent of their activities and the harm they may or may not be causing consumers of legal services and the administration of justice. The CMA acknowledged a lack of evidence pertaining to the unauthorised part of the legal services sector in its 2016 Final Report.<sup>49</sup> In the limited research the CMA conducted as part of the market study, it did not find any evidence of significant issues regarding unauthorised providers in relation to sales practices, quality of legal advice and clarity of information,<sup>50</sup> though it admitted it didn’t necessarily have the full picture. The LSB noted in their report on unregulated providers in 2016 that, “this study is not a comprehensive analysis of consumer detriment and further work would need to be undertaken for a complete analysis of benefits and risks.”<sup>51</sup> Clear evidence of widespread and significant harm is lacking.”<sup>52</sup>

179. We went on to detail the uncertainty over the scale of the unauthorised sector;

“In 2016 the LSB commissioned research on the for-profit provision of legal services by unauthorised service providers and found they only represented a small part of the sector,

“For profit unregulated providers make up a small proportion of the legal services market. In the individual legal needs survey, they represented 4.5-5.5% of cases in which consumers paid for advice or representation.<sup>53</sup>”<sup>54</sup>

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<sup>49</sup> CMA [Legal Services Market Study Final Report](#) 2016: 12

<sup>50</sup> CMA [Legal Services Market Study Final Report](#) 2016: 149

<sup>51</sup> LSB research summary [Unregulated Legal Service Providers](#) 2016: 6

<sup>52</sup> <https://www.barcouncil.org.uk/uploads/assets/3c5fbc22-dec9-4904-b531890bba68343a/Bar-Council-response-to-CMA-review-of-legal-services-market.pdf> 2020-17-18

<sup>53</sup> LSB research summary [Unregulated Legal Service Providers](#) 2016: 1

<sup>54</sup> <https://www.barcouncil.org.uk/uploads/assets/3c5fbc22-dec9-4904-b531890bba68343a/Bar-Council-response-to-CMA-review-of-legal-services-market.pdf> 2020-18

180. We think that there needs to be a robust evidence base before any consideration is given to extending the scope of regulation beyond that envisaged by Parliament when it enacted the Legal Services Act 2007. It must detail the size of the unregulated sector, and whether, as the LSB predicts, it is growing, as well as any consumer detriment caused by a lack of regulation.

181. We are pleased to see the LSB acknowledge in the consultation document,

“We recognise the economic pressures on the profession and that the focus on the unregulated sector potentially raises fairness issues for those who pay the levy”<sup>55</sup>.

182. Any LSB resource used to plan and implement the regulation of unauthorised providers should not be derived from those that already pay, via their Practising Certificate Fee, to be regulated.

183. It is logical to continue to mine existing research for useful information that can inform regulatory policies. This will minimise cost, and consequently we are supportive of it.

184. The Covid19 dashboard the LSB has developed is useful at providing a snapshot of changing legal needs of the population and in illustrating the growing backlog of cases in the Crown Court and Magistrates Court. We support its continued existence for the duration of the pandemic. As identified above, the Bar Council consider that the intelligence received through this means, as well as material that we and other regulators can provide, ought to be reflected in the positive workstreams contained in the business plan going beyond merely gathering of market intelligence.

185. We support the case studies on consumer vulnerability. It is in everybody’s interests that more vulnerable members of society are supported in meeting any legal needs they may have. Information on how to better support vulnerable citizens to access legal services will raise awareness of the issues and inform policy and practice.

186. We are not sure why data trusts should form the focus of LSB research. No explanation is given for this aim and we question its relevance to legal services regulation and whether it is necessary at this time.

### **Use of the Public Panel**

187. The LSB Report “The State of Legal Services” was published in November 2020. The narrative report refers to the LSB’s Public Panel report some 16 times in support

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<sup>55</sup> [LSB Draft strategy for legal services regulation and draft business plan 2021-22](#), 2020: 15

of the views advanced. The same Public Panel report also provides all of the large headline quotes set into the text.

188. An example of such a headline, in the form of a quote from a member of the public is:

*“It is odd that the list of regulated services has not been reviewed for some time. With the advance of internet-based services, this is in danger of being left behind the pace of the real world and new ways of providing advice that ought to be regulated.”<sup>56</sup>*

189. The Public Panel report was in fact the product of a market research exercise commissioned by the LSB from a third party conducted over a week in June and July of 2020. It involved guided question and answer sessions with 41 members of the public.

190. We asked for more information on how this research was carried out and received a "technical annexe" in December 2020 which the LSB then placed on its website. We have concerns about how this exercise was conducted and the manner in which guided questioning appears to have produced results which align with the policy objectives which the LSB set out in its November 2020 Report.

191. It appears that participants were shown videos and given “fact sheets”. By way of an example one such fact sheet had the heading “Changing which legal activities should or should not be regulated” and included the following “fact”:

*“The list of activities that only regulated lawyers or law firms can provide hasn’t been reviewed for a long time. Many people think the list does not reflect those activities where consumers are at greatest risk. The system is also confusing for people to understand. Developments in technology, such as websites where people complete legal forms without input by a lawyer, mean that more people are likely to use unregulated law firms in future.”<sup>57</sup>*

192. We think these are questionable assertions and, for the reasons set out earlier, the topic itself is well outside the scope of the LSB's statutory role. However, the "fact sheet" might well explain why a member of the public has been quoted as providing the opinion referred to above. It appears to derive entirely from what he or she had been presented with as an apparently factual statement. We question whether the LSB should be using the levy imposed on legal professionals to conduct an exercise for the

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<sup>56</sup> LSB report on The State of Legal Services, November 2020, p.34

<sup>57</sup> <https://www.legalservicesboard.org.uk/wp-content/uploads/2020/12/Public-Panel-Report-August-2020-Technical-Annex.pdf>



purpose of obtaining material with which to lobby for changes to which legal activities are regulated.

193. We note that the Public Panel report states in terms that “The Legal Services Board (LSB) is developing a new strategy for the legal services sector”. As we have observed this is not the role of the LSB and it should not be employing its funding for this purpose.

194. We are also concerned that the LSB is simply bypassing the existing statutory mechanisms under the Legal Services Act which enable it to canvas the views of the public and users of legal services about matters which are properly within its remit. The Legal Services Consumer Panel (LSCP) was created by the Legal Services Act 2007 expressly for this purpose. The Panel is an independent arm of the Legal Services Board and is made up of eight lay members whose appointments were approved by the Lord Chancellor. The purpose of the panel is to:

*“...provide high quality, evidenced-based advice to the Legal Services Board, in order to help them make decisions that are shaped around the needs of users...The Panel has legal powers to publish its advice and the Legal Services Board has a legal duty to explain its reasons when it disagrees with the advice that we publish.”<sup>58</sup>*

195. For the last nine years the Panel has commissioned YouGov to conduct an annual survey on a sample of people who have used legal services. In 2020, it spoke to 3623 legal service users. It also carried out a range of work and published reports including its Consumer Impact Report based upon survey findings. It has just published a report dealing with the experiences of Black, Asian and Minority Ethnic groups using legal services. We would be very concerned if the LSB is proposing to carry out further work which should properly be carried out by the LSCP or is duplicating such work.

#### **Question 9 – Do you have any comments on our proposed budget for 2021/22?**

196. As stated in the overview, the LSB should be focusing on delivering its core functions within the remit of the Legal Services Act 2007 in a cost-effective manner. This has never been more pertinent, given that Covid19 has clearly had a far-reaching impact on the barristers’ profession, of which we are yet to see the full extent. Any increase to the budget must be for essential activity only.

197. We appreciate that the budget is said to reflect the resources the LSB needs to meet the strategic objectives. However, there is also new planned expenditure, for example investment in research. Whilst we agree that some research from the LSB can

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<sup>58</sup> <https://www.legalservicesconsumerpanel.org.uk/about-us>

be useful, such as the Covid-19 impact dashboard on the LSB's website,<sup>59</sup> we are concerned that expenditure is being factored into a budget where it is not strictly necessary. For example, in the paragraphs immediately preceding question nine, we raise some concerns about the LSB's funding of a Public Panel when the LCSP is already funded via the levy on the regulated legal sector to undertake very similar work. Perhaps consideration could be given to delaying certain pieces of less urgent research and work until the professions have recovered from the pandemic.

**Q10 – Do you have any comments regarding equality issues which, in your view/experience, may arise from our proposed business plan for 2021/22? Are there any wider equality issues and interventions that you want to make us aware of?**

There are no issues we wish to raise.

**Bar Council**

**12 February 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](mailto:SRichardson@BarCouncil.org.uk)*

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<sup>59</sup> [https://www.legalservicesboard.org.uk/coronavirus\\_impact](https://www.legalservicesboard.org.uk/coronavirus_impact)