



Bar Council response to the Legal Services Board draft Business Plan 2017/18 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 (LSB) consultation paper entitled draft Business Plan 2017/18.¹
2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Overview

4. The Bar Council welcomes the opportunity to respond to the LSB's draft Business Plan 2017-18. The response should be read in the context of our response² to the 2015-18 Strategic Plan in 2015.
5. We think theme 3: "performance, evaluation and oversight" is the most important stream of work for the LSB and is closest to its responsibilities as laid out in the Legal Services Act 2007 (LSA07). We consider the oversight activities as the core of the LSB's work and think it should be given the highest priority.

¹ http://www.legalservicesboard.org.uk/Projects/pdf/20160412_LSB_Business_Plan.pdf

² http://www.barcouncil.org.uk/media/336531/legal_services_board_strategic_plan_2015_18_and_business_plan_2015-16.pdf

Question 1: Do you have any comments on our proposed programme of work?

Theme 1-Breaking down the regulatory barriers to competition, innovation and growth

6. In our response to last year's LSB business plan, we expressed concern that the statement: "the market is moving away from traditional legal service structures defined by title, partnerships and chambers" is an inaccurate depiction of the Bar, since the vast majority of barristers practise from chambers and this looks likely to remain the case. This is testament to the enduring success of this model of practise. Hence we think that it is inappropriate for the LSB to promote certain business models over others. In our response to the Ministry of Justice's consultation paper entitled Tailored Reviews of the Legal Services Board and the Office for Legal Complaints 2016: call for evidence we said,

"The success of a business will be determined by the market and we consider that the LSB has been too vocal in its promotion of Alternative Business Structures (ABS.) The assertion that ABS are more innovative than other legal service business models is based on one research piece³ and we think it is too early to come to any firm conclusions. The Bar Standards Board has not yet become a Licensing Authority. Furthermore, the CMA, in its interim report⁴ has so far found the impact of ABS on competition in the market to be 'limited,' emphasising that they do not often differ much from 'traditional firms that were in operation in the market prior to 2011."

7. Turning to each of the LSB's planned activities for 2017-2018,

8. Whilst it is helpful to revise guidance periodically to ensure that is up to date, we do not think the education and training guidance should be revised in this coming year. The BSB is in the midst of considering significant change to the structure of barristers' education and training. This guidance ought to be reconsidered once the various routes to qualification have been finalised. For that reason, we suggest that this ought to be considered for a future plan.

9. We recognise that working towards a goal of "simplified regulatory arrangements" might appear attractive in principle but caution against prioritising consistency across regulators over proportionality of regulation. There are differential levels of risk posed by different types of businesses and their associated structures. This ought to be reflected in the regulation. For example, the rules governing the regulation of authorised bodies regulated by the SRA and BSB are and should be different because of the different risks they pose to consumers.

Theme 2- Tacking unmet legal need

10. We are supportive of the LSB's work for vulnerable clients. We are aware of the challenges of engaging with legal providers faced by people in vulnerable circumstances and

³ <https://research.legalservicesboard.org.uk/wp-content/media/Innovation-Report.pdf>

⁴ <https://assets.publishing.service.gov.uk/media/577f76daed915d622c0000ef/legal-services-marketstudy-interim-report.pdf>

we would like to see their legal needs met as best possible. We look forward to engaging further with the LSB on this important issue.

11. This issue of unmet legal need cannot be considered without an understanding of the relevant political and economic context. We urge the LSB to take into account the many other factors that can contribute to this problem such as cuts to legal aid and increased court fees. The focus should not be exclusively on lawyers' fees.

Theme 3- Performance, Evaluation and Oversight

12. So far as changes to the regulatory arrangements are concerned, we urge the LSB to conduct a thorough impact assessment or else require the party proposing the change to carry out the same. Impact assessments allow a thorough and objective analysis of the advantages and disadvantages of a proposed change and its impact upon consumers, the administration of justice and the regulated community. They are also useful for considering the impact of regulatory burdens. More systematic use of regulatory impact assessments would also help the LSB to meet its objectives in theme 1.

13. In 2016 the Bar Council responded⁵ to the LSB consultation on s69 statutory powers of intervention. We expressed concern that many of the powers being sought in relation to BSB- authorised bodies and individual barristers did not relate to the regulatory risk of the businesses concerned. We said,

“There does not appear to have been any serious consideration of the effectiveness of the existing powers available to the BSB and whether those are sufficient for its regulatory purposes”⁶

14. The basis for the proposed measures was not made out and this was revealed by the insufficient level of analysis on the impact of the proposed changes. We were and remain unconvinced that the far-reaching powers proposed are necessary or proportionate to the level of risk posed by bodies regulated by the BSB. We are concerned that these changes will bring about unnecessary regulatory burden and elevated costs to the profession.

15. The Bar Council is a strong advocate for regulation that is independent from government but this is a separate issue to that of structural separation of the BSB from the Bar Council. Our view is that, for the Bar and its clients, the arrangements to ensure regulatory independence are working well. There is no convincing evidence that the work of the BSB has been hampered by the role of the Bar Council as specified under the Act or by the way the Bar Council discharges its responsibilities. There is, therefore, no case for taking steps to make the BSB completely separate and to excise the Bar Council and the voice of profession from the

⁵Not yet published at the time of writing.

⁶response of the General Council of the Bar of England and Wales (the Bar Council) to the Legal Services Board consultation paper entitled 'Section 69 Order to modify the functions of the Bar Council' consultation paper

http://www.barcouncil.org.uk/media/504910/bar_council_s69_response.pdf

regulatory structure set up as envisaged by Clementi and promulgated by the LSA 2007. We consider that it does not make sense to look at the issue of structural separation of regulators and representative bodies without a wider review of the Legal Services Act that will allow for a proper examination of the roles of the regulatory and representative bodies. We agree with the CMA that review of the regulatory framework is a longer term issue⁷.

Question 2- Do you have any comments on the research we have proposed?

16. No, we find the research informative and helpful.

Question 3- Do you have any proposed comments on our proposed indicative budget?

17. We are pleased to see the LSB is continuing to reduce costs and ensure efficiencies where it can and we encourage the LSB to keep this under review. We note that the cost of the pensions scheme is 19% of the LSB's salary bill (2015/16 accounts) and it's possible that there could be opportunities for savings here.

18. We are supportive of the reduction in the cost of funding the LSB to each practitioner reducing from £34 (2010/11) to £19 (2016/17) per practitioner – a 44% reduction. We note that this is not wholly attributable to a reduction in LSB expenditure (estimated at 13% over this period) but is due in large part to the 21% increase in the number of practitioners from 143k lawyers (2010/11 accounts) to 173k lawyers (2017/18 plan). Even if LSB costs had remained flat, the cost per practitioner would have dropped significantly simply to this growth. We question therefore whether there is scope for a greater reduction in expenditure.

Bar Council
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⁷ CMA Legal Services Market Study final report 2016: 274