



Bar Council response to the Legal Services Board Draft Business Plan 2016-17

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) Draft Business Plan 2016-17.¹
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 2016-17. The response should be read in the context of our response² to the 2015-18 Strategic Plan last year.
5. The Bar Council considers that many of the regulatory barriers to competition, innovation and growth have already been removed as a result of a planned and sustained programme of liberalisation by the Approved Regulators, overseen by the LSB. Barristers can now enter into ABSs and entities, conduct litigation and accept instructions directly from the public and from licenced access clients. These changes should be given an opportunity to bed in and have their impact assessed before further changes are made. Although the regulatory landscape has changed, the referral model (based on the chambers model) remains popular amongst clients and the Bar. We believe that the enduring success of this model is because it

¹ [LSB 2016 draft business plan 2016-17](#)

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

fosters a culture of excellence and as a result of low overheads, flexibility and low risk of conflicts.

6. The Bar Council supports the LSB's intention to improve scrutiny of regulatory costs and hold the regulators to account for their performance. This is because the Bar Council is concerned that the BSB is expanding the scope of its activity into areas that are the responsibility of, and best suited to be undertaken by, the Bar Council, for example in relation to education, rule of law policy work and equality and diversity.

7. The Bar Council is not in favour of further regulatory independence. We do not think it is helpful that the LSB and BSB are calling for this ahead of the Government's consultation on the matter and in isolation from the whole regulatory framework underpinned by the LSA 2007. 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 and there is, therefore, no case for taking steps to make the BSB completely separate.

8. The wider context of cuts to legal aid and increases in court and tribunal fees is also important to consider when looking at access to justice. Whilst the statute requires that regulators' professional bodies and legal service providers play a role in increasing access to justice, it should not be and cannot be solely their responsibility to address this fundamental rule of law issue.

9. Whilst remunerated McKenzie friends can play a role in assisting litigants in person they pose a significant risk because of the absence of regulation, or of any requirement to maintain professional indemnity insurance cover and because their clients are unable to achieve satisfactory redress when they have cause to be dissatisfied with the service they receive. For these reasons the Bar Council welcomes the LSB's proposal to protect consumers who are using unregulated legal providers. Similarly the Bar Council supports the LSB's plans to commission research into vulnerable clients.

9. In our response to the LSB's Draft Strategic Plan 2015-2018 and Business Plan 2015-2016 we expressed concern that the plans did not 'make any reference to the long-term ambition to find a framework which no longer requires the services of the Legal Services Board.' We expected such a plan to be present in a strategic plan spanning a three-year period. We note that there is no reference to this in this year's business plan either and we would be interested to learn what the LSB's plans are in this regard.

1. Do you have any comments on the proposed work plan?

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

10. The Bar Council believes that the legal services market has already undergone a high degree of liberalisation in recent years. Focussing on the Bar, barristers can already become authorised to conduct litigation, undertake public and licenced access work in which they work directly with the consumers of legal services, form entities and establish ABSs. The

removal of regulatory barriers has enabled the Bar to offer a wider array of services to clients and ultimately increases consumer choice.

11. The Bar Council considers that the referral model is still the most efficient business model for the client. It enables targeted access to a wide range of competing specialist legal advice and advocacy services at low cost. As barristers within chambers are self-employed the potential for conflicts is much reduced, enabling greater consumer choice. This is particularly important in highly specialist areas of law where only a handful of chambers operate. The chambers model is very lean with low overheads and can adapt swiftly to changing market conditions. Indeed a few chambers have set up annexes and entities that aim to tap into specific markets. For example 9 Bedford Row recently formed ABS 9 Jockey Fields Limited to focus on military law and through this structure they hope to refer work back to solicitors and tender for work more easily.

12. Dual practice enables barristers to work in both an employed and self-employed capacity, allowing them to adapt to the changing market and offer their legal services in more diverse ways.

13. We would therefore challenge the LSB's assertion that, "the market is moving away from traditional legal service structures defined by title, partnerships and chambers", and would ask where the evidence for this is. This may apply to many legal service providers but we question its application to the Bar. If anything, we are seeing chambers innovating and adapting in response to the market.

14. We are supportive of the LSB's aim to, "improve scrutiny of regulatory costs and identify opportunities for saving". We are concerned that the BSB is going beyond its core activities in the areas of education, equality and diversity and policy input into the rule of law and that this will unnecessarily increase costs. However any scrutiny ought to be conducted in a timely manner in order that the authorisation to practice process is not delayed.

15. We recognise that "simplified regulatory arrangements" might appear attractive in principle. However, the non-lawyer element of ABS may lead to a higher level of regulatory risk with the result that any simplification in regulation should seek to avoid reducing standards or weakening consumer protection.

16. The Bar Council is a strong advocate for regulation that is independent from government but disagrees with recent calls for greater independence of the BSB from the Bar Council. Our view is that, for the Bar and its clients, the arrangements for securing 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 has discharged 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 regulatory structure set up in the LSA 2007. Further, we consider that it does not make sense to look at regulatory independence without a wholesale review of the Act and an examination of the roles of the regulatory and representative bodies.

Theme 2-Enabling the need for Legal Services to be met more effectively

17. When considering how legal services needs can be addressed most effectively, it is important to avoid focusing entirely on the ability of legal services providers to address this need. The ability of consumers to access legal services is powerfully shaped by government policy. For example, recent changes have made it difficult for individuals and SMEs to gain access to legal services because of cost. The cuts to legal aid that took certain family and civil cases outside the scope of legal aid came about through the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) in 2012. Among other things, this has removed the ability of claimants and defendants to gain financial assistance for their legal representation in divorce, save for circumstances where there is an allegation of domestic abuse.

18. In addition, recent court and tribunal fee increases have made a court or tribunal case too expensive for some. Court fees for divorce have risen almost four-fold, from £140 to £550.³ Employment tribunals have seen a 70% drop in claims in the last year.⁴ It is thought that this is not attributable to spurious claims being deterred but rather by the substantial increase in tribunal fees making claims unaffordable. The Bar Council argues that such contextual factors ought to be borne in mind when considering how legal services needs can be addressed most effectively.

19. In the context of comparison websites, plainly consumers need to be able to make informed choices. When seeking legal services we think that there is already a wealth of information available to help them make that choice. In our recent response to the Competition and Markets Authority Market Study into the supply of legal services in England and Wales Statement of Scope we listed the many sources of information which consumers can use when seeking a barrister. Please see Annex A for a full list.

20. We would seek clarification on the level of information intended to be included on any comparison website. We would highlight the fact that all barristers' disciplinary records can be seen on the [BSB's Barristers' register](#), as commended in the recent report by the Legal Services Consumer Panel entitled, "Opening up data in legal services"⁵, and caution against duplication of effort which is a waste of resources and may make decision-making by consumers, confronted with similar information in different places, more difficult.

21. We would also point to the existence of the [public access portal](#), a Bar Council search engine that lists public access qualified barristers, mediators and arbitrators. This is intended for use by members of the public who wish to instruct a barrister directly.

22. However the majority of consumers of barristers' services come via professional clients. They are usually sophisticated purchasers, who are well-versed in the different information sources and consequently well-qualified to make informed assessments of a

³ <http://www.independent.co.uk/news/uk/politics/soaring-court-fees-will-discourage-ordinary-people-from-seeking-justice-a6835231.html>

⁴ *Ibid*

⁵ http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/OpenDatainLegalServicesFinal.pdf

barrister's quality and cost and to make a recommendation to their clients. Hence the need for further information is less than where members of the public instruct their lawyer directly.

23. The Bar Council is also concerned about the unregulated sector, in particular remunerated McKenzie friends who have no professional indemnity insurance, no ethical code to adhere to and who owe no duty to the court. As the LSB has acknowledged, consumers have no right to complain when they are dissatisfied with the service they have received. This state of affairs cannot be in the consumer or public interest. We are concerned that vulnerable clients are at particular risk.

24. Like the LSB, the Bar Council is committed to improving access to justice for vulnerable clients. It already delivers training for public access barristers in how to handle vulnerable clients and has a key role in the implementation of the vulnerable witness training programme for criminal barristers. It also supports the work of the Bar Pro Bono Unit and other pro-bono schemes whose clients are often vulnerable and have nowhere else to turn for legal advice. The Bar Council welcomes the LSB's intention to commission research into the experience of vulnerable consumers of legal services. In this connection it is important that the LSB considers the wider context in which legal services providers seek to address clients' needs by including consideration of the impact of legal aid cuts on vulnerable clients' ability to access legal advice and representation.

Theme 3- Performance, evaluation and oversight

25. We wish to re-emphasise the points that the Bar Council has made in the past with respect to LSB's draft business and strategic plans that the LSB's core function is to exercise regulatory oversight. It is of paramount importance that regulation should be proportionate, reasonable and independent from government.

26. We note that the LSB states that it, "shares with the legal services regulators a regulatory objective to encourage an independent, strong, diverse and effective legal profession". In our response to the BSB's 2016-2018 Strategic Plan we expressed concern about the BSB's assertion that its role is to, "uphold our obligations under the LSA 2007 and the Equality Act 2010, promoting diversity in the profession and eliminating unlawful discrimination and equality of opportunity and fostering good relations between different groups". We consider that this interpretation of the BSB's role is too broad and would question the LSB's stated aim of promoting the role of regulators in driving improvement in this area. Whilst we would agree that the BSB should set regulatory standards in line with the aforementioned statutes and ensure compliance with the Equality and Diversity rules within the Handbook, we consider the active promotion of diversity objectives to be a task better suited to (and already being undertaken by) the Bar Council. Indeed in 2014 a Memorandum of Understanding (MoU) on diversity issues between the Bar Council and the BSB established the roles and responsibilities of each body. It was agreed that:

"(the) BSB will focus on its regulatory duties and Bar Council will focus on awareness raising, advice, support and dissemination of good practice."

27. At paragraph 25 of the BSB's strategic plan it is stated that, "We will promote good practice". The MoU clearly states development and dissemination of good practice as falling within the realm of the Bar Council and we are concerned that the BSB is going beyond the role established for it in the MoU and the LSA 2007. Any duplicative work would be an inefficient use of time and money. We urge the LSB, when considering the role of regulators on this subject, to ensure that the focus on diversity remains on regulatory duties and not on the promotion of best practice as undertaken by the Bar Council.

28. We have no issues with the proposed work plan with respect to the OLC.

29. With regard to concerns at paragraph 59 of the LSB's Draft Business Plan about, "regulatory arbitrage" from the Bar perspective, there is only a very narrow degree of overlap in regulation and this is only relevant in the area of regulated legal entities, which constitute a very small number of barristers. As the BSB can only regulate entities that focus on the provision of advocacy and litigation services and will only be able to regulate ABSs, if approved, with the same focus, that regulatory arbitrage is not a risk. Further, we have argued at length in previous responses, and more recently in our submission to the CMA, that regulation needs to be proportionate to the regulatory risk posed. Given that BSB-regulated entities and ABSs do not hold client money, this sets them apart from other entities regulated by other regulators. The risk posed to the public is lower and the level of regulation should reflect that. Regulation that is disproportionate in its effects restricts innovation and growth and is not in the interests of the public nor of the profession. The Bar Council agrees that where there are inconsistencies of regulation that need addressing, it is best that this be done by the frontline regulators working together, rather than by the LSB.

30. We consider that there is a strong case for a specialist regulator for barristers and entities focused on advocacy and litigation. A specialist regulator that is tailored to the activities that barristers undertake has the expertise, buy-in from the profession and is likely to regulate more effectively.

2. Do you have any comments on the research that we have proposed?

31. The Bar Council fully supports evidence-based policymaking and considers that the proposed pieces of research entitled, "Regulatory issues for special bodies", and, "Vulnerable consumers", are potentially useful. Before we can comment meaningfully on these projects, we need further information about their aims and objectives, and the budgets assigned to them.

32. We are concerned that the proposal to conduct research entitled, "The Investor Perspective" goes beyond the core purpose of the LSB. We believe it is sufficient that entities and ABSs are permitted and that the market will determine how successful they are as businesses and the extent to which external investment is attracted to them.

33. We do not understand the purpose of the research entitled, "emerging market risks" and seek further clarification as to what this entails.

3. Do you have any comments on the commission we proposed for the Legal Services Consumer Panel?

34. This would seem a sensible area of research. However if research is undertaken in collaboration with the Legal Services Consumer Panel, it needs to be clear which parts of the legal services sector are being investigated. In the piece of research the panel conducted on unbundling,⁶ barristers were omitted from the research despite the fact that, as a referral profession, their services are by their very nature unbundled. We hope this was not the result of a misunderstanding of the work of the Bar.

4. Do you have any comments on the LSB's budget?

35. We are pleased to see the LSB is continuing to reduce its operating costs but would question the staff costs which seem disproportionately high.

36. We note the relatively low direct cost to lawyers of funding the LSB but would point out that it is not as simple as represented because some LSB and BSB initiatives will also have a financial impact on barristers. For example, compliance with supervision requirements may increase the costs of regulation both for the BSB (with a knock-on impact on barristers' practising certificate fees) and chambers which dedicate time and money to comply with the supervision requirements. These costs will inevitably create a knock-on effect for the consumer through higher fees. We question whether the supervision of chambers is proportionate given chambers' limited role in the provision of legal services. For example, neither chambers nor their individual members are permitted to handle client money and chambers have limited contact with a client's affairs. Unlike lawyer-only entities or ABSs, chambers are not regulated organisations as it is the barrister-members that provide the legal services and not chambers.

Bar Council
19 February 2016

For further information please contact
Sarah Richardson
The General Council of the Bar of England and Wales
289-293 High Holborn, London WC1V 7HZ
Direct line: 0207 611 1316
Email: SRichardson@barcouncil.org.uk

⁶ https://research.legalservicesboard.org.uk/wp-content/media/14-086345-01-Unbundling-Report-FINAL_060815.pdf

Annex A- information sources that can be used to assess the quality of a barrister

1. Chambers' websites, which have detailed information on barrister members. Each barrister usually has their own webpage setting out a comprehensive CV detailing qualifications, practice areas, notable cases and quotes from clients. The website may also have articles and blogs written by members which demonstrate their expertise and knowledge;
2. Speaking to the clerking team, who will have a detailed knowledge of their barristers' areas of practice;
3. Professional Directories, such as *Legal 500* and *Chambers and Partners*;
4. The Bar Council and Thomson Reuters search engine, "[Bar Directory](#)"
5. The [BSB Barristers Register](#) which also provides information on any disciplinary action against a barrister;
6. The Specialist Bar Association websites, where a client is looking for a barrister in a particular area of law. A full list of the Specialist Bar Associations can be found on the [Bar Council website](#).
7. [The Bar Council website](#);
8. Articles in the legal press written by barristers which demonstrates their expertise in a particular area;
9. Previous experience of working with a barrister or on a case on which the barrister was acting for the other side or a recommendation from a colleague;
10. Whether the barrister has been awarded the QC title;
11. The barrister's number of years of experience (known as years' call).