



Bar Council response to the Review of the Legal Services Regulatory Framework consultation paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Ministry of Justice consultation paper entitled Review of the Legal Services Regulatory Framework.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.

Introduction

4. The Bar Council welcomed the announcement of the Government's decision to undertake a review of the legal services statutory framework.² The purpose of the review is to consider what could be done to simplify the regulatory framework and reduce unnecessary burdens on the legal sector whilst retaining appropriate regulatory oversight. This response summarises the Bar Council's assessment of the current state of regulation of legal services in England and Wales. It argues for a re-balancing of the regulation of legal services in a way that will meet the public interest in effective regulation, the consumer interest in protection and the need to remove unnecessary costs and burdens on the profession. It puts forward a concept design for a modified model of regulation which builds on the past and looks forward to the future. We would be pleased to meet with the Ministry of Justice to discuss this submission.

¹ Ministry of Justice (2013) Legal Services Regulatory Framework

² *Official Report* (HC), 5 June 2013, col 106 WS.

Context

5. Our response takes account of the policy context in which the reforms reflected in the Legal Services Act 2007 (the Act) were developed and what has been achieved since then, by the Legal Services Board (LSB) as well as the Approved Regulators (ARs).

6. Ten years ago the Department for Constitutional Affairs claimed that the legal services market was “outdated, inflexible, over-complex and insufficiently accountable or transparent.”³ This view was shared by Sir David Clementi whose consultation paper, published in 2004,⁴ identified three main areas of concern: the complexity of regulation, concern about complaints’ handling and concern about the restrictive nature of business structures then available. In his final report, Sir David concluded that the system he faced in 2004 was flawed in part because the governance structures of the main frontline professional bodies were inappropriate for the regulatory tasks they faced and because there was over-complex and inconsistent regulatory oversight arrangements.⁵ The B+ model of regulation which Sir David Clementi recommended, and which the Government subsequently accepted,⁶ was designed to address the acknowledged shortcomings of legal services regulation.

Need for regulation

7. The Bar Council recognises, and accepts, the need for high quality professional regulation which safeguards the independence of the legal profession from government and operates in the public and consumer interest. The Bar Council supported the B+ model, as it continues to do subject to the modifications we propose in this paper. We welcomed the Bill introduced to Parliament to implement the Clementi recommendations for a new scheme of legal services regulation, having separated the Bar Council’s representative functions from its regulatory functions by the creation of the Bar Standards Board on 1 January 2006, as the independent regulator of the Bar. We also generally welcomed the overhaul of arrangements for complaints’ handling and the introduction of measures to enable the liberalisation of the provision of legal services.

Assessment of the current state of regulation

8. It is timely to take stock of what has been achieved since the implementation of the Act by the LSB and the ARs to satisfy the regulatory objectives of the Act.⁷ The LSB and the ARs have shared obligations⁸ to fulfil these statutory objectives. The labyrinthine regulatory maze vividly described by Sir David Clementi has been simplified considerably. The arrangements for complaints’ handling have been streamlined and improved through the creation of the Office for Legal Complaints (OLC). A significant measure of liberalisation has been achieved

³ *Competition and regulation in the legal services market* (July 2003).

⁴ *Review of the regulatory framework for Legal services in England and Wales* (March 2004).

⁵ *Review of the Regulatory Framework for Legal Services in England and Wales: Final Report* (December 2004), pp 2-3.

⁶ *The Future of Legal Services: Putting Consumers First* (Cm 6679, October 2005).

⁷ Section 1.

⁸ Sections 3(2) and 28(2).

by enabling legal service providers who wish to do so, and in response to consumer needs, to establish Alternative Business Structures (ABS). The LSB has achieved a great deal of what was expected of it in driving forward the changes Parliament approved five years ago.

9. Since the publication in 2001 of the Office of Fair Trading's report *Competition in Professions*⁹ and more recently in the decade since the policy design of the Act was formed, circumstances have changed considerably. The economic climate today is very different from the conditions which existed when the framers of the 2007 legislation embarked on their task. The environment in which legal services are provided has changed markedly, particularly in relation to publicly funded work. There have been significant developments in regulatory practice over this period not least in response to the failure of financial regulation in the crash of 2007-2008.

10. The achievement of many of the LSB's strategic aims and changes in the context of regulation naturally invites questions about the future of the LSB, particularly having regard to concerns which have been expressed about the way in which the LSB has exercised its oversight functions.

11. The LSB has expressed itself to be "in no doubt" about the active nature of oversight placed on it by the Act, if necessary by doing "anything we judge necessary to facilitate the carrying out of our functions".¹⁰ The LSB interprets the scope of its oversight role very widely:

Our judgements are not limited to considering simply whether a decision of an Approved Regulator is "Wednesbury" reasonable. It can be open to the LSB to impose a different solution if we reasonably form a judgement that the regulator's decision is harmful when considered in the broader context of our oversight of the entire sector, or that a more proportionate and effective means of implementation is possible.¹¹

12. The Bar Council has not been alone in expressing concerns about the LSB's approach to its role, about the duplication of regulation, increases in regulatory burdens on legal services providers and increases in the cost of regulation and the cost of compliance. The Bar Council's concerns were evidenced in our detailed response in 2012 to the Ministry of Justice's Triennial Review of the LSB.¹² They have also been a recurring theme of the Bar Council's responses to the LSB's draft Business Plans which have been issued for consultation.¹³

13. We do not repeat those concerns here save to emphasise the following points. Since the LSB was established the Bar has been required to pay £2.43m to cover the cost of LSB's

⁹ Oft 328 (March, 2001).

¹⁰ *Overseeing Regulation: The LSB's approach to its role* (June, 2013), p 3.

¹¹ *Ibid*, p 4.

¹²

http://www.barcouncil.org.uk/media/132078/bar_council_triennial_review_final_response_paper_300_32012.pdf

¹³ See, for example, our response to the LSB's Draft Business Plan 2013-14:

http://www.barcouncil.org.uk/media/199801/13.03.04_lsb_draft_business_plan_2013-14_bar_council_response.pdf

establishment and running expenses. The cost to each member of the profession (comprising approximately 15,000 members) has been £162.¹⁴ The way in which the LSB interprets its regulatory role and exercises its powers has a direct impact on the work of the BSB (and other regulators) and hence the cost of their operations, as well as the other compliance burdens under which they operate. These costs have to be paid for entirely by their regulated communities. Although it may be argued – as the Chair of the LSB has argued – that the annual cost of regulation by the LSB (together with the costs of the OLC) on the Bar is small,¹⁵ the knock on cost of regulation by the BSB has been rising steadily year on year. The directly attributable costs of the BSB have risen from £2.9m in 2008 to £4.3m in 2013. These increases have a knock on effect on the costs of providing the necessary Bar Council infrastructure costs to support the regulator of Bar, which have also been steadily rising. Over this period, the Bar Council’s Central Services costs (to cover such items as IT, research, HR and project support) have risen from £3.1m in 2008 to £5.2m in 2013.¹⁶ For many barristers, notably those whose work is publicly funded and thus the subject of repeated cuts in public expenditure (in some cases by as much as 40% recently), the rising cost of regulation is a matter of real concern.

14. When the Bar Council separated its representative from its regulatory functions in 2006 it addressed an important issue of wider concern about the governance structures of the main frontline professional bodies. The reforms the Bar Council made enabled it to realise the benefits of the B+ model of regulation which Clementi identified,¹⁷ and which Parliament subsequently approved, in preference to the Single Regulator model (Model A). The resulting two-tier model of regulation was intended to:

- a. leave day-to-day regulatory rule-making and oversight as far as possible at the practitioner level and thereby to increase the commitment of practitioners to high standards; as Clementi recognised such commitment is important particularly in the area of professional conduct rules, where rules of behaviour and ethical standards should be seen as an aid to raise standards, not as a constraint to be circumvented¹⁸
- b. emphasise the principle that the legal profession should be independent of government when frontline regulatory powers are exercised by practitioners, and
- c. in the interests of regulatory consistency, enable frontline regulators to adhere to minimum standards set by the oversight regulator, emphasising the point the Bar Council had made in its submission to the Clementi consultation that the need for consistency in the regulatory regime should not be equated with uniformity (a requirement that an identical set of rules should apply to all lawyers); one size

¹⁴ The cost to each barrister of the OLC (establishment and running costs) over this period has been an additional £133.

¹⁵ The Bar Council calculates that the Bar has paid 5% of the total combined cost ((£4.43m) of the LSB and the OLC since they were created.

¹⁶ *Bar Council Financial Statements 2012/13* (2013 - forthcoming), p 48.

¹⁷ *Review of the regulatory framework for Legal services in England and Wales* (March 2004) at pp 34-36.

¹⁸ *Ibid* at p 34.

does not fit all, nor should it be made to do so unless there are compelling, countervailing arguments in the public interest to the contrary.

15. The separation of the Bar Council's representative and regulatory functions, involving delegation to the independent BSB of responsibility for regulation of barristers in accordance with Internal Governance Rules (IGRs), has generally worked well. Both parts of the Bar Council as Approved Regulator recognise their respective roles and responsibilities and acknowledge that they will not always agree on the means for achieving the regulatory objectives. However the same assessment cannot be made of the relationship between the Bar Council and the LSB. The full potential of the B+ model of regulation has not been achieved.

Need for a new approach

16. In our judgment, the LSB has involved itself in the operations of the frontline regulator to an extent that was never envisaged by Parliament, contrary to the Government's expressed intention.¹⁹ The LSB has sought to micro-manage in ways that are plainly inconsistent with oversight regulation. For example, it sought to impose unrealistic and impractical requirements in relation to Chambers' Complaints Handling – Signposting Requirements in disregard of the concerns which practitioners had expressed about the risks of non-compliance and consequent weakening of respect for professional regulation. In our response to the Ministry of Justice's Triennial Review of the LSB we cited other examples of over-zealous engagement in activities properly to be regarded as the primary concerns of frontline regulators involving, for example, the duplication of requests for regulatory data (such as equality and diversity data) and the commissioning of research of dubious value, at the profession's expense, into referral fees and the Cab Rank Rule. A particularly egregious example of the LSB's broad interpretation of its oversight remit related to professional education and training. The Chair of the LSB claimed in his 2010 Upjohn Lecture²⁰ that the current framework of legal education and training was "not fit for purpose" and challenged the profession to put its house in order. But the conclusion of the Legal Education and Training Review, which was undertaken as a result, at not inconsiderable expense paid for by the profession, was that the existing arrangements for legal education and training were broadly satisfactory and by no means in need of a major overhaul for which the LSB had been calling. Practitioner respect for the oversight regulator could not have been enhanced by this outcome.

17. Concerns about the oversight regulator's interpretation of its role are not confined to England and Wales. The extent of the LSB's involvement in professional regulation has provoked regular expressions of concern amongst lawyers (and their clients) in overseas jurisdictions about the apparent weakening of the principle of the independence of the legal profession in England and Wales from the Government. This is a familiar refrain on

¹⁹ See, for example, the observation by the Parliamentary Under-Secretary of State (Mrs Bridget Prentice MP): "It is important that the oversight regulator does not micro-manage and second-guess the actions of approved regulators" *Official Report* (HC Standing Committee Debate), 13 June 2007, at col 95.

²⁰ Edmonds, D "Training the lawyers of the future – a regulator's view" (2011) *The Law Teacher* Vol 45, pp 4-17.

international conference platforms and on the margins of international legal gatherings. If left unchecked such a view could damage perceptions abroad about the attractiveness of the UK as the leading global dispute resolution centre of the world which contributes in excess of £20bn to UK gross domestic product.²¹ As the Government recognises,²² the effective delivery of legal services, as well as fair and efficient legal systems, underpins economic growth and stability at home and abroad. Effective legal services can result in a multiplier effect, supporting economic growth and UK businesses overseas. If the legal sector is subjected to disproportionate professional regulation which is costly and burdensome, the effects will not be confined to the sector itself and could spread much more widely to the detriment of the public and UK's national interests.

18. Proper regulation, in the public interest, is vital. However, as speakers in a recent parliamentary debate recognised,²³ it needs to be to be balanced against cost and existing resources and performed efficiently. Recognising that it is no longer desirable to return to a model of pure self-regulation, we believe that the time has come to modify the current regulatory framework, building on the past experience and achievements and adjusting ambition for the future to current and foreseeable circumstances.

19. We believe that the modified model described below will not only help to preserve but also to develop a strong and independently-minded legal profession, operating to high standards, which is able to compete successfully internationally.

New model of regulation summarised

20. In summary, the key features of the Bar Council's modified model of legal services regulation (which, as it would apply to the profession of barrister, is represented diagrammatically in the Annex to this paper) are as follows:

- a. **Scope of regulatory objectives:** We recommend that a review of the scope of the regulatory objectives set out in section 1 of the Act is undertaken. Whether some of the objectives should be included under the regulatory panoply of that legislation should be considered. For example, we question whether it is appropriate to include within a scheme of *professional* regulation the statutory objective of increasing public understanding of the citizen's legal rights and duties (section 1(1)(g)) or including within such a scheme a requirement on professional regulators to improve access to justice (section 1(1)(c)).
- b. **Re-balancing of the B+ model:** We recommend that a re-balancing of the Clementi B+ model of regulation is undertaken to ensure, as far as possible and subject to appropriate oversight, that day-to-day professional regulatory activity

²¹ See TheCityUK's Research Report *Legal Services 2013*. Legal services contributed £20.9bn to UK GDP in 2011, 1.6% of total GDP. The Government is keen to consolidate the UK's international standing in legal services in what it acknowledges is becoming an increasingly competitive field.

²² *UK Legal Services on the International Stage: Underpinning Growth and Stability* (Ministry of Justice and UK Trade & Investment, 2013), Ministerial foreword.

²³ *Official Report* (HL) 4 December 2012, cols 514-532.

is undertaken at practitioner level by the Approved Regulators and separately from their representative functions. For this reason we reject the call recently made by the LSB for a single, cross-cutting regulator.²⁴ This would suffer from the disadvantages of Model A which Sir David Clementi considered. We believe it would be even more costly and cumbersome than the current arrangements. Bringing regulation back to the profession, in the public interest and in the way we recommend, will not only fulfil the original intentions of Parliament but, crucially, it will also help to ensure that professional commitment to regulation is secured. But to be credible and effective, the new, lighter touch model will also need to be sufficiently attentive to the needs of consumers. Accordingly we recommend that each Approved Regulator should draw on the views of a consumer panel to provide input to regulatory activity and (where appropriate) representative functions.

- c. **Regulatory role of Approved Regulators:** Consistent with the public interest and in order to provide consumer confidence and protection, we recommend the regulatory functions of ARs should be limited to upholding professional discipline, enforcing professional standards and applying disciplinary sanctions. These would be the core regulatory functions. Complaints about barristers' performance (service complaints) should continue to be determined by the Legal Ombudsman through the Office for Legal Complaints (OLC) which provides a single portal for the handling of such complaints against the legal profession. The discharge of the regulatory functions referred to above should continue to be undertaken independently of the ARs' representative functions.
- d. **Admission to profession and related matters:** Arrangements for determining admission to the profession and the content and standards of education and training for the profession and for monitoring performance to ensure high standards are maintained should revert to the professional bodies whose decisions should have regard to input from their consumer panel. These functions should be resourced by funds provided by the profession expressly for this purpose.
- e. **Independence and consistency of regulation:** We recommend that the role of oversight regulation should no longer be undertaken by the LSB. The Board should be replaced by a "College of Regulators".

The *role* of the College of Regulators would be to regulate the ARs and in particular to:

- (i) ensure that the ARs have proper disciplinary arrangements in place and that they exercise their powers in relation to discipline and enforcement in a consistent manner
- (ii) designate new ARs if appropriate

²⁴ *A blueprint for legal services regulation* (September, 2013).

- (iii) monitor the performance of the ARs to ensure that they exercise their powers in accordance with the agreed regulatory objectives and remain “fit for purpose”
- (iv) exercise powers of intervention as appropriate, and
- (v) license ABSs.

The *composition* of the College of Regulators should comprise representatives of each of the ARs together with some lay members and representatives of the Judiciary. The College should be chaired by a senior member of the Judiciary, appointed by the Lord Chancellor (in consultation with the Lord Chief Justice), to ensure that the proceedings of the College are conducted impartially, fairly and independently and that they are seen to be so. It is plainly important that the work of the College is undertaken in the public interest and that it will secure the confidence not only of consumers but also of members of the legal profession whose commitment to regulation will be important to maintain, at home and abroad. The College should be supported by a small executive team and resourced from funds provided by the ARs in proportion to the size of their regulated communities.

The College should *report* to the Lord Chancellor who should be obliged to lay an annual report before Parliament.

21. The modified model of regulation described above will require primary legislation. However much of the enabling legislation that would be needed could operate by way of amendment of the 2007 Act, including the repeal of section 4.²⁵ The amending legislation would simplify the current regulatory framework and reduce unnecessary burdens on the legal sector whilst retaining appropriate regulatory oversight. It would enable the benefit of experience gained from the existing two-tier model to be applied to the new environment in which legal services are being delivered and need to be regulated. The new model could also allay concerns overseas about the independence of our legal profession having been weakened by changes introduced by the 2007 legislation and provide a more balanced approach to the regulation of legal services which other jurisdictions might wish to emulate.

Conclusion

22. We shall be pleased to discuss the above concept design which builds on the achievements of the past and looks forward to the future of legal services regulation.

Bar Council
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²⁵ Which, amongst other things, requires the LSB to “assist” in the maintenance and development of standards in relation to the education and training of persons authorised to carry out reserved legal activities.

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Modified B+ model of regulation

