



**House of Lords Industry and Regulators Committee
Inquiry into UK regulators
Bar Council written evidence**

About us

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the House of Lords Industry and Regulators Committee Inquiry into UK regulators.
2. The Bar Council represents approximately 18,000 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.
4. 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.

Summary

5. The Legal Services Board (LSB) is overreaching its proper role as the *oversight* regulator of the various Approved Regulators in the legal services sector. For instance, it has recently decided (for the first time) to promulgate a "strategy for sector", despite (a) not being a direct regulator at all and (b) having no role at all in large parts of the legal services sector. It is proposing to increase its budget by 14%. It is subject to no proper external scrutiny. It is time for a review of the performance of the LSB. It is particularly disappointing that the LSB has resisted any such review because a confident transparent regulator ought to welcome and encourage periodic external appraisal of its performance.
6. We have recently submitted a paper to the Justice Select Committee outlining our position on regulation in the legal sector. The paper is at Annex A. In summary:
 - a. Strong regulation of professional legal services providers is vital in the public interest.

- b. The Act struck a careful balance between self-regulation and external regulation, maintaining an element of professional self-regulation by the Approved Regulators, but requiring the exercise of regulatory functions to be taken independently from representative functions (s.30), and creating a Legal Services Board. The LSB's principal role is the oversight of the Approved Regulators (s.49).
- c. There is no regulator of the entire legal services sector, because not all legal services are regulated. Giving legal advice, for instance, is not a reserved legal activity. There are reasons to believe that the practice of regulation by the LSB has moved away from what was intended by Parliament. It is, in any event, time for a review, not of the Act, but of the way in which the LSB is performing its role under the Act.
- d. We hope that the LSB will now support our call for such a review: the LSB has not been subject to any comprehensive external review since 2017.

Question 1: Are UK regulators being given a clear job to do?

- 7. Parliament established the Legal Services Board (LSB) and set out its responsibilities when it passed the Legal Services Act 2007. Under the Act, the role of the LSB is (and is only) to fulfil its statutory functions. In discharging its functions, it must so far as is reasonably practicable act in way which is compatible with the regulatory objectives (s.3). The principal role of the LSB is the *oversight* of the Approved Regulators.
- 8. Barristers are regulated by a frontline regulator, namely the General Council of the Bar (the GCB or "Bar Council"), that delegates its regulatory functions to the functionally independent Bar Standards Board (BSB). The performance of the regulatory functions is overseen by the Legal Services Board (LSB).
- 9. The LSB is not an economic or market regulator. It does not regulate the entire legal services sector: the giving of legal advice is not regulated, and much excellent work is done by non-regulated providers of legal advice through Citizens Advice, Trade Unions, and charities.
- 10. The Bar Council supports the statutory framework which has been in place for the last 16 years and supports the role of the LSB as oversight regulator of the Approved Regulators, as envisaged by the Act.
- 11. But we are concerned that there has been a lack of sufficient scrutiny and oversight of the LSB. Although the performance of the Approved Regulators is, rightly, regularly assessed by the LSB, there has been insufficient review of the LSB's own performance. That does not feel right; there should not be such an imbalance in the frequency of reviews of performance and scope of work.

Question 2: Is the right balance being struck between the responsibilities of regulators and those of the Government, particularly where there are political or distributional trade-offs that need to be resolved?

12. The Legal Services Act 2007 rightly guarantees that the regulation of barristers should be independent of government, and we believe that this strikes the right balance. There is no regulator of the entire legal services sector, because not all legal services are regulated.
13. There are reasons to believe that the practice of regulation by the LSB has moved away from what was intended by Parliament. It is, in any event, time for a review, not of the Act, but of the way in which the LSB is performing its role under the Act. We are disappointed that the LSB still does not support our call for such a review: the LSB has not been subject to any comprehensive external review since 2017.

Question 3: Are regulators appropriately independent of government? Is the right balance being struck between strategic and political input from government and preserving the operational independence of the regulators?

14. As regards the legal system, and in particular the judiciary and legal professionals including barristers, there is no place for undue influence from government in relation to regulation, nor does this take place. The Bar Council in its representative role regularly engages with government on issues affecting the Bar and wider justice system but this is quite separate from its regulatory function.
15. As outlined above, the LSB has not been the subject of a Departmental review since 2017. The Bar Council has concerns that its performance should be the subject of periodic reviews, not least because the Bar Council considers the LSB has exceeded its remit in a number of respects and because it sets and approves its own budget, and approves the budgets of the frontline regulators. To this extent there should be more urgency from government in ensuring a review takes place.

Question 4: Does the Government provide too much or too little guidance to regulators in making decisions, particularly in deciding between different objectives and priorities?

16. The Act defines the regulatory objectives, and the regulators rightly maintain their independence from government in seeking to fulfil these objectives.

Question 5: Are the roles and remits of different regulators sufficiently discrete, or is there overlap and duplication?

17. The Act clearly sets out the role and remit of the frontline regulator and approved regulator. However, in the absence of a Departmental review of the LSB (as outlined above), over the last six years lines have become increasingly blurred.
18. The practice of regulation by the LSB has moved away from what was intended by Parliament. For example, there are many topical legal issues which are contentious, interesting, and difficult - including issues about the use of SLAPPs and the use of Non-Disclosure Agreements (NDAs). The LSB must take care not to confuse the regulation of lawyers' conduct with the regulation of lawyers' client's conduct. The LSB has no role in the regulation of the conduct of lawyers' clients – that is for Parliament or the courts. Lawyers' duties to their clients are to advise them on the law and assist them in behaving lawfully in their own best interest, whilst the lawyers

themselves must of course behave with integrity, honesty and independence. The LSB's recent consultation on NDAs¹ suggests an inappropriately wide role for legal regulators in using regulatory levers to restrict or restrain lawful conduct².

19. The danger with all regulators, particularly those that are not subject to any checks and balances, is that they think that every problem can be solved by more regulation.

Question 6: How effectively do regulators co-operate with one another, and how could this be improved?

20. Owing to regulatory independence, we are naturally only aware of some of the BSB's regulator to regulator cooperation. The examples that we are aware of are in relation to areas of work where both the Bar Council and the Bar Standards Board have an interest, and which may come up in our ongoing dialogue. A good example is anti-money laundering where the Bar Standards Board leads on the regulatory aspects of AML at the Bar and the Bar Council is responsible for encouraging best practice and helping the profession to understand its duties under the AML regulations. In this area the Bar Standards Board regularly cooperates with other legal services regulators in order to share best practice. This kind of cooperation strikes us as useful but we are not aware of the extent of the Bar Standard's Board regulator to regulator cooperation in other matters.

Question 7: Do the UK's regulators have the necessary skills, capabilities and expertise internally to perform the roles they have been given? If they do not, how could this be improved?

21. Prior to the regulatory structure instituted by the Act, those responsible for the regulation of the profession were frequently its senior members. This model may have had its flaws, however its key strength was that regulatory decisions were taken by those who were more likely to understand from first-hand experience, what the most important risks were and what measures would be most effective to mitigate them. The high reputation of the English and Welsh legal profession both at home and overseas suggests that this was an effective approach to regulation.
22. The Bar Standards Board (BSB), which is the body to whom the Bar Council delegates its regulatory functions, is comprised of barristers and lay members. The lay members having a small majority. This works well.
23. The LSB, which is the oversight regulator, also has a lay majority. But because it is the oversight regulators for nine front line regulators it cannot have much input from each individual profession. This is a major weakness and explains why some of the LSB's pronouncements do not sufficiently reflect the quite different work and very varied risk profiles of the various legal services professions. In short: the LSB is too remote.

¹ <https://legalservicesboard.org.uk/news/legal-services-board-launches-call-for-evidence-on-the-misuse-of-ndas-and-the-role-of-lawyers>

² <https://www.barcouncil.org.uk/static/a4fb239d-1b28-4f52-baa79f38784b67d9/BCEW-response-to-LSB-call-for-evidence-on-the-misuse-of-NDAs-July-2023.pdf>

Only three of its ten Board members are lawyers at all, and the majority of its members know little about barristers or the Bar.

24. It is precisely because the frontline regulators have a better understanding of the professions that they regulate that the LSB should confine itself to ensuring that the frontline regulators are doing their jobs properly, rather than attempting to devise an overarching strategy for the entire legal services sector.
25. Insufficient practitioner input also risks undermining the confidence of the profession in the regulator, and their cooperation with the regulator. This cooperation is important in the “regulation by consent” model.
26. The Bar Council is concerned from its interaction with the LSB that insufficient knowledge of the bar is having a negative effect on the quality of the LSB’s decision making. It is vital that regulation that is independent of the profession must not mean a loss of expertise. In order to be truly impartial and fair, decision makers need fully to understand the subject matter to which their decisions relate.
27. A by-product of this feature of the current model of regulation is the increasing tendency of regulators to stray beyond their statutory remit and into policy areas for which they have no mandate. It may be that regulators are employing too many people whose interest is in policy and too few who have appropriately granular knowledge of legal practice.
28. One way in which this problem could be addressed would be to introduce a mechanism for the professions to appoint sufficiently senior members to regulatory bodies and for the regulatory bodies to be required to have appropriate internal structures to ensure that these individuals are involved in decision making.

Question 8: Who should hold the regulators accountable for their performance against their objectives? What is the appropriate role of Parliament in performing this scrutiny role?

29. In answer to the first question, the Act imposes a sensible accountability structure in the sense that the LSB as overseeing regulator is designed to hold the regulators of particular legal services to account. But the serious flaw in the current structure relates to the scrutiny of the LSB itself. The LSB is an Arm’s Length Body (ALB). The Cabinet Office oversees the overall programme of ALB reviews. The LSB was last reviewed in 2017 under the 2015-2020 Tailored Review Programme. Since 2017, the LSB has carried out annual internal evaluations (with only an external review of governance in November 2022 by a consultancy company, which did not seek input from the regulated community). Given that six years have passed since the last review, The Bar Council has frequently asked the Ministry of Justice to initiate a review of the LSB.
30. The Bar Council has long-standing concerns that the LSB is straying outside its role as defined in the Act. This pushes up the cost of their operation, which is funded through a levy on legal professionals’ practising certificates. These costs can end up inflating the cost of legal services to the consumer. The LSB recently announced a proposal to increase their budget for 2024-25 by 13.9% illustrates this point.
31. It is inappropriate for the Legal Services Board to spend the money it raises from the regulated sector on developing a strategy for the whole of the Legal Services sector.

This is a role for the Government, not the LSB. It was only in March 2021 that the LSB first decided, for itself, that it had a role in setting out a “strategy for sector”, and it is unclear what prompted this change of self-perception. It is also worth noting that a large part of the legal services sector is not regulated at all, because the giving of legal advice is not a reserved legal activity, and much important frontline advice to consumers is not given by authorised persons.

32. The Bar Council view is that developing policy for the sector as a whole is a matter for the Government, not for the LSB. The LSB has an extremely important role to perform in checking that the Approved Regulators fulfil their regulatory functions properly, but its role is one of oversight of the Approved Regulators, not a role of agenda-setting or strategising for the sector as a whole.
33. The Bar Council has been concerned for some time that the LSB has on occasion made regulatory interventions when there was little evidence of any problem, and matters could have been left to the frontline regulators to address. The Bar Council also has concerns about the rigour of the LSB’s approach to the gathering and analysis of the material it relies on as “evidence” to support its interventions.
34. The LSB seems to believe that lawyers should be ‘gatekeepers’ and should form moral judgement about clients, rather than advising and representing clients within the law. If the law is not working that is a matter for the legislature not the legal profession. For the Bar, the ‘Cab Rank Rule’ is part of a moral bedrock, meaning that barristers should not be identified with their clients and their causes.
35. We would welcome regular scrutiny by the Justice Select Committee.

Question 9: How should the Government and the regulators themselves facilitate appropriate scrutiny and accountability of regulators? Are regulators sufficiently transparent about their own performance?

36. In the legal sector, the frontline regulators are subject to oversight by the Legal Services Board and this should provide sufficient scrutiny and accountability without the intervention of government. However, there is an issue (as outlined throughout our response) as to the accountability of the Legal Services Board itself.
37. The Bar Standards Board is open with its performance metrics, allowing barristers and the Bar Council to understand their performance with regards to disciplinary processes and authorisation applications. Such information is helpfully included in their Board papers and in various annual reports.

Question 10: What mechanisms and metrics could be used to hold regulators accountable on a regular and ongoing basis and to judge whether a regulator is performing well?

38. Strong regulation of professional legal services providers is vital in the public interest. The Legal Services Act struck a careful balance between self-regulation and external regulation, maintaining an element of professional self-regulation by the Approved Regulators, but requiring the exercise of regulatory functions to be taken independently from representative functions (s.30), and creating a Legal Services Board. The LSB’s principal role is the oversight of the Approved Regulators.

39. Although the performance of the Approved Regulators is, rightly, regularly assessed by the LSB, there has been insufficient review of the LSB's own performance. It is important to keep the activities of regulators within proper bounds because if regulators begin to overreach their proper role it leads to unnecessary burdens on the regulated professions resulting in increased costs - ultimately passed on to consumers. There is also a risk that matters that are for the legislature are decided by regulators instead. That cannot be right.
40. No Departmental review of the LSB has happened since 2017 and the time is right now for an in-depth review of the way in which the LSB discharges its duties.

Question 11: Do any of the UK's international comparators address the above questions particularly well? What lessons, if any, can the UK learn from other jurisdictions on these matters?

41. The Bar Council supports the statutory framework which has been in place for the last 16 years and supports the role of the LSB as oversight regulator of the Approved Regulators, as envisaged by the Act.
42. The problem is with how the LSB discharges its role.
43. International comparisons are of doubtful utility because of the different way legal professions are organised in different places, and the different degrees to which there are constitutional guarantees of independence.

**The Bar Council
December 2023**



Justice Select Committee Summary note of the Bar Council's position

About Us

1. The Bar Council represents approximately 18,000 barristers in England and Wales. It is the Approved Regulator for the Bar of England and Wales. A strong and independent Bar exists to serve the public and is crucial to the administration of justice and upholding the rule of law.

Summary

2. Strong regulation of professional legal services providers is vital in the public interest.
3. The Legal Services Act 2007 (the Act) struck a careful balance between self-regulation and external regulation, maintaining an element of professional self-regulation by the Approved Regulators, but requiring the exercise of regulatory functions to be taken independently from representative functions (s.30), and creating a Legal Services Board. The LSB's principal role is the oversight of the Approved Regulators (s.49).
4. There is no regulator of the entire legal services sector, because not all legal services are regulated.
5. There are reasons to believe that the practice of regulation by the LSB has moved away from what was intended by Parliament. It is, in any event, time for a review, not of the Act, but of the way in which the LSB is performing its role under the Act.
6. We hope that the LSB will now support our call for such a review: the LSB has not been subject to any comprehensive external review since 2017.

The regulatory framework and the important oversight role of the LSB

7. Parliament established the Legal Services Board (LSB) and set out its responsibilities when it passed the Legal Services Act 2007 (the Act). Under the Act, the role of the LSB is (and is only) to fulfil its statutory functions. In discharging its functions it must so far as is reasonably practicable act in way which is compatible with the regulatory objectives (s.3).
8. The principal role of the LSB is the *oversight* of the Approved Regulators: see section 49(3).

9. The LSB is not an economic or market regulator. It does not regulate the entire legal services sector: the giving of legal advice is not regulated and much excellent work is done by non-regulated providers of legal advice through Citizens Advice, Trade Unions, and charities.
10. It is inappropriate for the Legal Services Board to spend the money it raises from the regulated sector on developing a strategy for the whole of the Legal Services sector. This is a role for the Government, not the LSB. It was only in March 2021 that the LSB first decided, for itself, that it had a role in setting out a “strategy for sector”, and it is unclear what prompted this change of self-perception.
11. The Bar Council has also been concerned for some time that the LSB has on occasion made regulatory interventions, including over-use of its power to issue statutory policy statements, when (contrary to the Better Regulation Principles) there was little evidence of any problem, and matters would better have been left to the front-line regulators who have a much closer understanding of the risks inherent in the professions they regulate. The Bar Council also has concerns about the rigour of the LSB’s approach to the gathering and analysis of the material it relies on as “evidence” to support its interventions.
12. The Bar Council is further concerned that the LSB’s Internal Governance Rules are driving too great a separation between the Approved Regulators and those through whom they discharge their regulatory functions. In the case of the Bar, this is the Bar Standards Board (BSB). It is the Approved Regulators who are ultimately responsible for delivering high quality regulation and standards, and too remote a relationship between the ARs and those to whom day-to-day regulation is entrusted compromises the ability of the professions to maintain standards in the public interest. For instance, at the moment the Bar Council is unhappy about steps being taken by the BSB to make it easier to pass the Bar exams, and there are currently acute tensions between CILEX and CILEX Regulation. The Approved Regulators must be permitted to maintain an appropriate degree of influence over budget and policy decisions in relation to regulation (though not, of course, individual disciplinary decision-making).
13. There are many topical legal issues which are contentious, interesting, and difficult - including issues about the use of SLAPPs and the use of Non-Disclosure Agreements (NDAs). But the LSB must take care not to confuse the regulation of lawyers’ conduct with the regulation of lawyers’ client’s conduct. The LSB has no role in the regulation of the conduct of lawyers’ clients – that is for parliament or the courts. Lawyers’ duties to their clients are to advise them on the law and assist them in behaving lawfully in their own best interest, whilst the lawyers themselves must of course behave with integrity, honesty and independence. The LSB’s recent consultation on NDAs³ suggests an inappropriately wide role for legal regulators in using regulatory levers to restrict or restrain lawful conduct⁴.

³ <https://legalservicesboard.org.uk/news/legal-services-board-launches-call-for-evidence-on-the-misuse-of-ndas-and-the-role-of-lawyers>

⁴ <https://www.barcouncil.org.uk/static/a4fb239d-1b28-4f52-baa79f38784b67d9/BCEW-response-to-LSB-call-for-evidence-on-the-misuse-of-NDAs-July-2023.pdf>

Conclusion

14. The Bar Council supports the statutory framework which has been in place for the last 16 years and supports the role of the LSB as oversight regulator of the Approved Regulators, as envisaged by the Act.
15. But we are concerned that there has been a lack of sufficient scrutiny and oversight of the LSB. Although the performance of the Approved Regulators is, rightly, regularly assessed by the LSB, there has been insufficient review of the LSB's own performance. That does not feel right; there should not be such an imbalance in the frequency of reviews of performance and scope of work.
16. It is important to keep the activities of regulators within proper bounds because if regulators begin to overreach their proper role it leads to unnecessary burdens on the regulated professions resulting in increased costs - ultimately passed on to consumers. There is also a risk that matters that are for the legislature are decided by regulators instead. That cannot be right.
17. No MoJ Departmental review of the LSB has happened since 2017 and the time is right now for an in-depth review of the way in which the LSB discharges its duties.

22 November 2023