



Bar Council response to the Bar Standards Board's 'Strategic programme for 2019-2022' consultation paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to Bar Standards Board consultation paper on the strategic programme for 2019-2022.¹

2. The Bar Council represents over 16,000 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.)

Question 1: Do you agree that the three proposed risk themes we have identified for the 2019 Risk Outlook are the right areas on which we should focus our regulatory attention over the next three years?

4. We would suggest that there are essentially two parts to this question. First, are the risk themes that have been identified the most appropriate areas that affect the profession and the wider legal services landscape that ought to inform the BSB's work? Second, taking into account the work that is already being undertaken by other stakeholders, is further direct regulatory action necessary or do these themes set the context for the BSB's pre-existing work? We will keep both of these points in mind

¹ Bar Standards Board, "[Consultation on the Bar Standards Board's strategic programme for 2019-2022](#)" (2018)

when setting out our thoughts on the risk themes below. There is a distinction between the BSB being alive to the risks that affect the Bar and drawing them to the attention of the profession for action as compared to taking direct action as a regulator.

5. More broadly, we understand that it is necessary for the BSB to have a full understanding of the stresses and burdens that affect the profession and note that proper regulation is incumbent on a proper understanding of the full context. These risk themes are also helpful for the Bar Council as it affects the work that we undertake in the public interest.

6. We commend the BSB for restricting itself to areas that are within its clear regulatory control or direct influence. As the BSB highlights, the Legal Services Act requires the BSB to regulate in a manner that is accountable, proportionate, consistent and targeted and it is right that the BSB has developed the strategic plan consultation with these principles in mind.

7. As this is an overarching strategy that governs a four-year period, it is necessarily high-level and does not go into detail of the work being planned. We look forward to seeing more detail about the planned activity in the BSB's annual business plans in due course.

8. We shall set out our views on each of the risks identified in the consultation:

Risk theme 1: Working cultures and professional environment inhibit an independent, strong, diverse and effective profession

9. We agree that this is a key challenge affecting the profession and this risk theme is appropriate and in keeping with the regulatory objectives. The retention and progression of female and BAME barristers has been a longstanding issue where there has been insufficient progress.

10. At the point of entry to the profession, the BSB's finding that BAME BPTC graduates are roughly half as likely to obtain pupillage as white graduates with similar attainment is concerning. However, as stated in the 'Report on the Differential Attainment of Applicants through the Pupillage Gateway' (4 February 2018), this "top-level" summary masks a wealth of important detail. The Bar Council's own research suggests that some BAME groups do as well as or even better than their white counterparts, that some do significantly worse and that the picture is more complex still when the interaction of ethnicity and gender is considered. We recognise that the Bar Council's research only accounts for approximately 50% of pupillages.

11. Therefore, in terms of focussing regulatory attention on diversity at the point of access to the Bar, more nuanced conclusions need to be drawn before it can be determined what action, if any, should be taken and by whom. We encourage the Bar Standards Board to work in collaboration with the Bar Council to ascertain the best approach. Given that the diversity profile of entrants to the profession is broadly representative of the population (para.26), arguably the bulk of regulatory attention on diversity should be focussed on progression and reviewing/ensuring existing regulation is fit for purpose in addition to ensuring compliance with pre-existing regulation. In that vein, we urge the BSB to consider reviewing the effectiveness of the rules on the fair allocation of work. Our experience is that these rules are not having the desired effect to a sufficient degree and a reconsideration of the approach may be warranted. It may be sensible for attention on access to the profession to be more investigative and any action pursued in a more proportionate and sophisticated way (e.g. further research and collaborative working with the Bar including the Bar Council).

12. Turning to working cultures, some of the findings (e.g. from the Barristers' Working Lives surveys) are troubling and important, given the potential impact on, e.g. the strength and effectiveness of the profession in the public interest. It is questioned whether the finding that average hours worked by full-time practising barristers is significant in itself: most barristers are self-employed and similar patterns may exist in other self-employed professions. It is very difficult to change working cultures through regulation and any reforms take time to bed in.

13. On the other hand, we consider that more work needs to be done to address high levels of bullying, discrimination or harassment. The Bar Council has been undertaking work to address these issues through our Wellbeing at the Bar programme as well as undertaking specific projects to tackle harassment and bullying. This momentum should be used to create an effective dialogue with the profession, to determine what (if any) further role the regulator can and/or should play in addressing the issues proportionately and effectively.

14. We note that the BSB draws on some of the Bar Council's Working Lives research in the course of drawing together the evidence that supports this risk theme. We urge the BSB to participate in a constructive, regular dialogue with the Bar Council to ensure there is no duplication of effort and to establish the BSB's role in relation to these issues.

Risk theme 2: Innovation and disruption in the legal services market offers threats and opportunities for the profession and for the public

15. We agree that this is a significant risk that affects the profession. From our perspective there are linkages with the first risk concerning wellbeing and working culture. Specifically, we urge the BSB to bear in mind the potential risks to barristers' welfare from court closures and associated developments such as Flexible Operating Hours, which could lead to increased working hours for practitioners. These developments are also likely to have an impact on those with caring commitments. We suggest that the BSB keep these points in mind when developing the more nuanced approach to supervision reflecting equality and diversity considerations that is referenced in the consultation paper in paragraph 56.

16. So far as digital inclusion challenges are concerned, in our view, these apply not only to consumers but also to certain practitioners.

17. Although we agree that the Bar could become increasingly at risk of cyber security attacks, we do not necessarily agree that they are equally as vulnerable as solicitors' firms, many of which hold larger amounts of data and have greater numbers of bank accounts and email accounts that could be hacked.

18. We are unclear, at this stage, what the BSB has in mind to address the technological challenges that create barriers to the quality of advocacy and we shall follow the BSB's plans with interest.

Question 2: Do you have any additional information or evidence which we may have overlooked when identifying the three proposed risk themes, either about the three identified themes or about other risk areas? If so, please indicate what this is so that we can contact you if necessary.

19. We have set out our views on the additional information and evidence that the BSB ought to have in mind in our answers to questions 1 and 3.

Question 3: Do you agree that the three proposed aims for the 2019-22 BSB Strategic Plan are correct? If not, what do you think our strategic aims should be?

Aim 1: Delivering risk-based, targeted and effective regulation

20. We are very supportive of this aim, which goes to the BSB's core purpose and function. This aim encapsulates core regulatory activity as well as a review of pre-existing policies and practices. It is good practice to review the impact of reforms that have been in place over the past few years to establish whether they need to be revised. So far as the outcomes in paragraph 52 are concerned, we would welcome greater clarity as to the standards expected by barristers particularly on equality and diversity issues.

Aim 2: Encouraging an independent, strong, diverse and effective legal profession

21. We strongly support this strategic aim, which correlates with the sixth regulatory objective set out in the Legal Services Act.

Aim 3: Advancing access to justice in a changing market.

22. This is rather a broad and slightly vague aim, which we think could be usefully broken down further. We welcome the commitment to understand better ‘the risks to professional competence and ethics that arise from a more digitised administration of justice, and in particular, the challenges that disclosure of digital evidence and new online courts impose.’ This aligns with our concerns about barristers being able to understand and act in the interest of clients, for example, when it comes to raising concerns about a client’s lack of capacity. This is an issue on which we are seeing a rise in queries to the Ethical Enquiries Service.

23. It is also helpful that the BSB is seeking to understand the role of unregistered barristers in the legal services market.

24. We would welcome further information about the activities that flow from this strategic aim.

Question 4: Have you identified any adverse or positive equality impacts as a result of the priorities we have identified?

25. No.

Bar Council

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