



The Bar Council

**Bar Council response to the Legal Services Board's (LSB) consultation on  
Upholding Professional Ethical Duties, a consultation paper on  
LSB's proposed statement of policy**

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the LSB's consultation on Upholding Professional Ethical Duties, a consultation paper on the LSB's proposed statement of policy.<sup>1</sup>
2. The Bar Council is the voice of the barrister profession in England and Wales. Our nearly 18,000 members – self-employed and employed barristers – make up a united Bar that aims to be strong, inclusive, independent and influential. As well as championing the rule of law and access to justice, we lead, represent and support the Bar in the public interest through:
  - a) Providing advice, guidance, services, training and events for our members to support career development and help maintain the highest standards of ethics and conduct
  - b) Inspiring and supporting the next generation of barristers from all backgrounds
  - c) Working to enhance diversity and inclusion at the Bar
  - d) Encouraging a positive culture where wellbeing is prioritised and people can thrive in their careers
  - e) Drawing on our members' expertise to influence policy and legislation that relates to the justice system and the rule of law
  - f) Sharing barristers' vital contributions to society with the public, media and policymakers
  - g) Developing career and business opportunities for barristers at home and abroad through promoting the Bar of England and Wales
  - h) Engaging with national Bars and international Bar associations to facilitate the exchange of knowledge and the development of legal links and legal business overseas
3. To ensure joined-up support, we work within the wider ecosystem of the Bar alongside the Inns, circuits and specialist Bar associations, as well as with the Institute of Barristers' Clerks and the Legal Practice Management Association.
4. As the General Council of the Bar, we are the Approved Regulator for all practising barristers in England and Wales. We delegate our statutory regulatory functions to the

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<sup>1</sup> <https://legalservicesboard.org.uk/our-work/consultations-2/open-consultations-2>

operationally independent Bar Standards Board (BSB) as required by the Legal Services Act 2007.

### Overview:

5. We agree with the LSB's general conclusion (at paragraph 36 of the consultation paper) that the most effective way for it to achieve its aims of meeting any gaps in the regulatory framework is to issue a statement of policy under the Legal Services Act 2007 ("**LSA 2007**") s.49. (We assume that the LSB will be exercising its power under s. 49(2), to "*prepare and issue a statement of policy with respect to any other matter*" i.e. a matter other than those specified in s. 49(1).) We note in particular three factors giving rise to this conclusion:

6. First – that these matters are necessarily high level. An overly-prescriptive approach will inevitably fail to predict new circumstances or issues before they arise. It could also give rise to issues such as 'teaching to the test', where the regulation or education targets specific prescriptions, whilst missing or under-emphasising more fundamental issues. In the worst outcome, an overly-prescriptive approach could allow Enron-type adherence to strict rules at the expense of more fundamental concerns – an aspect of the 'creative compliance' problem highlighted at paragraph 29 of the consultation paper.

7. Second – whilst the ethical issues faced by the different legal professions can at a high level be categorised in broadly similar fashions, they can also arise, for different legal professions, in strikingly different circumstances. For example, the various professions which regularly engage in advocacy before courts and tribunals may well need greater concentration in their regulation of duties to uphold the administration of justice (at least in the context of advocacy) than, say, notaries and licensed conveyancers. To require all the front-line regulators to adopt the same approach would be wildly inefficient and ultimately counterproductive.

8. Third – whilst we recognise the issues highlighted at paragraph 29 as representing conduct that falls short of proper professional ethical conduct by lawyers, we do not agree (if it is suggested) that these sorts of behaviour are commonplace at least at the Bar, or necessarily appropriate for additional regulatory control. Indeed our impression, gained through the levels of engagement of barristers with our guidance and education resources and our ethical enquiries services, is that the vast majority of barristers seek to uphold the highest ethical standards. We would encourage the LSB to recognise that the Bar faces different challenges to those faced by the solicitors' profession (and the other legal professions) and also that evidence of issues with professional ethical obligations for one profession does not necessarily translate across to all the other professions. For example, in response to some of the specific issues highlighted at paragraph 29 of the consultation paper:-

8.1. *'Abusing or taking unfair advantage through excessive conduct, e.g. SLAPPs' and 'Silencing those with valid legal claims and preventing victims speaking out, e.g. misuse of NDAs'*: As we have said in response<sup>2</sup> to the LSB's Business Plan consultation, we do

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<sup>2</sup> [Bar Council response to LSB Business Plan 2025-26 consultation](#)

not consider that direct or specific regulation is the most suitable tool for addressing all of the ethical concerns that have arisen in recent years. We consider that the problems created by strategic litigation against public participation (SLAPPs) and Non-Disclosure Agreements (NDAs) are best addressed by Parliament through legislation – and as of 2025 both SLAPPs and NDAs have been so addressed. Of course, compliance with such legislation thereafter forms part of barristers’ ongoing professional duties, hence the reference above to ‘direct or specific regulation’. However, those ongoing professional duties are already well provided for in the current regulatory structure.

8.2. ‘Other conduct around case handling’: The issues highlighted under this heading (“misleading courts, making false claims, distorting evidence and misrepresenting facts”) are clearly already all serious breaches of professional ethical standards. We would stress that whilst there is **some** evidence of this occurring, on closer inspection it is very limited, at least as far as the Bar is concerned. For example, the consultation paper at paragraph 29 fn.19 cites Moorhead R, Vaughan S, Tsuda K ‘What does it mean for lawyers to uphold the rule of law?’ (2023) at page 26, which in turn states that “*The SRA and BSB have noted an increase in reports of lawyers misleading the courts*”, referencing the BSB’s 2021-2022 Regulatory Decisions Reports at page 22. Looking at the BSB’s Regulatory Decisions Reports for 2022/23<sup>3</sup> and 2023/24<sup>4</sup> this shows that:

- 1) Reports of misleading generally have reduced (from 31 in 2021/2022 to 8 in 2023/2024); and of misleading the courts<sup>5</sup> in particular have reduced (from 21 in 2021/2022 to 7 in 2023/2024).
- 2) 2021/2022 was a statistical outlier in terms of new referrals to investigation of misconduct generally:

2019/20: 175  
2020/21: 128  
2021/22: 236  
2022/23: 122  
2023/24: 108

Although we do not know the detail, we suspect that the spike in new referrals in 2021/22 may have arisen from the challenges presented by the new ways of working made necessary by the COVID pandemic.

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<sup>3</sup><https://www.barstandardsboard.org.uk/asset/5C58DE03%2D410A%2D4C0C%2D9B104CCA378D145F/>

<sup>4</sup><https://www.barstandardsboard.org.uk/asset/3092876D%2DED33%2D468D%2DA03BD55038B2ED87L>

<sup>5</sup> Under the headings ‘Making misleading / false / unfounded submissions or statements’ and ‘Other misleading the court’.

8.3. *'Ethical apathy'*: We note that the evidence on this is entirely based on solicitors. In particular, Vaughan S, Oakley E *"Gorilla exceptions' and the ethically apathetic corporate lawyer"* (2016) was expressly only concerned with SRA-regulated individuals.

8.4. *'Creative compliance'*: Again, we note that the evidence on this is not necessarily based on barristers. In particular, Moorhead R, Vaughan S, Tsuda K (2023) at page 40 cites *"discussion with corporate and in-house lawyers"*. Whilst such lawyers are not exclusively solicitors, barristers will necessarily form a small minority of them (although recognising that it is becoming increasingly more common for barristers to work in-house, such as at law firms or in government).

9. We would also note that barristers are especially – indeed, relative to other legal professionals, uniquely – exposed to ethical scrutiny in their advocacy and conduct of proceedings before courts and tribunals. That work is public-facing, and their conduct is exposed to immediate challenge by opponents and judges. Any taking of ethical “liberties” therefore stands at very high risk of exposure and condemnation, with immensely detrimental consequences for the barrister’s reputation and standing. As every barrister knows, a reputation for untrustworthiness is very quickly acquired, but almost impossible to lose. It is therefore difficult to over-emphasise the extent to which barristers are subject to “peer pressure” to maintain the highest ethical standards in their work.

10. Furthermore, the professional requirement to exercise independent judgment in all matters (not just ethical matters) is very deeply engrained in barristers. There is no hierarchy in barristers’ chambers. Professional advancement is not dependent on the approval of one’s peers, but simply on the quality of each individual’s work. The pressures that exist in a corporate environment - to conform, to avoid challenge to superiors, even to subscribe to collective ‘group think’ – are entirely absent from the working world of self-employed barristers. We return to this point below.

11. This is not to say that any of the issues set out at paragraph 29 of the consultation paper do not merit concern, or regulatory oversight. Rather, that we agree that a high level principles-based approach is appropriate for the policy statement, but with the caveat that this does not necessarily indicate a need for substantial change in all areas of regulation. In implementing this we agree that the best way for the LSB to act is to take a high-level outcomes-based approach, with specified expectations, affording the frontline regulators a degree of clarity as to what is expected of them. But at the same time allowing for nuanced approaches to implementation whereby the different legal professions are all treated appropriately.

### **Question 1- Do you agree with our proposed definition of professional ethical duties?**

12. In broad terms we agree, although we have a concern as to the precise wording as set out below.

13. The proposed definition (in paragraph 25 of the consultation) reflects the “*professional principles*” as legally-defined in the LSA 2007 s.1(3). (To the extent that it is of relevance, the “*duties*” are referred to in the proposed definition in the same order as they are set out in LSA 2007 s. 1(23).) However, we do note that the LSA 2007 s.1(3) describes the ‘professional principles’ as just that – principles, not duties. Those principles broadly correspond with common legal and professional duties set out, in much greater detail, in law and in legal regulators’ professional codes, but the principles themselves lack any detailed delineation of those duties. Our understanding is that LSA 2007 s.1(3) is not intended to, and does not, impose separate or freestanding legal or ethical duties on regulated persons. So far as regulated persons’ professional ethical duties are concerned, those are to be found, and are defined, in the particular code of conduct applicable to the regulated person. The legislative function of LSA 2007 s. 1(3) is simply to provide content for the regulatory objective set out in s. 1(1)(h) of the Act, i.e. “*promoting and maintaining adherence to the professional principles*”. That is an objective that applies to regulators, not regulated persons.

14. Accordingly, we would understand the proposed definition of “*professional ethical duties*” as being a compendious reference, for the purposes of the proposed statement of policy, to the various professional ethical duties set out in professional codes of conduct, each of which seeks to promote and maintain adherence to the professional principles, as appropriate to the relevant profession. We do not object to a definition of “*professional ethical duties*”, if it is understood in this way. But to be entirely accurate, a regulated person is subject only to such professional ethical duties as are set out in their applicable code. Those ethical duties relate to and broadly correspond with the professional principles, but they are not defined by, or indeed limited by, those professional principles.

15. We agree that the statement in the second sentence of the definition (“*They must ensure...*”) in general gives a helpful emphasis to the fact that an ethical duty to act in the best interests of one’s client is not an overriding duty, and must, in broad terms, be balanced with the other duties.

16. Our remaining concern is that this proposed definition may inadvertently give the impression that all professional ethical duties are of equal weight in all situations, or that one duty cannot override another. By emphasising that a duty to act in the best interests of one’s client does not override a duty to the court where they are in conflict, it might be read as implying *vice versa* that a duty to court does not override a duty to act in the best interests of one’s client. Clearly this is not the case.

17. As the consultation paper itself highlights, the various regulators all appear to acknowledge that in appropriate circumstances one professional duty can override another; see at paragraph 50. We consider that this is, at least in principle, legally correct. For example, as a matter of law, a duty of confidentiality can be overridden by a duty to or imposed by the court, as where there is a disclosure order or a more general duty to disclose. This point about it being possible in law for one legal or ethical **duty** to override another is why we highlighted the fact that where LSA 2007 s.1(3) speaks about professional **principles** it does not impose any freestanding **duties**. Furthermore, it is also important to remember that any such duties can be qualified or even overridden by, for example, primary legislation. Possibly the best-known exceptions to the duties owed to clients are duties on lawyers under money laundering

legislation, which expressly override duties to the client: e.g. the prohibition of ‘tipping off’ clients under the Proceeds of Crime Act 2002 s.333A.

18. In the context of this consultation, we are concerned that it should be made clear that in the case of those professionals exercising a right of audience or conducting litigation their duty to act with independence in the interests of justice is an overriding duty. This reflects the current BSB Code of Conduct where Core Duty 1 (*You must observe your duty to the court in the administration of justice*) expressly “*overrides any other core duty, if and to the extent the two are inconsistent*”; see BSB Handbook, Code of Conduct, gC1. Crucially, this also reflects what we believe to be the law, namely that a duty to the court must necessarily be an over-riding duty – and if and to the extent that there were a contrary overriding duty then there could be no over-lapping duty to the court. By definition, therefore, any duty to the court ‘overrides’ any other duty. NB: Although the word ‘override’ might not be entirely accurate (e.g. a duty to the court indicates that there is no contrary legal duty to truly override), we think this term is sufficiently clear to be used here, and that in this context using a forceful and unambiguous word is probably better than trying to insert a short explanation of the legal position.

19. We also find it difficult to believe that there could ever be a legal duty on a professional to act without integrity, honesty or independence, save for expressly imposed statutory duties such as in relation to ‘tipping off’ offenses. Essentially, we do not see how (say) a duty to act in the client’s best interests could legally extend to imposing a duty to act dishonestly, without integrity or without independence. Duties are also necessarily limited by context. For example, a duty to act in the client’s best interests is limited to acting in the client’s best interests in a professional capacity and in the context of their retainer – so there will not be a duty on a lawyer to go beyond the scope of the retainer, or (say) to provide babysitting services for free, no matter how much it would be in the client’s best interests. Accordingly, we do not see that there could ever be a duty imposed or implied by law that would require a lawyer to, or extend to having to, act dishonestly, without integrity or without independence. NB: We have not been able to find any authority precisely on this point – but we suspect that this is probably because the point is so obvious.

20. We recognise that the problem with drafting on this issue is that although one duty can override another, precisely when it does so is usually highly contextual and fact-specific. Furthermore, it may well be that different legal professions have different overriding duties in different circumstances; see, again, the various approaches adopted by the approved regulators at paragraph 50 of the consultation paper.

In this respect we note that some of the other authorised regulators currently describe **principles** “*which safeguard the wider public interest*” including “*upholding the rule of law and [upholding] public confidence [in the profession]*” as taking precedence; see the Solicitors Regulatory Authority’s Principles and the Intellectual Property Regulation Board’s Overarching Principles. In so far as these are merely professional principles, that may be an unexceptional statement. However, if it were claimed to go further and be a statement that the duty to uphold public confidence in the profession could override other legal duties (such

as a duty of confidentiality) then we would respectfully say that this must be wrong in law<sup>6</sup>. Furthermore, if it were suggested that the duty to uphold the rule of law could somehow reduce other legal duties then this would be an oxymoron – surely the rule of law requires the upholding of (genuine) legal duties.

21. The Faculty Offices' Code of Practice goes somewhat further and talks about an "*overriding professional duty on any lawyer*" to "*uphold the rule of law and the proper administration of justice*". The duty to uphold the proper administration of justice may be another way of putting the overriding duty to the court. (It may also be a reflection of the position of notaries as public certifying officers. The Bar Council does not make any submissions on the precise remit of notaries' duties.) The posited duty to uphold the rule of law is however less easy to understand as a free-standing code duty. Surely the proper way for lawyers to uphold the rule of law is to comply with the law and their professional obligations. If more than this is meant, it is unclear what that more is.

22. Precisely how a legal professional should deal with those conflicts can give rise to some of the most difficult of all professional ethical issues. By way of example, if the duty to the court requires an advocate not to mislead the court expressly or by implication, which includes not implying that a disclosure obligation has been complied with when it has not, should the advocate breach confidence to the client and tell the court that the obligation has not been met, even if the client instructs them not to do so? In the abstract, and referring only to the LSA 2007 s.1(3) professional principles, that might appear to be a correct answer, but in fact it is wrong. In order to handle the conflict (i) the advocate must withdraw from acting, thereby removing the ethical and professional conflict, but thereafter (ii) the advocate does not have to, and must not, reveal the contents of the undisclosed document to the court, in breach of the client's confidence; see BSB Code of Conduct, rC25.3 and gC13.

23. We would therefore suggest that the proposed definition is slightly amended to reflect the fact that:

- 1) A duty to the court can 'override' other duties;
- 2) The duty to act with honesty, independence and integrity can 'override' other duties; but
- 3) In general (and subject to the aforesaid) the duties do not override each other, there is no order of precedence, and conflicts of duty must be handled as directed by the relevant lawyer's applicable code of conduct.

24. It may also be worth highlighting that there can be express provision to the contrary, thereby clarifying that different regulators may wish or need to highlight different overriding duties in particular contexts.

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<sup>6</sup> In this respect, see below at paragraph 19 for how the BSB Code of Conduct deals with conflicts between the duty to the court and duties of confidentiality. In summary, barristers have to withdraw from acting, but thereafter cannot make disclosure of the confidential information – emphasising that the duty of confidentiality is not simply expunged by the conflicting duty to the court. If that is the case for the duty to court, it must also be the case a fortiori for the duty to uphold public confidence in the profession.

25. We note that at the recent PERL Fourth Roundtable (7 May 2025) the LSB put forward a slightly amended version of the definition, as follows:

*“... authorised persons have a duty to act with honesty, independence and integrity; maintain proper standards of work; keep the affairs of clients confidential; and comply with their duty to the court to act with independence in the interests of justice. They must place their duty to the court and their duty to act with honesty, independence and integrity above the duty to act in the best interests of their client where these come into conflict.”*

26. We believe that this indicates that the LSB recognises the issues set out above. We agree that this formulation is an improvement on the original version. We would, however, suggest a slight modification of that version as follows (taking the BSB Code of Conduct wording as a template):

*“authorised persons have a duty to act with honesty, independence and integrity; maintain proper standards of work; keep the affairs of clients confidential; and comply with their duty to the court to act with independence in the interests of justice. Subject to the fact that they must place their duty to the court and their duty to act with honesty, independence and integrity above the duty to act in the best interests of their client where these come into conflict, these duties are not presented in order of precedence.”*

**Question 2- Do you agree with our proposal to set general outcomes?**

27. For the reasons set out in the Overview section above, we do agree. Clearly the precise details as to how those outcomes are worded, and how they are targeted through specific expectations is crucial. But we agree that the approach is in principle correct.

**Question 3- Do you agree these proposed outcomes address the harms and unethical behaviours presented in the evidence? Are there any further outcomes we should consider?**

28. Whilst we do agree that the issues raised in the consultation paper are addressed by the proposed outcomes, we would stress that the evidence of unethical behaviours by barristers is more limited and nuanced than the general evidence relating to the legal profession as a whole.

**Question 4- Do you agree that the proposed general outcomes should be met by regulators through a set of specific expectations?**

29. Again, for the reasons set out in the Overview section above, we do agree. Again, the precise details as to how those specific expectations are worded is crucial. But we agree that the approach is in principle correct.

**Question 5- Do you agree that regulators should demonstrate that evidence-based decisions have been taken about which expectations are appropriate to implement for those they regulate?**

30. For the reasons set out in the Overview section above, we do agree. Different regulators deal with different professions, which are subject to different issues, and face different situations of ethical conflict or challenge. Evidence based regulation is not only to be encouraged, but is essential and required in accordance with the legislation. The LSA 2007 s.28 requires that all approved regulators must have regard to “*the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed*” (emphasis added). Without evidence-based decision-making it would be impossible to meet this regulatory obligation.

**Question 6 - Do you agree with the proposed Outcome 1?**

31. We do agree with the proposed Outcome 1 and have the following additional comments.

32. The LSA 2007 section 1(1) sets out the regulatory objectives. Outcome 1, ensuring that authorised persons have the right knowledge and skills on professional ethical duties both at the point of qualification and throughout their career, undoubtedly falls under section 1(1)(h) of the 2007 Act, the promotion and maintenance of adherence to the professional principles.

33. Having the right knowledge on professional ethical duties at the point of qualification and throughout one’s career should clearly not only be encouraged but (we think) required. And if the word ‘skills’ in Outcome 1 means practical skills of how to make ethical decisions in your day-to-day practice, then that must also be welcomed. Once a barrister is armed with the right fundamental principles of professional ethics, they need the skills to utilise the framework of rules, regulations, guidance, and other resources considered in Outcome 2. As with so many aspects of a barrister’s working life, it’s knowing where to find the answer and understanding what it means when you have found it which is key. Barristers cannot be expected to memorise the BSB Handbook, but they need the skills to use it effectively and efficiently. The expected redraft of the BSB Handbook to make it more user-friendly and accessible is much anticipated and eagerly awaited.

**Question 7- Do you agree with the specific expectations proposed under Outcome 1?**

34. In general we agree with the proposed specific expectations, but with the following comments:

- 1) Whilst we agree that there should be standards for education and training, we would emphasise that this should not necessarily be expected to lead to changes in what is currently required. Change for the sake of change is not to be encouraged.

- 2) In particular, we would be cautious about alterations to the education and training currently-required, leading up to qualification as a barrister. The BSB has relatively recently put in place an ethics paper as part of the qualification process, and it would be precipitate to conclude that the current structure and process is inadequate. More generally, the consultation points out that the evidence shows it is more likely to be experiences in the workplace, the cultures in those workplaces, and the expectations from their employers, clients and their regulators which shape the thinking and behaviour of authorised persons; see paragraph 5. We think the specific expectations could possibly put greater emphasis on setting new standards for training post-qualification, although we do note the cross reference at fn.62 of the consultation to the LSB's ongoing competence statement of policy. Possibly there could be included an express reference in the body of the expectation to that statement of policy.
- 3) The second part of the expectations (roman number II) can be split into two parts. It is obviously right that regulators would benefit from sharing best practice, to mutual advantage. Moreover, maintaining relevant, fit for purpose, and up-to-date standards for education and training on professional ethical duties is manifestly the aim of all regulators. However, the fundamental and important distinctions that exist between the different types of legal professionals as listed in paragraph 1 of the Executive summary of the consultation Paper needs to be respected and reflected not only in the professional ethical duties but in the education and training of those duties.

#### **Question 8- Do you agree with the proposed Outcome 2?**

35. We agree with the general wording of proposed Outcome 2. At a high level it is clear and comprehensive, and does not impose any contested interpretations of the law or legislation.

36. We would note that paragraph 49 of the consultation paper states that the ethics literature review *"concluded that the 'formalist' conception of the rule of law on solely serving client interests and acting within the letter of the law rather than the spirit is too narrow in the context of legal services and legal services regulation"*. That may be an accurate summary of the literature review. However, the Bar Council would stress that it does not accept that the statement is legally correct. The regulatory objective of *"supporting the constitutional principle of the rule of law"* is embodied in the LSA 2007 s.1(1)(b). As such, whatever *"the constitutional principle of the rule of law"* is or may be, at least for the purposes of the LSB and the regulation of the legal professions, it is a legally-defined concept. If and to the extent that is a 'formalist' approach, nonetheless it cannot, by definition, be not *"too narrow"* in the context of legal regulation.

#### **Question 9- Do you agree with the specific expectations proposed under Outcome 2?**

37. We agree with the proposed specific expectations under Outcome 2. Again, at a high level they are clear and comprehensive, and we do not have any suggested additions.

38. We would again note that different professions have different experiences of these issues, and the different frontline regulators have had very different approaches to their rules, regulations, guidance and other resources. In this respect the Bar Council would note that whilst there are undoubtedly some areas of the BSB's Handbook and other rules and guidance which could be improved (in particular its clarity / readability), and obviously as new issues arise so they will need to be dealt with in new documentation, in general the BSB's documentation is relatively comprehensive. This is not a suggestion that the BSB should be complacent – but it does tend to highlight once again that the LSB should be taking a high-level approach to these issues, as one frontline regulator's issues may not be universal.

**Question 10- Do you agree with the proposed outcome 3?**

39. We agree with the general wording of proposed Outcome 3. At a high level it is clear and comprehensive, and the principles it embodies are clearly to be encouraged.

**Question 11- Do you agree with the specific expectations proposed under outcome 3?**

40. We have some concerns about the specific expectations proposed under outcome 3.

41. Our primary concern is that they appear to be drafted with an assumption that all lawyers operate in an employed or partnership environment. We support the principles underpinning those expectations, and we recognise that the majority of authorised persons across the legal sector subject to professional ethical duties will be employed or in a partnership (or equivalent), and may be providing legal services to / via their employer / partnership. However, the majority of the Bar (80.4%)<sup>7</sup> operates in self-employed practice for some or all of its work. Of those barristers that are employed, only some will work for authorised bodies and so be subject to any new requirements related to this expectation.

42. Barristers in self-employed practice are obviously not immune from the types of pressures and challenges faced by employed authorised persons, but their specific circumstances are clearly different. For example;

- 1) Duties of confidentiality often require self-employed barristers to maintain confidentiality within their working environment of chambers. Whilst an *“environment of openness and speaking up”* is to be encouraged in respect of ethical duties

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<sup>7</sup> As of 20 May 2025, the breakdown of practising barristers (17,864) by types of employment is as follows:

- Self-employed barristers: 80.4% (14,363)
- Employed barristers: 16.9% (3,017)
- Dual capacity (undertaking both self-employed and employed work): 2.7% (484)

Our source of data is the internal membership database (CRM) shared by the Bar Council and the Bar Standards Board as of 20 May 2025. Each year, as part of the Authorisation to Practice (AtP) process, all barristers who wish to continue to practise must renew their practising certificates. The information collected as part of that process allows monitoring of key demographic characteristics and trends.

in principle, there may well be obligations of confidentiality that mean that this is simply not possible, at least to the same extent and in the same way as in a more common employed or partnership-type environment.

- 2) It is difficult to see precisely how obligations to have “*internal reporting up policies and/or guidance to establish a clear line of accountability*”, or to “*foster work environment and cultures where ethical decision-making is supported and valued*” could, should or would apply to chambers of individual self-employed barristers.

43. We also have a concern in terms of the precise wording of proposed expectation I: “*Set clear reporting expectations for authorised persons, their managers and employees within authorised firms on any breach or anticipated risk of breach of professional ethical duties, to facilitate an environment of openness and speaking up*” (emphasis added).

44. If this is only concerned with internal reporting, then it may well be appropriate for employed or partnership-type lawyers, but again there would be difficulties in applying this in the context of individual self-employed barristers in chambers. Not only are there questions of confidentiality, but there may well not be an appropriate structure or hierarchy within which a barrister could appropriately or meaningfully make such a report. For barristers, appropriate reporting lines are to the BSB: see paragraph 45 below.

45. We can only assume that the expectations under outcome 3 are not intended to apply to self-employed barristers in chambers.

46. If the proposed reporting duty in relation to anticipated risk of breach relates to reporting to the lawyers’ regulators, then it goes very far beyond the current duties which fall upon barristers to report themselves where they have committed serious misconduct (rC65.7) and other barristers where they have reasonable grounds to believe there has been serious misconduct by them (rC66). Leaving aside whether it is appropriate to report hypotheticals (“*anticipated risk of breach*”) to a regulator, it is not clear what the regulator would or could do with such information in the absence of an actual breach of professional duty. We are also concerned about the related question of the administrative burden that would be placed on regulators to field reports made by lawyers about anticipated ethical breaches. Although it is difficult to predict the likely number of reports to be received by regulators, it is probably fair to assume that they do not have capacity in their current set up to deal with such reports. If this requires an expansion in their workforce, then the Bar Council would be very concerned about the increased cost to the profession via barristers’ practising certificate fees; and see below under Question 21.

#### **Question 12- Do you agree with the proposed outcome 4?**

47. We agree with the general wording of proposed Outcome 4. At a high level it is clear and comprehensive. We would however again emphasise that different professions and their regulators will face different challenges, and that different professions may have different levels of and issues relating to non-compliance, thereby rendering different levels and

approaches to supervision appropriate. In this case the word “appropriate” in the proposed outcome is of crucial importance.

**Question 13 - Do you agree with the specific expectations proposed under outcome 4?**

48. We agree with the proposed specific expectations under Outcome 4. Again, at a high level they are clear and comprehensive.

49. Our only suggested amendment is at paragraph I(d). This appears to us to be highlighting decisions and judgments of adjudicating bodies, rather than decision-making bodies. The former will provide useful data and evidence, but the latter might include policy decision-making bodies which would be guidance or directives rather than evidence of compliance. We would therefore suggest a minor amendment so that it would read:

*“decisions and judgments from the courts, disciplinary tribunals, the Legal Ombudsman, regulators and other such adjudicating ~~decision-making~~ bodies”.*

**Question 14 - Do you agree with the proposed Outcome 5?**

50. We agree with the general wording of proposed Outcome 5. At a high level it is clear and comprehensive.

51. We agree that it is important that regulators have processes in place to evaluate the impact of the measures they undertake to meet outcomes 1 to 4 – not only to make sure that they remain relevant and are fit for purpose, but also to identify any unintended consequences from the proposed changes.

**Question 15 - Do you agree with the specific expectations proposed under Outcome 5?**

52. We agree with the specific expectations proposed under Outcome 5, with the following additional suggestion.

53. We suggest that there should be a specific expectation around transparency in the evaluation processes, so that regulators ensure:

- 1) There is a mechanism for feedback from the professions they regulate on the impact of the measures applied and in order to capture emerging issues.
- 2) There is regular reporting on performance and outcomes including at points when the approach to regulation may need to evolve to address emerging issues.

54. We recognise that both these aspects, and the more general requirement for transparency, may well already be required under other aspects of the regulatory regime. However, an express requirement here would not go amiss.

**Question 16 – Do you agree with our proposed timelines for implementation?**

55. The proposed two staged implementation timeline looks logical as outcomes 4 and 5 are contingent on the implementation of outcomes 1, 2 and 3. On the question of whether those timelines are feasible for the regulators, this is a question best addressed by them.

**Question 17 – Is there any reason why a regulator would not be able to meet the statement of policy outcomes within the timeframes proposed?**

56. Again, the regulators are best placed to answer this question. However, we would say that the LSB needs to be cognisant of the many competing priorities of regulators and the fact that they vary significantly in size, which may influence the speed at which they can implement the proposed new outcomes.

**Question 18 - Have you identified any equality impacts, we haven't considered which, in your view, may arise from our proposed statement of policy?**

57. No. However, we would note that although the desire to protect individuals from SLAPPs is shared by us (albeit see above as to how to deal with them), they do not appear to us *prima facie* to engage any Equality Act 2010 issues. This is different from the position on NDAs, which clearly can and regularly do.

**Question 19 - Do you have any evidence relating to the potential impact of our proposals on specific groups with certain protected characteristics, and any associated mitigating measures that you think we should consider?**

58. No.

**Question 20 - Are there any other wider equality issues or impacts that we should take into account and/or any further interventions we should take to address these in our statement of policy?**

59. Not in relation to the statement of policy. Clearly implementation of the various outcomes / expectations will require assessment of equality issues and impacts, but it is not believed that any arise in relation to the high-level statement of policy.

**Question 21 - Do you have any comments on the potential impact of the draft statement of policy, including the likely costs and anticipated benefits?**

60. Although, again, the BSB is better placed to predict the impact upon of the proposals upon it, we anticipate that the proposals could be claimed to create more work for the BSB as a result of new areas of work and its evaluation of that work – even though much of what is

required should already be being done. We believe that realistically most of what is proposed should be capable of being met with resources and actions that are already either in place or are already in train – for example, the BSB’s upcoming consultations on education, and updating the BSB Handbook. Accordingly, any additional work should be minimal, and primarily ‘one-off’ to be undertaken in the short to medium term. We expect that the policy should **not** result in any increase to the BSB’s budget, which as was noted in our response to the BSB’s 5-year strategy call for evidence, has had successive increases in recent years.<sup>8</sup>

61. It is difficult to comment on the potential impact on both barristers and the BSB until the statement of policy is finalised and the BSB decides for itself how to implement it (following a consultation process). At this early stage, it appears the largest impact will be on barristers working within authorised entities, i.e. those working for law firms and BSB-authorized and licenced bodies, owing to the operation of outcome 3 and the related expectations. Any changes to the training and continuous professional development of barristers, will, in contrast, be universal.

62. It is worth mentioning that barristers are already subject to extensive regulation both from the BSB and as a result of other legislation such as the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 and the General Data Protection Regulation. Additional regulation further increases the burden of compliance, reducing the time available to barristers to provide specialist legal services to their clients. There is also a financial cost to it, either through time lost to fee-earning activities and through the hiring of professional staff to assist with regulatory compliance activities, or through paying consultants to advise them. As we stated in our response to the LSB’s business plan consultation earlier this year, when talking about incremental increases to the cost borne by each barrister of funding the LSB:

*“The cumulative effect is not insignificant, and it represents yet another increased compliance cost borne by barristers. This will impact those barristers whose annual earnings place them in the lower income bands particularly hard.”*

63. The same considerations apply to any additional regulatory cost, which is to say, it all adds up and has an impact. That impact will particularly affect barristers undertaking publicly-funded work, since they cannot pass on increased costs of compliance to their clients.

#### **Question 22 - Do you have any further comments?**

64. We have no additional comments.

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<sup>8</sup> <https://www.barcouncil.org.uk/static/e002f4b4-8418-4fab-8f05e65cf1fe5427/Bar-Council-response-to-the-BSB-call-for-evidence-on-its-5-year-strategy.pdf>

**Bar Council**  
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