



Bar Council response to Bar Standard's Board (BSB) consultation on the regulation of barristers in chambers

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the BSB's consultation on the regulation of barristers in chambers.¹
2. The Bar Council represents over 17,000 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.
4. The Bar makes a vital contribution to the efficient operation of criminal and civil courts and tribunals. It provides a pool of talented individuals 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 BSB.
5. Before addressing the consultation questions, we wish to summarise our views and make some general points on the role of chambers, their accountability to the BSB, diversity and the cost of regulation.

¹<https://www.barstandardsboard.org.uk/news-publications/consultations.html>

Summary

6. The BSB (via delegation of regulation by the General Council of the Bar) is authorised by schedule 5 of the Legal Services Act 2007 to regulate individual barristers.² Self-employed barristers practising from chambers have specific and express code of conduct obligations to ensure that their chambers comply with certain BSB Handbook rules and operate in various manners; for example, the rC89.1 duty to take reasonable steps to ensure that their chambers is administered competently and efficiently. The BSB ensures and monitors compliance by the individual barristers with this limited number of rules through its supervision of chambers. However, this is not to be confused with regulation of chambers. It is the individual barristers who are regulated, albeit regulatory compliance is often (though not always) achieved through the administration and operation of chambers. The BSB does not have the power to regulate chambers and therefore must not begin regulating chambers. To do so would be to act ultra vires.

7. Another important distinction that must be maintained is between setting and policing minimum standards and best practice. The former falls squarely within the remit of the BSB. The latter is best done by the representative body, the Bar Council. If the BSB attempts to promulgate best practice it runs the risk of blurring the lines, giving the impression that best practice is a regulatory requirement and increasing the burden on chambers and in particular, heads of chambers, with all the associated cost.

8. We agree that the BSB should monitor compliance of barristers' chambers related obligations by focussing their resources on those chambers whose members present a higher risk, regardless of the size of the chambers. Conversely, they should use a lighter touch with the well-run ones. This approach represents a pragmatic use of limited resources and is consistent with the better regulation principles that regulation should be targeted and proportionate. Care must be taken to ensure that the burden on chambers created by the regulatory return is not replicated in any new system, even on those chambers whose members present a higher risk. For the avoidance of doubt, we are not advocating for a two-tier system. One approach must be applied consistently to all barristers (and chambers).

9. What has become clear in discussions with chambers, is that rules and guidance must be clear, simple, accessible and consistently applied. Resources that are difficult to find, navigate and comprehend create uncertainty, cost valuable time and make compliance more challenging than it need be.

² This is to be distinguished from their regulation of barristers employed by BSB authorised bodies where the BSB does have a role in regulation of the entity as well as the authorised persons practising from it.

10. We recognise the value of the Bar Council working with the BSB to ensure chambers management related work is complementary and non-duplicative.

General points

The role of chambers

11. The consultation questions do not ask respondents to comment on all the themes raised by the BSB proposals, which is an omission in our view. Any extension of the roles of both the BSB and of chambers, may be outside the scope of its power, challenging to implement and should be properly debated before any of the consultation questions arise.

12. Two themes that are raised in the consultation but neglected in the questions are:

- i. That chambers have a role in the regulation of individual barristers (e.g. paragraph 12 "*...chambers in performing their important oversight and governance roles.*"; paragraph 21 "*...chambers consciously focus on their role in maintaining standards.*"; and paragraph 40 "*...chambers committees to oversee standards*"; and,
- ii. At least by implication, chambers as collectives will be accountable to the BSB.

13. Aside from the question of the scope of the BSB's powers, the issue is that chambers are not necessarily structured to exercise this oversight of their members, nor are its members necessarily qualified to perform this function.

14. Chambers are a collective of self-employed individuals with ethical and regulatory obligations to be independent of each other. Members of chambers frequently appear against each other or in front of other members sitting in part-time judicial posts or as arbitrators. Chambers internal structures have to be such that they do not impact on these ethical, regulatory or practical requirements of independent individuals. A collective of independent practitioners in a similar practice area with regular conflicts of interest cannot be an effective or appropriate regulator of individual members of the collective.

15. Membership of chambers is usually on the basis of skill in a particular area of practice. Skill or experience in management or in professional regulation are not and should not be considerations when selecting new members.

16. In addition, many chambers are not in a position to have a dedicated resource of skilled individuals to perform BSB Handbook rule compliance functions.

Accountability of the collective and heads of chambers to the BSB

17. The consultation acknowledges that chambers do not necessarily have any corporate legal status. It describes chambers as unincorporated associations. This description should be treated with some care. Although unincorporated associations are now relatively rare, chambers are not like traditional unincorporated associations such as, for example, sports clubs. It is better to see chambers as associations *sui generis*.

18. The important point is that because most chambers do not have any legal personality and are made up of independent practitioners, it is difficult to see the basis on which they can collectively have enforceable obligations to a regulator such as the BSB.

19. We understand the BSB to suggest that certain obligations should fall to heads of chambers. However, that would be inappropriate because heads of chambers do not take on liability for the actions of other self-employed practitioners. It is unclear therefore, how such obligations would be enforced. Such obligations would create a considerable disincentive to barristers to taking on this onerous but unpaid role. Anecdotally some chambers already have difficulty in recruiting a member of chambers as the head of chambers as, for example, its status and significance relative to, for example, judicial appointment, has declined.

Diversity

20. The proposals raise significant diversity issues. It is now recognised that one of the impediments to busy practitioners taking up leadership roles in chambers is the time such positions can take up. This is particularly acute for those with caring responsibilities. These proposals could impose significant additional time commitments on those occupying these voluntary positions. At paragraph 22 of the consultation paper the BSB says:

“We might stipulate that chambers must undertake an audit of access and have a five year plan to improve it. We might require chambers to share regularly with their members, and discuss, data on the distribution of work...”

21. Quite apart from such proposed regulatory action falling beyond the scope of what is appropriate or available to the BSB (as it does not regulate chambers), such requirements would take a significant amount of chambers’ leaders’ time, creating further obstacles to participation in the management and leadership of chambers.

22. The BSB states that smaller sets can have more difficulty complying with BSB requirements (noting our point at paragraph 47 that some small sets are well-resourced and find compliance less of a challenge). At Annex A in the consultation document, the BSB shows that smaller sets are those that often have greater diversity. Any additional regulatory burden will therefore have a disproportionate effect on women and those from underrepresented ethnicities.

Cost

23. Any additional regulatory burden on barristers generates financial costs whether through the lost practising time of barristers, diversion of chambers staff time, paying for an external consultant's expertise or through hiring new staff.

24. There is also likely to be a cost to the BSB as they will need more resources to implement a new and more involved supervision programme. The BSB is funded through the Practising Certificate fee (PCF), gathered from practising barristers. The BSB is seeking a 9% increase to their budget for the 2024-25 business year. As well as this putting more financial pressure on barristers, some of whom, are already under strain (particularly those doing publicly funded work), there is the risk that the higher cost of the PCF will be passed onto barristers' clients in the form of higher fees.

25. Chambers that undertake mainly legal aid work provide a vital public service. Against the backdrop of a reduction in barristers' fees for many successive years they often have little or no financial reserves to call upon to pay for additional regulatory compliance work. The Institute for Government states there has been "*a 9.8% decline in the number of full-time criminal barristers* between 2017/18 and 2021/22.*"³ They also cite interviewees who attributed an increase in ineffective trials (those that are rescheduled when the trial does not take place on the planned day) to unavailability of legal advocates.⁴ Any additional financial burdens could act as a further disincentive to practise at the criminal Bar.

26. There is also the question of how the BSB will resource this additional work. The BSB has at times struggled to keep up with meeting its Key Performance Indicators for authorisations and disciplinary work.⁵ We consider this essential work which the BSB should continue to focus upon, rather than generating additional lines of work that are intended to meet over-stated regulatory expectations.

Consultation questions

Question 1- Do you agree with our proposed approach of parallel websites to set out regulatory expectations and supporting guidance and good practice? Do you agree with the proposed coverage of the Bar Standards Board website? Do you have suggestions about how the proposed websites could be made as accessible and useful to chambers as possible?

27. Subject to the observations below, the Bar Council is not opposed to the suggestion that the BSB should develop a website setting out more clearly its regulatory expectations of

³ Institute for Governance [Performance tracker](#), 30 October 2023

⁴ Ibid

⁵ [BSB Regulatory Decision-making Statistical Report 2022/23](#) and [BSB Regulatory Decision-Making Annual Report 2021/22](#)

barristers. However, it considers that practical advice to barristers on developing policies and procedures and best practice guidance should all fall within the remit of the Bar Council. Any online material developed by the BSB should make this distinction clear. It is also important to keep resources up to date and for them to be clear and easy to navigate. The language used must be comprehensible to the non-lawyers that frequently staff chambers and manage compliance issues. The Bar Council's Ethical Enquiries Service receives calls from barristers and chambers staff seeking assistance in finding rules and guidance. This is likely due to the uncertainty created by the way current resources are presented on the BSB's website and within the BSB Handbook. As our Chair stated when Vice-Chair to the BSB Board in early 2023, the Handbook is difficult to read and traverse even for senior barristers.

28. The BSB Handbook sets out the rules, and these are cross referenced by guidance notes which provide clarity on what the rules mean, but it does not usually provide advice or guidance to barristers on how to create policies and procedures to meet that rule. That work is mainly undertaken by the Bar Council. The Bar Council has a website that hosts extensive ethics and practice resources⁶ which sets out clear guidance to barristers as to how to implement their regulatory requirements, including template documents where appropriate. If the BSB's proposed website crosses over into the areas already covered by the Bar Council this is likely to create confusion.

29. This potential confusion is highlighted by examples of recent guidance provided by the BSB which - whilst said to be guidance, did not provide practical assistance to barristers to implement new or revised BSB requirements. For example, the Religion and Belief Toolkit has no reference to some religions, no reference to belief, no guidance on how to manage conflicting beliefs in the workplace, and no clarity over what role chambers has to play. Another example is the Anti-Racist Statement which provided no guidance on what training on this topic needs to cover. In both these cases, the Bar Council had to provide support and practice guidance to barristers on complying with their regulatory requirements. Barristers will be unable to comply with their regulatory requirements if the BSB produces guidance that contains an unstructured and incomplete mixture of rules and ideals. To enable barristers to meet their regulatory requirements, it would be more effective if there are clear parameters in place whereby their regulator sets out its minimum requirements; the regulator recognising that the Bar Council is best placed to provide good practice guidance as to how to implement those rules.

30. The Bar Council considers that if the BSB develops its proposed website that there should be signposting between that website and the Bar Council website, the Ethics and Practice Hub.

⁶ <https://www.barcouncilethics.co.uk/>

31. When the BSB updates barristers' regulatory requirements, the BSB should give the Bar Council sufficient notice to allow the Bar Council to publish its own updated guidance simultaneously with the new regulatory requirements. This is particularly pertinent where the BSB signposts barristers to the Bar Council's website. If this did not happen, the Bar Council's guidance would be out of step with the BSB's regulatory requirements.

Consultation Question 2: Part 1

Do you agree that regulations bearing on chambers should largely be expressed in terms of outcomes, but with an indication of where we would expect to see policies or other measures in place to support delivery of those outcomes?

32. The starting point is that the BSB Handbook already imposes outcomes on individual barristers. Section A.A2 of the Handbook states:

.2 The Outcomes – these explain the reasons for the regulatory scheme and what it is designed to achieve. They are derived from the regulatory objectives as defined in the LSA and the risks which must be managed if those objectives are to be achieved. They are not themselves mandatory rules, but they are factors which BSB regulated persons or unregistered barristers should have in mind when considering how the Core Duties, Conduct Rules or Bar Qualification Rules (as appropriate) should be applied in particular circumstances. The Bar Standards Board will take into account whether or not an Outcome has, or might have been, adversely affected when considering how to respond to alleged breaches of the Core Duties, Conduct Rules or Bar Qualification Rules.

33. From the terms of the question, it appears to be envisaged that the proposed 'outcomes' would operate in a similar way in relation to chambers as they operate in relation to barristers. Outcomes focussed regulation poses some significant challenges, outlined below.

34. Barristers deal with legal and regulatory duties every day of their working lives. They are adept at reading and comprehending complex legislation and regulations that provide legal certainty. An outcome is, by its nature, an inherently vague exposition of a desired result. Barristers, generally, work long hours in an intellectually demanding job. Reading, considering and understanding outcomes, then devising ways to achieve them, is not a task that they have time or incentive to carry out.

35. Part of the reason, it seems, that outcomes as a concept are challenging, is because of a lack of awareness of the existence of outcomes in the BSB Handbook. It is not a well-publicised aspect of the Code of Conduct.

36. An example is the change in Continuing Professional Development (CPD) rules in 2019. The old CPD rules required the simple completion of a form showing what CPD activities had been carried out for a particular year, and it was instantly reviewable. The CPD regime that replaced it requires barristers, in effect, to 'self-appraise' and set their own development plans. The majority of barristers have never been in an employed workplace, and do not have a clear idea of what self-appraisal involves, making compliance more challenging.

37. The most efficient way of achieving high levels of compliance would be to set a clear rule and then publicise it well. If, for example, there was a straightforward rule that all barristers had to attend E&D training – say – once every two years, this would have an immediate impact on awareness levels of barristers, and it is likely that it would have a positive effect on attitudes towards equality in chambers.

38. Framing outcomes upon chambers instead of barristers is unlikely to lead to '*chambers actively debating these issues*' or '*senior members of chambers identifying with, and actively championing, these objectives*', as is hoped for at paragraph 21 of the Consultation Paper. Self-employed barristers in chambers tend to have limited time. Any system of regulation needs to be as clear and easy to follow as possible. Outcomes without clear rules or processes are ambiguous and lead to uncertainty as well as being perceived as difficult to comply with.

39. Some barristers routinely step up and take on additional management-related responsibilities for their chambers, but these are in the small minority. This is because the roles are unpaid and even worse, incomes tend to drop when chambers' responsibilities are taken on because they displace paid work.

40. If further additional responsibilities are added to chambers (via rules imposed on self-employed barristers) or heads of chambers by the BSB, it is likely that the impact will be:

- a) Chambers will incur potentially substantial additional cost by way of additional management support or buying in of external solutions in order to comply with the outcomes;
- b) Some small chambers will struggle to achieve the outcomes, and;
- c) Barristers will be disincentivised to take on unpaid management roles for the benefit of their chambers as a whole.

41. If this happens, it is less satisfactory from a regulatory risk perspective, because outsourcing compliance reduces the engagement and involvement of individual barristers, making change in culture and true risk more difficult. It would also alienate further barristers from the work of the BSB.

42. Further, we note the consultation paper specifically states as undesirable the adoption of template Bar Council policies “*with little or no active consideration or discussion*” (paragraph 23). We challenge this assumption that chambers currently adopt templates off the peg without proper consideration. With the exception of a handful of policies, it is virtually impossible to adopt a template policy without first considering how it needs to be adjusted or reframed to fit the specific structure and needs of a chambers. The process of adjusting the document is valuable in prompting consideration of issues and crystallising decisions. It should be noted, though, that it is very rare that the entirety of chambers is involved in that process, other than perhaps to approve the document in question. Such work would normally be carried out by a small group of members, for example the management or equality and diversity committee.

Part 2: Do you agree that chambers would be aided by parallel Bar Council and other professional websites providing guidance and examples of good practice in meeting those outcomes?

43. Aside from the fact that the question refers to outcomes, there is no reason why the Bar Council and other professional websites should not provide guidance of good practice. To avoid the confusion, the BSB should actively desist from giving best practice guidance. That can be, and is, done by the Bar Council. If the BSB actively coordinated with the Bar Council, overlap will be avoided.

44. Relevant to barristers’ ability to understand their Handbook obligations is the presentation of the current Handbook. Challenges to its accessibility, navigation and comprehension include the complex paragraph numbering, the colour coding system (which is incompatible with a black and white printer) and dense wording. Barristers are generally used to reading and interpreting complex legislative provisions but these characteristics of the BSB Handbook make it difficult to navigate.

Question 3- Do you agree that small and medium chambers are best supported through informal networks of support such as those outlined above? Do you have any suggestions about how these networks can be encouraged and promoted?

45. The BSB’s suggestions regarding ‘informal’ networks of chambers are not practical. Furthermore, there is already support and good practice guidance available, primarily on the Bar Council website, but also from other organisations relevant to the profession.

46. The majority of chambers have 50 or fewer barristers,⁷ making small to medium chambers the dominant model. Larger chambers account for less than 10% of the total number of chambers. The BSB’s consultation paper suggests that barristers in chambers with 50 or

⁷ The consultation document notes at paragraph six that two thirds of chambers have fewer than fifty members.

fewer members lack sufficient critical mass and do not have the capacity to be able to cope with compliance of their members' Handbook obligations. By contrast, the implication is that those sets with 51 or more members do. However, the paper provides no evidence of how it has reached that conclusion. Further, the BSB must set its regulatory expectations of barristers to an individual level. If the BSB considers that all chambers with 50 or fewer members do not have the capacity to be able to cope with its compliance activities, this indicates that the BSB is setting its regulatory expectations of individual barristers too high.

47. We believe that it is possible to have small sets of well-resourced chambers that can demonstrate excellent compliance. We also consider that larger but less well-resourced sets may find compliance more of a challenge. Assessing whether a chambers will be able to meet their members' regulatory requirements based on their size alone also fails to take into account other pertinent factors. Smaller sets may (but do not always) have fewer resources than larger sets. The financial resources a chambers has at its disposal are not necessarily linked to the number of barristers practising from that chambers. For example, a chambers of 75 barristers who practise in legal aided work is likely to have far fewer financial resources than a chambers of 25 King's Counsel practising in high level commercial work.

48. Smaller specialist sets can be more agile and may find it easier to implement change than larger multi-disciplinary sets. This is illustrated by some smaller sets of chambers reporting, to the Bar Council's Chambers Management Working Group, the speed at which they were able to adjust at the beginning of the pandemic as compared to their larger counterparts. It can also be easier for chambers to communicate key messages when there are only a small number of barristers with whom to communicate.

49. Different chambers have different operating models. Some chambers may have a more traditional set up whereby a head of chambers and a senior clerk take on the role of managing chambers whereas others may have formed incorporated service companies with a board of directors. There has been no evidence presented that one setup is necessarily better than another. Nor is chambers' business arrangements properly a matter for the BSB.

50. In the consultation paper the BSB speculates that voluntary consolidation could be a solution to chambers' capacity issues but that it will not currently adopt an active policy of consolidation of chambers. It is alarming that the qualifying use by the BSB of the word "currently" indicates that an active policy of consolidation may be considered at another time.

51. The Bar Council considers it inappropriate for the regulator to pursue a policy of consolidation of chambers, regardless of whether it is encouraging it or taking a more active approach to pursue this aim. Dictating the business structures of chambers, which are not regulated as entities, is clearly outside the scope of the BSB's powers and remit. The Bar Council also considers it inappropriate that regulation should place such a burden on

barristers that consolidation of chambers has to be considered in order to facilitate regulatory compliance. It cannot be right that the impact of any regulatory requirements are such that chambers are forced to consider whether they can continue to operate as currently constituted or not. This suggests that the BSB has set the minimum standards too high.

52. The alternative suggestion in the consultation paper that chambers might also share back office functions lacks detail and is practically unworkable at many levels. Within the consultation paper there is no explanation as to which back office functions the BSB thinks could be shared, how this could be arranged and how this will achieve greater regulatory compliance by barristers.

53. In reality, there are significant challenges in chambers sharing back office functions with each other. It is highly unlikely that any two chambers who decide to share back office functions will have identical needs and it would be difficult for chambers to come to an agreement as to how the costs of meeting their different needs should be fairly apportioned between them. At a level of marketing and procurement of instructions, many such chambers will be in fierce competition with one another including on issues such as charge out rates, particular professional clients, expertise within chambers in particular practise areas. These hurdles do not appear to be considered in the consultation paper.

54. If it is suggested that there is a sharing of additional staff, there could be issues around an individual being employed or engaged by two sets of chambers, particularly where conflicts of interest and client confidentiality issues may arise. There could also be disputes around equal allocation of resources. The cost of resourcing additional staff or external consultants may be prohibitive for many sets of chambers.

55. In any situation where sensitive personal data had to be shared, in order to comply with GDPR⁸ there would be a need for data sharing agreements between the chambers and barristers involved. This would become more complex if multiple chambers are involved in the sharing arrangement. Accordingly, such arrangements could counterproductively result in a greater rather than diminished administrative burden on chambers.

56. The final suggestion that larger sets might share best practice with smaller sets of chambers on a formal basis is similarly unrealistic. This idea appears to be based on feedback from the roundtable discussions, which, though valuable for their insights, only offer a snapshot of the profession as a whole. Fundamentally, this suggestion shows a lack of understanding of the commercial reality of barristers and chambers. Chambers are normally in competition with other chambers for work, and consequently the sharing of any practical information which may be commercially advantageous to another set is not incentivised.

⁸ [General Data Protection Regulation](#)

57. By contrast, we have heard that there is already some informal sharing of policies and learning where commercial sensitivity does not apply. There is a concern that any attempt to formalise these informal arrangements, many of which are founded on goodwill, may have a chilling effect as chambers adopt a cautious approach and classify more of their documents as commercially sensitive.

58. The suggestion also fails to give any proper consideration to whether larger sets of chambers have sufficient spare resource to assist other sets of chambers. Chambers are businesses and if run efficiently it is unlikely that they will have spare capacity to assist the needs of other chambers as well as fulfilling their own operational requirements.

59. In addition to the Bar Council, the Specialist Bar Associations, Institute of Barristers' Clerks ('IBC'), Legal Practice Management Association ('LPMA'), and Circuits are all valuable sources of information, support and training for chambers. Clerks and practice managers can choose to be members of the long-established and well-organised IBC and LPMA to share their insights and benefit from the knowledge and support of others.

60. The BSB makes an unfounded assumption that where template documents are provided, chambers have little incentive to think through policies and best practice for themselves.⁹ Our trainers in equality and diversity report that it is almost impossible to use templates without their being adapted and tailored to meet the needs of the user. It is incorrect to assume that templates are being used without considering their content or effect.

Consultation question 4

Do you agree that the Bar Standards Board should not seek to revive a kitemarking scheme for chambers, but should instead develop a graduated supervision strategy on the lines outlined above?

61. Whilst we recognise that there is some support amongst the profession for the implementation of a new kitemark scheme for the Bar, we support the BSB's proposal not to revive the pre-existing BarMark certification which, prior to its dissolution in 2012, was delivered by the Bar Council working in conjunction with an external partner.

62. We believe that the introduction of a kitemark scheme (which would inevitably be similar in scale to the quinquennial Regulatory Returns) would only serve to advantage a small proportion of sets with significant infrastructure, many of whom would likely still find the process a burdensome one (as they did with BarMark). There is no evidence that the

⁹ <https://www.barstandardsboard.org.uk/news-publications/consultations.html> 2023, paragraph 23

BarMark certification added value or assisted the public in any particular manner, nor that any substitute kitemark scheme would do so now. As we have submitted in previous regulatory consultation responses, there is a sophisticated set of annually updated directories that provide publicly available information about how individual chambers are rated in the market. Whilst we are conscious that some of our members have issues about the fairness of these directories, they satisfactorily serve the consumer interest in such matters. Additionally, there are pre-existing ISO standards that can be used by those who wish to demonstrate the quality of their respective businesses, and we see no need for these standards to be duplicated within the profession.

63. Over the past year, the BSB has demonstrated an increased interest in *“the role of chambers in promoting standards, equality and access to justice... [and how it can] consolidate and promote best practice in chambers’ oversight of standards, equality and access”*¹⁰. In its Strategic Plan 2022 – 2025¹¹, the BSB states that *“there is a need to clarify [its] expectations of chambers”*, which have an important role to play in *“helping [the BSB] to deliver [its] vision of a Bar that is diverse, accessible, independent, knowledgeable, skilled and inclusive”*.

64. Whilst we recognise that the way in which sets operate can have a profound impact on our members’ working lives, chambers do not provide legal services and therefore cannot be and are not regulated by the BSB. Rather, the BSB regulates the individual members of chambers, particularly in relation to their duties to ensure that their administration and actions **through** chambers comply with their various regulatory obligations. For example, it is not that chambers are regulated to ensure there are proper arrangements for dealing with pupils and pupillage, but rather, the individual members are obliged to take reasonable steps to ensure that *“proper arrangements are made in [their] chambers for dealing with pupils and pupillage”*; rC89.4.

65. Whilst this may appear at first sight an overly technical point, it does impact significantly on two issues;

- (a) Firstly – enforcement. The BSB enforcement mechanisms are entirely directed towards individuals, save for in the unusual cases of interventions and divestitures of BSB authorised bodies and BSB licensed bodies. This is plainly all that is

¹⁰ <https://www.barstandardsboard.org.uk/static/b3d46689-6a38-4166-a9f6fdd34fa4f315/BSB-Annual-Report-2022-23FINAL.pdf>

¹¹ <https://www.barstandardsboard.org.uk/static/5cc0746d-611e-4df1-a313c08be0072b1b/ef701fb0-7631-4729-a498267635059f0b/v6-BSB-Strategy-2022-25-1.pdf#:~:text=strengthening%20the%20BSB's%20independence%2C%20capability%20self%2D%20confidence%20and%20credibility.&text=%2D%20Promoting%20equality%2C%20diversity%20and%20inclusion.&text=We%20are%20committed%20to%20providing,fair%2C%20transparent%2C%20and%20proportionate.>

permitted under the 2007 Act. We are therefore not sure what the BSB is envisaging at paragraph 36 of the consultation, if this is not enforcement processes against individual barristers for breaches of the Code of Conduct or other parts of the Handbook.

- (b) Secondly – publication of assessments of individual chambers, as to which, see below.

66. More generally, whilst we recognise and agree that the BSB should seek to raise professional standards at the Bar, it is important to remember (as the consultation recognises at paragraph 26) that its regulatory requirements represent minimum standards that the Bar should meet. Encouraging ‘best practice’ and assisting in sharing these behaviours is to be encouraged (and is a role best suited to the Bar Council) – but should not and cannot be mandated, nor ‘compliance’ with it enforced. Accordingly, we are concerned that the BSB is interpreting its role too broadly in what is described at paragraph 36 of the consultation.

67. Furthermore, there is a real risk that compliance with increased supervision requirements will further increase the costs of regulation for the profession. As our Chair stated in his inaugural speech, the BSB’s spend has increased by 64% over the last six years,¹² at a rate more than double that of inflation, which is funded mainly via the Practising Certificate Fee paid by barristers. The regulatory costs borne by barristers should not rise further.

68. Further, there is no evidenced objective basis (through claims records to BMIF, the reports to the Legal Ombudsman, or the material published by the BSB itself) that demonstrates any systemic or substantial decline in professional standards that warrants any substantial change of the kind that is proposed.

69. Anecdotally, we are aware that barristers who belong to sets without significant infrastructure are already dedicating a significant proportion of their time to ensuring compliance, which is taking them away from their fee-earning work, whilst those in larger chambers are having to allocate a higher percentage of their financial contributions to the resourcing of their support teams.

70. This is clearly not to say that persistent non-compliance by barristers with regulatory obligations should not be met with appropriate enforcement action. However, it is important to clearly identify that this would be for breaches of the minimum regulatory standards required under the Code of Conduct and the Handbook more generally, and not as a means of encouraging or developing best practice. Not only is this a question of jurisdiction and impact on enforcement, but culturally it should be embedded in the BSB’s approach to

¹² Samuel Townend KC’s [inaugural speech](#) p.16

chambers oversight that one is mandatory and the other is voluntary, and non-compliance with the latter is not to be treated as an adverse action to be punished.

71. To the extent that there is regulatory oversight, then it is clearly appropriate that it is directed towards and concentrated on those who pose the greatest risk to the public and/or are the most serious of offenders. In *this* sense a 'graduated supervision strategy' is appropriate. However, in light of the issue with minimum standards regulation versus best practice encouragement, it might be better to describe that as a 'regulatory risk based/directed supervision strategy'.

Do you believe that, as part of this strategy, the Bar Standards Board should make public its assessment of individual chambers?

72. For the reasons outlined above, we do not agree that the BSB should or can regulate chambers directly, nor should it develop a mandatory graduated supervision strategy if this extends beyond regulatory minimums. It therefore follows that we do not agree that the BSB should make public any assessments of individual chambers, or individual members, save for the requirements for publication of relevant enforcement mechanisms such as disciplinary tribunals' decisions.

73. We would also be very concerned if the BSB were to publicise adverse findings or the determinations of a process which did not meet the usual standards of natural justice or were in relation to issues which were outside the BSB's enforcement jurisdiction. The BSB would have to take its own advice as to whether any such processes or actions would leave it open to judicial review, but the Bar Council notes by analogy that the historic difficulties in ensuring that the disciplinary processes met such requirements might give a good example of how problematic such issues can be. To be blunt, if the breaches concerned are sufficiently serious to justify formal disciplinary action, then the processes and tests for publication are there already. If they are not sufficiently serious for formal disciplinary action, it has to raise the question of whether the expensive and time consuming¹³ processes appropriate for publication will have or should have been engaged and properly applied.

74. As the BSB will be aware, all chambers in England and Wales benefit from the willingness of their members to contribute their time, on a voluntary basis, to the effective management of their respective sets. There is a real risk that threats of publication of anything less than genuine enforcement actions under Part 5 of the BSB's Handbook will simply result in chambers being left without any members who are willing to take on senior leadership roles, for fear of the associated adverse publicity. This would be detrimental to the future progression of the Bar and would not therefore be within the interest of the consumer.

¹³ For both the BSB and the barristers concerned.

Do you support ending comprehensive quinquennial Regulatory Returns in favour of targeted surveys of risk and compliance?

75. We support the BSB's proposal to end the comprehensive quinquennial Regulatory Returns, which we concluded was disproportionate and unnecessarily burdensome to both chambers and the regulator who struggled to process the completed returns in a timely fashion.

76. We understand that some of the practice management obligations currently set out within the BSB's Handbook can only be measured with the cooperation of barristers' sets. To that end, we support the implementation of targeted surveys that relate specifically to these obligations and encourage the BSB to adopt a more pragmatic approach to any related activities, to ensure that the requests it makes of chambers are reasonable and proportionate, and do not impact heavily on the abilities of individual practitioners to devote time to their paying practices.

Question 5- Do you agree with the approach to re-defining chambers outlined in paragraph 38 above?

77. A physical location is no longer an intrinsic part of all chambers. It follows that any new definition should be sufficiently broad to include virtual chambers or chambers where members working patterns are such that they spend significant amounts of time in court, working from home or otherwise away from the geographic location of chambers. This is not to understate the importance of regular contact with colleagues and the supportive environment afforded by physically coming together.

78. We are not convinced that having "an agreed constitution" ought to be part of a new definition of chambers. For one thing, how does one define a 'constitution', or test whether a document or set of documents meets any such definition or criteria? Of course, in practice most chambers will have a constitution (in some form or another) because this is an effective tool for managing chambers. It is currently best practice to have one rather than a regulatory requirement. As already highlighted earlier in our response, the BSB must be clear not to mandate best practice. Therefore, having "an agreed constitution" ought not to be included in the definition of chambers.

79. If the BSB alters the definition of chambers it ought to also consider any consequential impact on rules such as rS20 which dictate the support systems a new barrister must have in place for the first three years of practice.

Do you agree that the Bar Standards Board should not prescribe governance arrangements for chambers meeting this definition, but expect chambers themselves to establish appropriate leadership and governance arrangements?

80. We agree that governance arrangements should not be prescribed by the BSB. It falls outside the BSB's permitted remit. The BSB will be aware of the diversity of chambers' size, structure and culture. Heads of chambers and chambers' management committees must have freedom to organise themselves in a way that is complementary to their skills and the resources they have to draw on, for example, whether they have chambers management staff. It is in barristers' collective interests to have efficient and well-run chambers that maintain good reputations and attract talented new members. Prescription of governance arrangements could act as a disincentive for barristers to take on leadership roles within chambers, which would be counterproductive to the BSB's aims.

The Bar Council
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