



## **Bar Council response to the Legal Services Board's (LSB) "Business Plan 2022-23" consultation paper**

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the LSB consultation paper entitled Business Plan 2022-23.<sup>1</sup>
2. The Bar Council represents approximately 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. 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.

### **Q1 – Do you agree with our proposed workstreams for the 2022/23 business plan?**

#### **Continuing workstreams**

4. The LSB's discharge of statutory functions is the LSB's core function, and we firmly believe this is what the LSB should be focussing on. There have been occasions where we think the LSB has strayed outside the remit conferred upon it by the Legal Services Act 2007, for example in work aimed at changing the regulatory framework as well as designing a strategy for the whole legal services sector. As outlined in the LSB's 2022/23 business plan, two well-led reviews have been carried out by the LSB.

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<sup>1</sup> LSB 2021, [Business Plan 2022-23 consultation](#)

While we understand their purpose was to ensure the regulators meet the well-led standard of the Regulatory Performance Assessment Framework,<sup>2</sup> we note the time and resources that it undoubtedly will have taken to complete these reviews. We would therefore reiterate that the discharge of statutory functions must be the primary focus of the LSB, and that any proposed new workstreams must take into account the resource implications and any impact on these statutory functions. In this context it makes sense to ensure that the LSB's regulatory performance framework, a key regulatory tool, is fit for purpose.

5. Our views on the consumer empowerment related proposals are summarised in our response to the LSB Draft Statement of Policy on Empowering Consumers consultation paper.<sup>3</sup>

6. We responded to the LSB's Call for Evidence on Ongoing Competence in 2020 and will be responding to the LSB's currently open consultation on the same topic.<sup>4</sup> As specified in our response to the Call for Evidence on Ongoing Competence, "Regulatory action should be taken, but should only be taken, if (inter alia) it is proportionate and targeted only at cases in which action is needed."<sup>5</sup> In addition, any targeted interventions must be based on evidence of actual harm to consumers.

7. Regarding the LSB's diversity and inclusion project, we reiterate our response to the LSB's 2020-2021 strategy and business plan.<sup>6</sup> The Bar Council supports the LSB's objectives on equality and diversity. The Bar has a good evidential base, demonstrating that the Bar is becoming more diverse year by year. The well-established efforts and existing work programmes of the Bar Council, the Bar Standards Board (BSB) and others continue to improve equality and diversity at the Bar. The LSB should be mindful of which organisations are best able to manage this. The Bar Council believes the legal sector's representative bodies are best placed to promote diversity including through best practice with frontline regulators providing assistance through regulation only. Regulators necessarily are responsible for minimum standards only. Further, there is a risk of duplication of work. On retention and progression, we are not clear what additional regulatory levers are available and,

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<sup>2</sup> <https://legalservicesboard.org.uk/wp-content/uploads/2021/06/BSB-Well-led-review-findings-report.pdf>, <https://legalservicesboard.org.uk/wp-content/uploads/2021/09/Faculty-office-Well-led-review-report.pdf>

<sup>3</sup> <https://www.barcouncil.org.uk/uploads/assets/8bf90064-dae4-426b-9574f72def4c6829/Bar-Council-response-to-LSB-Consumer-Empowerment-statement-of-policy-consultation-paper.pdf>

<sup>4</sup> <https://legalservicesboard.org.uk/wp-content/uploads/2021/12/Ongoing-competence-consultation-paper-December-2021.pdf>

<sup>5</sup> <https://www.barcouncil.org.uk/uploads/assets/cc4d10c9-34d4-4970-886780b85d900364/LSB-Ongoing-Competence-consultation-response.pdf>, paragraph 4

<sup>6</sup> <https://www.barcouncil.org.uk/uploads/assets/b1033e1b-6542-4c13-958790c8a8a64981/Bar-Council-response-to-the-LSB-draft-strategy-and-business-plan-21-22.pdf>, paragraphs 65-72

aside from changes to the work allocation rule which we agree needs refining, we are unclear as to how the LSB could or should contribute further to work which is already underway.

8. On the technology and innovation project, we would emphasise our previously stated view on the development of a central regulatory database. As noted in our response to the LSB's consultation on its draft statement of policy on Consumer Empowerment,

“a single register developed by the LSB would be duplication, highly likely to be unwieldy and would be costly. Further, we do not believe it would add to consumer choice with already readily available information on the Barristers' Register operated by the BSB and Chambers' websites.”<sup>7</sup>

9. We have some reservations about work on the unregulated sector and the prospect that this may lead to proposals to change the scope of regulation, work which we consider to fall outside the LSB's jurisdiction. It is not appropriate for the LSB to use its budget, funded as it is by regulated legal professions, to carry out work on unregulated providers of legal services, who, by contrast, pay nothing towards the LSB's costs.

10. We welcome the initiative to improve access to justice for small businesses and people in vulnerable circumstances and the intention to base policies on evidence.<sup>8</sup>

11. We are uncertain of the utility and cost-effectiveness of convening an annual conference and would welcome further information on its purpose.

12. We are also unsure of the purpose of a new LSB microsite and would welcome further information about this proposal. It is unclear who the intended audience would be for the microsite, the costs of developing and maintaining that website are not specified and we are concerned that maintaining the website could detract from other important work. We query why the LSB cannot utilise their existing website to host the information, which already provides comprehensive and detailed information on the work the LSB is carrying out.

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<sup>7</sup> <https://www.barcouncil.org.uk/uploads/assets/8bf90064-dae4-426b-9574f72def4c6829/Bar-Council-response-to-LSB-Consumer-Empowerment-statement-of-policy-consultation-paper.pdf>, at paragraph 52.

<sup>8</sup> <https://www.barcouncil.org.uk/uploads/assets/b1033e1b-6542-4c13-958790c8a8a64981/Bar-Council-response-to-the-LSB-draft-strategy-and-business-plan-21-22.pdf>, paragraph 62

## **Proposed new workstreams**

### Financial protection arrangements (Professional Indemnity Insurance and compensation funds)

13. We will leave it to others who are better placed than us to comment on the PII proposals.

### Disciplinary and enforcement processes

14. While the Bar Council is of course supportive of regulatory bodies having fit-for-purpose enforcement measures, we have some concerns with the LSB's stated focus on establishing and embedding enforcement principles, in particular where there is no evidence of a lack of public confidence or where changes are already being made by frontline regulators.

15. The LSB will be aware the Bar Tribunals & Adjudication Service's (BTAS) recently published an update to its Sanctions Guidance.<sup>9</sup> The new Sanctions Guidance followed two rounds of consultations, to which the Bar Council submitted responses.<sup>10</sup> The consultation focused on sanctions in relation to individual barristers, in particular sanctions imposed for sexual misconduct and misconduct over social media. The changes made following the consultations bring the sanctions ranges into closer alignment with what members of the public and the Bar expect. There is consequently no pressing need for further change to the sanctions guidance.

16. Where issues with (the public confidence in) enforcement and discipline are demonstrated to exist, the LSB may assist those regulators with developing and improving enforcement principles. However, it must be careful not to constrain frontline regulators with unduly prescriptive principles, recognising that there is great variety amongst legal service providers and the types of disciplinary issues that may arise. Barristers, for example, do not handle client money, which means disciplinary issues seldom relate to client account issues/misappropriation of client funds. We consider that frontline regulators are well placed to determine the most effective disciplinary and enforcement processes for their regulated communities.

17. We broadly support the elements highlighted by the LSB which should underpin regulators' processes and outcomes, namely transparency, proportionality, consistency and timeliness.

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<sup>9</sup> [The Bar Tribunals & Adjudication Service Sanctions Guidance Version 6](#)

<sup>10</sup> [Bar Council response to the BTAS Sanctions Guidance Review Consultation](#) and [Bar Council response to the Second BTAS Sanctions Guidance Review Consultation](#)

18. The Bar Council welcomes transparency of the disciplinary process and disciplinary outcomes as well as their costs but expects that transparency does not come at the expense of client confidentiality and the right of legal professionals not to suffer reputational damage before complaints are upheld.

19. Proportionality of disciplinary processes and outcomes is of course supported by the Bar Council. However, we question the need for the LSB to attempt to develop a common principle on this when it is already embedded in the disciplinary processes of all legal regulators. We also question how the LSB would determine what amounts to a proportionate outcome or process. Options to appeal decisions by the BSB or BTAS to the High Court already exist, who are able to properly assess and address any concerns over the proportionality of a disciplinary process or outcome.

20. The Bar Council supports drawing on evidence of how existing enforcement and disciplinary processes operate for different regulators. However, any conclusions that are drawn from this evidence should recognise the legitimate differences in treatment of different legal professionals. The Bar Council does not support the development of a set of common principles for all regulators. Fit-for-purpose should not become one-size-fits-all.

#### Consumer redress

21. Access to redress is an important piece of regulation that forms one of the consumer protections that is integral to using a regulated legal professional such as a barrister. It is in clients' and legal professionals' interests for redress mechanisms, whether they be the first-tier complaints handling process or a complaint raised with the Legal Ombudsman, to be proportionate, fair, efficient and cost-effective.

22. The LSB's oversight of the Office of Legal Complaints (OLC) is an important part of their core work and we are keen to see its performance improve to the benefit of both clients who bring a service complain to them and the legal professionals about whom they complain.

23. The LSB's plans to review the 2016 rules and guidance on first tier complaints handling are uncontroversial. There is merit in checking they are still relevant and fit for purpose. The Bar Council supports barristers in complying with their regulatory obligations relating to first tier complaints handling and in recent years have hosted an annual complaints handling seminar for barristers and their support staff. This serves to give feedback on the types of complaints dealt with by the Legal Ombudsman about barristers and to disseminate best practice on complaints handling at this stage in the complaints process.

24. We set out our view on the question of redress for consumers who use unregulated services in our response to the LSB's draft strategy and business plan 20-21.<sup>11</sup>

#### Rule of law and regulation

25. Although we agree with everything the LSB is saying on this theme, and are glad to see the role of legal professionals in upholding the Rule of Law recognised, alongside the importance of compliance with a robust ethics code, we are uncertain of the ultimate purpose of this work, and whether it is a good use of resources.

#### Review of LSB education and training guidance

26. The plan to review the LSB's guidance on regulatory arrangements for education and training is uncontentious.

#### **Q2 – Are there any areas missing from our proposed business plan 2022/23 that you believe should be included?**

27. No.

#### **Q3 – Do you agree with our view that 2022/23 is not the right time to undertake a statutory review of the reserved legal activities?**

28. Yes, we agree that this is not the right time to undertake a statutory review of the reserved legal activities. In our response to the LSB's draft strategy and business plan 20-21 we gave our views:<sup>12</sup>

“This is not a matter for the regulator but for government. The LSB should concentrate on putting into effect the statutory framework of regulation, not on amending that framework.

Quite apart from that point, we do not think that this is an appropriate priority. We are not persuaded there is sufficient evidence of a problem with the reserved legal activities that warrants their being changed. Particular caution must be exercised when considering those activities which have a public interest role, namely, exercising a right of audience and conducting litigation.

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<sup>11</sup> Bar Council [response](#) to LSB's draft strategy and business plan 20-21: page 18-19

<sup>12</sup> *ibid*: page 17

The Bar Council believes that ‘conducting litigation’ and ‘exercising rights of audience’ are high-risk and vital to the administration of justice. These reserved legal activities have a clear public interest basis for a high level of regulation. Currently, only authorised providers can conduct both of these and that brings with it a high degree of consumer confidence and consumer protection as well as helping support the administration of justice and rule of law.

The quality of service would likely be reduced if rights of audience were not a reserved activity, and anybody could exercise one. For example, remunerated McKenzie Friends, who can sometimes be given permission by a judge to exercise a right of audience, have been the subject of criticism and their clients may not be aware that they are not afforded the same protections as clients of regulated lawyers such as barristers or solicitors. Other interests and regulatory objectives would also be put at serious risk. It is vital for the proper functioning of our courts and legal system, that those exercising rights of audience and conducting litigation are properly trained, regulated and insured. This runs in tandem with the duty owed by those lawyers to the courts and judges they are appearing before, which is in the public interest.

On the question of whether the remaining four reserved legal activities, (administration of oaths, probate activities, reserved instrument activities and notarial activities) should remain reserved, in our view it is essential that any review of them contains an assessment of not only the public interest but also the risk of harm to individual consumers if they were to be altered.

The question of whether legal advice generally should be a regulated legal activity raises a host of issues. We think it highly likely that bringing all legal advice within the regulated perimeter would limit choice for consumers and could inadvertently increase the amount of unmet legal need. In any event the time is not right for such a fundamental review.

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Any review of the reserved legal activities would take considerable time and resource. Now is not appropriate for the LSB to be diverting resources to such a review.

We agree that the LSB should not undertake a statutory review of reserved legal activities in 2021-22. The legal service sector is under considerable strain right now with the financial resilience of many barristers and the businesses they operate from significantly weakened. At the same time the Bar is trying to deal with a combined court backlog of well over half a million cases, growing daily under challenging circumstances with remote hearings and socially distanced

juries in some instances.<sup>13</sup> We are wary of the potential for regulatory change (whether taking place within the LSA07 or outside it) to cause further disruption and damage to the Bar and its ability to meet the needs of consumers of legal services and the administration of justice.”

29. We think the same considerations still apply today.

#### **Q4 – Do you have any views on developments in litigation funding?**

30. The Bar Council supports access to justice. Continual cuts by the Government to legal aid – such as in the Legal Aid Sentencing and Punishment of Offenders Act 2012 – which further reduced the scope of legal aid in civil and family cases, have caused an increasing need to find other ways to fill the gaps.

31. The Bar Council has on several occasions considered the possibility of establishing a Contingent Legal Aid Fund (CLAF), most recently in 2016.<sup>14</sup> Whilst it was not practical for the Bar Council itself to become a third-party funder, it does illustrate the need for sources of funding to fill the gaps left by the reduction in legal aid. We are therefore hesitant about criticism of third-party funders, when the cause of the problem is actually legal aid cuts.

32. In December 2009, Lord Justice Jackson published the final report of his Review of Civil Litigation Costs.<sup>15</sup> In relation to Third Party Funding he concluded:

“6.1 I do not consider that full regulation of third party funding is presently required. I do, however, make the following recommendations:

- 1) A satisfactory voluntary code, to which all litigation funders subscribe, should be drawn up. This code should contain effective capital adequacy requirements and should place appropriate restrictions upon funders’ ability to withdraw support for ongoing litigation.
- 2) The question whether there should be statutory regulation of third party funders by the FSA ought to be re-visited if and when the third party funding market expands.

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<sup>13</sup> Noted in the Bar Council response to the Competition and Markets Authority’s (CMA) Review of the legal services market study in England and Wales:

<https://www.barcouncil.org.uk/uploads/assets/3c5fbc22-dec9-4904-b531890bba68343a/Bar-Council-response-to-CMA-review-of-legal-services-market.pdf>

<sup>14</sup> <https://www.barcouncil.org.uk/resource/joint-claf-working-group-established.html>

<sup>15</sup> <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>

- 3) Third party funders should potentially be liable for the full amount of adverse costs, subject to the discretion of the judge.”

33. Those recommendations were taken forward. The Association of Litigation Funders has a Code of Conduct<sup>16</sup> and the Bar Council has a role as nominator in paragraph 13.2 of that Code.

34. The Bar Council does not see a special need for regulation of third party funders. However, if there is a need, the Legal Services Board are not the appropriate body for that role. Lord Justice Jackson recommended that it would be a matter for the Financial Services Authority. The FSA has been renamed the Financial Conduct Authority (FCA) and the Bar Council agrees that the FCA would be the appropriate body. Whilst some third party funders may have lawyers on their staff, they are not law firms, they are finance providers, and therefore this is a matter for financial regulators.

**Q5 – Do you have any comments on our proposed market intelligence work? Is there anything missing that you think we should focus on?**

35. The Bar Council understands the need for and supports evidence-based policymaking, but evidence must be robust, stand up to scrutiny and be more than somebody’s opinion. Research should only be undertaken where it is necessary, targeted and value for money. As such, we can only express support for some of the LSB’s proposed market intelligence work.

36. As stated in our response to the LSB’s 2021-2022 strategy and business plan,<sup>17</sup> we support the use of data to help improve access to justice for small businesses and the use of the COVID-19 dashboard to inform the LSB’s workstreams.

37. We reiterate our comments in our response to the LSB’s 2021-2022 strategy and business plan,<sup>18</sup> that we do not consider the Public Panel to be an effective use of money because it undertakes work that is very similar to that of the Legal Services Consumer Panel (LSCP), also funded via a levy on regulated legal professionals. Our concerns around the methodology of the Public Panel also still remain, such as the guided question and answer sessions. When members of the public panel participating in the research on ongoing competence were told about competence checks undertaken in other professions and then asked if legal professionals should

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<sup>16</sup> <https://associationoflitigationfunders.com/code-of-conduct/documents/>

<sup>17</sup> [Bar Council response to the Legal services Board’s \(LSB\) Draft strategy for legal services regulation and draft business plan 2021-22 consultation paper](#), page 14

<sup>18</sup> [Bar Council response to the Legal services Board’s \(LSB\) Draft strategy for legal services regulation and draft business plan 2021-22 consultation paper](#), page. 39-42

be subject to the same, it should come as no surprise that they responded in the affirmative. We are also concerned about undertaking research with members of the public that have not used or experienced legal services. This cannot yield information about peoples' experiences of the legal services sector and cannot be termed consumer research.

38. Turning to the areas of proposed research, we are supportive of research into financial protection arrangements for consumers. We reiterate our comments in our response to the LSB's 2021-2022 strategy and business plan that we do not agree with the establishment of a single register as this replicates information already available on regulators' website; it risks conflating all the professions and confusing consumers, in particular where such a register includes non-regulated providers; it is not a good use of funds; it creates a false impression of equivalence between all providers; it risks differences in information being published on the single register and on the regulators' own websites.<sup>19</sup>

39. The Bar Council supports research into counter-inclusive practices to the extent that it is necessary. The Bar Council has recently done a lot of research and work in this area and would invite the LSB to learn about it, as well as any research undertaken by other professional bodies and regulators, in order to identify gaps and avoid duplication.

#### **Q6 – Do you agree with our proposed budget for 2022/23?**

40. We are not in favour of the increased proposed budget for 2022/23 at an above inflation rate. Though the impact on each individual practitioner will be small, such incremental increases accumulate over time and increase the cost of practising. The LSB needs to focus on delivering its core functions within the remit of the Legal Services Act 2007 in a cost-effective manner. We appreciate that the LSB has deprioritised some work, such as a statutory review of the reserved legal activities. Arguably the LSB is continuing with some workstreams that we do not feel are strictly necessary such as the commissioning of an additional website or organising an annual conference.

41. With the impact of COVID-19 still having a far-reaching impact on the barristers' profession, we cannot support any above-inflation increase to the LSB's proposed budget. As stated in our response to the LSB consultation on its draft statement of policy on Consumer Empowerment,

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<sup>19</sup> [Bar Council response to the Legal services Board's \(LSB\) Draft strategy for legal services regulation and draft business plan 2021-22 consultation paper](#), page. 20-21

“The well-known lack of available public funding, delays in payment and unilaterally reduced fees in this sector, and the recent impact of the COVID-19 pandemic means this section of the Bar is at rock bottom in terms of earnings and morale and many, having suffered years of, at best, getting by, are threatening to leave the profession. We consider it essential that burdens are not added to our members without corresponding alleviation elsewhere. Interventions that require an increase in practising certificate fees or require an individual practitioner to carry out additional work for compliance reasons is likely to have a detrimental impact and reduce the diversity of the Bar.”<sup>20</sup>

**Q7 – Do you have any comments regarding equality issues which, in your view/experience, may arise from our proposed business plan for 2022/23?**

42. Nothing beyond the issues already identified.

**Q8 – Are there any wider equality issues and interventions that you wish to make us aware of?**

43. There is a vast amount of work being carried out on equality and diversity across the Bar and at all levels. Chambers, Inns, Specialist Bar Associations and Circuits are all contributing, and the LSB should not assume that the Bar Council and BSB are the only bodies at the Bar working on equality and diversity.

**Bar Council  
1 February 2022**

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<sup>20</sup> [Bar Council response to the Legal Services Board’s \(LSB\) Draft statement of policy on empowering consumers-consultation paper](#), page 13